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5 Attorney for the Defendant
[Redacted]

FILED

JAN 10 2020

Clerk of the Court
Superior Court in and for the County of Santa Clara
BY: [Signature] DEPUTY

7 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

8 People of the State of California

Plaintiff,

10 vs.

12 Defendant

Case No.: [Redacted]

AGREED UPON STIPULATION

14 The parties to the Murgia Motion as well as the Recusal Motion heard on January 10, 2020 Stipulate as
15 follows:

16 Michelle Dauber exchanged email communications with various Deputy District Attorneys at the Santa
17 Clara County Office of the District Attorney between January 1, 2016 and January 1, 2018. Attached to
18 some of Ms. Dauber's emails were images of court files. The Deputy District Attorneys who received
19 these images were aware they were images of court files. No Deputy District Attorney removed court
20 files from any courthouse for use by Ms. Dauber or her students. No Deputy District Attorney warned
21 Ms. Dauber or her students that it was a violation of a local rule of court to photograph court files within
22 the courthouse. If called as witnesses each of the Deputy District Attorneys would testify that they were
23 not aware of how, when, where, or by whom the photographs were taken. No Deputy District Attorney
24 was aware of any permissions given or not given to take the photographs. No charges were filed against
25 Ms. Dauber.

[Signature]

22 TERESA SOUTO
Deputy District Attorney

[Signature]
24 PETER FLORES, Jr.
Deputy Attorney General

[Signature]
26 Leah N. Gillis, Esq.
27 Attorney for the Defendant
28

From: [Kianerci, Alaleh](#)
To: [Harman, Terry](#)
Subject: Fwd: draft dauber letter
Date: Wednesday, August 17, 2016 11:04:00 AM

Clear to call. Any idea of what she wants to say.

Sent from my iPhone

Begin forwarded message:

From: "Michele Landis Dauber" <[REDACTED]>
Date: August 17, 2016 at 9:15:04 AM PDT
To: "Alaleh Kianerci" <AKianerci@da.sccgov.org>
Subject: Re: draft dauber letter

Hey it was good to see you last night. Can you give me a call for a quick question?
[REDACTED]

Sent from my iPhone

On May 25, 2016, at 4:05 PM, Alaleh Kianerci <AKianerci@da.sccgov.org> wrote:

so as far as the letters. There are two separate ones. I have the one that Stephanie Pham '18 and Matthew Baiza '18 wrote. Who wrote the other one? Can you send me a draft of that? Was it in the original email?

Alaleh Kianerci
Deputy District Attorney
650.324.6418

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>>> Michele Dauber <[REDACTED]> 5/25/2016 1:11 PM
>>>

Here it is. I thought you wanted this stuff Friday but here it is right now. When do you want the student letters, we are up to 143 sigs on one and 13 student and Greek leaders on the other.

On Wed, May 25, 2016 at 12:49 PM, Alaleh Kianerci

<AKianerci@da.sccgov.org> wrote:

just checking in with you. Do you think you can have a signed copy for me by tomorrow?

Alaleh Kianerci
Deputy District Attorney

[650.324.6418](tel:650.324.6418)

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>>> Michele Landis Dauber <[REDACTED]> 5/24/2016 6:32 PM
>>>

No I did not mean a legal precedent but when I read it I don't want others to think that so I will change the language slightly.

Sent from my iPhone

> On May 24, 2016, at 6:30 PM, Alaleh Kianerci <AKianerci@da.sccgov.org> wrote:

>

> Sorry I didn't read that to mean a legal precedent. I though you were talking more about setting an example. A finding of "unusual circumstances" in this case would not set a legal precedent for other cases under the code section. It is purely discretionary and another court would not be bound by J. Persky's finding.

>

>

>

> Alaleh Kianerci
> Deputy District Attorney
> [650.324.6418](tel:650.324.6418)

>

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delete the message from your computer. If you have received this message in error, please notify the sender by return email.

> >>> Michele Landis Dauber <[REDACTED]> 5/24/2016 6:21 PM
>>>

> No I'm still editing! But great. What about the line about it setting a precedent? Does a finding under 1203 technically set a precedent given the fact that it is discretionary? I have known mike Armstrong for years and he's no dummy. So he will catch that.

>
> Sent from my iPhone

>
> > On May 24, 2016, at 6:16 PM, Alaleh Kianerci <AKianerci@da.sccgov.org> wrote:

> >
> > It looks perfect! The law looks great and I particularly like the statistics that give the crime perspective. Of course the part on [REDACTED] is also great. Thank you for all your help. If you can sign it as well, I will include it in my sentencing brief.

> >
> >
> > Alaleh Kianerci
> > Deputy District Attorney
> > [650.324.6418](tel:650.324.6418)

> >
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> > >>> Michele Dauber <[REDACTED]> 5/24/2016 6:02 PM >>>
> > Hi Alaleh:

> >
> > Here is a draft letter. I am still editing but I wanted to give you a crack to make sure that I got the law part right.

> >
> > Let me know asap, tonight if at all possible.

> >
> > Also -- we are getting close to 100 sigs on the letter. The Stanford Daily wants to do a story but I told them no based on our prior conversation. Is that still your view?

> >
> > Thanks!
> > Michele

> >
> > -----
> > NOTICE: This email message and/or its attachments may contain information that is confidential or restricted. It is intended only for the individuals named as recipients in the message. If you are NOT an authorized recipient, you are prohibited from using, delivering, distributing, printing, copying, or disclosing the message or content to others and must delete the message from your computer. If you have received this message in error, please notify the sender by return email.

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From: [Kianerci, Alaleh](#)
To: [Ramos, Luis](#)
Subject: Fwd: [REDACTED]
Date: Tuesday, July 05, 2016 10:39:00 AM
Attachments: [REDACTED].msg

Alaleh Kianerci
Deputy District Attorney
650.324.6418

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From: f
To: [Kianerci, Alaleh](#)
Subject: [REDACTED]
Date: Tuesday, July 05, 2016 10:26:00 AM

Ms. Kianerci,

I wrote you a nice long letter but the computer blipped and it got erased - annoying and too bad.

So, very fast:

1. Maybe you are sincere, maybe on the political bandwagon, but Brock Turner case is being deliberately misrepresented to public. Your own actions letting "rape" charges stand were big part of that. You knew as soon as the DNA came back they were disproven.
2. [REDACTED] should answer questions about her sexual history, ie, drinking and picking up strangers - which I think he's done, if the comments quoted in press from her during trial are correct.
3. [REDACTED] should answer questions about that night.
4. [REDACTED] Spoken Word experience made her give a good speech - but it's not complete, it way understates her own drinking., and basically, a privileged 22 year old from a very rich family blames a 19 year old freshman who she likely agreed to hookup with.
5. [REDACTED] made herself a legitimate subject of inquiry - she has NO right to anonymity - NONE - I believe the rape shield laws are BS anyway, but [REDACTED] sought publicity and approval, saw a chance to give a great Spoken Word performance - another thing the public should know, about her actress/dramatist background, so she does not get anonymity any longer - and all the more so because she distorted the facts.
6. Please don't try to do anything to stop me and others from bringing her name to light, so her drinking and sexual history can be explored. Especially something illegal or unconstitutional.
7. I realize you think you are doing right - but what is going on here is a struggle over fairness to men - people like Dauber don't want the legal system to be fair to men - the real purpose of the recall is not to get rid of Persky, but to scare all judges into not ruling against women - the loss of judicial independence is not a side effect, it's the entire PURPOSE of trhe recall. She wont' say that of course.

From: [Michele Dauber](#)
To: [Kianerci, Alaleh](#)
Subject: Fwd: WHAT PROGRESS HAVE YOU MADE
Date: Monday, July 04, 2016 7:46:00 AM

----- Forwarded message -----

From: Michele Dauber [REDACTED]
Date: Sat, Jul 2, 2016 at 4:07 PM
Subject: WHAT PROGRESS HAVE YOU MADE
To: Glenn Mcgovern <gmcgovern@da.sccgov.org>, Jeff Rosen <jrosen@da.sccgov.org>

Hi Glen:

I hope your 4th of July weekend in very nice.

I just got a very freaked out text from [REDACTED] that she has now received a five page letter from this same guy (almost certainly), Steve White, now sent to her home address. What is being done to end this harassment?

My understanding was that I had given you basically everything you needed including a video of the likely perpetrator of this harassment and stalking. What has been done to ensure [REDACTED] safety? How is this being handled.

Thank you,

Michele Dauber

From: [Kianerci, Alaleh](#)
To: [Ramos, Luis](#)
Subject: Fwd: Steve White Just Tweeted [REDACTED] Name.
Date: Tuesday, July 05, 2016 8:58:00 AM
Attachments: [Fwd Steve White Just Tweeted \[REDACTED\] Name.msg](#)

Alaleh Kianerci
Deputy District Attorney
650.324.6418

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From: [Michele Dauber](#)
To: [Kianerci, Alaleh](#)
Subject: Fwd: Steve White Just Tweeted [REDACTED] Name.
Date: Monday, July 04, 2016 7:45:00 AM
Attachments: [Screen Shot 2016-07-04 at 7.42.23 AM.png](#)

Hi Alaleh can you please get something to happen regarding this?

----- Forwarded message -----

From: **Michele Dauber** [REDACTED]
Date: Mon, Jul 4, 2016 at 7:44 AM
Subject: Steve White Just Tweeted [REDACTED] Name.
To: Glenn Mcgovern <gmcgovern@da.sccgov.org>, Jeff Rosen <jrosen@da.sccgov.org>

Where did he get this unredacted document?

Steve White @boatbrain · 23h

Stanford Professor Michele Dauber has been posting documents from the Brock Turner case, so I'm posting a few too.

1 ACT) and Penal Code Section 269(c) (SEXUAL PENETRATION WHEN THE VICTIM WAS
2 INTOXICATED OR ANESTHETIZED).

3 The Custodian of Records for Palo Alto Fire Department, located at 250 Hamilton
4 Avenue, Palo Alto, CA 94301, has in his/her possession, or under his/her control, the following
5 described documents:

6 **Fire department report for Medic 62 and engine 66**
7 **who transferred victim [REDACTED] (DOB:**
8 **[REDACTED]) on January 18, 2016 to Santa Clara County**
9 **Valley Medical Center.**

10 I am requesting these records because Defendant is charged with a crime arising out of
11 an incident that occurred around January 18, 2015. These records may establish the extent of
12 the incident. These records may also provide evidence regarding Defendant's actions of the
13 incident that resulted in the criminal charges pending against the Defendant in this case.

14 All interested parties, whose records are being sought, have been sent notice of the time
15 and date set for hearing and advised of his/her right to be heard at such hearing.

16 WHEREFORE, declarant prays that a Subpoena Duces Tecum be issued requiring the
17 Custodian of Records for Palo Alto Fire Department to produce the above described documents
18 and records at a session of the above-entitled Court on March 14, 2016, at 8:30 AM, and each
19 succeeding day thereafter until excused by the Court.

20 **You are not required to appear in person if you produce the records described**
21 **herein, together with a completed declaration of Custodian of Records in compliance with**
22 **Evidence Code sections 1560, 1561, 1562, and 1271. (1) Place a copy of the records in an**
23 **envelope (or other wrapper). Enclose our original declaration with the records, with the**
24 **appropriate information filled in by you and signed. Seal them. (2) Attach a copy of this**
25



Find fr

Tren

Happ
378K

#EUR
907K

Frede
5,074

#mon
53K T

Found
9,643

#Arch

Nigel
164K

#July

From: [Michele Landis Dauber](#)
To: [Kianerci, Alaleh](#)
Subject: Fwd: more Steve White
Date: Wednesday, July 06, 2016 11:29:00 AM

It's also the case that had the redactions been proper none of this would be happening in the first place so I would appreciate not getting a lecture from Glenn about how the law works.

Sent from my iPhone

Begin forwarded message:

From: "Glenn McGovern" <GMcGovern@da.sccgov.org>
Date: July 6, 2016 at 1:07:30 PM CDT
To: "Michele Dauber" <[REDACTED]>
Cc: "Alaleh Kianerci" <AKianerci@da.sccgov.org>
Subject: Re: more Steve White

Michele,

We have identified the individual and are looking at possible ways to deal with him. At present, he has not violated any laws including the stalking statute. That said, I am sure you understand that we will not be sharing what our method(s) of approach will be with you. This is a one way street. I realize that can be frustrating, but it is the nature of the beast. We are in continued contact with the victim, and she has direct means of communication with me and the prosecutor. Lastly, there is nothing preventing you from reaching out to the FBI yourself if you feel that is warranted.

Glenn

>>> Michele Dauber <[REDACTED]> 7/6/2016 10:03 AM >>>
http://www.mercurynews.com/crime-courts/ci_30094097/brock-turner-new-woes-sex-case-judge

he is now publishing about [REDACTED] father's occupation, what their home is worth, what she majored in college.

Look, this seems to be to be surveillance that would cause a reasonable person to be fearful. She is subjectively and objectively fearful. This guys is obviously nuts. Why can't the FBI be called in? It is stalking.

Look in the comments:

"Turner is not from a wealthy family as is so often portrayed; his family is middle class as is so called victims. She grew up in a \$3,000,000 dollar home in Palo Alto"

"So called victim was a literature major and throughout her years at the University, took classes in, wrote and publicly performed Spoken Word(poetry.) Her victim statement is Spoken Word; her magnum opus in that genre.

The following are the final few sentences in a story written by so called victim about a friend who was fingered. (Note: Some of the words were changed so the following passage may not be searched to find the story and the identity of its author.)

"Not speaking means one didn't do right and one didn't do wrong, so I can't be punished. It's not my dilemma if I don't want it to be. Please everybody by staying passive, don't imperil this safe state, I said. Don't let people know who I really am. I am liked. So what."

There would have been no anonymity; her name would not have been redacted from publicly available police and court records.

It would have been very bad for her professional reputation.

So called victim's father is a Clinical Psychologist whose specialty is treating Alcohol and other Chemical Dependencies. His PhD Dissertation concerned the effects of alcohol consumption on human behavior. Public knowledge that his daughter, a 22 year old University graduate, was involved in a drunken, lewd affair with a nineteen year old Stanford freshman under the redwood trees outside a fraternity party would have been very bad for his professional reputation.

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From: [Michele Landis Dauber](#)
To: [Kianerci, Alaleh](#)
Subject: Re: Steve White Just Tweeted [REDACTED] Name.
Date: Tuesday, July 05, 2016 11:33:00 AM

I know. Ken is working through connections at Twitter we will see what we can do. He already got one account taken down but he just started using this one. Why can't we report stalking to fbi

Sent from my iPhone

On Jul 5, 2016, at 11:17 AM, Alaleh Kianerci <AKianerci@da.sccgov.org> wrote:

Hi Michelle,

We are aware of this issue and working on it. We will get back to you. I also personally reported his twitter posts. I don't know if that will make a difference.

Best,
Alaleh

Alaleh Kianerci
Deputy District Attorney
650.324.6418

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>>> Michele Dauber <[REDACTED]> 7/5/2016 7:57 AM >>>

It seems to me that the credible threat is the threat to publicly disclose her identity. That public disclosure given this situation is such that a reasonable person would fear for her safety. He has made that threat repeatedly.

The federal anti-stalking law is substantially more liberal. [18 USCS § 2261A](#).
[Stalking. \(2013\)](#)

(2) with the intent to kill, injure, **harass**, intimidate, or **place under surveillance** with intent to kill, injure, **harass, or intimidate** another person, uses the mail, any interactive computer service or

electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that--

(A) places that person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A),

shall be punished as provided in section 2261(b) of this title.

On Tue, Jul 5, 2016 at 7:51 AM, Michele Dauber [REDACTED] wrote:
Cal Pen Code § 646.9 . Stalking. (2008)

On Tue, Jul 5, 2016 at 7:37 AM, Glenn McGovern
<GMcGovern@da.sccgov.org> wrote:

Michele,
It was just a guess, I'm not sure how he acquired the document. It's possible he acquired it early, and has just been sitting on it. All avenues of criminal action are being looked at, but it a fine line when dealing with 1st Amendment rights.

>>> Michele Dauber <[REDACTED]> 7/5/2016 7:32 AM >>>

I was assured by Jeff that he was going to ensure no more redaction errors so I am disappointed about that.

He has now tweeted it hundreds of times.

Are you able to do anything? It sure seems like harassment of [REDACTED].

On Tue, Jul 5, 2016 at 7:24 AM, Glenn McGovern <GMcGovern@da.sccgov.org> wrote:

It's hard to say. On the face of hit, I would guess he took a look at the court file which is open to the public and found an unredacted page.
Glenn

>>> Michele Dauber [REDACTED] 7/4/2016 7:44 AM >>>

Where did he get this unredacted document?

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From: [Kianerci, Alaleh](#)
To: [Rosen, Jeff](#); [Ramos, Luis](#); [Michele Dauber](#)
Subject: Re: Fwd: 3 of 9 -- B1577162 (People v. Turner)
Date: Friday, June 10, 2016 2:30:00 PM
Attachments: [ATT00001](#)

Hi Michele,

I am really sorry that her first name was released by the Court. I filed an order with the Court yesterday asking the Judge to interpose her first name with Jane Doe and [REDACTED] name with Jane Doe II on any documents they release. I also called Palo Alto PD to let them know her family's address and to do drive by's to ensure no one is bothering them. I have been in constant contact with [REDACTED], [REDACTED] and [REDACTED] and I am fielding all attempts to contact them. I have responded personally to several reporters and made it absolutely clear they are not to contact her or her family or friends. Our Public Information Officer Sean Webby has also intercepted and fielded many attempts to contact her. He has also agreed to drive up to their home to run interference for any attempts to contact her or her family. We are doing everything in our power to reach out to specific members of the media to make it clear that they are not to contact her directly or indirectly. I know that this is difficult. Please forward us any information of journalists trying to contact her so we can reach out to them and shut it down.

Best,
Alaleh

Alaleh Kianerci
Deputy District Attorney
650.324.6418

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>>> Michele Dauber <[REDACTED]> 6/10/2016 2:04 PM >>>

Pages of the court docs that disclose [REDACTED] name

----- Forwarded message -----

From: **Sam Levin** <sam.levin@guardian.co.uk>
Date: Fri, Jun 10, 2016 at 1:44 PM
Subject: Fwd: 3 of 9 -- B1577162 (People v. Turner)
To: Michele Dauber <[REDACTED]>

page 10 of this, screenshot attached

----- Forwarded message -----

From: **Joseph Macaluso** <JMacaluso@scscourt.org>
Date: 10 June 2016 at 01:53
Subject: 3 of 9 -- B1577162 (People v. Turner)
To:

Joseph D. Macaluso

Superior Court of California, County of Santa Clara

[\(408\) 882-2715](tel:(408)882-2715) [Desk]

[\(408\) 691-0046](tel:(408)691-0046) [Cell]

[@scscourt](https://twitter.com/scscourt) [Twitter]

scscourt.org

--

Sam Levin

Reporter

Guardian News & Media

[646-935-9115](tel:646-935-9115)

sam.levin@theguardian.com

[@samtlevin](https://twitter.com/samtlevin)



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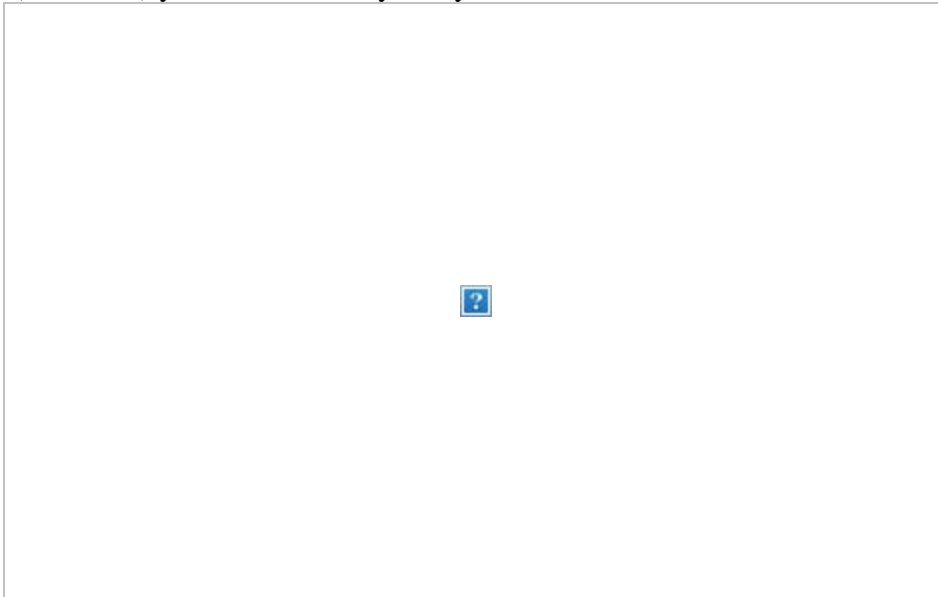
From: [Harman, Terry](#)
To: [Ramos, Luis](#)
Subject: FW: Chapman file question
Date: Tuesday, September 27, 2016 4:03:16 PM
Attachments: [image004.jpg](#)
[image005.png](#)
[image006.png](#)

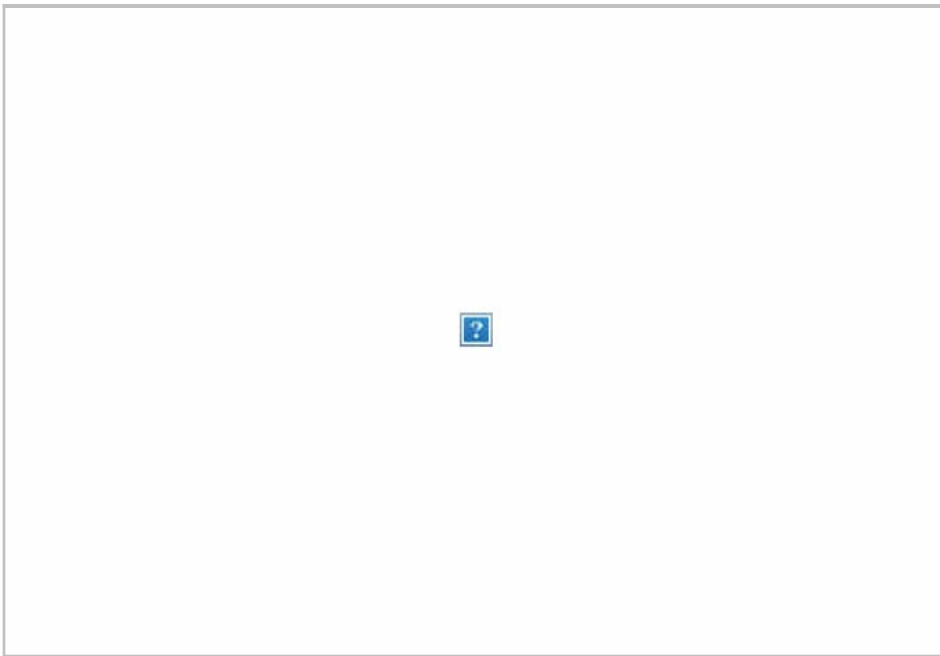


Terry Lynn Harman
Assistant District Attorney
Santa Clara County
70 West Hedding Street
San Jose, CA 95110
408.792.2826

From: Michele Dauber [mailto: [REDACTED]]
Sent: Monday, September 26, 2016 10:53 PM
To: Harman, Terry <ttharman@dao.sccgov.org>
Subject: Re: Chapman file question

Also, is the maximum sentence added correctly on this form? To me it looks like 22 (8+8+3+3) years. But this says 11 years 4 mos.





On Mon, Sep 26, 2016 at 10:46 PM, Michele Dauber <[REDACTED]> wrote:

On this screenshot from the file, the Judge indicated that the people wanted a 9 top/bottom and the court made an offer of 6 top/no bottom. Right under that it says SM (san mateo) case, D has 1 yr CNSP. Does that mean conspiracy? What does that mean?

This is a very disturbing case.

Thanks,
Michele

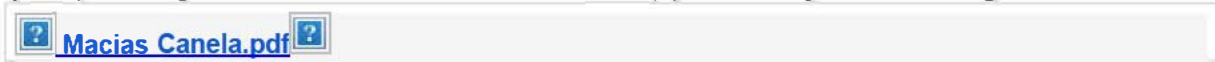
From: [Hendrickson, Cindy](#)
To: [Welch, Brian](#)
Subject: FW: DV case
Date: Friday, September 30, 2016 9:00:51 AM

Here is a copy of the Court file in the Caneles case.

From: Michele Dauber [mailto:mldauber@gmail.com]
Sent: Friday, September 30, 2016 8:39 AM
To: Hendrickson, Cindy <chendrickson@dao.sccgov.org>
Subject: Re: DV case

Sure thing. Here's the whole file.

My experience reading Persky files is that he tends to put in these 17(b) things on his own initiative, sometimes in disagreement to probation, which often says that it likes to see 2/3 (2 years) of the probation before consideration of 17(b). So I am just wondering.



On Fri, Sep 30, 2016 at 8:31 AM, Hendrickson, Cindy <chendrickson@dao.sccgov.org> wrote:

Can you please send me a copy of the entire plea agreement so I can run it by the attorneys involved in the case? Thx.

From: Michele Dauber [mailto:████████████████████]
Sent: Thursday, September 29, 2016 6:11 PM
To: Hendrickson, Cindy <chendrickson@dao.sccgov.org>
Subject: Re: DV case

Dear Cindy:

Thanks for this response.

Can you please tell me if the 17(b) was an offer of the court or the DA? The plea form indicates that it was the DA but I am wondering whether that part was an offer of the court.

Thanks,
Michele

On Wed, Sep 28, 2016 at 4:59 PM, Hendrickson, Cindy <chendrickson@dao.sccgov.org> wrote:

Hi Michele,

You are very welcome.

Agreements to have a felony charge reduced to a misdo after one year of successful completion of probation are common, and it does appear from the document you sent that such an agreement was reached in the Canala case.

I looked up the Smith case and noticed that it is Alaleh's case. She is probably in the best position to answer your questions on this matter. I suspect you have her contact information since she is the attorney on the Turner case, just in case: akianerci@da.sccgov.org. [650-324-6418](tel:650-324-6418).

Talk to you soon!

Cindy

From: Michele Dauber [mailto:]
Sent: Wednesday, September 28, 2016 2:56 PM
To: Hendrickson, Cindy <chendrickson@dao.sccgov.org>
Subject: DV case

Dear Cindy:

Thanks for your generosity with your time today. I really apologize again for my failure to communicate very well. I feel badly.

I wanted to attach the 17(b) commitment from Mr. Canala's plea agreement. Based on the plea form I had thought it was part of the plea deal but I could be wrong.

Here's another case I have a question about (that I mentioned today):


B1581137 Keenan Smith

I am confused about what happened with the sentence in this case. It appears that he never showed up to begin his sentence or to do his DV classes but then I can't tell what happened as a result of that. Can you help me understand?

Thanks,
Michele

From: [Kianerci, Alaleh](#)
To: [Rosen, Jeff](#); [Harman, Terry](#); [Ramos, Luis](#); [Webby, Sean](#)
Subject: FW: FYI
Date: Thursday, December 07, 2017 9:48:30 AM

More news

From: Michele Dauber [mailto:
Sent: Thursday, December 07, 2017 9:28 AM
To: Kianerci, Alaleh <akianerci@dao.sccgov.org>
Subject: FYI

<http://www.mydaytondailynews.com/news/crime--law/brock-turner-dayton-character-witnesses-key-part-appeal/eALo270axvrwBfR0hibdQI/>

From: [Harman, Terry](#)
To: [Ramos, Luis](#)
Subject: FW: Question about case
Date: Tuesday, September 27, 2016 3:50:36 PM
Attachments: [image001.jpg](#)

Hi Luis,

Do you have any information on this? At your convenience. Thank you.



Terry Lynn Harman
Assistant District Attorney
Santa Clara County
70 West Hedding Street
San Jose, CA 95110
408.792.2826

From: Michele Dauber [mailto: [REDACTED]]
Sent: Monday, September 26, 2016 12:11 PM
To: Harman, Terry <tharman@dao.sccgov.org>
Subject: Question about case

Hi Terry:

I have a question about this case:

Christian Toribio, B1581167

He was convicted of 311.11(c) which is the more serious child porn conviction. He also was suspected by the police of possibly molesting children since he was a "nanny" (WTF) for some people who inexplicably would not allow their children to be interviewed despite the possibility that they had been abused.

He got a plea with the DA for 6 months. I was a little confused by this because it is clear that 6 months is kind of the going rate for 311.11(a) which is less serious. This case had MANY MANY HIGHLY DISTURBING videos the descriptions of which I can never ever erase from my memory now having read them.

Why was this only 6 months? What do you have to do to go to prison for this?

Thanks!
Michele

From: [Harman, Terry](#)
To: [Kianerci, Alaleh](#)
Cc: [Webby, Sean](#); [Ramos, Luis](#)
Subject: FW: status of Turner appeal
Date: Thursday, October 13, 2016 8:50:17 AM
Attachments: [image001.jpg](#)

Hi Alaleh,
Please see Dauber's email below. T



Terry Lynn Harman
Assistant District Attorney
Santa Clara County
70 West Hedding Street
San Jose, CA 95110
408.792.2826

From: Michele Dauber [mailto:████████████████████]
Sent: Wednesday, October 12, 2016 5:05 PM
To: Harman, Terry <tharman@dao.sccgov.org>
Subject: status of Turner appeal

Hi Terry:

I received an email from several people telling me that Turner filed an appeal of his 290 registration and that the decision is expected imminently. Can you update me on this?

Thanks,
Michele

From: [Rosen, Jeff](#)
To: [Boyarsky, Jay](#)
Subject: Fwd: chat?
Date: Thursday, March 30, 2017 10:41:55 PM

FYI

Sent from my iPhone

Begin forwarded message:

From: Michele Dauber [mailto: [REDACTED]]
Date: March 30, 2017 at 8:01:32 PM PDT
To: "Rosen, Jeff" <jrosen@dao.sccgov.org>
Subject: Re: chat?

Dear Jeff:

I gave some thought to our conversation and have some follow up thoughts. If you want to give me a call I can let you know about them. I would appreciate speaking just with you rather than with you and Jay.

Michele

On Thu, Mar 30, 2017 at 3:05 PM, Michele Dauber [mailto: [REDACTED]] wrote:

On Thu, Mar 30, 2017 at 1:45 PM Rosen, Jeff <jrosen@dao.sccgov.org> wrote:

Dear Michelle,

Sure. Please send me your cell phone number and I'll try to give you a call later today.

Sincerely,

Jeff

From: Michele Dauber [mailto: [REDACTED]]
Sent: Thursday, March 30, 2017 11:12 AM

To: Rosen, Jeff <jrosen@dao.sccgov.org>

Subject: chat?

Hi Jeff:

I am wondering if we can set up a call on a non-County political matter.

Thanks!

Michele

From: [Welch, Brian](#)
To: [Hamilton, Clarissa](#)
Subject: Fwd: D.A. Answers for BuzzFeed Inquiry on People v. Gunderson
Date: Thursday, August 25, 2016 3:59:00 PM

My statement to buzzfeed.

Sent from my iPhone

Begin forwarded message:

From: "Sean Webby" <SWebby@da.sccgov.org>
Date: August 25, 2016 at 2:29:46 PM PDT
To: "Katie Baker" <katie.baker@buzzfeed.com>
Cc: "Brian Welch" <BWelch@da.sccgov.org>, "Terry Harman" <THarman@da.sccgov.org>
Subject: D.A. Answers for BuzzFeed Inquiry on People v. Gunderson

Katie,

Thank you for the nice compliment.

So here's our answers to your questions. If you have any further questions or need clarifications on these answers, then please don't hesitate to call or email.

S.

1. Is it typical for a sentence in a domestic violence felony case to be delayed for over a year? In Santa Clara County, it is not typical for convicted defendants in any case to have their sentencing scheduled a year from the date of guilty plea. However, judges have the discretion to schedule sentencing based on the circumstances unique to a particular case or defendant. In most domestic violence cases, whether charged as a felony or misdemeanor, the sentencing hearing occurs within a month of two of the guilty plea. In some cases, including those involving domestic violence, defendants may receive time to complete various programs in advance of the sentencing date in the hope that by doing so, the court will reduce the charges at the time of sentencing. In other cases, the court may delay sentencing to avoid certain collateral consequences, such as an adverse impact on schooling or employment.
2. Was it ultimately up to the judge to decide the sentence and how long it should be in this case, or was that more the role of the DA and the defendant's attorney, as Goodman claimed? How does what happened here differ from a typical plea deal? In this case the defendant pled no contest to the only charge named in the complaint. As such, it was solely within the court's discretion to determine the sentence. Although a

defense attorney and prosecutor may request, even jointly, a particular sentence, the judge has the sole discretion to decide and impose a lawful sentence. The timing of the sentencing hearing was also within the sole discretion of the court. The sentence imposed in this case was not unusual; the timing of the sentencing hearing and the court's ruling that the hearing would be postponed for more than a year to allow the defendant to complete a DV class and attend AA while a student at the University of Hawaii was unusual, but not unprecedented.

3. Should Hawaii have been notified that Gunderson went there for a year? Did that violate the interstate compact? It's a close call whether the plea agreement required an application to the Interstate Commission for Adult Offender Supervision (ICAOS). Although the defendant pled guilty, he was not under any supervision by probation; that would not occur until he was formally sentenced and placed on probation. There is no question that once sentenced, defendant was required to submit a formal transfer request to ICAOS; the only question is whether he was required to submit a formal request after pleading no contest and agreeing to complete the 52 week DV class and attend AA weekly. There are no advisory opinions from ICAOS addressing this specific scenario. However, the Commission has issued an advisory opinion finding that formal transfer was required for defendants entering into Deferred Entry of Judgment (DEJ). In DEJ cases, which are usually those involving the use or possession of illegal drugs and narcotics, the defendant pleads guilty or no contest and is placed on DEJ probation. The defendant is ordered to complete treatment programs, and if successful, the guilty plea is dismissed at the conclusion of the program. Arguably, defendant's no contest plea in this case, coupled with the court's orders to complete the DV class and attend AA, can be analogized to DEJ, thus requiring a formal transfer through ICAOS.
4. Why did it take so long for him to be sent to jail? The case was on calendar on December 14, 2015, for "proof of programs." When the defendant pled no contest on May 26, 2015, the court scheduled a hearing for December 14, 2015, for "proof of programs" and excused the defendant's appearance because of his school schedule. At the December 2015 hearing defense counsel informed the prosecutor that defendant had dropped out of the University of Hawaii and had not regularly attended the DV class and AA. The prosecutor asked the court to schedule a hearing and order the defendant to appear. The court agreed and made that order. On January 14, 2016, defendant appeared, claimed that the death of his grandmother caused him to drop out of school and miss several AA meetings, and represented that he had re-enrolled in school and was regularly attending his DV class. The prosecutor argued that defendant should be remanded to custody because he had failed to abide by the court's order of May 26, 2015. The court declined to remand the defendant, advanced the sentencing hearing to March 10, 2016, and referred the matter to the probation department for a full report. On March 10, 2016, the court imposed sentence: defendant was placed on three years felony probation (the charge was not reduced to a

misdemeanor), ordered to serve 4 months in the county jail, complete a certified DV program (Hawaii's program did not meet California's standards), stay away from the victim, and pay standard fines and fees. The court agreed to allow the defendant to serve the jail term starting on June 1, 2016, based on his attorney's representation that he was still enrolled in school. Defendant may not have been enrolled in school as stated by his attorney, or he dropped out shortly after the sentencing hearing because the probation department requested another hearing on March 21, 2016, to address the defendant's custodial status. At that hearing a different judge was presiding and he remanded defendant to serve the 4 month jail sentence. Defendant was released on May 18, 2016. It is not unusual for a judge to allow a defendant to serve a jail term in a manner that does not disrupt school or employment.

5. Can you tell me the exact dates he went to jail? Can't find them anywhere. Defendant was remanded to custody on March 21, 2016. He was released on May 18, 2016. He had been originally ordered to serve his jail term starting on June 1, 2016, but that was changed at the request of the probation officer on March 21, 2016.
6. Is it typical for a sentence in a domestic violence felony case to be delayed and then lowered to a misdemeanor in a case like this? This was an unusual disposition. Most DV defendants would be sentenced shortly after entering a guilty or no contest plea and would have to successfully complete probation before receiving a reduction of the charge to a misdemeanor. Defendant, to his credit, accepted responsibility early in the proceedings and pled no contest to the felony domestic violence charge. Ideally, the defendant would have been sentenced within 60 days of the guilty plea, placed on formal probation, and then requested transfer to Hawaii through his probation officer. Presumably, that process would have created the collateral consequence of preventing the defendant from attending the fall term at the University of Hawaii, which appears to be the motivation for the court's decision to schedule the sentencing hearing after the defendant could complete the 52-week DV class and attend AA on a weekly basis, and if successful, would only then consider reducing the charge to a misdemeanor. Because the defendant did not fulfill the conditions of the plea, the court declined to reduce the charge to a misdemeanor at the time of sentencing.
7. Is it true that the victim was never asked to come into court or provide any sort of statement, neither from the DA's office or the judge? The victim was contacted by phone when the case was initially presented to the DA's office for review. Once the case was filed, the victim received written correspondence informing her that the case had been filed and advising her of her rights as a victim, including the right to make a statement at the time of sentencing. The assigned prosecutor did not contact the victim prior to the May 26, 2015, court hearing where the defendant pled no contest to the felony DV charge, but that is not unusual, especially when the prosecutor was not aware prior to the hearing that the defendant would be resolving his case. After that hearing the DA's office sent the

victim a letter informing her of the disposition, the sentencing date, and her right to be present at the hearing and her right to make a victim impact statement. Once the matter was referred to the probation department for a sentencing report, that department also sent the victim a letter informing her of the date of the sentencing hearing and her right to be present. The probation officer preparing the report contacted the victim and took her statement, which was included in the probation report. The victim told the probation officer that she was a forgiving person, they were both intoxicated, he "wasn't in his right mind," and wondered if counseling, rather than a county jail sentence, would be appropriate. The prosecutor did not call the victim and ask her to make a statement at the sentencing hearing, but that is rarely done, especially when the victim is notified in writing on two occasions of her right to be present and make a statement and the victim gives a statement to the probation officer.

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: 408-792-2997

Cell: 408-209-8064

>>> Katie Baker <katie.baker@buzzfeed.com> 8/25/2016 2:17 PM >>>

Thank you! Am on my cell if you are calling: 818 371 0906. Appreciate it - you're really good at your job!

Katie

On Thu, Aug 25, 2016 at 5:17 PM, Sean Webby <SWebby@da.sccgov.org> wrote:

Just about to get you answers, Katie. Stand by.

S.

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: [408-792-2997](tel:408-792-2997)

Cell: [408-209-8064](tel:408-209-8064)

>>> Katie Baker <katie.baker@buzzfeed.com> 8/25/2016 6:33 AM

>>>

Realized it's clear from the documents I have that he was ultimately convicted and sentenced to a felony, so don't worry about confirming

that.

Sorry, but one last question instead - the victim told me she was never asked to come into court or provide any sort of statement, neither from the DA's office or the judge. Can you confirm this to me? Off the record is fine, I just wouldn't want to quote her as saying something that isn't true.

Thank you!

On Wed, Aug 24, 2016 at 3:31 PM, Katie Baker

<katie.baker@buzzfeed.com> wrote:

One more question - Goodman told me Gunderson was, ultimately sentenced to a felony and will have that on his record. Can you confirm that for me? Couldn't verify it independently online although I think it says as much in the transcripts. Just wanted to make sure!

Thanks!

On Wed, Aug 24, 2016 at 1:18 PM, Katie Baker

<katie.baker@buzzfeed.com> wrote:

oh one more note for my first question -- Is it typical for a sentence in a domestic violence felony case to be delayed and then lowered to a misdemeanor in a case like this? Thanks!

On Wed, Aug 24, 2016 at 1:17 PM, Katie Baker

<katie.baker@buzzfeed.com> wrote:

Hello, thanks for talking just now. You were incredibly helpful. These are the questions I would like on the record answers to:

Is it typical for a sentence in a domestic violence felony case to be delayed for over a year? (If you want to say "unusual but not unprecedented" on the record that would be fine with me.)

Was it ultimately up to the judge to decide the sentence and how long it should be in this case, or was that more the role of the DA and the defendant's attorney, as Goodman claimed? How does what happened here differ from a typical plea deal?

Should Hawaii have been notified that Gunderson went there for a year? Did that violate the interstate compact?

Why did it take so long for him to be sent to jail?

Can you tell me the exact dates he went to jail? Can't find them anywhere.

And of course feel free to add anything else.

Thanks so much! If you can get back to me by tomorrow that would be great.

Best,
Katie

On Wed, Aug 24, 2016 at 12:47 PM, Katie Baker
<katie.baker@buzzfeed.com> wrote:
yes, please call! [818 371 0906](tel:8183710906)

On Wed, Aug 24, 2016 at 12:45 PM, Sean Webby
<SWebby@da.sccgov.org> wrote:

Let's talk now. Have a sec?

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: [408-792-2997](tel:4087922997)

Cell: [408-209-8064](tel:4082098064)

>>> Katie Baker <katie.baker@buzzfeed.com> 8/24/2016
8:11 AM >>>

It's okay, I understand you must be really busy. I just would rather talk to you while I'm still reporting my story than only get comment at the very end. Looking forward to talking!

On Wed, Aug 24, 2016 at 11:09 AM, Sean Webby
<SWebby@da.sccgov.org> wrote:

Hi Katie. I was swamped yesterday. Please forgive me. Ill call later this am after I confer with ADA Harman.

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: [408-792-2997](tel:4087922997)

Cell: [408-209-8064](tel:4082098064)

>>> Katie Baker <katie.baker@buzzfeed.com>
8/24/2016 8:04 AM >>>

Hi Sean, just checking in again - I'm free all day today.

[818 371 0906](tel:8183710906)

Best,
Katie

On Tue, Aug 23, 2016 at 11:24 PM, Katie Baker

<katie.baker@buzzfeed.com> wrote:

I'm guessing we won't talk tonight. I'm free anytime tomorrow. Please call my cell: [818 371 0906](tel:8183710906) is the direct line.

Best,
Katie

On Tue, Aug 23, 2016 at 8:01 PM,

<katie.baker@buzzfeed.com> wrote:

Didn't hear from you - did I miss your call? I can't talk anymore for a few hours but would later tonight or early tomorrow. Would really like to talk ASAP....

Sent from my iPhone

On Aug 23, 2016, at 2:11 PM, Sean Webby

<SWebby@da.sccgov.org> wrote:

afternoonish.

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: [408-792-2997](tel:4087922997)

Cell: [408-209-8064](tel:4082098064)

>>> Katie Baker

<katie.baker@buzzfeed.com> 8/23/2016

8:54 AM >>>

Hi, just checking in. Do you know what time you'll be available to speak today?

Just want to make sure I'm available.

Thanks!

Best,
Katie

On Mon, Aug 22, 2016 at 2:36 PM, Katie

Baker <katie.baker@buzzfeed.com>
wrote:

haha okay, talk soon I hope!

On Mon, Aug 22, 2016 at 2:30 PM, Sean
Webby <SWebby@da.sccgov.org>
wrote:

You'd be surprised. ;)

Best,

Sean Webby

Public Communications Officer
Santa Clara County

District Attorney's Office

Work: [408-792-2997](tel:408-792-2997)

Cell: [408-209-8064](tel:408-209-8064)

>>> Katie Baker

<katie.baker@buzzfeed.com>

8/22/2016 11:27 AM >>>

Sounds good! I just don't know if you
can be briefed without knowing
what my story is about! I haven't
told anyone yet! Just call when you
can.

On Mon, Aug 22, 2016 at 2:26 PM,
Sean Webby

<SWebby@da.sccgov.org> wrote:

You bet, Katie. Give me a bit so I
can get fully briefed. Bueno?
S.

Best,

Sean Webby

Public Communications Officer
Santa Clara County

District Attorney's Office

Work: [408-792-2997](tel:408-792-2997)

Cell: [408-209-8064](tel:408-209-8064)

>>> Katie Baker

<katie.baker@buzzfeed.com>

8/22/2016 11:05 AM >>>

Tomorrow is fine. I would like to
talk though before I get a
statement...since I haven't

actually asked any questions yet?
Can we chat on the phone? This story likely won't run for a few days - I just wanted to give you a heads up on what it's about while I do my research and reporting, so if we could speak as soon as possible that would be great.

Best,
Katie

On Mon, Aug 22, 2016 at 1:10 PM, Sean Webby
<SWebby@da.sccgov.org>
wrote:

Hey Katie. I'm back from vacation today. So please work through me. You have my contacts, right? Were reviewing some info and should be back to you soon. Hard deadline is today or - if it takes that long - is tomorrow okay?
Thanks.
S.

Best,
Sean Webby
Public Communications
Officer
Santa Clara County
District Attorney's Office
Work: [408-792-2997](tel:408-792-2997)
Cell: [408-209-8064](tel:408-209-8064)
>>> Katie Baker
<katie.baker@buzzfeed.com>
8/22/2016 10:03 AM >>>
Forgot to add that I have a doctor's appt from 4-5 EST so please call before or after then - thank you

On Mon, Aug 22, 2016 at 11:56

AM, Katie Baker
<katie.baker@buzzfeed.com>
wrote:

Thank you so much! Looking forward to speaking.

On Mon, Aug 22, 2016 at 11:55 AM, Terry Harman
<THarman@da.sccgov.org>
wrote:

Hi Katie,
You will get a call today!

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District
Attorney
Ph. [408.792.2826](tel:408.792.2826)
Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Katie Baker
<katie.baker@buzzfeed.com>
8/22/2016 7:25 AM >>>
Hello Ms. Harman,

Reaching out again today to see if we can find a time to talk -- just in case you missed my email yesterday since it was the weekend!

Let me know, or give me a call anytime. My numbers are below.

Best,
Katie

On Sun, Aug 21, 2016 at 12:11 PM, Katie Baker
<katie.baker@buzzfeed.com>
wrote:

Hello Ms. Harman,

I'm reaching out in advance of a story I'm working on about Judge Persky - I'm pretty sure Michele Dauber has told you I'm reporting it. I'm in the early stages of my reporting, but I wanted to speak on the phone and get your perspective on the matter. And of course I'd love to quote you in my eventual piece as well if you

are willing.

Do you have time to speak tomorrow or Tuesday? Please let me know, or give me a call anytime at the numbers below. Thank you!

Best,
Katie

--

Katie J.M. Baker | Reporter
BuzzFeed News
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--

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authorized recipient, you are prohibited from using, delivering, distributing, printing, copying, or disclosing the message or content to others and must delete the message from your computer. If you have received this message in error, please notify the sender by return email.

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Katie J.M. Baker | Reporter

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[@katiejmbaker](mailto:katiejmbaker) |

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111 E. 18th St., 11th Floor, New York, NY 10003

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Katie J.M. Baker | Reporter

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Katie J.M. Baker | Reporter

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From: [Kianerci, Alaleh](#)
To: [Webby, Sean](#); [Harman, Terry](#)
Subject: Fwd: Emily Doe/Interview Request for Huffington Post's Highline
Date: Thursday, December 29, 2016 9:42:21 PM

I'm forwarding this to you guys.

Sent from my iPhone

Begin forwarded message:

From: "Julia Ioffe" <julia.ioffe@gmail.com>
Date: December 27, 2016 at 8:18:45 PM GMT
To: <MWM_152046861_09132016@sccconnect.mail.onmicrosoft.com>
Subject: Emily Doe/Interview Request for Huffington Post's Highline

Hi Alaleh,

Michele Dauber gave me your contacts as I'm working on a profile of her and the recall effort, and she suggested I talk to you. I'm also wondering if I can pass questions to Emily through you. If you had time to talk this week, I'd really appreciate it.

Thank you so much,
Julia

From: [Webby, Sean](#)
To: [Harman, Terry](#)
Subject: Fwd: question related to Turner and sex registration - deadline 2 pm on Thurs, Sept. 1
Date: Thursday, September 01, 2016 8:13:00 AM
Attachments: [question related to Turner and sex registration - deadline 2 pm on Thurs Sept. 1.msg](#)

Thoughts?

S.

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: 408-792-2997

Cell: 408-209-8064

From: [Tracey Kaplan](#)
To: [Webby, Sean](#); [Welch, Brian](#); [Kianerci, Alaleh](#); [Tracey Kaplan](#)
Subject: question related to Turner and sex registration - deadline 2 pm on Thurs, Sept. 1
Date: Wednesday, August 31, 2016 5:25:00 PM

I'm writing a story about some of the restrictions and rules that accompany mandatory sex offender registration, including for Turner. Some defense attorneys I've spoken to say it's too onerous for this particular crime. Dauber thinks it should be 10 years. Does your office have any comment -- do you think it's appropriate in this case? Obviously, it's required by law. But do you also think it's necessary in this case to keep the community safe, since you've described him as a predator?

Please let me know if you're going to make any comment about the sex registrant requirement.
Thanks.

--

Warm regards,

Tracey Kaplan, Staff Writer
Email: tkaplan@bayareanewsgroup.com
Cell/text: 831.227.7166

From: [Webby, Sean](#)
To: [Welch, Brian](#)
Subject: Fwd: Re: D.A. Answers for Buzzfeed Inquiry on People v. Gunderson
Date: Thursday, August 25, 2016 4:38:00 PM
Attachments: [Re D.A. Answers for Buzzfeed Inquiry on People v. Gunderson.msg](#)

???

Best,
Sean Webby
Public Communications Officer
Santa Clara County
District Attorney's Office
Work: 408-792-2997
Cell: 408-209-8064

From: katie.baker@buzzfeed.com
To: [Webby, Sean](#)
Subject: Re: D.A. Answers for BuzzFeed Inquiry on People v. Gunderson
Date: Thursday, August 25, 2016 4:37:00 PM

One more question. I just received a police report from his December charge in Washington. The report states that he was living at home with his parents there instead of in Hawaii starting Nov 1. Was the court aware of this, that he had moved? Were his out of state charges taken into consideration? It's not in the transcripts as far as I can see. Thanks so much for all your help. Am trying to make sure I get everything right.

Best,
Katie

On Aug 25, 2016, at 5:56 PM, Sean Webby <swebby@da.sccgov.org> wrote:

Please use Assistant DA Brian Welch.

Sent from my iPhone

On Aug 25, 2016, at 2:36 PM, Katie Baker <katie.baker@buzzfeed.com> wrote:

This is really great. Thank you so much. Who should I attribute it to?
You?

On Thu, Aug 25, 2016 at 5:29 PM, Sean Webby
<SWebby@da.sccgov.org> wrote:

Katie,

Thank you for the nice compliment.

So here's our answers to your questions. If you have any further questions or need clarifications on these answers, then please don't hesitate to call or email.

S.

1. Is it typical for a sentence in a domestic violence felony case to be delayed for over a year? In Santa Clara County, it is not typical for convicted defendants in any case to have their sentencing scheduled a year from the date of guilty plea. However, judges have the discretion to schedule sentencing based on the circumstances unique to a particular case or defendant. In most domestic violence cases, whether charged as a felony or misdemeanor, the sentencing hearing occurs within a month of two of the guilty plea. In some cases, including

those involving domestic violence, defendants may receive time to complete various programs in advance of the sentencing date in the hope that by doing so, the court will reduce the charges at the time of sentencing. In other cases, the court may delay sentencing to avoid certain collateral consequences, such as an adverse impact on schooling or employment.

2. Was it ultimately up to the judge to decide the sentence and how long it should be in this case, or was that more the role of the DA and the defendant's attorney, as Goodman claimed? How does what happened here differ from a typical plea deal? In this case the defendant pled no contest to the only charge named in the complaint. As such, it was solely within the court's discretion to determine the sentence. Although a defense attorney and prosecutor may request, even jointly, a particular sentence, the judge has the sole discretion to decide and impose a lawful sentence. The timing of the sentencing hearing was also within the sole discretion of the court. The sentence imposed in this case was not unusual; the timing of the sentencing hearing and the court's ruling that the hearing would be postponed for more than a year to allow the defendant to complete a DV class and attend AA while a student at the University of Hawaii was unusual, but not unprecedented.

3. Should Hawaii have been notified that Gunderson went there for a year? Did that violate the interstate compact? It's a close call whether the plea agreement required an application to the Interstate Commission for Adult Offender Supervision (ICAOS). Although the defendant pled guilty, he was not under any supervision by probation; that would not occur until he was formally sentenced and placed on probation. There is no question that once sentenced, defendant was required to submit a formal transfer request to ICAOS; the only question is whether he was required to submit a formal request after pleading no contest and agreeing to complete the 52 week DV class and attend AA weekly. There are no advisory opinions from ICAOS addressing this specific scenario. However, the Commission has issued an advisory opinion finding that formal transfer was required for defendants entering into Deferred Entry of Judgment (DEJ). In DEJ cases, which are usually those involving the use or possession of illegal drugs and narcotics, the defendant pleads guilty or no contest and is placed on DEJ probation. The defendant is ordered to complete treatment programs, and if successful, the guilty plea is dismissed at the conclusion of the program. Arguably,

defendant's no contest plea in this case, coupled with the court's orders to complete the DV class and attend AA, can be analogized to DEJ, thus requiring a formal transfer through ICAOS.

4. Why did it take so long for him to be sent to jail? The case was on calendar on December 14, 2015, for "proof of programs." When the defendant pled no contest on May 26, 2015, the court scheduled a hearing for December 14, 2015, for "proof of programs" and excused the defendant's appearance because of his school schedule. At the December 2015 hearing defense counsel informed the prosecutor that defendant had dropped out of the University of Hawaii and had not regularly attended the DV class and AA. The prosecutor asked the court to schedule a hearing and order the defendant to appear. The court agreed and made that order. On January 14, 2016, defendant appeared, claimed that the death of his grandmother caused him to drop out of school and miss several AA meetings, and represented that he had re-enrolled in school and was regularly attending his DV class. The prosecutor argued that defendant should be remanded to custody because he had failed to abide by the court's order of May 26, 2015. The court declined to remand the defendant, advanced the sentencing hearing to March 10, 2016, and referred the matter to the probation department for a full report. On March 10, 2016, the court imposed sentence: defendant was placed on three years felony probation (the charge was not reduced to a misdemeanor), ordered to serve 4 months in the county jail, complete a certified DV program (Hawaii's program did not meet California's standards), stay away from the victim, and pay standard fines and fees. The court agreed to allow the defendant to serve the jail term starting on June 1, 2016, based on his attorney's representation that he was still enrolled in school. Defendant may not have been enrolled in school as stated by his attorney, or he dropped out shortly after the sentencing hearing because the probation department requested another hearing on March 21, 2016, to address the defendant's custodial status. At that hearing a different judge was presiding and he remanded defendant to serve the 4 month jail sentence. Defendant was released on May 18, 2016. It is not unusual for a judge to allow a defendant to serve a jail term in a manner that does not disrupt school or employment.

5. Can you tell me the exact dates he went to jail? Can't find them anywhere. Defendant was remanded to custody on March 21, 2016. He was released on May 18, 2016.

He had been originally ordered to serve his jail term starting on June 1, 2016, but that was changed at the request of the probation officer on March 21, 2016.

6. Is it typical for a sentence in a domestic violence felony case to be delayed and then lowered to a misdemeanor in a case like this? This was an unusual disposition. Most DV defendants would be sentenced shortly after entering a guilty or no contest plea and would have to successfully complete probation before receiving a reduction of the charge to a misdemeanor. Defendant, to his credit, accepted responsibility early in the proceedings and pled no contest to the felony domestic violence charge. Ideally, the defendant would have been sentenced within 60 days of the guilty plea, placed on formal probation, and then requested transfer to Hawaii through his probation officer. Presumably, that process would have created the collateral consequence of preventing the defendant from attending the fall term at the University of Hawaii, which appears to be the motivation for the court's decision to schedule the sentencing hearing after the defendant could complete the 52-week DV class and attend AA on a weekly basis, and if successful, would only then consider reducing the charge to a misdemeanor. Because the defendant did not fulfill the conditions of the plea, the court declined to reduce the charge to a misdemeanor at the time of sentencing.

7. Is it true that the victim was never asked to come into court or provide any sort of statement, neither from the DA's office or the judge? The victim was contacted by phone when the case was initially presented to the DA's office for review. Once the case was filed, the victim received written correspondence informing her that the case had been filed and advising her of her rights as a victim, including the right to make a statement at the time of sentencing. The assigned prosecutor did not contact the victim prior to the May 26, 2015, court hearing where the defendant pled no contest to the felony DV charge, but that is not unusual, especially when the prosecutor was not aware prior to the hearing that the defendant would be resolving his case. After that hearing the DA's office sent the victim a letter informing her of the disposition, the sentencing date, and her right to be present at the hearing and her right to make a victim impact statement. Once the matter was referred to the probation department for a sentencing report, that department also sent the victim a letter informing her of the date of the sentencing hearing and her right to be present. The probation officer

preparing the report contacted the victim and took her statement, which was included in the probation report. The victim told the probation officer that she was a forgiving person, they were both intoxicated, he “wasn’t in his right mind,” and wondered if counseling, rather than a county jail sentence, would be appropriate. The prosecutor did not call the victim and ask her to make a statement at the sentencing hearing, but that is rarely done, especially when the victim is notified in writing on two occasions of her right to be present and make a statement and the victim gives a statement to the probation officer.

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: [408-792-2997](tel:408-792-2997)

Cell: [408-209-8064](tel:408-209-8064)

>>> Katie Baker <katie.baker@buzzfeed.com> 8/25/2016
2:17 PM >>>

Thank you! Am on my cell if you are calling: [818 371 0906](tel:8183710906).

Appreciate it - you're really good at your job!

Katie

On Thu, Aug 25, 2016 at 5:17 PM, Sean Webby

<SWebby@da.sccgov.org> wrote:

Just about to get you answers, Katie. Stand by.
S.

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: [408-792-2997](tel:408-792-2997)

Cell: [408-209-8064](tel:408-209-8064)

>>> Katie Baker <katie.baker@buzzfeed.com>
8/25/2016 6:33 AM >>>

Realized it's clear from the documents I have that he was ultimately convicted and sentenced to a felony, so don't

worry about confirming that.

Sorry, but one last question instead - the victim told me she was never asked to come into court or provide any sort of statement, neither from the DA's office or the judge. Can you confirm this to me? Off the record is fine, I just wouldn't want to quote her as saying something that isn't true.

Thank you!

On Wed, Aug 24, 2016 at 3:31 PM, Katie Baker

<katie.baker@buzzfeed.com> wrote:

One more question - Goodman told me Gunderson was, ultimately sentenced to a felony and will have that on his record. Can you confirm that for me? Couldn't verify it independently online although I think it says as much in the transcripts. Just wanted to make sure!

Thanks!

On Wed, Aug 24, 2016 at 1:18 PM, Katie Baker

<katie.baker@buzzfeed.com> wrote:

oh one more note for my first question -- Is it typical for a sentence in a domestic violence felony case to be delayed and then lowered to a misdemeanor in a case like this? Thanks!

On Wed, Aug 24, 2016 at 1:17 PM, Katie Baker

<katie.baker@buzzfeed.com> wrote:

Hello, thanks for talking just now. You were incredibly helpful. These are the questions I would like on the record answers to:

Is it typical for a sentence in a domestic violence felony case to be delayed for over a year? (If you want to say "unusual but not unprecedented" on the record that would be fine with me.)

Was it ultimately up to the judge to decide the sentence and how long it should be in this case, or was that more the role of the DA and the defendant's attorney, as Goodman claimed? How does what happened here differ from a typical plea deal?

Should Hawaii have been notified that Gunderson went there for a year? Did that violate the

interstate compact?

Why did it take so long for him to be sent to jail?

Can you tell me the exact dates he went to jail?
Can't find them anywhere.

And of course feel free to add anything else.

Thanks so much! If you can get back to me by tomorrow that would be great.

Best,
Katie

On Wed, Aug 24, 2016 at 12:47 PM, Katie Baker
<katie.baker@buzzfeed.com> wrote:
yes, please call! [818 371 0906](tel:8183710906)

On Wed, Aug 24, 2016 at 12:45 PM, Sean Webby
<SWebby@da.sccgov.org> wrote:

Let's talk now. Have a sec?

Best,
Sean Webby
Public Communications Officer
Santa Clara County
District Attorney's Office
Work: [408-792-2997](tel:4087922997)
Cell: [408-209-8064](tel:4082098064)

>>> Katie Baker
<katie.baker@buzzfeed.com> 8/24/2016
8:11 AM >>>

It's okay, I understand you must be really busy. I just would rather talk to you while I'm still reporting my story than only get comment at the very end. Looking forward to talking!

On Wed, Aug 24, 2016 at 11:09 AM, Sean Webby
<SWebby@da.sccgov.org> wrote:

Hi Katie. I was swamped yesterday. Please forgive me. Ill call later this am after I confer with ADA Harman.

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: [408-792-2997](tel:408-792-2997)

Cell: [408-209-8064](tel:408-209-8064)

>>> Katie Baker

<katie.baker@buzzfeed.com> 8/24/2016

8:04 AM >>>

Hi Sean, just checking in again - I'm free all day today.

[818 371 0906](tel:8183710906)

Best,
Katie

On Tue, Aug 23, 2016 at 11:24 PM, Katie Baker <katie.baker@buzzfeed.com> wrote:

I'm guessing we won't talk tonight. I'm free anytime tomorrow. Please call my cell: [818 371 0906](tel:8183710906) is the direct line.

Best,
Katie

On Tue, Aug 23, 2016 at 8:01 PM, <katie.baker@buzzfeed.com> wrote:

Didn't hear from you - did I miss your call? I can't talk anymore for a few hours but would later tonight or early tomorrow. Would really like to talk ASAP....

Sent from my iPhone

On Aug 23, 2016, at 2:11 PM, Sean Webby <SWebby@da.sccgov.org> wrote:

afternoonish.

Best,
Sean Webby
Public Communications

Officer
Santa Clara County
District Attorney's Office
Work: [408-792-2997](tel:408-792-2997)
Cell: [408-209-8064](tel:408-209-8064)
>>> Katie Baker
<katie.baker@buzzfeed.com>
8/23/2016 8:54 AM >>>

Hi, just checking in. Do you know what time you'll be available to speak today? Just want to make sure I'm available. Thanks!

Best,
Katie

On Mon, Aug 22, 2016 at 2:36 PM, Katie Baker
<katie.baker@buzzfeed.com>

wrote:

haha okay, talk soon I hope!

On Mon, Aug 22, 2016 at 2:30 PM, Sean Webby
<SWebby@da.sccgov.org>

wrote:

You'd be surprised. ;)

*Best,
Sean Webby*

Public

Communications

Officer

Santa Clara County

District Attorney's

Office

Work: [408-792-2997](tel:408-792-2997)

Cell: [408-209-8064](tel:408-209-8064)

>>> Katie Baker
<katie.baker@buzzfeed.com>

8/22/2016 11:27 AM

>>>

Sounds good! I just

don't know if you can
be briefed without
knowing what my
story is about! I
haven't told anyone
yet! Just call when
you can.

On Mon, Aug 22, 2016
at 2:26 PM, Sean
Webby
<SWebby@da.sccgov.org>
wrote:

You bet, Katie.
Give me a bit so I
can get fully
briefed. Bueno?
S.

Best,
Sean Webby
Public
Communications
Officer
Santa Clara County
District Attorney's
Office
Work: [408-792-
2997](tel:408-792-2997)
Cell: [408-209-8064](tel:408-209-8064)
>>> Katie Baker
<katie.baker@buzzfeed.com>

8/22/2016 11:05
AM >>>

Tomorrow is fine. I
would like to talk
though before I get
a statement...since
I haven't actually
asked any
questions yet? Can
we chat on the
phone? This story
likely won't run for
a few days - I just
wanted to give you

a heads up on what it's about while I do my research and reporting, so if we could speak as soon as possible that would be great.

Best,
Katie

On Mon, Aug 22,
2016 at 1:10 PM,
Sean Webby
<SWebby@da.sccgov.org>
wrote:

Hey Katie. I'm back from vacation today. So please work through me. You have my contacts, right? Were reviewing some info and should be back to you soon. Hard deadline is today or - if it takes that long - is tomorrow okay?
Thanks.
S.

Best,
Sean Webby
Public
Communications
Officer
Santa Clara
County
District

Attorney's
Office
Work: [408-792-
2997](tel:408-792-2997)

Cell: [408-209-
8064](tel:408-209-8064)

>>> **Katie
Baker**
<katie.baker@buzzfeed.com>

8/22/2016
10:03 AM >>>

Forgot to add
that I have a
doctor's appt
from 4-5 EST
so please call
before or after
then - thank
you

On Mon, Aug
22, 2016 at
11:56 AM, **Katie
Baker**
<katie.baker@buzzfeed.com>

wrote:
Thank you so
much!
Looking
forward to
speaking.

On Mon, Aug
22, 2016 at
11:55 AM,
**Terry
Harman**
<THarman@da.sccgov.org>

wrote:
Hi Katie,
You will get a
call today!

Terry Lynn
Harman
Assistant
District
Attorney

Santa Clara
County
District
Attorney
Ph.

[408.792.2826](tel:408.792.2826)

Fax

[408.286.5437](tel:408.286.5437)

THarman@da.sccgov.org

>>> Katie

Baker

<katie.baker@buzzfeed.com>

8/22/2016

7:25 AM >>>

Hello Ms.

Harman,

Reaching out
again today
to see if we
can find a
time to talk --
just in case
you missed
my email
yesterday
since it was
the weekend!

Let me know,
or give me a
call anytime.
My numbers
are below.

Best,
Katie

On Sun, Aug
21, 2016 at
12:11 PM,
Katie Baker
<katie.baker@buzzfeed.com>

wrote:

Hello Ms.
Harman,

I'm reaching
out in
advance of
a story I'm
working on
about
Judge
Persky - I'm
pretty sure
Michele

Dauber has told you I'm reporting it. I'm in the early stages of my reporting, but I wanted to speak on the phone and get your perspective on the matter. And of course I'd love to quote you in my eventual piece as well if you are willing.

Do you have time to speak tomorrow or Tuesday? Please let me know, or give me a call anytime at the numbers below.
Thank you!

Best,
Katie

--

**Katie J.M.
Baker |
Reporter
BuzzFeed
News**

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795.6487](tel:(646)795.6487) |

c: [\(347\)
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[@katiejmbaker](https://twitter.com/katiejmbaker)

|

[http://www.buzzfeed.com/katiej](http://www.buzzfeed.com/katiejmbaker)

[mbaker](http://www.buzzfeed.com/katiejmbaker)

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c: [\(347\) 620-5820](tel:(347)620-5820)
[@katiejmbaker](mailto:katiejmbaker) |
<http://www.buzzfeed.com/katiejmbaker>
111 E. 18th St., 11th
Floor, New York, NY
10003

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Reporter

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From: [Webby, Sean](#)
To: [Welch, Brian](#); [Harman, Terry](#)
Subject: Fwd: Re: Email #4 from BuzzFeed News
Date: Wednesday, August 24, 2016 12:34:00 PM
Attachments: [Re Email #4 from BuzzFeed News.msg](#)

Best,
Sean Webby
Public Communications Officer
Santa Clara County
District Attorney's Office
Work: 408-792-2997
Cell: 408-209-8064

From: [Katie Baker](#)
To: [Webby, Sean](#)
Subject: Re: Email #4 from BuzzFeed News
Date: Wednesday, August 24, 2016 12:33:00 PM

One more question - Goodman told me Gunderson was, ultimately sentenced to a felony and will have that on his record. Can you confirm that for me? Couldn't verify it independently online although I think it says as much in the transcripts. Just wanted to make sure!

Thanks!

On Wed, Aug 24, 2016 at 1:18 PM, Katie Baker <katie.baker@buzzfeed.com> wrote:

oh one more note for my first question -- Is it typical for a sentence in a domestic violence felony case to be delayed and then lowered to a misdemeanor in a case like this? Thanks!

On Wed, Aug 24, 2016 at 1:17 PM, Katie Baker <katie.baker@buzzfeed.com> wrote:

Hello, thanks for talking just now. You were incredibly helpful. These are the questions I would like on the record answers to:

Is it typical for a sentence in a domestic violence felony case to be delayed for over a year? (If you want to say "unusual but not unprecedented" on the record that would be fine with me.)

Was it ultimately up to the judge to decide the sentence and how long it should be in this case, or was that more the role of the DA and the defendant's attorney, as Goodman claimed? How does what happened here differ from a typical plea deal?

Should Hawaii have been notified that Gunderson went there for a year? Did that violate the interstate compact?

Why did it take so long for him to be sent to jail?

Can you tell me the exact dates he went to jail? Can't find them anywhere.

And of course feel free to add anything else.

Thanks so much! If you can get back to me by tomorrow that would be great.

Best,
Katie

On Wed, Aug 24, 2016 at 12:47 PM, Katie Baker <katie.baker@buzzfeed.com> wrote:
yes, please call! [818 371 0906](tel:8183710906)

On Wed, Aug 24, 2016 at 12:45 PM, Sean Webby <SWebby@da.sccgov.org> wrote:
Let's talk now. Have a sec?

*Best,
Sean Webby*

Public Communications Officer
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Cell: [408-209-8064](tel:408-209-8064)

>>> Katie Baker <katie.baker@buzzfeed.com> 8/24/2016 8:11 AM >>>

It's okay, I understand you must be really busy. I just would rather talk to you while I'm still reporting my story than only get comment at the very end. Looking forward to talking!

On Wed, Aug 24, 2016 at 11:09 AM, Sean Webby <SWebby@da.sccgov.org> wrote:

Hi Katie. I was swamped yesterday. Please forgive me. Ill call later this am after I confer with ADA Harman.

Best,

Sean Webby

Public Communications Officer
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Cell: [408-209-8064](tel:408-209-8064)

>>> Katie Baker <katie.baker@buzzfeed.com> 8/24/2016 8:04 AM >>>

Hi Sean, just checking in again - I'm free all day today.

[818 371 0906](tel:8183710906)

Best,
Katie

On Tue, Aug 23, 2016 at 11:24 PM, Katie Baker <katie.baker@buzzfeed.com> wrote:

I'm guessing we won't talk tonight. I'm free anytime tomorrow. Please call my cell: [818 371 0906](tel:8183710906) is the direct line.

Best,
Katie

On Tue, Aug 23, 2016 at 8:01 PM, <katie.baker@buzzfeed.com> wrote:

Didn't hear from you - did I miss your call? I can't talk anymore for a few hours but would later tonight or early tomorrow. Would really like to talk ASAP....

Sent from my iPhone

On Aug 23, 2016, at 2:11 PM, Sean Webby <SWebby@da.sccgov.org>

wrote:

afternoonish.

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

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>>> Katie Baker <katie.baker@buzzfeed.com> 8/23/2016
8:54 AM >>>

Hi, just checking in. Do you know what time you'll be available to speak today? Just want to make sure I'm available. Thanks!

Best,

Katie

On Mon, Aug 22, 2016 at 2:36 PM, Katie Baker

<katie.baker@buzzfeed.com> wrote:

haha okay, talk soon I hope!

On Mon, Aug 22, 2016 at 2:30 PM, Sean Webby

<SWebby@da.sccgov.org> wrote:

You'd be surprised. ;)

Best,

Sean Webby

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>>> Katie Baker <katie.baker@buzzfeed.com>
8/22/2016 11:27 AM >>>

Sounds good! I just don't know if you can be briefed without knowing what my story is about! I haven't told anyone yet! Just call when you can.

On Mon, Aug 22, 2016 at 2:26 PM, Sean Webby

<SWebby@da.sccgov.org> wrote:

You bet, Katie. Give me a bit so I can get fully

briefed. Bueno?

S.

Best,

Sean Webby

Public Communications Officer

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>>> Katie Baker <katie.baker@buzzfeed.com>

8/22/2016 11:05 AM >>>

Tomorrow is fine. I would like to talk though before I get a statement...since I haven't actually asked any questions yet? Can we chat on the phone? This story likely won't run for a few days - I just wanted to give you a heads up on what it's about while I do my research and reporting, so if we could speak as soon as possible that would be great.

Best,

Katie

On Mon, Aug 22, 2016 at 1:10 PM, Sean Webby <SWebby@da.sccgov.org> wrote:

Hey Katie. I'm back from vacation today. So please work through me. You have my contacts, right?

Were reviewing some info and should be back to you soon. Hard deadline is today or - if it takes that long - is tomorrow okay?

Thanks.

S.

Best,

Sean Webby

Public Communications Officer

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>>> Katie Baker <katie.baker@buzzfeed.com>

8/22/2016 10:03 AM >>>

Forgot to add that I have a doctor's appt from 4-5 EST so please call before or after then - thank you

On Mon, Aug 22, 2016 at 11:56 AM, Katie Baker <katie.baker@buzzfeed.com> wrote:

Thank you so much! Looking forward to speaking.

On Mon, Aug 22, 2016 at 11:55 AM, Terry Harman <THarman@da.sccgov.org> wrote:

Hi Katie,
You will get a call today!

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Katie Baker <katie.baker@buzzfeed.com>
8/22/2016 7:25 AM >>>
Hello Ms. Harman,

Reaching out again today to see if we can find a time to talk -- just in case you missed my email yesterday since it was the weekend!

Let me know, or give me a call anytime. My numbers are below.

Best,
Katie

On Sun, Aug 21, 2016 at 12:11 PM, Katie Baker <katie.baker@buzzfeed.com> wrote:

Hello Ms. Harman,

I'm reaching out in advance of a story I'm working on about Judge Persky - I'm pretty sure Michele Dauber has told you I'm reporting it. I'm in the early stages of my reporting, but I wanted to speak on the phone and get your perspective on the matter. And of course I'd love to quote you in my eventual piece as well if you are willing.

Do you have time to speak tomorrow or Tuesday? Please let me know, or give me a call anytime at the numbers below. Thank you!

Best,
Katie

--

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From: [Webby, Sean](#)
To: [Welch, Brian](#); [Harman, Terry](#)
Subject: Fwd: Re: Email #4 from BuzzFeed News
Date: Wednesday, August 24, 2016 10:20:00 AM
Attachments: [Re Email #4 from BuzzFeed News.msg](#)

Also...

S.

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: 408-792-2997

Cell: 408-209-8064

From: [Katie Baker](#)
To: [Webby, Sean](#)
Subject: Re: Email #4 from BuzzFeed News
Date: Wednesday, August 24, 2016 10:19:00 AM

oh one more note for my first question -- Is it typical for a sentence in a domestic violence felony case to be delayed and then lowered to a misdemeanor in a case like this? Thanks!

On Wed, Aug 24, 2016 at 1:17 PM, Katie Baker <katie.baker@buzzfeed.com> wrote:

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Should Hawaii have been notified that Gunderson went there for a year? Did that violate the interstate compact?

Why did it take so long for him to be sent to jail?

Can you tell me the exact dates he went to jail? Can't find them anywhere.

And of course feel free to add anything else.

Thanks so much! If you can get back to me by tomorrow that would be great.

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Katie

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Santa Clara County

District Attorney's Office

Work: [408-792-2997](tel:408-792-2997)

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Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
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Do you have time to speak tomorrow or Tuesday?
Please let me know, or give me a call anytime at the numbers below. Thank you!

Best,
Katie

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Katie J.M. Baker | Reporter

BuzzFeed News

o: [\(646\) 795 6487](tel:646.795.6487) | c: [\(347\) 620-5820](tel:347.620.5820)

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From: [Webby, Sean](#)
To: [Welch, Brian](#); [Harman, Terry](#)
Subject: Fwd: Re: Email #4 from BuzzFeed News
Date: Wednesday, August 24, 2016 10:20:00 AM
Attachments: [Re Email #4 from BuzzFeed News.msg](#)

Please see questions. Let's get this back to her soon. (She's being super cooperative.)

S.

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: 408-792-2997

Cell: 408-209-8064

From: [Katie Baker](#)
To: [Webby, Sean](#)
Subject: Re: Email #4 from BuzzFeed News
Date: Wednesday, August 24, 2016 10:18:00 AM

Hello, thanks for talking just now. You were incredibly helpful. These are the questions I would like on the record answers to:

Is it typical for a sentence in a domestic violence felony case to be delayed for over a year? (If you want to say "unusual but not unprecedented" on the record that would be fine with me.)

Was it ultimately up to the judge to decide the sentence and how long it should be in this case, or was that more the role of the DA and the defendant's attorney, as Goodman claimed? How does what happened here differ from a typical plea deal?

Should Hawaii have been notified that Gunderson went there for a year? Did that violate the interstate compact?

Why did it take so long for him to be sent to jail?

Can you tell me the exact dates he went to jail? Can't find them anywhere.

And of course feel free to add anything else.

Thanks so much! If you can get back to me by tomorrow that would be great.

Best,
Katie

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yes, please call! [818 371 0906](tel:8183710906)

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Let's talk now. Have a sec?

Best,
Sean Webby
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District Attorney's Office
Work: [408-792-2997](tel:4087922997)
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Santa Clara County District Attorney

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Katie J.M. Baker | Reporter

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o: [\(646\) 795 6487](tel:(646)7956487) | c: [\(347\) 620-5820](tel:(347)620-5820)
[@katiejmbaker](mailto:katiejmbaker@buzzfeed.com) | <http://www.buzzfeed.com/katiejmbaker>
111 E. 18th St., 11th Floor, New York, NY 10003

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111 E. 18th St., 11th Floor, New York, NY 10003

From: [Webby, Sean](#)
To: [Welch, Brian](#); [Harman, Terry](#)
Subject: Fwd: Re: Email #4 from BuzzFeed News
Date: Thursday, August 25, 2016 8:07:00 AM
Attachments: [Re Email #4 from BuzzFeed News.msg](#)

Take a look. True?

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: 408-792-2997

Cell: 408-209-8064

From: [Katie Baker](#)
To: [Webby, Sean](#)
Subject: Re: Email #4 from BuzzFeed News
Date: Thursday, August 25, 2016 6:34:00 AM

Realized it's clear from the documents I have that he was ultimately convicted and sentenced to a felony, so don't worry about confirming that.

Sorry, but one last question instead - the victim told me she was never asked to come into court or provide any sort of statement, neither from the DA's office or the judge. Can you confirm this to me? Off the record is fine, I just wouldn't want to quote her as saying something that isn't true.

Thank you!

On Wed, Aug 24, 2016 at 3:31 PM, Katie Baker <katie.baker@buzzfeed.com> wrote:

One more question - Goodman told me Gunderson was, ultimately sentenced to a felony and will have that on his record. Can you confirm that for me? Couldn't verify it independently online although I think it says as much in the transcripts. Just wanted to make sure!

Thanks!

On Wed, Aug 24, 2016 at 1:18 PM, Katie Baker <katie.baker@buzzfeed.com> wrote:

oh one more note for my first question -- Is it typical for a sentence in a domestic violence felony case to be delayed and then lowered to a misdemeanor in a case like this? Thanks!

On Wed, Aug 24, 2016 at 1:17 PM, Katie Baker <katie.baker@buzzfeed.com> wrote:

Hello, thanks for talking just now. You were incredibly helpful. These are the questions I would like on the record answers to:

Is it typical for a sentence in a domestic violence felony case to be delayed for over a year? (If you want to say "unusual but not unprecedented" on the record that would be fine with me.)

Was it ultimately up to the judge to decide the sentence and how long it should be in this case, or was that more the role of the DA and the defendant's attorney, as Goodman claimed? How does what happened here differ from a typical plea deal?

Should Hawaii have been notified that Gunderson went there for a year? Did that violate the interstate compact?

Why did it take so long for him to be sent to jail?

Can you tell me the exact dates he went to jail? Can't find them anywhere.

And of course feel free to add anything else.

Thanks so much! If you can get back to me by tomorrow that would be great.

Best,

Katie

On Wed, Aug 24, 2016 at 12:47 PM, Katie Baker <katie.baker@buzzfeed.com> wrote:
yes, please call! [818 371 0906](tel:8183710906)

On Wed, Aug 24, 2016 at 12:45 PM, Sean Webby <SWebby@da.sccgov.org> wrote:
Let's talk now. Have a sec?

Best,
Sean Webby
Public Communications Officer
Santa Clara County
District Attorney's Office
Work: [408-792-2997](tel:4087922997)
Cell: [408-209-8064](tel:4082098064)

>>> Katie Baker <katie.baker@buzzfeed.com> 8/24/2016 8:11 AM >>>
It's okay, I understand you must be really busy. I just would rather talk to you while I'm still reporting my story than only get comment at the very end. Looking forward to talking!

On Wed, Aug 24, 2016 at 11:09 AM, Sean Webby
<SWebby@da.sccgov.org> wrote:

Hi Katie. I was swamped yesterday. Please forgive me. Ill call later this am after I confer with ADA Harman.

Best,
Sean Webby
Public Communications Officer
Santa Clara County
District Attorney's Office
Work: [408-792-2997](tel:4087922997)
Cell: [408-209-8064](tel:4082098064)

>>> Katie Baker <katie.baker@buzzfeed.com> 8/24/2016 8:04 AM
>>>
Hi Sean, just checking in again - I'm free all day today.

[818 371 0906](tel:8183710906)

Best,
Katie

On Tue, Aug 23, 2016 at 11:24 PM, Katie Baker
<katie.baker@buzzfeed.com> wrote:

I'm guessing we won't talk tonight. I'm free anytime tomorrow. Please

call my cell: [818 371 0906](tel:8183710906) is the direct line.

Best,
Katie

On Tue, Aug 23, 2016 at 8:01 PM, <katie.baker@buzzfeed.com>
wrote:

Didn't hear from you - did I miss your call? I can't talk anymore for a few hours but would later tonight or early tomorrow. Would really like to talk ASAP....

Sent from my iPhone

On Aug 23, 2016, at 2:11 PM, Sean Webby
<SWebby@da.sccgov.org> wrote:

afternoonish.

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: [408-792-2997](tel:4087922997)

Cell: [408-209-8064](tel:4082098064)

>>> Katie Baker <katie.baker@buzzfeed.com>

8/23/2016 8:54 AM >>>

Hi, just checking in. Do you know what time you'll be available to speak today? Just want to make sure I'm available. Thanks!

Best,
Katie

On Mon, Aug 22, 2016 at 2:36 PM, Katie Baker
<katie.baker@buzzfeed.com> wrote:

haha okay, talk soon I hope!

On Mon, Aug 22, 2016 at 2:30 PM, Sean Webby
<SWebby@da.sccgov.org> wrote:

You'd be surprised. ;)

Best,

Sean Webby

Public Communications Officer

Santa Clara County
District Attorney's Office

Work: [408-792-2997](tel:408-792-2997)

Cell: [408-209-8064](tel:408-209-8064)

>>> Katie Baker <katie.baker@buzzfeed.com>

8/22/2016 11:27 AM >>>

Sounds good! I just don't know if you can be briefed without knowing what my story is about! I haven't told anyone yet! Just call when you can.

On Mon, Aug 22, 2016 at 2:26 PM, Sean Webby
<SWebby@da.sccgov.org> wrote:

You bet, Katie. Give me a bit so I can get fully briefed. Bueno?

S.

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: [408-792-2997](tel:408-792-2997)

Cell: [408-209-8064](tel:408-209-8064)

>>> Katie Baker <katie.baker@buzzfeed.com>

8/22/2016 11:05 AM >>>

Tomorrow is fine. I would like to talk though before I get a statement...since I haven't actually asked any questions yet? Can we chat on the phone? This story likely won't run for a few days - I just wanted to give you a heads up on what it's about while I do my research and reporting, so if we could speak as soon as possible that would be great.

Best,

Katie

On Mon, Aug 22, 2016 at 1:10 PM, Sean Webby
<SWebby@da.sccgov.org> wrote:

Hey Katie. I'm back from vacation today. So please work through me. You have my contacts, right?

Were reviewing some info and should be back to you soon. Hard deadline is today or - if it takes that long - is tomorrow okay?

Thanks.

S.

Best,

Sean Webby

Public Communications Officer

Santa Clara County

District Attorney's Office

Work: [408-792-2997](tel:408-792-2997)

Cell: [408-209-8064](tel:408-209-8064)

>>> Katie Baker

<katie.baker@buzzfeed.com> 8/22/2016

10:03 AM >>>

Forgot to add that I have a doctor's appt from
4-5 EST so please call before or after then -
thank you

On Mon, Aug 22, 2016 at 11:56 AM, Katie
Baker <katie.baker@buzzfeed.com> wrote:

Thank you so much! Looking forward to
speaking.

On Mon, Aug 22, 2016 at 11:55 AM, Terry
Harman <THarman@da.sccgov.org>
wrote:

Hi Katie,
You will get a call today!

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Katie Baker <katie.baker@buzzfeed.com>

8/22/2016 7:25 AM >>>

Hello Ms. Harman,

Reaching out again today to see if we can find a time
to talk -- just in case you missed my email yesterday
since it was the weekend!

Let me know, or give me a call anytime. My numbers
are below.

Best,
Katie

On Sun, Aug 21, 2016 at 12:11 PM, Katie Baker
<katie.baker@buzzfeed.com> wrote:

Hello Ms. Harman,

I'm reaching out in advance of a story I'm working on about Judge Persky - I'm pretty sure Michele Dauber has told you I'm reporting it. I'm in the early stages of my reporting, but I wanted to speak on the phone and get your perspective on the matter. And of course I'd love to quote you in my eventual piece as well if you are willing.

Do you have time to speak tomorrow or Tuesday? Please let me know, or give me a call anytime at the numbers below. Thank you!

Best,
Katie

--

Katie J.M. Baker | Reporter

BuzzFeed News

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From: [Harman, Terry](#)
To: [Welch, Brian](#); [Webby, Sean](#)
Subject: Fwd: Reporter Inquiry
Date: Sunday, August 21, 2016 4:56:00 PM

FYI

Sent from my iPhone

Begin forwarded message:

From: "Katie Baker" <katie.baker@buzzfeed.com>
Date: August 21, 2016 at 9:12:31 AM PDT
To: "Terry Harman" <THarman@da.sccgov.org>
Subject: Reporter Inquiry

Hello Ms. Harman,

I'm reaching out in advance of a story I'm working on about Judge Persky - I'm pretty sure Michele Dauber has told you I'm reporting it. I'm in the early stages of my reporting, but I wanted to speak on the phone and get your perspective on the matter. And of course I'd love to quote you in my eventual piece as well if you are willing.

Do you have time to speak tomorrow or Tuesday? Please let me know, or give me a call anytime at the numbers below. Thank you!

Best,
Katie

--

Katie J.M. Baker | Reporter

BuzzFeed News

o: [\(646\) 795 6487](tel:(646)7956487) | c: [\(347\) 620-5820](tel:(347)620-5820)

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From: emailthis@ms3.lga2.nytimes.com on behalf of [jdemertzis](#)
To: [Boyarsky, Jay](#)
Subject: NYTimes.com: Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear
Date: Thursday, July 13, 2017 9:04:22 AM

Dauber quoted.

Sent by jdemertzis@dao.sccgov.org:



Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear

BY ERICA L. GREEN AND SHERYL GAY STOLBERG

Betsy DeVos's Education Department is re-evaluating the get-tough policies on campus sexual assault that were enforced by the Obama administration.

Or, copy and paste this URL into your browser: <https://nyti.ms/2u9L8pZ>

To ensure delivery to your inbox, please add nytdirect@nytimes.com to your address book.

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From: [Webby, Sean](#)
To: [Kianerci, Alaleh](#)
Subject: RE: Emily Doe/Interview Request for Huffington Post's Highline
Date: Friday, December 30, 2016 7:59:22 AM

Ill handle.

Sean Webby
Public Communications Officer
Santa Clara County District Attorney's Office
W: 408-792-2997

From: Kianerci, Alaleh
Sent: Thursday, December 29, 2016 9:42 PM
To: Webby, Sean <swabby@dao.sccgov.org>; Harman, Terry <tharman@dao.sccgov.org>
Subject: Fwd: Emily Doe/Interview Request for Huffington Post's Highline

I'm forwarding this to you guys.

Sent from my iPhone

Begin forwarded message:

From: "Julia Ioffe" <julia.ioffe@gmail.com>
Date: December 27, 2016 at 8:18:45 PM GMT
To: <MWM_152046861_09132016@sccconnect.mail.onmicrosoft.com>
Subject: Emily Doe/Interview Request for Huffington Post's Highline

Hi Alaleh,

Michele Dauber gave me your contacts as I'm working on a profile of her and the recall effort, and she suggested I talk to you. I'm also wondering if I can pass questions to Emily through you. If you had time to talk this week, I'd really appreciate it.

Thank you so much,
Julia

From: [Ramos, Luis](#)
To: [Webby, Sean](#); [Harman, Terry](#)
Subject: Re: Fwd: RE - PRESS: Judge Persky sentencing for Latino man
Date: Wednesday, June 29, 2016 2:22:00 PM

I'm aware of one case that matches this description, People v. Ramirez, Docket No. B1485841, but it has not yet been sentenced. If it is the case I am thinking of, it is also a case Prof. Dauber recently inquired about. The sentencing was moved to August 18th.

Luis M. Ramos
Supervising Deputy District Attorney, Sexual Assault
Santa Clara County
408.792.2793
lramos@da.sccgov.org

>>> Sean Webby 6/29/2016 1:58 PM >>>
Is this true? Has there been a sentence?

Best,
Sean Webby
Public Communications Officer
Santa Clara County
District Attorney's Office
Work: 408-792-2997
Cell: 408-209-8064

From: [Welch, Brian](#)
To: [Harman, Terry](#)
Subject: Re: Fwd: Reporter Inquiry
Date: Monday, August 22, 2016 8:12:00 AM

Great. Let me know how it goes!

>>> Terry Harman <tharman@da.sccgov.org> 8/21/2016 4:55 PM >>>
FYI

Sent from my iPhone

Begin forwarded message:

From: "Katie Baker" <katie.baker@buzzfeed.com>
Date: August 21, 2016 at 9:12:31 AM PDT
To: "Terry Harman" <THarman@da.sccgov.org>
Subject: Reporter Inquiry

Hello Ms. Harman,

I'm reaching out in advance of a story I'm working on about Judge Persky - I'm pretty sure Michele Dauber has told you I'm reporting it. I'm in the early stages of my reporting, but I wanted to speak on the phone and get your perspective on the matter. And of course I'd love to quote you in my eventual piece as well if you are willing.

Do you have time to speak tomorrow or Tuesday? Please let me know, or give me a call anytime at the numbers below. Thank you!

Best,
Katie

--

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BuzzFeed News
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[@katiejmbaker](mailto:katiejmbaker) | <http://www.buzzfeed.com/katiejmbaker>
111 E. 18th St., 11th Floor, New York, NY 10003

From: [Boyarsky, Jay](#)
To: [Demertzis, Jim](#)
Subject: Re: NYTimes.com: Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear
Date: Thursday, July 13, 2017 9:47:08 AM

Thanks for sending.
I've forwarded it Rosen, Harman and Webby.

On Jul 13, 2017, at 9:04 AM, jdemertzis <emailthis@ms3.lga2.nytimes.com> wrote:

Dauber quoted.

Sent by jdemertzis@dao.sccgov.org



Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear

BY ERICA L. GREEN AND SHERYL GAY STOLBERG

Betsy DeVos's Education Department is re-evaluating the get-tough policies on campus sexual assault that were enforced by the Obama administration.

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From: [Sumida, Cynthia](#)
To: [Kianerci, Alaleh](#); ekadvany@embarcaderopublishing.com
Cc: [Webby, Sean](#)
Subject: Re: Reporter inquiry -- Brock Turner trial date
Date: Thursday, June 02, 2016 9:10:00 AM
Attachments: [Turner Sentencing Memo-Letters.pdf](#)

Good Morning Ms. Kadvany:

I have been requested to send you the following attached documents:

- Sentencing Memorandum for Docket B1577162;
- Letter from the Victim; and
- Letter from the Stanford Association of Students for Sexual Assault Prevention (ASAP).

Regards,

Cynthia Sumida
Public Information Officer
Phone | 408-792-2469
Santa Clara County Office of the District Attorney
70 West Hedding - West Wing
San Jose, CA 95110

>>> Elena Kadvany <ekadvany@embarcaderopublishing.com> 6/1/2016 3:34 PM >>>
Hi Alaleh,

I saw that the [Santa Cruz Sentinel](#) got copies of the prosecution and defense's pre-sentencing memos, as well as a letter from the victim to Judge Persky. I was wondering if you would be willing to send me your memo. Let me know if that's possible.

Thanks very much.

See you tomorrow,
Elena

On Tue, May 17, 2016 at 10:01 AM, Elena Kadvany <ekadvany@embarcaderopublishing.com> wrote:
Great, thanks.

On Tue, May 17, 2016 at 8:55 AM, Alaleh Kianerci <AKianerci@da.sccgov.org> wrote:

it's on at 9am however, it's quite a large sentencing calendar so it may not go till later in the morning.

Alaleh Kianerci
Deputy District Attorney
[650.324.6418](tel:650.324.6418)

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sender by return email.

>>> Elena Kadvany <ekadvany@embarcaderopublishing.com> 5/17/2016 8:26 AM >>>
Hi Alaleh - What time is the sentencing set for on June 2? 9 a.m.?

Thanks!

On Thu, Apr 14, 2016 at 4:44 PM, Alaleh Kianerci <AKianerci@da.sccgov.org> wrote:

Oh wow that's right just reread it you were just copied on it. Sorry for the confusion. Sentencing is still June 2nd.

Alaleh Kianerci
Deputy District Attorney
[650.324.6418](tel:650.324.6418)

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>>> Elena Kadvany <ekadvany@embarcaderopublishing.com> 4/14/2016 4:29 PM >>>

Hi Alaleh - I received that same letter but unfortunately was not the person who wrote it. I'm not sure who did; it was mailed to me anonymously. It sounded like a parent, but that's just me speculating!

Is the sentencing still scheduled for June 2?

Best,
Elena

On Thursday, April 14, 2016, Alaleh Kianerci <AKianerci@da.sccgov.org> wrote:

Hey Elena,
I received your letter. Thank you! Can you give some insight as to who we could interview from Brock's dorm to possibly introduce some of the information you mentioned at the sentencing hearing.
Thanks
Alaleh

Alaleh Kianerci
Deputy District Attorney
[650.324.6418](tel:650.324.6418)

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>>> Elena Kadvany <ekadvany@embarcaderopublishing.com> 3/10/2016 2:24 PM >>>
Hi Alaleh,

Hope all is well. I just wanted to confirm that the Brock Turner trial is still on schedule to begin this coming Monday, March 14, at 8:30 a.m.

Thanks for your assistance.

Best,

On Thu, Oct 22, 2015 at 1:53 PM, Elena Kadvany <ekadvany@embarcaderopublishing.com> wrote:
Thanks very much.

On Thu, Oct 22, 2015 at 1:43 PM, Alaleh Kianerci <AKianerci@da.sccgov.org> wrote:

The trial was set for March 14th.

Alaleh Kianerci
Deputy District Attorney
Sexual Assault Unit
Santa Clara County
70 West Hedding St.
West Wing
San Jose, California 95110
[\(408\) 792.2955](tel:4087922955) (Office)

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>>> Elena Kadvany <ekadvany@embarcaderopublishing.com> 10/22/2015 10:32 AM >>>
Hi Alaleh,

My name is Elena Kadvany; I'm a Palo Alto reporter who covers sexual assault at Stanford and have emailed you before concerning the Brock Turner case. I couldn't make the trial-setting conference earlier this week and was wondering if a trial date has been set (and if so, when)?

I would appreciate any info! Thanks.

Best,

--

Elena Kadvany | Education/youth staff writer | Palo Alto Weekly
450 Cambridge Ave., Palo Alto, CA 94306
[\(650\) 223-6519](tel:6502236519) - office
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Sent from Gmail Mobile

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From: [Ramos, Luis](#)
To: [Kianerci, Alaleh](#)
Subject: RE: Thank You
Date: Wednesday, July 05, 2017 9:58:00 AM

Wow. This is amazing. I think it's super cool to know how far and wide the work you did has affected so many women. This is such a positive message. You deserve all the praise.

Luis M. Ramos
Supervising Deputy District Attorney, Sexual Assault
Santa Clara County
408.792.2793
lramos@dao.sccgov.org

-----Original Message-----

From: Kianerci, Alaleh
Sent: Wednesday, July 05, 2017 9:51 AM
To: Ramos, Luis <lramos@dao.sccgov.org>
Subject: FW: Thank You

It's crazy that people still reach out to me. I think it's Dauber stirring stuff up again, but wow pretty incredible.

-----Original Message-----

From: Katy Lyle [REDACTED]
Sent: Tuesday, July 04, 2017 6:06 PM
To: Kianerci, Alaleh <akianerci@dao.sccgov.org>
Subject: Thank You

Hi Ms. Kianerci,

I've known about your case against Brock Turner for over a year now, ever since I read the survivor's impact statement on BuzzFeed one morning, and I don't know why I'm just now saying thank you.

Thank you so much for ensuring this man was held accountable for what he did. Thank you for being there for the woman who needed you. And thank you for showing men and women everywhere that you would fight for them, that you weren't afraid to stand up against Turner's ridiculous defense and the backward patriarchal system that allowed him to think he could get away with it.

To me, your name is hope. I can't know the name of the woman you helped, but I get to know the name that defended her and got her justice. You fought hard for her, and you got more than I and many other survivors ever did. Even though that sorry excuse for a judge ruined what would have otherwise been an outcome I would have wished for after it happened to me, you did what was right and you made your point, that justice applies to everyone and that women were no longer going to be silently victimized.

I'm sure Turner's survivor has heard enough of this, but her statement brought tears of relief to my eyes. Not because of the horrible things she described happening to her, those brought back a lot of pain I was all too familiar with, but because she spoke with such strength and candor, and that she refused to be ashamed of what was done to her, as our society often encourages people victimized by sexual violence to be. When reading her words, I cried because of her resolve, of her endurance, of how she refused to let Turner downplay what he did as "side effects of college partying". I cried because she held him accountable with her voice, and it was so good to hear that voice. I didn't hear her make the statement, but I can imagine the sound of her voice. It's the sound I had hoped to make when using my own voice to let my assailants know that they hadn't broken me or silenced me.

I've wanted to have that voice, to have people listen to it, for six years now. While I will never be able to use it, it means so much that she was able to. I hope she's doing okay now. I hope she knows that time helps. Six years hasn't

made it all go away, but she was already stronger one year in than I am now. I hope she knows she'll be okay. It sounds stupid, but when you're on the right side of things and you fought as hard as she did, it can't not be okay.

I don't know if you'll ever actually read this email. Maybe I don't even expect you to; I just needed to write it. Maybe I just needed to pretend that someone would hear my voice and understand what it was trying to say. Maybe I just wanted to join all the voices thanking you for all you've done.

You deserve all the thanks in the world. You are a phenomenal fighter, as is the woman who entrusted you with her story. We all owe you two a huge debt of gratitude. I'm glad she trusted you.

Sent from my iPhone

From: [Eve Sutton](#)
To: [DistAttySantaClara](#); [Sumida, Cynthia](#); [Jennifer Song--CAattygenlofc](#); [KamalaHarris CAAttyGenl](#)
Cc: [KathleenRussell CenterForJudicialExcellence](#); [Tamir Sukkary--CJE](#); [Joe Sweeney--cje](#); [Michele Dauber--LawProf](#);
[REDACTED]
Subject: Stanford Rape victim, CJE, fighting inaction from Commission on Judicial Performance
Date: Thursday, June 30, 2016 4:29:00 PM
Attachments: [JudgeRemovedFor-2pg.pdf](#)

This email is going to staff at Santa Clara County District Attorney office, with Cc: to Professor Dauber and to my beloved advocates for judicial reform, whom I meet every month or two as I speak to CA Judicial Council in hopes of stopping the insanity of judges facilitating illegal foreclosures and evictions. We are fortunate that Jeff Rosen is consciencious and I subscribe to his newsletter to support his efforts, even from my perch in another county (San Mateo) as I live in East Palo Alto.

I became concerned about judicial reform when I realized that our statewide foreclosure crisis had everything to do with the JUDGES, who refuse to stop illegal foreclosures and evictions based on fraudulent, robo-signed documents. There would be no robo-signing, no fraudulent documents, and far fewer fraudulent foreclosures if banks were concerned that JUDGES would stop that nonsense the minute those fake documents were revealed in a court room. In reality, judges have created and continue to facilitate a market for stolen homes, including mine, which was illegally sold last year: July 2, 2015. Since October, 2015, I have been speaking to judges directly, at CA Judicial Council, about the need for judges to enforce the law!

At our last meeting of CA Judicial Council (Fri June 24 in SF) we expected to see someone talk about the Persky case during Public Comments but nobody did (except Kathleen Russell, who extended herself to mention Judge Persky even though she usually speaks exclusively about the cases of Family Court injustice that are the main focus of her agency). Court reform advocates have learned the hard way that the Commission on Judicial Performance is worse than nothing; it is a separate black hole of corruption hiding behind a farce of a public agency. They are insulated and uncommunicative, and their only office is in the same building as the California Judicial Council, on the 14th floor, down the hall from an office of the Attorney General, and a vacant office reserved for Gov Brown: 455 Golden Gate, San Francisco.

As I explained to Cynthia when I called Jeff Rosen's office today, I support the actions of Jeff Rosen, District Attorney of Santa Clara County, in reprinting the long letter from the victim of the rape at Stanford. However, those who have spent months, years, decades trying to remove bad judges know that judges have NEVER been removed by CA Commission on Judicial Performance for doing a bad job of enforcing rights. Out of 1825-2000 judges, about one half of one percent have been removed since 2001, around 11-12 total, all for bad employee behavior -- affairs with clerks, or taking 5 days off to attend a half-day seminar-- really small stuff compared to excusing murderers, rapists, and criminal bankers. I researched all those dismissals and attach my summary here: [JudgeRemovedFor-2pg.pdf](#)

On March 28, 2016, dozens of judicial reform advocates outnumbered a few self-interested speakers in Sacramento to give clear, compelling evidence of the need for deep, systematic change in how complaints about judges are handled. We cannot allow the Commission on Judicial Performance to add layer on layer of secrecy about their dealings, and we cannot allow them to waste millions of dollars while discarding

98.6% of all complaints filed by victims.

Mr. Rosen, a District Attorney has a 50% chance of getting some action in response to a complaint, even if only a private reprimand of the judge, while a "normal" civilian has essentially ZERO chance. This is one area where your direct action CAN make a difference.

Here is the whole meeting from March 28, worth watching not only for the detailed airing of complaints about the first item (increase in budget for salaries of Commission on Judicial Performance) but for also the additional Judicial budget items which follow. Note that the first speaker is Victoria Henley from the CA Commission on Judicial Performance, the very agency we must reform:
<http://calchannel.granicus.com/MediaPlayer.php?view_id=7&clip_id=3503>

Here is the 2 minute clip of Asm Nora Campos announcing her surprise decision NOT to hold the vote as scheduled, the first time anyone has stopped the Commission to question its procedures:

<<https://www.youtube.com/watch?v=0pdLjVeABik&feature=youtu.be>>

--Eve Sutton [REDACTED]
(650) 325-3234 leave msg after 6 rings
10am-9pm Pacific time www.mortmelt.com

on 6/30/16 1:40 PM, Cynthia Sumida at CSumida@da.sccgov.org wrote:

Good Afternoon,

Attached is the latest edition of the District Attorney's newsletter, The West Wing. In this special edition, the Office focuses on a single anonymous letter written by a courageous sexual assault victim to a local judge.

Cynthia Sumida
Public Information Officer
Phone | 408-792-2469
Santa Clara County Office of the District Attorney
70 West Hedding - West Wing
San Jose, CA 95110

Pages 1-2: JUDGES REMOVED FROM ALL CA SUPERIOR COURTS 2001-Present

Paraphrased from links on: <http://cjp.ca.gov/decisions_by_type_of_discipline.htm>

See this link for all discipline back to 1973 including non-removal discipline (public admonishment, censure, etc.)

Year denied further review	County	First Name	Last Name	Reason for Removal --Paraphrased. For exact text, check the full report.	Inquiry Number
2015	Tulare	Valeriano	Saucedo	Inappropriate flirting and advances to clerk, including hundreds of personal text messages, \$26,000 in gifts, sending (to clerk's husband) a crude unsigned handwritten letter accusing clerk of having an affair with bailiff.	194
2012	Orange	Richard W	Stanford	Willful misconduct, pattern of handling traffic tickets for family and friends. Although assigned to criminal felony dept, he transferred these traffic tickets to his dept and told clerk to waive the fines. (Opinion by McConnell, Chairperson, pg 5)	190
2008	Orange	Kelly A	MacEachern	She got 5 days leave to attend a seminar; was enrolled for only half a day. (Opinion by Judith D. McConnell, Vice-chairperson)	184
2008	Riverside	Robert G	Spitzer	Inexcusable delays and inaction, false salary affidavits, embroilment, and ex parte [one-sided, to either plaintiff or defendent] communications. (Opinion by Fredeerick P. Horn, Chairperson)	182
2007	Monterey	Jose A	Velasquez	Egregious pattern of infringing on constitutional rights of numerous defendents; transgressing the limits of his authority, often in a caprecious and malicious manner. Incarcerated defendents without respect to constitutional rights, increased sentences when defendents asked respectful questions, interfered with right to trial by jury, coerced defendants, etc. (Opinion by Fredeerick P. Horn, Chairperson)	180
2006	Santa Barbara	Diana R	Hall	Inappropriate political activity: signing four campaign disclosure statements under penalty of purjury listing herself as the source of a \$20,000 contribution from her romantic partner, knowing that information to be false. Repeatedly driving while under influence of alcohol. Improperly questioning questioning a prosecutor who was exercising his right to disqualify her in a judicial proceeding. (Opinion by Marshall B Grossman, Chairperson)	175

2005	Los Angeles	Kevin A	Ross	Willful misconduct, prejudicial misconduct, improper action in 4 unrelated criminal cases: He added new criminal charges against a defendant and incarcerated the defendant without any pretense of due process; phoned a defendant about a drug case; questioned an unrepresented defendant despite defendant's request for an attorney; accused a defendant of being a pathological liar and continued the hearing without the defendant's lawyer, denying the right to present evidence. Discussed details of a pending case on TV. Acted as a private arbitrator for pilot of reality show. (Opinion by Marshall B Grossman, Chairperson)	174
2003	Alameda	D. Ronald	Hyde	Used his judicial position to obtain confidential information from DMV records; told a sexual story to new court officer and clerk; intervened in his daughter's small claims case; improper communications with one side of a case; improperly acted as a domestic violence victim's advocate; ex parte communication with successor judge (after being disqualified from a case); all after several prior disciplinary events. (Opinion by Rise Jones Pichon, Chairperson.)	257
2003-2004	Contra Costa	Bruce	Van Voorhis	Willful misconduct (4 acts) and prejudicial misconduct (7 acts) related to the judge's comments to prosecutors, a public defender, jurors, and staff members [including loss of judicial temperament, abuse of authority, and embroilment, after prior admonishments]	165
2003	San Joaquin	Michael E	Platt	Willful misconduct: dismissed 3 traffic tickets and attempted to dismiss a fourth; none of the tickets would have come before him in the ordinary course of judicial business. Two attempts to influence other judicial officers on behalf of a friend or acquaintance. (opinion by Rise Jones Pichon, Chairperson)	162
2002	Los Angeles	Patrick	Couwenberg	lied on resume about his education and military experience	155

Other Cases Relating to the Commission

[*McComb v. Superior Court of San Francisco, et al*](#) (1977)

[*Mosk v. Superior Court of Los Angeles County*](#) (1979)

[*Adams v. Commission on Judicial Performance*](#) (1994)

[*The Recorder v. Commission on Judicial Performance*](#)(1999)

[*Commission on Judicial Performance v. Superior Court of Los Angeles County*](#) (2007)

From: [Angel, David](#)
To: [Boyarsky, Jay](#); [Rosen, Jeff](#); [Webby, Sean](#)
Subject: You probably saw this already
Date: Friday, September 02, 2016 6:52:00 AM
Attachments: [20160800 - Put Away the Pitchforks Against Judge Persky -Politico - Bazelon.pdf](#)
[TEXT.txt](#)

<http://www.ndaajustice.org/aoi/20160800%20-%20Put%20Away%20the%20Pitchforks%20Against%20Judge%20Persky%20-%20Politico%20-%20Bazelon.pdf>

POLITICO



AP Photo

IN THE ARENA

Put Away the Pitchforks Against Judge Persky

Yes, he gave Stanford rapist Brock Turner a break. But to recall him would be to overturn our legal system.

By LARA BAZELON | August 08, 2016

On this we can all agree: Brock Allen Turner, a blonde-haired, blue-eyed, one-time All-American Stanford freshman swimmer, is stone cold, beyond-a-reasonable-doubt guilty of committing a violent sexual assault against an unconscious woman behind a dumpster. Because what Turner did was brutal, criminal and depraved, and because of his utter lack of remorse—much less insight into his behavior—he should have gone to prison.

But the reaction to the lenient sentence given to Turner by Santa Clara County Superior Court Judge Aaron Persky is, frankly, frightening, dangerous and profoundly misguided.

In a charge spearheaded by Stanford law professor Michele Dauber—a close friend of the victim’s family—an effort is underway to recall Persky from office. Sixteen state legislators have demanded that the California Commission on Judicial Performance investigate Persky for misconduct. Over a million members of the feminist organization UltraViolet signed an online petition voicing their agreement. The group also hired a plane to fly over Stanford during graduation carrying a banner that said, “Protect Survivors. Not Rapists. #PerksyMustGo,” and paid for a billboard on a nearby, high-traffic freeway that sends the same message.

Earlier this summer, prosecutors filed a motion to disqualify Judge Persky from presiding over another sexual assault case involving an unconscious victim—a sedated patient allegedly fondled by a nurse. More recently, Persky came under fire once again for imposing a three-year sentence on a Latino man who committed an assault, that, on the surface at least, seemed similar to Turner’s. But unlike the Turner case, the sentence was imposed after the defense and the prosecution agreed to it. Nevertheless, the mob pounced. It was yet another sign, they said, of Persky’s bias toward white, affluent men—presumably the only kind of person he was able to relate to. Dauber told NPR, “Hopefully, a qualified woman will replace him.”

As a law professor well-versed in the vital importance of an independent judiciary, Dauber should know better. Removing a judge—never mind investigating him for misconduct—because of a single bad decision undermines the rule of law. It sends a chill down the spines of elected judges everywhere, which is nearly every judge in the state court across the United States.

Let’s look at the facts. The statutory maximum for Turner’s felony convictions, sexual penetration and assault with the intent to commit rape, is 14 years imprisonment. The statutory minimum—absent “unusual” circumstances—is two years imprisonment. The prosecutor asked for six years. Persky, who presided over the trial and sentencing, gave Turner six months in jail, to be followed by three years of probation. (Judge Persky was also required by statute—no exceptions this time—to order Turner to register with the state of California as a sexual offender for the rest of his life).

Turner was unrepentant throughout, shamelessly claiming he was a naif who got caught up in a drug and alcohol culture in college when his own text messages from high school made it plain he had used MDMA and LSD. He had also been arrested for underage drinking and appeared to have a disturbing history of making aggressive and unwanted sexual advances on women. The physical and psychological damage he inflicted on the

victim is plain from her searing statement, which she read aloud before Judge Persky announced his ruling, and which has since gone viral.

And so, on this we can all also agree: Brock Allen Turner is thoroughly undeserving of the enormous break Judge Persky gave him.

Nor is the virulent backlash against Judge Persky surprising. Steeped in a Judeo-Christian culture, we have always been a vengeance-driven people. I get the righteous indignation, and the sense that if Turner won't have to pay, the man who spared him should, and then some.

But to join the mob in demanding Persky's head on a stick is just wrong. There is no evidence—zero—that in his 13 years on the bench, Judge Persky has committed misconduct. Ironically, given that he is a former career prosecutor, Judge Persky's tiny band of vocal supporters are almost entirely public defenders, whose clients are all poor, and overwhelmingly, people of color. Sajid Khan, a San Jose deputy public defender wrote, “many colleagues in my office that appear before Judge Persky believe that a public defender client who wasn't white or affluent” would have been treated the same way.

There is a remedy for an unlawful decision: file an appeal. Santa Clara District Attorney Jeff Rosen, while fiercely disagreeing with the sentence, decided against challenging it in a higher court. As his office explained, Judge Persky's “decision was authorized by law and was made by applying the correct standards.” This careful decision simply underscores that Judge Persky did nothing other than exercise his discretion—wrongheadedly—but not illegally.

Sentencing a criminal defendant is one of the most fraught and consequential decisions a judge must make. To make that decision, a judge must assess the defendant as an individual, with his life prospects—and in some cases, literally, his life—hanging in the balance. We want those judges focused like a laser on the facts and the law, not looking over their shoulders at an image of Judge Persky burning in effigy and factoring in considerations designed to save their jobs. The politics of judicial self-preservation has no place in the courtroom.

We have seen this movie before and we know how it ends—badly. Normally, but not always, these crusades are led by conservative Republicans. In 1986, they successfully remade the California Supreme Court in their own image by instigating the recall of three justices because they voted over 60 times to reverse in capital cases. This included Rose Bird, the first female justice and the chief justice. In April, the Republican-controlled Legislature in Kansas passed a bill that would authorize the impeachment

of 4 of its 7 Supreme Court judges, outraged that they had struck down anti-abortion regulations and death penalty sentences on constitutional grounds.

There is a remedy for a law you don't like: replacing it with a different one. That too, is underway; with the full-throated support of Rosen, the California state assembly recently introduced a bill to prohibit probationary sentences for crimes like those committed by Turner.

Appeals and legal fixes take time though, and do nothing to satisfy a mob's bloodlust. It's far more satisfying to throw the bums out, no matter how foolhardy; the longterm consequences be damned. Last year, John Oliver, host of the popular HBO comedy show *Last Week Tonight*, did a takedown of the crass, stupid, lowest-common denominator manner in which judicial elections are conducted across the United States. After showing a series of hokey ads, Oliver turned to an example he called "downright horrifying." In 2010, Illinois Supreme Court Justice Thomas L. Kilbride, who was standing for a retention election, was subjected to a barrage of negative advertisements funded in part by the billionaire conservative Koch brothers and the U.S. Chamber of Commerce. In one ad, three actors playing criminals convicted of brutal stabbings, murders and sexual assaults crowed that Kilbride "sided with us over law enforcement or the victims."

But as Oliver pointed out, not one of these criminals was released by Kilbride, who "merely questioned the legality of procedural points in their trials, which is a judge's job." (After raising nearly \$3 million of his own money in what was called the most expensive judicial election in 25 years, Kilbride retained his seat.) "The danger," Oliver noted, "is if ads like those get inside judges' heads and make them rule more harshly to protect themselves in the future, and the problem is, that does happen."

Is this really the way Dauber and her allies would like our criminal justice system to operate? Because that is what they are advocating for, only this time, they say, it is righteous because the cause is justice for sexual assault survivors. I have no doubt that David and Charles Koch believe their cause is righteous, too.

It is shortsighted and unwise for smart, progressive women to get down in the same mudpit.

Here is my preferred remedy, which I readily concede is improbable given our history and the current political climate. Stop treating judges like politicians who should bend to the public will. Abolish judicial elections and create a bipartisan commission for each state composed of attorneys that represent diverse constituencies and are themselves diverse. Have them select among qualified candidates judges for lifetime appointment,

who, like federal judges, can be removed only by impeachment for committing crimes or gross ethical breaches, not for issuing unpopular decisions.

We need to let judges get on with the business of judging. Michele Dauber, the Koch brothers, name-your-special-interest group will not always agree with them; at times, there may be cause for genuine outrage. But judges need to do their jobs without fear of mob retaliation. Bloodlust is toxic to justice, no matter who wields the pitchfork.

RE: Speaking opportunity at Stanford

From Luis Ramos
To Cindy Hendrickson, Lauren Schoenthaler, Michele DauberTerry Harman
Date 2015/09/02 08:12
Subject: RE: Speaking opportunity at Stanford
Attachments: TEXT.htm

Lauren and Michelle. It was my pleasure to share with you and your students the work that we do at the DA's office. If you need something similar in the future, please call on me. And Lauren, it was great seeing you after so many years and to know you are doing so well. Take care, L.

Luis M. Ramos
Supervising Deputy District Attorney, Sexual Assault
Santa Clara County
408.792.2793
lramos@da.sccgov.org

>>> Lauren Schoenthaler <lks@stanford.edu> 9/1/2015 5:51 PM >>>

Luis,

It was so nice to see you after so many years. I agree with Michele's words. Our county is lucky to have you in this role. I hope our paths cross again before another decade passes!

Kind regards,

Lauren

From: Michele Dauber [mailto:████████████████████]
Sent: Tuesday, September 01, 2015 5:28 PM
To: Lauren Schoenthaler; Luis Ramos
Subject: Re: Speaking opportunity at Stanford

Dear Luis:

Thank you so much for taking your time to visit with the class today. You made a very big impression on the students. You clearly are a model of professionalism and dedication to

protecting victims' rights and interests. It was an incredible experience for them to get to meet you and I can't thank you enough for participating.

I know that the students share my admiration and appreciation.

Warm regards,

Michele Dauber

On Mon, Aug 31, 2015 at 2:22 PM, Michele Dauber [REDACTED] > wrote:

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Thanks,

Michele Dauber

Michele Landis Dauber

Frederick I. Richman Professor of Law

Stanford Law School

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From: Luis Ramos [mailto:LRamos@da.sccgov.org]

Sent: Monday, August 31, 2015 10:28 AM

To: Cara Johnson; Lauren Schoenthaler

Cc: Cindy Hendrickson; Terry Harman
Subject: Fwd: Speaking opportunity at Stanford

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Luis M. Ramos
Supervising Deputy District Attorney, Sexual Assault
Santa Clara County
[408.792.2793](tel:408.792.2793)
lramos@da.sccgov.org<mailto:lramos@da.sccgov.org>

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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California Judicial Branch News Service cjbns.org

Fwd: FW: Parking Instructions for Professor Dauber class at Stanford University

From Luis Ramos
To [REDACTED]
Date 2015/09/01 08:59
Subject: Fwd: FW: Parking Instructions for Professor Dauber class at Stanford University
Attachments: TEXT.htm

Luis M. Ramos
Supervising Deputy District Attorney, Sexual Assault
Santa Clara County
408.792.2793
lramos@da.sccgov.org

>>> Lauren Schoenthaler <lks@stanford.edu> 8/31/2015 10:40 AM >>>

Dear Luis, Professor Dauber and Tess,

This is to put each of you in touch with each other. Luis Ramos, the head of the sex crimes unit at the DA's office in Santa Clara is going to participate on tomorrow's panel from 10 – 12. I attach below the parking information.

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Thanks,

Lauren

From: Tessa Eva Ormenyi [mailto:tormenyi@stanford.edu]
Sent: Sunday, August 30, 2015 5:46 PM
To: Lauren Schoenthaler

Subject: Fw: Parking Instructions for Professor Dauber class at Stanford University

Hi Lauren,

Please see below for the information we've sent to guest speakers in the class Re: parking at Stanford. If necessary, forward to the prosecutor that you have invited to join us during class.

Thank you,
Tessa

From: Tessa Eva Ormenyi
Sent: Sunday, August 30, 2015 5:44 PM
To: Tessa Eva Ormenyi
Subject: Parking Instructions for Professor Dauber class at Stanford University

Hello,

We are looking forward to your visit to Professor Dauber's class, 1 in 5: The Law, Politics, and Policy of Campus Sexual Assault, this week at Stanford University. Our class is held in Neukom Building, Room 104. Below are details on parking and room location. Please let me know if you have any questions or concerns. My number is [REDACTED] if you wish to reach me on the day-of.

TAs from the class will meet you at the corner of Campus Dr. and O'Connor Ln with a parking pass at 9:45am and direct you to the parking lot. Our class is held in Neukom 104. The Neukom building is on your right after the stop sign when you continue to walk down O'Connor Lane. Turn right at the stop sign and we will meet you there to walk to the classroom (located to the right of Barnum Tower).

Directions to Neukom Building, 559 Nathan Abbott Way, Stanford CA 94305, from 280.

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At the second light turn left onto Campus Dr.

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Take University Ave west, past El Camino and continue onto Palm Dr.

At the stop sign turn left onto Campus Dr.

Continue clockwise on Campus Dr and turn right onto O'Connor Lane. If you have reached Mayfield Ave, you have gone too far.

Best Regards,

Tessa Ormenyi

RE: Speaking opportunity at Stanford

From Luis Ramos
To Cara JohnsonCindy Hendrickson, Lauren SchoenthalerTerry Harman
Date 2015/08/31 10:47
Subject: RE: Speaking opportunity at Stanford
Attachments: TEXT.htm

Lauren. I'm happy to participate. See you tomorrow. Thanks, L.

Luis M. Ramos
Supervising Deputy District Attorney, Sexual Assault
Santa Clara County
408.792.2793
lramos@da.sccgov.org

>>> Lauren Schoenthaler <lks@stanford.edu> 8/31/2015 10:42 AM >>>

Dear All,

I did want to mention one major irony, which is that the reporter from the Palo Alto Weekly is no longer attending tomorrow. I am still hopeful that this will not impact Luis's ability to attend.

Thanks,

Lauren

From: Lauren Schoenthaler
Sent: Monday, August 31, 2015 10:34 AM
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Cc: Cindy Hendrickson; Terry Harman
Subject: RE: Speaking opportunity at Stanford

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Luis M. Ramos
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[Redacted]

[Redacted]

[Redacted]

[Redacted]

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RE: Speaking opportunity at Stanford

From Luis Ramos
To Hendrickson, Cindy, Schoenthaler, Lauren, Dauber, MicheleHarman, Terry
Date 2015/09/02 08:12
Subject: RE: Speaking opportunity at Stanford
Attachments: TEXT.htm

Lauren and Michelle. It was my pleasure to share with you and your students the work that we do at the DA's office. If you need something similar in the future, please call on me. And Lauren, it was great seeing you after so many years and to know you are doing so well. Take care, L.

Luis M. Ramos
Supervising Deputy District Attorney, Sexual Assault
Santa Clara County
408.792.2793
lramos@da.sccgov.org

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[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

California Judicial Branch News Service cjbns.org
cjbns@judicialbranchnews.org



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Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 7/9/2016 8:42 AM >>>
Hi Terry:

I also am wondering about this sentence being only 4 days. Is there something that makes this case unusual?

Thanks!
Michele

On Fri, Jul 8, 2016 at 5:01 PM, Michele Dauber <[REDACTED]>
wrote:
<IMAGE.jpeg>

Dear Terry:

I have a question about how to read this file. I want to make sure I understand it correctly. It appears to me that Mr. Chain made a request to have his conviction for child porn reduced from a felony to a misdemeanor. It as scheduled to be heard on June 20 by Judge Persky (who was the judge who accepted his plea and handled his plea negotiations). On June 20 Judge Brown was there not Judge Persky, and I cannot understand his notes or the other attached documents. Was the motion to reduce the conviction to a misdemeanor granted or was it continued to 8/25? What will occur on 8/25?

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<IMAGE.jpeg> <IMAGE.jpeg> <IMAGE.jpeg> <IMAGE.jpeg>

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Narayan, Kavita

From: Michele Dauber [REDACTED]
Sent: Friday, July 08, 2016 5:02 PM
To: Harman, Terry
Subject: Robert Chain child pornography question

CLIC LAB RESULTS

LABORATORY SERVICES

THE FOLLOWING INFORMATION IS FOR THE INFORMATION OF THE COURT:

DEFENDANT: [REDACTED]

CHARGE: [REDACTED]

DATE OF RECEIPT: [REDACTED]

LABORATORY FILE: [REDACTED]

LABORATORY REPORT: [REDACTED]

LABORATORY RESULTS:

DATE AND TIME	TEST	TYPE OF DRUG	EXPLANATION
FEB 03 2015	89 Madder	A	1st trial (partial) 3-10 051 7-10
MAY 10 2015	89 Madder	A	3-24 2015 1st trial (partial) 3-10 051 7-10
MAY 20 2015	89 Madder	A	3-24 2015 1st trial (partial) 3-10 051 7-10
JUN 04 2015	89 Madder	A	3-24 2015 1st trial (partial) 3-10 051 7-10
JUL 08 2015	89 Madder	A	3-24 2015 1st trial (partial) 3-10 051 7-10
AUG 20 2015	89 Madder	A	3-24 2015 1st trial (partial) 3-10 051 7-10

JUDGE'S NOTES: 8/17/15 reaction

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Thanks,
 Michele

Paid Adjudication Form for Robert James Chain, Defendant, Charge PC11.1(a), Range 16-2-3. Includes case summary and court information.

Probation Department Form with handwritten notes: "8-25-16 AIR 150 89". Contains sections for "NEXT APPEARANCE", "PLA CONDITIONS", and "PROBATION DEPT".

Request for Calendar Setting form from Superior Court of California, County of Santa Clara. Requested by Brian Madden on 4/20/16. Includes signature of Judge Kevin Rosty.

Filed Motion form titled "NOTICE OF MOTION TO REDUCE OFFENSE TO MISCHELANEOUS OFFENSE OF BRIAN MADDEN". Includes signature of Brian Madden, Attorney for Defendant.

Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Wednesday, February 15, 2017 11:21 AM
To: Harman, Terry
Subject: Re: Info with Excel Filter

[REDACTED]

On Wed, Feb 15, 2017 at 11:20 AM, Harman, Terry <tharman@dao.sccgov.org> wrote:

[REDACTED]

Terry Harman

Terry Lynn Harman
Assistant District Attorney
Santa Clara County
70 West Hedding Street
San Jose, CA 95110
[408.792.2826](tel:408.792.2826)

From: Michele Dauber [mailto:[REDACTED]]
Sent: Wednesday, February 15, 2017 11:08 AM
To: Harman, Terry <tharman@dao.sccgov.org>
Subject: Re: Info with Excel Filter

Great this is very helpful thank you so much.

[REDACTED]

[REDACTED]

On Wed, Feb 15, 2017 at 11:07 AM, Harman, Terry <tharman@dao.sccgov.org> wrote:

Some DV cases may also allege 236, 245, 243(d), but 273.5 is one of the more common DV charges.



Terry Lynn Harman

Assistant District Attorney

Santa Clara County

70 West Hedding Street

San Jose, CA 95110

[408.792.2826](tel:408.792.2826)

From: Michele Dauber [mailto:████████████████████]

Sent: Wednesday, February 15, 2017 11:00 AM

To: Harman, Terry <tharman@dao.sccgov.org>

Subject: Re: Info with Excel Filter

So would I look for 273.5? Is that what the initial would be and then pleaded down?

On Wed, Feb 15, 2017 at 10:59 AM Harman, Terry <tharman@dao.sccgov.org> wrote:

Yes, but it is searchable.

Terry Lynn Harman

Assistant District Attorney

Santa Clara County

70 West Hedding Street

San Jose, CA 95110

[408.792.2826](tel:408.792.2826)

From: Michele Dauber [mailto: [REDACTED]]
Sent: Wednesday, February 15, 2017 10:58 AM

To: Harman, Terry <tharman@dao.sccgov.org>
Subject: Re: Info with Excel Filter

So is this just every single case he heard ever during that period? There are over 10K records here.

On Wed, Feb 15, 2017 at 10:55 AM, Harman, Terry <tharman@dao.sccgov.org> wrote:

Hi Michele,

Our system does not show what the case resolved for – so there may be 415 settlements with the 16 week program in some of those cases. You will have to check the court files for more specific information.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County
70 West Hedding Street
San Jose, CA 95110

[408.792.2826](tel:408.792.2826)

From: Michele Dauber [mailto: [REDACTED]]
Sent: Wednesday, February 15, 2017 9:23 AM

To: Harman, Terry <tharman@dao.sccgov.org>
Subject: Re: Info with Excel Filter

Hi Terry:

This is over 10,000 records. I was just looking for DV cases that had ended in DVAP 16 week anger management classes and a conviction for PC 415. This can't be that list, can it?

Thanks,

Michele

On Wed, Feb 15, 2017 at 9:18 AM, Harman, Terry <tharman@dao.sccgov.org> wrote:

Hi Michelle,

Please see the attached document. The court file will contain details regarding the sentences.

Terry Lynn Harman

Assistant District Attorney

Santa Clara County

70 West Hedding Street

San Jose, CA 95110

408.792.2826

From: Michele Dauber (mailto: [REDACTED])

Sent: Tuesday, February 14, 2017 2:43 PM

To: Harman, Terry <tharman@dao.sccgov.org>

Subject: Re: Info with Excel Filter

Wonderful that is so great thank you

On Tue, Feb 14, 2017 at 2:18 PM, Harman, Terry <tharman@dao.sccgov.org> wrote:

Hi Michelle,

Yes, we are able to provide some information. I am awaiting confirmation from our data person. You'll get the info this week. Thank you!

Terry Lynn Harman

Assistant District Attorney

Santa Clara County

70 West Hedding Street

San Jose, CA 95110

408.792.2826

From: Michele Dauber (mailto: [REDACTED])
Sent: Monday, February 13, 2017 11:35 AM

To: Harman, Terry <tharman@dao.sccgov.org>
Subject: Re: Info with Excel Filter

Hi Terry:

Any progress on this?

Thanks,

Michele

On Tue, Jan 31, 2017 at 1:41 PM, Michele Dauber <[REDACTED]> wrote:

January 1, 2015 through September 1, 2016.

Thanks so much!

Michele

On Tue, Jan 31, 2017 at 2:39 PM, Harman, Terry <tharman@dao.sccgov.org> wrote:

Hi Michelle,

What is the time period you are looking for?

Terry Lynn Harman


Assistant District Attorney

Santa Clara County

70 West Hedding Street

San Jose, CA 95110

408.792.2826

From: Michele Dauber [mailto: 
Sent: Tuesday, January 31, 2017 1:31 PM
To: Harman, Terry <tharman@dao.sccgov.org>
Subject: Re: Info with Excel Filter

Dear Terry:

Hope you are well. I have another request for info on Judge Persky's cases. I would like a list of those cases that resulted in convictions under PC 415 Disturbing the Peace that were heard in D89. I am looking specifically for those cases in which defendants were sentenced to the 16 week conflict accountability program, and my understanding is that this involves a guilty plea to PC415 (regardless of the charged offense).

Thanks very much,

Michele

On Mon, Sep 19, 2016 at 5:17 PM, Terry Harman <THarman@da.sccgov.org> wrote:

It is every case. I misunderstood what our IT people provided. The Penal Code charges are included so you can better sift through the cases that you want.

Terry Lynn Harman

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THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 9/19/2016 3:54 PM >>>

Hi Terry, is this every case or just the sex and dv ones or what?

On Mon, Sep 19, 2016 at 3:00 PM, Terry Harman <THarman@da.sccgov.org> wrote:

Hi Michelle,

Please see the attachment. You should be able to search for sex and DV charges based on the Penal Code sections in the right hand column.

Terry Lynn Harman

Assistant District Attorney

Santa Clara County District Attorney

Ph. [408.792.2826](tel:408.792.2826)

Fax 408.286.5437

THarman@da.sccgov.org

>>> "Scavio, John" <jscavio@dao.sccgov.org> 9/19/2016 2:55 PM >>>

Hi Terry,

Here's the info with filters applied to the column headers. The filters create a drop-down list at each column header which allows you to select info of interest.

Thanks,

John


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Narayan, Kavita

From: Harman, Terry
Sent: Wednesday, February 15, 2017 9:19 AM
To: Michele Dauber
Subject: RE: Info with Excel Filter
Attachments: Copy of Dept 89 Info.xlsx

Hi Michelle,
Please see the attached document. The court file will contain details regarding the sentences.



Terry Lynn Harman
Assistant District Attorney
Santa Clara County
70 West Hedding Street
San Jose, CA 95110
408.792.2826

From: Michele Dauber [mailto: [REDACTED]]
Sent: Tuesday, February 14, 2017 2:43 PM
To: Harman, Terry <tharman@dao.sccgov.org>
Subject: Re: Info with Excel Filter

Wonderful that is so great thank you

On Tue, Feb 14, 2017 at 2:18 PM, Harman, Terry <tharman@dao.sccgov.org> wrote:

Hi Michelle,

Yes, we are able to provide some information. I am awaiting confirmation from our data person. You'll get the info this week. Thank you!



Terry Lynn Harman
Assistant District Attorney
Santa Clara County
70 West Hedding Street
San Jose, CA 95110
408.792.2826

From: Michele Dauber [mailto: [REDACTED]]
Sent: Monday, February 13, 2017 11:35 AM

To: Harman, Terry <tharman@dao.sccgov.org>
Subject: Re: Info with Excel Filter

Hi Terry:

Any progress on this?

Thanks,
Michele

On Tue, Jan 31, 2017 at 1:41 PM, Michele Dauber < [REDACTED] > wrote:
January 1, 2015 through September 1, 2016.

Thanks so much!

Michele

On Tue, Jan 31, 2017 at 2:39 PM, Harman, Terry <tharman@dao.sccgov.org> wrote:

Hi Michelle,

What is the time period you are looking for?

Terry Harman

Terry Lynn Harman

Assistant District Attorney

Santa Clara County

70 West Hedding Street

San Jose, CA 95110

408.792.2826

From: Michele Dauber [mailto: [REDACTED]]
Sent: Tuesday, January 31, 2017 1:31 PM
To: Harman, Terry <tharman@dao.sccgov.org>
Subject: Re: Info with Excel Filter

Dear Terry:

Hope you are well. I have another request for info on Judge Persky's cases. I would like a list of those cases that resulted in convictions under PC 415 Disturbing the Peace that were heard in D89. I am looking specifically for those cases in which defendants were sentenced to the 16 week conflict accountability program, and my understanding is that this involves a guilty plea to PC415 (regardless of the charged offense).

Thanks very much,

Michele

On Mon, Sep 19, 2016 at 5:17 PM, Terry Harman <THarman@da.sccgov.org> wrote:

It is every case. I misunderstood what our IT people provided. The Penal Code charges are included so you can better sift through the cases that you want.

Terry Lynn Harman

Assistant District Attorney

Santa Clara County District Attorney

Ph. [408.792.2826](tel:408.792.2826)

Fax [408.286.5437](tel:408.286.5437)

THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 9/19/2016 3:54 PM >>>

Hi Terry, is this every case or just the sex and dv ones or what?

On Mon, Sep 19, 2016 at 3:00 PM, Terry Harman <THarman@da.sccgov.org> wrote:

Hi Michelle,

Please see the attachment. You should be able to search for sex and DV charges based on the Penal Code sections in the right hand column.

Terry Lynn Harman

Assistant District Attorney

Santa Clara County District Attorney

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THarman@da.sccgov.org

>>> "Scavio, John" <jscavio@dao.sccgov.org> 9/19/2016 2:55 PM >>>

Hi Terry,

Here's the info with filters applied to the column headers. The filters create a drop-down list at each column header which allows you to select info of interest.

Thanks,

John

Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Monday, October 17, 2016 3:04 PM
To: Harman, Terry
Subject: Fwd: persky missing cases

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Terry;

These files have been missing forever and my assistants have not been able to get them despite many trips. Can you guys help me shake them loose. Joe is his usual helpful self.

Michele

----- Forwarded message -----

From: Meghan Warner <[REDACTED]>
Date: Mon, Oct 17, 2016 at 3:02 PM
Subject: persky missing cases
To: Michele Landis Dauber <[REDACTED]>

Hi Michele,

The 3 below are the missing cases that should definitely be in Palo Alto. I can request them tomorrow if that works.

CARDENAS	FLAVIO	B1261004
LOPEZ	ROBERT	B1578850
LOPEZ	RODOLFO	B1683916

Best,
Meghan

Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Friday, September 30, 2016 8:39 AM
To: Hendrickson, Cindy
Subject: Re: DV case

Sure thing. Here's the whole file.

My experience reading Persky files is that he tends to put in these 17(b) things on his own initiative, sometimes in disagreement to probation, which often says that it likes to see 2/3 (2 years) of the probation before consideration of 17(b). So I am just wondering.



On Fri, Sep 30, 2016 at 8:31 AM, Hendrickson, Cindy <chendrickson@dao.sccgov.org> wrote:

Can you please send me a copy of the entire plea agreement so I can run it by the attorneys involved in the case? Thx.

From: Michele Dauber [mailto:[REDACTED]]
Sent: Thursday, September 29, 2016 6:11 PM
To: Hendrickson, Cindy <chendrickson@dao.sccgov.org>
Subject: Re: DV case

Dear Cindy:

Thanks for this response.

Can you please tell me if the 17(b) was an offer of the court or the DA? The plea form indicates that it was the DA but I am wondering whether that part was an offer of the court.

Thanks,

Michele

On Wed, Sep 28, 2016 at 4:59 PM, Hendrickson, Cindy <chendrickson@dao.sccgov.org> wrote:

Hi Michele,

You are very welcome.

Agreements to have a felony charge reduced to a misdo after one year of successful completion of probation are common, and it does appear from the document you sent that such an agreement was reached in the Canala case.

I looked up the Smith case and noticed that it is Alaleh's case. She is probably in the best position to answer your questions on this matter. I suspect you have her contact information since she is the attorney on the Turner case, just in case: akianerci@da.sccgov.org. [REDACTED]

Talk to you soon!

Cindy

From: Michele Dauber [mailto:[REDACTED]]
Sent: Wednesday, September 28, 2016 2:56 PM
To: Hendrickson, Cindy <chendrickson@dao.sccgov.org>
Subject: DV case

Dear Cindy:

Thanks for your generosity with your time today. I really apologize again for my failure to communicate very well. I feel badly.

I wanted to attach the 17(b) commitment from Mr. Canala's plea agreement. Based on the plea form I had thought it was part of the plea deal but I could be wrong.

Here's another case I have a question about (that I mentioned today):

B1581137 Keenan Smith

I am confused about what happened with the sentence in this case. It appears that he never showed up to begin his sentence or to do his DV classes but then I can't tell what happened as a result of that. Can you help me understand?

Thanks,

Michele

Narayan, Kavita

From: Michele Dauber [redacted]
Sent: Wednesday, September 28, 2016 1:04 PM
To: Harman, Terry
Subject: Re: Campus Sexual Assault Work Group Meeting Friday, Sept. 30 at 10 a.m.

Obviously not. I am sorry my email seems to suggest otherwise. I think I was distracted when I wrote it and I said "I can talk to her" I just meant, I could talk to her kind of like "I can talk to a movie star" because I already know her through that. Sorry, just thinking out loud. No, no I would not do that. I fully understand what the event is about.

We are still having Kamilah, correct?

I am sorry I can't make it on Friday, this is really exciting. [redacted]
[redacted]

On Wed, Sep 28, 2016 at 12:58 PM, Harman, Terry <tharman@dao.sccgov.org> wrote:

Ashleigh Banfield made the connection. Sharon will be reading excerpt's from Emily Doe's letter. We are so, so thrilled to have her be a presenter.

As an aside, there will be no recall talk on the Symposium stage - the focus is on the wider discussion of campus sexual assault, not Judge Persky.



Terry Lynn Harman
Assistant District Attorney
Santa Clara County

70 West Hedding Street

San Jose, CA 95110

408.792.2826

From: Michele Dauber [mailto:[redacted]]
Sent: Tuesday, September 27, 2016 5:54 PM

To: Harman, Terry <tharman@dao.sccgov.org>
Subject: Re: Campus Sexual Assault Work Group Meeting Friday, Sept. 30 at 10 a.m.

That's super interesting. She also endorsed the recall and I think we are in negotiations to have her host an event in LA for us so that's awesome if she does this -- I can talk to her.

On Tue, Sep 27, 2016 at 5:48 PM, Harman, Terry <tharman@dao.sccgov.org> wrote:

I am sorry that you will miss the meeting!

I hope that it's nothing too serious, and that you won't be off your feet for long. I'll keep you in my thoughts.

As for a get well soon hint....I think that your BASIC INSTINCT should be give you a CASINO clue.



Terry Lynn Harman

Assistant District Attorney

Santa Clara County

70 West Hedding Street

San Jose, CA 95110

408.792.2826

From: Michele Dauber [mailto: [REDACTED]]

Sent: Tuesday, September 27, 2016 5:44 PM

To: Harman, Terry <tharman@dao.sccgov.org>

Subject: Re: Campus Sexual Assault Work Group Meeting Friday, Sept. 30 at 10 a.m.

Hi Terry:

I am [REDACTED] can you tell me who the celebrity is? I can't make the meeting.

M

On Tue, Sep 27, 2016 at 5:40 PM, Hannan, Terry <tharman@dao.sccgov.org> wrote:

Hi All,

The Symposium is really coming together. I have an exciting surprise for those who will be attending Friday's work group meeting regarding a celebrity presenter at our Symposium! The final draft of the MOU is attached, although it is still pending a final law enforcement review.

We have received many positive responses from our "Save the Date" email blasts, and I look forward to hearing from all of you on Friday, September 30 at 10 a.m. at the DA's Office. Thank you all so much for your continued support and contributions to this endeavor.



Terry Lynn Hannan

Assistant District Attorney

Santa Clara County

70 West Hedding Street

San Jose, CA 95110

408.792.2826

Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Wednesday, September 28, 2016 7:54 AM
To: Harman, Terry
Subject: Fwd: question about a case

----- Forwarded message -----

From: Michele Dauber <[REDACTED]>
Date: Wed, Sep 28, 2016 at 7:52 AM
Subject: Re: question about a case
To: "Hendrickson, Cindy" <chendrickson@dao.sccgov.org>

I left out that part of the plea was the promise of a 17(b) after one year.

On Wed, Sep 28, 2016 at 7:50 AM, Michele Dauber <[REDACTED]> wrote:
Dear Cindy,

Glad we will talk this morning and thank you for making time.

Since we will be talking I thought I would share a case that I have been looking at and wondering about. Terry probably told you that I am some students are engaged in a review of Judge Persky's cases involving violence against women.

One such case I just read last night gave me pause. It is B1476171, Canales. Mr. Canales was convicted of stalking his ex-girlfriend. He harassed her by phone and email, followed her at her employment, lay in wait for her to come out of work, and then chased her with his car, using his car as a weapon to block and attack her. The police witnessed the car chase and he was arrested while this was happening. He was charged with stalking 649(a) and assault with deadly weapon (car) 245(a)(1) (and a couple of misdemeanors).

His sentence was, to me, outrageously low. He received 120 days all WWP, no electronic monitoring [although EMP is exactly what some might think would be good for someone who stalks and follows someone]. But that's not the really concerning part. The really concerning part is that there were no DV conditions on the probation. He got "sentenced" to 4 months of "mental health counseling with anger management" and not 1203.097 conditions, even though the conviction was for a felony and the victim was his past girlfriend with whom he had recently broken up (therefore qualified for DV conditions I think, but you can correct me if I am wrong). So here we have felony stalking, assault with a deadly weapon that could have killed someone, and all he got was 120 days WWP with some counseling. It was not treated as the domestic violence that it clearly was.

I have now reviewed dozens of these cases and to be honest, the nonserious treatment that Judge Persky affords DV is the thing that has shocked and upset me the most. These cases are treated as minor inconveniences and it is not just the judge -- many legal actors in this scenario seem to downplay or minimize the harm of these felonies. In the Canales case, this could have killed someone. Maybe it still will.

Thanks,
Michele

On Tue, Sep 27, 2016 at 3:44 PM, Michele Dauber <[REDACTED]> wrote:
I am so sorry.

On Tue, Sep 27, 2016 at 3:44 PM, Hendrickson, Cindy <chendrickson@dao.sccgov.org> wrote:
No problem!

Tomorrow at 9 is fine.

Cindy

From: Michele Dauber [mailto:[REDACTED]]
Sent: Tuesday, September 27, 2016 1:07 PM

To: Hendrickson, Cindy <chendrickson@dao.sccgov.org>
Subject: Re: question about a case

I am so sorry. I somehow got myself confused and thought we were talking at 1pm today. I really apologize!
Could we reschedule. I can do tomorrow morning at 9:00am if today is now out.

So so sorry.

Michele

On Tue, Sep 27, 2016 at 10:58 AM, Hendrickson, Cindy <chendrickson@dao.sccgov.org> wrote:

Perfect. [\(408\) 792-2551](tel:4087922551)

From: Michele Dauber [mailto:[REDACTED]]
Sent: Tuesday, September 27, 2016 7:42 AM
To: Hendrickson, Cindy <chendrickson@dao.sccgov.org>
Subject: Re: question about a case

How about 11:00am today?

On Mon, Sep 26, 2016 at 10:03 AM, Cindy Hendrickson <CHendrickson@da.sccgov.org> wrote:

Hi Michelle,

I have an Intimate Partner Task Force meeting at that time. I am available today until about 2:30, and tomorrow 10:30-12:45, and Wednesday morning, in case any of those times work for you.

Cindy

>>> Michele Dauber <[REDACTED]>/26/2016 9:55 AM >>>

How about tomorrow at 1pm?

On Mon, Sep 26, 2016 at 8:48 AM, Cindy Hendrickson <CHendrickson@da.sccgov.org> wrote:

Hi Michelle,

I hope I can live up to Terry's billing! :)

Please feel free to call me at your convenience. [\(408\) 792-2551](tel:4087922551). If you have specific cases in mind, please feel free to send me those case numbers in advance, but if not then we can still have a productive conversation.

I look forward to speaking with you!

Cindy

>>> Michele Dauber <[REDACTED]>9/25/2016 2:36 PM >>>

Hi Cindy:

We haven't met but I would love to chat, perhaps with Terry if she would also like to be in that conversation, to start a dialogue about what appears to me to be very low sentencing for domestic violence in the Palo Alto courthouse. Would there be a good time to talk about some systemic solutions for example training or specialized courts as in San Jose. I don't have a specific solution in mind only an observation that there appears to be an issue.

Thanks!

Michele Dauber

On Sun, Sep 25, 2016 at 2:22 PM, Terry Harman <THarman@da.sccgov.org> wrote:

Hi Michele,

Cindy Hendrickson is the ADA for both our Family Violence Unit and North County. She is in the best position to address your concerns. You may already be acquainted with her, but if you are not, she is quite fantastic!

Terry Lynn Harman

Assistant District Attorney

Santa Clara County District Attorney

Ph. [408.792.2826](tel:408.792.2826)

Fax [408.286.5437](tel:408.286.5437)

THarman@da.sccgov.org

>>> Michele Dauber [REDACTED] 9/25/2016 2:16 PM >>>

One thing that I have really noticed going through these cases is the disturbing pattern of low low sentences for very very violent domestic abuse. I am wondering if perhaps this is because these cases are heard in North County outlying court instead of specialized DV court. Do you think that we could get together and discuss ways to address this long term?

Thanks,
Michele

On Sun, Sep 25, 2016 at 2:09 PM, Terry Harman <THarman@da.sccgov.org> wrote:

The department will be noted when the sentencing calendar is run, but I don't have that information immediately in front of me.

Terry Lynn Harman

Assistant District Attorney

Santa Clara County District Attorney

Ph. [408.792.2826](tel:408.792.2826)

Fax [408.286.5437](tel:408.286.5437)

THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 9/24/2016 9:05 AM >>>

Hi Terry,

Is there any way to check and make sure that Judge Persky is not keeping this case and where it will be heard?
It is coming up.

Thanks!

Michele

On Mon, Sep 19, 2016 at 10:04 AM, Michele Dauber <[REDACTED]> wrote:

Will Judge Persky be sentencing Mr. Chapman (B1578851) [Stanford mall child groper] in October even though he has moved to Civil Division. There is a waiver in the plea but it was an offer of court so I am not sure how that works.

This is an important question so I'd appreciate knowing! Thanks.

MLD

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Narayan, Kavita

From: Harman, Terry
Sent: Tuesday, September 27, 2016 3:55 PM
To: Michele Dauber
Subject: RE: Updates

Hi Michelle,
I forwarded your email to the lawyer for Superior Court. They should be able to locate the court files you are requesting.

Terry Harman

Terry Lynn Harman
Assistant District Attorney
Santa Clara County
70 West Hedding Street
San Jose, CA 95110
408.792.2826

From: Michele Dauber [mailto: [REDACTED]]
Sent: Monday, September 26, 2016 1:51 PM
To: Harman, Terry <tharman@dao.sccgov.org>
Subject: Fwd: Updates

Can you help us with this? We just want to know where these files are.

----- Forwarded message -----

From: Michele Dauber < [REDACTED] >
Date: Mon, Sep 26, 2016 at 1:49 PM
Subject: Fwd: Updates
To: Joseph Macaluso <jmacaluso@scscourt.org>

Dear Joe:

This is one of my student volunteers. She is having trouble with the clerks. She requested these cases from Palo Alto and was told they were at Hall of Justice. She went down to Hall of Justice and was told that they are in Palo Alto. Hall of Justice also limited her to five cases per day in contravention to our agreement.

Can you please find out where are these files so that we can view them ASAP? We have already traipsed all over the county looking.

Please also clarify to your clerks in San Jose what the rules are with respect to our requests, which was 25 per day per researcher not 5.

Michele Dauber

----- Forwarded message -----

From: Bhavishya Ravi [REDACTED]

Date: Mon, Sep 26, 2016 at 1:45 PM

Subject: Re: Updates

To: Michele Dauber [REDACTED]

Hi Michele,

These are the cases HOJ said were in Palo Alto

ALVITERFROST	RUBEN	B1364787	In Palo Alto
CHATIKAVANIJ	TOOMI	B1365074	In Palo Alto
IOVTCHEV	BORISLAV	B1472426	In Palo Alto
HABETGEBREAL	KIRUBEL	C1524109	In Palo Alto
WOMACK	AARON	B1579875	In Palo Alto

Based on our excel sheet, our notes tell us that:

The first, second third and fifth have been listed as HOJ. The fourth was "unable to locate".

I tried to get them to review just the records electronically to affirm if they're located in SJ or not, they refused.

Thanks,
Bhavishya

California Judicial Branch News Service - cjbns.org
Socioeconomic Justice Institute - socioeconomicinstitute.com

Narayan, Kavita

From: Harman, Terry
Sent: Monday, September 19, 2016 3:01 PM
To: [REDACTED]
Subject: Fwd: Info with Excel Filter
Attachments: Dept 89 Info Request.xlsx

Hi Michelle,

Please see the attachment. You should be able to search for sex and DV charges based on the Penal Code sections in the right hand column.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. 408.792.2826
Fax 408.286.5437
THarman@da.sccgov.org

>>> "Scavio, John" <jscavio@dao.sccgov.org> 9/19/2016 2:55 PM >>>

Hi Terry,

Here's the info with filters applied to the column headers. The filters create a drop-down list at each column header which allows you to select info of interest.

Thanks,
John

Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Monday, September 19, 2016 9:49 AM
To: Harman, Terry
Subject: Re: Your Request

Hi Terry:

I have a question about how to read this. My assistants just called me in a panic from the courthouse because most of these cases are not sex or DV but are burglary and drugs. When I look at the offense charged the majority do not seem to fall into DV or sex, though some do.

How should I read this list? Am I using it wrong? Was it generated so that I can be confident that this has all the sex and DV cases as well as some extras or could there be sex and DV cases that are not on this list but existed?

Thanks,
Michele

On Thu, Sep 15, 2016 at 4:36 PM, Terry Harman <THarman@da.sccgov.org> wrote:

Hi Michelle,
Attached is the list of sex and dv cases that were heard in Dept. 89.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

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Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Thursday, September 15, 2016 5:22 PM
To: Harman, Terry
Subject: Re: Your Request

You would not believe the hard time those clerks are giving my student. I sent her over to get started on the list you sent me earlier (i did a cross match on those with sentences and those that were dv for starters) and the clerks are basically harassing her out of the building, they asked if she was in the recall and when she told them the truth they refused to give her files, told her she had to pay for them, yelled at her, it was ridiculous.

On Thu, Sep 15, 2016 at 5:11 PM, Terry Harman <THarman@da.sccgov.org> wrote:
Funny. A little sarcasm is good.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 9/15/2016 5:06 PM >>>
Really?

Are you being funny?

On Thu, Sep 15, 2016 at 5:03 PM, Terry Harman <THarman@da.sccgov.org> wrote:
You're welcome.
Joe Macaluso was a big help.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 9/15/2016 4:57 PM >>>
Oh. My. God. Thank you.

On Thu, Sep 15, 2016 at 4:36 PM, Terry Harman <THarman@da.sccgov.org> wrote:
Hi Michelle,
Attached is the list of sex and dv cases that were heard in Dept. 89.
Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney

Ph. [408.792.2826](tel:408.792.2826)
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Narayan, Kavita

From: Harman, Terry
Sent: Thursday, September 15, 2016 4:36 PM
To: [REDACTED]
Subject: Your Request
Attachments: Dept.89 Sex and DV Cases.xlsx

Hi Michelle,
Attached is the list of sex and dv cases that were heard in Dept. 89.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. 408.792.2826
Fax 408.286.5437
THarman@da.sccgov.org

Narayan, Kavita

From: Harman, Terry
Sent: Monday, September 12, 2016 8:30 AM
To: [REDACTED]
Subject: Your Calendar request
Attachments: Appearances at dept 89 from 2015-01-01 to 2016-08-19.xlsx

Good morning!

Pursuant to your California Public Records Request, attached is the list of cases that were scheduled in Judge Persky's Dept. from January 2015 to June 2016. I have asked that they cull through the list to identify sexual assault and domestic violence cases. I will forward that upon receipt. Thank you.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. 408.792.2826
Fax 408.286.5437
THarman@da.sccgov.org

Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Friday, September 09, 2016 6:01 PM
To: Harman, Terry
Subject: checking on the dockets I requested

Hi Terry,
Can I get an update?

Thanks,
Michele

Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Tuesday, August 30, 2016 5:09 PM
To: Harman, Terry
Subject: Re: update on the records?

Dear Terry thanks for the update.

On Tue, Aug 30, 2016 at 4:49 PM, Terry Harman <THarman@da.sccgov.org> wrote:

Hi Michelle,

We've made the request to CJIC for the calendars. They are working on it, but I do not have a timetable as of this writing.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 8/30/2016 4:29 PM >>>

Hi Terry do you have an update on my records request?

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Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Monday, August 29, 2016 1:50 PM
To: Harman, Terry
Subject: Re: Persky Records Request

Yes that is what I want but I want to make sure I am not paying \$500 for something I don't want. How can we resolve this.

On Mon, Aug 29, 2016 at 1:44 PM, Terry Harman <THarman@da.sccgov.org> wrote:

I do not know what his understanding is of your request.

I know what you told me [copies of all of Persky's calendars from January 2015 to June 2016], and that's what I referenced when I spoke to the lawyer for the Superior Court.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 8/29/2016 12:21 PM >>>

Why is he saying this is different from my original request which was anything showing the case names and numbers?

On Mon, Aug 29, 2016 at 11:38 AM, Terry Harman <THarman@da.sccgov.org> wrote:

Let me check with our IT expert.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
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THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 8/29/2016 10:57 AM >>>

Terry why does this cost \$500? I thought you said it was a 2 minute operation. I feel like this is absurd. Can you help me understand this?

On Mon, Aug 29, 2016 at 10:52 AM, Michele Dauber <[REDACTED]> wrote:
Is this what I want? Will it have the info I am seeking?

----- Forwarded message -----

From: Joseph Macaluso <JMacaluso@scscourt.org>
Date: Mon, Aug 29, 2016 at 10:50 AM
Subject: Persky Records Request
To: Michele Landis Dauber <[REDACTED]>

Hi Michele--

Hope this email finds you well. I'm following up on the records request...

I understand you have discussed this matter with Terry Harmon in the District Attorney's Office, and at her suggestion, a summary report would satisfy your request for information, which differs from your original request.

If this is the case, we will ask the County Information Technology Department to run the report (we are unable to run the query ourselves in the County's proprietary database). I have been given an estimate of \$488 to run the report (4 hours of time multiplied by \$122/hour which represents the hourly rate of the person developing the query).

Once you deliver a check written to Santa Clara Superior Court to my attention at 201 N. First Street, 8th Floor, San Jose, CA 95113, we will have the report run.

Thank you.

Joseph D. Macaluso

Superior Court of California, County of Santa Clara

[\(408\) 882-2715](tel:4088822715) [Desk]

[\(408\) 691-0046](tel:4086910046) [Cell]

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scscourt.org

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Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Tuesday, August 16, 2016 1:10 PM
To: Harman, Terry
Subject: Re: Fwd: question

Just so you know it's 2000 per WEEK they are asking me for with no limit on how many weeks or what I would get -- he's sayign write us a blank check with no promise as to what we will even give you FOR PUBLIC RECORDS. It's literally an outrage.

On Tue, Aug 16, 2016 at 1:04 PM, Michele Dauber <[REDACTED]> wrote:
Yes they want me to pay \$2000 per week to hire someone to work fulltime to reconstruct his calendars because they claim that they have deleted and thrown away every single copy in existence. It is literally madness. I will forward you my incredibly infuriating exchange with Macaluso.

On Tue, Aug 16, 2016 at 12:59 PM, Terry Harman <THarman@da.sccgov.org> wrote:

Hi Michelle,
When you initially asked us about this, we referred you to the court because the court runs the calendars. The response from the court is puzzling. Those are expensive fees for a Public Records Act request. I would be interested in knowing how they determined those fees, because calendars are regularly run by the court and each calendar does not cost \$2000. \$2,000 is close to a week's salary for a legal clerk and running one calendar takes closer to four minutes, not forty hours.

Terry Lynn Harman
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Ph. [408.792.2826](tel:408.792.2826)
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THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> /16/2016 12:26 PM >>>

Hi Terry,
I am bumping this email to see if you can help me.

M
----- Forwarded message -----

From: Michele Dauber <[REDACTED]>
Date: Sun, Jul 31, 2016 at 8:49 PM
Subject: question
To: Terry Harman <THarman@da.sccgov.org>

Hi Terry:

Hope all is well. Glad to see the conference is taking shape. I have a request that I hope you can help me with.

I have been trying to obtain the calendars or dockets for the Palo Alto courthouse. Ideally what I am looking for is Judge Persky's calendar since he was assigned to Dept 89 in early 2015. And, even more ideally I am looking for all the sex crime cases and dv cases he heard during this period but I am willing to winnow all of them out of the entire calendar for Palo Alto.

The court is giving me a really hard time with obtaining what are public records. They have now informed me that to get the period from 1/1/15 through approximately 3/16 I would have to pay thousands of dollars to re-create those calendars. The charge would be approx \$2k per week and the number of weeks it would take to create these calendars would be indeterminate.

Obviously the cost is prohibitive. Is there any way that the DA has stored information and can help provide me with information about the calendar for the period 1/1/15 to present? As I said, it may but need not be exclusively Judge Persky -- it is relatively easy to take a large list and search it for those assigned to 89.

I am sorry to ask but the latest request for thousands and thousands makes it clear that the court will not be making these documents available to me and I wonder if the DA has a system and can provide this information.

My goal is to be as fair as possible by looking at all the cases rather than just the ones I am able to locate serendipitously. I am trying to review the entire record, and also to place it in context. Any help you can offer by providing calendar or docket info I would appreciate very very very much.

There is a bit of a rush for this info, so if you are able to answer fairly expeditiously I would so much appreciate it.

Thank you for considering this request,

Warmly,

M

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Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Tuesday, August 16, 2016 1:08 PM
To: Harman, Teny
Subject: Re: Calendars Request

As you can see I have hit the end of the line with these people but I imagine that the DAs office can probably search its own database and come up with a list of the cases from Dept 89 for me. I don't even need to know if they are sex or batterer cases. I just need to know the names and numbers of the cases heard in Department 89 since January 2015 when he started. I believe I might have the last 6 months. So really I only need January 2015 to March 2016

On Tue, Aug 16, 2016 at 1:05 PM, Michele Dauber <[REDACTED]> wrote:
Obvious runaround.

----- Forwarded message -----

From: Michele Landis Dauber <[REDACTED]>
Date: Wed, Jul 27, 2016 at 3:42 PM
Subject: Re: Calendars Request
To: Joseph Macaluso <JMacaluso@scscourt.org>

Hi Joe thanks for this. Wow this is a lot more money than I expected I am so sorry I won't be able to make this decision just yet. It's so much money to access public records wow. I am so shocked. I never expected this. And since you can't guarantee how many weeks it would take its kind of an open ended financial commitment it could cost much more than 4 weeks because as you say it would be impossible to even say how many weeks it could take. It could be thousands and thousands and still not provide the full records. Wow.

I will take this to my board and we will circle back now knowing the thousands of dollars to access these public records.

Thank you again so very very much for your help.

Michele

Sent from my iPhone

On Jul 27, 2016, at 5:52 PM, Joseph Macaluso <JMacaluso@scscourt.org> wrote:

Hi Michele,

Staff are only able to provide a range of time as there's tremendous uncertainty on how long the this process will take to recreate Dept. 89's calendars.

On the very low end, they believe it will not be less than a solid week of an employee working on nothing else except this. At \$48.91, this would be about \$2000. On the high end, it could be as much as four weeks of work. As I stated earlier, it's a very manual computer process, with many steps and variables, so there is no clear predictor on the time it will take.

To get the ball rolling, as I know you would like to get these records as soon as possible, please provide a check in the amount of \$1,956.40 (clerk cost times 40 hour work week) so we can begin to work on this. The check can be made out to Santa Clara County Superior Court and the envelope can be made attention to me.

My suggestion is that we produce these in batches on a weekly basis, and will do so until the 40 hour balance is used up. We'll then have a better sense of how long it will take to do the rest (if 40 hours isn't sufficient) and you can issue another payment if necessary. The court will, of course, reimburse you should there be a balance in your favor.

Let me know if you have any questions.

Joseph D. Macaluso

Superior Court of California, County of Santa Clara

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scscourt.org

California Judicial Branch News Service cjbns.org
Socioeconomic Justice Institute socioeconomicinstitute.com

Narayan, Kavita

From: Michele Dauber [REDACTED]
Sent: Thursday, July 07, 2016 4:39 PM
To: Harman, Terry
Subject: Re: Campus Sexual Assault Work Group Meeting

Would sentences include pleas as well?

What would others be? Cases that have not yet concluded or cases that have been dismissed?

I would think 2 lists -- one of matters that have been fully resolved with conviction (whether by plea or otherwise) and sentenced and the other including all other matters. Only one name and number per matter necessary.

If date case is charged is available that's good, or the date of the conviction -- some date relevant to the case.

On Thu, Jul 7, 2016 at 4:31 PM, Terry Harman <THarman@da.sccgov.org> wrote:

Hi Michele,

Are you interested in sentencings only or all court proceedings in front of Persky?

Terry Lynn Harman
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Santa Clara County District Attorney
Ph. [408 792 2826](tel:4087922826)
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THarman@da.sccgov.org

>>> Michele Dauber [REDACTED] 7/7/2016 3:11 PM >>>

Dear Terry:

Ordered the transcript, thanks!

Can I ask another favor?

I would like to get a list of the cases (names and numbers) heard in Judge Persky's courtroom (going back as far as I can but at least the past few years). Ideally I am most interested in sex crimes (including child sex offenses and child pornography) and domestic abuse cases, but if all you have is minute orders and lists for that courtroom I can have my assistant go through every case and find the ones we are interested in looking at.

I would be most appreciative if you can help me located these records or point me to where I can find them.

Thanks so much,
Michele

On Thu, Jul 7, 2016 at 9:42 AM, Terry Harman <THarman@da.sccgov.org> wrote:

Hi Michelle,

Here is the case information:

Ming Hsuan Chiang --B1475227

Terry Lynn Harman
Assistant District Attorney

Santa Clara County District Attorney

Ph. [408.792.2826](tel:408.792.2826)

Fax [408.286.5437](tel:408.286.5437)

THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 7/6/2016 6:39 PM >>>

Hi Terry:

I wonder if you can do me a favor. i am trying to get a transcript from a plea and sentencing hearing in Judge Persky's courtroom on June 2 and apparently in order to do that I need the Name and Case number. But no one will assist me in obtaining that information and I was told it is basically impossible to get due to a "new system."

Here is what I am looking for:

I am trying to obtain a transcript of a hearing in Judge Persky's courtroom that occurred on June 2, 2016. It occurred at approximately 10:00am, and involved a plea and sentencing for a domestic violence perpetrator. The attorney for the perpetrator is Earl Jiang of Fremont. I have asked the court reporter, Carley Bagatelos to purchase the transcript. Ms. Bagatelos informed me that I had to order it from Court Services. Court Services informed me I need the name of the defendant and the case number and the minute order, but said it would not be obtainable and they could neither help me to obtain that information nor advise me on how to obtain it because of a "new system" that means there is no way to find out.

The particular case took over 1/2 hour and involved a long victim statement in which she strenuously objected to the plea. It was unusual and I am confident that the name of the case would be relatively easy to find.

Once I have the name and case number I can apparently order the transcript online.

Really appreciate it if it is possible to help me out.

Thank you,
Michele

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Narayan, Kavita

From: Michele Landis Dauber <[REDACTED]>
Sent: Thursday, October 13, 2016 12:10 PM
To: Harman, Terry
Subject: Re: status of Turner appeal

Sorry the reporter was obviously totally misinformed. Your info is the same info I gave her. Thank you!

Sent from my iPhone

On Oct 13, 2016, at 12:07 PM, Harman, Terry <tharman@dao.sccgov.org> wrote:

According to the Sixth District website, the appellant's opening brief is not even due until 11/8/16. So, I don't think any decision is imminent.

See

http://appellatecases.courtinfo.ca.gov/search/case/scheduledActions.cfm?dist=6&doc_id=2148517&doc_no=H043709

<image001.jpg>

Terry Lynn Harman
Assistant District Attorney
Santa Clara County
70 West Hedding Street
San Jose, CA 95110
408.792.2826

From: Michele Dauber [mailto:[REDACTED]]
Sent: Wednesday, October 12, 2016 5:05 PM
To: Harman, Terry <tharman@dao.sccgov.org>
Subject: status of Turner appeal

Hi Terry:

I received an email from several people telling me that Turner filed an appeal of his 290 registration and that the decision is expected imminently. Can you update me on this?

Thanks,
Michele

Narayan, Kavita

From: Michele Dauber [REDACTED]
Sent: Sunday, October 02, 2016 8:55 PM
To: Harman, Terry
Subject: I was featured on the White House United States of Women website/blog

<http://www.theunitedstateofwomen.org/blog/michele-dauber-spotlight/>

[BACK TO BLOG](#)

Spotlight: Changing Rape Culture with



SHARE  

This week, Rachel Birnam, a United State of Women Intern, sat down with Michele Dauber, a Stanford law professor, to talk about the epidemic of rape culture on college campuses. Rachel is a recent graduate of the University of California, San Diego, where she raised awareness as a student activist around sexual assault on campus, and wrote her senior thesis on Violence, Sexuality, and Women of Color.

Spotlight: Changing Rape Culture with Michele Dauber



Professor Michele Dauber is pushing to change the culture of sexual assault on college campuses by leading the recall campaign against Judge Aaron Persky, who sentenced Brock Turner to a mere 6 months in jail after he raped an unconscious woman on Stanford's campus. Prior to the Turner case, Professor Dauber co-chaired the Board on Judicial Affairs and helped to lead the process that revised Stanford's policy on sexual assault. She is a long-time advocate for improving university policies on sexual assault, increasing compliance with Title IX, and ensuring that survivor's voices are heard and believed.

Rachel: How did your past experiences in law and policy equip you to lead this charge? I'm sure you face harassment everyday for advocating for the Judge's recall – Did you ever second-guess yourself when you were starting this campaign?

Michele: My background as a faculty member at Stanford really gave me some insight into how sexual violence on college campuses is minimized and normalized in our society. That is particularly true where alcohol is involved, and alcohol is involved in the vast majority of campus sexual assault cases. What we see is that sexual assault is extremely prevalent on college campuses. 43% of undergraduate senior women at Stanford are going to experience serious sexual misconduct during their four years with us. So, my background of supporting survivors, working with survivors, and reforming Stanford's policy, is helping to inform my work with the recall campaign.

This work, additionally, has made me aware of the glaring need to treat these crimes like crimes. Not every victim wants to have their offender prosecuted, but for those who do, and there are many more that do than we see in the criminal system, they deserve to have these crimes taken seriously. It is especially disappointing that in a case, like the Turner case, in which we had every kind of evidence (eye witnesses, forensics, and a

perpetrator apprehended in the act), he was convicted by a jury of three serious sex felonies, and he was sentenced, essentially, for a misdemeanor. So, no, I've never questioned the correctness of the course that we have decided to take because women deserve justice from the courts of law and they deserve to have their cases adjudicated fairly and without bias.

“NO, I’VE NEVER QUESTIONED THE CORRECTNESS OF THE COURSE THAT WE HAVE DECIDED TO TAKE BECAUSE WOMEN DESERVE JUSTICE FROM THE COURTS OF LAW...”



You mentioned that I've been criticized for the recall campaign, and one of those criticisms that I think is particularly pernicious is that somehow this is going to have a negative effect on judicial independence. I think it's very important to clarify that judges in California are elected, not appointed. Judge Aaron Persky is an elected official. He is subject to the accountability we have come to expect from our elected officials.

There are other ways of selecting judges that put them outside of that system but that's not what we have under the California Constitution. The recall election is part of our system of holding elected officials accountable in California. To be honest, there is nothing more American and more democratic than petitioning and voting. Quite to the contrary of having a negative impact on the judicial system, we are giving people the opportunity to vote in an important case of a judge who is biased.

When people say "what about judicial independence?" I say back to that, "what about judicial bias?" Independence is important, but it depends on a lack of bias, and where you have any kind of bias in the system – racial bias, gender bias, religious bias – that negatively impacts a certain class of litigants, criminal defendants, or victims, that is a threat to the rule of law. When people do not believe that they can get justice by going to court, they lose faith in the entire legal system. Ultimately that kind of bias is very corrosive and can erode support for the legitimacy of the entire justice system.

I am confident that we're going to be successful and nothing bad will happen as a result. What will happen as a result of our campaign is that Judge Persky will no longer be a judge and someone better will have that job. In addition, we will send a message that

violent crimes against women are serious and perhaps judges need training in order to correctly decide these cases.

“WE WILL SEND A MESSAGE THAT VIOLENT CRIMES AGAINST WOMEN ARE SERIOUS AND PERHAPS JUDGES NEED TRAINING IN ORDER TO CORRECTLY DECIDE THESE CASES.”



Rachel: Speaking of Brock Turner, his case isn't the first of its kind. Why do you think this case, everything from the victim's story to his shortened sentence, resonated with people and angered people more than ever before?

Michele: First of all, I think it's the power of the statement that the survivor wrote; I think that's an extraordinarily significant piece of political writing, of literature. She really opened a window, I think, into what the experience of being a sexual assault survivor is like. For survivors, she put into words what many of them have been feeling for a long time and didn't necessarily have the words for. And for people who haven't been assaulted – friends, family members, and other people in general – it really opened their eyes to what that experience is like, as any good piece of literature should do. It took them inside that experience and elicited a compassionate response. The vast majority of the credit for the uproar has to go to her writing.

In addition to that, I think there's a second reason that we're seeing a renewed surge of interest in this topic. There is a set of people who have criticized colleges and universities, claiming that colleges shouldn't be involved in these cases, or if they do, they shouldn't make an aggressive response because supposedly these are "he said she said" situations, often involving alcohol. The argument is that supposedly colleges can't really decide who to believe, and it's just too hard for colleges and universities to tell what's happening, and you know, a lot of these cases might not even really be an assault. That has been a narrative that has many adherents. Not me, but some people have believed that.

“WE HAVE A SO-CALLED, ‘PERFECT VICTIM,’ WHO DID ‘EVERYTHING RIGHT,’ AND STILL, DIDN’T GET JUSTICE.”



The Turner case has none of those elements. We have a so-called, “perfect victim,” who did “everything right,” and still, didn’t get justice. She went to the police, she had a rape kit done within hours of the assault, there were eyewitnesses, there was DNA, there was forensic and photographic evidence, and he was apprehended at the scene. The jury heard the evidence and convicted him of three serious felony sex crimes. Then at the end of the day, she still didn’t get justice. I think that that is the thing that really, in part, provoked the outrage. I think many women felt that the message Judge Persky sent was: “even when we do ‘everything right,’ we still can’t win.”

To me the problem with that is the message that the judge sent, other than being utterly enraging, is that if you get sexually assaulted at Stanford, don’t bother to call the police. In many communities, that is already what people do. In campus communities, women almost never go to the police. Less than 3% of Stanford students who were sexually assaulted reported their assault to the campus authorities, let alone the police. When people don’t believe that they are going to be treated fairly, when they believe that they are going to get biased treatment, they lose hope and faith in the law enforcement system and in the justice system more generally.

The message that this judge sent to women on college campuses in Santa Clara County, and all over the state, and in fact, all over the country because of the amplification of the message, was if you get sexually assaulted, you’re on your own. Judge Persky’s message is that campus rape, at least when it’s committed by an athlete, is not a serious crime, it’s basically treated like a misdemeanor, so it’s not really worth your trouble to come forward. And to perpetrators, Judge Persky said don’t worry, we got your back. And that is a message that actively puts women on our college campuses in danger. That is why I feel like it has attracted the attention that it did because I think that people really perceived that; that this message is “if this happens to you, don’t come to the authorities because you won’t get help.”

Rachel: How can young people, both on and off campus, get involved with the movement to end sexual violence?

Michele: There are a lot of ways that people can get involved. First of all, on campuses, there will often be a women's organization or an anti-sexual violence organization that is doing programming and activities around this. Almost every campus has something like this, and if yours doesn't, you should start one. If your campus has something like a Take Back the Night rally, you can find out which organization is hosting it and volunteer, or try to add some programming. One thing that I think is useful is for people to run for student government and also sign up to be on a university committee that focuses on this topic. There's almost always a way that you can get involved as a student in the mechanisms themselves on your campus by being the student delegate to the faculty senate or being the student delegate to the judicial committee or by being the undergraduate government president or vice president. Those trajectories can actually put you in a position where you can take up that issue and help to make change. At Stanford, we have seen elected student government leaders really push this issue forward in a very positive way.

**"LET'S REMEMBER THIS IS PRIMARILY,
BUT NOT EXCLUSIVELY, A WOMEN'S ISSUE."**



Outside of college campuses, there are different community organizations, such as battered women's shelters, that are looking for volunteers, and the women who are served by those organizations are often victims of sexual violence because those two issues go hand in hand. There's the YWCA, which does a lot of programming for victims of sexual violence. There are millennial women's organizations, in terms of more activist spaces, like Grlcvlt, an intersectional feminist organization that is supporting the recall campaign. There are a whole host of young people's organizations that are being founded all the time that are dedicated to stopping sexual violence and doing that from an intersectional perspective that takes into account class, race, sexual orientation, and gender status. Let's remember this is primarily but not exclusively a women's issue. LGBTQ individuals are sexually victimized at higher rates than the straight community. Communities of color have particularly high rates of sexual assault, especially the Native American community, and transgender individuals have high rates of sexual violence as well, so it is certainly not the issue of any one gender or one race or one class. However, if you're asking what organizations people can join, or how they can get involved in a formal movement, often time sexual violence programming is pushed forward by women's organizations. So if you're looking for a way to get involved, that is a place to start.

Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Monday, September 26, 2016 10:53 PM
To: Harman, Terry
Subject: Re: Chapman file question

Also, is the maximum sentence added correctly on this form? To me it looks like 22 (8+8+3+3) years. But this

Code Section	Crime	Date Convicted	Case #

ALL CASES:

6. I understand the charge(s), allegation(s) and enhancement(s) against me, and the possible pleas and defenses. 6

7. I understand that the maximum sentence for the charge(s) to which I am pleading guilty or no contest to, is a state prison term of 11 years and 4 months. 7

8. If applicable - I understand there is a mandatory minimum of _____ for the offense(s) of _____ (in County). 8

PLEA AGREEMENT WITH THE DISTRICT ATTORNEY (Skip to #10 if no agreement w/ D.A.)

9a. The prosecutor, my attorney, and I have agreed that I plead guilty or no contest to the charge(s) and admit the allegation(s) and prior convictions listed above. The Court will sentence me to:

State prison for _____

I understand that upon my release from prison I will be placed on parole for up to _____ (3 years, 10 years, 20 years and 6 months, or life) or on post-release community supervision for up to 3 years.

A prison term of _____ served in County Jail with no supervision after.

A prison term of _____ with _____ by be served in County Jail followed by a term of _____ served on mandatory supervision.

says 11 years 4 mos.

I HAVE AN ATTORNEY AND I TALKED WITH MY ATTORNEY ABOUT THIS CASE

2. Before entering this plea, I have had a full opportunity to discuss with my attorney a) the facts of my case, b) the elements of the charged offense(s), prior conviction(s), enhancement(s), and special allegation(s), c) any defenses that I may have, d) my constitutional rights and waiver of those rights, e) the consequences of this plea, including immigration consequences, if applicable, and f) anything else I think is important to my case. 2

I AM THINKING CLEARLY

3. I have not recently used any medication, alcohol, or drug that is affecting my ability to understand this form or the consequences of my plea. 3

I UNDERSTAND THE NATURE OF THE CHARGES I AM PLEADING TO

4. I understand I will plead guilty or no contest to these charge(s) and admit these allegation(s): 4

Count	Code Section of Charge (or Amended Charge)	Crime	Allegation(s) (If Applicable)
CT-1	P.C. 288(A)(1)	LEWD CONDUCT	
CT-2	P.C. 288(A)(1)	LEWD CONDUCT	
CT-3	P.C. 288(D)(1)	LEWD (UNDER 14)	PC. 784-F
CT-4	P.C. 288(D)(1)	LEWD (UNDER 14)	PC. 784-F

CR-620 REV 04/04/14 ADVISEMENT OF RIGHTS, WAIVER, AND PLEA FORM FELONY Page 1 of 1

On Mon, Sep 26, 2016 at 10:46 PM, Michele Dauber <[REDACTED]> wrote:
 On this screenshot from the file, the Judge indicated that the people wanted a 9 top/bottom and the court made an offer of 6 top/no bottom. Right under that it says SM (san matco) case, D has 1 yr CNSP. Does that mean conspiracy? What does that mean?

This is a very disturbing case.

Thanks,
 Michele

Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Monday, September 26, 2016 10:47 PM
To: Harman, Terry
Subject: Chapman file question
Attachments: Screen Shot 2016-09-26 at 10.45.02 PM.png

On this screenshot from the file, the Judge indicated that the people wanted a 9 top/bottom and the court made an offer of 6 top/no bottom. Right under that it says SM (san mateo) case, D has 1 yr CNSP. Does that mean conspiracy? What does that mean?

This is a very disturbing case.

Thanks,
Michele

~~NAME~~ RICHARD CHAPMAN
Rob Richard Chapman DEFENDANT

	DISCOVERY RECEIVED
	COMPLAINT
	POLICE
	SUPPLEMENTAL
	LABORATORY
	CII RAP SHEET
	LOCAL CJIC RAP SHEET
	DMV PRINTOUT
	DISCOVERY RELEASED

AKA	CEN	AGENCY
DOB <i>09/26/1967</i>	<i>15017443</i>	<i>04312</i>
COMPLAINT FILED <i>05/01/2015</i>	VIOLATION DATE <i>04/25/2015</i>	STATEMENT OF COSTS FILED
AMOUNT OF COSTS CJAF: \$129.75	WARRANT ISSUED DATE:	TO:
WARRANT BAIL <i>\$0.00</i>	JUDGE	
WARRANT RECALLED	AMENDED COMPLAINT FILED: DATE	
WARRANT FILED	NOTICE OF ELIGIBILITY RECEIVED: DATE	
NOTICE OF INELIGIBILITY FILED: DATE	NOTICE OF ELIGIBILITY RECEIVED: DATE	

*DATA: 9 yrs T/B.
 ct: 6 yr Top full report
 SM case: & has 1 yr CNBP*

DVPO EXPIRATION DATE _____ PC977 DATE _____

DATE/ TIME TO APPEAR	BOND# / SURETY, CASH, O/R RELEASE	DATE POSTED/ FILED	AMOUNT	BAIL FORFEITED	FORFEITURE SET ASIDE/ REINSTATED	SUMMARY JUDGMENT ELIGIBLE ENTERED	EXONERATED
<i>05/01/2015 1:35PM-D89</i>	<i>1/c</i>						

DATE AND TIME	DEPT.	NAME OF COUNSEL APPEAR THIS DATE	DISPOSITION
<i>JUL 25 2016</i>	<i>89</i>	<i>McDonnell</i>	<i>Δ PG-AIC 6 yrs Top (A offer) Full Report</i>

Narayan, Kavita

From: Banfield, Ashleigh <Ashleigh.Banfield@turner.com>
Sent: Sunday, September 25, 2016 11:42 AM
To: Harman, Terry
Subject: Re: Campus Sexual Assault Symposium Agenda

Hi Terry...

Just want to forward on to you a text that Sharon sent me about a friend of hers whom she thinks would be a good addition to the panel... Please give her a call if you're interested in him... I'm also forwarding his contact information that she sent it to me.

Here's her text:

this lawyer: John Shallman has done tremendous research on the Persky case he is a valuable panel person for you. lives here in Encino.
you will like talking with him.
Sharon.

his phone # [REDACTED]

Sent from my iPhone

On Sep 23, 2016, at 7:16 PM, Terry Harman <THarman@da.sccgov.org> wrote:

Hi Ashleigh,

I hope you are doing well! Attached is an updated Symposium agenda. Have a wonderful weekend.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. 408.792.2826
Fax 408.286.5437
THarman@da.sccgov.org

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<AGENDA.FINALNov 18.docx>

Narayan, Kavita

From: Harman, Terry
Sent: Thursday, August 18, 2016 2:47 PM
To: [REDACTED]
Subject: Re: please don't share the Gunderson case to anyone due to the press exclusives

Yes, of course. No worries.
We are looking into the case from our end.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. 408.792.2826
Fax 408.286.5437

THarman@da.sccgov.org

>>> Michele Dauber [REDACTED] 8/18/2016 1:55 PM >>>

People gossip you know how it is and I have been very tightlipped about this case, due to having given those two press outlets (one national and one local) exclusives so please do keep it between us for another 2 weeks before it comes out.

Thanks,
Michele

On Thu, Aug 18, 2016 at 1:11 PM, Michele Dauber [REDACTED] wrote:
I don't want any other press organization to get it, I have given these press orgs exclusives.

Narayan, Kavita

From: Michele Landis Dauber [REDACTED]
Sent: Thursday, July 21, 2016 2:38 PM
To: Harman, Terry
Subject: Re: Robert Chain child pornography question

Oh perfect thanks. So we went and pulled the court files of everyone arrested in the sweeps from 2010, 2012, and 2014 in Santa Clara and we can't find a single person with the same profile first offense, number of images etc who got less than 6 months. This is only case from the sweeps that I see that went to persky. I also did a west law search statewide just for the heck of it and again can't find that low of a jail sentence. Is there any explanation that you see for the 4 days? I am baffled.

On the task force I talked to Stephanie and want to register my agreement with her that we should not in any way focus on the "alcohol hook up" culture that I believe was suggested last time. That will be very alienating for survivors and young women, I also think we should have breakouts if we are doing a full day -- then we could tailor the message to different groups. In particular I think we should consider subgroups such as victims of color and gender identity groups.

My two cents...

Michele

Sent from my iPhone

On Jul 21, 2016, at 11:10 AM, Terry Harman <THarman@da.sccgov.org> wrote:

Hi Michelle,

The report was from San Jose PD, not Sunnyvale. The "nonresident" notation has nothing to do with immigration; it refers to whether the person is a resident of San Jose.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. 408.792.2826
Fax 408.286.5437
THarman@da.sccgov.org

>>> Michele Dauber [REDACTED] 7/19/2016 11:14 AM >>>

Dear Terry:

Just checking back in about this case and whether you were able to find out anything that might explain this sentence of one night in jail. Also I am wondering about something in the police report. On the attached screenshot it says "nonresident." This is from the Sunnyvale PD police report. My RA is telling me this means noncitizen. Is that correct?

Thanks for your assistance,

Michele

On Wed, Jul 13, 2016 at 12:25 PM, Michele Landis Dauber <[REDACTED]> wrote:
Yes that is why I find the 1 night in jail time served just puzzling.

Sent from my iPhone

On Jul 13, 2016, at 12:24 PM, Terry Harman <THarman@da.sccgov.org> wrote:

Child pornography is always disturbing, but some images are more graphic than others. It's a visual assault and every aspect of it is completely disgusting.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Michele Landis Dauber <[REDACTED]> 7/13/2016 3:17 PM >>>
Just so you know the images included an image of a baby being penetrated by a penis or a large finger. There was a video of young girls engaged in sexual acts and dozens of photos of age 6-8 yo vaginas. I feel it will be hard to forget what I read.

Sent from my iPhone

On Jul 13, 2016, at 11:52 AM, Michele Landis Dauber <[REDACTED]> wrote:

This is helpful -- a retired judge also told me the 6 month figure. I would be most grateful to know if there is anything in the file. I was told that the probation Rec was 2 years prior to the section 17 and judge p changed it to 1 year. That is alluded to in transcript. Why only 2 days though?

Sent from my iPhone

On Jul 13, 2016, at 10:51 AM, Terry Harman <THarman@da.sccgov.org> wrote:

Hi Michelle,
From reviewing the documents you sent, it appears that the plea in this case was to an offer made by the Court. [3 years formal probation, Credit Time Served [CTS], possible §17 after 1 year probation]. The sentence is quite low. In general, first time porn possession cases garner 6 months county jail unless there is some aggravating factor warranting more time [i.e., the number of images]. However, Judge Persky is not the only judge who has given less than 6 months. It is unclear from our computer system

whether there was some fact that would warrant CTS and a §17, so I have ordered the file. The next court date [August 25, 2016] is for the judge to hear the defendant's §17 motion.

Terry Lynn Harman
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Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Michele Dauber [REDACTED]
7/11/2016 6:49 AM >>>

In trying to understand the sentence in particular, I am not an expert in this by any means so any help you can offer would be greatly appreciated. It looks to me like as it is a felony it would be 16/2/3, but it is of course eligible for less in the county jail and for probation. There is no explanation in the transcript for the 4 days (which was 2 days time served) and the images themselves were very disturbing at least according to the descriptions. Is there something that explains the 4 days that I am missing?

Thanks!
Michele

On Mon, Jul 11, 2016 at 5:22 AM, Michele Dauber [REDACTED] wrote:
Thanks Terry that would be great.

On Mon, Jul 11, 2016 at 4:19 AM, Terry Harman <THarman@da.sccgov.org> wrote:

Hi Michelle,
I will check on this.

Terry Lynn Harman
Assistant District Attorney
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Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Michele Dauber [REDACTED]
7/9/2016 8:42 AM >>>
Hi Terry:

I also am wondering about this sentence being only 4 days. Is there something that makes this case unusual?

Thanks!
Michele

On Fri, Jul 8, 2016 at 5:01 PM, Michele Dauber

<[REDACTED]> wrote:

<IMAGE.jpeg>

Dear Terry:

I have a question about how to read this file. I want to make sure I understand it correctly. It appears to me that Mr. Chain made a request to have his conviction for child porn reduced from a felony to a misdemeanor. It as scheduled to be heard on June 20 by Judge Persky (who was the judge who accepted his plea and handled his plea negotiations). On June 20 Judge Brown was there not Judge Persky, and I cannot understand his notes or the other attached documents. Was the motion to reduce the conviction to a misdemeanor granted or was it continued to 8/25? What will occur on 8/25?

Sorry I could not be at the TF today, but I hear from Stephanie it was a productive meeting. Would you please send me a call in number for the next session if possible? I am not sure where I will be but if I am able to call in I will.

It sounds like an exciting conference is taking shape!

Thanks,
Michele

<IMAGE.jpeg> <IMAGE.jpeg> <IMAGE.jpeg> <IMAGE.jp
eg>

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Narayan, Kavita

From: Michele Landis Dauber <[REDACTED]>
Sent: Wednesday, July 13, 2016 2:53 PM
To: Harman, Terry
Subject: Re: Robert Chain child pornography question

This is helpful -- a retired judge also told me the 6 month figure. I would be most grateful to know if there is anything in the file. I was told that the probation Rec was 2 years prior to the section 17 and judge p changed it to 1 year. That is alluded to in transcript. Why only 2 days though?

Sent from my iPhone

On Jul 13, 2016, at 10:51 AM, Terry Harman <THarman@da.sccgov.org> wrote:

Hi Michelle,

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The next court date [August 25, 2016] is for the judge to hear the defendant's §17 motion.

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Ph. 408.792.2826
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THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 7/11/2016 6:49 AM >>>

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Thanks!
Michele

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Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Michele Dauber [REDACTED] 7/9/2016 8:42 AM >>>

Hi Terry:

I also am wondering about this sentence being only 4 days. Is there something that makes this case unusual?

Thanks!
Michele

On Fri, Jul 8, 2016 at 5:01 PM, Michele Dauber [REDACTED] wrote:
<IMAGE.jpeg>

Dear Terry:

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Thanks,
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<IMAGE.jpeg> <IMAGE.jpeg> <IMAGE.jpeg> <IMAGE.jpeg>

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Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Tuesday, July 19, 2016 11:15 AM
To: Harman, Terry
Subject: Re: Robert Chain child pornography question
Attachments: Screen Shot 2016-07-19 at 8.04.46 AM.png

Categories: Follow-up

Dear Terry:

Just checking back in about this case and whether you were able to find out anything that might explain this sentence of one night in jail. Also I am wondering about something in the police report. On the attached screenshot it says "nonresident." This is from the Sunnyvale PD police report. My RA is telling me this means noncitizen. Is that correct?

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Fax [408.286.5437](tel:408.286.5437)
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>>> Michele Dauber [REDACTED] 7/11/2016 6:49 AM
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Thanks!
Michele

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<IMAGE.jpeg>

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<IMAGE.jpeg> <IMAGE.jpeg> <IMAGE.jpeg> <IMAGE.jpeg>

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Narayan, Kavita

From: Michele Dauber [REDACTED]
Sent: Friday, July 08, 2016 5:02 PM
To: Harman, Terry
Subject: Robert Chain child pornography question

DATE AND TIME	TYPE OF CASE	CASE NO.	AMOUNT	SAL. FORFEITURE	POPULATION	SOFT AND HARDWARE	EXEMPTED	EXEMPTED
FEB 03 2015	SA	Madden	A					
MAY 10 2015	SA	Madden	A					
MAY 20 2015	SA	Madden	A					
JUN 04 2015	SA	Madden	A					
JUL 08 2015	SA	Madden	A					
JUN 20 2015	SA	Madden	A					

Dear Terry:

I have a question about how to read this file. I want to make sure I understand it correctly. It appears to me that Mr. Chain made a request to have his conviction for child porn reduced from a felony to a misdemeanor. It as scheduled to be heard on June 20 by Judge Persky (who was the judge who accepted his plea and handled his plea negotiations). On June 20 Judge Brown was there not Judge Persky, and I cannot understand his notes or the other attached documents. Was the motion to reduce the conviction to a misdemeanor granted or was it continued to 8/25? What will occur on 8/25?

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It sounds like an exciting conference is taking shape!

Thanks,
Michele

Narayan, Kavita

From: Harman, Terry
Sent: Tuesday, June 21, 2016 1:21 PM
To: [REDACTED]
Subject: Re: People v. Ramirez

Good afternoon!

The issue of collateral consequences is not a bright-line rule, because there may be some factor that persuades the prosecution that immigration issues should be considered even though the case involves a serious crime. However, it is fair to say that the weight given collateral consequences decreases when the crime involved is a serious or violent felony.

Although waived referrals are most common when there is a top/bottom sentence involved, a top/bottom plea does not necessarily mean there is a waived referral. There are other reasons to get a full probation report (i.e., to get a victim statement, to determine restitution amounts, etc.).

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. 408.792.2826
Fax 408.286.5437
THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 6/21/2016 10:00 AM >>>

This is very very helpful. Just so I understand correctly, the more serious the crime, the less weight would be given to collateral consequences. In other words, if the crime is minor (like a minor amount of pot) but a conviction would lead to very serious collateral consequences, the prosecution would consider, whereas if the crime is rape or murder, it would not provide a basis for leniency. Is that correct? Deportation would be considered where the crime is minor (traffic infraction) but not where it is major (220/289). Thus, the fact of Mr. Rivera's immigration status would not play a role in your consideration but could from the defense perspective. Is that correct?

In a 3 year top-bottom plea agreement like this one, in which the People, the defense, and the judge all agree to 3 years, the probation report would simply be custody credits. Why then would it delay the sentencing if it is not a full report?

Thank you,
Michele

On Tue, Jun 21, 2016 at 9:54 AM, Terry Harman <THarman@da.sccgov.org> wrote:

Good morning, Professor Dauber.

Yes, there is generally a discussion of the defendant's overall criminal history in a probation report. Probation reports are accessible to the public for 60 days after the sentencing [Penal Code §1203.05(a)].

Historically, probation officers have participated in regularly scheduled settlement calendars geared at early resolution. However, it is extremely common that pleas are negotiated through discussions involving only the court and both counsel. A person's criminal history, or lack thereof, is *always* a factor in reaching a negotiated disposition, whether the probation officer is present or not. Post-plea, some cases are sent to the Probation Department for a "waived referral,"

which generally limits the Probation Department's role to calculating custody credits. Other cases are sent to Probation for a "full report" which will include the Probation officer's sentencing recommendation. Keep in mind that many negotiated pleas include a sentencing range while others have a specified "top/bottom" sentence. In those cases where the collateral consequences are significantly greater than the punishment for the crime itself, it is incumbent upon the prosecutor to consider and, if appropriate, take reasonable steps to mitigate those collateral consequences. Collateral consequences can range from loss of educational opportunities, financial assistance from the state, public housing, the ability to practice many trades or professions, and immigration consequences. For the most part, minor crimes [misdemeanors and low level felonies] tend to trigger our collateral consequences policy, as opposed to more serious crimes, such as sexual assault. Our policy is consistent with the U.S. Supreme Court case of *Padilla v. Kentucky* (2010) 130 S.Ct. 1473, which held that collateral immigration consequences of a conviction can be profound and warrant direct consideration by both the prosecution and defense. If a prosecutor determines that the crime does not warrant mitigation of immigration consequences, the defense may certainly make a separate plea to the court.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 6/20/2016 10:54 AM >>>

If you get the chance can you respond to these q's below? Calling on phone is fine if easier [REDACTED] thanks!

On Mon, Jun 20, 2016 at 10:07 AM, Michele Dauber <[REDACTED]> wrote:
So would the rest of that history be in the probation report eventually after sentencing?

Also, is it typical for the people and the judge to accept the plea and negotiate the sentence even when the probation report is not yet in?

Finally, does immigration status matter at all in sentencing in a case like this? I cannot tell Mr. Ramirez's status from this file but am wondering whether the sentence considers that in some way?

On Mon, Jun 20, 2016 at 10:04 AM, Terry Harman <THarman@da.sccgov.org> wrote:

Correct. We allege priors that are connected to the crime [strikes, Prop 8 priors, etc.] or otherwise must be part of the pleading.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 6/20/2016 9:57 AM >>>

Just to make sure I am not missing anything, all I see in the file is that there are no strikes. Is that all that is available to public?

On Mon, Jun 20, 2016 at 9:33 AM, Terry Harman <THarman@da.sccgov.org> wrote:

Good morning.
Please forgive the delayed response. All of the criminal history information that is available to the public can be found in the court file.

Terry Lynn Harman

Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

>>> Michele Dauber <[REDACTED]> 6/16/2016 8:19 PM >>>

Dear Terry:

Does Mr. Ramirez have any prior criminal history in terms of arrests or convictions that are relevant to his sentencing.

Thanks,
Michele

On Thu, Jun 16, 2016 at 3:37 PM, Terry Harman <THarman@da.sccgov.org> wrote:

Good afternoon, Professor Dauber.

I received your inquiry regarding *People v. Ramirez* [B1475841]. All of the pretrial conferences and negotiations were handled by Judge Persky. The People always maintained that the defendant should receive a state prison sentence and Judge Persky did not disagree. The People's offer was for the defendant enter a plea to a felony violation of Penal Code §289 and serve a three year state prison term [often referred to as a "3 year "top/bottom"'], and all other standard terms and conditions, including that the defendant register as a sex offender pursuant to Penal Code § 290. Judge Persky agreed with the disposition of the case.

Judge Persky was not available on the date the plea was taken, so Judge Gilbert Brown handled the plea. Sentencing was initially scheduled for June 30, 2016, but the Probation Department has requested a continuance to complete their report. There was an *Arbuckle* waiver at the time of the plea, which is standard practice, but the expectation is that Judge Persky will handle the sentencing unless he is unavailable.

Thank you.

Terry Lynn Harman
Assistant District Attorney
Santa Clara County District Attorney
Ph. [408.792.2826](tel:408.792.2826)
Fax [408.286.5437](tel:408.286.5437)
THarman@da.sccgov.org

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Narayan, Kavita

From: Hendrickson, Cindy
Sent: Friday, December 02, 2016 10:28 AM
To: Michele Dauber
Subject: January meeting
Attachments: CV - 2016.doc

Hi Michele,

I am looking forward to meeting with you on January 5th in your office. In the meantime, here is my CV. Thanks again for the tremendous compliment you have paid me by reaching out!

Cindy



Cindy Seeley Hendrickson

Education: 1987 graduate of Stanford University with an A.B. in International Relations.
1990 graduate of UCLA Law School.

Licenses: Admitted to the California Bar in December 1990.
Admitted to the District of Columbia Bar in December 1991.

Employment: Legal clerk for Johnnie L. Cochran Jr. from 1988 to 1990.

Extern for U.S. Attorney of Northern District of California – Fall of 1989.

Associate with the civil litigation firm of Thornton Taylor and Downs in San Francisco from September 1990 to May 1995.

Deputy District Attorney for the County of Santa Clara from May 1995 to September 2011.

Supervising Deputy District Attorney for the County of Santa Clara from September 2011 to December 2014.

Assistant District Attorney for the County of Santa Clara from January 2015 to the present.

Legal Associations: California District Attorneys Association (CDAA)
Santa Clara County St Thomas More Society- Board Member
William A. Ingram American Inn of Court (2011-2016)

Teaching experience:

National Elder Abuse Symposium (CDAA): November 2016 – The Role of Undue Influence in Criminal Prosecutions.

Santa Clara County Sheriff's Academy (POST): April 2016 – Domestic Violence Protocol.

National Elder Abuse Symposium (CDAA): December 2015 – The Role of Undue Influence in Criminal Prosecutions.

Elder Abuse Symposium (CDAA): December 2008 – Fraud and Financial Abuse Investigations (Panel); and Real Estate Fraud/Reverse Mortgages (Panel).

National College of District Attorney's Pilot Program: Prosecuting Elder Abuse Cases: December 2007 – Overview of Elder Abuse; Charging in Elder Abuse Cases; Ethics and Professionalism; Crawford issues; Sentencing in Elder Abuse Cases.

Elder Abuse Symposium (CDAA): December 2005 – Prosecutor’s Toolbox.

Elder Abuse Awareness Conference (CDAA): May 2005 – Financial Elder Abuse.

California Mortgage Association: April 2005 – The Impact of Elder Abuse Laws on Lenders, Escrows and Trustees.

Silicon Valley Bar Association: February 2005 – Elder Abuse, The Criminal Perspective.

Elder Abuse Symposium (CDAA): February 2005 – Financial Abuse Interviews – Questioning Victims and Suspects.

Elder Abuse Symposium (CDAA): December 2004 – Roundtable Discussion of Experiences and Skills.

Elder Abuse Symposium (CDAA): December 2003 – Investigating and Prosecuting Undue Influence Cases.

National Association of Bunco Investigators (NABI): May 2000 and October 2003 – Prosecution Strategies.

“Beyond Awareness” Elder Abuse Conference hosted by the Lake County District Attorney’s Office: October 2003 – Investigating and Prosecuting Undue Influence Cases.

California State Bar: September and October 2003 – Elder Abuse: The Domestic Violence Problem of the 21st Century.

Santa Clara County Estate Planning Council: September 2003 – Elder Abuse: The Domestic Violence Problem of the 21st Century

Elder Abuse Symposium (CDAA): December 2002 – Investigating and Prosecuting Undue Influence Cases.

California Department of Justice: August 2001 - Fiduciary Issues in Elder Abuse.

Numerous Peace Officer Standards and Training “POST” courses in Santa Clara County since May 1999 on various topics relating to investigating and prosecuting elder fraud and domestic violence cases. Assisted in teaching recruits about writing reports and testifying at preliminary examinations.

Frequent speaker at local rotary clubs, professional and service organizations, and senior citizen groups on the topic of elder financial abuse 1999-2008.

Lecturer for other county agencies and advocacy groups on topics related to domestic violence and elder abuse prosecutions since 1999.

Awards:

1996 winner of Santa Clara County District Attorney's office Robert Webb award for misdemeanor trial attorney of the year.

1998 winner of the St Thomas More Society of Santa Clara County person of the year award.

2000 winner of the Santa Clara County District Attorney's office Clay Haupt award for excellence.

Personal:

Raised in Alexandria Virginia in a family of thirteen that included children adopted from various racial and ethnic backgrounds. Married mother of three daughters.

Narayan, Kavita

From: Michele Dauber [REDACTED]
Sent: Friday, December 02, 2016 10:23 AM
To: Hendrickson, Cindy
Subject: personal email?

Can you send me your personal email and cell?

Thanks!
Michele

Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Thursday, December 01, 2016 5:53 PM
To: Hendrickson, Cindy
Subject: Re: lunch meeting

I actually have an 8:00am conference call. Can I call you after?

On Thu, Dec 1, 2016 at 5:10 PM, Michele Dauber <[REDACTED]> wrote:
What number should I call?

On Thu, Dec 1, 2016 at 5:10 PM, Hendrickson, Cindy <chendrickson@dao.sccgov.org> wrote:

Yes! I should be in by about 8:30. Talk to you soon.

Cindy

From: Michele Dauber [mailto:[REDACTED]]
Sent: Thursday, December 01, 2016 5:08 PM
To: Hendrickson, Cindy <chendrickson@dao.sccgov.org>
Subject: Re: lunch meeting

Dear Cindy:

Do you have a minute to chat on the phone tomorrow by any chance?

Best,

Michele

On Thu, Sep 29, 2016 at 11:50 AM, Hendrickson, Cindy <chendrickson@dao.sccgov.org> wrote:

Thanks!

From: Michele Dauber [mailto: [REDACTED]]
Sent: Thursday, September 29, 2016 11:30 AM
To: Hendrickson, Cindy <chendrickson@dao.sccgov.org>
Subject: Re: lunch meeting

there is pay parking by Tressider.

On Thu, Sep 29, 2016 at 11:25 AM, Hendrickson, Cindy <chendrickson@dao.sccgov.org> wrote:

That sounds perfect! Just tell me where to park...See you then!

Cindy

From: Michele Dauber [mailto: [REDACTED]]
Sent: Thursday, September 29, 2016 10:48 AM
To: Lauren Schoenthaler [REDACTED] >
Cc: Hendrickson, Cindy <chendrickson@dao.sccgov.org>
Subject: Re: lunch meeting

11:30 at faculty club is great.

Lauren Happy Birthday.

On Thu, Sep 29, 2016 at 10:47 AM, Lauren Schoenthaler [REDACTED] > wrote:

Hi All!

Cindy it is always a pleasure! It's been too long. I hope all is well with you and yours. I could meet for a quick lunch on 10/12 here on campus if possible. I have a 1 pm that I can't push, so I was hoping for 11:30 at the faculty club. That said, I am perfectly happy to bow out for you two to meet.

Kind regards,

Lauren

On Wed, Sep 28, 2016 at 3:11 PM, Hendrickson, Cindy <chendrickson@dao.sccgov.org> wrote:

p.s. Happy birthday tomorrow Lauren!

Cindy

From: Michele Dauber [mailto: [REDACTED]]
Sent: Wednesday, September 28, 2016 12:11 PM
To: Lauren Schoenthaler [REDACTED] Hendrickson, Cindy <chendrickson@dao.sccgov.org>
Subject: lunch meeting

Hi Cindy and Lauren:

Cindy was kind enough to allow me to call and start our conversation over and apologize for the poor communication on my end. We would love to schedule a time for the three of us to have lunch, hopefully week of 10/10 to discuss dating violence and how we can do more to prevent and address it on campus, as well as to educate me further on the problems of DV prosecution in SCC.

Just to get the ball rolling I am good every day that week other than 10/13.

Thanks,

Michele

Narayan, Kavita

From: Richard Alexander <ra@alexanderlaw.com>
Sent: Tuesday, May 02, 2017 11:01 AM
To: Hendrickson, Cindy
Cc: Michele Dauber; Rich Robinson; Carole DiFilippi
Subject: enjoyed meeting you
Attachments: Rape Crisis - The Victim's Rights.pdf

Hi Cindy,

Carole and I enjoyed meeting you last night and look forward to seeing your campaign unfold. Definitely get back to me and let me know who else is in the race. Put me on your email update list, s.v.p.?

Here is my 1979 county bar project that became a training manual for YWCA rape crisis counsellors.

For far too long there has not been a strong voice for recognition of this issue. Thank goodness there now are vigorous advocates with a public voice ringing the bell of knowledge and truth that has been heard loudly and clearly across the U.S. You are an important part of effort.

You definitely should talk to Rich Robinson who is an astute political campaign consultant with 30 years of experience. He knows the ins and outs of Santa Clara County, the Supervisors and numerous city council campaigns and more importantly he knows where the bodies are buried. And he knows the rules for judicial campaigns from his previous clients. Rich has perfected cutting edge social media campaigning that no one has used as effectively as he has. Give him a call 408.458.0673.

Go break a leg.

Onward,

Dick

Richard Alexander
[ALEXANDER LAW GROUP, LLP](#)
99 Almaden Blvd Suite 575
San Jose, CA 95113
408.289.1776/ fax 287.1776
Cell 650.492.1776

Narayan, Kavita

From: Michele Dauber [REDACTED] >
Sent: Wednesday, September 28, 2016 2:56 PM
To: Hendrickson, Cindy
Subject: DV case
Attachments: Screen Shot 2016-09-28 at 2.50.08 PM.png

Dear Cindy:

Thanks for your generosity with your time today. I really apologize again for my failure to communicate very well. I feel badly.

I wanted to attach the 17(b) commitment from Mr. Canala's plea agreement. Based on the plea form I had thought it was part of the plea deal but I could be wrong.

Here's another case I have a question about (that I mentioned today):

B1581137 Keenan Smith

I am confused about what happened with the sentence in this case. It appears that he never showed up to begin his sentence or to do his DV classes but then I can't tell what happened as a result of that. Can you help me understand?

Thanks,
Michele

California Judicial Branch News Service - cjbns.org
Socionomic Justice Institute - socionomicjustice.com

ALL CASES:

6. I understand the charge(s), allegation(s) and enhancement(s) against me, and the possible pleas and defenses.

6.
J.M.C

7. I understand that the maximum sentence for the charge(s) to which I am pleading guilty or no contest to, is a state prison term of 3 years and _____ months.

7.
J.M.C

8. If applicable - I understand there is a mandatory minimum of _____ for the offense(s) of _____ in Count(s) _____.

8.
X

PLEA AGREEMENT WITH THE DISTRICT ATTORNEY (Skip to #10 if no agreement w/ D.A.)

9a. The prosecutor, my attorney, and I have agreed that if I plead guilty or no contest to the charge(s) and admit the allegation(s) and prior convictions listed above, the Court will sentence me to:

9a.
J.M.C

- State prison for _____
- I understand that upon my release from prison I will be placed on parole for up to _____ (3 years, 10 years, 20 years and 6 months, or life) or on post-release community supervision for up to 3 years.
- A prison term of _____ served in County Jail with no supervision after.
- A prison term of _____ with _____ to be served in County Jail followed by a term of _____ served on mandatory supervision.
- County jail for 4 months - 120 days and up to 5 years on probation.
- A range of punishment from _____ up to _____.
- If applicable - understand I am not eligible for probation.
- Probation Limitation/Romero - I understand I will not be granted probation unless the Court finds that this is an unusual case where the interests of justice would be best served by granting probation.
- If applicable - As part of the plea agreement, I understand the other count(s), allegation(s), and/or enhancement(s) will be dismissed at the time of sentencing.
- If applicable ("Harvey Stipulation") - I agree that the Court can consider dismissed counts at sentencing, including by ordering me to pay restitution to any victim(s) in dismissed count(s).

If applicable - Additional term(s) of the plea agreement:
After 1 yr of successful Probation
case can be reduced to a Murderer
pursuant to §17-PC.

There are no other agreements, and everything above is the total agreement. All other sentencing requirements/terms are left to the discretion of the Court.

Narayan, Kavita

From: Michele Landis Dauber [REDACTED]
Sent: Tuesday, September 06, 2016 3:01 PM
To: Ramos, Luis
Subject: Re: Reporter from Stanford Daily attending class on Wednesday

The address is 559 Nathan Abbott way Stanford in room n104

Sent from my iPhone

On Sep 6, 2016, at 2:58 PM, Luis Ramos <LRamos@da.sccgov.org> wrote:

Hi Michele. Thanks for your note. I think it's fine for you to inform the class at the outset that we will not discuss the Turner case. I have no objection to the reporter's presence under the scenario you describe below. Will you please provide the address and/or directions where I need to go tomorrow at 9:00? Thanks, L.

Luis M. Ramos
Supervising Deputy District Attorney, Sexual Assault
Santa Clara County
408.792.2793
lramos@da.sccgov.org

>>> Michele Dauber [REDACTED] 9/3/2016 2:42 PM >>>
Hi All:

This is to make you aware of two things. First, Luis stated to me that he does not want to have discussion of the Turner case. That is fine with me as a groundrule and Mike I assume you feel the same way. Shall I just state that at the outset?

Second, a student reporter from the Stanford Daily would like to attend class that day. I am generally inclined toward openness and transparency and allow reporters and community members to attend all my classes generally speaking. I have told her that she cannot quote anyone in the class other than me without their specific consent, including students and guest speakers (in other words, everything is off the record unless she gets a specific consent after class from the speaker). If you are uncomfortable with her being there even under that rule, please let me know ASAP.

Best,
Michele

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Narayan, Kavita

From: Ramos, Luis
Sent: Friday, October 14, 2016 1:40 PM
To: Michele Landis Dauber; Harman, Terry
Subject: RE: What Michelle Obama Didn't Say

Well done, Michele. Congratulations. L.

-----Original Message-----

From: Michele Landis Dauber [mailto:]
Sent: Friday, October 14, 2016 11:34 AM
To: Harman, Terry <tharman@dao.sccgov.org>; Ramos, Luis <lramos@dao.sccgov.org>
Subject: What Michelle Obama Didn't Say

<http://www.politico.com/magazine/story/2016/10/trump-sexual-assault-women-michelle-obama-speech-214357>

Sent from my iPhone

California Judicial Branch News Service cibns.org
Socioeconomic Institute socioeconomicinstitute.com



AP Photo

IN THE ARENA

What Michelle Obama Didn't Say

The first lady is right: enough is enough. But first we need to start holding enablers and bystanders accountable for sexual assault.

By MICHELE LANDIS DAUBER | October 14, 2016

Since Donald Trump's videotaped confession of sexual assault came to light last week, we have been subjected to a sickening string of allegations from women who have recounted being groped and harassed by the GOP nominee. These include a woman who told the *New York Times* that Trump—a complete stranger—stuck his hand up her skirt on a first-class flight to New York in the 1980s, and a *People* magazine reporter who said that in 2005, Trump pinned her against a wall and forced his tongue down her throat. As Michelle Obama said on Wednesday, "Enough is enough."

As a society, we have to acknowledge that successful sexual assault—successful, that is, from the perspective of perpetrator—isn't a one-man job. It needs a crowd of excusers, enablers,

and minimizers to ensure that the assault doesn't end badly for the perpetrator, even if the victim complains. In the various institutions of American society, men (and it is almost always men) who commit sexual assault have mostly been able to count on that crowd of enablers. That has been particularly true of privileged men like Trump.

Although Trump has denied these new allegations, they have the ring of truth. Over the years, we have heard him on Howard Stern and listened to the similar stories of other women about his long history of sexual harassment and forced sexual encounters. We can also recognize the telltale signs of male entitlement in his bluster and self-absorption. The important question now is whether GOP leaders will repudiate Trump once and for all or continue to minimize both the seriousness of his offenses and their implications for his candidacy.

But it is not just the Republican Party. Examples of enabling and excusing sexual misconduct elsewhere abound. The military has promoted officers who rape while drumming out their female victims. Colleges and universities have looked the other way at serial sexual assault, particularly when committed by athletes and professors. Even in those rare instances when victims file criminal charges, judges often deliver unreasonably lenient sentences, sending the message that these crimes are just not all that serious.

One of the most notorious examples in the latter category is the case of Brock Turner, a recruited athlete at Stanford who was sentenced to only a few months in jail, despite his conviction for three felony sex crimes for assaulting an unconscious woman behind a dumpster during a frat party. The judge disregarded the victim's compelling statement asking for a longer sentence. Turner blamed his crime on Stanford's "party culture." Turner's father, another enabler, argued to Judge Aaron Persky that it would be unfair to send his son to prison over what he described as "20 minutes of action." The judge agreed, and made an exception. Prison, according to Judge Persky would "have a severe impact on him."

The script that Trump's team has trotted out—"It was a long time ago, it doesn't reflect who he really is, he didn't really mean it, it was just locker room talk, he respects women, it's not a big deal, let's move on"—is straight out of the standard repertoire of minimization and denial for enablers. One can easily imagine Alabama Senator Jeff Sessions arguing that the footage only reflects 20 minutes of action out of Trump's lengthy career in business and philanthropy.

This litany of excuses is standard because it almost always works. Men usually get away with it. Women know this. We're not dumb and we know what comes next. We remember

the enablers of the Senate Judiciary Committee who gave Clarence Thomas a pass to the Supreme Court.

That explains the current wave of unrestrained, snarling rage from women—including some Republican women who are literally losing it over the fact that their party leadership will not withdraw their endorsements of this serial sexual predator. How can it be 2016 and nothing has changed? How can we still be dealing with *this*? But the *this* is not just Trump's hideous conduct, though that is plenty bad. Our anger is not solely or even primarily directed at Trump. It is directed at the powerful men and institutions, like House Speaker Paul Ryan and the RNC, that refuse to hold him accountable.

Over and over, the institutions that women count on to protect us have betrayed us, exacerbating the injury of the assault. Men in power have valued the careers of other men—as athletes, as soldiers, as corporate officers – as politicians – far more than they have valued our right to be free of the grossest and most personal kinds of violations. They have looked the other way.

As a result, sexual assault is epidemic. For example, at Stanford University where I teach, nearly 40 percent of undergraduate women experience some form of sexual assault or serious sexual misconduct. The figures are even worse for some groups such as women of color, disabled women and LGBT students. Yet fewer than 3 percent of these assaults are reported to campus authorities.

One reason may be that the same survey found that only 28 percent of women and 45 percent of men think that it's very likely that Stanford would hold anyone found responsible for sexual assault accountable. It is these university officials, seen by many as enablers, who often draw the strongest fire from students.

In this respect, the anger over sexual assault shares elements in common with the anger over police abuses in minority communities. In both cases, the lack of accountability and the willingness of authorities to enable and excuse the conduct of offenders often draws the sharpest protest.

Women are demanding greater accountability not only from offenders but also from enablers and their institutions. We want an end to the easy expectation of impunity. We have deployed a mix of shame, legal pressure, and publicity in various domains in order to raise the cost of bystanding.

For example, Baylor recently fired both University President Kenneth Starr and its popular football coach for failing to respond appropriately to sexual assaults by members of the

football team. At UC Berkeley, President Janet Napolitano—perhaps wanting to avoid Starr’s fate—pushed out both the provost and the chancellor over the failure to properly handle sexual harassment and assault. In the military, some officers are finally being disciplined for failing to respond to sexual assault. Here in Silicon Valley, women have lined up behind a recall election campaign against Judge Persky.

The tactical logic of this movement is clear. Going after enablers cuts off the oxygen for sexual assault. When university administrators lose their sinecures, or generals get hauled before Congressional committees to be railed at by Senators Kirsten Gillibrand and Claire McCaskill, and colonels see their careers get cut short because they failed to stop sexual assault by the captains and majors under them—perpetrators get a little more lonely, and a little more likely to face the consequences of their assaults.

What of those officials who have refused to withdraw their endorsements from Trump, including the RNC, Speaker Paul Ryan and Senate Majority Leader McConnell? As of this writing, Trump continues to be endorsed by hundreds of Republican elected officials, including more than 2 dozen US senators. An endorsement may be given for party loyalty or to appeal to a faction of supporters, but its public meaning is that the person endorsed is the person best suited to hold an office. Discovering that their candidate has bragged about committing sexual assault leaves his endorsers in a serious bind. Some like John McCain, who is in a tight race against a female opponent, have decided to bolt.

Donald Trump’s shock and anger at these defections is palpable, and understandable. These losses are a significant deviation from the enabler’s playbook. It appears, however, that for the most part Republicans are sticking to the script. Trump is mostly receiving pro-forma condemnations of his statements without losing endorsements. That’s the political equivalent of Judge Persky’s six month sentence—a slap on the wrist that won’t “have a severe impact” on him.

Trump’s confession of sexual assault puts an excruciating question to the GOP: What happens when a major political party and the crowd of enablers for a sexual assault perpetrator are one and the same, when the GOP becomes the Grand Old Frat Party?

For some, particularly Mormon Republicans, this is a moral question with an obvious answer, and they abandoned Trump in droves after the tape became public. For most, though, it is a political question: Will women apply the same logic to the Republican Party as to senior military officers, university presidents, or judges who excuse sexual assault in their domains? If so, the political survival of the party and its leadership depends on cutting

ties to Trump now. If not, then Trump is a short-term problem that the voters will solve in a few weeks, and it makes no sense to sacrifice the principle of party unity.

Most Republicans seem to believe that they and their party will not be held accountable for their enabling of Trump. Women have the power to prove them wrong. Let's use it.

Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Wednesday, August 17, 2016 5:27 PM
To: Rosen, Jeff
Subject: Re: [REDACTED]

I mean that tongue in cheek, BTW, :)

On Wed, Aug 17, 2016 at 5:26 PM, Michele Dauber <[REDACTED]> wrote:
Glad to hear it. You missed a great event. Did they tell you that two jurors showed up to show their support for the recall? You should reconsider.

On Wed, Aug 17, 2016 at 3:43 PM, Jeff Rosen <jrosen@da.sccgov.org> wrote:
[REDACTED]

Sent from my iPhone

> On Aug 17, 2016, at 2:46 PM, Michele Dauber <[REDACTED]> wrote:
> [REDACTED]
> [REDACTED]
> M

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California Judicial Branch News Service cjbns.org
Socioeconomic Justice Institute socinst.org

Narayan, Kavita

From: Michele Dauber [redacted] >
Sent: Thursday, August 31, 2017 8:26 AM
To: Welch, Brian
Subject: Re: where Keenan Smith was on Sunday 10/4

Hi Brian:

Would this be better to talk about over the phone? I'd be glad to talk about it. [redacted]

I have the file and am aware of the challenges in the case. I can see the body attachment.

Thanks,
Michele

On Thu, Aug 31, 2017 at 8:23 AM, Welch, Brian <bwelch@dao.sccgov.org> wrote:

Hi Michele,

Mr. Tadevosyan was remanded on July 21, 2016, to serve 90 days in jail. Victim informed my office in October that Mr. Tadevosyan had left the country. I doubt that he served time on SWP after his release and before he fled, but I would have to make some calls to confirm that. I am concerned that you are using this case as an example of Judge Persky's handling of DV cases. Please know that the victim was extremely uncooperative and was represented by counsel. The negotiated disposition we reached in this case was exceptional in light of the challenges we were up against.

Brian

From: Michele Dauber [mailto:[redacted]]
Sent: Wednesday, August 30, 2017 8:03 PM

To: Welch, Brian <bwelch@dao.sccgov.org>
Subject: Re: where Keenan Smith was on Sunday 10/4

Dear Brian thanks for the info. Did Mr. Tadevosyan ever serve any part of this sentence and if so which part? If it's easier to chat feel free to call me [redacted].

Thanks!

Michele

On Mon, Aug 28, 2017 at 1:11 PM Welch, Brian <bwelch@dao.sccgov.org> wrote:

Hi Michele,

There are no future court dates for Mr. Tadevosyan because the court issued a no-bail warrant for his arrest in November of 2016. He may have fled the country. I don't know if you've been in contact with the victim, but if you have information that's different from mine, please let me know. Thanks.

Brian

Brian M. Welch

Assistant District Attorney

Santa Clara County District Attorney's Office

70 W. Hedding Street

San Jose, CA 95110

[\(408\) 792-2624](tel:(408)792-2624)

From: Michele Dauber [mailto:

Sent: Saturday, August 26, 2017 8:58 AM

To: Welch, Brian <bwelch@dao.sccgov.org>

Subject: Re: where Keenan Smith was on Sunday 10/4

Dear Brian:

How are you? Well I hope.

I am writing to follow up on the case of Mr. Tadevosyan about whom we emailed and spoke last year in October. I have provided you with our prior email below for your reference.

Mr. Tadevosyan you will recall accepted a plea arrangement that sentenced him to spend 45 days in county and then get 274 days of work crew. As of October, he had not appeared for work crew. I am writing to see if he ever appeared for work crew and if not what the follow on to that was.

If it is easier to talk on the phone, please feel free to call [REDACTED]

Sincerely,

Michele

On Tue, Oct 11, 2016 at 11:05 AM, Welch, Brian <bwelch@dao.sccgov.org> wrote:

As soon as we have that date I'll make sure to let you know.

We also asked the jail about Mr. Tadevosyan, who you will recall you also inquired about. He has not yet reported for his weekend work, which was scheduled to begin on 9/17/16.

These developments have come as quite a surprise to many of us, because we have been under the impression that the jail and probation carefully monitor defendants on weekend work. Clearly, that's not happening. The jail has told us that they don't report to probation when someone fails to appear. Rather, they wait for the probation officer to contact them for a compliance update.

We're in contact with probation about this situation in general. Stay tuned.

Narayan, Kavita

From: Welch, Brian
Sent: Tuesday, October 18, 2016 8:27 AM
To: Michele Dauber
Subject: RE: pleadings for today

We won't know our position until we've heard from the probation officer and the defendant on the reasons for his failure to do weekend work. The court has options, such as imposing additional jail time for violating probation. Serving some jail time, even if just for a weekend, would seem appropriate.

From: Michele Dauber [mailto: [REDACTED]]
Sent: Tuesday, October 18, 2016 7:59 AM
To: Welch, Brian <bwelch@dao.sccgov.org>
Subject: Re: pleadings for today

What will you guys be asking for given the fact that he has been dropped from weekend work again? Perhaps he should have more frequent DVRs and complete his sentence on Sa/Sun from here out. Sometimes athletes have to miss games when they commit crimes. It happens. It's not as bad as missing work or class.

Thanks,
Michele

On Tue, Oct 18, 2016 at 7:55 AM, Welch, Brian <bwelch@dao.sccgov.org> wrote:

She will appear if the case can't be called at the beginning of the calendar when Aleh will be there. Aleh may have to leave before the calendar is completed, so Clarissa may stand in then. It's better for Aleh to make the appearance because she's handled the case from the outset.

From: Michele Dauber [mailto: [REDACTED]]
Sent: Tuesday, October 18, 2016 7:52 AM
To: Welch, Brian <bwelch@dao.sccgov.org>
Subject: Re: pleadings for today

OK, I thought I saw an email that you had said that the supervising DA was making the appearance. Did I remember that incorrectly?

What are the people asking for today?

On Tue, Oct 18, 2016 at 7:48 AM, Welch, Brian <bwelch@dao.sccgov.org> wrote:

We did not file anything for today's hearing, mostly because we don't have all the facts that probation has. I don't know if the defense filed anything. The probation department filed a report, but it's in our file with Ms. Kianerci who will be making the appearance.

Brian

From: Michele Dauber [mailto:[\[REDACTED\]](mailto:)]
Sent: Tuesday, October 18, 2016 7:37 AM
To: Welch, Brian <bwelch@dao.sccgov.org>
Subject: Re: pleadings for today

In the Smith case.

On Tue, Oct 18, 2016 at 7:37 AM, Michele Dauber <[\[REDACTED\]](mailto:)> wrote:

Hi Brian:

Can you send me copies of the pleadings from the DA, the defense and anything filed by the probation department today?

Thanks,

Michele

Narayan, Kavita

From: Welch, Brian
Sent: Tuesday, October 11, 2016 11:06 AM
To: Michele Dauber
Subject: RE: where Keenan Smith was on Sunday 10/4

As soon as we have that date I'll make sure to let you know.

We also asked the jail about Mr. Tadevosyan, who you will recall you also inquired about. He has not yet reported for his weekend work, which was scheduled to begin on 9/17/16.

These developments have come as quite a surprise to many of us, because we have been under the impression that the jail and probation carefully monitor defendants on weekend work. Clearly, that's not happening. The jail has told us that they don't report to probation when someone fails to appear. Rather, they wait for the probation officer to contact them for a compliance update.

We're in contact with probation about this situation in general. Stay tuned.

Brian

From: Michele Dauber [mailto: [REDACTED]]
Sent: Tuesday, October 11, 2016 9:03 AM
To: Welch, Brian <bwelch@dao.sccgov.org>
Subject: Re: where Keenan Smith was on Sunday 10/4

They had a bye week according to the football schedule, so he wasn't traveling with the team, so even if anyone was inclined to think that was a good reason to miss your sentence, that excuse does not exist for October 9.

Please let me know ASAP when you have a date?

Thanks,
MLD

On Tue, Oct 11, 2016 at 8:53 AM, Michele Dauber < [REDACTED] > wrote:

Hi Brian do you know when that will e?

On Tue, Oct 11, 2016 at 8:47 AM, Welch, Brian <bwelch@dao.sccgov.org> wrote:

Hi Michele,

We are getting this case put back on calendar to deal with these issues. He also failed to show up for weekend work on 10/9.

Brian

From: Michele Dauber [mailto: [REDACTED]]
Sent: Monday, October 10, 2016 1:44 PM
To: Welch, Brian <bwelch@dao.sccgov.org>
Subject: Re: where Keenan Smith was on Sunday 10/4

I am pretty sure this is him playing football on 9/3, the day before he had a "medical" excuse for 9/4. Maybe someone else was wearing his number that day. If it's him, he looks healthy. Just saying.

On Mon, Oct 10, 2016 at 9:01 AM, Michele Dauber [REDACTED] wrote:

Sorry I mean DID not get back not COULD not get back. Obviously if he was motivated to care about serving his sentence he would have driven his own car to Sac or taken a bus or done whatever he had to do including missing the game to get back to do what he was supposed to do.

On Mon, Oct 10, 2016 at 9:00 AM, Michele Dauber [REDACTED] wrote:

Sorry I mean Sunday 10/2. Game was in Sac on 10/1 at 6pm and I am going to guess they stay overnight in Sac and he could not get back to serve his sentence in the morning.

On Mon, Oct 10, 2016 at 8:44 AM, Michele Dauber [REDACTED] wrote:

<http://www.smdailyjournal.com/articles/sports/2016-10-03/csm-dealt-landslide-loss/1776425169241.html>

A 49-yard run by Bulldogs running back Keenan Smith to the Beavers' 10-yard line proved the CSM's last hurrah. Place kicker Carlos Silva followed with a missed 27-yard field-goal attempt, to which American River answered with a 47-yard Dahl-to-Brenden McCarthy touchdown pass.

Team played in Sacramento.

Narayan, Kavita

From: Welch, Brian
Sent: Friday, September 30, 2016 10:49 AM
To: [REDACTED]
Cc: Hamilton, Clarissa
Subject: Palo Alto DV Case

Dear Michele,

I am the Assistant DA overseeing the Palo Alto branch office. I previously supervised that office, which is now under the direct supervision of Clarissa Hamilton. Please do not to hesitate to contact me or Clarissa if you wish to discuss particular cases assigned to Palo Alto. I researched the Gunderson case when you brought it to our attention, and I have no qualms looking at other cases that interest you.

Cindy mentioned that you inquired about the Tadevosyan case. I am very familiar with that case, as is Clarissa, because of its seriousness and the challenges presented by the uncooperative victim and her retained attorney, Dennis Lempert. Deputy District Attorney Alex Adams was assigned that case, and despite his valiant efforts to persuade the victim to cooperate, she steadfastly refused to do so. Without the victim, our likelihood of success at trial was significantly reduced. The negotiated disposition was the product of our conversations with defense counsel. The court had very little input, other than to approve the negotiated terms. We agreed to extensive weekend work in lieu of straight jail time to allow the defendant to keep his job. Because the defendant financially supports the victim and her child, we were concerned that his jail term would cause him to lose his job, thus inflicting further hardship on the victim. I also view weekend work as a legitimate form of punishment in select cases. We were very pleased with this disposition, and if the defendant fails to meet the weekend work commitment, he will be remanded to custody.

I hope this email answers your questions.

Brian M. Welch
Assistant District Attorney
Santa Clara County District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110
(408) 792-2624

Narayan, Kavita

From: Michele Dauber [REDACTED] >
Sent: Monday, October 10, 2016 1:44 PM
To: Welch, Brian
Subject: Re: where Keenan Smith was on Sunday 10/4
Attachments: Facebook Screenshot Smith playing 9.2.png

I am pretty sure this is him playing football on 9/3, the day before he had a "medical" excuse for 9/4. Maybe someone else was wearing his number that day. If it's him, he looks healthy. Just saying.

On Mon, Oct 10, 2016 at 9:01 AM, Michele Dauber [REDACTED] > wrote:
Sorry I mean DID not get back not COULD not get back. Obviously if he was motivated to care about serving his sentence he would have driven his own car to Sac or taken a bus or done whatever he had to do including missing the game to get back to do what he was supposed to do.

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A 49-yard run by Bulldogs running back Keenan Smith to the Beavers' 10-yard line proved the CSM's last hurrah. Place kicker Carlos Silva followed with a missed 27-yard field-goal attempt, to which American River answered with a 47-yard Dahl-to-Brenden McCarthy touchdown pass.

Team played in Sacramento.



Narayan, Kavita

From: Michele Dauber <[REDACTED]>
Sent: Thursday, October 06, 2016 4:44 PM
To: Welch, Brian
Subject: Re: Keenan Smith

Hi Brian:

Thanks for talking today. I sent you the court file along with some screenshots.

The thing that confuses me is that the 4.5.16 note from the jail says he didn't show up on April 2 to commence his sentence (and that is what the probation letter on 7.15.16 also says. Does this mean he NEVER appeared for his sentence of just that he failed to show on April 2 but did show on April 3. I THINK it means he never showed. I am not sure. On April 25, the transcript shows that he had not yet (nearly 2 months after his plea) even talked to a PO, nor had he yet signed up for DV class (see timeline below)

3.2.16 Guilty Plea, requires him to serve wwp Sa-Sun from 4/2 until football seasons starts 8/6

4.2.16 failed to show to commence sentence

4.5.16 notice of violation issued by sheriff DOC

4.28.16 Had done nothing, not even met with PO.

5.25.16 DV review, says he's enrolled, and probation says he's "otherwise in compliance." Had he yet showed up to jail?

7.15.16 Probation sends letter changing his sentence to just Sunday giving him new surrender date of 8/7 and new weekend work start date of 8/25 (6 months after he was originally to start in April)

8.16.16 dropped from DV because of 3 no-shows. Nothing happens. Asked to sign up by 9/13

9.13.16 states that he signed up on 9.12.16

Here's my question. Did he EVER show up between April 2 and 7/16 or did he just NEVER show up to jail at all before 8.25. Has he showed up yet?

I am attaching one of the humorous (to me) moments from the

2 see the officer of the day. They'll give you a referral so you
3 can get enrolled in the domestic violence program. And then why
4 don't we come back May 24th. Is that enough time for him to get
5 into the program, Ms. Salas?
6 PROBATION: It should be.
7 THE COURT: Let's come back May 24th. That's at 1:35
8 here in Department 89. We're looking for proof of enrollment by
9 then. Okay?
10 MS. MULLER: Your Honor, I don't know if this is
11 possible, but Mr. Smith is playing football for a pretty serious
12 school. And he has practice on Tuesdays. It's difficult for
13 him to miss. Is there any other day that he could come in to
14 show proof?
15 COURT PROBATION OFFICER: Wednesday afternoon?
16 (Ms. Muller conferring with the defendant.)
17 MS. MULLER: Wednesday would work.
18 THE COURT: Okay. So that's May 25th instead. So we
19 have a special set on the Prop 36 calendar May 25th at 1:35 here
20 in Department 89. That's for proof of enrollment in a DV
21 program. Okay? Thank you.

transcript.

Thanks,
Michele

On Thu, Oct 6, 2016 at 4:33 PM, Michele Dauber <[REDACTED]> wrote:



Keenan Smith (1).pdf

County of Santa Clara
Memorandum



STATEMENT OF JAIL SENTENCES

TO: Department of Corrections
FROM: Probation Department - Adult Division

DATE: 07/14/11
FID NUMBER: 103 P. 100
PHONE: (408) 455-1800

RE: Brian Keenan

AKA: Brian Keenan

CASE NUMBER: 43403 01/01/11

POB: 11/24/65

BOOKING NUMBER: 0000000000

DOC#: 000000

RECEIVED
JUL 15 2011

This Department requires the defendant of Correctional Account No. 0000 00000000 to serve 180 days of the above stated sentence in compliance with the court order of probation on 09/20/10 to serve 180 days of the County Jail with 28 work days + 28 (120) + 84 days of Probation.

Under the conditions and terms of the Court, the defendant is required to communicate with the Department of Corrections as follows:

Assignment Type: WWP
Original Order: 180 days of Jail + 28 + 84 days of Probation

PROBATION DATE: 09/20/10
SUSPENSION DATE: 09/20/10 6:00 AM 3v

REASON FOR REVISION: None
Comply with stated sentence and work schedule

VERIFICATION:

By: [Signature] Date: 7/14/11
[Signature] Date: 7/14/11

- Joint of sentence program
- Sentence Court
- Probation
- JWS

8/1/11

Narayan, Kavita

From: Michele Dauber [REDACTED]
Sent: Thursday, October 06, 2016 4:34 PM
To: Welch, Brian
Subject: Keenan Smith

 Keenan Smith (1).pdf 

County of Santa Clara
Memorandum



REINSTATEMENT OF JAIL SENTENCE

TO: Department of Corrections
FROM: Probation Department - Adult Division

DATE: 07/13/2018
F3 NAME: Eric Price
PHONE: (408) 468-1818

RE: Smith, Karan
AKA: Smith, Karan Earlylan

CASE NUMBER: 2340-0108-107
PIN: 131545

BONDING NUMBER: 655556
ECN: 655556

RECEIVED
JUL 13 2018

This Department requested the Affidavit of Commital issued by DOC on 04/03/2018 due to the failure of the defendant to appear in court on the date indicated resulting in 90 days of jail in the County Jail with 22 actual days + 22 418 PC + 84 days CTS as a condition of Probation.

Under the standing order issued by the Court, the defendant is required to commence sentence with the Department of Corrections as follows:

Summarize Type: WPP
Original Order: 120 days CJ CJ or 22 + 22 + 84 days CTS

PREBOOK DATE: 06/27/2018
SURRENDER DATE: 06/25/2018 8:30 AM Su

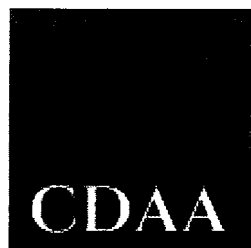
REASON FOR MISDETERMINATE: Confined with school schedule and work schedule

VERIFICATION:

Eric Price 7/11/18
Karan Smith 7/14/18

- Dept. of Corrections (Required)
- Superior Court
- Release Unit
- JPD

8/13/18



CALIFORNIA
DISTRICT
ATTORNEYS
ASSOCIATION

PROFESSIONALISM

*A Sourcebook of Ethics and Civil Liability
Principles for Prosecutors*

2016

Stephen M. Wagstaffe
President

Mark Zahner
Chief Executive Officer

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in a public capacity, is not disqualified to act in one area of his or her public duty solely because of similar activity in another such area.” (*In re Lee G.* (1991) 1 Cal.App.4th 17; see *People v. Municipal Court (Byars)* (1978) 77 Cal.App.3d 294; *People v. Superior Court of San Luis Obispo County (Hollenbeck)* (1978) 84 Cal.App.3d 491.)

- J. A prosecutor should never represent a person accused of a crime. (Gov. Code § 26540; 66 Ops.Cal.Atty.Gen. 30 [1983]; Bus. & Prof. Code § 6131(a); Rules Prof. Conduct, rule 3-310; *People v. Rhodes* (1974) 12 Cal.3d 180.)

XIII. Duty During Public Communications

A. ABA Standard 3-1.10—Relationship With the Media

(Formerly ABA Standard 3-1.4: Public Statements)

- (a) For purposes of this Standard, a “public statement” is any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication or media, including social media. An extrajudicial statement is any oral, written, or visual presentation not made either in a courtroom during criminal proceedings or in court filings or correspondence with the court or counsel regarding criminal proceedings.
- (b) The prosecutor’s public statements about the judiciary, jurors, other lawyers, or the criminal justice system should be respectful even if expressing disagreement.
- (c) The prosecutor should not make, cause to be made, or authorize or condone the making of, a public statement that the prosecutor knows or reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding or heightening public condemnation of the accused, but the prosecutor may make statements that inform the public of the nature and extent of the prosecutor’s or law enforcement actions and serve a legitimate law enforcement purpose. The prosecutor may make a public statement explaining why criminal charges have been declined or dismissed, but must take care not to imply guilt or otherwise prejudice the interests of victims, witnesses or subjects of an investigation. A prosecutor’s public statements should otherwise be consistent with the ABA Standards on Fair Trial and Public Discourse.
- (d) A prosecutor should not place statements or evidence into the court record to circumvent this Standard.
- (e) The prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement or providing non-public information that the prosecutor would be prohibited from

making or providing under this Standard or other applicable rules or law.

- (f) The prosecutor may respond to public statements from any source in order to protect the prosecution's legitimate official interests, unless there is a substantial likelihood of materially prejudicing a criminal proceeding, in which case the prosecutor should approach defense counsel or a court for relief. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (g) The prosecutor has duties of confidentiality and loyalty, and should not secretly or anonymously provide non-public information to the media, on or off the record, without appropriate authorization.
- (h) The prosecutor should not allow prosecutorial judgment to be influenced by a personal interest in potential media contacts or attention.
- (i) A prosecutor uninvolved in a matter who is commenting as a media source may offer generalized commentary concerning a specific criminal matter that serves to educate the public about the criminal justice system and does not risk prejudicing a specific criminal proceeding. A prosecutor acting as such a media commentator should make reasonable efforts to be well-informed about the facts of the matter and the governing law. The prosecutor should not offer commentary regarding the specific merits of an ongoing criminal prosecution or investigation, except in a rare case to address a manifest injustice and the prosecutor is reasonably well-informed about the relevant facts and law.
- (j) During the pendency of a criminal matter, the prosecutor should not re-enact, or assist law enforcement in re-enacting, law enforcement events for the media. Absent a legitimate law enforcement purpose, the prosecutor should not display the accused for the media, nor should the prosecutor invite media presence during investigative actions without careful consideration of the interests of all involved, including suspects, defendants, and the public. However, a prosecutor may reasonably accommodate media requests for access to public information and events.

B. ABA Model Rule of Professional Conduct 3.8—Special Responsibilities of a Prosecutor

[The prosecutor in a criminal case shall ...]

- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve

a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

C. ABA Standard 3-6.10—Comments by Prosecutor After Verdict or Ruling

(Formerly ABA Standard 3-5.10: Comments by Prosecutor After Verdict)

- (a) The prosecutor should respectfully accept acquittals. Regarding other adverse rulings (including the rare acquittal by a judge that is appealable), while the prosecutor may publicly express respectful disagreement and an intention to pursue lawful options for review, the prosecutor should refrain from public criticism of any participant. Public comments after a verdict or ruling should be respectful of the legal system and process.
- (b) The prosecutor may publicly praise a jury verdict or court ruling, compliment government agents or others who aided in the matter, and note the social value of the ruling or event. The prosecutor should not publicly gloat or seek personal aggrandizement regarding a verdict or ruling.

D. Rules of Professional Conduct, Rule 5-120 (ABA Model Rule of Professional Conduct 3.6—Trial Publicity)

- (A) A member who is participating, or has participated, in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (B) Notwithstanding paragraph (A), a member may state:
 - (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) the information contained in a public record;
 - (3) that an investigation of the matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;

- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (a) the identity, residence, occupation, and family status of the accused;
 - (b) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (c) the fact, time, and place of arrest; and
 - (d) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- E. As public officials, prosecutors and their assistants and deputies have a duty to provide information to the public about the administration of criminal justice.
1. The prosecutor should regularly inform the public about the activities of the prosecutor's office and law enforcement agencies. Communications should include the prosecutor's views on important issues and problems affecting criminal justice. The reason is recited in Government Code section 6250: "Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this State." (See also Gov. Code § 54950; ABA Formal Op. 1999 [1940].)
 - a. The following information about the defendant or suspect *shall* be provided to the public upon request according to the California Public Records Act (CPRA), Government Code section 6254(f), unless the dissemination of that information would endanger the successful completion of an investigation or a related investigation or would endanger the safety of an involved person:
 - full name (except juveniles),
 - area of residence,
 - occupation,
 - physical description (including color of eyes and hair, height, and weight),
 - age,
 - gender,

- descent,
 - time and date of arrest,
 - location of arrest,
 - factual circumstances,
 - amount of bail and time and manner of release,
 - location held,
 - all charges including warrants,
 - parole or probation holds,
 - schedule and explanation of the judicial process,
 - penalty range, and
 - information in the court's file.
- b. Information that *may not* be disclosed to the media during a criminal matter, based on Rules of Professional Conduct, rule 5-120, ABA MRPC 3.6 and 3.8, National Prosecution Standards (3d ed. 2009) 2-14.1–2-14.8, includes the following information, which should not be divulged directly (news conference, interview, or news release) to the media during the pendency of a criminal matter:
- a statement that has a “substantial likelihood of materially prejudicing an adjudicative proceeding in the matter” (Rules Prof. Conduct, rule 5-120);
 - the subject of any gag order;
 - a confession or admission of a suspect or defendant;
 - a statement regarding the suspect or defendant's refusal to make a statement;
 - the prior criminal history of the suspect or defendant unless it is part of the criminal pleading or crime under investigation (see Pen. Code §§ 11075, 11105, 11142, 13300, 13302, and 13303);
 - the prosecutor's personal belief in the suspect or defendant's guilt;
 - the identity of a sexual assault victim, domestic violence victim, confidential informant, or any at-risk person involved in the criminal matter;
 - the results of examinations or the defendant's refusal to submit to certain examinations (e.g., lineup, polygraph, blood-alcohol, DNA, or voice sample);
 - the pendency of a search warrant;
 - the events of a closed courtroom session or secret grand jury proceeding; or
 - juvenile matters.

Although the prosecutor is restrained by rules of professional conduct, the media may nonetheless glean information from law enforcement agencies, court files, or persons associated with the criminal matter. The fact that the

media has an independent source for information does not relieve a prosecutor of professional responsibilities.

- c. Information that a prosecutor *may* disclose to media, consistent with the Rules of Professional Conduct, include the following (if the information does not have a “substantial likelihood of materially prejudicing an adjudicative proceeding in the matter”) (Rules Prof. Conduct, rule 5-120):
 - description of the crime;
 - general description of the victim (except for sexual assault, domestic violence or at-risk persons) including age and occupation, but not addresses or phone numbers;
 - details of the investigation including the officers’ names unless such information would divulge secret police tactics;
 - description of the arrest of the suspect or defendant;
 - description of the suspect or defendant, including age, identity, residence (unless release would endanger innocent persons), occupation, and family status;
 - description of allegations in the charging document;
 - penalty range for the charged offenses or the sentence imposed;
 - amount of bail, location of jail;
 - court dates and explanation of the court process;
 - description of motions filed and contained within the judicial record and probation reports while they are part of the public judicial record;
 - a call for public assistance in providing information to aid an investigation or apprehension of an at-large suspect; and
 - a warning of danger regarding an at-large suspect.
2. Special considerations apply to the dissemination of information regarding juvenile court proceedings.
 - a. A prosecutor should consider juvenile matters to be confidential in accordance with Welfare and Institutions Code section 827 and rule 5.530 of the Rules of Court.
 - b. A prosecutor may disclose information regarding serious felonies pursuant to Welfare and Institutions Code section 676 if the information has been brought out in open court and could have been heard or observed by members of the news media at a court hearing, unless the court has placed restrictions on such dissemination.
 - c. After a hearing has commenced, a prosecutor may disclose the offense and the name of the juvenile, 14 years of age or older, charged with a Penal Code section 1192.7(c) serious felony.

- d. After the petition is sustained, a prosecutor may disclose the name of the juvenile, 14 years of age or older, charged with the commission of Penal Code section 667.5 or 1192.7(c) crimes.
 - e. When there is an outstanding arrest warrant for a Welfare and Institutions Code section 707(b) offense, a prosecutor may disclose the name and identifiers (e.g., size, date of birth, or race) of the minor where such disclosure is imperative for the minor's apprehension, and there is a prior court order from the presiding judge of the juvenile court.
 - f. When there is an outstanding arrest warrant for murder personally committed by a minor 14 years of age or older, the prosecutor may release the name and identifiers of the subject minor.
 - g. The public disclosure by a prosecutor of juvenile case information acquired independently of the documents deemed confidential under provisions of Welfare and Institutions Code section 827 would be unlawful absent a juvenile court order permitting such disclosure. However, when the juvenile proceedings are open to the public, generally the prosecutor may furnish the news media with whatever information is available to the public at those proceedings in which the prosecutor participates, unless the juvenile court has placed restrictions on such dissemination. (See 65 Ops.Cal.Atty.Gen. 503 [1982] and *T.N.G. v. Superior Court of San Francisco County* (1971) 4 Cal.3d 767.)
- F. Just because information may be disclosed, does not necessarily mean it should be disclosed. In releasing information to the media on a specific case, prosecutors must consider individual privacy rights, a defendant's right to a fair trial, and whether dissemination of the information furthers a public interest. (See *Marsh v. County of San Diego* (9th Cir. 2012) 680 F.3d 1148 [prosecutor's release of child homicide victim's photo to press constituted possible invasion of privacy and actionable civil rights violation—recognizing that the parent “has a constitutionally protected right to privacy over her child's death images”].)
- 1. The chief prosecutor should consider adopting a policy for releasing case information to the media. In formulating such a policy, guidance may be taken from the trial publicity ethics rules set out in Rules of Professional Conduct, rule 5-120, ABA MRPC 3.6 and 3.8, ABA DR 7-107, and National Prosecution Standards (3d ed. 2009) 2-14.1–2-14.8. The policy will vary according to local needs.
 - 2. In *People v. Marshall* (1996) 13 Cal.4th 799, 863, the California Supreme Court found no violation of ethics or law when a prosecutor informed a reporter of public record facts in a death penalty case. While the facts in *Marshall* preceded adoption of rule 5-120, the court implicitly recognized the principle in rule 5-120(B)(2) which permits an attorney to report the information in a public record.
 - 3. The United States Department of Justice Guidelines on release of information in criminal actions can supply additional guidance concerning what can and should not be disclosed. (28 C.F.R. § 50.2.)

4. The ABA's Ethics Committee has opined that prosecutors may announce to the media the filing of a civil suit, return of an indictment or the like, and at the request of the media, may provide copies of those court documents. Comments that would violate the trial publicity ethics rule (then DR 7-107) are prohibited. (ABA Informal Op. 1345 [1975].)
- G. Prosecutors who participate in press conferences should study rule 5-120.
1. Rule 5-120(A) prohibits extrajudicial statements that the attorney knows or reasonably should know will have a "substantial likelihood of materially prejudicing an adjudicative proceeding." It applies to attorneys who investigate or litigate "a matter."
 2. The Supreme Court rejected the "clear and present danger" test suggested by the California Bar Association. Apparently the Court agreed with some of the United States Supreme Court opinions in *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, declaring that the "substantial likelihood test" does not violate an attorney's First Amendment free speech rights.
 3. Rule 5-120(B) specifically permits statements relaying that an investigation is underway, the identity of investigating officers and agencies, statements of "the claim, offense or defense involved," requests for assistance, warnings of danger, some of the arrest circumstances, and some identifying information about the accused and "persons involved." An attorney may also state "the information in a public record."
 4. Rule 5-120(C) permits an attorney to make limited statements to mitigate the effects of prejudicial publicity not initiated by the attorney or the attorney's client. The test is whether a reasonable member would believe the reply is required to protect a client from the substantial undue prejudicial effect of the recent publicity.
 5. The "Discussion" after the rule makes it applicable "equally to prosecutors and criminal defense counsel," and to statements made by or for the attorney. It lists some of the factors used to determine whether an extrajudicial statement violates the rule. For example, references to inadmissible evidence and false or deceptive statements that would violate the attorney's duty of candor are facts indicating the rule has been violated.
 6. An attorney who violates a Rule of Professional Conduct that establishes a "duty" is subject to private reproof, public reproof, suspension, or disbarment. (See Bus. & Prof. Code §§ 6068, 6077, and 6103; also see the six cases discussing claims of prosecutorial misconduct during public communications at the end of this chapter.)
 7. Always distinguish your personal views from those of your office. Prosecutors are often invited to speak publicly away from the courtroom. Do not forget the law governing slander, libel, and official misconduct.
 8. Do not make unlawful or unwise disclosures to the media. A prosecutor's proverb—"Do not say it if you do not want to read it on page one of the newspaper"—offers good advice. "Off the record" conversations can cause

the loss of your career as a prosecutor, an attorney, and a homeowner. See Chapter IV: The Civil Liability of a Prosecutor, for a discussion about the potential civil liabilities of a prosecutor making public statements.

9. A prosecutor accused of misconduct during authorized public statements will find valuable support in *Bradbury v. Superior Court of Ventura County* (1996) 49 Cal.App.4th 1108, in which the district attorney signed a report criticizing a deputy sheriff for shooting a suspect. The peace officer's civil rights lawsuit pursuant to title 42 of the United States Code, section 1983 was dismissed because it failed to allege any injury beyond damage to reputation. The defamation lawsuit was dismissed because district attorneys have First Amendment rights to speak out on matters of public concern, and the right to speak is protected by California's anti-SLAPP law (Strategic Lawsuit to Prevent Public Participation) in Code of Civil Procedure section 425.16.
 10. A prosecutor accused in a complaint filed with the State Bar will find a full discussion of the issues in ABA Standards for Criminal Justice, Fair Trial, and Free Press (Approved Draft, 1968). (See also Annot., Release of Information Concerning Forthcoming or Pending Trials Ground for Contempt Proceedings or Other Disciplinary Measures Against Members of the Bar (1967) 11 A.L.R. 3d 1104; ABA Standards 3-1.10, 3-1.11, and 3-6.10; ABA Canon 20 of the Former Canons of Professional Ethics; and ABA Formal Op. 199 [1940].)
- H. The legal balance between free speech rights in the First Amendment and fair trial rights in the Sixth Amendment to the United States Constitution is the foundation for the trial publicity ethics rules. The rules have evolved as media dissemination becomes ubiquitous. A prosecutor accused of misconduct should know the history.
1. In 1908, the American Bar Association established Canon 20 of the Former Canons of Professional Ethics. The rule was simple and clear:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases, it is better to avoid an *ex parte* statement.
 2. The principles in Canon 20 were completely ignored during the murder trial in *Sheppard v. Maxwell* (1966) 384 U.S. 333. It was conducted amidst a media circus that included placing about 20 reporters inside the bar of the courtroom. The trial judge and the chief prosecutor were candidates for judgeships and the massive publicity included many matters unfairly prejudicial to *Sheppard*. In reversing the conviction, the Supreme Court declared that courts have the power to proscribe "extrajudicial statements by any lawyer, party, witness, or court official" that divulge prejudicial matters.

(*Id.* at 361.) The Court held that where there is a “reasonable likelihood that prejudicial news prior to trial will prevent a fair trial,” the judge should consider remedies such as continuance of the case, change of venue, giving special jury instructions, or sequestration of the jury. (*Id.* at 363.)

3. In 1969, the ABA established MCPR DR 7-107 (Trial Publicity) that followed the *Sheppard* principles. ABA DR 7-107(A) makes it unethical for a “lawyer participating in or associated with the investigation of a criminal matter” to make “an extrajudicial statement that a reasonable person would expect to be disseminated ... that does more than state without elaboration” certain basic public record facts about the investigation.
4. ABA DR 7-107(B) referring to “prosecution or defense” specifically prohibits references to:
 - character or reputation,
 - the possibility of a guilty plea,
 - confessions and admissions,
 - test results or refusals,
 - the identity and credibility of prospective witnesses, and
 - opinions about guilt or innocence, the evidence, or the merits of the case.
5. ABA DR 7-107(C) and National Prosecution Standard (3d ed. 2009) 2-14.3 list basic statements that are permissible such as identifying matters about the accused, the victim, and the time and location of the arrest.
6. ABA DR 7-107(D) prohibits attorneys selecting a criminal case jury from making statements “that are reasonably likely to interfere with a fair trial.” However, it permits quotations from court records made without additional comments.
 - a. “A judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding.” (Code Civ. Proc. § 1904.) A prosecutor should therefore file a redacted police report or an affidavit as probable cause documentation in order to protect the integrity of an incomplete investigation, a victim’s identity, confidential informants, defendant’s confession or results of examinations, or the subject of any gag order.
 - b. Documents not yet filed are not judicial records. For example, a prosecutor should not disseminate a probation report to the media before the date of judgment or granting of or probation. (Pen. Code § 1203.05.)
7. ABA DR 7-107(E) prohibits statements made after a plea or verdict of guilty that are “reasonably likely to affect the imposition of sentence.” Other sections in ABA DR 7-107 apply to civil and administrative hearings.
8. In 1983, the ABA established its “preferred” Model Rules of Professional Conduct. Rule 3.6 (Trial Publicity) generally followed ABA DR 7-107 and consolidated the ethics rules.

9. Rule 3.6(a) prohibits a lawyer engaged in “investigation or litigation” from making “extrajudicial statement[s] that ... the lawyer knows or reasonably should know ... will have a substantial likelihood of materially prejudicing an adjudicative proceeding.” Until 1994, Rule 3.6(b) contained most of the prohibited statements in ABA DR 7-107, and Rule 3.6(c) included most of the permitted statements in ABA DR 7-107. Rule 3.6(c) specifically allowed a lawyer to “state without elaboration” several facts including “the general nature of the claim or defense.”
 10. In *Maine v. Superior Court of Mendocino County* (1968) 68 Cal.2d 375, the California Supreme Court adopted the *Sheppard v. Maxwell* legal standards. For that reason, California prosecutors used the ABA rules for guidance until the United States Supreme Court decided *Gentile, supra*.
 11. In *Gentile*, a defense attorney held a press conference after the indictment was announced. He said (1) the evidence demonstrated his client’s innocence, (2) the likely perpetrator was a drug-addicted police officer, and (3) the witnesses were incredible because they were convicted criminals. (*Id.* at 1045.) He used a videotaped scene to support his allegations of drug use by the police officer. The Nevada State Bar, applying its version of Rule 3.6, sanctioned the attorney. In a fractured opinion, the United State Supreme Court accepted the constitutionality of the “substantial likelihood test” (*Id.* at 1037) by apparently finding it close enough to the “clear and present danger” test to adequately protect an attorney’s rights to free speech. (*Id.*) However, the Court found that the “safe harbor” provision in Rule 3.6, which allowed an attorney to state “the general nature of the claim or defense,” was void for vagueness because *Gentile* could not know when his remarks exceeded the protections of that safe harbor. (*Id.* at 1048–1049.)
 12. On August 10, 1994, the ABA responded to *Gentile* and amended Rule 3.6. The statements prohibited in section (b) were removed and placed in comment 5; section (c) was rewritten to delete all reference to “general” statements; and new section 3.6(d) was added. Section (c) permits an attorney to respond “to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer of the ... client.” Section (d) prohibits other attorneys in the law firm or government agency from making statements that violate the Rule.
- I. Disbarment or suspension of a prosecutor for violating trial publicity ethics rules is unlikely, but disciplinary proceedings should be avoided at all times.
1. *In re Haymond* (1898) 121 Cal. 385, where the prosecutor schemed to sell a confession to a local newspaper, and the supreme court declined to disbar him.
 2. *In re Burrows* (Ore. 1980) 618 P.2d 1283, in which a disciplinary action was brought against a district attorney for an alleged violation of ABA DR 7-107(B)(3). The prosecutor read to high school students a letter written by a criminal defendant to his mother, wherein the defendant expressed his sorrow for unspecified acts he had committed and asked his mother’s

forgiveness. The Supreme Court of Oregon held the reading was unlikely to have any effect on the pending criminal cases, and the prosecutor's comments were not designed to reach the news media or potential jurors.

3. *In re Rachmiel* (N.J. 1982) 449 A.2d 505, in which a former prosecutor originally told the media that a murder case that he had prosecuted, and which was overturned in a habeas corpus proceeding, should be re-tried. Three days later he wrote a letter to the press saying the case should not be re-tried and participated in a number of media interviews. The district attorney complained to the State Bar, which charged Rachmiel with violating ABA DR 7-107(B)(6) prohibiting expressions about the guilt or innocence of an accused. The court held that the rule applied to former prosecutors but gave the holding only prospective effect. The court also found that Rachmiel's remarks did not violate ABA DR 7-107(E)'s prohibition against extrajudicial comments that are reasonably likely to affect sentencing because the proceedings involved were a possible re-trial, not a current sentencing matter.
4. *In re Lasswell* (Ore. 1983) 673 P.2d 855, in which the State Bar charged a district attorney with violating ABA DR 7-107(B) as a result of commenting in a newspaper interview and a television program on facts relating to a large scale investigation into illegal drug traffic that led to the arrest and indictment of some 50 persons. The prosecutor told a reporter that the persons arrested were "sellers" of drugs and would have sold more than the investigator bought. He also said that entrapment defenses were unlikely to succeed and that he foresaw a conviction rate of 90 to 100 percent. (*Id.* at 128.) The court held that the "disciplinary rule deals with purposes and prospective effects, not with completed harm. It addresses the prosecutor's professional responsibility at the time he or she chooses what to speak or write." (*Id.* at 126.) The court found that the prosecutor was intending to point out that the investigator went after persons who were drug sellers, not persons merely possessing drugs. (*Id.* at 128.) In summary, the State Bar proved neither that the prosecutor intended to create seriously prejudicial beliefs in the minds of potential jurors nor that he was knowingly indifferent to a highly likely risk that his remarks would have this effect. (*Id.* at 130.)
5. See also *People v. Phillips* (1985) 169 Cal.App.3d 632, which involved an appeal from the denial of a recusal motion in a child sexual assault case. "While the deputy district attorney's participation in the radio talk show was certainly ill advised, the transcripts show he cautiously avoided references to the merits of Phillips' case, and his expressed concern for [the victim] was within the realm of proper prosecutorial functions." (*Id.* at 641.)
6. Consider carefully *Zimmerman v. Board of Professional Responsibility* (Tenn. 1989) 764 S.W.2d 757. In *Zimmerman*, a prosecutor was privately reprimanded for two violations of ABA DR 7-107.
 - a. The first violation occurred when, following his presentation at a murder case preliminary hearing, the prosecutor engaged in informal conversation with media reporters. During that conversation he told the reporters that the medical examiner had found the victim was strangled, stabbed many times, and had his throat slashed. He also said that he was considering

- asking for the death penalty and that the defendant confessed to stabbing the victim and slashing his throat almost from ear to ear. A violation of ABA DR 7-107(B) was charged.
- b. The second informal conversation with reporters occurred after verdicts of guilt in a separate case. The prosecutor commented that the torture suffered by the victim was extreme, that the verdicts reflected a community decision that such crimes against the elderly would not be tolerated, and that he was going to ask the sentencing judge to impose maximum sentences. A violation of ABA DR 7-107(E) was alleged.
 - c. The Supreme Court of Tennessee rejected the prosecutor's arguments that his statements were protected free speech and upheld both disciplinary findings.
7. Trial publicity ethics rules do not prohibit ethical public statements about the court's conduct. See, for example, San Diego County Bar Association Ethics Opinion 1974-8, concluding that a prosecutor's public criticism of a judge's sentence was not unethical. Nevertheless, prosecutors—as all members of the bar—are ethically required to maintain respect for the courts. (Bus. & Prof. Code § 6068(b).)
 8. In *Hollywood v. Superior Court of Santa Barbara County* (2008) 43 Cal.4th 721, the court declined to grant a request for recusal of a prosecutor who consulted with a movie studio that was producing a movie about a kidnapping and murder case in which one of the suspects was still at large. The court held that the prosecutor's cooperation with a movie studio was not a prejudicial disclosure of information because the prosecutor's main goal was that the release of the film would lead to the apprehension of the suspect; the prosecutor sought to have the suspect portrayed accurately; and because any potential tainting of a jury could be handled in voir dire. However, the court also explained in dicta that a prosecutor could disseminate information that portrayed a suspect in an inflammatory light in such a way that a potential jury would be tainted and that the defendant's right to a fair trial could be compromised.
 9. In *Haraguchi v. Superior Court of Santa Barbara County* (2008) 43 Cal.4th 706, the court held that a novel written by a prosecutor contained similar facts to an ongoing case and a similar antagonist to the defendant, but these similarities did not affect the defendant's right to a fair trial nor did the financial incentives from the sale of the book create a conflict of interest for the prosecutor.
 10. In *People v. McKinzie* (2012) 54 Cal.4th 1302, the court held that even though the prosecutor had directed a reporter's attention to the daily court transcript that included a piece of important but potentially unfairly prejudicial evidence that had not yet been admitted, the defendant's right to a fair trial was not tainted. The reporter then published an article that referred to the controversial evidence as if it had been admitted. However, the matter was

handled in voir dire when the judge asked if any of the potential jurors had read the article.

ABOUT THE AUTHOR

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making or providing under this Standard or other applicable rules or law.

- (f) The prosecutor may respond to public statements from any source in order to protect the prosecution's legitimate official interests, unless there is a substantial likelihood of materially prejudicing a criminal proceeding, in which case the prosecutor should approach defense counsel or a court for relief. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (g) The prosecutor has duties of confidentiality and loyalty, and should not secretly or anonymously provide non-public information to the media, on or off the record, without appropriate authorization.
- (h) The prosecutor should not allow prosecutorial judgment to be influenced by a personal interest in potential media contacts or attention.
- (i) A prosecutor uninvolved in a matter who is commenting as a media source may offer generalized commentary concerning a specific criminal matter that serves to educate the public about the criminal justice system and does not risk prejudicing a specific criminal proceeding. A prosecutor acting as such a media commentator should make reasonable efforts to be well-informed about the facts of the matter and the governing law. The prosecutor should not offer commentary regarding the specific merits of an ongoing criminal prosecution or investigation, except in a rare case to address a manifest injustice and the prosecutor is reasonably well-informed about the relevant facts and law.
- (j) During the pendency of a criminal matter, the prosecutor should not re-enact, or assist law enforcement in re-enacting, law enforcement events for the media. Absent a legitimate law enforcement purpose, the prosecutor should not display the accused for the media, nor should the prosecutor invite media presence during investigative actions without careful consideration of the interests of all involved, including suspects, defendants, and the public. However, a prosecutor may reasonably accommodate media requests for access to public information and events.

B. ABA Model Rule of Professional Conduct 3.8—Special Responsibilities of a Prosecutor

[The prosecutor in a criminal case shall ...]

- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve

those commercial discounts that are available to members of the general public or to an identifiable social, religious, employment, professional or business association to which non-prosecutors also belong. (See Pen. Code § 70; ABA DR 8-101(A)(3); and your office's policies concerning the acceptance of any gifts, including gifts from victims.)

2. Victims and witnesses may like you. Refuse to accept "gifts," and politely tell the donors why you are doing so. However, it is not wrong to accept a small, symbolic gift from a victim or his or her family.
3. Beware of "free" lunches. (*In re D'Auria* (1975) 67 N.J. 22 [a worker's compensation judge accepted numerous "free" lunches that were actually paid for by attorneys for insurance company representatives involved in matters pending before the judge].)
4. "A member shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions." (Rules Prof. Conduct, rule 5-300(A).)

D. Prosecutors may not use their official position for personal gain or financial advantage. Furthermore, prosecutors may not refer to official position, rank, and title if it conveys an appearance of an attempt to gain improper advantage or favor. Prosecutors are limited in the use of confidential information.

1. A prosecutor should not exploit the public trust and confidence in the office by means of personal publicity connected with a case before, during, or after trial. (ABA Standard 3-1.7(a); *United States v. Bufalino* (2d Cir. 1960) 285 F.2d 408.)
2. Since the use of official stationery implicitly communicates that a prosecutor is corresponding on behalf of the public office, using official stationery for personal objectives is improper. The prosecutor's office should have a policy for the use of stationery for such professionally related matters as making employment recommendations or references for interns, clerks, professional staff. Additionally, each prosecution office should have written policies regarding use of office computers, email, social media, and other technology.
3. The dissemination of information contained in criminal records is restricted by statute; unauthorized disclosure constitutes a misdemeanor offense. (Pen. Code §§ 11075–11081, 11140–11144, 13300–13305; Veh. Code §§ 1808.45, 1808.46; *Kilgore v. Younger* (1982) 30 Cal.3d 770, 780, 792; *Johnson v. Winter* (1982) 127 Cal.App.3d 435, 439.)
 - a. A prosecutor should not use confidential information obtained through official sources for personal advantage; such misuse may constitute theft and receipt of stolen property. (See *Williams v. Superior Court of Los Angeles County* (1978) 81 Cal.App.3d 330, 341–342.)

- b. Obtaining confidential official information by leading another to believe the request is on behalf of the official agency, when such is not the case, is a misdemeanor. (Pen. Code § 146b; Veh. Code §§ 1808.45, 1808.46.)
 - c. Similarly, when you learn that defense attorneys or defense investigators claimed to be working for the “DA” in circumstances establishing false impersonation of District Attorney authority, investigate and prosecute such cases both criminally and administratively. See Business and Professions Code section 7561.1(e), which provides that the license of a private investigator may be suspended or revoked if the individual “[i]mpersonated, or permitted or aided and abetted an employee to impersonate a law enforcement officer or employee of the United States of America, or of any state or political subdivision thereof.” (See *Hamilton, supra*, at 308.)
4. It is a felony to steal, remove, secrete, destroy, mutilate, deface, alter, or falsify any record or paper or proceeding of any court, or any record or paper filed or deposited in any public office or placed in the hands of a public officer for any purpose. (Gov. Code § 6200.) A district attorney and his or her deputies are clearly “public officers” under this statute. (See *People v. Pearson* (1952) 111 Cal.App.2d 9 [sheriff’s deputy is a public officer].) Court records, arrest records, and crime reports are all “public records.”
 5. It is a felony to appropriate government funds to one’s own use or that of another without authorization, to make a loan or profit from public funds, to knowingly make or keep a false account, to fraudulently alter or falsify an account, to willfully refuse to pay over or transfer public funds as required by law. (Pen. Code § 424.) This statute reaches such conduct as use of public employees’ time for other than official duties, misuse of an official vehicle, and filing false time reports, leave, or overtime reports affecting pay or credits. (See *People v. Battin* (1978) 77 Cal.App.3d 635 [use of staff for political purposes]; *People v. Sperl* (1976) 54 Cal.App.3d 640 [misuse of county car]; *People v. Groat* (1993) 19 Cal.App.4th 1228 [false time cards].)
 6. A prosecutor is not a peace officer (Pen. Code §§ 830–830.11), and it is a misdemeanor for a non-peace officer to display a badge with intent to convey the impression that the bearer has the authority of a peace officer. (Pen. Code § 538d; 90 Ops.Cal.Atty.Gen. 57 [2007].) In the wake of the Attorney General’s 2007 opinion on the subject, many district attorney offices have ceased authorizing or issuing badges to deputy district attorneys.
 7. Government Code section 1126(a) provides, in part: “[a] local agency officer or employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed.” That section further provides that each agency, such as a district attorney’s office, shall determine which activities are incompatible with the activities of the office and prohibit those activities. The law requires that these prohibited activities be published and provided to its employees (an Incompatible Activities Statement) and best practices suggest

that each covered employee should sign such a statement for inclusion in the employee's personnel file and be provided a copy of the Statement to retain. Additionally, best practices suggest that any exception to an incompatible activity, such as outside employment, be requested in writing and approved by the appropriate authority in the office.

XII. Duty to Avoid Conflicts of Interest

A. ABA Standard 3-1.7—Conflicts of Interest

(Formerly ABA Standard 3-1.3: Conflicts of Interest)

- (a) The prosecutor should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a conflict requiring recusal exists and is non-waivable, or informed consent has not been obtained, the prosecutor should recuse from further participation in the matter. The office should not go forward until a non-conflicted prosecutor, or an adequate waiver, is in place.
- (b) The prosecutor should not represent a defendant in criminal proceedings in the prosecutor's jurisdiction.
- (c) The prosecutor should not participate in a matter in which the prosecutor previously participated, personally and substantially, as a non-prosecutor, unless the appropriate government office, and when necessary a former client, gives informed consent confirmed in writing.
- (d) The prosecutor should not be involved in the prosecution of a former client. A prosecutor who has formerly represented a client should not use information obtained from that representation to the disadvantage of the former client.
- (e) The prosecutor should not negotiate for private employment with an accused or the target of an investigation, in a matter in which the prosecutor is participating personally and substantially, or with an attorney or agent for such accused or target.
- (f) The prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal, political, financial, professional, business, property, or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case.
- (g) The prosecutor should disclose to appropriate supervisory personnel any facts or interests that could reasonably be viewed as raising a potential conflict of interest. If it is determined

- (D) After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.
- (E) A member shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.
- (F) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.'
- (G) A member shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the member has knowledge.
- (H) This rule does not prohibit a member from communicating with persons who are members of a venire or jurors as a part of the official proceedings.
- (I) For purposes of this rule, "juror" means any empanelled, discharged, or excused juror.

2. Code of Civil Procedure Section 206

In criminal cases, a juror has the right not to discuss deliberations and should be reminded of that right by an attorney attempting to make contact after trial, and consent to the contact. Any violation of section 206 is considered a violation of a court order and could result in monetary sanctions.

3. Contact Initiated by a Juror

An attorney who is approached by a juror should politely inform the juror that any conversation is improper. The attorney should then advise the court, with opposing counsel present, of the nature and extent of the juror's contact, thereby allaying any suggestion of improper conduct by the attorney. (*In re Possino* (1984) 37 Cal.3d 163, 170.) Attorneys should only be addressing jurors in open court. Attempting to influence a juror is a crime under Penal Code section 95.

N. Trial Publicity

Prosecutors and defense counsel must follow the same rules regarding trial publicity, which are laid out in rule 5-120 of the Rules of Professional Conduct.

While the rules may limit free speech, they are constitutional because they aim to preserve the right to fair trial. Rule 5-120 will likely also apply to social networking media.

1. **Rule 5-120 of the Rules of Professional Conduct**

(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(B) Notwithstanding paragraph (A), a member may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(a) the identity, residence, occupation, and family status of the accused;

(b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;

(c) the fact, time, and place of arrest; and

(d) the identity of investigating and arresting officers or agencies and the length of the investigation.

2. **The “Replying to Adverse Publicity” Exception**

An attorney may make a statement that a reasonable member would believe is required to protect a client from the substantial, undue prejudicial effect of recent publicity not initiated by the member or the member’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse

publicity. (Rules Prof. Conduct, rule 5-120(C).) This does not include defamatory statements.

The Discussion Notes from the rule further state,

Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.

Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d); (3) whether the extrajudicial statement violates a lawful “gag” order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and (4) the timing of the statement.

VI. Money Sanctions Under Code of Civil Procedure Section 177.5

Section 177.5 of the Code of Civil Procedure gives the court power to impose monetary sanctions against attorneys who violate a court order, and states:

A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars (\$1,500), notwithstanding any other provision of law, payable to the court, for any violation of a lawful court order by a person, done without good cause or substantial justification. This power shall not apply to advocacy of counsel before the court. For the purposes of this section, the term “person” includes a witness, a party, a party’s attorney, or both. ¶ Sanctions pursuant to this section shall not be imposed except on notice contained in a party’s moving or responding papers; or on the court’s own motion, after notice and opportunity to be heard. An order imposing sanctions shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

The apparent purpose of section 177.5 is to compensate the court when attorneys cause unnecessary hearings that waste court resources (*In re Woodham* (2001) 95 Cal. App.4th 438; *Moyal v. Lanphear* (1989) 208 Cal.App.3d 491, 499), and can be used by the court to impose fines on attorneys who are simply late for court. (*People v. Tabb* (1991) 228 Cal.App.3d 1300, 1310–1312.) Section 177.5 does not require a showing of bad faith, nor does it require a willful violation. (*Id.* at 1311.)

No sanctions can be imposed under section 177.5 except on notice in the party’s moving papers or, if on the court’s own motion, after notice and opportunity to be heard has been provided to the accused attorney. Notice can consist of the court informing the attorney either to do or not to do something. An “‘opportunity to be heard’ in the

RULES OF PROFESSIONAL CONDUCT

(effective on November 1, 2018)

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows* or reasonably should know* will (i) be disseminated by means of public communication and (ii) have a substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), but only to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6, lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons* involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person* involved, when there is reason to believe* that there exists the likelihood of substantial* harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably* necessary to protect the individual or the public; and
- (7) in a criminal case, in addition to paragraphs (1) through (6):
 - (i) the identity, general area of residence, and occupation of the accused;
 - (ii) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;*
 - (iii) the fact, time, and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable* lawyer would believe* is required to protect a client from the substantial* undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a law firm* or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] Whether an extrajudicial statement violates this rule depends on many factors, including: (i) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (ii) whether the extrajudicial statement presents information the lawyer knows* is false, deceptive, or the use of which would violate Business and Professions Code section 6068, subdivision (d) or rule 3.3; (iii) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality, for example, in juvenile, domestic, mental disability, and certain criminal proceedings, (see Bus. & Prof. Code, § 6068, subd. (a) and rule 3.4(f), which require compliance with such obligations); and (iv) the timing of the statement.

[2] This rule applies to prosecutors and criminal defense counsel. See rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Rule 3.7 Lawyer as Witness

(a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:

- (1) the lawyer's testimony relates to an uncontested issue or matter;
- (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
- (3) the lawyer has obtained informed written consent* from the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm* is likely to be called as a witness unless precluded from doing so by rule 1.7 or rule 1.9.

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California Practice Guide: Professional Responsibility | September 2017 Update

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Chapter 8. Advocacy and Representation

D. Restrictions on Speech and Behavior Outside Courtroom

1. [8:655] **Statements to News Media Regarding Pending Proceedings:** Unlike ordinary citizens, lawyers involved in pending cases may be subject to ethical limitations on their “free speech” rights. Such limitations are *constitutionally* permissible only where the lawyer’s statements to the press or other media are “substantially likely to have a *materially prejudicial effect*” on the pending proceeding. [*Gentile v. State Bar of Nevada* (1991) 501 US 1030, 1076, 111 S.Ct. 2720, 2745 (emphasis added); see also *Canatella v. Stovitz* (ND CA 2005) 365 F.Supp.2d 1064, 1071-1072, fn. 7]

a. [8:656] **Compare—nonlawyers’ speech rights:** Restrictions on the speech rights of nonlawyers are considerably less onerous. Newspaper reporters (and others) may report what transpires in the courtroom and other facts as well. In such situations, a court can restrain public comment only if “further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would ... render a just verdict exclusively on the evidence presented in open court.” [*Nebraska Press Ass’n v. Stuart* (1976) 427 US 539, 569, 96 S.Ct. 2791, 2807]

b. [8:657] **Rationale for restriction on lawyer speech:** The basis for restricting lawyers’ ability to speak out on issues involved in their cases is the State’s interest in assuring fair trials: “Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by ‘impartial’ jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.” [*Gentile v. State Bar of Nevada*, *supra*, 501 US at 1075, 111 S.Ct. at 2745]

(1) [8:657.1] **Compare—prior restraint of attorney “speech” improper where less restrictive means available to prevent jury contamination:** A court order requiring an attorney in a civil trial to remove pages from her website touting recent successes in similar cases was an improper prior restraint on speech because less restrictive alternatives were available to handle the threat of jury contamination—i.e., jury admonishments (“not to Google the attorneys” or conduct independent research about them) and contempt consequences. [*Steiner v. Sup.Ct. (Volkswagen Group of America)* (2013) 220 CA4th 1479, 1490-1492, 164 CR3d 155, 164-166]

c. [8:658] **CRPC restrictions on statements to media:** In response to the *Gentile* decision, above, California adopted restrictions on lawyers’ speech about pending cases: A lawyer participating (or who has participated) in investigation or litigation of a matter is prohibited from making out-of-court statements about the matter if:

- a reasonable person would *expect the statement to be disseminated* by means of public communication; and
- the lawyer knows (or reasonably should know) that the statement will have a *substantial likelihood of materially prejudicing* an adjudicative proceeding in the matter. [CRPC 5-120(A); see also ABA Model Rule 3.6]

(1) [8:659] **Background:** Prior to the adoption of CRPC 5-120, California did not impose any restrictions on lawyers' speech to the press. CRPC 5-120 (which is substantially the same as ABA Model Rule 3.6) was adopted in response to the Supreme Court's decision in *Gentile v. State Bar of Nevada* (1991) 501 US 1030, 111 S.Ct. 2720. *Gentile* invalidated a Nevada State Bar rule, but upheld the right of states to restrict attorney speech where a substantial likelihood of material prejudice to a pending proceeding exists (§ 8:655).

(2) [8:660] **Exception—permitted factual statements:** CRPC 5-120 does *not* prohibit a lawyer from stating:

- the *claim, offense or defense involved* and the *identity of the persons* involved (unless prohibited by law);
- *information contained in a public record*;
- that an *investigation* of the matter *is in progress*;
- the *scheduling or result of any step in litigation*;
- a *request for assistance in obtaining evidence* and information necessary thereto;
- a *warning of danger* concerning the behavior of a person involved, if there is a likelihood of substantial harm to an individual or the public interest. [CRPC 5-120(B)(1)-(6)]

In addition, *in criminal cases*, a lawyer may state:

- the identity, residence, occupation, and family status of the accused;
- if the accused has not been apprehended, information necessary to aid in apprehension;
- the fact, time and place of arrest; and
- the identity of investigating and arresting officers or agencies and the length of the investigation. [CRPC 5-120(B)(7)]

(3) [8:661] **Exception—replying to adverse publicity:** The rule restricting lawyer speech outside court does not prohibit a lawyer from making a statement:

- the lawyer believes is *required to protect a client* from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client; and
- that is *limited* to information necessary to mitigate the adverse publicity. [See CRPC 5-120(C)]

(a) [8:662] **Conditions:** To invoke this “right of reply,” three conditions must be satisfied:

1) [8:663] **Statement necessary to protect from adverse publicity:** The statement must be one a reasonable lawyer would believe is required to protect a client from “substantial undue prejudicial effect of recent publicity.” [CRPC 5-120(C)]

2) [8:664] **Publicity not initiated by lawyer or client:** The prejudicial publicity that the lawyer seeks to counter must not have been initiated by the lawyer or client. [CRPC 5-120(C)]

3) [8:665] **Right of reply limited:** The right of reply is limited to statements disclosing information necessary to mitigate the recent adverse publicity. [CRPC 5-120(C)]

(b) [8:666] **Defamatory statements not protected:** The “right of reply” under CRPC 5-120(C) (above) only protects lawyers from discipline for making statements otherwise proscribed by CRPC 5-120. It does not provide a defense to a lawyer’s allegedly defamatory out-of-court statements. [*Rothman v. Jackson* (1996) 49 CA4th 1134, 1149, 57 CR2d 284, 294, fn. 5]

- [8:667] Opposing Counsel sued Attorney for defamation based on Attorney’s statements during a press conference where Attorney accused Opposing Counsel of attempting to extort money from Attorney’s client and making false statements.

The appellate court rejected Attorney’s defense that the press conference statements were entitled to immunity under CRPC 5-120(C) to protect Attorney’s client from recent prejudicial publicity. Although CRPC 5-120(C) ensures that statements made in compliance with its provisions will not subject attorneys to *discipline*, the Rule does not provide “that defamatory statements made by attorneys in extrajudicial statements in defense of their clients should be privileged and thus not subject to redress in a court of law.” [*Rothman v. Jackson, supra*, 49 CA4th at 1149, 57 CR2d at 294, fn. 5]

(4) [8:668] **Exception for statements of opinion?** Attorney’s televised statements that Psychiatrist who served as an expert witness in a particular case was “Looney Tunes,” that the criminal court “laughed at” Psychiatrist and “gave her zero” in response to Psychiatrist’s request for fees, and that Psychiatrist was a “terrible witness disliked by the jury” were protected under the First Amendment as statements of opinion and could not serve as the basis for a defamation claim. [*Lieberman v. Fieger* (9th Cir. 2003) 338 F3d 1076, 1079-1082 (opinion does not mention CRPC 5-120)]

(a) [8:668.1] **Compare—statements by attorneys serving as public employees:** The First Amendment does not insulate speech by attorneys serving as public employees in their official capacity whereas statements made in their private capacity as citizens may be protected. [*Garcetti v. Ceballos* (2006) 547 US 410, 421, 126 S.Ct. 1951, 1960; *Brandon v. Maricopa County* (9th Cir. 2017) 849 F3d 837, 845-846—county counsel’s fiduciary duties to county precluded First Amendment protection of statements made in counsel’s official capacity re matters concerning her representation of county]

(5) Scope of CRPC 5-120

(a) [8:669] **Applies to prosecutors and defense counsel alike:** The Rule is intended to apply equally to prosecutors and criminal defense counsel. [CRPC 5-120, Discussion]

1) [8:669.1] **Compare—special responsibilities of prosecutors:** Prosecutors in criminal cases must use reasonable care to prevent persons under their supervision—i.e., investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecution—from making an extrajudicial statement the prosecutor would be prohibited from making under CRPC 5-120. [CRPC 5-110(E) (added eff. 5/1/17); see also ABA Model Rule 3.8(f)]

(b) [8:670] **Any “adjudicative proceeding”:** The [Rule 5-120](#) restrictions apply to statements to the press affecting an “adjudicative proceeding.” [[CRPC 5-120\(A\)](#)]

Comment: Since [CRPC 5-120](#) does not define “adjudicative proceeding,” it may limit lawyers’ comments about pending arbitrations, administrative hearings, or even State Bar disciplinary proceedings, as well as court cases.

(c) [8:671] **Statements made on attorney’s behalf:** The Rule applies to statements made by or *on behalf* of the attorney. [[CRPC 5-120](#), Discussion]

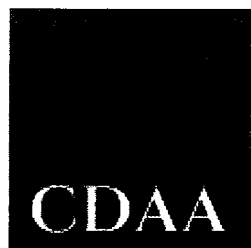
(6) [8:672] **“Substantial likelihood” of material prejudice; factors considered:** Whether a particular extrajudicial statement would have “a substantial likelihood of materially prejudicing” a case depends upon many factors, including:

- whether the statement contains clearly inadmissible evidence for the purpose of proving or disproving a material fact in issue in the matter;
- whether the statement includes information the attorney knows is false, deceptive, or the use of which would violate [Bus. & Prof.C. § 6068\(e\)](#) (attorney’s duty of confidentiality);
- whether the statement violates a “gag” order, protective order, statute, court rule or special rule of confidentiality (e.g., in juvenile, domestic, mental disability, and certain criminal proceedings); and
- the timing of the statement. [[CRPC 5-120](#), Discussion]

(7) [8:673] **Caution—“social media” communications:** Again, the reason for restricting a lawyer’s ability to speak out on issues involved in a pending case is to control the release of information about the case, thus ensuring a fair trial ([¶ 8:657](#)). There is simply no reason to think that such information, if posted over a “social media” site (such as Facebook or Twitter), is entitled to special protection. Indeed, using social networking sites to announce ongoing court proceedings may well violate [CRPC 5-120\(A\)](#).

[8:674 - 8:684] *Reserved.*

2. [8:685] **Compare—Public Statements Challenging Judge’s Integrity:** An attorney’s out-of-court *statements of opinion* impugning a judge’s integrity are not sanctionable unless proved false. [[Standing Committee on Discipline of U.S. Dist. Ct. for Cent. Dist. of Calif. v. Yagman](#) (9th Cir. 1995) 55 F3d 1430, 1438—“(A)ttorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false; truth is an absolute defense”]



CALIFORNIA
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PROFESSIONALISM

*A Sourcebook of Ethics and Civil Liability
Principles for Prosecutors*

2016

Stephen M. Wagstaffe
President

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Chief Executive Officer

in a public capacity, is not disqualified to act in one area of his or her public duty solely because of similar activity in another such area.” (*In re Lee G.* (1991) 1 Cal.App.4th 17; see *People v. Municipal Court (Byars)* (1978) 77 Cal.App.3d 294; *People v. Superior Court of San Luis Obispo County (Hollenbeck)* (1978) 84 Cal.App.3d 491.)

- J. A prosecutor should never represent a person accused of a crime. (Gov. Code § 26540; 66 Ops.Cal.Atty.Gen. 30 [1983]; Bus. & Prof. Code § 6131(a); Rules Prof. Conduct, rule 3-310; *People v. Rhodes* (1974) 12 Cal.3d 180.)

XIII. Duty During Public Communications

A. ABA Standard 3-1.10—Relationship With the Media

(Formerly ABA Standard 3-1.4: Public Statements)

- (a) For purposes of this Standard, a “public statement” is any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication or media, including social media. An extrajudicial statement is any oral, written, or visual presentation not made either in a courtroom during criminal proceedings or in court filings or correspondence with the court or counsel regarding criminal proceedings.
- (b) The prosecutor’s public statements about the judiciary, jurors, other lawyers, or the criminal justice system should be respectful even if expressing disagreement.
- (c) The prosecutor should not make, cause to be made, or authorize or condone the making of, a public statement that the prosecutor knows or reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding or heightening public condemnation of the accused, but the prosecutor may make statements that inform the public of the nature and extent of the prosecutor’s or law enforcement actions and serve a legitimate law enforcement purpose. The prosecutor may make a public statement explaining why criminal charges have been declined or dismissed, but must take care not to imply guilt or otherwise prejudice the interests of victims, witnesses or subjects of an investigation. A prosecutor’s public statements should otherwise be consistent with the ABA Standards on Fair Trial and Public Discourse.
- (d) A prosecutor should not place statements or evidence into the court record to circumvent this Standard.
- (e) The prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement or providing non-public information that the prosecutor would be prohibited from

making or providing under this Standard or other applicable rules or law.

- (f) The prosecutor may respond to public statements from any source in order to protect the prosecution's legitimate official interests, unless there is a substantial likelihood of materially prejudicing a criminal proceeding, in which case the prosecutor should approach defense counsel or a court for relief. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (g) The prosecutor has duties of confidentiality and loyalty, and should not secretly or anonymously provide non-public information to the media, on or off the record, without appropriate authorization.
- (h) The prosecutor should not allow prosecutorial judgment to be influenced by a personal interest in potential media contacts or attention.
- (i) A prosecutor uninvolved in a matter who is commenting as a media source may offer generalized commentary concerning a specific criminal matter that serves to educate the public about the criminal justice system and does not risk prejudicing a specific criminal proceeding. A prosecutor acting as such a media commentator should make reasonable efforts to be well-informed about the facts of the matter and the governing law. The prosecutor should not offer commentary regarding the specific merits of an ongoing criminal prosecution or investigation, except in a rare case to address a manifest injustice and the prosecutor is reasonably well-informed about the relevant facts and law.
- (j) During the pendency of a criminal matter, the prosecutor should not re-enact, or assist law enforcement in re-enacting, law enforcement events for the media. Absent a legitimate law enforcement purpose, the prosecutor should not display the accused for the media, nor should the prosecutor invite media presence during investigative actions without careful consideration of the interests of all involved, including suspects, defendants, and the public. However, a prosecutor may reasonably accommodate media requests for access to public information and events.

B. ABA Model Rule of Professional Conduct 3.8—Special Responsibilities of a Prosecutor

[The prosecutor in a criminal case shall ...]

- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve

a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

C. ABA Standard 3-6.10—Comments by Prosecutor After Verdict or Ruling

(Formerly ABA Standard 3-5.10: Comments by Prosecutor After Verdict)

- (a) The prosecutor should respectfully accept acquittals. Regarding other adverse rulings (including the rare acquittal by a judge that is appealable), while the prosecutor may publicly express respectful disagreement and an intention to pursue lawful options for review, the prosecutor should refrain from public criticism of any participant. Public comments after a verdict or ruling should be respectful of the legal system and process.
- (b) The prosecutor may publicly praise a jury verdict or court ruling, compliment government agents or others who aided in the matter, and note the social value of the ruling or event. The prosecutor should not publicly gloat or seek personal aggrandizement regarding a verdict or ruling.

D. Rules of Professional Conduct, Rule 5-120 (ABA Model Rule of Professional Conduct 3.6—Trial Publicity)

- (A) A member who is participating, or has participated, in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (B) Notwithstanding paragraph (A), a member may state:
 - (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) the information contained in a public record;
 - (3) that an investigation of the matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;

- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (a) the identity, residence, occupation, and family status of the accused;
 - (b) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (c) the fact, time, and place of arrest; and
 - (d) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- E. As public officials, prosecutors and their assistants and deputies have a duty to provide information to the public about the administration of criminal justice.
1. The prosecutor should regularly inform the public about the activities of the prosecutor's office and law enforcement agencies. Communications should include the prosecutor's views on important issues and problems affecting criminal justice. The reason is recited in Government Code section 6250: "Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this State." (See also Gov. Code § 54950; ABA Formal Op. 1999 [1940].)
 - a. The following information about the defendant or suspect *shall* be provided to the public upon request according to the California Public Records Act (CPRA), Government Code section 6254(f), unless the dissemination of that information would endanger the successful completion of an investigation or a related investigation or would endanger the safety of an involved person:
 - full name (except juveniles),
 - area of residence,
 - occupation,
 - physical description (including color of eyes and hair, height, and weight),
 - age,
 - gender,

- descent,
 - time and date of arrest,
 - location of arrest,
 - factual circumstances,
 - amount of bail and time and manner of release,
 - location held,
 - all charges including warrants,
 - parole or probation holds,
 - schedule and explanation of the judicial process,
 - penalty range, and
 - information in the court's file.
- b. Information that *may not* be disclosed to the media during a criminal matter, based on Rules of Professional Conduct, rule 5-120, ABA MRPC 3.6 and 3.8, National Prosecution Standards (3d ed. 2009) 2-14.1–2-14.8, includes the following information, which should not be divulged directly (news conference, interview, or news release) to the media during the pendency of a criminal matter:
- a statement that has a “substantial likelihood of materially prejudicing an adjudicative proceeding in the matter” (Rules Prof. Conduct, rule 5-120);
 - the subject of any gag order;
 - a confession or admission of a suspect or defendant;
 - a statement regarding the suspect or defendant's refusal to make a statement;
 - the prior criminal history of the suspect or defendant unless it is part of the criminal pleading or crime under investigation (see Pen. Code §§ 11075, 11105, 11142, 13300, 13302, and 13303);
 - the prosecutor's personal belief in the suspect or defendant's guilt;
 - the identity of a sexual assault victim, domestic violence victim, confidential informant, or any at-risk person involved in the criminal matter;
 - the results of examinations or the defendant's refusal to submit to certain examinations (e.g., lineup, polygraph, blood-alcohol, DNA, or voice sample);
 - the pendency of a search warrant;
 - the events of a closed courtroom session or secret grand jury proceeding; or
 - juvenile matters.

Although the prosecutor is restrained by rules of professional conduct, the media may nonetheless glean information from law enforcement agencies, court files, or persons associated with the criminal matter. The fact that the

media has an independent source for information does not relieve a prosecutor of professional responsibilities.

- c. Information that a prosecutor *may* disclose to media, consistent with the Rules of Professional Conduct, include the following (if the information does not have a “substantial likelihood of materially prejudicing an adjudicative proceeding in the matter”) (Rules Prof. Conduct, rule 5-120):
 - description of the crime;
 - general description of the victim (except for sexual assault, domestic violence or at-risk persons) including age and occupation, but not addresses or phone numbers;
 - details of the investigation including the officers’ names unless such information would divulge secret police tactics;
 - description of the arrest of the suspect or defendant;
 - description of the suspect or defendant, including age, identity, residence (unless release would endanger innocent persons), occupation, and family status;
 - description of allegations in the charging document;
 - penalty range for the charged offenses or the sentence imposed;
 - amount of bail, location of jail;
 - court dates and explanation of the court process;
 - description of motions filed and contained within the judicial record and probation reports while they are part of the public judicial record;
 - a call for public assistance in providing information to aid an investigation or apprehension of an at-large suspect; and
 - a warning of danger regarding an at-large suspect.
2. Special considerations apply to the dissemination of information regarding juvenile court proceedings.
 - a. A prosecutor should consider juvenile matters to be confidential in accordance with Welfare and Institutions Code section 827 and rule 5.530 of the Rules of Court.
 - b. A prosecutor may disclose information regarding serious felonies pursuant to Welfare and Institutions Code section 676 if the information has been brought out in open court and could have been heard or observed by members of the news media at a court hearing, unless the court has placed restrictions on such dissemination.
 - c. After a hearing has commenced, a prosecutor may disclose the offense and the name of the juvenile, 14 years of age or older, charged with a Penal Code section 1192.7(c) serious felony.

- d. After the petition is sustained, a prosecutor may disclose the name of the juvenile, 14 years of age or older, charged with the commission of Penal Code section 667.5 or 1192.7(c) crimes.
 - e. When there is an outstanding arrest warrant for a Welfare and Institutions Code section 707(b) offense, a prosecutor may disclose the name and identifiers (e.g., size, date of birth, or race) of the minor where such disclosure is imperative for the minor's apprehension, and there is a prior court order from the presiding judge of the juvenile court.
 - f. When there is an outstanding arrest warrant for murder personally committed by a minor 14 years of age or older, the prosecutor may release the name and identifiers of the subject minor.
 - g. The public disclosure by a prosecutor of juvenile case information acquired independently of the documents deemed confidential under provisions of Welfare and Institutions Code section 827 would be unlawful absent a juvenile court order permitting such disclosure. However, when the juvenile proceedings are open to the public, generally the prosecutor may furnish the news media with whatever information is available to the public at those proceedings in which the prosecutor participates, unless the juvenile court has placed restrictions on such dissemination. (See 65 Ops.Cal.Atty.Gen. 503 [1982] and *T.N.G. v. Superior Court of San Francisco County* (1971) 4 Cal.3d 767.)
- F. Just because information may be disclosed, does not necessarily mean it should be disclosed. In releasing information to the media on a specific case, prosecutors must consider individual privacy rights, a defendant's right to a fair trial, and whether dissemination of the information furthers a public interest. (See *Marsh v. County of San Diego* (9th Cir. 2012) 680 F.3d 1148 [prosecutor's release of child homicide victim's photo to press constituted possible invasion of privacy and actionable civil rights violation—recognizing that the parent “has a constitutionally protected right to privacy over her child's death images”].)
- 1. The chief prosecutor should consider adopting a policy for releasing case information to the media. In formulating such a policy, guidance may be taken from the trial publicity ethics rules set out in Rules of Professional Conduct, rule 5-120, ABA MRPC 3.6 and 3.8, ABA DR 7-107, and National Prosecution Standards (3d ed. 2009) 2-14.1–2-14.8. The policy will vary according to local needs.
 - 2. In *People v. Marshall* (1996) 13 Cal.4th 799, 863, the California Supreme Court found no violation of ethics or law when a prosecutor informed a reporter of public record facts in a death penalty case. While the facts in *Marshall* preceded adoption of rule 5-120, the court implicitly recognized the principle in rule 5-120(B)(2) which permits an attorney to report the information in a public record.
 - 3. The United States Department of Justice Guidelines on release of information in criminal actions can supply additional guidance concerning what can and should not be disclosed. (28 C.F.R. § 50.2.)

4. The ABA's Ethics Committee has opined that prosecutors may announce to the media the filing of a civil suit, return of an indictment or the like, and at the request of the media, may provide copies of those court documents. Comments that would violate the trial publicity ethics rule (then DR 7-107) are prohibited. (ABA Informal Op. 1345 [1975].)

G. Prosecutors who participate in press conferences should study rule 5-120.

1. Rule 5-120(A) prohibits extrajudicial statements that the attorney knows or reasonably should know will have a "substantial likelihood of materially prejudicing an adjudicative proceeding." It applies to attorneys who investigate or litigate "a matter."
2. The Supreme Court rejected the "clear and present danger" test suggested by the California Bar Association. Apparently the Court agreed with some of the United States Supreme Court opinions in *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, declaring that the "substantial likelihood test" does not violate an attorney's First Amendment free speech rights.
3. Rule 5-120(B) specifically permits statements relaying that an investigation is underway, the identity of investigating officers and agencies, statements of "the claim, offense or defense involved," requests for assistance, warnings of danger, some of the arrest circumstances, and some identifying information about the accused and "persons involved." An attorney may also state "the information in a public record."
4. Rule 5-120(C) permits an attorney to make limited statements to mitigate the effects of prejudicial publicity not initiated by the attorney or the attorney's client. The test is whether a reasonable member would believe the reply is required to protect a client from the substantial undue prejudicial effect of the recent publicity.
5. The "Discussion" after the rule makes it applicable "equally to prosecutors and criminal defense counsel," and to statements made by or for the attorney. It lists some of the factors used to determine whether an extrajudicial statement violates the rule. For example, references to inadmissible evidence and false or deceptive statements that would violate the attorney's duty of candor are facts indicating the rule has been violated.
6. An attorney who violates a Rule of Professional Conduct that establishes a "duty" is subject to private reproof, public reproof, suspension, or disbarment. (See Bus. & Prof. Code §§ 6068, 6077, and 6103; also see the six cases discussing claims of prosecutorial misconduct during public communications at the end of this chapter.)
7. Always distinguish your personal views from those of your office. Prosecutors are often invited to speak publicly away from the courtroom. Do not forget the law governing slander, libel, and official misconduct.
8. Do not make unlawful or unwise disclosures to the media. A prosecutor's proverb—"Do not say it if you do not want to read it on page one of the newspaper"—offers good advice. "Off the record" conversations can cause

the loss of your career as a prosecutor, an attorney, and a homeowner. See Chapter IV: The Civil Liability of a Prosecutor, for a discussion about the potential civil liabilities of a prosecutor making public statements.

9. A prosecutor accused of misconduct during authorized public statements will find valuable support in *Bradbury v. Superior Court of Ventura County* (1996) 49 Cal.App.4th 1108, in which the district attorney signed a report criticizing a deputy sheriff for shooting a suspect. The peace officer's civil rights lawsuit pursuant to title 42 of the United States Code, section 1983 was dismissed because it failed to allege any injury beyond damage to reputation. The defamation lawsuit was dismissed because district attorneys have First Amendment rights to speak out on matters of public concern, and the right to speak is protected by California's anti-SLAPP law (Strategic Lawsuit to Prevent Public Participation) in Code of Civil Procedure section 425.16.
 10. A prosecutor accused in a complaint filed with the State Bar will find a full discussion of the issues in ABA Standards for Criminal Justice, Fair Trial, and Free Press (Approved Draft, 1968). (See also Annot., Release of Information Concerning Forthcoming or Pending Trials Ground for Contempt Proceedings or Other Disciplinary Measures Against Members of the Bar (1967) 11 A.L.R. 3d 1104; ABA Standards 3-1.10, 3-1.11, and 3-6.10; ABA Canon 20 of the Former Canons of Professional Ethics; and ABA Formal Op. 199 [1940].)
- H. The legal balance between free speech rights in the First Amendment and fair trial rights in the Sixth Amendment to the United States Constitution is the foundation for the trial publicity ethics rules. The rules have evolved as media dissemination becomes ubiquitous. A prosecutor accused of misconduct should know the history.
1. In 1908, the American Bar Association established Canon 20 of the Former Canons of Professional Ethics. The rule was simple and clear:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases, it is better to avoid an *ex parte* statement.
 2. The principles in Canon 20 were completely ignored during the murder trial in *Sheppard v. Maxwell* (1966) 384 U.S. 333. It was conducted amidst a media circus that included placing about 20 reporters inside the bar of the courtroom. The trial judge and the chief prosecutor were candidates for judgeships and the massive publicity included many matters unfairly prejudicial to *Sheppard*. In reversing the conviction, the Supreme Court declared that courts have the power to proscribe "extrajudicial statements by any lawyer, party, witness, or court official" that divulge prejudicial matters.

(*Id.* at 361.) The Court held that where there is a “reasonable likelihood that prejudicial news prior to trial will prevent a fair trial,” the judge should consider remedies such as continuance of the case, change of venue, giving special jury instructions, or sequestration of the jury. (*Id.* at 363.)

3. In 1969, the ABA established MCPR DR 7-107 (Trial Publicity) that followed the *Sheppard* principles. ABA DR 7-107(A) makes it unethical for a “lawyer participating in or associated with the investigation of a criminal matter” to make “an extrajudicial statement that a reasonable person would expect to be disseminated ... that does more than state without elaboration” certain basic public record facts about the investigation.
4. ABA DR 7-107(B) referring to “prosecution or defense” specifically prohibits references to:
 - character or reputation,
 - the possibility of a guilty plea,
 - confessions and admissions,
 - test results or refusals,
 - the identity and credibility of prospective witnesses, and
 - opinions about guilt or innocence, the evidence, or the merits of the case.
5. ABA DR 7-107(C) and National Prosecution Standard (3d ed. 2009) 2-14.3 list basic statements that are permissible such as identifying matters about the accused, the victim, and the time and location of the arrest.
6. ABA DR 7-107(D) prohibits attorneys selecting a criminal case jury from making statements “that are reasonably likely to interfere with a fair trial.” However, it permits quotations from court records made without additional comments.
 - a. “A judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding.” (Code Civ. Proc. § 1904.) A prosecutor should therefore file a redacted police report or an affidavit as probable cause documentation in order to protect the integrity of an incomplete investigation, a victim’s identity, confidential informants, defendant’s confession or results of examinations, or the subject of any gag order.
 - b. Documents not yet filed are not judicial records. For example, a prosecutor should not disseminate a probation report to the media before the date of judgment or granting of or probation. (Pen. Code § 1203.05.)
7. ABA DR 7-107(E) prohibits statements made after a plea or verdict of guilty that are “reasonably likely to affect the imposition of sentence.” Other sections in ABA DR 7-107 apply to civil and administrative hearings.
8. In 1983, the ABA established its “preferred” Model Rules of Professional Conduct. Rule 3.6 (Trial Publicity) generally followed ABA DR 7-107 and consolidated the ethics rules.

9. Rule 3.6(a) prohibits a lawyer engaged in “investigation or litigation” from making “extrajudicial statement[s] that ... the lawyer knows or reasonably should know ... will have a substantial likelihood of materially prejudicing an adjudicative proceeding.” Until 1994, Rule 3.6(b) contained most of the prohibited statements in ABA DR 7-107, and Rule 3.6(c) included most of the permitted statements in ABA DR 7-107. Rule 3.6(c) specifically allowed a lawyer to “state without elaboration” several facts including “the general nature of the claim or defense.”
 10. In *Maine v. Superior Court of Mendocino County* (1968) 68 Cal.2d 375, the California Supreme Court adopted the *Sheppard v. Maxwell* legal standards. For that reason, California prosecutors used the ABA rules for guidance until the United States Supreme Court decided *Gentile, supra*.
 11. In *Gentile*, a defense attorney held a press conference after the indictment was announced. He said (1) the evidence demonstrated his client’s innocence, (2) the likely perpetrator was a drug-addicted police officer, and (3) the witnesses were incredible because they were convicted criminals. (*Id.* at 1045.) He used a videotaped scene to support his allegations of drug use by the police officer. The Nevada State Bar, applying its version of Rule 3.6, sanctioned the attorney. In a fractured opinion, the United State Supreme Court accepted the constitutionality of the “substantial likelihood test” (*Id.* at 1037) by apparently finding it close enough to the “clear and present danger” test to adequately protect an attorney’s rights to free speech. (*Id.*) However, the Court found that the “safe harbor” provision in Rule 3.6, which allowed an attorney to state “the general nature of the claim or defense,” was void for vagueness because *Gentile* could not know when his remarks exceeded the protections of that safe harbor. (*Id.* at 1048–1049.)
 12. On August 10, 1994, the ABA responded to *Gentile* and amended Rule 3.6. The statements prohibited in section (b) were removed and placed in comment 5; section (c) was rewritten to delete all reference to “general” statements; and new section 3.6(d) was added. Section (c) permits an attorney to respond “to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer of the ... client.” Section (d) prohibits other attorneys in the law firm or government agency from making statements that violate the Rule.
- I. Disbarment or suspension of a prosecutor for violating trial publicity ethics rules is unlikely, but disciplinary proceedings should be avoided at all times.
1. *In re Haymond* (1898) 121 Cal. 385, where the prosecutor schemed to sell a confession to a local newspaper, and the supreme court declined to disbar him.
 2. *In re Burrows* (Ore. 1980) 618 P.2d 1283, in which a disciplinary action was brought against a district attorney for an alleged violation of ABA DR 7-107(B)(3). The prosecutor read to high school students a letter written by a criminal defendant to his mother, wherein the defendant expressed his sorrow for unspecified acts he had committed and asked his mother’s

forgiveness. The Supreme Court of Oregon held the reading was unlikely to have any effect on the pending criminal cases, and the prosecutor's comments were not designed to reach the news media or potential jurors.

3. *In re Rachmiel* (N.J. 1982) 449 A.2d 505, in which a former prosecutor originally told the media that a murder case that he had prosecuted, and which was overturned in a habeas corpus proceeding, should be re-tried. Three days later he wrote a letter to the press saying the case should not be re-tried and participated in a number of media interviews. The district attorney complained to the State Bar, which charged Rachmiel with violating ABA DR 7-107(B)(6) prohibiting expressions about the guilt or innocence of an accused. The court held that the rule applied to former prosecutors but gave the holding only prospective effect. The court also found that Rachmiel's remarks did not violate ABA DR 7-107(E)'s prohibition against extrajudicial comments that are reasonably likely to affect sentencing because the proceedings involved were a possible re-trial, not a current sentencing matter.
4. *In re Lasswell* (Ore. 1983) 673 P.2d 855, in which the State Bar charged a district attorney with violating ABA DR 7-107(B) as a result of commenting in a newspaper interview and a television program on facts relating to a large scale investigation into illegal drug traffic that led to the arrest and indictment of some 50 persons. The prosecutor told a reporter that the persons arrested were "sellers" of drugs and would have sold more than the investigator bought. He also said that entrapment defenses were unlikely to succeed and that he foresaw a conviction rate of 90 to 100 percent. (*Id.* at 128.) The court held that the "disciplinary rule deals with purposes and prospective effects, not with completed harm. It addresses the prosecutor's professional responsibility at the time he or she chooses what to speak or write." (*Id.* at 126.) The court found that the prosecutor was intending to point out that the investigator went after persons who were drug sellers, not persons merely possessing drugs. (*Id.* at 128.) In summary, the State Bar proved neither that the prosecutor intended to create seriously prejudicial beliefs in the minds of potential jurors nor that he was knowingly indifferent to a highly likely risk that his remarks would have this effect. (*Id.* at 130.)
5. See also *People v. Phillips* (1985) 169 Cal.App.3d 632, which involved an appeal from the denial of a recusal motion in a child sexual assault case. "While the deputy district attorney's participation in the radio talk show was certainly ill advised, the transcripts show he cautiously avoided references to the merits of Phillips' case, and his expressed concern for [the victim] was within the realm of proper prosecutorial functions." (*Id.* at 641.)
6. Consider carefully *Zimmerman v. Board of Professional Responsibility* (Tenn. 1989) 764 S.W.2d 757. In *Zimmerman*, a prosecutor was privately reprimanded for two violations of ABA DR 7-107.
 - a. The first violation occurred when, following his presentation at a murder case preliminary hearing, the prosecutor engaged in informal conversation with media reporters. During that conversation he told the reporters that the medical examiner had found the victim was strangled, stabbed many times, and had his throat slashed. He also said that he was considering

- asking for the death penalty and that the defendant confessed to stabbing the victim and slashing his throat almost from ear to ear. A violation of ABA DR 7-107(B) was charged.
- b. The second informal conversation with reporters occurred after verdicts of guilt in a separate case. The prosecutor commented that the torture suffered by the victim was extreme, that the verdicts reflected a community decision that such crimes against the elderly would not be tolerated, and that he was going to ask the sentencing judge to impose maximum sentences. A violation of ABA DR 7-107(E) was alleged.
 - c. The Supreme Court of Tennessee rejected the prosecutor's arguments that his statements were protected free speech and upheld both disciplinary findings.
7. Trial publicity ethics rules do not prohibit ethical public statements about the court's conduct. See, for example, San Diego County Bar Association Ethics Opinion 1974-8, concluding that a prosecutor's public criticism of a judge's sentence was not unethical. Nevertheless, prosecutors—as all members of the bar—are ethically required to maintain respect for the courts. (Bus. & Prof. Code § 6068(b).)
 8. In *Hollywood v. Superior Court of Santa Barbara County* (2008) 43 Cal.4th 721, the court declined to grant a request for recusal of a prosecutor who consulted with a movie studio that was producing a movie about a kidnapping and murder case in which one of the suspects was still at large. The court held that the prosecutor's cooperation with a movie studio was not a prejudicial disclosure of information because the prosecutor's main goal was that the release of the film would lead to the apprehension of the suspect; the prosecutor sought to have the suspect portrayed accurately; and because any potential tainting of a jury could be handled in voir dire. However, the court also explained in dicta that a prosecutor could disseminate information that portrayed a suspect in an inflammatory light in such a way that a potential jury would be tainted and that the defendant's right to a fair trial could be compromised.
 9. In *Haraguchi v. Superior Court of Santa Barbara County* (2008) 43 Cal.4th 706, the court held that a novel written by a prosecutor contained similar facts to an ongoing case and a similar antagonist to the defendant, but these similarities did not affect the defendant's right to a fair trial nor did the financial incentives from the sale of the book create a conflict of interest for the prosecutor.
 10. In *People v. McKinzie* (2012) 54 Cal.4th 1302, the court held that even though the prosecutor had directed a reporter's attention to the daily court transcript that included a piece of important but potentially unfairly prejudicial evidence that had not yet been admitted, the defendant's right to a fair trial was not tainted. The reporter then published an article that referred to the controversial evidence as if it had been admitted. However, the matter was

handled in voir dire when the judge asked if any of the potential jurors had read the article.

ABOUT THE AUTHOR

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making or providing under this Standard or other applicable rules or law.

- (f) The prosecutor may respond to public statements from any source in order to protect the prosecution's legitimate official interests, unless there is a substantial likelihood of materially prejudicing a criminal proceeding, in which case the prosecutor should approach defense counsel or a court for relief. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (g) The prosecutor has duties of confidentiality and loyalty, and should not secretly or anonymously provide non-public information to the media, on or off the record, without appropriate authorization.
- (h) The prosecutor should not allow prosecutorial judgment to be influenced by a personal interest in potential media contacts or attention.
- (i) A prosecutor uninvolved in a matter who is commenting as a media source may offer generalized commentary concerning a specific criminal matter that serves to educate the public about the criminal justice system and does not risk prejudicing a specific criminal proceeding. A prosecutor acting as such a media commentator should make reasonable efforts to be well-informed about the facts of the matter and the governing law. The prosecutor should not offer commentary regarding the specific merits of an ongoing criminal prosecution or investigation, except in a rare case to address a manifest injustice and the prosecutor is reasonably well-informed about the relevant facts and law.
- (j) During the pendency of a criminal matter, the prosecutor should not re-enact, or assist law enforcement in re-enacting, law enforcement events for the media. Absent a legitimate law enforcement purpose, the prosecutor should not display the accused for the media, nor should the prosecutor invite media presence during investigative actions without careful consideration of the interests of all involved, including suspects, defendants, and the public. However, a prosecutor may reasonably accommodate media requests for access to public information and events.

B. ABA Model Rule of Professional Conduct 3.8—Special Responsibilities of a Prosecutor

[The prosecutor in a criminal case shall ...]

- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve

those commercial discounts that are available to members of the general public or to an identifiable social, religious, employment, professional or business association to which non-prosecutors also belong. (See Pen. Code § 70; ABA DR 8-101(A)(3); and your office's policies concerning the acceptance of any gifts, including gifts from victims.)

2. Victims and witnesses may like you. Refuse to accept "gifts," and politely tell the donors why you are doing so. However, it is not wrong to accept a small, symbolic gift from a victim or his or her family.
3. Beware of "free" lunches. (*In re D'Auria* (1975) 67 N.J. 22 [a worker's compensation judge accepted numerous "free" lunches that were actually paid for by attorneys for insurance company representatives involved in matters pending before the judge].)
4. "A member shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions." (Rules Prof. Conduct, rule 5-300(A).)

D. Prosecutors may not use their official position for personal gain or financial advantage. Furthermore, prosecutors may not refer to official position, rank, and title if it conveys an appearance of an attempt to gain improper advantage or favor. Prosecutors are limited in the use of confidential information.

1. A prosecutor should not exploit the public trust and confidence in the office by means of personal publicity connected with a case before, during, or after trial. (ABA Standard 3-1.7(a); *United States v. Bufalino* (2d Cir. 1960) 285 F.2d 408.)
2. Since the use of official stationery implicitly communicates that a prosecutor is corresponding on behalf of the public office, using official stationery for personal objectives is improper. The prosecutor's office should have a policy for the use of stationery for such professionally related matters as making employment recommendations or references for interns, clerks, professional staff. Additionally, each prosecution office should have written policies regarding use of office computers, email, social media, and other technology.
3. The dissemination of information contained in criminal records is restricted by statute; unauthorized disclosure constitutes a misdemeanor offense. (Pen. Code §§ 11075–11081, 11140–11144, 13300–13305; Veh. Code §§ 1808.45, 1808.46; *Kilgore v. Younger* (1982) 30 Cal.3d 770, 780, 792; *Johnson v. Winter* (1982) 127 Cal.App.3d 435, 439.)
 - a. A prosecutor should not use confidential information obtained through official sources for personal advantage; such misuse may constitute theft and receipt of stolen property. (See *Williams v. Superior Court of Los Angeles County* (1978) 81 Cal.App.3d 330, 341–342.)

- b. Obtaining confidential official information by leading another to believe the request is on behalf of the official agency, when such is not the case, is a misdemeanor. (Pen. Code § 146b; Veh. Code §§ 1808.45, 1808.46.)
 - c. Similarly, when you learn that defense attorneys or defense investigators claimed to be working for the “DA” in circumstances establishing false impersonation of District Attorney authority, investigate and prosecute such cases both criminally and administratively. See Business and Professions Code section 7561.1(e), which provides that the license of a private investigator may be suspended or revoked if the individual “[i]mpersonated, or permitted or aided and abetted an employee to impersonate a law enforcement officer or employee of the United States of America, or of any state or political subdivision thereof.” (See *Hamilton, supra*, at 308.)
4. It is a felony to steal, remove, secrete, destroy, mutilate, deface, alter, or falsify any record or paper or proceeding of any court, or any record or paper filed or deposited in any public office or placed in the hands of a public officer for any purpose. (Gov. Code § 6200.) A district attorney and his or her deputies are clearly “public officers” under this statute. (See *People v. Pearson* (1952) 111 Cal.App.2d 9 [sheriff’s deputy is a public officer].) Court records, arrest records, and crime reports are all “public records.”
 5. It is a felony to appropriate government funds to one’s own use or that of another without authorization, to make a loan or profit from public funds, to knowingly make or keep a false account, to fraudulently alter or falsify an account, to willfully refuse to pay over or transfer public funds as required by law. (Pen. Code § 424.) This statute reaches such conduct as use of public employees’ time for other than official duties, misuse of an official vehicle, and filing false time reports, leave, or overtime reports affecting pay or credits. (See *People v. Battin* (1978) 77 Cal.App.3d 635 [use of staff for political purposes]; *People v. Sperl* (1976) 54 Cal.App.3d 640 [misuse of county car]; *People v. Groat* (1993) 19 Cal.App.4th 1228 [false time cards].)
 6. A prosecutor is not a peace officer (Pen. Code §§ 830–830.11), and it is a misdemeanor for a non-peace officer to display a badge with intent to convey the impression that the bearer has the authority of a peace officer. (Pen. Code § 538d; 90 Ops.Cal.Atty.Gen. 57 [2007].) In the wake of the Attorney General’s 2007 opinion on the subject, many district attorney offices have ceased authorizing or issuing badges to deputy district attorneys.
 7. Government Code section 1126(a) provides, in part: “[a] local agency officer or employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed.” That section further provides that each agency, such as a district attorney’s office, shall determine which activities are incompatible with the activities of the office and prohibit those activities. The law requires that these prohibited activities be published and provided to its employees (an Incompatible Activities Statement) and best practices suggest

that each covered employee should sign such a statement for inclusion in the employee's personnel file and be provided a copy of the Statement to retain. Additionally, best practices suggest that any exception to an incompatible activity, such as outside employment, be requested in writing and approved by the appropriate authority in the office.

XII. Duty to Avoid Conflicts of Interest

A. ABA Standard 3-1.7—Conflicts of Interest

(Formerly ABA Standard 3-1.3: Conflicts of Interest)

- (a) The prosecutor should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a conflict requiring recusal exists and is non-waivable, or informed consent has not been obtained, the prosecutor should recuse from further participation in the matter. The office should not go forward until a non-conflicted prosecutor, or an adequate waiver, is in place.
- (b) The prosecutor should not represent a defendant in criminal proceedings in the prosecutor's jurisdiction.
- (c) The prosecutor should not participate in a matter in which the prosecutor previously participated, personally and substantially, as a non-prosecutor, unless the appropriate government office, and when necessary a former client, gives informed consent confirmed in writing.
- (d) The prosecutor should not be involved in the prosecution of a former client. A prosecutor who has formerly represented a client should not use information obtained from that representation to the disadvantage of the former client.
- (e) The prosecutor should not negotiate for private employment with an accused or the target of an investigation, in a matter in which the prosecutor is participating personally and substantially, or with an attorney or agent for such accused or target
- (f) The prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal, political, financial, professional, business, property, or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case.
- (g) The prosecutor should disclose to appropriate supervisory personnel any facts or interests that could reasonably be viewed as raising a potential conflict of interest. If it is determined

- (D) After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.
- (E) A member shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.
- (F) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.'
- (G) A member shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the member has knowledge.
- (H) This rule does not prohibit a member from communicating with persons who are members of a venire or jurors as a part of the official proceedings.
- (I) For purposes of this rule, "juror" means any empanelled, discharged, or excused juror.

2. Code of Civil Procedure Section 206

In criminal cases, a juror has the right not to discuss deliberations and should be reminded of that right by an attorney attempting to make contact after trial, and consent to the contact. Any violation of section 206 is considered a violation of a court order and could result in monetary sanctions.

3. Contact Initiated by a Juror

An attorney who is approached by a juror should politely inform the juror that any conversation is improper. The attorney should then advise the court, with opposing counsel present, of the nature and extent of the juror's contact, thereby allaying any suggestion of improper conduct by the attorney. (*In re Possino* (1984) 37 Cal.3d 163, 170.) Attorneys should only be addressing jurors in open court. Attempting to influence a juror is a crime under Penal Code section 95.

N. Trial Publicity

Prosecutors and defense counsel must follow the same rules regarding trial publicity, which are laid out in rule 5-120 of the Rules of Professional Conduct.

While the rules may limit free speech, they are constitutional because they aim to preserve the right to fair trial. Rule 5-120 will likely also apply to social networking media.

1. Rule 5-120 of the Rules of Professional Conduct

(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(B) Notwithstanding paragraph (A), a member may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(a) the identity, residence, occupation, and family status of the accused;

(b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;

(c) the fact, time, and place of arrest; and

(d) the identity of investigating and arresting officers or agencies and the length of the investigation.

2. The “Replying to Adverse Publicity” Exception

An attorney may make a statement that a reasonable member would believe is required to protect a client from the substantial, undue prejudicial effect of recent publicity not initiated by the member or the member’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse

publicity. (Rules Prof. Conduct, rule 5-120(C).) This does not include defamatory statements.

The Discussion Notes from the rule further state,

Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.

Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d); (3) whether the extrajudicial statement violates a lawful “gag” order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and (4) the timing of the statement.

VI. Money Sanctions Under Code of Civil Procedure Section 177.5

Section 177.5 of the Code of Civil Procedure gives the court power to impose monetary sanctions against attorneys who violate a court order, and states:

A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars (\$1,500), notwithstanding any other provision of law, payable to the court, for any violation of a lawful court order by a person, done without good cause or substantial justification. This power shall not apply to advocacy of counsel before the court. For the purposes of this section, the term “person” includes a witness, a party, a party’s attorney, or both. ¶ Sanctions pursuant to this section shall not be imposed except on notice contained in a party’s moving or responding papers; or on the court’s own motion, after notice and opportunity to be heard. An order imposing sanctions shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

The apparent purpose of section 177.5 is to compensate the court when attorneys cause unnecessary hearings that waste court resources (*In re Woodham* (2001) 95 Cal. App.4th 438; *Moyal v. Lanphear* (1989) 208 Cal.App.3d 491, 499), and can be used by the court to impose fines on attorneys who are simply late for court. (*People v. Tabb* (1991) 228 Cal.App.3d 1300, 1310–1312.) Section 177.5 does not require a showing of bad faith, nor does it require a willful violation. (*Id.* at 1311.)

No sanctions can be imposed under section 177.5 except on notice in the party’s moving papers or, if on the court’s own motion, after notice and opportunity to be heard has been provided to the accused attorney. Notice can consist of the court informing the attorney either to do or not to do something. An “‘opportunity to be heard’ in the

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(effective on November 1, 2018)

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows* or reasonably should know* will (i) be disseminated by means of public communication and (ii) have a substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), but only to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6, lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons* involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person* involved, when there is reason to believe* that there exists the likelihood of substantial* harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably* necessary to protect the individual or the public; and
- (7) in a criminal case, in addition to paragraphs (1) through (6):
 - (i) the identity, general area of residence, and occupation of the accused;
 - (ii) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;*
 - (iii) the fact, time, and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable* lawyer would believe* is required to protect a client from the substantial* undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a law firm* or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] Whether an extrajudicial statement violates this rule depends on many factors, including: (i) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (ii) whether the extrajudicial statement presents information the lawyer knows* is false, deceptive, or the use of which would violate Business and Professions Code section 6068, subdivision (d) or rule 3.3; (iii) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality, for example, in juvenile, domestic, mental disability, and certain criminal proceedings, (see Bus. & Prof. Code, § 6068, subd. (a) and rule 3.4(f), which require compliance with such obligations); and (iv) the timing of the statement.

[2] This rule applies to prosecutors and criminal defense counsel. See rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Rule 3.7 Lawyer as Witness

(a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:

- (1) the lawyer's testimony relates to an uncontested issue or matter;
- (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
- (3) the lawyer has obtained informed written consent* from the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm* is likely to be called as a witness unless precluded from doing so by rule 1.7 or rule 1.9.

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California Practice Guide: Professional Responsibility | September 2017 Update

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Chapter 8. Advocacy and Representation

D. Restrictions on Speech and Behavior Outside Courtroom

1. [8:655] **Statements to News Media Regarding Pending Proceedings:** Unlike ordinary citizens, lawyers involved in pending cases may be subject to ethical limitations on their “free speech” rights. Such limitations are *constitutionally* permissible only where the lawyer’s statements to the press or other media are “substantially likely to have a *materially prejudicial effect*” on the pending proceeding. [*Gentile v. State Bar of Nevada* (1991) 501 US 1030, 1076, 111 S.Ct. 2720, 2745 (emphasis added); see also *Canatella v. Stovitz* (ND CA 2005) 365 F.Supp.2d 1064, 1071-1072, fn. 7]

a. [8:656] **Compare—nonlawyers’ speech rights:** Restrictions on the speech rights of nonlawyers are considerably less onerous. Newspaper reporters (and others) may report what transpires in the courtroom and other facts as well. In such situations, a court can restrain public comment only if “further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would ... render a just verdict exclusively on the evidence presented in open court.” [*Nebraska Press Ass’n v. Stuart* (1976) 427 US 539, 569, 96 S.Ct. 2791, 2807]

b. [8:657] **Rationale for restriction on lawyer speech:** The basis for restricting lawyers’ ability to speak out on issues involved in their cases is the State’s interest in assuring fair trials: “Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by ‘impartial’ jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.” [*Gentile v. State Bar of Nevada*, *supra*, 501 US at 1075, 111 S.Ct. at 2745]

(1) [8:657.1] **Compare—prior restraint of attorney “speech” improper where less restrictive means available to prevent jury contamination:** A court order requiring an attorney in a civil trial to remove pages from her website touting recent successes in similar cases was an improper prior restraint on speech because less restrictive alternatives were available to handle the threat of jury contamination—i.e., jury admonishments (“not to Google the attorneys” or conduct independent research about them) and contempt consequences. [*Steiner v. Sup.Ct. (Volkswagen Group of America)* (2013) 220 CA4th 1479, 1490-1492, 164 CR3d 155, 164-166]

c. [8:658] **CRPC restrictions on statements to media:** In response to the *Gentile* decision, above, California adopted restrictions on lawyers’ speech about pending cases: A lawyer participating (or who has participated) in investigation or litigation of a matter is prohibited from making out-of-court statements about the matter if:

- a reasonable person would *expect the statement to be disseminated* by means of public communication; and
- the lawyer knows (or reasonably should know) that the statement will have a *substantial likelihood of materially prejudicing* an adjudicative proceeding in the matter. [CRPC 5-120(A); see also ABA Model Rule 3.6]

(1) [8:659] **Background:** Prior to the adoption of CRPC 5-120, California did not impose any restrictions on lawyers' speech to the press. CRPC 5-120 (which is substantially the same as ABA Model Rule 3.6) was adopted in response to the Supreme Court's decision in *Gentile v. State Bar of Nevada* (1991) 501 US 1030, 111 S.Ct. 2720. *Gentile* invalidated a Nevada State Bar rule, but upheld the right of states to restrict attorney speech where a substantial likelihood of material prejudice to a pending proceeding exists (§ 8:655).

(2) [8:660] **Exception—permitted factual statements:** CRPC 5-120 does *not* prohibit a lawyer from stating:

- the *claim, offense or defense involved* and the *identity of the persons* involved (unless prohibited by law);
- *information contained in a public record*;
- that an *investigation* of the matter *is in progress*;
- the *scheduling or result of any step in litigation*;
- a *request for assistance in obtaining evidence* and information necessary thereto;
- a *warning of danger* concerning the behavior of a person involved, if there is a likelihood of substantial harm to an individual or the public interest. [CRPC 5-120(B)(1)-(6)]

In addition, *in criminal cases*, a lawyer may state:

- the identity, residence, occupation, and family status of the accused;
- if the accused has not been apprehended, information necessary to aid in apprehension;
- the fact, time and place of arrest; and
- the identity of investigating and arresting officers or agencies and the length of the investigation. [CRPC 5-120(B)(7)]

(3) [8:661] **Exception—replying to adverse publicity:** The rule restricting lawyer speech outside court does not prohibit a lawyer from making a statement:

- the lawyer believes is *required to protect a client* from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client; and
- that is *limited* to information necessary to mitigate the adverse publicity. [See CRPC 5-120(C)]

(a) [8:662] **Conditions:** To invoke this “right of reply,” three conditions must be satisfied:

1) [8:663] **Statement necessary to protect from adverse publicity:** The statement must be one a reasonable lawyer would believe is required to protect a client from “substantial undue prejudicial effect of recent publicity.” [CRPC 5-120(C)]

2) [8:664] **Publicity not initiated by lawyer or client:** The prejudicial publicity that the lawyer seeks to counter must not have been initiated by the lawyer or client. [CRPC 5-120(C)]

3) [8:665] **Right of reply limited:** The right of reply is limited to statements disclosing information necessary to mitigate the recent adverse publicity. [CRPC 5-120(C)]

(b) [8:666] **Defamatory statements not protected:** The “right of reply” under CRPC 5-120(C) (above) only protects lawyers from discipline for making statements otherwise proscribed by CRPC 5-120. It does not provide a defense to a lawyer’s allegedly defamatory out-of-court statements. [*Rothman v. Jackson* (1996) 49 CA4th 1134, 1149, 57 CR2d 284, 294, fn. 5]

- [8:667] Opposing Counsel sued Attorney for defamation based on Attorney’s statements during a press conference where Attorney accused Opposing Counsel of attempting to extort money from Attorney’s client and making false statements.

The appellate court rejected Attorney’s defense that the press conference statements were entitled to immunity under CRPC 5-120(C) to protect Attorney’s client from recent prejudicial publicity. Although CRPC 5-120(C) ensures that statements made in compliance with its provisions will not subject attorneys to *discipline*, the Rule does not provide “that defamatory statements made by attorneys in extrajudicial statements in defense of their clients should be privileged and thus not subject to redress in a court of law.” [*Rothman v. Jackson, supra*, 49 CA4th at 1149, 57 CR2d at 294, fn. 5]

(4) [8:668] **Exception for statements of opinion?** Attorney’s televised statements that Psychiatrist who served as an expert witness in a particular case was “Looney Tunes,” that the criminal court “laughed at” Psychiatrist and “gave her zero” in response to Psychiatrist’s request for fees, and that Psychiatrist was a “terrible witness disliked by the jury” were protected under the First Amendment as statements of opinion and could not serve as the basis for a defamation claim. [*Lieberman v. Fieger* (9th Cir. 2003) 338 F3d 1076, 1079-1082 (opinion does not mention CRPC 5-120)]

(a) [8:668.1] **Compare—statements by attorneys serving as public employees:** The First Amendment does not insulate speech by attorneys serving as public employees in their official capacity whereas statements made in their private capacity as citizens may be protected. [*Garcetti v. Ceballos* (2006) 547 US 410, 421, 126 S.Ct. 1951, 1960; *Brandon v. Maricopa County* (9th Cir. 2017) 849 F3d 837, 845-846—county counsel’s fiduciary duties to county precluded First Amendment protection of statements made in counsel’s official capacity re matters concerning her representation of county]

(5) Scope of CRPC 5-120

(a) [8:669] **Applies to prosecutors and defense counsel alike:** The Rule is intended to apply equally to prosecutors and criminal defense counsel. [CRPC 5-120, Discussion]

1) [8:669.1] **Compare—special responsibilities of prosecutors:** Prosecutors in criminal cases must use reasonable care to prevent persons under their supervision—i.e., investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecution—from making an extrajudicial statement the prosecutor would be prohibited from making under CRPC 5-120. [CRPC 5-110(E) (added eff. 5/1/17); see also ABA Model Rule 3.8(f)]

(b) [8:670] **Any “adjudicative proceeding”:** The [Rule 5-120](#) restrictions apply to statements to the press affecting an “adjudicative proceeding.” [[CRPC 5-120\(A\)](#)]

Comment: Since [CRPC 5-120](#) does not define “adjudicative proceeding,” it may limit lawyers’ comments about pending arbitrations, administrative hearings, or even State Bar disciplinary proceedings, as well as court cases.

(c) [8:671] **Statements made on attorney’s behalf:** The Rule applies to statements made by or *on behalf* of the attorney. [[CRPC 5-120](#), Discussion]

(6) [8:672] **“Substantial likelihood” of material prejudice; factors considered:** Whether a particular extrajudicial statement would have “a substantial likelihood of materially prejudicing” a case depends upon many factors, including:

- whether the statement contains clearly inadmissible evidence for the purpose of proving or disproving a material fact in issue in the matter;
- whether the statement includes information the attorney knows is false, deceptive, or the use of which would violate [Bus. & Prof.C. § 6068\(e\)](#) (attorney’s duty of confidentiality);
- whether the statement violates a “gag” order, protective order, statute, court rule or special rule of confidentiality (e.g., in juvenile, domestic, mental disability, and certain criminal proceedings); and
- the timing of the statement. [[CRPC 5-120](#), Discussion]

(7) [8:673] **Caution—“social media” communications:** Again, the reason for restricting a lawyer’s ability to speak out on issues involved in a pending case is to control the release of information about the case, thus ensuring a fair trial ([¶ 8:657](#)). There is simply no reason to think that such information, if posted over a “social media” site (such as Facebook or Twitter), is entitled to special protection. Indeed, using social networking sites to announce ongoing court proceedings may well violate [CRPC 5-120\(A\)](#).

[8:674 - 8:684] *Reserved.*

2. [8:685] **Compare—Public Statements Challenging Judge’s Integrity:** An attorney’s out-of-court *statements of opinion* impugning a judge’s integrity are not sanctionable unless proved false. [[Standing Committee on Discipline of U.S. Dist. Ct. for Cent. Dist. of Calif. v. Yagman](#) (9th Cir. 1995) 55 F3d 1430, 1438—“(A)ttorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false; truth is an absolute defense”]

