

# The Marin Lawyer

An Official Publication of the Marin County Bar Association



## GENERAL MEMBERSHIP MEETING TUESDAY, AUGUST 5 LT. GOVERNOR GAVIN NEWSOM THE DEBATE ON LEGALIZING MARIJUANA

Newsom boldly offers a critique of the criminal justice system and argues that needlessly harsh sentences for low level, non-violent crimes have ravaged entire communities – particularly communities of color – and have cost state taxpayers billions of dollars. And, he said, the time has come

to have a “serious debate among serious people” about legalizing, taxing and regulating marijuana.

“It was in 1971 when Richard Nixon, a Californian, declared a war on drugs as a backlash to massive shifts in cultural values,” Newsom said. “And since the 1970’s, our learning curve on the war on drugs has cost the taxpayers more than \$1 trillion and counting. And that’s not even the most significant cost to our failed policies. Over that same period of time, the United States of America has spent over \$120 billion to arrest some 37 million people for non-violent drug offenses. That’s the equivalent of nearly the entire population of our great state.”

Last year, [Newsom agreed to chair a blue ribbon commission convened by the ACLU of California](#) to study the complex legal and policy issues that must be resolved as California considers legalizing marijuana for adults. As Newsom said Saturday, it is imperative that “if and when marijuana is

*(Continued on page 10.)*

## Calendar of Events

**August 5<sup>th</sup>**  
General Membership Meeting  
Speaker: Lt. Gov. Gavin Newsom  
“Legalizing Marijuana”  
12 – 1:30 pm

**September 17<sup>th</sup>**  
Probate and Estate Planning Section  
Speaker: Ed Berberian, Marin County  
District Attorney  
12 – 1:30 pm

**September 18<sup>th</sup>**  
Real Property Section and Business  
Law Section  
Piatti’s  
12 – 1:30 pm

**September 23<sup>rd</sup> – Save the Date**  
Labor and Employment Law Section

**September 30<sup>th</sup>**  
IP Section  
How to value intellectual property  
12 – 1:30 pm  
Resolution Remedies

Look for details each month in  
*The Marin Lawyer*

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*Dorothy Chou Proudfoot* was Guest Editor of this issue of *The Marin Lawyer*. *Caroline Joachim* is Series Editor for 2014.



## PROFESSOR RORY LITTLE REVIEWS U.S. SUPREME COURT TERM

*By Dorothy Chou Proudfoot*

At our General Membership meeting at the McInnis Club Restaurant, on June 25, 2014, UC Hastings Professor Rory Little spoke to the membership and fielded questions about the United States Supreme Court’s decisions this past term. Professor Little addressed a nearly full house in what has become a very popular program year after year. We are fortunate to have Professor Little, a noted scholar, practicing appellate attorney, and United States Supreme Court commentator, in our community.

Professor Little opened with some humor about *(Continued on page 10.)*



## **BROKER LIABILITY A LITTLE BIT OF CLARITY**

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The contours of real estate brokers' responsibilities and liabilities continue to evolve in California. In *Saffie v. Schmeling, et al*, the appellate court

considered the obligation of the seller's broker to the buyer with respect to a truthful but outdated due diligence report included in the seller's broker's multiple listing service (MLS) posting for the property. At trial, the Seller and the seller's broker were found to have no liability to the buyer notwithstanding that the due diligence report was potentially misleading. The buyer's broker did not fare as well and suffered a substantial award in favor of the buyer for breach of fiduciary duty and negligence. This case highlights the differing positions of sellers' brokers and buyers' brokers in real estate transactions.

In June 2006, Sasa retained Schmeling as his broker and listed his undeveloped commercial parcel for sale through Schmeling. Schmeling posted a listing for the property on the local MLS including the following statement in the posting:

"This parcel is in an earthquake study zone but has had a Fault Hazard Investigation completed and has been declared buildable by the investigating licensed geologist. Report available for serious buyers."

The noted Fault Hazard Investigation (Report) was from May, 1982. The Report was approved in June, 1982 by a letter issued by the county planning department.

Later in June, 2006, through Burton acting as the buyer's broker, Saffie entered into a purchase contract with Sasa for purchase of Sasa's property. During escrow, Schmeling provided a copy of the Report to Burton together with the county approval letter. Burton in turn provided the Report and approval letter to Saffie telling Saffie to "check out" the Report. Burton, however, did not read the Report or even understand the nature of the Report. No further due diligence was performed by Burton or Saffie and the purchase transaction closed.

Subsequent to closing, Saffie learned that the 1982 Report was out of date, no longer acceptable to the county and that substantial excavation work would be required by the county for Saffie's intended commercial development. As a consequence, Saffie's project was economically infeasible and Saffie sued to recover damages from Sasa,

as seller, and Schmeling and Burton, as the seller's and buyer's brokers, respectively.

At trial, the court found that Sasa and Schmeling had no liability to Saffie but that Burton was liable for breach of fiduciary duty and negligence. The trial court awarded damages in excess of \$232,000 against Burton. Saffie appealed the trial court's determination only with respect to the finding of non-liability on the part of Schmeling, as the seller's broker.

On appeal, Saffie contended that Schmeling's statement regarding the Report in the MLS posting was false and inaccurate as it did not specify the date of the Report thereby falsely suggesting that the Report was current as of the date of the MLS posting. Saffie admitted that other than omission of the date of the Report the MLS posting was truthful and that Schmeling's description of the Report was accurate. In rejecting Saffie's contentions, the appellate court noted that the cover of the Report clearly identified it as being from 1982, copies of the Report were available to buyers and both Saffie and Burton had actually received copies of the Report.

Holding that Schmeling had no liability to Saffie, the appellate court observed that, although the selling broker has responsibility for the truth of the broker's statement in an MLS posting, Saffie had failed to identify anything about Schmeling's MLS posting itself that was false or inaccurate and that by disclosing a copy of the Report and associated letter during escrow, Schmeling had fully satisfied his duty to Saffie of honesty, fairness and full disclosure toward all parties. The court also noted that Saffie's injury arose from Saffie's and Burton's failure to investigate and understand the implications of the information that the Report was from 1982 rather than a failure by Schmeling to provide truthful information in a timely manner. The court concluded:

"There is nothing in [Civil Code] section 1088, or any other source of law, imposing responsibility on a seller's broker to ensure that true statements in an MLS are not misconstrued, or to make certain the buyer and the buyer's broker perform the appropriate due diligence to evaluate the significance of such true statements for the buyer's particular purposes."

This case should provide comfort to sellers' brokers that there are some reasonable limits to their potential liability to buyers and that they will not be held responsible for the failures of buyers and buyers' brokers to perform their own investigations and due diligence. This case is also a good reminder to buyers' brokers of their fiduciary duty to assure that buyers understand the implications of the information and disclosures provided to them and undertake appropriate investigation and due diligence.