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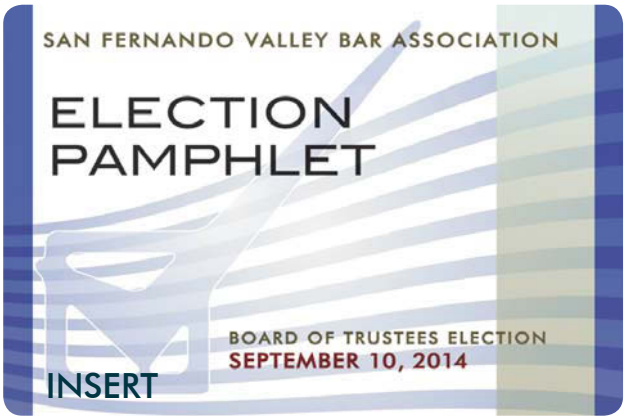
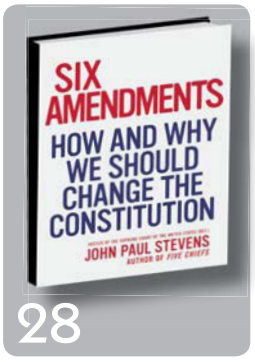
AUGUST 2014





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VALLEY LAWYER

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Printing Southwest Offset Printing

Bounding Thoughts of "Boxing Out"

ADAM D.H. GRANT
SFVBA President

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I FREQUENTLY CRAFT LEGAL arguments, create presentations for associations and conceive of the topics for this column during my long workouts while training for my next Ironman. As I prepared to participate in my tenth Ironman this summer, my weekend workouts have been rather long, thus allowing for the creative juices to flow.

One recent Saturday I rode my bike 115 miles in six hours, traveling from Northridge out to Ojai and back; no epiphanies. However, Sunday, after the alarm clock screamed at five in the morning, I drove to Malibu Creek Park and began a two and a half hour run through some of my favorite rolling hills. The trails include sharp short hills and trails which meander along an empty creek bed canopied by large majestic oak trees. As I ran, I encountered an occasional rabbit and deer and enjoyed the best solitude and quiet the Santa Monica Mountains have to offer; still no epiphanies.

However, about an hour into the run, as I was bounding through a dry creek, my thoughts came together. I found the timing rather intriguing because this portion of the run is one of my favorites as it requires an intense amount of focus. Trail running, unlike road running, requires a great deal more focus, core strength and flexibility. Your body is constantly changing position and adjusting to ever fluctuating terrain at the same time you are propelling yourself forward (at this point at about a seven minutes per mile pace). Despite the additional mental and physical acuity necessary at this time during the run, I came to my topic for this month's article: the art of "boxing out" and what it means to the young soon-to-be lawyers who took the State Bar Exam at the end of July.

"Boxing out" is a term that I learned in the past few years from my middle daughter, Jenna, and who I thank for teaching me the lesson I share with you in this article. Jenna is a very accomplished basketball player who transitioned from a private Jewish day-school environment to Cleveland High

School's challenging humanities magnet school where she is achieving academic success and playing basketball at the varsity level.

At 5'2", she plays as a shooting guard, but even more important from her coaches' perspective, she plays much larger than her physical stature because of her innate sense of when and how to box out. The basketball term refers to defensive move whereby one player puts their body in between another player, preventing that player from getting a rebound. In many cases, not being the tallest player on the team, Jenna does this effectively to insure that the tallest player on the team has the best chance of getting the rebound.

A dear friend of mine recently explained to me the value of such acumen in a young player. He explained, "Young players almost always think that the best way to win a game is to get the ball and make a basket, but mature players know that strong defensive moves like boxing out is what insures your team will win." He continued, "It is so rare that you see such maturity in a young player; she will be noticed."

So, whether you are reading this article as a seasoned attorney, as a new lawyer or as a recent law school graduate who just accomplished the mental marathon we call the California Bar Exam—remember, the best way to succeed in the long run is to box out. I am suggesting the belief that one way to a successful and fulfilling legal career is to think about a way you can "box out" a niche in the San Fernando Valley and help the entire team.

Last month's *Valley Lawyer* magazine included wonderful descriptions of the new trustee candidates. As I talk with other attorneys, I learn of new organizations in the Valley which need our help. I think about our own Executive Director, Liz Post, who will be receiving an Armand Arabian Award as a Leader in Public Service. Each person has learned the value of boxing out and I am honored to know each one.

SUN	MON	TUE	WED	THU	FRI	SAT
					1 *Valley Lawyer* Member Bulletin Deadline to submit announcements to editor@sfvba.org for September issue.	2
3	4	5	**6** Employment Law Section **EDD Claims, Hearings and Appeals** 12:00 NOON SFVBA OFFICE Attorney Tim Rhodes will discuss strategies in advising clients seeking or challenging an award of unemployment benefits. (1 MCLE Hour)	7	8	9
10	**11** Tarzana Networking Meeting 5:00 PM SFVBA OFFICE TEN The Esquire Network	12	**13** Business Law Section **Top 5 Recent Changes In Employment** 12:00 NOON SFVBA OFFICE Attorney Nicole Kamm will present critical information for all attorneys who work with business owners. The impact of the recent increase in minimum wage, new posting and documentation requirements will also be discussed. (1 MCLE Hour)	**14** Ice Cream Social 4:30 PM SFVBA OFFICE	15	16
17	18	**19** Criminal Law Section 6:00 PM SFVBA OFFICE See ad below.	20	21	22	23
24 31	25	**26** Editorial Committee 12:00 NOON SFVBA OFFICE	27	28	29	30

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FRIDAY, JUNE 13, 2014
















The SFVBA held its annual member appreciation event at The Stand restaurant in Encino where members were treated to delicious meals of gourmet hot dogs, burgers and steak sandwiches. SFVBA Platinum Sponsor Atkinson-Baker and member benefit providers, including Southland Credit Union, raffled off great prizes from gift cards to amusement park tickets. Members were also provided with one free hour of MCLE audio programming courtesy of Versatape.

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The Bypass Trust: A Useful Estate Planning Tool

By Doron M. Tisser and Brian H. Standing

The bypass trust can provide many advantages to clients, including portability, tax benefits and creditor protection. For these and other reasons, it remains a valuable tool in estate planning. However, it is not a suitable for all clients. Attorneys should familiarize themselves with the various benefits and disadvantages of the bypass trust to better advise their clients.

AS PART OF THE AMERICA TAXPAYER RELIEF ACT of 2012 (ATRA), Congress created portability of the estate tax exemption between spouses with the intention of simplifying the estate planning process for married couples by eliminating the need for a bypass trust. There are many reasons, however, both tax-related and non-tax-related, to continue to use a bypass trust in a married couple's estate plan, as well as certain disadvantages. The portability analysis, therefore, has simply added another layer of complexity to the estate planning process.

It is important to keep in mind that the analysis below is for the purpose of highlighting some of the important issues related to bypass trusts and portability. The decision as to whether to use a bypass trust as part of a married couple's estate plan must be made based on that couple's situation and needs. The issues addressed in this article only apply to a married couple, and the authors do not address all the issues to be reviewed when making a decision as to whether to use portability instead of a bypass trust.

What Is a Bypass Trust?

A bypass trust goes by many names: a credit shelter trust, a unified credit trust, an exemption trust, a B trust, or a decedent's trust. Despite its name, it has traditionally been used to save estate taxes on a surviving spouse's death.

Under ATRA, each person who dies, as of 2014, can leave up to $5.34 million estate tax-free to his or her beneficiaries. This amount is generally known as the applicable exemption amount (AEA).

For example, a married couple is worth $8 million in community property. Each spouse owns $4 million and each spouse has an applicable exemption amount of $5.34 million. If the husband dies first and leaves his $4 million to his wife, there is no estate tax at that time. However, when the wife dies, she will be worth $8 million and, therefore, $2.66 million will be subject to estate taxes at that time (i.e., $8 million less the $5.34 million she can leave estate tax-free).

In the above example, the husband's $5.34 million AEA that he could have left estate tax free disappeared at his death and can never be used. By leaving the $4 million to his wife, rather than using a bypass trust as discussed below, the children will end up paying estate taxes when the wife dies.

The husband could have put his assets, up to the amount of his AEA, into a bypass trust. The wife could have been the trustee (thereby controlling the assets in the trust) and the beneficiary of the trust, or the person entitled to distributions from the trust.

When the wife dies, the assets in the bypass trust will pass estate tax-free to the children, even if the assets have appreciated in value since her husband died. This is because the assets have been protected from estate taxes through the use of the husband's AEA. At the same time, the wife's $4 million would pass to the children estate tax-free because it is less than the $5.34 million the wife can leave estate tax-free when she dies.

The bypass trust is generally used to hold the AEA of the first spouse to die and have the assets in that trust "bypass" estate taxes at the second death.

What Is Portability?

Traditionally, if a husband dies and leaves his assets to his wife, as described above, his AEA does not get used and disappears, no longer being available to be used by anyone. As part of ATRA, Congress made permanent the concept of portability in the estate tax laws. In general, portability allows a surviving spouse to use the deceased spouse's unused AEA at the surviving spouse's death, if the surviving spouse makes an election to do so.

In the above example, if the husband had left his $4 million to his wife, his wife would have $8 million of assets at her death. At the same time, she would only have her AEA of $5.34 million, leaving $2.66 million subject to estate taxes. If, however, the wife elected portability at her husband's death, the husband's unused AEA of $5.34 million could be used at the wife's death, allowing her to leave $10.68 million of AEA, or the total of her and her husband's AEAs, to their children estate tax-free. Because her estate would be worth $8 million, there would be no estate taxes at her death. Portability allows a couple to achieve some of the same estate tax benefits as could be achieved through a bypass trust, without using a bypass trust.

It is important to know that the surviving spouse must elect portability on a timely filed estate tax return relating to the deceased spouse's death. Even if a surviving spouse's net worth will be below his or her AEA and it is unlikely he or she will have an estate tax at death, it is highly recommended that the surviving spouse file an estate tax return and elect portability, even if filing a return would not otherwise be required. This is to protect against future estate taxes in the event Congress reduces the AEA or the surviving spouse's net worth grows unexpectedly. The tax dollars which can be saved as a result of electing portability typically exceed the cost of preparing and filing an estate tax return.

The portability amount available to the surviving spouse, in addition to the AEA amount of the surviving spouse, can also be

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applied to any lifetime gifts from the surviving spouse, as well as to the estate tax payable at his or her death.

Why Use a Bypass Trust if Portability Can Be Elected?
Based on the availability of portability to protect up to $10.68 million of assets at the surviving spouse's death, many practitioners have recommended that their clients no longer use bypass trusts. Some of those reasons are listed below, together with a brief discussion of why those reasons may not apply. Following this discussion are reasons to continue using a bypass trust as part of a married couple's estate plan.

Bypass trusts cost more money to draft. It costs more money to draft an estate plan with a bypass trust than it does an estate plan without a bypass trust. However, the additional expense of drafting for a bypass trust should be very low in comparison to the potential benefits of having such a trust.

Trust administration is required for a bypass trust. When the first spouse dies, there is trust administration that must be done to set up the bypass trust at that time. This includes determining which assets should be funded into in the bypass trust, which assets should be funded into the surviving spouse's survivor's trust, and determining the income tax consequences of funding each trust.

The administration costs of creating a bypass trust are typically not much greater than creating a survivor's trust that does not have the estate tax savings, creditor protection and other benefits described in the next section of this article.

The bypass trust must file tax returns each year. The bypass trust, once established, must file its own income tax return annually. Again, this becomes a matter of cost versus the benefit of having a bypass trust. Anyone who has created a corporation, a partnership or a limited liability company for creditor protection and tax savings understands that filing a tax return for the entity is a small cost of obtaining the other benefits.

A partnership tax return and separate accounts may be necessary. If the surviving spouse and the bypass trust own a piece of real estate together, they may have to file a partnership return for the property. At the very least, a separate bank account will be needed for that property.

As discussed above, the cost and effort of the additional tax return, the separate bank account and the bookkeeping and accounting may be well worth the cost of having a bypass trust.

The trustee of the bypass trust must follow rules in administering the trust. The surviving spouse, as trustee of the bypass trust, must follow specific rules and carry out his or her obligations as the trustee of the bypass trust, which means more bookkeeping and separate bank accounts for the bypass trust. Among these rules are keeping the assets of the bypass trust segregated from other assets; making sure the trust's assets are properly invested; bookkeeping for the trust; and preparing annual accountings for the beneficiaries so they can see what has transpired with the trust's assets during the year.

This also requires a cost and benefit analysis. The bypass trust assets are protected both from estate taxes and the surviving spouse's creditors. Also, the accounting requirements provide protection to the remainder beneficiaries (e.g., children) in cases where the deceased spouse wants to control the ultimate distribution of the assets. The cost of administering the bypass trust should be looked at as the cost of the premiums of insurance policies that provides the same protection.

More income taxes will be required when an asset in the bypass trust is sold. Use of a bypass trust can result in more income taxes when an asset in the bypass trust is sold after the survivor's death through the loss of what is known as the step-up in basis at the second spouse's death.

In general, when the surviving spouse dies, assets owned by the surviving spouse can be sold income tax-free by the beneficiaries because the assets' bases are stepped up to their date of death fair market value. As an example, assume a husband and wife own stock as community property which they bought for $20 and it is now worth $100. The $20 they paid for the stock is their basis for income tax purposes. If they sell the stock, they would have to pay capital gains tax on the $80 increase in value. If, however, the husband dies, the wife gets a new basis in the stock equal to the value at the husband's death, i.e., $100. If the wife then sells the stock for $100, she would pay no capital gains tax because the sale price of $100 less the wife's new basis of $100 results in no gain to pay capital gains taxes on.

This same result is not available to assets held in a bypass trust. Instead, if assets which had been held in a bypass trust have increased in value and are sold by the beneficiaries after the surviving spouse's death, the beneficiaries will pay income taxes on the sale of those assets based on the increase in value because there is no step-up in basis of assets held in the bypass trust at the surviving spouse's death.

If the wife does not sell the stock and keeps it until her death, her children would receive a new basis in the stock equal to its fair market value at her death. So if the stock is worth $150 at the wife's death, the children's basis in the stock would be $150 and they would only pay tax on the sale of the stock if they sold it for more than $150. Now assume that after the husband dies, his half of the stock is placed in a bypass trust. The stock still receives a step up in basis to $100 at the husband's death. However, when the wife dies, there is not a step up in the basis of the stock held in the bypass trust. Therefore, the children, if they sell the stock for $150, would pay capital gains tax on the increase in value since the husband's death.

Some attorneys are saying that the loss of the step-up in basis for assets in the bypass trust may negate all of the

benefits of using a bypass trust. However, there may be ways to use a bypass trust (or a different trust with some of the same benefits) and allow the assets in that trust to receive a step-up in basis so the assets can be sold income tax-free after the surviving spouse dies. As with any good tax planning technique, this requires careful drafting.

Remember that even without the second step-up in basis, the beneficiaries still receive a step-up in basis at the first spouse's death. Unless the surviving spouse lives significantly longer than the first spouse to die, the increased capital gains tax is speculative compared to all of the benefits of a bypass trust. Also, a capital gains tax is generally only realized upon a sale, so if the beneficiaries have no plan to sell an asset, the second step-up may not be as important.

Even after taking the above factors into account, there are other reasons to use a bypass trust to carry out the clients' intentions. The rest of this article will look at some of those reasons.

Reasons to Continue Using a Bypass Trust

With the above discussion in mind, what are the advantages of a bypass trust after passage of the Act and the creation of portability? This section will highlight some of the situations in which a bypass trust provides protection and planning opportunities that cannot be obtained by relying on portability. The reasons given below for continued use of a bypass trust should not be assumed to apply in every situation. Rather, each situation must be judged on its own characteristics and all of the relevant factors must be taken into account.

Surviving Spouse's Creditor Protection

When the deceased spouse dies, if his or her assets are distributed directly to the surviving spouse, the surviving spouse has no protection from creditors with respect to those assets. Therefore, if the surviving spouse is sued, those assets may be lost to creditors.

On the other hand, If the deceased spouse's assets are placed into a bypass trust for the surviving spouse, the assets in that trust should be protected from the surviving spouse's creditors. Most surviving spouses would not expect to be sued, yet if you ask them if they would want the assets from the deceased spouse protected through a bypass trust in the event of a lawsuit, they would answer in the affirmative. Remember that people do not generally expect to be sued, yet they still carry insurance. The cost of the administration of the bypass trust can be viewed as insurance protecting the entire value of the deceased spouse's share of the estate for the rest of the survivor's life.

Appreciation of Value in Assets

If assets are left directly to a surviving spouse and those assets appreciate during the surviving spouse's lifetime, the appreciation in value of those assets will be subject to estate taxes when

he or she dies. Significant appreciation can cause an estate tax where such a tax might not otherwise have been expected.

If assets are placed into a bypass trust, those assets, including the appreciation during the surviving spouse's lifetime, will not be subject to estate taxes when the surviving spouse dies. This is because the bypass trust eliminates estate taxes on the value of all of the assets placed in the bypass trust, including any appreciation from the death of the deceased spouse. In addition, proceeds from the sale of bypass assets are available to pay income tax on gains when assets are sold. Use of a bypass trust provides flexibility in planning for payment of taxes.

The Non-Portable Generation-Skipping Tax Exemption Amount

While the AEA is portable until the surviving spouse's death, there is no portability for the generation-skipping tax exemption amount (GSTEA).

The generation-skipping tax (GST) is a tax that applies, in general, when assets are distributed to someone two generations below the person establishing the trust (i.e., a grandchild), as shown in the example below. The GSTEA is an amount that can be applied to a trust to prevent a future estate tax and generation-skipping tax (GST), in the same way that the AEA can be applied to a bypass trust to avoid estate taxes at a surviving spouse's death. The GST rules are very complex and beyond the scope of this article, but must be kept in mind when planning an estate. However, some general observations can be made.

The GSTEA could apply if you set up a trust for your spouse, and when your spouse dies, the assets go to your children. If, however, any of your children die after you, but before your spouse dies, and the assets go to your grandchildren, a GST might apply. The GSTEA can also apply after both spouses die, and a child dies before full distribution of the child's trust to him or her.

The tax laws allow a person to allocate his or her GSTEA to a trust, such as a bypass trust, so that if one of the children dies prematurely, there would be no GST when the assets in the trust go to grandchildren.

As mentioned above, the GSTEA is not portable. So if a bypass trust is not established, it is possible that, when the gifts to skip generations exceeds the surviving spouse's GSTEA, an unnecessary GST tax might apply at the surviving spouse's death which could have been avoided by using a bypass trust that is protected by the deceased spouse's GETEA.

The protection from the GST can be had by creating a bypass trust and applying the deceased spouse's GSTEA to the bypass trust. Married couples should consider using a bypass trust to preserve the GSTEA.

Preservation of the Deceased Spouse's Distribution of Assets

If assets are given to the surviving spouse, rather than placed in a bypass trust for the benefit of the surviving spouse, the surviving spouse controls who receives those assets when he or she dies. If assets are placed in a bypass trust, when the surviving spouse dies, the assets are distributed to the beneficiaries of the deceased spouse, as stated in the bypass trust provisions.

While there are situations where a deceased spouse is not worried about the surviving spouse changing the beneficiaries, sometimes this is a client's primary concern. In general, the couple should consider using a bypass trust to protect the deceased spouse's beneficiaries if:

- The deceased spouse has children from a prior marriage and wants to make sure his or her share of the assets go to his or her children when the surviving spouse dies.
- The deceased spouse is concerned that the surviving spouse may decide not to leave assets to a particular child, and that child may not receive what the deceased spouse wants him or her to receive.
- There is a concern that the surviving spouse may get remarried and leave the assets to a new spouse.
- There is a concern that the surviving spouse may be influenced by a third party to change the distribution of assets to someone other than the children.

Estate Tax on Earned Income

Net after-tax income earned from the assets placed in the bypass trust but retained in the bypass trust can pass estate tax-free at the survivor's death, because both the assets and the income from those assets (after income taxes are paid) will pass estate tax free at the surviving spouse's death.

If assets are distributed to the surviving spouse or placed in a bypass trust and distributed to the surviving spouse, the net after-tax income retained by the surviving spouse until death will be subject to estate taxes at the survivor's death.

Discounting of Value for Estate Tax Purposes

If ownership of assets is divided between a bypass trust and a survivor's trust, the value of the assets in the survivor's trust could be reduced for estate tax purposes through discount valuations. This is because each trust is treated as a partner owning a portion of the property with limitations on control and marketability. A complete discussion of discounting is beyond the scope of this article, but it is a powerful tool in decreasing the value of certain assets of the estate and therefore the amount of estate tax which is owed.

Future Elimination of Portability

While portability may be here to stay, there is no guarantee. Congress and the President have continued proposing changes in the estate tax and gift tax laws, citing the need to raise taxes and address the growing wealth inequality.

Assume a surviving spouse elects portability and foregoes the use of a bypass trust on the assumption that portability

will remain in the law. If the deceased spouse's assets are distributed directly to the surviving spouse and Congress repeals portability, instead of being protected through the use of a bypass trust, those assets will be subject to estate taxes at the surviving spouse's death.

Change in the AEA

The AEA is currently $5.34 million. However, there is no guarantee that the AEA will not be reduced by Congress. In fact, President Obama has proposed legislation to reduce the AEA to $3.5 million, stating that taxes need to be raised.

If assets are left to a surviving spouse directly, rather than through the use of a bypass trust, and if Congress reduces the AEA, and the surviving spouse is worth more than his or her AEA at his or her death, there may be estate taxes upon the death of the surviving spouse. A bypass trust can help prevent this.

Use of a Qualified Terminable Interest Property Trust (QTIP) Instead of a Bypass Trust

The use of a bypass trust traditionally has been to avoid estate taxes at the surviving spouse's death. It may be possible to achieve the same result through portability but this would not resolve the other issues discussed above, such as protecting the surviving spouse from creditors, protecting from generation-skipping taxes, protecting children from a prior marriage, or obtaining a discount on the value of the assets at the surviving spouse's death.

Almost all of the benefits for using a bypass trust (other than avoiding estate taxes on those assets) could also be achieved by placing the assets into a QTIP trust at the time of the first spouse's death.

If a client is not sure whether they would want to use a bypass trust or a QTIP trust at the first spouse's death, the trust could be drafted in a way that would allow a QTIP election to be made for the bypass trust, assuming that the bypass trust otherwise qualifies as a QTIP trust.

As is often the case when Congress passes a new tax law, an attempt at simplifying the taxpayers' lives does just the opposite. While portability provides practitioners with an additional estate planning tool, it cannot be relied upon in absence of a thorough review of all of the circumstances, which means that estate planning is now as complex as ever.

For every client, there may be tax and non-tax objectives which can only be achieved through the use of a bypass trust, but there is no hard and fast rule for when to use one. Whether it is the protection of appreciation from estate tax, preservation of the GSTEA, creditor protection for the surviving spouse, or protection of the deceased spouse's beneficiaries from the surviving spouse, a bypass trust can be vital to many married couples' estate plans. The decision of whether or not to use a bypass trust should only be made after careful consideration of all factors.

Test No. 70

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. When the surviving spouse dies, the assets in the bypass trust will pass estate tax-free to the children, even if the assets have appreciated in value since the decedent died.
   ❑ True ❑ False

2. Portability allows a surviving spouse to use the deceased spouse's unused Applicable Exemption Amount (AEA) at the surviving spouse's death only if the surviving spouse makes an election to do so.
   ❑ True ❑ False

3. When the surviving spouse dies, assets owned by the surviving spouse can be sold income tax-free by the beneficiaries because the assets' bases are stepped up to their date of death fair market value.
   ❑ True ❑ False

4. The applicable exemption amount in 2014 is $5.34 million.
   ❑ True ❑ False

5. The portability amount available to the surviving spouse, in addition to the AEA amount of the surviving spouse, may not be applied to any lifetime gifts from the surviving spouse.
   ❑ True ❑ False

6. Even when established, the bypass trust does not file its own annual income tax return.
   ❑ True ❑ False

7. The surviving spouse must elect portability on a timely filed estate tax return relating to the deceased spouse's death in order to use the deceased spouse's unused AEA at the surviving spouse's death.
   ❑ True ❑ False

8. Assets held in a bypass trust are stepped up in basis at the death of the surviving spouse.
   ❑ True ❑ False

9. If assets are placed into a bypass trust, those assets, including the appreciation during the surviving spouse's lifetime, will not be subject to estate taxes when the surviving spouse dies.
   ❑ True ❑ False

10. Proceeds from the sale of bypass assets are not available to pay income tax on gains when assets are sold.
    ❑ True ❑ False

11. While the AEA is portable until the surviving spouse's death, there is no portability for the generation-skipping tax exemption (GSTEA) amount.
    ❑ True ❑ False

12. The GSTEA is an amount that can be applied to a trust to prevent a future generation-skipping tax (GST).
    ❑ True ❑ False

13. If assets are given to the surviving spouse directly, rather than placed in a bypass trust for the benefit of the surviving spouse, the surviving spouse does not control who receives those assets when he or she dies.
    ❑ True ❑ False

14. Couples should consider using a bypass trust to protect the deceased spouse's beneficiaries if the deceased spouse has children from a prior marriage and wants to make sure his or her share of the assets go to his or her children when the surviving spouse dies.
    ❑ True ❑ False

15. Net after-tax income earned from the assets placed in the bypass trust will not pass estate tax free at the surviving spouse's death.
    ❑ True ❑ False

16. If assets are distributed to the surviving spouse, or are placed in a bypass trust and the income is distributed to the surviving spouse, the net after-tax income retained by the surviving spouse until death will be subject to estate taxes at the survivor's death.
    ❑ True ❑ False

17. If ownership of assets is divided between a bypass trust and a survivor's trust, the value of the assets in the survivor's trust could be reduced for estate tax purposes through discount valuations.
    ❑ True ❑ False

18. Almost all of the benefits for using a bypass trust (other than avoiding estate taxes on those assets) could also be achieved by placing the assets into a Qualified Terminable Interest Property Trust (QTIP) at the time of the first spouse's death.
    ❑ True ❑ False

19. If the deceased spouse's assets are distributed directly to the surviving spouse and Congress repeals portability, those assets will not be subject to estate taxes at the surviving spouse's death.
    ❑ True ❑ False

20. The GST is a tax that applies, in general, when assets are distributed to someone one generation below the person establishing the trust.
    ❑ True ❑ False

MCLE Answer Sheet No. 70

INSTRUCTIONS:
1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the $15 testing fee for SFVBA members (or $25 for non-SFVBA members) to:

   San Fernando Valley Bar Association
   5567 Reseda Boulevard, Suite 200
   Tarzana, CA 91356

METHOD OF PAYMENT:
❑ Check or money order payable to "SFVBA"
❑ Please charge my credit card for $_____.

_____
Credit Card Number Exp. Date

_____
Authorized Signature

5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0490, ext. 105.

Name_____
Law Firm/Organization_____
_____
Address_____
City_____
State/Zip_____
Email_____
Phone_____
State Bar No._____

ANSWERS:
Mark your answers by checking the appropriate box.
Each question only has one answer.

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
10.	❑ True	❑ False
11.	❑ True	❑ False
12.	❑ True	❑ False
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False

SAN FERNANDO VALLEY BAR ASSOCIATION

ELECTION PAMPHLET

BOARD OF TRUSTEES ELECTION
SEPTEMBER 10, 2014

Dear SFVBA Member:

Attorney members of the San Fernando Valley Bar Association have the unique opportunity to elect their Bar Leaders by voting in our annual Board of Trustees election. By allowing members to choose from a ballot of candidates rather than a predetermined slate, our Board of Trustees is more representative of our membership.

Ballots will be mailed to attorneys the second week of August. Election Day is September 10. I encourage members to take a few minutes to review the following Election Pamphlet and read each candidate's statement. The nominees have contributed to the programs and success of our organization, and represent a cross-section of our Sections, areas of practice and our community.

Thank you for your support and membership this year. I appreciate you giving me the opportunity to serve you.

ADAM D.H. GRANT
President
San Fernando Valley Bar Association

San Fernando Valley Bar Association
founded in 1926

CARYN BROTTMAN SANDERS
PRESIDENT

I am honored and excited to serve as the President of the San Fernando Valley Bar Association in the coming year. I have had the pleasure of working with Adam Grant this year and I am committed to continuing to see the Valley Mediation Center become a valuable asset to our members and the community. I also intend to continue to work to improve the Attorney Referral Service both for our members and to help provide access to justice for those who need an attorney. I have spent the last several years working with the Valley judges to strengthen the ties between the courts and our members and look forward to continuing those relationships.

I am very pleased that I will be able to work with an excellent Executive Committee and Board of Trustees. I am confident that our energy and vision will benefit the Bar and our community. I urge all of you to get involved in some way in your Valley Bar Association!

CAROL L. NEWMAN
CANDIDATE FOR PRESIDENT-ELECT

I'm honored to be running for President-Elect of the SFVBA. I'm now the Secretary. In addition, I serve as:

- A member of the Membership & Marketing Committee; and
- A member of the Diversity Committee. In this capacity, I've been attending meetings of the Multicultural Bar Alliance, a unique organization of Los Angeles-area bar leaders of which the SFVBA is proudly a member.

I'm also the SFVBA's liaison to The Esquire Network (TEN), a networking organization of lawyers dedicated to business development for its members. SFVBA members receive a discount on TEN membership. The SFVBA is the sponsor of TEN's monthly Tarzana meeting.

I'm also the former co-chair of the former Business Law, Real Estate & Bankruptcy Section, having served in that capacity for several years.

Last year I organized the City Attorney candidates' debate which the SFBVA co-sponsored with the University of West Los Angeles before the runoff election.

I have two goals. First, I want to create more opportunities for our members to network with each other and to establish more relationships with other networking partners, so that our members can develop more business, and at the same time expand the visibility and influence of the SFVBA. Second, I want to establish relationships with other bar associations, again to expand the visibility and influence of the SFVBA. We are a very large regional bar association. We can and should expand our influence regionally and statewide.

I'm very proud to be an officer of the SFVBA. I hope that you will support me for President-Elect.

KIRA S. MASTELLER
CANDIDATE FOR SECRETARY

I hope to receive your vote so that I can continue to serve on the Board of Trustees of the San Fernando Valley Bar Association as Secretary. I have enjoyed being an active participant in the legal community as a member of the Board of Trustees for the past six years and by continuing to help others in need, often fund raising or donating my time in service.

I hope to continue my service to our legal community by serving as Secretary for SFVBA and bringing my personal, legal and business skills to the SFVBA, our community, our lawyers and our State Bar Association. I have over 25 years of experience in the legal profession, initially as an office manager, a paralegal and ultimately as an attorney and now a shareholder at Lewitt Hackman in Encino.

I enjoy working with the SFVBA to encourage and promote the highest ethical and professional standards in our legal community and to serve individuals and businesses to keep our community flourishing.

Thank you for your consideration.

Kira S. Masteller, Esq.

DAVID S. KESTENBAUM
CANDIDATE FOR TREASURER

Although I am in my second term on the Board of Trustees, I hope to receive your vote for Treasurer of the San Fernando Valley Bar Association. I have enjoyed the last two years as Chair of the Criminal Law Section and look forward to continuing my service to the Valley lawyers as a member of the Executive Committee. I have been an active participant in many of the SFVBA's projects, including just recently helping a mock trial class at Reseda High School.

I have been a practicing attorney for over 35 years and have been given an "AV" rating by Martindale-Hubble for the past 15 years. I was also the Managing Partner of my former firm for 13 years and currently the President of my new firm; I understand that there is a lot of work that goes into keeping an organization such as the SFVBA running efficiently.

I have been practicing criminal law either as a prosecutor or as a defense attorney since 1985 and my current office is directly across from the Van Nuys courthouse so I understand the needs of the lawyers practicing in our community. If I receive your vote as Treasurer, I promise to continue my involvement in the community and to be dedicated to making the SFVBA one of the most vibrant local associations to be a member of.

JONATHAN BIRDT
CANDIDATE FOR TRUSTEE

I am honored to have been selected to run for a seat on the Board of Trustees for the San Fernando Valley Bar Association. As a current member of the Attorney Referral Servive Committee, I've learned a great deal about the Association and would like to continue to serve the Association in the role of a Board Member.

I have practiced law in the San Fernando Valley for over 17 years; first as insurance defense lawyer before transitioning to the other side at a plaintiffs' firm before opening my own firm in 2010. Today, I devote most of my practice to representing consumers and small businesses in personal injury litigation matters.

Being a trial lawyer has taught me a great deal about humility and the importance of giving back and has led to my side projects in civil rights actions. It is my hope to continue to serve the community on the Board, with the ARS and through my other volunteer activities with the courts and Public Counsel.

I would like to use the position on the Board of Trustees as an opportunity to strengthen the Association and to reach out to our local community to let them know we are here as a trusted asset and a place they can turn for solid lawyer referrals by improving our court and community outreach system. With that, we can all reach more clients, benefitting the community as a whole.

MICHELLE E. DIAZ
CANDIDATE FOR TRUSTEE

I feel honored to have been selected by the SFVBA's Nominating Committee as a candidate for our Board of Trustees. I've been practicing for 16 years and have experience in many areas of law, including catastrophic personal injury, employment law, and insurance coverage litigation. Currently, my focus is on family law. In addition to belonging to the Family Law Section, I am a member of the Attorney Referral Service, I volunteer regularly at the San Fernando and Van Nuys courts as a family law settlement officer, and I serve as an arbitrator for the SFVBA's Mandatory Fee Arbitration program. I am a big fan of our Bar Association and the services provided to the membership by the wonderful staff, and what we all provide to the community. As Trustee, I would have even more opportunities to contribute to the success of the San Fernando Valley Bar Association membership and our programs. I am proud to be endorsed by fellow members and colleagues whom I greatly respect and admire (in alphabetical order):

- Seymour I. Amster (Past President of SFVBA)
- W. Scott Bowersock
- Robert Gantman
- Laura L. Horton
- Elizabeth C. Kaufman (Past President of SFVBA)
- Steven N. Niebow
- Michelle Short-Nagel (Trustee of SVFBA)

It would be a true privilege to serve as one of your Trustees – I hope to receive your vote!

Michelle E. Diaz, Esq.
michelle@michellediazlaw.com

STEPHEN A. GERSHMAN, CFLS
CANDIDATE FOR TRUSTEE

I obtained my undergraduate degree in political science at the Pennsylvania State University in June 1972. I obtained my Juris Doctor Degree from Pepperdine University School of Law in May 1976 and was admitted to the practice of law in California in December 1976. I have been practicing in the family law field for over 36 years. I have been certified by the Board of Legal Specialization of the State Bar as a Certified Specialist in Family Law since November 29, 1994. Until 2000, I also practiced in the area of civil litigation. My practice since then has been exclusively in the area of family law.

I have volunteered as a judge pro tem in Van Nuys, North Valley, Central and previously in Burbank in both family law and small claims since the early 1990s. Prior to that time I also volunteered as a judge pro tem in Santa Monica and Torrance in the same areas and traffic court.

I am a volunteer daily settlement officer in family law in Central, Van Nuys and North Valley. I also participate in judgment days in North Valley and the settlement week in Van Nuys.

My goals as a Trustee would be to develop more programs to assist the trial courts now that ADR has been eliminated. This would involve not only settlement of ultimate issues, but also mediating and resolving discovery disputes which take up many court hours.

I would also like to develop a program for domestic violence that would assist both the victim and alleged perpetrator both before and after hearing. There is a program model in Santa Clara County that has greatly reduced the repeat rate by requiring both victims and perpetrators to participate. They will share the model on the condition that perpetrators are included. Also finding ways to assist pro pers so that they are better prepared when they appear in court so that the case takes up less court time.

SEAN E. JUDGE
CANDIDATE FOR TRUSTEE

I'm Sean Judge, and I am pleased and privileged to be nominated for a third term on the Board of Trustees.

I have been practicing law for the past 24 years, and have been a lawyer in the Valley since 2001. My practice initially involved representing large corporations and insurers at large, Los Angeles-based law firms. Since moving my practice to the Valley, my emphasis shifted to representing individuals and small businesses. Since late 2010, I have mostly moved out of litigation and into mediating civil cases, something I have enjoyed doing over the past three and a half years.

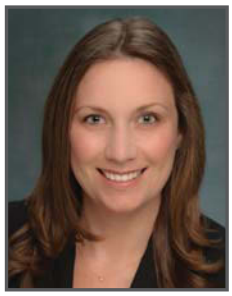
My work has primarily involved being a liaison between the Mandatory Fee Arbitration Program and the Board. Over the past few years, my main goal has been (a) to encourage lawyers to use our program (primarily by providing for it in fee agreements), and (b) more importantly, to provide lawyers with information about how not to become involved in fee arbitrations. I have written numerous articles for *Valley Lawyer* detailing cases in which mostly avoidable mistakes could have saved the time and trouble of fee arbitration. I also co-wrote a comprehensive article for young lawyers detailing how the program works. I hope that you have found these articles to be useful and informative over the past eighteen months.

The MFA Program is in the nascent stages of considering a mediation program that we hope will resolve many of these disputes before they actually have to be arbitrated.

More generally, over the next few years, I would like to encourage more participation in bench-bar activities where the membership has the opportunity to meet with judicial officers informally. Although we have our annual Judges' Night, I would like to see additional events where we interact with the Valley judges.

Your support over the past three years has been deeply appreciated, and I look forward to serving as a Trustee for the next two years. Please feel free to contact me at my office at (818) 610-8799 or via email at sean@judgemediation.com if you have any questions or comments. Thank you for considering my candidacy.

NICOLE KAMM
CANDIDATE FOR TRUSTEE



I have been an active member of the San Fernando Valley Bar Association since 2006. I served on the Diversity Committee and as Chair of the Employment Law Section from 2012-2014. I have also had the privilege of being mentored by several past SFVBA Presidents, including Sue Bendavid, David Gurnick and Steve Holzer, each of whom helped instill in me a commitment and dedication to the legal community. I look forward to continuing to serve the Bar Association and community as a member of the Board of Trustees.

The SFVBA is an incredible resource not only in networking opportunities, but also referral services, continuing education, and volunteer programs. Ideally, even more local attorneys will take part in these resources. As Chair of the Employment Law Section, I worked to move this vision forward. If elected Trustee, I will continue to encourage and develop participation among SFVBA members and other attorneys.

As an employment defense attorney, my practice encompasses litigation and dispute resolution, advice and counsel, transactional work, and management training. I am active in the business community, regularly speaking, writing and sharing information on emerging employment law issues. I co-founded a cooperative study group for employment attorneys (plaintiff's and defense) and a networking group for female professionals (Women to Women). I believe these professional and personal experiences will provide valuable perspective to the Board of Trustees and our legal community.

I appreciate your vote and support of the SFVBA.

ALAN KASSAN
CANDIDATE FOR TRUSTEE

Thank you for considering me for the San Fernando Valley Bar Association Board of Trustees. My candidacy is supported by our current Association President, Adam D.H. Grant, and has been endorsed by our incoming President, Caryn Sanders, and our Immediate Past President, David Gurnick.

I have faithfully served as a Trustee for the last two years. I have attended and been an active participant at Board meetings and Board events. I will also be serving as the Association's Membership Committee Chairperson for 2014-2015. I want to continue my service as a Trustee and ask that you support me.

I was born and raised in the San Fernando Valley. I have also raised my own family, and practiced law here for the last 28 years. Serving my community has always been a part of my DNA. I have acted as a Judge Pro Tem, a volunteer mediator, and have been active with a variety of professional and non-profit Boards and Associations over the last many years.

My law practice is also service oriented. I represent employees and other insureds to help them recover benefits for health insurance, life insurance, long term care insurance, and long term disability insurance claims when they are wrongfully denied.

As a Trustee, I hope to help bring even more new and dynamic educational programs to our membership, and to expand the many other benefits of Association membership. I invite and encourage all members to become involved in our Association, and if you have questions or ideas, email them to me!

With your vote and support I hope to continue serving our community as a member of the Board of Trustees, and to help advance the stature of our Association.

YI SUN KIM
CANDIDATE FOR TRUSTEE

I am currently a member of the Board of Trustees, and I truly appreciate this opportunity from the SFVBA Nominating Committee to run again in order to continue my tenure.

I have been an associate with Greenberg & Bass since I was admitted in 2007. I have also been a member of the SFVBA every year since that time. It is this commitment and loyalty that I have for the organizations and communities of which I am a part which compels me to continue serving on the Board.

While on the Board, I have become more proactive within the SFVBA, including leading or organizing seminars for various sections. My focus in particular was on reviving the New Lawyers Section, which is obviously crucial to the SFVBA's growth. We were able to provide free MCLE seminars and plan additional networking and informative events for the near future. In the process, I met numerous young members eager to get involved who can bring substantial benefits to the SFVBA. It is my goal to provide the opportunities in which they can do so.

Please vote for me so I can continue my efforts in strengthening the membership of the SFVBA.

GREGORY S. LAMPERT
CANDIDATE FOR TRUSTEE

I appreciate the nomination for the SFVBA Board of Trustees. I am relatively new to the San Fernando Valley Bar Association, having joined in 2013.

I am starting my 25th year of practice in Intellectual Property Law and am the Managing Partner of Christie, Parker & Hale, LLP. We are an Intellectual Property boutique celebrating our 60th anniversary in Southern California, having started in Pasadena in 1954. We moved our office to Glendale in 2012.

What better way to get to know the members of the SFVBA by really getting involved with the Association by serving on the Board. I believe I can make a significant contribution to the Association through leadership skills developed over the years in managing my firm of 45 professionals. I have been a long-time member of the Pasadena Bar Association, the Los Angeles Intellectual Property Association and the Los Angeles County Bar Association. Many CPH attorneys have held leadership positions in these bar associations over the years as well as currently as my Partner Oliver Bajracharya is the President of the Pasadena Bar Association and Mark Garscia is on the Board of the LACBA. To this end, I'd like to promote joint programs with these associations.

I am active in several networking organizations and I believe one of the benefits of bar association membership is the networking it affords. I would want to promote networking opportunities for the association members, particularly for newer lawyers and bar members trying to establish their practice. Education and mentorship are also benefits in great need to newer lawyers and I'd like to foster mentorship relationships between long time members of the association and the newer members.

Thank you for your consideration.

STEPHEN A. LENSKE
CANDIDATE FOR TRUSTEE

I am deeply honored to have been selected by the SFVBA Nominating Committee to run for a position on the Board of Trustees. If elected, I bring to the SFVBA experience gained from a 45-year legal practice, 31-year career in the U.S. Army Reserve Judge Advocate General' Corps. and 30 plus years of community service.

I am a long-time Valley resident. Since 1981, I have maintained a business law practice with the West Valley Law Firm of Lenske, Lenske & Abramson, of which I am a founding partner.

My community service has included over five years on the West Valley Community Police Advisory Board. I also was elected to the West Hills Neighborhood Council for over ten years, serving as its President for over six years.

I have actively participated in many programs sponsored by the SFVBA, ABA and LACBA. The SFVBA activities have included Judge Pro Tem, ADR and Mandatory Fee Arbitration Programs.

My goal for the SFVBA would be to support existing bar programs as well as help create or revive ADR programs in coordination with our local courts. These programs would include volunteer judicial arbitrations, judge pro tem and mediation/settlement services.

KATHY G. NEUMANN
CANDIDATE FOR TRUSTEE

I am honored to be named as a candidate for Trustee, and appreciate the confidence the Nominating Committee has in my commitment to serving our association.

Over the years, I have met many wonderful people at SFVBA events, many of whom have become valued colleagues and friends. I have learned and grown professionally from the educational seminars and networking events offered by SFVBA. I believe in the SFVBA.

I support pro bono opportunities offered by our Association; I serve as a volunteer Family Law Mediator for both the San Fernando and Van Nuys courthouses, as well as for the Settlement-o-Ramas. Additionally, I am on the Bar's Mandatory Fee Arbitration Panel.

Our bar association creates a community among its members. We learn from, assist, and enjoy camaraderie that only other lawyers can fully appreciate. Additionally, our association serves our courts by working to alleviate congestion in our courtrooms. SFVBA also serves our community of non-lawyers/litigants, who are often intimidated by our legal system, and who may be without sufficient means to pay for legal representation.

As a member of the Board of Trustees, I will work to bridge the justice gap by providing more access to justice for litigants who cannot afford to fund cases. An "incubator program" will offer new lawyers an opportunity to learn from experienced lawyers, and to assist unrepresented litigants. By helping our community, and each other, we can restore polish to our collective reputation.

I hope to persuade our members to embrace California Rule of Court Rule 9.4, so that we conduct ourselves at all times with dignity, courtesy, and integrity. This would not only enhance the public's perception of our profession, it would make the practice of law much more enjoyable for all of us.

As a Trustee, I will contribute ideas and energy that will help grow our bar association, keep SFVBA dynamic, and uphold the highest professional standards in our legal community.

Thank you for your support and for your vote.

TONI VARGAS
CANDIDATE FOR TRUSTEE

Thank you for considering me for the San Fernando Valley Bar Association Board of Trustees.

I entered the legal profession after a full career in the healthcare industry. While serving patients in large teaching hospitals, I developed a tremendous concern for elderly and disabled patients who were tossed about in our health care system. To my surprise, I decided to go to law school

After graduating, I immediately knew that my goals and interests would best be accomplished by serving in a public interest practice. I have been a public interest attorney for my entire legal career. Initially I did the full range of legal services, including landlord tenant disputes, conservatorships, public benefits, family law, simple wills and advance directives.

I feel like one of the luckiest people in the world. Eleven years ago, I found my way to Neighborhood Legal Services of Los Angeles where I was hired to join their legal team in the Health Consumer Center. I have assisted clients with a wide range of healthcare problems from access to care to denial of care. Of particular importance to me, has been the opportunity to focus on the healthcare needs of the elderly and disabled.

As a Trustee I feel that my specialty in healthcare and public interest work will prove valuable to the SFVBA members. If elected, I believe my experiences would be well suited to supporting several programs sponsored by SFVBA, including the Attorney Referral Services' Senior Citizens Legal Services Program and the Self Help Centers which were developed in conjunction with SFVBA, the Superior Court and Neighborhood Legal Services of Los Angeles. Finally, as a Trustee, I would be pleased in my capacity to serve our newest attorneys who today face far more challenges than many of us did who graduated from law school several years ago. I would appreciate you vote and if elected I will bring the same dedication to serving the community and the members as I do in my practice.

NLSLA

Neighborhood Legal Services
of Los Angeles County

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JUST NEIGHBORS

Saturday, September 6
6:30 PM
at The Autry Museum in Griffith Park

Enjoy a private exhibition viewing of The Autry's *Route 66: The Road and Romance*

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LAUSD Board Member
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Handling Your First Conservatorship:

A Survival Guide

By Caren R. Nielsen and John E. Rogers, Jr.

IT GOES WITHOUT SAYING THAT conservatorships are not for the faint of heart. You have all heard the stories of unwary practitioners who wandered onto the second floor of the downtown courthouse thinking they had their first conservatorship under control only to emerge shadows of their former selves, staggering back to their cars, with briefcases full of further corrective work to be done, heads swimming with arcane acronyms, desperately wondering if there was still time to sub out.

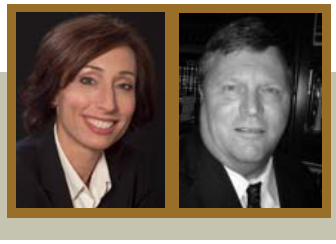
It's tragic and wholly unnecessary. With a little bit of preparation and a clear head, any one of you can successfully handle a conservatorship. This article will give you the hard-knocks, back-alley, real-life straight scoop needed to get the job done. This is a conservatorship survival guide, plain and simple.

Make sure your client is bondable. If your client is going to act as conservator of the estate, meaning he or she will control the conservatee's income and assets, the client is going to have to be bonded. Accordingly, the client will have to pass the bonding company's credit check. Many a teary-eyed newbie to the field has successfully gotten their client into office only to find out he or she is simply unbondable. This means either a complex and often just about unworkable "blocked account" arrangement or, worse, starting over with someone new. In short, a disaster. What should you do? Have your client pre-vetted by the bond company. Know *before* you file.

Get the doctor's Capacity Declaration before filing. For the court to have the authority to rule on the conservatee's lack of capacity, it must have before it a court form called the Capacity Declaration completed by a doctor, a psychologist, or a practitioner in the conservatee's religious affiliation which is offered only once every million filings. The declaration needs to find that the proposed conservatee, or the person who can no longer manage his or her life, lacks capacity.

The form seems simple. But over half the time doctors fail to check the right boxes or initial where they are supposed to. What happens? The matter is continued over and over until this is done. What should you do? First, read the form and understand it. Second, mark a copy with "Sign Here" and "Initial Here" stickers and send that to the client. Third, check the form thoroughly when it comes back. Do keep in mind that a Capacity Declaration that inadvertently finds the conservatee has capacity, while usually worth a chuckle or two in court, is of little help in moving things forward.

Caren R. Nielsen and **John E. Rogers,** Jr. are partners in Nielsen & Rogers LLP, a law firm focused exclusively on conservatorships, probate and trust administration and litigation, estate planning, Medi-Cal planning, and elder law. Nielsen is a Certified Elder Law Specialist as recognized by the State Bar of California and the ABA. She can be reached at crn@nielsenlegal.com. Rogers can be reached at jer@nielsenlegal.com.



Find out ahead of time if the conservatee is going to object. It isn't much fun to go into court expecting a routine appointment hearing only to learn the proposed conservatee is mad as a hornet about the whole thing and is demanding a jury trial. The best move is to know this well in advance and work on alternate approaches, ways to sweeten the conservatorship and make it more palatable to the conservatee.

Often an elderly conservatee turns out to be generally amenable to the idea of assistance with his or her life if the subject is broached gently and proactively. Therefore, it doesn't usually do to have that individual, often a fragile and easily frightened elder, served out of the blue with a citation and a petition for conservatorship. Instead, make sure you discuss the probable reaction of the elder with your client and develop tactics for mitigating the shock of the filing.

Play ball with the court appointed attorney. When you commence a conservatorship in Los Angeles County, a private attorney is named by the court as an advocate for the proposed conservatee. That lawyer is called the Probate Volunteer Panel (PVP) attorney. Nine times out of ten, that attorney will be a reasonable, smart, cooperative individual who immediately understands what is going on and is a semi-ally in the process.

A common rookie mistake is treating the PVP as an adversary and refusing to comply with document requests or to answer questions. Nothing will make a case spiral out of control faster than this. Be friendly and cooperate. Allow the PVP to speak freely with your client—unless there is some clear reason not to.

Do not accept payment from the conservatee's funds without a court order. There are few better ways to lose favor with the court than violating this rule. It is simple. Don't accept payment from the conservatee's funds, say, via a Power of Attorney held by your client, without a prior court order. This means you either wait to be paid or your client privately pays on an as you go basis, then seeks reimbursement later.

Check your Probate Notes ahead of time and try to cure them. The court reviews Conservatorship matters before the court hearings and issues commentary called *Probate Notes*. These comments can be found online at the court's website. Read them. Understand them. Respond to them.

Probate Notes are divided into sections. Three of the most important sections are: Matters to be Cleared, Judge to Determine (JTDs), and Attorney's Comments. Read all of this very carefully. The Matters to be Cleared section is a list of questions

you must answer or tasks you must complete before approval. File a verified supplement, or, if the issues are within your own percipient knowledge, your own declaration, addressing these Matters to be Cleared.

The JTDs section is comprised of issues yet to be determined by a judge. These are points the court's staff attorney has deemed ready for review and decision by the judge. You typically need not file anything in regard to these points. But read them and know what to say about them in court.

The Attorney's Comments section is where the court's reviewing attorney may, at his discretion, provide some thoughts on the general disposition of the case. Read that carefully, too.

Be courteous in all your interactions over the *Probate Notes*. If the court has missed something, bring it up in a matter-of-fact manner. No finger-pointing. No told-you-so comments. Ever. File the supplement or declaration as far ahead of the hearing as possible to give the court time to review it.

Have a citation issued and personally serve it on the conservatee. The code requires that a citation be issued in the name of the conservatee and that it be personally served on him or her, with a complete copy of the court petition and the notice of hearing. This applies regardless of the ability of the conservatee to understand the papers or even acknowledge their delivery. Often this means simply leaving a copy by the bedside at a care facility—a formality but also a sine qua non. Who should handle the service? Not the client. A friend of the client will suffice, someone not interested in the proceeding. Someone from your office, your attorney service, or a process server may also serve it.

Review the estate planning documents of the proposed conservatee before filing a petition for conservatorship. In many cases, valid powers of attorney and a trust can prevent or at least delay the establishment of a conservatorship. Families frequently assume that powers of attorney cease to have any power once the elder loses capacity. In most cases, this is not true.

Most modern estate planning-generated powers of attorney are durable, meaning they are still operative after the principal (the creator) loses capacity. Also, even if circumstances preclude actual reliance on the powers of attorney, there are likely to be paragraphs on the powers of attorney nominating one or more people to be the conservator. You can save yourself hours of time by knowing who the conservatee wanted to serve as conservator if needed. Indeed, the court usually places significant emphasis on who the proposed conservatee selected during a prior period of lucidity.

Never draft a scratch form without checking to see if a Judicial Council form exists. If it does, it must be used. We've all been in this situation: shown up with the world's greatest declaration from a doctor, only to discover the court requires a check-the-boxes form. This often happens with Petitions for the Appointment of Temporary Conservators. Rookie lawyers will draft an impressive scratch pleading, full of magnificent lawyerly jargon, only to have it rejected at the filing window. Don't be one of those tearful guys walking dejectedly back to the office, failed petition clutched in one fist, and a hanky in the other. Always check.

Civil litigators may often say they hate probate court because there are too many continuances and too many forms. However, if you aware of the rules and treat the court, its staff and others with respect, then probate court conservatorships can be a lot of fun.

Motivation to Renew: Attorneys Discuss the Value of Membership

By Irma Mejia

SUMMER IS WELL UNDER WAY AND SO IS THE SFVBA's 2014-2015 membership renewal campaign. While the Bar's membership year begins October 1, renewals start coming in mid-summer as members take advantage of early renewal incentives. This year's initial incentive offered two free hours of MCLE audio programming from Versatape for members who renewed by July 22. Versatape is the SFVBA's MCLE recording partner, providing audio recordings of Bar seminars for sale online. Versatape's reasonable pricing and convenience have made it very popular with members.

The Bar received a significant boost in early renewals thanks in part to the early incentive. It proved to be so popular that a similar one is currently offered providing renewing members with one free hour of MCLE audio programming.

Early renewal incentives are only one reason members have been quick to renew. Renewing early ensures members receive uninterrupted access to the Bar's most popular benefits, including MCLE seminars, Fastcase, *Valley Lawyer*, and networking opportunities. Longtime attorney member Bonnie Viets Stern of Pearlman, Borska & Wax in Encino chose to renew early to continue supporting and enjoying the quality services and programming she has come to expect from the SFVBA. "I believe it is important to support our local bar association which provides invaluable support for the community, both legal and non-legal," she says. "I enjoy the monthly magazine and look forward to attending the workers' compensation seminars coordinated through the SFVBA."

MCLE

Stern isn't the only member who finds great value in the Bar's educational programming. Attorney member Matthew Lax of Cutter & Lax, Attorneys at Law in Encino also chose to renew his membership in large part because of the Bar's educational seminars. "For the upcoming membership year, I'm most looking forward to the great family law MCLE programs," explains Lax.

Canoga Park attorney Beatriz Chen also cites the family law MCLE programs as the main reason for renewing. "I renewed my membership because I feel more a part of this association than any of the others I am involved in," she says. "The biggest benefit I got out of membership this past year was the Family Law Section's Trial Techniques Series. I learned so much out of it and have put a lot of the tips and advice it provided to use in my own practice. I hope to see more seminars in both family law and immigration in the upcoming year."

It's these great programs that have members coming back to the SFVBA, year after year. The SFVBA truly strives to provide convenient and affordable continuing education opportunities for all members. It is licensed by the State Bar of California to provide MCLE programming in all areas of law, including specialty programming in legal ethics, elimination of bias and prevention of substance abuse. With 17 active sections, the SFVBA is able to offer monthly seminars in a wide variety of practice areas. From family law to workers' compensation to bankruptcy law, the SFVBA's monthly programming has something to offer every member.

In addition to the quality programming, members enjoy the benefit of MCLE seminars that are close to the home or office with programs that are much more affordable than what is offered through other organizations. The SFVBA also makes it a goal to offer frequent free seminars. Since January 2014, the Bar has offered its members 8 hours of free participatory MCLE programming! Those free MCLE seminars alone pay for the cost of a year's membership.

For members unable to attend seminars throughout the year, the Bar offers its popular annual MCLE Marathon every January. Members are able to earn 13 hours of participatory credits over the course of two days and at a fraction of the cost of what other services charge.

The Bar's MCLE programming is very important to its members, especially in light of the State Bar's increased MCLE compliance audits. Members enjoy the convenience and peach of mind of having the Bar maintain MCLE transcripts for all members who attend the Bar's events. Members who have incomplete records of their MCLE attendance for a given reporting period may request their complimentary transcripts from the Bar's office.

Fastcase

Another of the Bar's most popular benefits is Fastcase, the online law library. Fastcase offers SFVBA members unlimited access to court opinions from all 50 states, the U.S. Supreme Court, all

the Federal Courts of Appeal, the Federal District Courts and the Federal Bankruptcy Courts. It's one of the Bar's most popular member benefits.

Individual subscriptions to online legal research services are very expensive. The Bar's goal in offering Fastcase to its members is to help make the practice of law slightly easier and cost-effective. By renewing their membership, attorneys are able to continue their free and unlimited premium access to Fastcase—a service that would normally cost an individual subscriber $995 a year! For many small firms or sole practitioners, this benefit alone is worth the cost of membership.

Valley Lawyer

Many members cite *Valley Lawyer* as one of their favorite benefits. This is in no small part the result of the informative and insightful contributions of the members themselves. *Valley Lawyer* is a member-driven publication. Its content, editorial policies and design are all the result of the brilliant collaboration of Bar members. Through *Valley Lawyer*, members showcase their knowledge, announce their accomplishments and share their experiences.

Attorney member Joseph L. Hong of Wade & Lowe, APC in Calabasas cites the publication as one of the reasons he renewed this year. "I love *Valley Lawyer*. It's always exciting when I get a copy in the mail," he says. "There are always interesting articles to read. And it helps me keep up with what's going on in the Valley's legal scene."

Networking

Hong's renewal is also driven by his desire to take advantage of the Bar's networking opportunities. "In 2014-2015, I'm looking forward to attending more events and getting to know more of the wonderful members of the SFVBA," he explains.

For Hong and all other attorneys, networking plays a major role in the development of a law practice. It's one of the most effective ways for members to learn from peers and develop their business. That is why the SFVBA is dedicated to offering regular opportunities for members to interact with one another. Since the beginning of 2014, the Bar has hosted 8 free and well-attended networking events.

The figure above doesn't include the monthly meetings of The Esquire Network (TEN) held at the Bar office since October 2013. TEN meetings are intended to help attorneys develop strong referral networks with other area attorneys. These meetings help attorneys develop their pitch and introduce them to other skilled practitioners in different practice areas.

Attorney Referral Service

Referrals from attorneys make up only a fraction of the new clients an attorney receives. A significant portion of clients are first-time users of legal services who turn to the SFVBA's Attorney Referral Service (ARS) for trusted referrals.

The ARS is an outstanding public service, connecting community members with the right attorney for their legal matter. ARS consultants conduct preliminary client intake and set-up appointments with the best attorney for the case. It is a crucial tool for growing a business and maintaining an active client profile. Current SFVBA members receive a significant discount on the cost of ARS membership. It's just another way the Bar is working hard to ensure its members' success.

In addition to its regular referral service, the ARS also offers important community programs, including the Senior Citizens Legal Services Program, the Modest Means Program and Limited Scope Representation. These programs help bridge the gap between clients who don't qualify for free legal assistance through other organizations but who cannot meet the full costs of attorney services. The ARS also performs a lot of community outreach, appearing at local fairs and hosting educational workshops for the public in an effort to familiarize them with the different types of legal services they may one day need.

SFVBA membership brings additional great benefits, including discounted rates for conference room rentals and mediator directory listings; special rates for court-reporter services through Atkinson-Baker, the Bar's Platinum Sponsor and Court-Reporter Partner; and discounts and coupons to local amusement parks and attractions.

As attorney Michael Prihar of Granada Hills demonstrates, it's hard to pinpoint just one favorite benefit. "*Valley Lawyer* serves as a great source of information regarding recent developments in the field, as well as information about attorneys in the Valley," he says. "Fastcase is an excellent resource for case research. And, I believe the Bar's Attorney Referral Service is an asset to local residents searching for competent counsel."

The daily tasks of running a practice is demanding enough, so the SFVBA is dedicated to making many aspects of career development, from continuing education to research to networking to referrals, as easy as possible. The Bar's ultimate goal is to help its members succeed.

But what about those members who have already made it? Those who have reached the success they set out to attain? As SFVBA Past President Robert Flagg explains, renewing his membership is more about "paying it forward" than about seeking a particular tangible benefit. "I renewed to support the SFVBA as it moves forward in this century—as it did in the last—to continue to create a place for the members of our profession who live or work in the Valley to interact in order to improve the practice of law and the relationships between lawyers, the Valley judiciary and the Valley community," he explains. "I renewed so that new members of our profession can find, as I did, opportunities to give back, to learn and to grow."

Irma Mejia is Editor of *Valley Lawyer* and serves as Publications and Social Media Manager at the San Fernando Valley Bar Association. She also administers the Bar's Mandatory Fee Arbitration Program. She can be reached at editor@sfvba.org.

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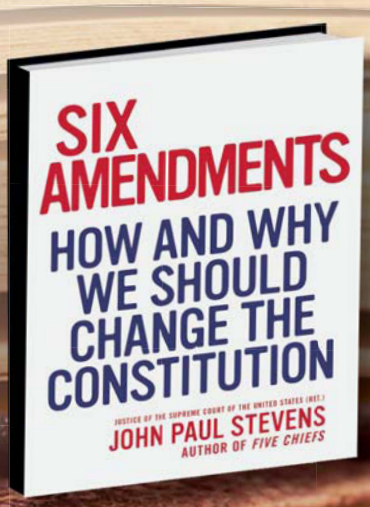
Book Review

Amending the Constitution: *A Supreme Court Justice's Perspective*



By Randi R. Geffner

MOST OF US HAVE PROBABLY NOT PONDERED esoteric constitutional issues since law school or bar review. Certainly the occasional First Amendment issue arises in our common consciousness and becomes a topic of discussion when Donald Sterling horrifies us all with ignorant, racist rants, or when the bearded guy from *Duck Dynasty* spews some homophobic hate speech. Second Amendment issues also arise horrifyingly often when we question the parameters of the right to bear arms following a mass shooting by a one-person militia.

As attorneys and scholars of the law, when constitutional issues hit the news, we may find ourselves dusting off the recesses of our minds to engage in conversations about the viability and applicability of constitutional doctrines enacted in a very different time. How are the amendments that comprise the Bill of Rights to be interpreted more than two hundred years after their creation? Do the 27 amendments to the United States Constitution, which form the backbone for our system of government and jurisprudence, remain relevant?

The premise of *Six Amendments: How and Why We Should Change the Constitution*, written by retired Supreme Court Justice John Paul Stevens, is that evolution is required in order for certain amendments and constitutional doctrines to keep pace with the times that have changed so dramatically since their enactment. As Justice Stevens explains in his book, "[a] legal rule should not persist merely because of its unmerited longevity."

Justice Stevens focuses on a range of topics that may be of interest to constitutional scholars, including the anti-commandeering language of the Supremacy Clause, issues with political gerrymandering, the enactment of reasonable campaign spending restrictions, and the elimination of sovereign immunity status for certain acts of states or state officials. He also addresses more emotionally charged issues relating to the elimination of the death penalty under the Eighth Amendment and limiting the language of the Second Amendment pertaining to the right to bear arms. It is in these latter chapters that *Six Amendments* is at its most accessible.

Justice Stevens was nominated as an Associate Justice of the Supreme Court by President Gerald Ford in 1975, where he served for nearly thirty-five years and was known for his incisive and eloquent decisions. It is clear from his history of service to the Constitution, and from his discussions in *Six Amendments*, that Justice Stevens has great respect for the Constitution and seeks, by the suggestions made in this book, to improve upon what he clearly believes to be a document capable of evolving. The text is scholarly and provocative, but may prove to be too dry a read for all but the most ardent constitutional students.

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Six Amendments is at its best and most accessible when Justice Stevens is providing historical perspective, little-known facts, and glimpses behind the scenes at the processes of the Supreme Court, as well as the personalities and issues that have shaped constitutional law and the opinions handed down by the Court over time. The inside access makes for some fascinating reading and provides perspective only attainable from one who was a pivotal participant in Supreme Court decisions through the course of three decades. Justice Stevens also provides a thorough and engaging history of the relevant decisions leading up to the current state of the law, and the reasons why this history justifies revision of the current amendments. There is no doubt that the reader will find references to case law and historical perspective that provide new and different analysis than previously considered by most law students, attorneys and judicial officers. This perspective alone is quite a gift from Justice Stevens to the reader.

Unfortunately, much of the content of *Six Amendments* is less accessible to the lay reader with a limited background in constitutional law. As a textbook on the evolution of constitutional doctrine the book may excel, but as a general interest book for one who may be looking to explore a new topic or broaden their perspective, *Six Amendments* makes for a somewhat overwhelming read. The analogies and history are interesting and enlightening, however the subject matters of sovereign immunity, anti-commandeering and the like may be new territory for the lay reader and therefore not as interesting, relevant or accessible as the discussions concerning the death penalty and the right to bear arms.

The discussions of the death penalty and the right to bear arms provide the most relevant and interesting portions of the book. It is in these last two chapters that the reader gains a glimpse into the passion and emotion of Justice Stevens, as compared to the more dry and scholarly approach taken in the earlier chapters.

In the fifth chapter, Justice Stevens takes on the Eighth Amendment proscription against cruel and unusual punishment in the context of the death penalty. He pulls no punches and does not leave the reader guessing as to his stance on this matter, stating that "[i]ntervening events have convinced me that even if the death penalty was justified in 1982, this is no longer the case."

Justice Stevens notes that the death penalty does not serve a deterrent purpose, particularly in light of the enactments by most states of statues authorizing life imprisonment without possibility of parole. As such, the only rationale for retaining the death penalty is in the interest of retribution, to avenge the harms caused by the most vicious of criminals. Justice Stevens concludes that retribution is not a rational basis for punishing a criminal by death, particularly in light of the fact that our system of justice is not infallible. He poses, and answers in the negative, the question as to whether the execution of only an "insignificant minimum" number of innocent persons is ever tolerable in our society, stating "[w]hen it comes to state-mandated killing of innocent civilians, there can be no 'insignificant minimum.'"

In this most compelling portion of *Six Amendments*, Justice Stevens passionately discusses the "finality of the death sentence in a criminal justice system that is not infallible, and [proposes] an amendment to put an end to what has been a wretched arrangement." As such, he proposes the addition of five words to the Eighth Amendment, which would read as follows: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments such as the death penalty inflicted.

In the sixth chapter, Justice Stevens addresses the volataile issue of gun control. Again he wastes no time in informing the reader of his perspective on this issue, leading off with a reference to the 2012 massacre of children at Sandy Hook Elementary School. There is no doubt from the opening sentences of this chapter that Justice Stevens advocates changes which will lessen the number of the horrific shooting incidents that have become all too common of late. He explains the origins and history of the Second Amendment, clarifying that the right to bear arms was, and should be, limited to the keeping and bearing of arms for military purposes. As such, the following additions to the Second Amendment are proposed: A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms when serving in the Militia shall not be infringed.

Justice Stevens eloquently explains the necessity of this important amendment, as follows:

> "Emotional claims that the right to possess deadly weapons is so important that it is protected by the federal Constitution distort intelligent debate about the wisdom of particular aspects of proposed legislation designed to minimize the slaughter caused by the prevalence of guns in private hands. These emotional arguments would be nullified by the adoption of the proposed amendment. The amendment would certainly not silence the powerful voice of the gun lobby; it would merely eliminate its ability to advance one mistaken argument."

In the final sentences of *Six Amendments*, Justice Stevens notes that the massacres of 26 people, including 20 first graders, at Sandy Hook Elementary provided him the catalyst for writing this book. That much is clear, as his eloquence and persuasive writing are at their finest when discussing the changes necessary to diminish the likelihood of more senseless and horrific violence. Similarly, Justice Stevens' discussion of the unacceptable risk of wrongly executing even one innocent person by the death penalty is emotional, yet well-grounded in historical and judicial precedent. These last two chapters of *Six Amendments* are the best this work has to offer, and are well worth the read.

There Is Life after Death and It's Digital:

Estate Planning for Digital Assets

By Marc J. Schwartz

IN 2006, AT THE AGE OF 61, MY father was diagnosed with "mixed dementia," which included Alzheimer's disease. My father was primarily responsible for managing his and my mom's finances and investments. When we eventually moved him into an assisted living home in 2010, my mother was left with the overwhelming task of collecting mail, going through file drawers, and ultimately sorting through unbelievable amounts of paper, which she eventually sorted into shoeboxes that took up most of her kitchen.

As heartbreaking as it was to watch my mother sort through all of this paperwork, there was some comfort in knowing that my father was not too technologically inclined and that all of the information needed to keep my mother's financial life moving forward was located in those piles of paperwork. For me and my generation, and especially for my children, approaching a similar problem would be exacerbated by the fact that all of that same information that was in my mom's shoeboxes is now in digital form. And those assets now have value.

Indeed, a recent study showed that on average globally, people value their digital assets at over $35,000.[1] Despite the high value placed on their digital assets, 93 percent of Americans do not have a plan for these assets, let alone any idea how they would be handled after they die.[2] When this statistic is combined with the fact that 70 percent of young families in the United States do not even have a will,[3] there is an estate planning crisis brewing, if it hasn't already arrived.

As a result of so many assets being digital, not only can there be undue delays in handling the estate, but assets may simply become lost. It is easy to imagine a decedent having an online bank account, where he has substantial assets, but the bank has no physical locations and only provides statements electronically. If an heir does not have access to the online account, or at least access to the decedent's email, the money in that account may go undiscovered, and may even escheat to the state. Currently, California is holding in excess of $6.9 billion in unclaimed property.[4] One can envision how many of those assets are from lost digital sources.

Before the problem of planning for digital assets can be discussed, the very term has to be defined. While no set definition exists, most digital assets can be broken down into four categories: personal, social medial, financial and business.[5] The personal category would include photographs, word processing documents and even music playlists that are stored on a person's computer or smartphone.[6] Social media assets would include usernames and passwords for sites such as Facebook, Twitter, LinkedIn and various email accounts. Included in the financial category would be bank account login information, online shopping sites such as Amazon.com, and online financial sites such as PayPal. Finally, business assets would include items such as customer lists, and patient information.[7]

It is important to categorize digital assets because the person who leaves them behind may want different people to handle the various categories.[8] A person may have private details in emails and elsewhere that he would not want disclosed, especially if they are hurtful. Contained in the digital assets may be evidence of an extra-marital affair or an illegitimate child. With family members of deceased loved ones already experiencing so much pain, a person may obviously want to appoint the correct fiduciary to handle those assets in order to avoid further emotional strain.

A recent example of the need for discretion came to light in the highly publicized case of Alison Atkins who died at the age of 16.[9] Among the digital assets she left behind were some dark journals that were clearly not meant to be shared. The ability of deceased's parents to access these journals highlights the competing interests of a family's desire to access the decedent's personal assets and the decedent's right to privacy. The laws with regard to digital assets, however, have not kept up with technology.

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In spite of the mountains of digital assets that exist, only seven states have passed any legislation regarding the ownership of digital assets: Connecticut, Idaho, Indiana, Oklahoma, Rhode Island, Virginia and Nevada.[10] Even with legislation, however, many of these states do not do a very good job of addressing much more than email accounts. As a result, a fiduciary is faced with numerous challenges when handling post mortem digital assets.

Chief among these challenges are privacy rights. Even though somebody dies, that does not mean their privacy rights are lost. Under federal law, the Computer Fraud and Abuse Act (18 U.S.C. §1030) and the Stored Communication Act (18 U.S.C. §2701 et seq.) can limit what can be accessed by fiduciaries.[11] To complicate things further, a fiduciary is also responsible for staying in compliance with the various terms of service and policies of the websites and companies. These policies are strict, and are bound to stay that way because of a company's fear of liability. A review of some of these policies from some of the biggest players in digital assets is instructive.

Yahoo

Yahoo states in their Terms of Service[12] that there is no right of survivorship and that an email account is not transferable. Specifically, Yahoo states that "[y]ou agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted."

Yahoo takes this policy quite seriously. When the parents of Marine Justin Ellworth, who was killed while fighting in Iraq, asked for access to Ellworth's email account, Yahoo refused.[13] Yahoo admitted it was a difficult decision, but stood by its Terms of Service, claiming that its subscribers had a right to privacy. The parents eventually sought legal intervention through the probate court, who then directed Yahoo to provide the contents of the email account used by Ellsworth.[14] Even then, however, the parents felt that certain contents were missing.

Facebook

Facebook has a similar policy of not providing login information for accounts.[15] Facebook, however, will "memorialize" an account upon a valid request. When an account is memorialized, Facebook freezes the account and does not allow anyone to login. The account also cannot be modified in any way, including adding or removing friends, modifying photos or deleting any pre-existing content. Memorialized accounts are also removed from the "People You May Know" feature.

Google

Unlike Facebook and Yahoo, Google seems slightly more open to sharing an email account with the loved ones of a deceased person. Google states "[i]f you need access to the Gmail account of an individual who has passed away, in rare cases we may be able to provide the contents of the Gmail account to an authorized representative of the deceased person."[16] Google states that access will only occur "after a careful review," and that it is "lengthy process" with no guarantee that they will be able to assist you.[17]

Microsoft

While Microsoft will not provide a deceased person's password to an account, they have a process called "Next of Kin."[18] This process allows for the release of Outlook.com contents (Hotmail, Live.com, MSN, and other Microsoft email accounts), including all emails and attachments, address books, and Messenger contact list to the next of kin following a "short authentication process."

When something as complicated and ubiquitous as digital assets starts to pervade our lives, the need for uniformity is essential. Similar to the Uniform Commercial Code developed and published in the 1950s, we need a uniform approach to handling digital assets post mortem that can be adopted by all of the states.[19] While the efforts of the few states that have actually taken affirmative steps to handle this problem need to be acknowledged, there is little consistency among the various laws. One of the inherent problems is that unlike real estate and other physical assets, digital assets do not know boundaries.

One of the main issues to address in developing a set of uniform laws for handling digital assets as part of a person's estate is privacy. It is the concern over privacy that is at the heart of the various policies of web-based companies discussed herein, and it is privacy that was the motivation for the federal laws.

Nobody will disagree that privacy is important, but when someone dies, there needs to be a balance between the decedent's need for privacy and the heirs' claim to the assets of the decedent. In light of the decedent's diminished need for privacy, the claims of the heirs should

prevail in almost all circumstances unless otherwise dictated by the decedent.

Another consideration in drafting such uniform laws is to ensure that the laws are broad enough to include all the future technological developments that are yet to occur. While there is some potential danger in defining digital assets too broadly, we have to make sure to avoid the mistakes of states like Connecticut that did not include in their laws any mention of blogs or social media.

Until such time that uniform laws are written and passed by all 50 states, it is up to the estate planning practitioner to make sure that their client's wishes are carried out. In order to avoid the undue delay of processing an estate, to make sure that necessary bills get paid, and to ensure that all assets are accounted for, practitioners need to instruct their clients to prepare a comprehensive list of usernames and passwords, which should include descriptions and notes. Clients should also be instructed to consider writing out specific instructions if certain assets are to be treated in special ways.

One tool to make sure that digital assets are handled in accordance with the client's wishes is to include certain powers in the durable power of attorney that is prepared with every complete estate plan. The durable power of attorney should include powers to the fiduciary to access, maintain, distribute and dispose of digital assets. Despite the presence of these powers, it is important to advise a trustee to still take into consideration the special considerations of privacy statutes and the website policies as discussed previously. Otherwise, a trustee could be exposed to significant liability.

We live in a very different world today than we did just twenty years ago. People now talk to their phones, and play movies on their televisions without a tape or disc. It is our job as estate planning practitioners to make clients aware of new issues, such as planning for digital assets, and to make sure that their wishes are properly documented. This is also a great time to encourage clients with existing plans to review their plans with counsel.

My mom's shoeboxes are now gone, with almost all of the information now in the cloud. The aptly named cloud seems like the perfect place for digital assets to be located, both during and after life.

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[1] Robert Siciliano, *How Do Your Digital Assets Compare*, McAfee Blog Central, May 14, 2013, http://blogs.mcafee.com/consumer/digital-assets.
[2] Rocket Lawyer News, *Rocket Lawyer Designates April 'Make a Will Month', Offers Free Wills for the Entire Month: New Survey Reveals 64% of Americans Still Do Not Have a Will* (April 8, 2013), https://www.rocketlawyer.com/news/article-Make-a-Will-Month-2013.aspx.
[3] *Id.*
[4] California State Controller's Office, Unclaimed Property Main Page, available at http://www.sco.ca.gov/upd.html (last visited July 16, 2014)
[5] Maria Perrone, *What Happens When We Die: Estate Planning of Digital Assets*, 21 CommLaw Conspectus, 188-189 (2013) citing Naomi Cahn, Postmortem Life On-Line, 25 PROB. & PROP. 36-37 (2011).
[6] See *Riley v. California*, 573 U.S. ____(2014). U.S. Supreme Court describing modern cell phones as "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.
[7] Perone, *supra* note 5.
[8] Rochelle Haller, *Web of Estate Planning Consideration for Digital Assets, Estate Planning Magazine*, Volume 40, Number 5, May 2013, http://www.grahamdunn.com/blog/articles/post/web-of-estate-planning-considerations-for-digital-assets.
[9] Geoffrey A. Fowler, *Wall Street Journal, Life and Death Online and Facebook: Who Controls a Digital Legacy* (January 5, 2013).
[10] *See* Conn. Gen. Stat. Ann §45a-344a (West Supp. 2012); Idaho Code Ann. §15-3-715 (Supp. 2012); Ind. Code Ann. §29-1-13-1.1 (LexisNexis 2011); Okla. State Ann. tit. 58, §269 (West Supp. 2012); R.I. Gen Laws §§33-27-1 to -5 (2011); VA Code Ann. §64.2-110 (West Supp. 2013); Nev. Rev. Stat. 143.188 (2013).
[11] See *LVRC Holdings LLC v. Brekka* 581 F.3d 1127, 1132-33 (9th Cir. 2009) holding that any permission will constitute authorized access.
[12] Yahoo Terms of Service Section 28, updated March 16, 2012. https://info.yahoo.com/legal/us/yahoo/utos/utos-173.html.
[13] Fowler, *supra* note 9.
[14] Paul Sancya, , *Yahoo will give family slain Marine's e-mail account*, USA Today (AP), April 21, 2005. http://usatoday30.usatoday.com/tech/news/2005-04-21-marine-e-mail_x.htm?POE=TECISVA.
[15] Facebook Help Center, How do I report a deceased person or an account that needs to be memorialized, available at https://www.facebook.com/help/150486848354038 (last visited July 16, 2014).
[16] Google Help, Accessing a deceased person's mail available at https://support.google.com/mail/answer/14300?hl=en (last visited July 16, 2014).
[17] *Id.*
[18] Microsoft Help, My family member died recently/is in coma, what do I need to do to access their Microsoft account available at http://answers.microsoft.com/en-us/outlook_com/forum/oaccount-omyinfo/my-family-member-died-recently-is-in-coma-what-do/308cedce-5444-4185-82e8-0623ecc1d3d6 (last visited on July 16, 2014).
[19] There is some effort to come up with uniformity. See *ULC Committees—Fiduciary Access to Digital Assets*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Committee.aspx?title=Fiduciary+Access+to+Digital+Assets (last visited July 16, 2014). "The Committee will draft a free-standing act and/or amendments to ULC acts… that will vest fiduciaries with at least the authority to manage and distribute digital assets, copy or delete digital assets, and access digital assets."

Is Professional Courtesy Dead?

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A FEW MONTHS AGO, I completed a case that did not go as well as my client had hoped. We believed in our client's position and felt that the facts supported the action and the desired outcome. Unfortunately for my client, the trier of fact did not agree.

Litigating the case to its completion included several motions and hearings, both on various factual and legal issues. Throughout the process, I maintained a professional distance, arguing zealously for my client's position but not taking the issues too personally. It seemed that opposing counsel could not so easily separate himself from the fray.

Upon receiving one of the other side's early pleadings, I was surprised to find that opposing counsel had personally attacked me. He argued not only the facts of the matter and the various points of law but he felt it necessary to impugn my character and integrity, making the matter much more personal than it should have been. By the time the last document was filed, shortly before the end of the matter, I was, unfortunately, no longer surprised by those attacks.

As a young attorney, I worked for a firm that handled various business matters and some collections. We also represented businesses that were creditors in various bankruptcies and so I appeared in federal court several times on those matters. Although some might argue that the matters I was handling were less contentious than many litigation matters, there were highly contested issues (both legal and factual) in some of those cases. Yet, despite the vigorously argued points, when the doors to the courtroom closed behind us as we exited, I could easily converse with counsel on more topics than the weather and the fact that the judge had been twenty minutes late taking the bench. Perhaps federal court is different but there seemed to be a general camaraderie amongst counsel that is lacking in many of today's courtrooms.

Another example of the interesting relationships between counsel occurred a few years ago when I took on a case in Bakersfield. Because the case involved a suit against a city agency, the county's counsel was involved. During an initial conversation, in which we discussed a recent filing I had submitted, he called me out for what he felt was a personal attack on him. We discussed it and after resolving that minor issue, were able to work together to get the matter resolved, even though we represented opposing parties.

Perhaps the sometimes hostile attitudes of counsel stem from the clients' wishes to attack and to vigorously pursue their claims. We get calls on a regular basis in which a potential client indicates that they want a "shark" or a "pit bull." In those cases, it is often difficult to navigate the fine line of respecting your client's wishes and trying to work with opposing counsel to achieve a desired result.

In another recent case, opposing counsel would often share anecdotes and make polite conversation. During a deposition, he attempted to engage

my client in such conversation. Having sometimes done the same thing myself to relieve tension in the room, I saw nothing wrong in the exchange. Unfortunately, my client did. Several weeks later, in fact, the client was still fuming that opposing counsel would act in such a manner. The client also questioned a response of mine to counsel, in which I thanked counsel for his cooperation, and apparently took offense to my being courteous.

I explained to that client that I appreciated their emotional position with respect to the case, and that they were absolutely entitled to their opinion of opposing counsel and how he handled the case. However, I also explained that the likelihood existed that I would encounter opposing counsel again in another matter and wanted to maintain a good professional relationship. It is my belief that attorneys should remain professional and courteous to one another, regardless of how the other side is acting.

Going back to my first example, I tried to continue to be courteous and professional to opposing counsel. I did not stoop to his level and return the personal attacks, although I did attempt to clarify some of the more glaring misstatements to the court, although I doubt the court spent much time considering those sideline issues.

I have to assume that he took on some of his client's apparent righteous indignation at having to defend a lawsuit and chose to litigate the matter that way, rather than considering other options of resolution, or ways to handle the case. Regardless, I was left wondering why the attorney would choose such an aggressive and personally directed tactic, particularly in a business related matter in which he was not personally invested.

I'm sure we have all had those clients who want to scorch the earth and leave the other side in ashes. For some, the temptation may be great to do just that and to obliterate the other side (both the party and counsel). At the same time, we should remember to temper our personal reactions to the cases. It is not for us to become emotionally involved in our clients' matters, although in some cases, I can certainly recognize that it might be difficult not to.

At the end of the day, we are advocates for our clients' positions. But when the dust settles and the clients go their respective ways, we are left to continue to wander the Halls of Justice. If we burn too many bridges with our opposing counsel, how can we expect courtesy in return on another case or at a later time? If we treat each other with respect now, odds are better that they will remember how we treated them when we need something (an extension of time to respond or a stipulation to continue a hearing or trial date) and they might be more willing to grant it.

Consider that the next time you find yourself getting emotionally involved in a case and remember that a little courtesy and respect goes a long way.

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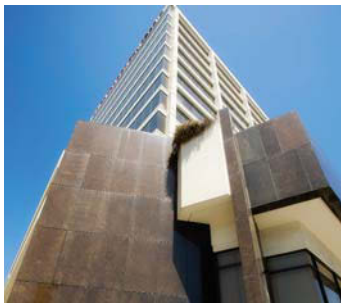


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