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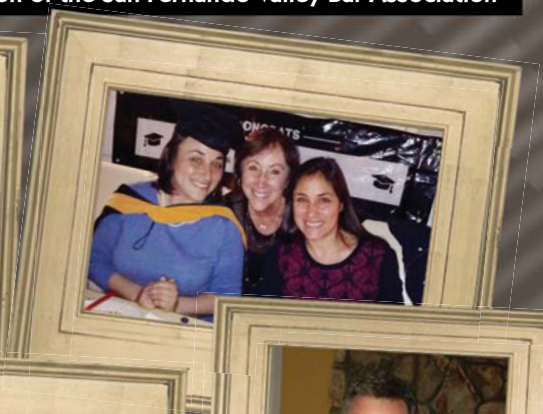

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CONTENTS

Bankruptcy Law

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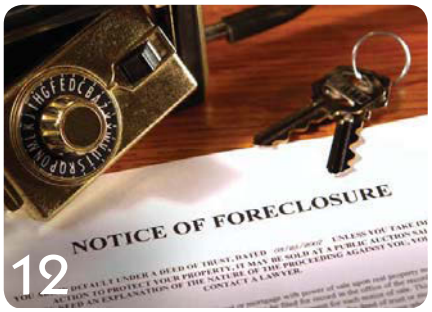

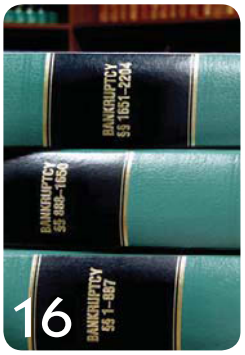

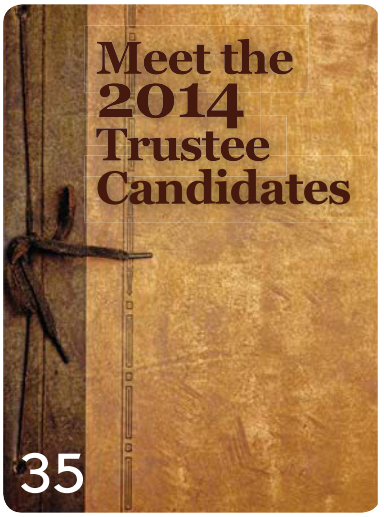

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Printing Southwest Offset Printing

Remembering the Meaningful Moments in Your Career

ADAM D.H. GRANT
SFVBA President

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EACH OF US HAS A NUMBER WHICH FOREVER marks our careers as attorneys: our bar number. Mine is 153271 and it reminds me on a daily basis that I have been practicing law for almost 24 years. When I see my number, I frequently reflect on meaningful moments over my legal career. Just recently, I met with a person who represents one of those moments and the meeting became the impetus for this article. I share this memory to encourage each reader to reflect on their own meaningful moments, to remind themselves why they continue to practice law and serve the needs of our community.

About 15 years ago, I represented a shy 5-year-old who suffered a horrible reaction to medication. The reaction caused 95% of his skin to fall off, resulting in numerous skin graft surgeries and permanent skin discoloration over about 30% of his body. After rejecting the defendants' paltry settlement offer, I spent approximately three weeks in a jury trial. The jury returned a verdict of $5,748,000 for my client.

The boy was in court when the jury read the verdict. After his mom explained what the verdict meant, he hugged me very tightly when I kneeled down to his level. As expected, the defendants appealed. They lost the yearlong appeal and eventually paid. I arranged to have a special needs trust set up for this young boy to insure he was well taken care of for the rest of his life.

Over the years, the mother periodically referred matters to me, but I never talked with the young boy again. That all changed last week. I received a call from his mother who told me that her son wanted to talk with me and ask me some questions. I, of course, immediately agreed to the contact and looked forward to the visit. A few days later, I anxiously waited for this young man to come to my office to talk. After the receptionist brought the young man into the office, I stood up from behind my desk, my heart pounding, and greeted the boy that had grown into to an amazing young man. He refused the handshake, opting for another one of his hugs.

Over the next hour or so, I learned about how the shy boy had grown into an ambitious, hardworking, bright young man. He shared with me how the money deposited into the trust allowed him to attend a private school to help with his learning disabilities and obtain the necessary counseling to address the emotional difficulties caused by the skin discoloration. He told me about how he obtained a full academic scholarship to attend an excellent university, how he and his mother became closer after the case, and that she felt grateful to be able to provide for him. He shared with me the many times he thought about me and his case. I lost count of how many times he thanked me in that hour.

When he left—again, not without a large hug—I shut my door and reflected on what I had just experienced. My practice currently involves business litigation, construction defect and real estate disputes. I also have developed a specialty in mobile app and digital privacy over the years.

Occasionally, but very rarely, does the work I do as an attorney impact a person's life. It certainly does not directly impact a young child's life in the way the case I handled over 15 years ago impacted the young boy. I felt invigorated about the work I do and motivated to make a difference in any way possible.

I write this article and hope that as you read my words, you will reflect. I hope you will understand how I felt when the young boy hugged me after the verdict. I hope you will feel the excitement I felt when I learned he wanted to talk with me. I hope you will feel the well of emotions I had as I learned about how my legal ability impacted his life. Finally, I hope you take the time to reflect on your meaningful moments, share them with others and reinvigorate this profession. As attorneys, we have abilities and opportunities to really make a difference. Please remember and take those opportunities.

SUN	MON	TUE	WED	THU	FRI	SAT
		1 Valley Lawyer Member Bulletin Deadline to submit announcements to editor@sfvba.org for August issue.	**2** 50 Years Civil Rights Act	**3**	**4** Happy 4th!	**5**
6	**7**	**8**	**9** Time to Renew Your Bar Membership! Renew online at www.sfvba.org	**10**	**11**	**12** Family Law Section Trial Tech Module Nine 8:45 AM SPORTSMEN'S LODGE See page 9
13	**14** Tarzana Networking Meeting 5:00 PM SFVBA OFFICE	**15** Small Firm & Sole Practitioner Section Gay Jurors and Peremptory Challenge Refresher 12:00 NOON SFVBA OFFICE Attorney Taylor C. Wagniere will lead the discussion. Join us for this important Elimination of Bias lunch seminar!	**16**	**17**	**18**	**19**
20	**21**	**22** Editorial Committee 12:00 NOON SFVBA OFFICE	**23**	**24**	**25**	**26**
27	**28**	**29**	**30**	**31**		

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Saturday, July 12, 2014

8:45 a.m. • 4.25 Hours MCLE

Sportsmen's Lodge, Studio City

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Exhibitors: Krycler Ervin Taubman & Kaminsky CPAs and Barry Cane Insurance Services

8:45 a.m. Continental Breakfast and Registration
9:00 a.m. Closing Argument
10:15 a.m. Evidence
12:15 p.m. Lunch
12:45 p.m. – 2:00 p.m. Trial

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BULLETIN BOARD

The Bulletin Board is a free forum for members to share trial victories, firm updates, professional and personal accomplishments.

Alexander J. Harwin was appointed to the SFVBA Board of Trustees in May. Harwin, an employment law attorney and partner at the downtown firm of Lewis Brisbois Bisgaard & Smith LLP, was appointed to fill the vacancy left by former Trustee and Retired Judge Michael R. Hoff's departure. The SFVBA welcomes Harwin and looks forward to his leadership and contributions.

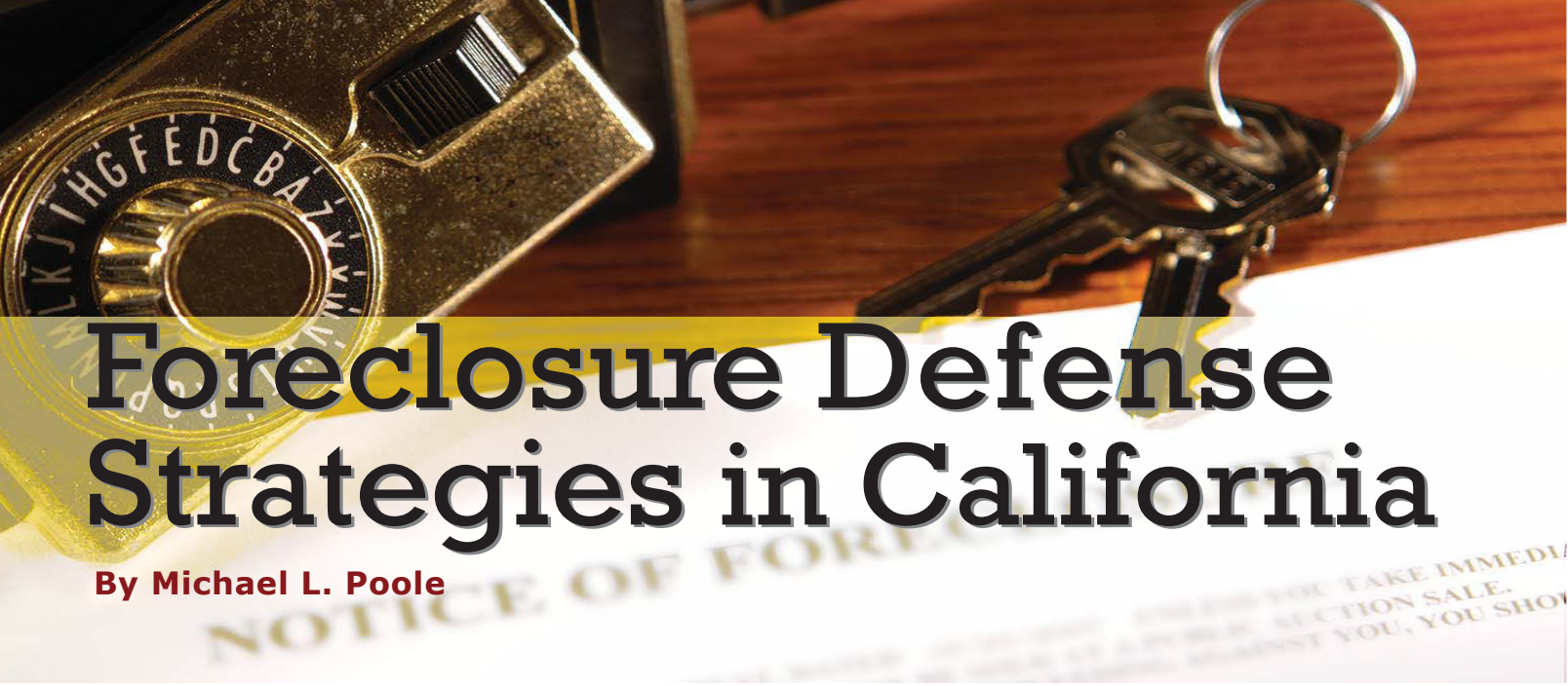
SFVBA Executive Director **Liz Post** has been selected as one of this year's recipients of the Armand Arabian Leaders in Public Service Award, an award for exceptional leadership on behalf of the public interest. The award will be presented October 2, 2014 by the Encino Chamber of Commerce.

Orly Ahrony announces the formation of Ahrony Graham Zucker LLP in Los Angeles, a partnership focusing on the practice of post-conviction law, including appeals, state/federal habeas petitions, parole suitability hearings, re-sentencing, and prison matters.

(L-R) Bankruptcy Judges Geraldine Mund (ret.), Maureen Tighe, Arthur Greenwald and Pearl Greenwald in 2005

Retired Bankruptcy **Judge Arthur M. Greenwald** passed away on June 4. Judge Greenwald served on the federal bench for sixteen years, eleven of which were spent on the bench at the Woodland Hills Bankruptcy Court. Prior to his court appointment, he served as Assistant U.S. Attorney for the Central District of California. Judge Greenwald retired in 2005. He had been admitted to the State Bar of California in 1964 after receiving a law degree from Southwestern Law School and an undergraduate degree from the University of California, Los Angeles. A thoughtful jurist who carefully considered all arguments presented before him, Judge Greenwald left a lasting impression on the attorneys of the Valley.

Email your announcement to editor@sfvba.org. Announcements are due on the fifth of every month for inclusion in the upcoming issue. Late submissions will be printed in the subsequent issue. Limit one announcement per firm per month.



Foreclosure Defense Strategies in California

By Michael L. Poole

THIS ARTICLE IS MEANT TO INTRODUCE attorneys and other interested parties to some basics of foreclosure defense law in California, although the principles could apply to other states as well. The law of foreclosure defense is wonderfully complicated and pits you, the lawyer, up against the finest attorneys out there. You are usually facing major banks that can afford to hire the best counsel and often seem to have an unlimited arsenal of money to spend. Although your opponents are formidable, besting or equaling them in court can be most satisfying and the attorney in this position can sleep well knowing he or she is helping people stay in their homes, which sometimes are the clients' only asset of substance.

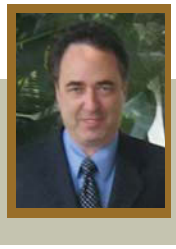
Currently in California, foreclosure defense law revolves primarily around the Homeowner Bill of Rights, fraud, and the laws concerning unfair business practice. There are a multitude of reasons why someone may be faced with foreclosure of their property. Typical examples include the loss of income, a temporary hardship, payments that have gone up or a loan with terms the borrower didn't understand. The client is probably challenged financially so it is essential that the foreclosure defense attorneys have a basic understanding of bankruptcy law as there is often a crossover.

Potential clients are behind in payments on an adjustable rate loan and are facing foreclosure. The loan may have negative amortization, including an introductory teaser rate or an interest only period. These loans typically do not pay the principal balance down in the beginning years of the loan and by design they cause the payments to rise at some point. Not coincidentally, this generally occurs after three years, which is the statute of limitations for fraud in California.

Usually, but not always, there was a real estate broker involved who didn't clearly explain the terms of the loan and may have been more concerned with their commission than the wellbeing of the borrower. The borrower may have limited ability to understand complicated contracts put together by banks. The client usually wants to stay in their house and have the loan modified. They may have already tried to get a modification and were turned down by the bank or the bank's servicer. Or the client may be resigned to losing their property but they just need some time to figure out where they are going to live.

Negative amortization and interest only loans are good targets for foreclosure defense because often the client didn't agree to enter into a loan that goes up or stays the same when payments are made. They understandably think that as they pay, the balance drops. If the borrower was misled during the loan origination period into taking on this type of loan, a cause for fraud and unfair business practices exists. In California, it is illegal to give a borrower a negative amortization loan unless the borrower fully understands its terms and consequences.

In addition to fraud, the California Business & Professions Code §17200 can be included as a cause of action and also breach of the implied covenant of good faith and fair dealing as another cause of action. If the client had a fully amortized fixed rate loan, one cannot include these causes of actions because those loans have no ambiguous or complicated



Michael L. Poole practices law exclusively in the area of foreclosure defense and bankruptcy. Poole is also an active California Real Estate Broker. His office is in Sherman Oaks. He can be reached at mpoole25@gmail.com.

terms. In those scenarios as well as the adjustable loans, I look to the California Homeowner Bill of Rights.

Homeowner Bill of Rights

A word about the California Homeowner Bill of Rights (HBR): HBR was designed to slow down the foreclosure process and ensure that loan servicers are limited to foreclosing on homes only after giving the borrowers a meaningful opportunity to obtain available loss mitigation options. California Civil Code §2923.4(a) states that the "purpose of the act that added this section is to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure." California Civil Code §2924.12(a)(1) states that "if a trustee's deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17." It is clear that any defense of a foreclosure in California necessitates a thorough understanding of HBR.

The HBR requires lenders to satisfy certain requirements before they can record a notice of default. Some of these requirements include that the servicer make a written determination that the borrower is not eligible for a loan modification and that any appeal period has expired; that the borrower did not accept a loan modification within 14 days of the offer or did accept one and defaulted; that when a borrower asks for help, the lender must provide a single point of contact and satisfy other requirements; and that the lender must advise the borrower of certain other rights prior to recording the notice, including borrower's right to meet with the lender to discuss alternatives. There are other requirements which can be learned from a complete review of the HBR.

How does this all play out as a practical matter in litigation? Based on personal observation, seemingly less than two percent of lenders actually comply with these numerous requirements and if they have, fewer still can provide the proof in court. Keep in mind that the only remedy under the HBR is postponement of the sale until the requirements are satisfied.

So if you are a lender faced with an alleged violation of the HBR, would you fight it in court spending who knows how much money or would you just rescind the notice of default and start over, this time complying carefully with the statute's requirements? If you use logic to answer this question you will get it wrong.

Lenders litigate. Perhaps it has something to do with the servicer's contracts with banks, or the servicer has a financial incentive to do so. But this bodes well for the client who now has a fight on their hands. With competent counsel they can put pressure on the lender to settle. What would a good settlement be for your client? Before you get to deal with that question in litigation, you normally must get past the demurrer stage of the process.

Demurrers

Foreclosure defense is all about demurrers, oppositions to demurrers and sometimes appealing demurrer decisions if you lose on all of them. Demurrers are more hotly contested in these types of lawsuits than others.

Recently there has been a swell of foreclosure defense practices that have popped up. These firms charge borrowers a small down payment and a monthly fee to litigate the case. Because the monthly fee is less than the normal mortgage payment, it pays for a litigant to engage these attorneys, if only to buy some time at a cheaper rate than a mortgage or rent. It is an effective tactic that annoys some judges. I also use this method to make litigation affordable to the average person, but many firms out there just use this as a way to thwart lenders legitimate efforts to foreclose.

Imagine you are a judge seeing a high volume of these cases come into your court every day. Many of these cases are from plaintiffs who are gaming the system to buy time and enjoy a free ride. On demurrer, everything alleged in the complaint must be taken as true. Even though a demurrer has a high bar to reach for success, some judges become predisposed to get rid of these cases because they are tired of them. It is difficult for a court to determine the difference between a legitimate case and a less legitimate one so the successful foreclosure defense attorney must understand and effectively argue against the demurrer.

Here are some typical demurrers a foreclosure defense attorney is likely to encounter:

	Cause of Action Demurrer	Counter to Demurrer
All	tender	exception to tender rule
Fraud	Statute of Limitations	time plaintiff discovered last overt act
BPC 17200	fail to satisfy UCL 3 prong test	properly pled violations
HBR	NOD judicially noticed	question of fact

In all causes of action, you may see a demurrer for tender, meaning the borrower should be in a position to return the money. The tender demurrer can be countered by pointing out that the exceptions to the rule apply in foreclosure defense cases where the validity of the debt is challenged and/or the foreclosure has not yet taken place.[1]

In fraud causes of action you will almost always see a statute of limitations argument. It is three years in California. Many loans defended in these cases originated before the recession of 2008. To counter this demurrer, an argument must be made that plaintiff reasonably discovered the fraud years after signing the promissory note, bringing in California Civil Code §338 subdivision 4 (cause of action accrued upon discovery). Another often effective counter to this demurrer is

the "last overt act" rule which says in a conspiracy the statute doesn't run until the object of the conspiracy is completed, namely the foreclosure.[2]

A good cause of action under California Business and Professions Code §17200 (UCL) can survive demurrer by properly pleading the violations the lender committed. As in any demurrer defense, you put forth your best arguments and see what the court says.

A cause of action under California Civil Code §2923.5 and the HBR will allege that the Notice of Default (NOD) contains a false declaration. The demurrer will attack this on the grounds that the NOD is a judicially noticed document. That issue cannot be decided on demurrer.[3]

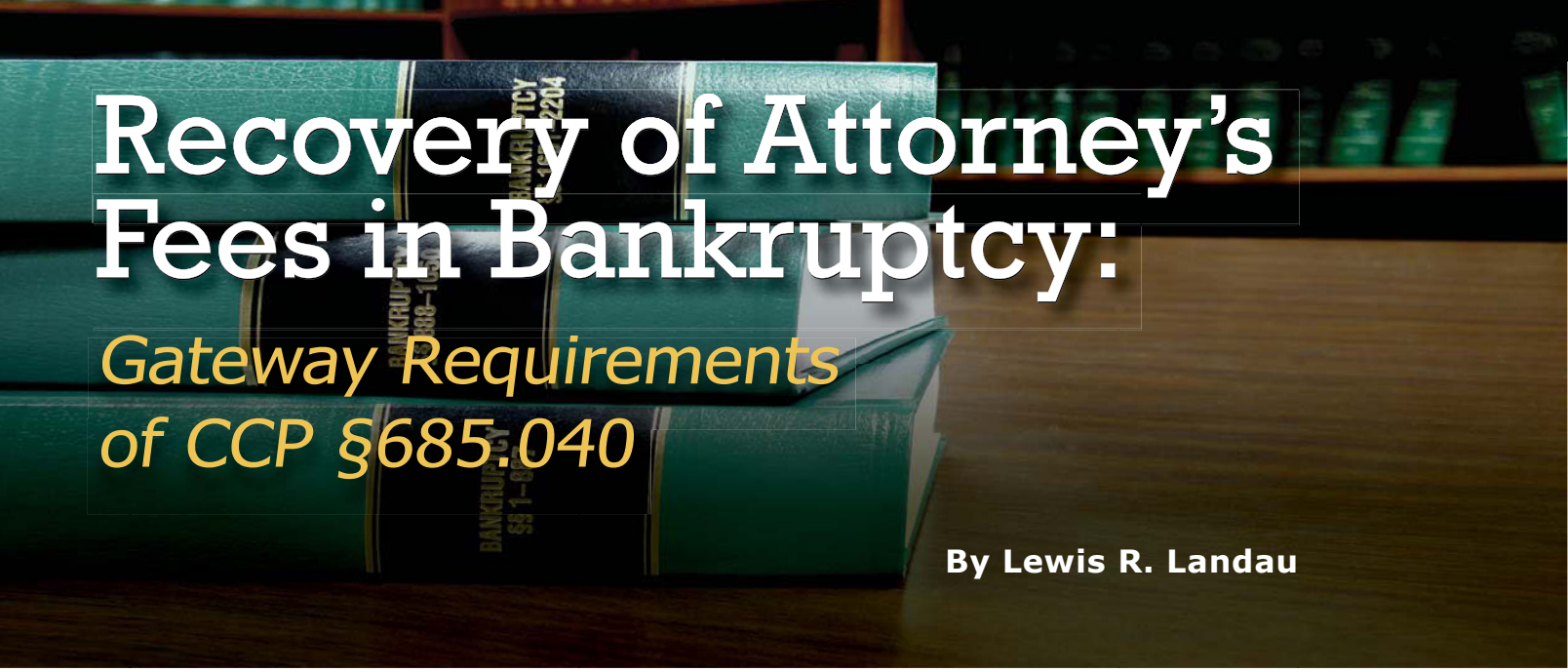
A good defense attorney will try to turn the demurrer process into an evidentiary hearing, clearly meant for trial, and some judges will accept that. Even if your complaint is perfectly crafted to allege unfair business practices, a demurrer is likely to say it isn't. As an effective foreclosure defense attorney one must be prepared to argue in writing against all these demurrers and be prepared to verbally argue against them in court. The demurrer stage is the point where most of these cases get killed. If you can get past this stage, you have a good chance to get some kind of settlement offer.

Oftentimes even though you have crafted a solid second or third amended complaint, the court will unfairly sustain a demurrer. But all you usually need is one or two causes of action to survive in order to see a reasonable settlement offer. If all of your causes of action are wiped out on demurrer, you should be prepared to appeal the case and you will have a good chance of winning. If the appeal concerns the HBR, attorney fees may be awarded upon success. However, if you are facing a seasoned opposing counsel, a settlement offer is likely to be presented before that happens.

When a foreclosure defense attorney gets past the demurrer stage, a typical settlement might end up as a loan modification offer for your client. Banks must often follow certain rules so it is a good idea when a client is first met to make sure they have an income sufficient to qualify for one. Most foreclosure defense cases never go to trial. They either die in the demurrer stage or settle shortly after. One reason most banks eventually settle is due to the high risk of going to trial. As in other types of litigation, anything can happen in trial and banks are not currently perceived positively by many in the public.

There are so many facets encompassing foreclosure defense law that an article of this scope could not begin to cover them. Hopefully this article provides a taste of what it is about and that some of you may appreciate the pleasure of going up against the best attorneys and for the satisfaction of helping people in desperate need of saving their homes.

[1] *See Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112-113 and *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 225-226.
[2] *See Wyatt v. Union Mortgage Co.*, (1979) 24 Cal.3d 773, 787.
[3] *See Unruh-Hazton v. Regents of University of California* (2008) 162 Cal.App.4th 343.



Recovery of Attorney's Fees in Bankruptcy:

Gateway Requirements of CCP §685.040

By Lewis R. Landau

THIS SCENARIO IS commonplace: A party prevails on a contract claim in litigation and obtains a Superior Court judgment. The unsuccessful party files a bankruptcy case. The parties continue litigating through the bankruptcy case and the prevailing party incurs substantial additional attorney's fees litigating to collect on its judgment in chapter 7, 11 or 13. Does the prevailing party recover its attorney's fees incurred in bankruptcy litigation?

Like most answers to legal questions, it depends. And in this context, it depends on properly managing cross-over procedural issues arising under California and bankruptcy laws.

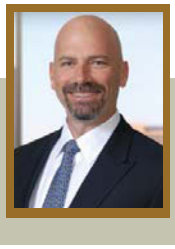
This article focuses on California Code of Civil Procedure §685.040 and the gateway requirement that the prevailing party on a contract claim can only recover attorney's fees for enforcing its judgment "if the underlying judgment includes an award of attorney's fees to the judgment creditor."

There are a multitude of reasons why a judgment may not include an award of pre-judgment attorney's fees even though the prevailing party is entitled to fees on its contract claim. Perhaps the prevailing party simply missed the filing deadline. Perhaps the parties stipulated to judgment and did not provide for a fee award in the judgment. Perhaps the bankruptcy was filed before fee issues ripened and the bankruptcy stay precluded conclusion of the litigation. The scenarios resulting in a creditor holding a pre-bankruptcy judgment that does not include a fee award are endless.

Whatever the reason, if the judgment does not contain an award of pre-judgment attorney's fees, then all the attorney's fees incurred in a potentially lengthy effort to enforce and collect the judgment are not allowed under the American Rule. Although the prevailing party may believe that its contract claim and attorney fee clause create a right to attorney's fees in a subsequent bankruptcy case under the Supreme Court's *Travelers* opinion and subsequent Ninth Circuit cases, *Travelers* only authorized unsecured creditor attorney's fees in bankruptcy if authorized under non-bankruptcy law.[1] Because the pre-bankruptcy judgment extinguishes the contract claim, only the judgment remains as the source of the bankruptcy claim. Thus, CCP §685.040's gateway requirement of obtaining a judgment that includes an award of attorney's fees is critical to preserving the right to attorney's fees in a post-judgment bankruptcy case.

Background of American Rule and Merger of Contract Claim into Judgment

Under the American Rule followed in California, "each party to a lawsuit ordinarily must pay his or her own attorney fees."[2] An exception to this rule exists where the parties have agreed to "the measure and mode of compensation of attorneys."[3] For example, a contract may contain a provision providing for attorney fees in enforcing the contract. Where a contract contains such a provision, the court must fix reasonable attorney fees as an element of the costs of the lawsuit.[4]



Lewis R. Landau is a Partner at Horgan, Rosen, Beckham & Coren, LLP in Calabasas. Mr. Landau is certified as a specialist in bankruptcy law by the California Board of Legal Specialization and his practice focuses on complex commercial litigation and bankruptcy matters. He can be reached at llandau@hrbc.com.

In *Chelios v. Kaye*, the plaintiffs appealed an order denying post-judgment attorney's fees.[5] The court held that "[w]hen, as here, a lawsuit on a contractual claim has been reduced to a final, nonappealable judgment, all of the prior contractual rights are merged into and extinguished by the monetary judgment, and thereafter the prevailing party has only those rights as are set forth in the judgment itself."

In 1992, the California legislature amended section 685.040 of the Enforcement of Judgments Law in direct response to the *Chelios* decision.[6] The amendment did not abrogate *Chelios* and the holding that contract rights merge into the judgment and extinguish the contract claim. Instead, the amendment provided for the inclusion of post-judgment attorney fees as costs when attorney fees were initially included in the judgment.[7]

Thus, CCP §685.040 contains a mechanical requirement that looks to the judgment to determine if pre-judgment attorney's fees are included therein. If so, then fees for enforcement of judgment are authorized under California law. If not, then the American Rule stands without exception in a subsequent bankruptcy case and each party to a lawsuit ordinarily must pay his or her own attorney fees.

Travelers and the Allowance of Fees to Unsecured Creditors in Bankruptcy

Prior to the Supreme Court's *Travelers* decision, fees for litigating bankruptcy issues in the Ninth Circuit were not recoverable as unsecured claims under the so called *Fobian* rule, notwithstanding a contract clause allowing prevailing party fees.[8] In *Travelers*, the Supreme Court resolved an intercircuit conflict over whether a claim for contractually permitted post-petition attorney's fees may be disallowed solely because such fees were incurred while litigating bankruptcy issues. The Supreme Court rejected the *Fobian* rule.

The Supreme Court's holding was limited to the issue of whether fees can be denied solely because they arose from litigating bankruptcy matters. Subsequent Ninth Circuit decisions make clear that unsecured creditors are allowed attorney's fees if authorized under non-bankruptcy law.[9] In the foregoing cases, however, CCP §685.040 was not in issue because no pre-bankruptcy judgment had been entered merging and extinguishing the contract claim.

California Procedure for Including Pre-Judgment Attorney's Fees in a Judgment

A party entitled to contractual attorney's fees cannot move for attorney's fees until it is adjudicated the prevailing party on the judgment. Thus, litigation over attorney's fees will necessarily arise post-judgment. Under the California Rules of Court, a motion for attorney's fees must be filed within the appeal period, generally 60-days after judgment.[10]

Absent excusable neglect, failure to timely move for an award of pre-judgment fees waives the right to fees incurred at trial.[11] But because litigation over attorney's fees arises after the judgment, and a money judgment is enforceable prior to including the attorney fee award, the circumstance will typically arise where a bankruptcy case is filed potentially staying the continuation of litigation before the judgment includes an attorney fee award.

Thus, state court litigators and bankruptcy lawyers must be aware of the impact of CCP §685.040 and the gateway requirement that the prevailing party can only recover attorney's fees in a subsequent bankruptcy "if the underlying judgment includes an award of attorney's fees to the judgment creditor." Once the contract claim is

merged into and extinguished by the judgment, CCP §685.040 becomes the only basis for an exception to the American Rule for recovery of fees in bankruptcy.

Potential Complexity of Bankruptcy Issues Impacting Timing and Strategy

The impact of a post-judgment bankruptcy case raises complex issues of timing and strategy. The automatic bankruptcy stay may or may not toll the judgment appeal period and the appeal period sets the deadline for filing the pre-judgment fee motion. The automatic bankruptcy stay only applies to claims originally filed against the bankruptcy debtor, not actions by the debtor. Cross-claims by or against the bankruptcy debtor must also be considered.

A mistake in continuing litigation that is stayed could lead to Bankruptcy Court sanctions and actions taken in violation of the stay are void. Moreover, the Superior Court may defer to the potential application of the bankruptcy stay and refuse to adjudicate a fee motion without an express order of the Bankruptcy Court. This is fertile ground for difference of opinion, mistakes in timing and strategic errors.

In *Lewow v. Surfside III Condominium Owners' Assn., Inc.*, the California Court of Appeals, Second District (CCA), had occasion to analyze the interplay of the cross-over procedural issues arising under California and bankruptcy laws. In *Lewow*, the HOA defeated Lewow's contract claims alleging the HOA failed to perform its duties. On February 10, 2010, notice of entry of judgment was mailed to appellant. That same day, Lewow filed a chapter 13 bankruptcy case. On July 23, 2010, the bankruptcy case was dismissed. On July 25, 2010, notice of the dismissal was mailed to the HOA.

The HOA filed its almost $300,000 fee motion on August 26, 2010, 32 days after the mailing of notice of the bankruptcy dismissal. Lewow claimed the HOA's fee motion was untimely and waived. On appeal, the CCA held that the trial court erroneously concluded that Lewow's bankruptcy tolled the 60-day fee motion deadline. But the CCA nonetheless affirmed the Superior Court's fee award under Bankruptcy Code §108(c)(2) which authorized filing of the fee motion until 30-days after notice of bankruptcy case dismissal.[12]

Although filed 32 days after notice of dismissal, the Court of Appeals held that "[t]he issue of whether the bankruptcy stay tolled the 60-day period is complex and debatable. It is understandable that the Association was mistaken." Thus, the CCA held that a 2-day tardiness in filing the fee motion was excused for good cause.

The CCA's holding that these issues are "complex and debatable" confirms the conclusion of this article. It is best to avoid circumstances wherein a party must plead for an after the fact determination that its neglect was excusable.

Recommendations for Best Practices

Counsel for a prevailing party must consider strategies for prompt compliance with CCP §685.040 to avoid the pitfalls of a subsequent bankruptcy. If a bankruptcy case is filed before the prevailing party obtains a judgment including attorney's fees, the most common strategy is moving for relief from stay for cause to continue and conclude the non-bankruptcy litigation.[13] However, relief from stay for cause to continue non-bankruptcy litigation requires a multi-factor analysis that may or may not result in obtaining relief from stay.[14] The Bankruptcy Court may refuse to relieve the stay solely to facilitate a prevailing party perfecting entitlement to an attorney fee award. If the prevailing party is stayed from perfecting its judgment by including an attorney fee award, its bankruptcy claim

for any attorney's fees is vulnerable to disallowance.

If continuation of the non-bankruptcy litigation is stayed and the Bankruptcy Court will not relieve the stay, then the prevailing party can move for an award of attorney's fees if the bankruptcy case is dismissed and the stay terminates.[15] The fees requested in that circumstance should include both pre-judgment and post-judgment fees as the post-judgment fees are subject to allowance under CCP §685.040 for bankruptcy related services that sought to enforce the judgment.[16]

The foregoing supports a best practice of moving quickly for an award of pre-judgment attorney's fees for inclusion in the judgment immediately after a judgment is filed. Although the prevailing party has as long as 60-days to move for an award of pre-judgment fees, having the motion on file in the event of a bankruptcy will support relief from stay to at least conclude the fee motion and perfect the right to recover post-judgment fees for enforcement of the judgment.

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[1] *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 127 S.Ct. 1199, 1206, 167 L.Ed.2d 178 (2007).
[2] *Musaelian v. Adams*, 45 Cal. 4th 512, 516 (2009).
[3] CCP §1021.
[4] Civ. Code, §1717, subd. (a); CCP §1033.5, subd. (a)(10)(A).
[5] *Chelios v. Kaye*, 219 Cal.App.3d 75 (Cal. At. App. 1990); *Berti v. Santa Barbara Beach Properties*, 145 Cal. App. 4th 70, 74 (Cal. Ct. App. 2006).
[6] *Chinese Yellow Pages Co. v. Chinese Overseas Marketing Service Corp.*, 170 Cal. App. 4th 868, 880 (Cal. Ct. App 2008); see Stats. 1992, ch. 1348, §3.
[7] CCP §685.040 ("Attorney's fees incurred in enforcing a judgment are included as costs collectible under [the Enforcement of Judgments Law] if the underlying judgment includes an award of attorney's fees to the judgment creditor pursuant to subparagraph (A) of paragraph (10) of subdivision (a) of Section 1033.5."); *see* CCP §1033.5, subd. (a)(10)(A) [attorney fees allowable as cost if authorized by contract].)
[8] *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991); *In re DeRoche*, 434 F.3d 1188 (9th Cir. 2006).
[9] *In re SNTL Corp.*, 571 F.#d 826 (9th Cir. 2009).
[10] CRC Rule 3.1702.
[11] *Bankes v. Lucas*, 9 Cal. App. 4th 365 (1992); *Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.*, 223 Cal. App. 3d 924 (Cal. Ct. App. 1990); *Imperial Bank v. Pim Electric, Inc.*, 33 Cal. App. 4th 540, 548 (Cal. Ct. App. 1995); *Lewow v. Surfside III Condominium Owners' Assn., Inc.*, 203 Cal. App. 4th 128 (2012).
[12] The author questions the conclusion that Bankruptcy Code §108(c)(2) operated to extend the HOA's deadline to file the fee motion until 30 days' after notice of termination of the stay. Because Lewow's original claim was against the HOA, the entire action was never stayed and never subject to the extensions of time set forth in §108.
[13] *See*, USBC CD Cal. Local Bankruptcy Form 4001.1.RFS. NONBK.MOTION.
[14] *In re Plumberex Specialty Products, Inc.*, 311 B.R. 551, 557 (C.D. Cal. 2004) (citing 12 Curtis factors).
[15] *Chinese Yellow Pages, supra; Lewow, supra.*
[16] *Chinese Yellow Pages, supra*.

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Home Sweet Home:

The Homestead Exemption

By Larry D. Simons

The homestead exception of the Bankruptcy Code provides debtors with a viable opportunity for a fresh start after the discharge of their debts. However, debtors and their counsel should be aware of the limitations of this exemption. Debtors may risk forfeiting the exemption if the requirements are not met.

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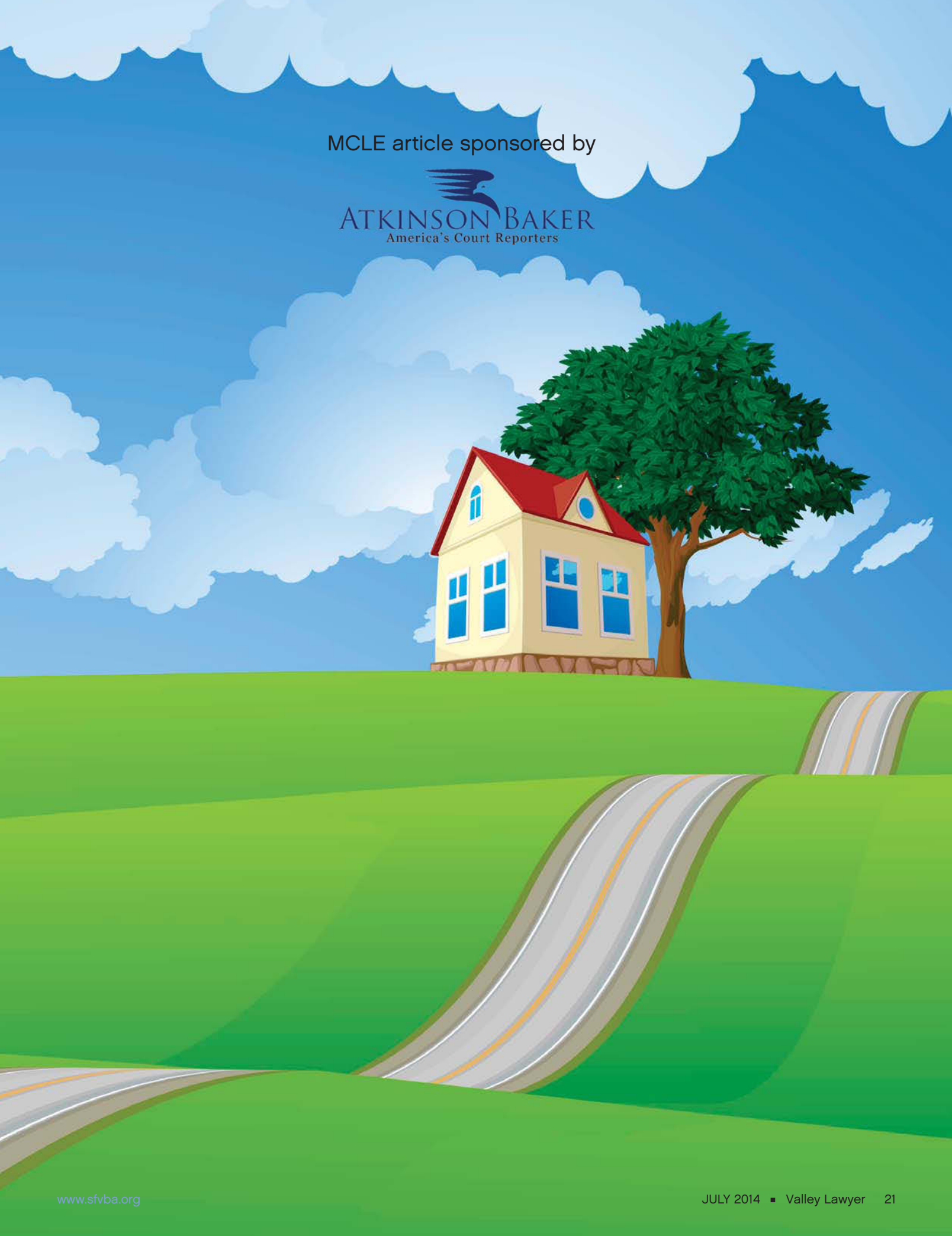


THE BANKRUPTCY CODE IN THE UNITED STATES (Title 11 of the United States Code) seeks to provide debtors with what has been called a fresh start upon receiving their discharge. One of the hallmarks of the concept of a fresh start in the Bankruptcy Code centers on allowing debtors to keep certain property (both real and personal) by claiming that property as exempt. All states have an exemption which is designed to protect a debtor's homestead in bankruptcy. Some states have more generous exemptions than others.

A debtor is required to list property which he claims as exempt.[1] If a debtor fails to claim exemptions or file schedules within the time specified by Rule 1007 of the Federal Rules of Bankruptcy Procedure (FRBP), a debtor's dependent may file the list of exempt property within 30 days thereafter.[2]

A debtor filing a bankruptcy petition in California may claim exemptions under one of two sets of state law exemptions which were enacted in lieu of the Bankruptcy Code exemptions.[3] One exemption applies to debtors generally and the other applies to debtors in bankruptcy.[4]

Limitations on State Homestead Exemptions

In 2005, amendments were made to the Bankruptcy Code creating two subsections to 11 U.S.C. Section 522 that prevent the debtor from taking full advantage of state homestead exemptions under certain circumstances. These provisions impose a monetary limit of $125,000 on the amount of a debtor's interest in homestead property that may be exempted if the homestead interest was acquired within a period of 1,215 days before the commencement of the bankruptcy case or if the debtor has committed certain bad acts.

11 U.S.C. Section 522(p)(1) provides that the debtor may not exempt "any amount of interest" in homestead property in excess of $146,450 that was acquired by the debtor during the 1,215-day period before the filing of the petition. The monetary cap imposed by Section 522(p)(1) does not apply to any interest transferred from a debtor's previous principal residence to the debtor's current principal residence if the debtor's previous residence was acquired before the 1,215-day period and both the previous and current residences are located in the same state.

In addition, the limitation does not apply to an exemption claimed on a principal residence by a family farmer. Given that Section 522(p) was apparently intended to discourage pre-bankruptcy exemption planning in which some debtors have made use of unlimited or substantial state homestead exemptions, the provision should be limited to homestead property interests the debtor gains through his or her own affirmative actions or efforts. Thus, Section 522(p) should not apply, for example, to an interest attributable simply to an increase in the market value of the debtor's homestead during the 1,215-day period, since that is not an interest acquired by the debtor.

11 U.S.C. Section 522(q)(1)(A) limits the debtor's exempt homestead interest to $146,450 if a party in interest asserting an objection to the debtor's claim of exemption establishes that the debtor has been convicted of a felony (as defined in 18 U.S.C. Section 3156), which "under the circumstances, demonstrates that the filing of the case was an abuse of the provisions" of the Code.

The objecting party must demonstrate that the bankruptcy filing is abusive in light of the felony conviction, perhaps by showing that the debtor is attempting to discharge civil liability owing to a crime victim, or that the bankruptcy filing may in some manner impede the debtor's obligation to pay restitution related to a felony conviction.

What Type of Property Qualifies as a Homestead?

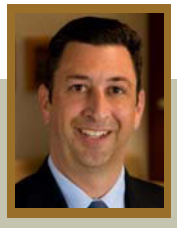
The federal homestead exemption requires occupancy, either actual or constructive.[5] The key is intent. If debtor is not living in the residence, but he intends to return to use the residence as his home, it will qualify as a homestead.[6] For example, a vacation home used seasonally and sporadically by debtor does not qualify as a homestead.[7] On the other hand, a home in which debtor did not reside, but intended to do so, and paid all mortgage payments, taxes, maintenance, may qualify as a homestead.[8]

In California, the factors to be considered in determining residency for homestead purposes are physical occupancy of the property and the intention with which the property is occupied. The debtor's temporary out of town employment does not invalidate the homestead exemption.[9]

Under the homestead exemption, a debtor may exempt a specified amount of his or her interest in a homestead; the debtor does not have the right to retain or exempt the homestead itself.[10] The exemption applies to the debtor's principal dwelling, whether the dwelling is a house, boat, mobile home, or condominium.[11]

California's Homestead Exemption

The homestead exemption in California can be found at California Code of Civil Procedure Section (CCP) 704.730(a).



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That statute allows a debtor to claim various amounts, depending on their marital status, age and/or income level. If a debtor is single, they can claim an exemption of $75,000. The exemption increases to $100,000 if the debtor is married or if the debtor is a head of household (described in the statute as a family unit).

The debtor can claim an exemption of $175,000 if the debtor (or their spouse) is over 65, or if the debtor (or their spouse) is disabled, or if the debtor has an annual income of not more than $25,000 (the amount increases to $35,000 if the debtor is married).

Although the statute may appear unambiguous on its face, there are several phrases in the statute and factual situations which have given rise to several decisions interpreting the statute.

Separate Households: How Many Homesteads?

If the debtor and his or her spouse reside in separate homesteads, only one residence is exempt.[12] Further, the combined homestead exemption of both spouses cannot exceed the allowed exemption of $175,000 or $100,000, whichever is applicable.[13] If both spouses are entitled to a homestead exemption, the amount exempted from the sale of the property must be apportioned between them on the basis of their proportionate interest in the homestead.[14]

In the case of *In re Wilson*,[15] the court discussed whether or not a spouse who had filed individually but was still married could claim a homestead exemption in property owned by both spouses as joint tenants for purposes of lien avoidance pursuant to 11 U.S.C. Section 522(f). The court, after reviewing the definition of a homestead provided by CCP Section 704.710(c), found that the California legislature contemplated allowing separated spouses to claim a single homestead in one of their residences.

The legislature's lone exception to this rule prevents one spouse from relying on the occupancy of the other to claim a homestead exemption following a decree of legal separation. However, this exception does not apply to spouses who are merely physically separated, and creating such an exception would be contrary to the plain language of the statute.

In *Strangman v. Duke*,[16] a husband declared a homestead in his interest in property held with his wife in joint tenancy. The court allowed the husband to apply the entire exemption to his interest in the property. In allowing the husband the exemption, the court noted that "husband and wife cannot have two homesteads, not even upon different properties, and of course cannot have two homesteads upon different interests in the same property."[17]

In the case of *In re Schneider*,[18] a husband and wife declared a homestead exemption in property held by them in joint tenancy. The wife, the judgment debtor in the case, sought to apply the entire exemption to her one-half interest in the property to prevent the judgment creditor from executing against her interest in the property.

On appeal, the district court allowed this application, notwithstanding the objection of the bankruptcy trustee, who asserted that allowing the wife to apply the entire exemption to her portion of the property would effectively enable the husband to subsequently claim a second homestead exemption.

The district court stated "the homestead exemption is not apportionable and there is only one exemption as between husband and wife. . . . The debtor […] has first filed and claims the family homestead exemption declared jointly by her and her husband. If her husband subsequently files in bankruptcy he may claim only those exemptions to which he is entitled under state law. Under that law there is no allowable homestead exemption because that exemption has already been asserted by his spouse. Thus the fear of the trustee is unfounded."[19]

Family Unit Defined

As discussed previously, a single parent may claim a homestead exemption of $100,000. Is there any limitation on the single parent claiming the higher exemption of $100,000 as opposed to the $75,000 exemption? What if the child living with the parent is no longer a minor (e.g., the child has completed high school or college and returns home)? Is the single parent still entitled to the higher homestead amount?

In the case of *In re Dore*,[20] the bankruptcy court analyzed the meaning of the term "family unit" as contained in CCP Section 704.730(a)(2). Section 704.710(b)(2)(D) defines family unit as including "an unmarried relative . . . . who has attained the age of majority and is unable to take care of or support himself or herself" and is cared for or maintained by the judgment debtor in the homestead.

"Incapable" as used in the Code of Civil Procedure, refers to a person who, though not insane, is by reason of age, disease, weakness of mind, or other cause, unable, unassisted, to properly manage and take care of himself or his property.[21]

Consistently, "unable" and its derivations have been used to define persons physically or mentally incapable of caring for themselves, or suffering from a legal disability. Given the structure of the statute, and the nature of the persons described therein, the *Dore* court determined that no support can be found for a construction of CCP Section 704.710(b)(2)(D) which will permit the inclusion of one who is merely unemployed, within the definition of one who is "unable to take care of or support themselves."[22] Therefore, one should be aware that if a debtor has a dependent over the age of 18, the debtor will be precluded from claiming a higher exemption unless the dependent is unable to take care of themself.

Determining Gross Income

CCP Section 704.730(a)(3) allows a debtor to claim a

homestead exemption of $175,000 if he is at least 55 years old and his household income falls below the amount contained in the statute. The statute does not explain what the appropriate period to measure gross annual income is. It would appear from the statute that the term "gross annual income" should apply to the debtor's income for the year preceding the filing of the bankruptcy petition.

The Ninth Circuit discussed gross annual income in the case of *In re Goldman*.[23] In *Goldman*, the trustee objected to the debtor's homestead, arguing that the debtor's income over the twelve months preceding the debtor's bankruptcy petition filing exceeded $15,000, as did debtor's income in the previous calendar year. However, the bankruptcy court held that debtor was eligible for the special exemption, interpreting the statute's use of the term gross annual income to mean the debtor's income in the calendar year of the bankruptcy petition filing.

Reviewing the trustee's appeal, the district court reversed, stating that gross annual income means the debtor's income in the twelve-month period immediately preceding debtor's bankruptcy petition filing, not the twelve months within the calendar year of petition filing.

The debtor appealed this decision to the Ninth Circuit Court of Appeals, which held that the bankruptcy court was correct: "[t]he plain, ordinary meaning of 'annual income' is income over a calendar year (i.e., the calendar year in which debtor's petition is filed)."[24] The computation of income can be easily ascertained if the debtor is a wage earner, which is one who receives regular paychecks or commission checks as an independent contractor.

But what if the debtor is self-employed? How is gross annual income determined? The Bankruptcy Appellate Panel for the Ninth Circuit held in the case of *Shelly v. Kendall (In re Shelly)*[25] that when a debtor owns a retail store, the way to measure "gross income" would be the income from the sole proprietorship reduced by the expenses of that company.

The Bankruptcy Appellate Panel limited its holding though by stating gross income was a malleable concept and should not convey the same definite and inflexible significance under all circumstances and wherever used. It is a term whose construction and meaning depends on the context of the subject matter.[26]

Some courts have distinguished *Shelly* when the debtor(s) business is service oriented. "… [I]t is appropriate to determine the primary source of [d]ebtor's income, and, if it was from rendering of services, deductions from gross receipts should not be allowed."[27] At least one other bankruptcy court has found that a debtor operating a service-oriented business should be allowed to deduct business expenses from gross income.[28]

Reinvestment of the Homestead Proceeds

CCP Section 704.720(b) states that if a debtor sells his homestead, the proceeds from the sale of the homestead are exempt for a period of six months from the time that the

debtor receives the proceeds. In order to keep the proceeds as exempt, the debtor must reinvest them within the six-month period.

The interpretation of the statute applied if a debtor sold his house prior to filing for bankruptcy and then filed for bankruptcy within six months of selling his house without reinvesting the proceeds within the six-month period. In the case of *England v. Golden (In re Golden)*,[29] the debtor argued that the proceeds were exempt notwithstanding his failure to reinvest the proceeds because the funds were exempt at the time he filed for bankruptcy. The Ninth Circuit rejected this argument and held that the debtor had received the proceeds subject to the reinvestment condition in the statute and that the proceeds could lose their exempt status once the reinvestment period lapsed.[30]

What if the bankruptcy trustee (or the debtor in a reorganization chapter) sold their residence after filing? Does the same six-month reinvestment period apply? In *Wolfe v. Jacobson (In re Jacobson)*,[31] the debtors filed Chapter 7 and claimed a homestead exemption of $150,000 on their home. Subsequently, a judgment creditor obtained relief from stay and conducted a sheriff's sale of the home. The debtors received their exemption proceeds from the sale. They did not reinvest those proceeds in another home. After the six months to reinvest ran, the trustee demanded the proceeds.

The Ninth Circuit held that "The debtors share of the proceeds are not fully exempt either. If the debtor does not reinvest his proceeds in a new homestead within six months of receipt, they lose their exempt status. The [debtors] did not reinvest the $150,000 they received. The trustee argues—and we agree—that these proceeds lost their exempt status as a result."[32]

The Ninth Circuit further held that "[t]he [debtors] had a right to $150,000 in proceeds [under CCP Section 704.730(a)(3)]. That right was contingent on their reinvesting the proceeds in a new homestead within six months of receipt. [citation omitted] The [debtors] did not abide by that condition and thus forfeited the exemption."[33] The debtors in *Jacobson* contended that the Ninth Circuit's prior ruling in *Golden* was distinguishable because the debtors in Jacobson filed for bankruptcy before the homestead was sold unlike the debtors in *Golden*. The Ninth Circuit rejected the difference, declining to read out the reinvestment requirement from the homestead exemption.

The ability of a trustee or creditor to demand turnover of homestead proceeds after the expiration of the six month reinvestment period remains the subject of ongoing litigation at the bankruptcy court level and at least one bankruptcy judge has been critical of the *Jacobson* decision.[34]

Although bankruptcy courts give great deference to a debtor's right to claim a homestead exemption, the unwary practitioner should be aware of the pitfalls contained in the homestead statute and be prepared for challenges to the exemption claimed by the debtor. The general deference given by bankruptcy courts has its limitations as discussed herein.

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[1] 11 U.S.C. Section 522.
[2] FRBP 4003(a).
[3] *See*, 11 U.S.C. Section 522(b)(2); Cal Code of Civ Proc. Section 703.140(a).
[4] *Wolfson v. Watts (In re Watts)* 298 F3d 1077 (9th Cir 2002).
[5] *In re Brent*, 68 B.R. 893, 895, (Bankr. D. Vt. 1987).
[6] *Brent*, 68 B.R. at 897.
[7] *In re Tomko*, 87 B.R. 372, 375 (Bankr. E.D. Pa. 1988).
[8] *In re Pham*, 177 B.R. 914 (C.D. Cal.1994).
[9] *Pham*. 177 B.R. at 919.
[10] *In re Reed*, 940 F.2d 1317, 1321 (9th Cir. 1991).
[11] *See* Cal. Code of Civ. Proc. Section 704.710.
[12] Cal Code of Civ. Proc. Section 704.720(c).
[13] Cal Code of Civ Proc. Section 704.730(b).
[14] Cal. Code of Civ. Proc. Section 704.730(b).
[15] 175 BR 735, 738 (ND Cal. 1994) *rev'd on other grounds* 90 F.3d 347 (9th Cir. 1996).
[16] 140 Cal. App. 2d 185 (1956).
[17] *Strangman*, 140 Cal. App. 2d at 189.
[18] 9 B.R. 488 (ND Cal. 1981).
[19] *Schneider* 9 B.R. at 491.
[20] 124 BR 94 (Bankr. SD Cal. 1991).
[21] Matter of Daniels, 140 Cal. 335, 73 P. 1053 (1903).
[22] *Dore*, 124 BR at 97.
[23] 70 F.3d 1028 (9th Cir. 1995).
[24] *Goldman*, 70 F.3d at 1029.
[25] 184 B.R. 356, 358 (9th Cir. BAP 1995) *aff'd* 109 F.3d 639 (9th Cir. 1997).
[26] *Shelly,* 184 BR at 359.
[27] *In re Sweitzer*. 332 BR 614, 617 (Bankr. C.D. Cal. 2005), *citing* In Guy F. Atkinson Co. Of California and Subsidiaries v. Commissioner of Internal Revenue, 82 TC 275, 298 (1984).
[28] *In re Bush*, 346 B.R. 207 (Bankr. S.D. Ca. 2006).
[29] 789 F.2d 698 (9th Cir. 1986).
[30] *Id.*
[31] *Wolfe v. Jacobson (In re Jacobson)* 676 F.3d 1193 (9th Cir. 2012).
[32] *Jacobson*, 676 F.3d at 1198-99.
[33] *Jacobson*, 676 F.3d at 1199.
[34] Hon. Alan M. Ahart, *In Re Jacobson: The Ninth Circuit Court of Appeals Erred by Holding the Debtor Liable for Her Exempt Homestead Sale Proceeds*, 32 Cal. Bankr. J. 411 (2013).

Test No. 69

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. The Bankruptcy Code allows debtors to keep certain property (real and personal) by exempting it.
   ❑ True ❑ False

2. A debtor's dependent can file a list of exemptions for the debtor at any time if they are unable to do so.
   ❑ True ❑ False

3. In California, a debtor can choose exemptions from both sets of exemptions allowed by the statute.
   ❑ True ❑ False

4. A debtor is limited to a homestead exemption of $146,450 for any property acquired within 1,215 days of filing bankruptcy.
   ❑ True ❑ False

5. If a debtor's property increases in value during the 1,215-day period, the debtor is limited to an exemption of $146,450.
   ❑ True ❑ False

6. A party can object to a debtor's homestead if the debtor has been convicted of a felony and the filing is an abuse of the Code.
   ❑ True ❑ False

7. In order to claim a homestead exemption under the federal scheme, a debtor must occupy the residence.
   ❑ True ❑ False

8. To claim an exemption under California's homestead, a debtor must occupy the residence.
   ❑ True ❑ False

9. A debtor's homestead can be applied to a house, boat, mobile home or condominium.
   ❑ True ❑ False

10. A single person can claim a homestead amount of $75,000.
    ❑ True ❑ False

11. A married couple is entitled to a homestead exemption of $125,000.
    ❑ True ❑ False

12. If a debtor (or their spouse) is older than 65 or disabled, they can claim an exemption of $150,000.
    ❑ True ❑ False

13. If a debtor and their spouse reside in separate properties, each may claim a homestead exemption.
    ❑ True ❑ False

14. A single debtor who has a child over the age of 18 living with them while attending college may claim a higher homestead exemption.
    ❑ True ❑ False

15. In order for a single person to claim a child over 18 as part of their "family unit," the child must be unable to take care of himself or herself.
    ❑ True ❑ False

16. If married debtors have annual income of less than $45,000, they are entitled to an exemption of $175,000.
    ❑ True ❑ False

17. When determining annual income for a debtor, the proper measuring period is the year in which the petition was filed.
    ❑ True ❑ False

18. If a debtor is self-employed, annual income is to be measured by deducting expenses from the gross income.
    ❑ True ❑ False

19. A debtor who sells his residence prior to filing bankruptcy must reinvest the proceeds within six months of receiving them in order to claim them as exempt.
    ❑ True ❑ False

20. If a trustee sells a debtor's residence, the debtor does not have to reinvest the exempt proceeds within six months in order to retain those proceeds.
    ❑ True ❑ False

MCLE Answer Sheet No. 69

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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
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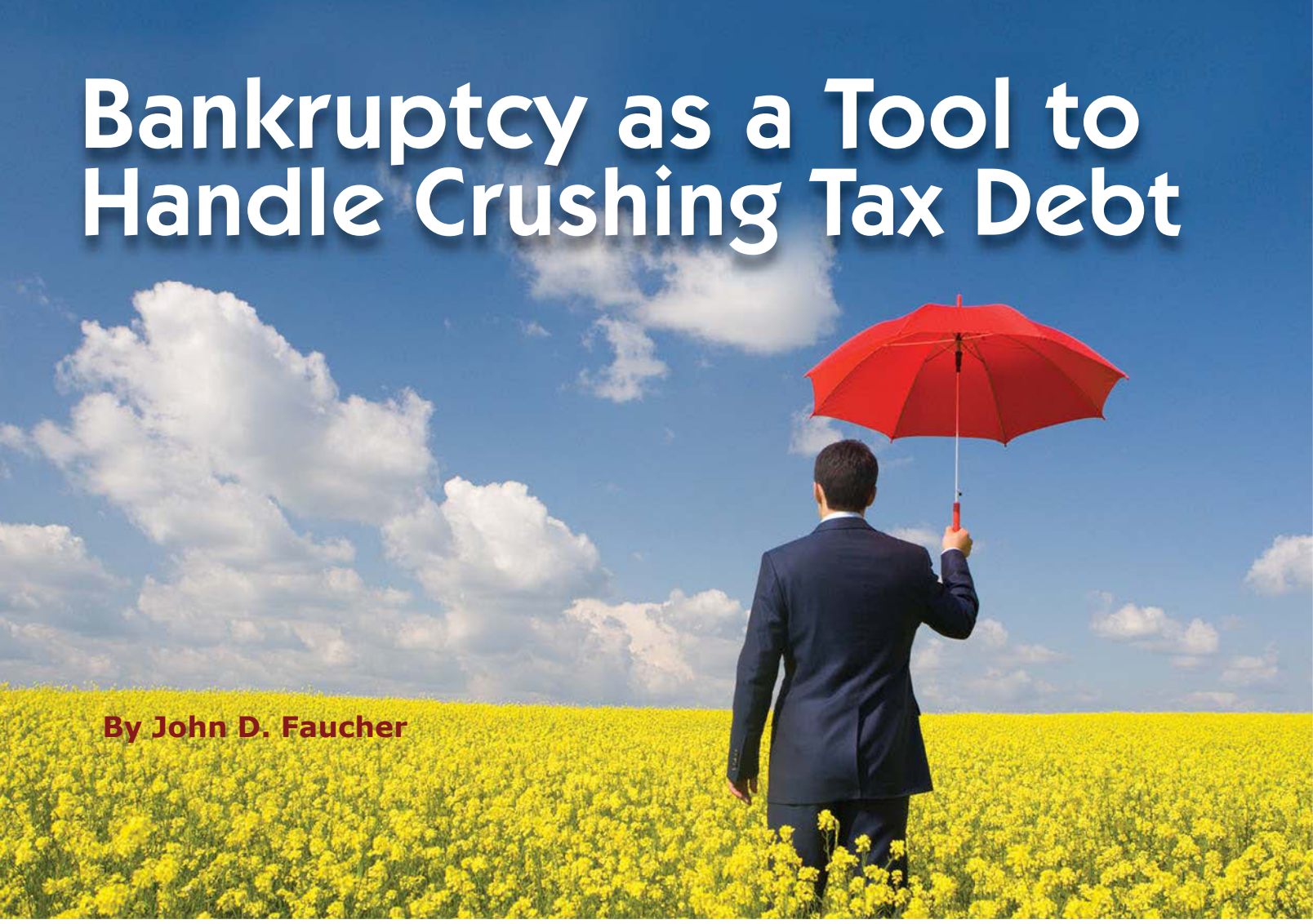
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False

Bankruptcy as a Tool to Handle Crushing Tax Debt



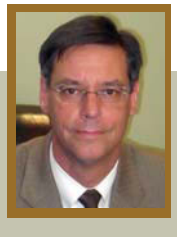
By John D. Faucher

MATT PLUMMER[1] WENT INTO business with two other partners, brokering flowers from fields in Santa Barbara and Ventura Counties to wholesalers in Los Angeles. Business went well for two years, then suddenly took a nosedive because of the recession and the business's failure to make effective decisions. The partnership split up, and Plummer found a job running a Von's florist shop, trying to forget about his failed business venture.

The IRS did not forget. It audited the partnership, and determined that the partnership had underreported income by $1 million in 2007, its last year of operation. When it looked at the partnership agreement provided by the tax matters partner, the IRS determined that Plummer, a one-third shareholder, was allocated 90 percent of the income (his former partners didn't try to change the IRS's mind, though this allocation was far from reality). Plummer's tax bill, announced via a statutory notice of deficiency,[2] amounted to $700,000 including penalties and interest. At the time of the audit, Plummer was making a yearly salary of $45,000.

Plummer went straight to a tax lawyer, Kimball Maher, to straighten things out. He had good reason to fight the IRS: the auditor had not considered costs of goods sold, and the revised partnership agreement actually gave Plummer a 10 percent share in the partnership's income. Maher advised that Plummer had a winner of a case: he was highly likely to prevail and have the IRS or the Tax Court agree that he owed no extra tax for 2007. However, this would only occur after a two-year litigation process that could cost up to $75,000, with an up-front retainer of $20,000 to start on the work. Plummer didn't have that kind of money.

Maher knew another avenue to deal with a delinquent tax bill: bankruptcy. Plummer would need



John D. Faucher practices law at the intersection of tax and bankruptcy: tax litigation, tax collection workouts, and bankruptcy. He spent 10 years as a docket attorney for the Internal Revenue Service. He can be reached at jdfaucherlaw@gmail.com.

to live with a crushing tax bill for a specified period, then could wipe it clean away with a bankruptcy discharge. If he did it right, the IRS would have to leave him alone.

The six tests for discharging taxes in bankruptcy lie in 11 U.S.C. §523(a)(1) and 11 U.S.C. §507(a)(8). The first three of these tests mostly challenge our arithmetical abilities: If the taxpayer wants to discharge an income tax, that tax must be from a return that was due more than three years before the bankruptcy petition date,[3] and was actually filed more than two years before the bankruptcy petition date.[4] The tax must also not have been assessed less than 240 days before the bankruptcy petition date.[5]

In addition to the three arithmetic rules above (the three-year, two-year, and 240-day rules), a tax must meet three other rules to be discharged in bankruptcy. The tax must not relate to a period where the taxpayer never filed a tax return,[6] nor to a tax return that was fraudulent.[7] Finally, the taxpayer must never have attempted to "evade or defeat" the tax.[8]

Plummer chose not to fight the IRS. He accepted the audit results by signing a "consent to assessment" form and sending it back to the IRS. A month later, Maher ordered an account transcript from the IRS to see when it received the consent, and therefore the date of the assessment.

Maher didn't forget that there was another tax authority to satisfy as well: the California Franchise Tax Board (FTB). Based on the audit results, Maher told Plummer to prepare an amended state return and mail it. Plummer dragged his feet, and before he was able to file his amended return, the FTB used the IRS's results to issue a Notice of Proposed Assessment showing $300,000 owing for the 2007 tax year.

The same 240-day rule applies to the FTB as to the IRS. However, when the FTB issues a Notice of Proposed Assessment, it does not give the taxpayer a chance to agree with it. The proposed assessment is not final until 60 days after the notice, and there is no way to speed up that process. Plummer had to wait 300 days, not 240, from the Notice of Proposed Assessment until he was able to file bankruptcy and discharge his $300,000 debt. Had he mailed in his amended return, he would have needed to wait only 240 days from the date the FTB received it.

So Maher got account transcripts from both the IRS and the FTB, and counted 240 days from the dates of final assessments to determine when to file the bankruptcy. In the meantime, the taxing authorities started their collection processes. Indeed, the whole point of the time limits on discharging taxes is to allow the tax authorities some time to use their tender mercies against the taxpayer.

Good practitioners know that bankruptcy is only one of many tools to use against the tax authorities. Until a taxpayer qualifies to discharge a tax, there are other ways to keep him financially alive.

The best tool for Plummer's situation was an installment agreement (like a truce between the tax authority and the taxpayer). The taxpayer agrees to make a regular monthly payment, and the tax authority agrees to not do anything else too painful, like levy wages. The monthly amount is based entirely on the taxpayer's income and ability to pay; there are guidelines to determine what expenses are allowed.

Maher called the IRS and told the revenue officer his strategy: he wanted an installment agreement. The collection officer (collectors are officers, auditors are revenue agents) agreed that there was little point in trying to collect much of this debt from Plummer; he took some financial information, and with four months left to go, put him in uncollectible status (known to IRS collection officers as status 53) rather than an installment agreement. The IRS was willing to

just walk away from this taxpayer, knowing it would never get a dime from Plummer.

Plummer was uncollectible because he had no extra income, and one reason he had no extra income was that the FTB was already taking that income. The FTB has a hard time competing with the IRS: it has much fewer resources to audit taxpayers and collect tax. However, whenever it gets a competitive advantage over the IRS, it won't let go. Here, the FTB's revenue officer started garnishing Plummer's wages almost immediately, taking 25 percent of his take-home pay. The revenue officer would not consider an installment agreement, even knowing that Plummer would file bankruptcy soon and that the garnishment would never pay more than tiny part of the $300,000 debt. The only installment agreement he would consider would be one that paid more than the garnishment was already collecting, even if FTB guidelines would have allowed a much lower payment.

The FTB takes such a hard line because it stands in a very different situation to the taxpayer than the IRS does. The IRS feeds money to the U.S. Treasury, the largest pot of money in the world. And money doesn't really mean the same thing to the Treasury that it means to any other entity: dollars returning to the Treasury is like water returning to the ocean, or electricity returning to ground. Because the government can always just print money, the Treasury doesn't really miss money that isn't paid to it.

The FTB, however, feeds the state treasury, and that entity needs real dollars. Its bank accounts have actual balances in them, and those accounts can become overdrawn. It is almost unthinkable that the U.S. Treasury would need to write an IOU for a practical, rather than a politically motivated, reason; California has needed to do so. The state needs tax dollars much more immediately than the federal government does.

Maher waited the requisite 240 days on both assessments, then filed Plummer's case. The case went smoothly: Plummer answered questions at his Meeting of Creditors; the trustee issued a no-asset report; no one sued him for nondischargeability of a debt; he took his financial management course. After the discharge was issued, Maher called the special procedures personnel at both tax authorities to find out whether Plummer's 2007 liability was discharged. The IRS agent agreed immediately that it was; the FTB did not make its determination until six months later, after sending a bill for the $300,000 liability and then saying, in effect, "never mind."

But there is no judicial determination that the 2007 taxes are discharged: there are merely notations on an account transcript, notations that the IRS or FTB can go back and administratively change if they later decide that Plummer's 2007 liability didn't actually meet all six dischargeability tests.

Few people can disagree about four of the tests: either the appropriate amount of time passed or it didn't. As for fraud, a tax return is presumed legitimate until a taxing authority proves it fraudulent, a proceeding that usually takes place outside the bankruptcy court and that almost no one involved with can ignore.[9]

There can be some initial ambiguity over whether a taxpayer actually filed a return. If the IRS starts an audit and the taxpayer has not filed a return for that year, it will request a return from the taxpayer. If the taxpayer doesn't provide one, the IRS will eventually prepare a substitute for return and assess the amount of tax it believes is owed.[10] The taxpayer then loses the opportunity to file his own return. Tax owed for that tax year is never dischargeable.[11] If the taxpayer is able to file a return in the audit that the IRS accepts, then the taxpayer has filed a return and the tax year is dischargeable.

The final test raises the most ambiguity: did the taxpayer attempt to evade or defeat such tax? Because it is in the same sentence with "fraudulent return," most people reading this section for the first time believe that it is reserved for people who have done really bad things. But evasion can turn out to be surprisingly easy to do: choosing to spend money on a vacation, for instance, at a time when you knew you owed tax can be evasion.[12]

If Plummer wanted a judicial determination about his taxes being discharged, he could have gotten it by filing an adversary proceeding—a complaint for declaratory relief—in the bankruptcy court. In California, the IRS is willing to stipulate to the first five dischargeability tests.[13] It is not willing to stipulate to the "evade or defeat" test, explicitly reserving its right to later challenge the dischargeability of the tax based on evidence it does not currently have.

That reservation of rights may not matter much in practice. The tax authority has the burden of proving the attempt to evade or defeat a tax. People file bankruptcy and get discharged because they genuinely have few resources. It is impractical for the government to spend much effort trying to collect taxes from someone who has admitted financial defeat and is rebuilding his or her life.

Generally, the IRS sees itself as a law enforcement agency. It relies on the cooperation of the vast majority of its citizens to self-report and pay their taxes. It is not interested in ruining people's lives so long as they make the attempt to comply with its requirements. So long as Plummer does not become a tax protestor, he can expect to have the IRS and FTB leave him alone, be free of his tax debt for the 2007 year, and look forward to being a productive member of our competitive economy.

[1] All names used in this article are fictitious.

[2] The statutory notice of deficiency, governed by 26 U.S.C. §6212, tells the taxpayer what amount of tax the IRS has determined is owed, and allows the taxpayer to file a petition with the Tax Court within 90 days if the taxpayer disagrees and wants to challenge the determination.

[3] 11 U.S.C. §§523(a)(1)(A), 507(a)(8)(A)(i).

[4] 11 U.S.C. §523(a)(1)(B)(ii).

[5] 11 U.S.C. §§523(a)(1)(A), 507(a)(8)(ii). An assessment (similar to a judgment in civil litigation) is a record of the tax owed. 26 U.S.C. §6203. Once the tax is assessed, the taxpayer can no longer challenge the amount of the debt, and the taxing authority can rely on it to collect the tax. Until the assessment, the tax liability is just a gleam in the government's eye. The IRS most commonly relies on self-reported tax returns to assess a tax liability. When a taxpayer mails a tax return to the IRS, the self-reported amount is assessed upon receipt of the return. Sometimes, as in Matt Plummer's case, the IRS assesses in a different manner: after an audit or a Tax Court case. At the end of Plummer's audit, the IRS proposed its $700,000 assessment, and gave him the opportunity to either agree with it (thereby starting the 240-day clock) or challenge it in Tax Court (with the 240-day clock starting at the end of the court proceedings).

[6] 11 U.S.C. §523(a)(1)(B)(i). This rule seems redundant in combination with the two-year rule of §523(a)(1)(B)(ii). After all, if a return wasn't filed at all, it would never satisfy the two-year test. In practice, this rule is used to weed out situations where the IRS assessed the tax before the taxpayer got around to filing his own return, as discussed below.

[7] 11 U.S.C. §523(a)(1)(C).

[8] 11 U.S.C. §523(a)(1)(C).

[9] Under 26 U.S.C. §6663, the government has the burden of proving fraud by clear and convincing evidence. That determination is usually made in Tax Court, but a bankruptcy court may hear a fraud case under 11 U.S.C. §505.

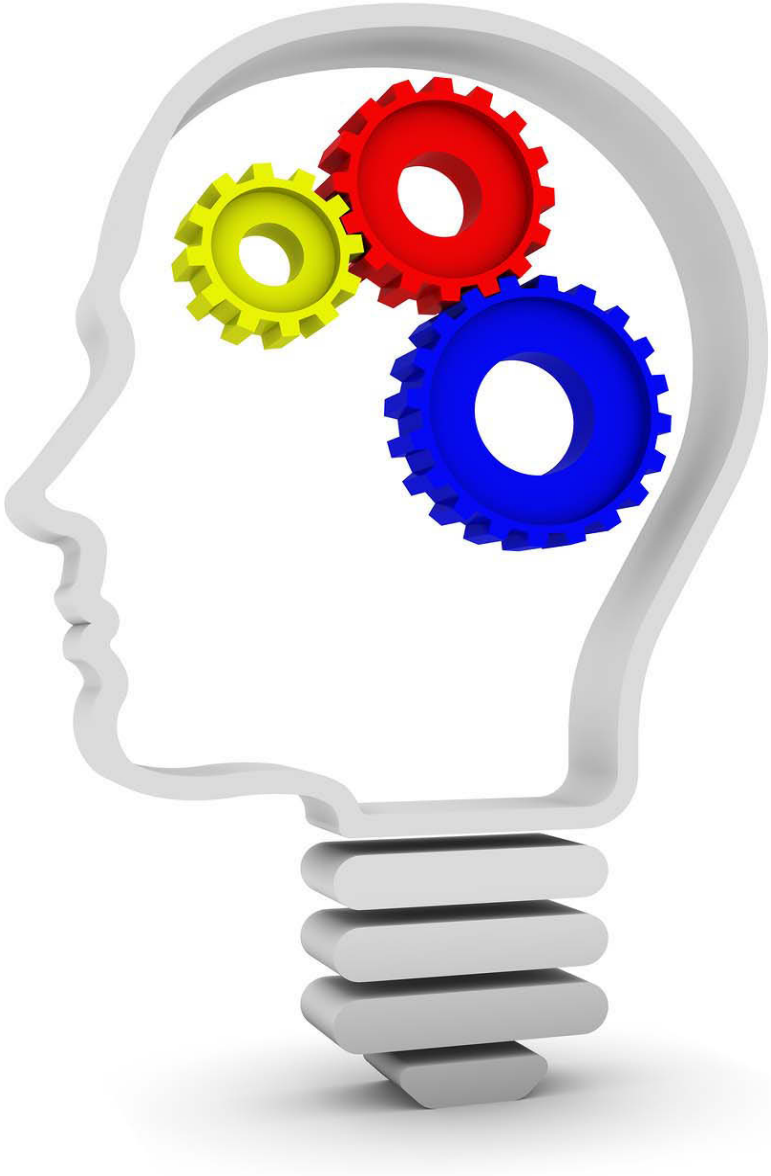
[10] 26 U.S.C. §6020(b).

[11] The Ninth Circuit established this rule in *In re Hatton*, 220 F.3d 1057 (2000). Since then, Congress amended Bankruptcy Code §523(a) with a definition of "return" that specifically excludes the substitute for return. Since then, no case has held that a tax assessed with a substitute for return is dischargeable; other circuits have read this amendment to deny dischargeability to all late-filed returns. See, e.g., *In re McCoy*, 666 F.3d 924 (5th Cir. 2012). The IRS itself does not take such a draconian view, as shown in Chief Counsel Notice 2010-016. However, the IRS does not litigate in bankruptcy courts; all U.S. Government appearances in bankruptcy courts are through the U.S. Attorney's Offices and the Department of Justice Tax Division, and these bureaucracies generally take a harsher line against debtor-taxpayers than the IRS.

[12] See, e.g., *Dalton v. IRS*, 77 F.3d 1297 (10th Cir. 1997); *In re Fegeley*, 118 F.3d 979 (3rd Cir. 1997); *In re Jacobs*, 490 F.3d 913 (11th Cir. 2007). The elements of evasion are simple: 1. The taxpayer had a tax-related duty (such as filing or paying); 2. The taxpayer knew of that duty; 3. The taxpayer voluntarily and intentionally violated that duty. *Fegeley* at 984. While the elements are simple and could trip up someone who is more incompetent than dishonest, the facts in the reported cases tend toward more shocking patterns. For instance, in *Jacobs*, the taxpayer lived for a decade in a golfing resort, invested $120,000 into his wife's jewelry store, paid $20,000 for his wife's cosmetic surgery, and drove a late-model Mercedes-Benz at the same time that he owed hundreds of thousands of dollars of past income tax.

[13] In other jurisdictions than California, the government will not stipulate in a case where it agrees with the taxpayer about the dischargeability of tax years. Rather, it will move to dismiss the cause of action because there is no current controversy. *In re Mlincek*, 350 B.R. 764 (Bankr. N.D. Ohio 2006).

Determining the Value of a Patent or Patent Application

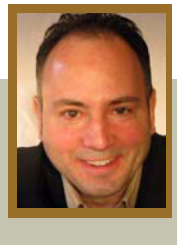


By David L. Hoffman

MOST LAWYERS KNOW THAT THE VALUE OF A business is made up of the value of its assets. Tangible assets like stocks, bonds and real estate have relatively straightforward methods of valuation. By contrast, intangible assets such as patents are much harder to value.

Determining patent value is vital for many purposes. The method by which value is determined can also vary greatly. For most purposes, there is no generally accepted methodology. Many times valuation is subjective. There are several reasons to value a patent:

- As an asset in the purchase or sale of the patent itself
- For determining damages in a litigation
- For determining the royalty rate and any upfront license fee in a licensing transaction
- As an asset or collateral for a loan or stock offering or similar transaction
- As an asset in the sale of the company
- In a potential transfer from one entity to another
- As an asset in a bankruptcy estate or company dissolution
- As an asset in the probate estate in the event of death of an owner



David L. Hoffman, intellectual property attorney and intellectual property litigator at Hoffman Patent Group, obtains patents, trademarks and copyrights for its clients, and defends those sued for any type of intellectual property infringement. He can be reached at david@dlhpatent.com.

Many of these reasons are occasioned by potential or actual legal proceedings or contracts. Like any asset, knowing a patent's value can be critical to a client for making good strategic decisions. "Business owners should be proactive about assessing and knowing the value and competitive advantages of their businesses' intellectual property, including patents," says business valuation expert Davis Blaine of The Mentor Group in Westlake Village.

Value can change over a patent's life, typically twenty years from its earliest filing date.[1] Initially, upon invention, a company must decide whether to even file a patent application. There are two important considerations at this stage. The first is the potential market for the invention. This is not the entire potential gross sales. Rather, the portion of gross sales attributable to a patent is often determined by subtracting out any other factors, including the company's innate ability to manufacture and deliver good products or services and market them. Once all other factors are removed, then the remaining expected profit attributable to any patent that might issue can be determined.

The second factor to consider is the potential scope of any patent that may be obtained. How much competition might a patent exclude, if any, and/or what price differential might it support versus the competition? Because patent issuance is a contingency, the likelihood of issuance should be factored into valuation.

Sometimes these factors are determined by a gut valuation. Ideally, they should be carefully considered, for example, by performing a patent search to gauge what, if anything, may be protectable.

From an accounting standpoint, a pending patent application's value might simply be the cost to prepare and file it. However, this cost approach is unlikely to reflect the competitive advantage that a patent may provide. If it is a ground-breaking invention in a huge market (e.g., the laser), the value is obviously not just cost. By contrast, even if it is a great invention, but there is no market, the application may be worthless. To be most effective, counsel for the company should encourage the client to fully consider these factors.

In any event, it is important for the company to determine the value in order to figure out how much to invest in commercializing the product or service and in protecting it.

Following the invention phase, the company needs to decide whether to try to sell or license the application and/or sometimes to borrow against it. A patent application may help attract investors. In this case, the application's value may depend on the amount of investment and may be all of the investment or just a portion. If one licenses the patent, then the royalty income may be used to measure value. If one can borrow against it, the value to the company of the loan (which is not necessarily the loan amount) could be used as the value.

Once the patent issues, any of the above methods can still be used to determine value as appropriate. While issued patents carry a presumption of validity,[2] there still could be a discount for any potential for invalidation.

One of the reasons for valuation, as an asset in the sale of the company, is common. It is particularly important to have a valuation in this situation to help speed up an otherwise slow process of sale and to streamline negotiations. According to Mr. Blaine, chairman of The Mentor Group, Inc. and Mentor Securities, LLC, "sellers should be well prepared [including] understanding what intellectual property is owned by the company and the advantages it provides." The result is often reflected in an increased price for the business, according to Blaine.

Where there is a product or service for sale, the value of the patent is best determined by an income approach—what is the cash flow from the patented product or service, and how much of that cash flow is attributable to the patent? The cash flow might increase when the patented product or service helps sell other products or services of the company (convoyed sales).

If there are no products or services for sale, or for a number of other reasons, the patent may be valued by a market approach—what would a willing buyer pay for the patent? This is a hypothetical approach where past sales of similar patents may be used as a gauge. In this case, determining value might be analogized to how an appraiser values real estate using comps.

Sometimes a patent's value can be damaged over time, for example if a company fails to enforce the patent or if previously unknown prior art (past similar patents or publications) or other facts arise that cast doubt on the patent's validity.

Many patent owners do not know or improperly estimate their patent portfolio's value. Patents typically account for less than 20% of the value of a business, even in the case of technology companies. As noted by valuation professional Daren Mesrobian of Vineyard Capital Advisors, Inc. in Pasadena, "a patent, while having some value independently of the company, is much more valuable when it is able to leverage a business' name and customers."

Understanding and keeping track of the value is important to the business owner and practitioner in many circumstances, whether deciding to file a new patent application, pricing a patent for sale or license, or selling a company.

[1] *See* 35 U.S.C. §154.
[2] 35 U.S.C. §282.

Meet the 2014 Trustee Candidates

By Irma Mejia

This summer, members will select from eleven candidates to f ll six Trustee vacancies on the SFVBA's Board of Trustees for the 2014-2015 f scal year. Trustees are charged with developing and supporting the Bar's policies and programs and are elected to two-year terms. The candidates are presented here through photographs and information that displays their distinctive personalities. They hail from a variety of backgrounds and practice areas and offer unique sets of skills and passions.

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.

My greatest joys!

Keeping the official score book for my twin boys' baseball team

JONATHAN BIRDT

Favorite Movie: *Evolution*

Favorite Legal Movie: *A Few Good Men*

Favorite Summer Vacation: Touring Italy with my family last year and this year's special trip with my daughter to Florida for her to swim with dolphins and scuba dive after a cheeseburger in paradise

What I Do for Fun: Ski all winter and spend summer on the lake. We are part-time residents in Big Bear and sneak away whenever we can.

Favorite Book: *Heart of Darkness* by Joseph Conrad

Childhood Career Goal: I had something of a misspent youth and never expected to become an adult; still waiting according to most.

Birdt has practiced law in the San Fernando Valley for over 17 years, first as an insurance defense lawyer, then as a plantiff's attorney, and finally opening his own personal injury firm in 2010. "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," says Birdt.

In addition to his busy practice, Birdt serves as an active pro bono litigator for Public Counsel and as guardian ad litem for more than ten civil cases over the years. He is also a member of the SFVBA Attorney Referral Service Committee.

As a Trustee, Birdt would work to increase community outreach, letting the public know the SFVBA is a trusted asset it can turn to for dependable lawyer referrals. "With a strong ARS Program, we can all reach more clients and benefit the community as a whole," explains Birdt.

MICHELLE DIAZ

Favorite Movie: I can't pick just one, but at the top of my list are *The Princess Bride* and *The Shawshank Redemption*.

Favorite Legal Movie: *Philadelphia*

Favorite Summer Vacation: A few years ago, my husband, kids and I took a two week trip: a week of camping, followed immediately by a week at a resort by the beach.

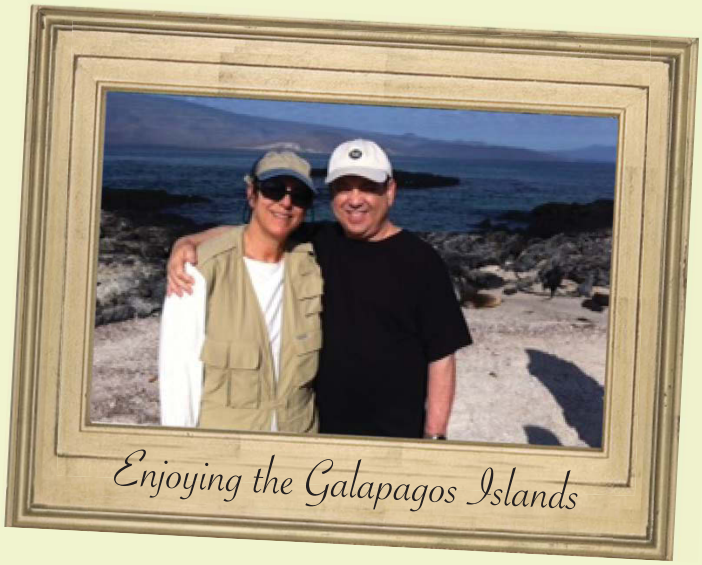
What I Do for Fun: Hang out with my family—we like to swim, ride bikes, ski, go to Disneyland, go to sporting events (kids' games and professional games)

Favorite Book: Tough to pick just one, but I really like *One Hundred Years of Solitude* by Gabriel García Márquez.

Childhood Career Goal: I couldn't pick one then, and was sure (at age 5) that I would be either President of the United States or a race car driver.

Diaz has been practicing law for 16 years. Prior to establishing her own firm focusing almost exclusively on family law, Diaz worked in civil litigation in the areas of catastrophic personal injury, insurance coverage, and employment discrimination. She is a member of the SFVBA's Attorney Referral Service and volunteers regularly as a family law settlement officer in Valley courthouses. She also serves as an arbitrator for the SFVBA's Mandatory Fee Arbitration Program.

"The SFVBA has been a wonderful resource, both through the attorneys I've met and the very talented staff we have at the Bar," she says. "As a Trustee I will focus on raising the profile of our Bar and its members with consumers in the Valley." She also intends to work on increasing member involvement and strengthen the Bar's programs and events.



Enjoying the Galapagos Islands

STEPHEN GERSHMAN

Favorite Movie: *Casablanca*

Favorite Legal Movie: It's a tie between *To Kill a Mockingbird* and *Inherit the Wind* (the original with Spencer Tracy and Fredric March)

Favorite Summer Vacation: My trip to the Galápagos Islands and Ecuadoran rainforest

What I Do for Fun: House repairs, attend classic car shows, watch sports (especially the Dodgers at the stadium), and read novels and political books

Favorite Book: *To Kill a Mockingbird* by Harper Lee

Childhood Career Goal: To be a doctor

Gershman has been practicing family law for over 36 years and has been a certified specialist in family law since 1994. He has a strong background in service, volunteering as a judge pro tem in Valley courthouses in both family law and small claims since the early 1990s. He also volunteers as a daily settlement officer in family law, participates in judgment days and settlement week in the Van Nuys courthouse, and serves as a fee arbitrator in the SFVBA's Mandatory Fee Arbitration Program.

As a Trustee, he wants to develop programs that will resolve issues, such as discovery disputes, that take up many court hours. He also wants to develop a program to help both victims and perpetrators of domestic violence, modeled after a successful program in Santa Clara County. Finally, he wants to find solutions to meet the needs of the under-served segments of the Valley community, particularly those who do not qualify for free legal services but cannot afford large retainer fees. "I want to find ways to assist pro pers so that they are better prepared when they appear in court, thereby saving some of the court's time," explains Gershman.

Tuned In

SEAN JUDGE

Favorite Movie: So many to choose from… only one? *Apocalypse Now*

Favorite Legal Movie: *Murder on a Sunday Morning*

Favorite Summer Vacation: Going on a baseball stadium tour of the Midwest and East Coast stadiums with our son

What I Do for Fun: Yoga, swimming, reading, instrumental music

Favorite Book: World War II histories and biographies. *The Tao Te Ching* by Lao Tzu is also something I come back to.

Childhood Career Goal: To be a doctor, until I realized that I didn't really like cutting things open and that pre-med and I didn't always go together so well

With 24 years of experience as an attorney, Judge's background includes time representing large corporations and insurers at Los Angeles-based firms before moving his practice to the San Fernando Valley in 2001. Once in the Valley, his practice focused on representing individuals and small businesses. Since 2010, he has mostly moved out of litigation and into mediating civil cases, which he enjoys greatly.

Judge has served as a Trustee for the past three years and as a liaison between the SFVBA's Mandatory Fee Arbitration Program and the Board. If reelected, he plans to continue his work strengthening the Mandatory Fee Arbitration Program. "My main goal has been to encourage lawyers to use our program and, more importantly, to provide lawyers with information to prevent problems from escalating to the point of fee arbitration," he says. He has worked toward these goals by writing "Lessons from Mandatory Fee Arbitration," a regular column in *Valley Lawyer* and past MCLE articles on the topic of fee arbitration.

NICOLE KAMM

Favorite Movie: *The Breakfast Club*

Favorite Legal Movie: *The Paper Chase*

Favorite Summer Vacation: Taking my daughter on a recent three-day whirlwind trip to London

What I Do for Fun: Hang out with my kids, spend time with friends, and read

Favorite Book: Currently, *Blue Nights* by Joan Didion

Childhood Career Goal: To be a public health worker

As an employment defense attorney at Lewitt Hackman, Kamm represents business owners in a variety of employment matters, including counseling clients on claim prevention, supervisor training, implementing policies and practices, and litigation defense. In practice since 2006, Kamm is a leading voice in the area of employment law, writing and speaking regularly on the topic.

She is also dedicated to efforts to close the gender gap in the work place. Kamm co-founded Women to Women, a networking group for emerging female professionals, and served as a member of the SFVBA's Diversity Committee for several years. She has also served as Chair of the Employment Law Section since 2012.

"As a Trustee, I look forward to utilizing my professional and personal experience to streamline services and programs and encourage member participation," says Kamm. "I also look forward to continuing to work with the SFVBA to encourage and promote the highest ethical and professional standards among our members and serve others in the community."

ALAN KASSAN

Favorite Movie: *The Shawshank Redemption*

Favorite Legal Movie: *My Cousin Vinny*

Favorite Summer Vacation: Sailing on a 60-foot, four cabin catamaran around the Tahitian Islands for a week

What I Do for Fun: I am an obsessed landscape photographer. I take advantage of every chance I get to hike, camp and photograph. I also love mountain biking, fly fishing, and spending as much time as I can with my four sons.

What is your favorite book: Issac Asimov's *The Foundation Trilogy*

Childhood Career Goal: To be a great father

Born and raised in the San Fernando Valley, Kassan has been practicing law and volunteering in this community for 28 years. His law practice is what he calls "service-oriented," focused on representing individuals recover benefits from health insurance, life insurance, long-term care insurance, and disability insurance claims that were wrongfully denied.

"Serving my community has always been a part of my DNA," says Kassan. Over the years, he has served as a judge pro tem, a volunteer mediator, and as an active member of a variety of professional and non-profit boards and associations, including the SFVBA. He has been a Trustee for the past two years and is the incoming Chair of the SFVBA's Membership and Marketing Committee.

"As a Trustee, I hope to help bring even more new and dynamic educational programs to our membership and expand the many other benefits of Bar membership," he says.

YI SUN KIM

Favorite Movie: *Vertigo*

Favorite Legal Movie: *My Cousin Vinny*

Favorite Summer Vacation: A study abroad program during law school with eight other friends to Hong Kong for two months. During that trip, I also visited Thailand (Bangkok), China (Beijing), and South Korea (where I have family I had not seen for years).

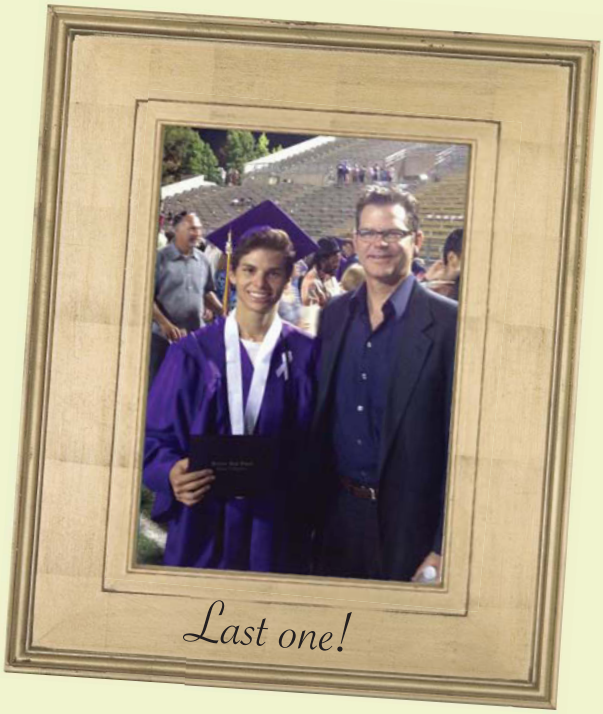
What I Do for Fun: Spend time with my new nephew and family.

Favorite Book: *A Tale of Two Cities* by Charles Dickens

Childhood Career Goal: To be a pediatrician

As an associate with Greenberg & Bass, Kim's practice focuses on bankruptcy and business litigation and transactions. Commitment and loyalty are hallmarks of her practice and personality. Having joined the staff at Greenberg & Bass in 2002, Kim was happy to continue to work there once she became an attorney in 2007. And since then, she has been a dedicated member of the SFVBA, serving on the Board of Trustees and as Co-Chair of the New Lawyers Section. "I have gained extensive insight on what lies behind the scenes of the SFVBA and obtained a true respect and appreciation for the organization," says Kim.

As a Trustee, her goal is to continue her work reviving the New Lawyers Section, which she sees as crucial to the SFVBA's growth. Already, Kim has helped organize free MCLE seminars and plans for additional networking and informative events for the near future. "In the process, I have met numerous new and younger members eager to get involved who can bring substantial benefits to the Bar," she explains. "It is my goal to provide the opportunities for them to do so."



GREG LAMPERT

Favorite Movie: *Man on Fire*

Favorite Legal Movie: *A Few Good Men*

Favorite Summer Vacation: A family reunion at Club Med Columbus Isle in the Bahamas

What I Do for Fun: Ride a motorcycle and restore muscle cars

Favorite Book: The Bible

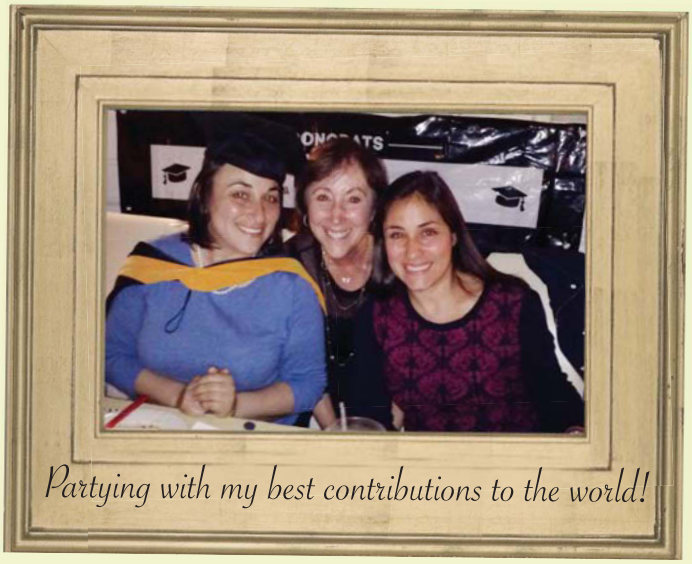
Childhood Career Goal: To be a professional athlete

A veteran attorney in intellectual property law and managing partner at Christie, Parker & Hale, LLP in Glendale, Lampert has 25 years of experience. "I can make a significant contribution to the SFVBA through leadership skills developed over the years in managing my firm of 45 professionals," says Lampert.

A longtime member of various professional organizations, Lampert has come to understand that one of the strongest benefits a bar association can offer its members is the opportunity for networking. His focus as a Trustee would be to promote joint programs with other bar associations and to promote the Bar's networking opportunities, particularly for newer lawyers and bar members trying to establish their practice.

"Education and mentorship are also benefits in great need to newer lawyers," says Lampert. To this end, he would like to foster mentorship relationships between long time members of the association and newer attorneys.

Biking with the kids and grandkids



Partying with my best contributions to the world!

STEPHEN LENSKE

Favorite Movie: *Ice Castles*

Favorite Legal Movie: *Miracle on 34th Street*

Favorite Summer Vacation: As a Disney fan, my wife and I vacation every other year at Disney World.

What I Do for Fun: In addition to weekly movie nights with friends, my wife and I like to attend local events and attractions like the Renaissance Faire, the County Fair, L.A. Zoo, Aquarium of the Pacific, Huntington Library, concerts, plays, dance performances, as well as frequent various local amusement parks, including Disneyland and Universal Studios.

Favorite Book: *Hawaii* by James Mitchner

Childhood Career Dream: I always wanted to follow in the footsteps of my uncle, a well-known lawyer in Portland, who maintained a legal practice up to the ripe old age of 100 at the insistence of his many local clients.

In practice for 45 years, Lenske's experience includes a 31-year career in the U. S. Army Reserve Judge Advocate General's Corps and more than 30 years of community service. In 1981, he co-founded the West Valley law firm of Lenske, Lenske & Abramson, where his work focuses on business litigation and gaming.

Lenske served for 35 years as a judge pro tem in the Los Angeles Superior Court. His other community service includes over five years on the West Valley Community Police Advisory Board and eight years as a volunteer fee arbitrator in the SFVBA's Mandatory Fee Arbitration Program.

"My goal for the SFVBA is to support existing bar programs while helping to create or revive ADR programs, such as volunteer judicial arbitrations, judge pro tem and mediation and settlement services, in coordination with our local courts," says Lenske.

KATHY G. NEUMANN

Favorite Movie: *Mary Poppins*

Favorite Legal Movie: *My Cousin Vinny*

Favorite Summer Vacation: The safari trip I took in Kenya

What I Do for Fun: Travel

Favorite Book: *The Invisible Bridge* by Julie Orringer

Childhood Career Goal: To be a mommy and something in an office where I could help people

Having turned to the practice of law later in life, Neumann worked through night school as a single mother to earn her law degree. "My aspiration to become a lawyer was two-fold: to become part of a respected profession, and to help people obtain justice," says Neumann.

She has had a successful career as a family law attorney and mediator for 17 years. Her previous experience includes successful stints in real estate and business. She currently volunteers as a daily settlement officer in the Los Angeles Superior Court.

As a Trustee, Neumann intends to work to improve the reputation of the profession while increasing the public's access to justice through a Modest Means Incubator Program which would help low-income litigants obtain advice and assistance while providing training for new attorneys. She also intends to encourage SFVBA members to embrace the new California Rule of Court (Rule 9.4) holding attorneys to the highest standard of conduct. "Hopefully, by demonstrating respect for each other, we can enhance the public's perception of our profession," she explains.

TONI VARGAS

Favorite Movie: *The Sixth Sense*

Favorite Legal Movie: *To Kill a Mockingbird*

Favorite Summer Vacation: Going home to North Carolina to visit my parents after moving to California

What I Do for Fun: Work in my garden, run, read and spend time with friends

Favorite Book: *The Immortal Life of Henrietta Lacks* by Rebecca Skloot

Childhood Career Goal: To be a doctor

Vargas' career has been dedicated to working in the public-interest. As an attorney at Neighborhood Legal Services of Los Angeles County (NLSLA) and previously at Bet Tzedek Legal Services, she has gained experience meeting the various legal needs of low-income litigants. She has handled various types of matters, including unlawful detainers, temporary restraining orders in domestic violence cases, elder abuse, conservatorships and simple wills. For the past 11 years, her practice has focused exclusively on healthcare access for low-income families, the elderly and disabled.

As a Trustee, she hopes to serve as a liaison between the SFVBA and the NLSLA. "My long history in legal services makes me particularly equipped to bring the perspective of the low-income community to the Board," says Vargas. "I see an opportunity to raise interest, awareness, and participation in addressing the health care needs of all low-income residents, including children and their parents." She also wants to work with the Board to find solutions to better serve the legal issues affecting the elderly.

NEW MEMBERS

The following were approved for membership on June 10, 2014 by the SFVBA Board of Trustees:

Anita Avakian
Los Angeles

Brian J. Goldenfeld
Clasen Raffalow & Rhoads
Los Angeles
Paralegal

Alan Goldstein
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Helen Lee
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Amanda Marz
Girardi & Keese
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Valentina Y. Matiji
Law Office of Valentina Matiji
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Immigration and Naturalization

Janel Obenchain
Santa Clara
Paralegal

Sandy S. Rabadi
Law Office of Sandy Rabadi
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Criminal

Barbara Ann Riggs
Stern Kory Sreden & Morgan AAC
Santa Clarita
Associate Member, Forensic Accounting

Karen A. Rooney
Karen Rooney Law
Sherman Oaks
Labor and Employment

Latanya L. Sewell
Law Offices of Latanya Sewell
Studio City
latanyasewell@aol.com
Family Law

Mona Sobhani
Van Nuys

Jeffrey S. Swartz
Lewis Marenstein et al.
Woodland Hills
Workers' Compensation

Pouyan Zivari
Anchor Loans, Inc.
Calabasas
Commercial Transactions

MINUTES OF THE 2014 NOMINATING COMMITTEE OF THE SAN FERNANDO VALLEY BAR ASSOCIATION

THE 2014 NOMINATING COMMITTEE MET ON MAY 21, 2014 AT THE Lewitt Hackman law firm. Present were President Adam Grant, President- Elect Caryn Sanders, Immediate Past President David Gurnick, and committee members Barry Goldberg (by telephone), Michael Kaiser, Hratch Karakachian, Mark Shipow and Michelle Short-Nagel. Executive Director Liz Post also attended.

Pursuant to the Bylaws, the Immediate Past President is Chair of the Nominating Committee. David Gurnick called the meeting to order at 4:00 p.m. David noted that sometimes in the past the Committee nominated multiple candidates for offices and there were competitive elections, and recently, for several years, the Committee has nominated single candidates for each officer position. This has reflected collegiality among the leadership and membership of the Bar Association, and shared visions or at least the absence of strongly competing visions for the leadership and future of the Bar Association. Individuals who have been interested to be nominated to offices have spoken and worked out who would seek a position and who might seek that position in a subsequent year, rather than running against each other. David said we are a fraternal organization making this appropriate; when there are different visions the Committee might be more interested to again nominate multiple candidates. The Committee need not follow this practice this year or any particular year, and could nominate single or multiple candidates to offices.

It was noted the President-Elect automatically becomes President. The Committee noted that one person expressed interest in each officer position and the Committee was comfortable with these candidates. The Committee nominated current Treasurer Carol Newman as candidate for President-Elect, Treasurer Kira Mastellar as candidate for Secretary, and Trustee Charles Shultz as candidate for Treasurer.

There was discussion about nominations for Trustee positions. It was noted the Committee is required to nominate at least 9 but not more than 12 candidates for Trustee.

Three current Trustees sought to be nominated as Trustee candidates: Alan Kassan, Yi Sun Kim and Sean Judge. The Committee nominated these persons.

Nine members sought to be nominated as candidates for Trustee. The Committee discussed various matters, among them, contents of the applications, past involvement in the Bar Association and other activities, manner and style as this might bear on service on the Board of Trustees, State Bar discipline, geographic location and law firm membership.

The Committee nominated the following as candidates for Trustee: Jonathan Birdt, Michelle E. Diaz, Stephen A. Gershman, Nicole Kamm, Gregory S. Lampert, Stephen A. Lenske, Kathy G. Neumann and Toni M. Vargas. One applicant will be contacted and encouraged to be more involved and apply again next year.

The meeting was adjourned at 4:50 p.m.

Respectfully submitted

David Gurnick

Chair and Secretary of the Committee

The Art of Conversation

AMY M. COHEN
SCVBA President

amy@cohenlawplc.com

SEVERAL MONTHS AGO, I WROTE ABOUT THE difficultly that wallflowers face with networking in today's business world, and gave some tips on how to get away from the wall and into the fray of meeting new people. Unfortunately, getting away from the wall is just half the battle. Many events offer just a brief opportunity to introduce yourself and get basic information about someone. Others offer the opportunity to spend more time getting to know others in the room. Once you get yourself out there, shake a hand or two, and introduce yourself, then what?

Recently I found myself sitting between two people who knew each other, but had not seen each other in many months. It was not a business meeting, but rather a social setting. One might expect that the conversation would flow easily because these individuals knew each other and because the pressure of a business setting was gone. Unfortunately for me, caught in the middle, that did not happen.

There were several moments of painful silence. I even tried to make a joke about their lack of dialog, given the amount of time that had passed since they last saw one another. Neither rose to the occasion. I continued to struggle the remainder of the evening to engage both in conversation and ultimately had to focus on speaking with one of them, as the other drifted away.

This scenario might sound familiar to some, in that a wallflower has difficultly not just putting themselves out there, but in being able to make conversation after they have made that initial contact. What do you talk about? How do you keep the conversation flowing once you get past the "how are you today?" or "nice to meet you" stage?

Shortly after the incident I mention above, a friend posted an article to Facebook about life skills they learned as a sorority member. One of those things mentioned by the author was the art of conversation and having developed the ability to make small talk on just about any subject. Even if you were not part of a sorority or did not receive lessons in small talk, you might still aspire to be a witty raconteur, defined by Webster's dictionary as "a person who excels in telling anecdotes." No one likes uncomfortable silences.

But again, what to talk about? In my earlier article, I mentioned that we oftentimes find connections with people we meet, without realizing it, whether through our children's schooling or activities or even our own schooling, friends or family. Any of those topics could be considered safe, so long as the person was comfortable talking about family or personal things. In some settings, you might find yourself being asked about your business—what you do, where your office is located, what type of clients you have. I recommend having some of those answers prepared ahead of time. Know what you want to say in response to some of those questions.

In the legal world, when introduced to someone new, we are often first asked what type of law we practice. For some, it is a simple and quick response, such as criminal law or family law. For others, such simple terms might not cut it. Think about how you want your practice to be identified and be prepared to chat about it. Some attorneys like to share anecdotes about a case or a particular client (no names, please) and in many settings, those types of stories help keep the conversation flowing.

If you are not comfortable talking about yourself, beyond the basics of who you are, what you do and where your office is located, you can still participate in meaningful conversation by asking questions. Depending on who you have been introduced to (or introduced yourself to), you can delve into their practice areas (or business), or if you have already established an outside connection, ask questions about their family. Remember to listen to their response and be engaged. Their response might give you the opportunity for follow-up questions as well.

Another opportunity for conversation is the news. Everyone has opinions and depending on the subject, you may spark lively conversation by bringing up a recent news story or event or even politics. If you keep updated on local or state news, you may have conversation topics at the ready, and in the legal arena, recent higher court decisions may be good topics as well, depending on the make-up of those attending.

As with any new situation, there is bound to be some awkwardness when you first wade in. Hopefully once you find common ground and really start talking to someone, the conversation will flow. As others join or leave a group, the conversation topics may change, but should continue, and the more you talk, the easier it becomes. And if all else fails, learn a joke—make sure it is funny—and when you feel the conversation lagging, you can throw it out there as a parting line. Good luck and happy conversing!

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- Recognition and 5% discount on tables at Bar-wide events, including Judges' Night
- Invitations to President's Circle exclusive events with bench officers, community leaders and large firms

WE RECOGNIZE THE FOLLOWING PRESIDENT'S CIRCLE MEMBERS FOR THEIR DEMONSTRATED COMMITMENT AND LEADERSHIP IN SUPPORTING THE LEGAL PROFESSION AND ITS WORK IN THE COMMUNITY.

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Contact SFVBA Executive Director Liz Post at (818) 227-0490, ext. 101 or epost@sfvba.org to sign up your firm today!

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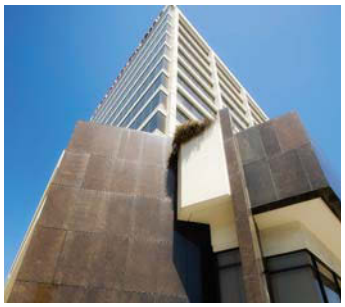


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