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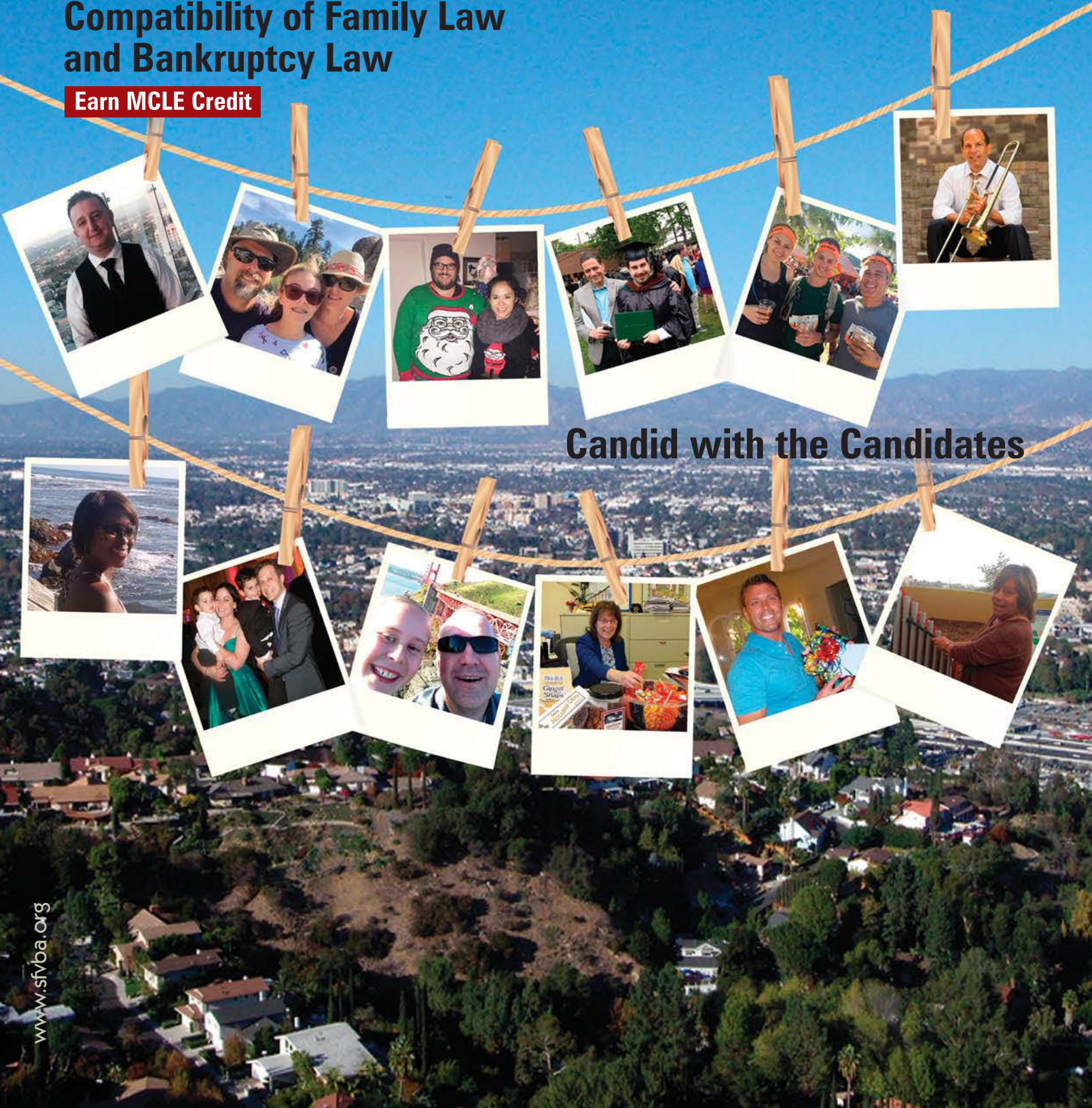
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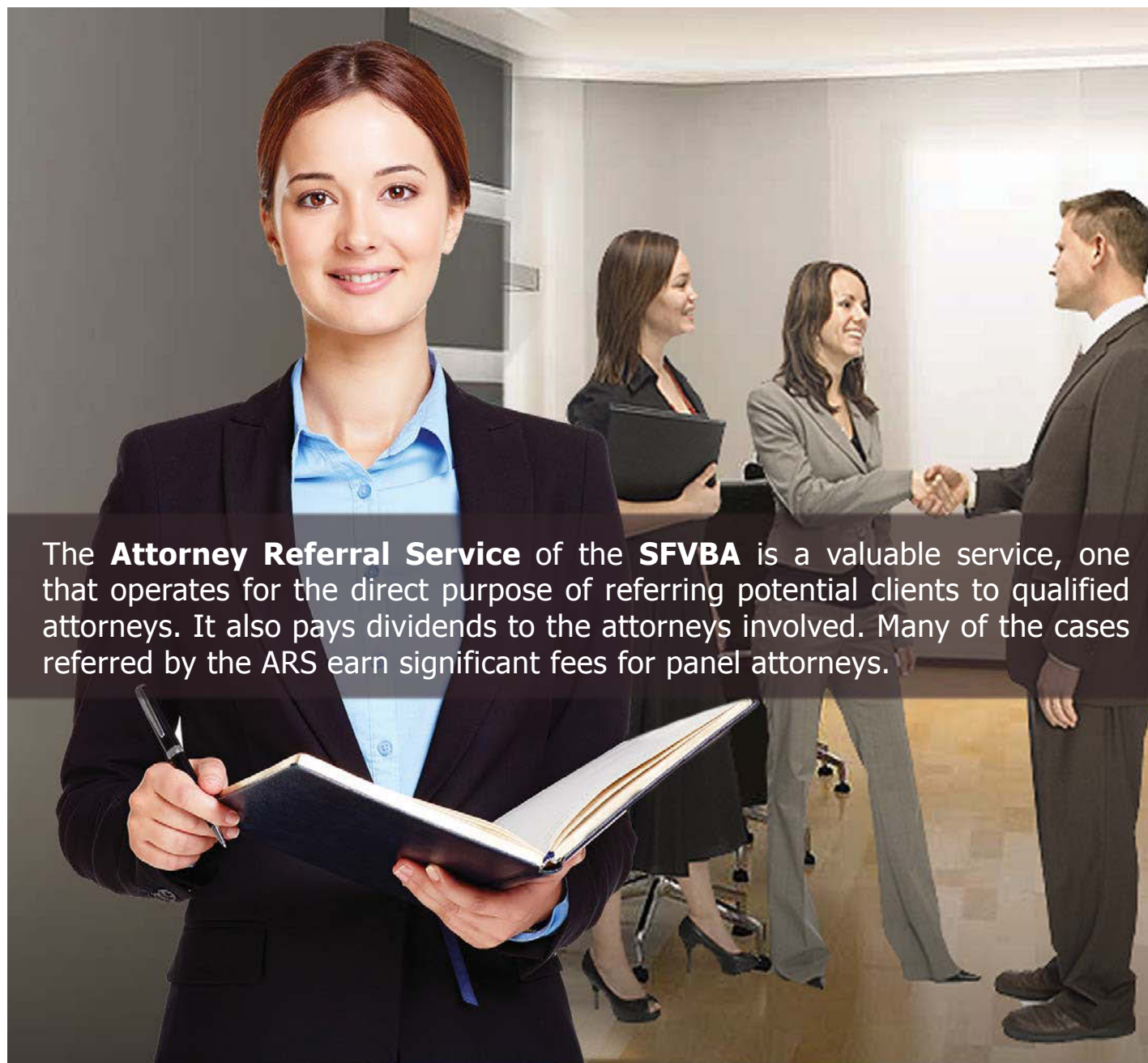
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5567 Reseda Boulevard, Suite 200
Tarzana, CA 91356
Phone (818) 227-0490
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Irma Mejia

GRAPHIC DESIGNER

Marina Senderov

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Celebrate the Declaration of Independence

IF YOU ARE LIKE MOST PEOPLE, you associate the month of July with Independence Day. But do you associate the 4th of July with a day off to enjoy barbeques and fireworks? Or with a patriotic vision of celebrating America and the Declaration of Independence that began our nation's journey? I am reluctant to admit that I generally belong to the former category.

Given that admission, I was prompted to write this article during a recent visit to Disneyland. Those of you who know me well, know that my family is a bit obsessed with Disneyland. We have been there more times this year than I will admit in writing. However during all of those visits, I had never watched the flag retreat ceremony that is performed daily.

While my daughter was visiting with some friends, I found myself on Main Street just prior to the flag retreat ceremony and decided to watch. They begin the ceremony honoring those in attendance that served in each branch of the military by asking them to step forward while the Disneyland Band plays a portion of that branch's anthem, followed by other patriotic songs.

While the ceremony is something I highly recommend, this article was prompted not by the ceremony itself, but by the Disneyland guests and my reactions to those guests. In the hustle and bustle of Main Street at 5:00 p.m., the vast majority of guests—young and old, families,

CARYN BROTTMAN SANDERS
SFVBA President




carynsanders@sbcglobal.net

couples, groups of teens and twenty-somethings—stopped in their tracks, removed their hats (or Mickey ears), and faced the flag for the singing of the national anthem. Maybe I should have expected it, but it truly surprised me in a good way.

As attorneys, we are charged with the task of protecting the rights and freedoms provided by the Declaration of Independence and those that we have obtained in the years since. As officers of the court, we are charged with protecting those rights and freedoms as they grow and evolve, whether or not we support and agree with them.

As a bar association and members thereof, we are also charged with educating the public about those rights and freedoms. I encourage you to get more involved with the programs of the San Fernando Valley Bar Association to find ways to support the members of our profession and the community in the education and support of our rights and freedoms.

Whether or not you are the patriotic sort, celebrate the Declaration of Independence, the rights and freedoms that have arisen in part from that historic document, the people who were brave enough to stand up for those rights and freedoms, and celebrate yourself and your fellow attorneys who have dedicated their careers to stand up for those rights and freedoms. 

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Leadership in Action

IRMA MEJIA
Publications & Social
Media Manager



editor@sfvba.org

THIS MONTH *VALLEY LAWYER* shines the spotlight on the Bar's aspiring leaders. These members are running for positions on the SFVBA Board of Trustees. They are talented lawyers eager to serve the Valley's legal community. I encourage you to read the candidate profiles and consider your own vision of the Bar's future. The election will take place September 10.

Of course, members who don't wish to or don't have time to join the Board can stand out as leaders in different ways. You can become active in a section and assist with its MCLE programming. You can also join a committee to help direct the Bar's public programs.

Perhaps the most rewarding and glamorous way, in my humble opinion, to make a name for yourself within the Bar is to contribute to *Valley Lawyer*. Our award-winning publication is popular among attorneys throughout Southern California and receives a lot of attention online.


This issue is full of content from members who have made a name for themselves in these pages. Barry Kurtz and Bryan Clements are regular contributors of articles on franchise law. They have become known in the community as trusted advisors in this area of law.

David R. Hagen, author of this month's MCLE article, is a Past President of the SFVBA and a former member of the Board of Directors of the Valley Community Legal Foundation. In addition to contributing articles, he has recently published a book on managing debt which readers will remember was

reviewed in the February 2015 issue of this magazine.

Even Associate Members can stand out by sharing their knowledge on issues of interest to lawyers in the Valley. Chris Hamilton has established himself among members as a helpful expert in forensic accounting by writing articles and offering presentations to members.

Finally, members who aren't interested in writing academic articles for *Valley Lawyer* are invited to follow in the footsteps of Randi Geffner who has stood out as an insightful book reviewer. This month marks the publication of her second review in under a year.

I encourage you to make an impact in your own unique way. 

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			1	2	3	4 Happy 4th!
5	Valley Lawyer Member Bulletin Deadline to submit announcements to editor@sfvba.org for August issue.	7	8	Membership & Marketing Committee 6:00 PM SFVBA OFFICE	9	10
12	Tarzana Networking Meeting 5:00 PM SFVBA OFFICE 	Business Law & Real Property Section Asset Protection 12:00 NOON SFVBA OFFICE Come hear the latest asset protection strategies. Jacob Stein will discuss how best to serve your client's needs. This is an important seminar for not only business law attorneys but also probate and estate planning attorneys. (1 MCLE Hour) Board of Trustees 6:00 PM SFVBA OFFICE	15	Employment Law Section Reasonable Accommodations 12:00 NOON SFVBA OFFICE Andrea Oxman, Counsel at Klinedinst, PC, and Paula D. Pearlman, Senior Staff Counsel of the California Department of Fair Employment and Housing, will discuss reasonable accommodations for employees with disabilities. (1 MCLE Hour)	17	18
19	20	Fro-Yo Networking Mixer 5:00 PM MENCHIE'S 13369 VENTURA BOULEVARD SHERMAN OAKS Sponsored by  See page 11	22	23	24	25
26	27	Editorial Committee 12:00 NOON SFVBA OFFICE	29	30	31	



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2 Valley Lawyer Member Bulletin Deadline to submit announcements to editor@sfvba.org for September issue.	3	4	5 Membership & Marketing Committee 6:00 PM SFVBA OFFICE	6	7	8
9 Tarzana Networking Meeting 5:00 PM SFVBA OFFICE 	10	11 Board of Trustees 6:00 PM SFVBA OFFICE	12	13	14	15
16	17	18	19	20 Joint Mixer with Santa Clarita Valley Bar Association 6:00 PM	21	22
23	24	25 Editorial Committee 12:00 NOON SFVBA OFFICE	26	27	28	29
30	31					

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Crossing the Line: Don't Let Business Clients Become Accidental Franchisors

By **Barry Kurtz**
and **Bryan H. Clements**

TOO OFTEN, EXPANSION-minded business owners choose to offer trademarked products or services through purported licensing agreements or distribution or dealership arrangements only to discover, well into the game, that what they have actually done is sell franchises. Becoming an “accidental franchisor” can spell disaster for the unwitting business owner who has stepped over the line that separates franchising from other commercial arrangements involving trademarked goods or services.

Suppose a business client requests an attorney draft a licensing, dealership or distributorship agreement to allow another business owner to offer his or her business’ trademarked products.

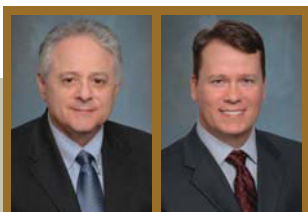
Without a basic understanding of franchise law, the attorney may miss the warning signs that the proposed business arrangement may create a franchise. Under federal law, as well as in California, it does not matter what the arrangement is called when the agreement is drafted: if the elements of a franchise are present, it is a franchise.

Franchise sellers must comply with extensive pre-sale registration and disclosure requirements or face severe penalties. Attorneys who make such a mistake will have unhappy clients when state regulators come knocking or when a franchisee sues for rescission. To avoid such a problem, every business lawyer should familiarize himself or herself with the following basics of franchise law.

Regulating Franchises in California

Under California law, a business relationship is a franchise if the business will be substantially associated with the franchisor’s trademark; if the franchisee will directly or indirectly pay a fee to the franchisor for the right to engage in the business and use the franchisor’s trademark; and if the franchisee will operate the business under a marketing plan or system prescribed in substantial part by the franchisor.

The Department of Corporations (DOC) regulates franchises in California and interprets the three elements of a franchise broadly. To start with, if a business enterprise uses another company’s trademark to identify its business, or in its advertising, there will



Barry Kurtz, a Certified Specialist in Franchise and Distribution Law by the California State Bar Board of Specialization, is the Chair of the Franchise & Distribution Practice Group at Lewitt Hackman in Encino. He may be reached at bkurtz@lewitthackman.com. **Bryan H. Clements** is an associate in Lewitt Hackman’s Franchise & Distribution Practice Group. He may be reached at bclements@lewitthackman.com.

be room to argue that the franchisee's business is substantially associated with the franchisor's trademark. If the other elements are present, making the determination as to whether a franchised business will be substantially associated with the trademark of another business will not be easy, and splitting hairs won't work. This analysis is best left to an experienced franchise attorney.

Just about any payment can be interpreted as satisfying the fee element, regardless of whether the parties call it something else in their agreements. You don't want to find yourself in court or in front of the DOC arguing that a payment is not a fee—it is a losing argument.

The third element, which requires that the franchisee will operate the business under a marketing plan or system prescribed in substantial part by the franchisor, is known as the "control" element. It, too, is broadly interpreted. The following represent a few examples of what may satisfy the control element:

- Providing advice and training regarding the sale of the trademarked products or services
- Exercising significant control over the operation of the franchisee's business
- Granting exclusive rights to sell one's products or services in specific territories
- Requiring franchisees to purchase or sell specific quantities of products or services.

Differences between Franchises and Other Business Arrangements

In the typical franchise arrangement, franchisees sell or distribute their franchisor's trademarked products or services. They usually have exclusive, protected territories, or territories in which the franchisor will not permit other franchisees to operate or to offer the same products or services. Also, it is typical for a franchisor to provide its

franchisees with an operations manual containing a tried and true system of operations and to closely monitor the franchisees for compliance to protect the integrity of its systems. In typical franchises, franchisees rely on their franchisors for advice, training, advertising and marketing assistance. Furthermore, franchisors usually mandate the use of specific suppliers, and in some cases, even act as the exclusive supplier of certain products or services sold by their franchisees.

True licensing, distributorship and dealership arrangements are not franchises because they lack at least one of the three elements defined under California law as described above. For example, under a typical licensing arrangement, one company permits another to sell its products or services in exchange for a percentage of the proceeds without any other involvement on the part of the licensor. In dealership and distributorship arrangements, independent businesses operate under their own trade names. The dealers or distributors usually buy products or services from the other party at wholesale prices and then resell them to the public. Neither party is substantially involved in the business affairs of the other.

Why Not Classify Every Arrangement as a Franchise?

In general, a franchise is a contractual arrangement that makes one party or business dependent upon another. Franchise agreements strongly favor franchisors and are typically written by the franchisor's attorneys; franchisees usually have little power to negotiate favorable terms. While franchise agreements are not considered contracts of adhesion, the Federal Trade Commission, as well as many states, have taken the position that these arrangements provide a much greater potential for fraud, which explains why franchises are so

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- Several Multi-Kilo Drug Cases: Dismissed due to Violation of Rights (LA County)

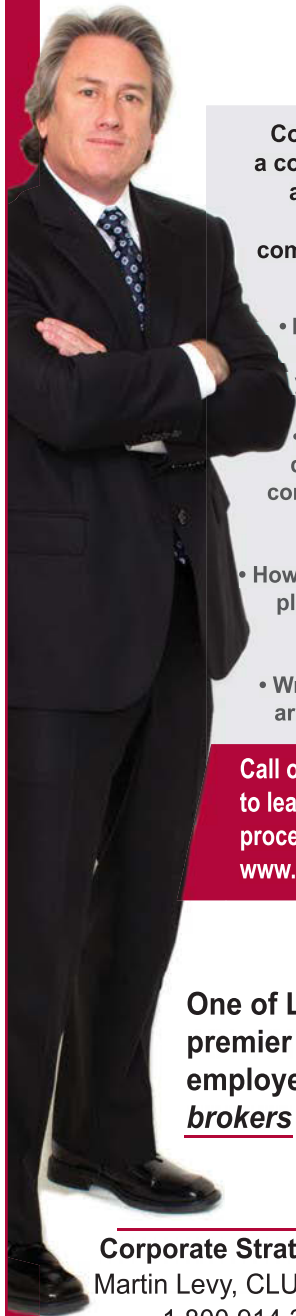
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highly regulated, and other business relationships are not.

The prospect of registering a franchise can be quite expensive and time consuming. Expansion-minded entrepreneurs typically prefer to streamline the deal process and will push for the simplest, cheapest option. But keep in mind that any combination of the use of a trademark for a fee and the imposition of the trademark owner's operating methods or systems or other direct involvement in the operator's business will make these relationships a franchise. That is why it is crucial for attorneys involved in setting up any of the above mentioned arrangements to determine whether the practices push the relationship into the realm of franchising and explain to their clients the risks related to a mischaracterization of the relationship.

Under California's Franchise Investment Law (FIL), it is unlawful to offer or sell a franchise in California unless the offering has been registered with the DOC or it is exempt. If an arrangement satisfies the elements of a franchise under California law as listed above, the franchisor must take on burdens not imposed in licensing, distributorship and dealership arrangements.

The franchisor must file a franchise disclosure document with the DOC outlining the franchise opportunity in detail and providing information regarding the franchisor's own background and business experience, among other things, before entering into any discussions with potential franchisees. He or she must also disclose potential franchisees with its registered disclosure document and wait at least 14 full days before having the franchisee execute any franchise documents or accepting any payments. Finally, the franchisor must obtain DOC approval for any material modifications to its registered franchise documents before presenting them to franchisees, including any new or


modified provisions regarding royalties, fees, e-commerce, and territorial rights.

Risks of Mischaracterizing of the Relationship

The DOC closely polices franchisor-franchisee arrangements and may assess penalties of \$2,500 per violation of the FIL. This apparently modest fine, however, is only part of the story. The DOC also has the authority to require accidental franchisors to provide notice of the violation to all of its franchisees, offer rescission of all contracts related to the franchise, and refund payments made by the rescinding franchisees.

As an example, suppose a company enters into purported licensing agreements with several other companies involving trademarked products or services, unaware that the details of the arrangements have actually established franchisor-franchisee relationships. Further suppose that at some point, one of the licensees who has been losing money discovers the error. If the licensee reports the matter to the DOC, the DOC will likely fine the franchisor and require it to offer all of its inadvertent franchisees the right to rescind their original agreements and get their money back. This applies to each franchisee's original investment, as well as any losses, less profits, they may have incurred.

Needless to say, if the franchisor wishes to continue conducting the same business it will then need to complete the registration process. This can prove painful, even ruinous to the inadvertent franchisor.

For years, business owners have found franchising to be a highly effective expansion strategy. That said, franchising is a highly complex area of the law that lends itself to specialization. Attorneys representing business owners must be able to spot the telltale signs of a franchise to avoid unwittingly assisting their clients in becoming accidental franchisors. 

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When Worlds Collide: Compatibility of Family Law and Bankruptcy Law

By David R. Hagen



Divorce and financial problems are often closely associated. In some dissolutions, bankruptcy looms as a real possibility. For this reason, family law attorneys should carefully consider the crossover issues between bankruptcy and family law to best advise clients.



MARITAL AND FINANCIAL PROBLEMS SEEM TO go hand in hand and financial problems seem to exacerbate marital problems. According to a 2012 survey from the American Institute of CPAs, money is the most common reason couples fight. This is even truer with spouses going through a divorce.

In her book, *The Two-Income Trap: Why Middle Class Mothers and Fathers Are Going Broke*, Harvard Professor (now U.S. Senator) Elizabeth Warren indicates that over 86% of all individual bankruptcy filings were caused by one of three causes: loss of a job, uninsured medical problems, or the breakup of a marriage. Even in situations without acrimony, divorce can cause financial hardship as spouses realize that it is usually more difficult to operate two households with an income stream that was formerly operating one.

With this nexus between marital and financial problems, one would think that the two systems would be compatible, or at least designed and enacted with each other in mind. This is just not so. The family and bankruptcy codes have different agendas. Family law seeks equity in the division of assets and debts within a community, among many other things. The principal purpose of the Bankruptcy Code is to grant a fresh start to the "honest but unfortunate debtor."¹ One party unexpectedly filing bankruptcy can really complicate a pending, or even completed, dissolution. The language and procedures used in the two systems can be very different and a bankruptcy will usually create unintended results.

This divergence between the two fields is nothing new. Congress has redefined the dischargeability of community property equalization payments twice in just the past 21 years. Even the United States Supreme Court found it necessary to delve into these crossover issues in a 1991 decision, *Farrey v. Sanderfoot*², which dealt with the issue of avoiding liens on awarded community property.

With the changes to the Bankruptcy Code in 2005, these differences have become even more pronounced. A new category of debt, called a Domestic Support Obligation (DSO) was created, the automatic stay was greatly modified, and even the dischargeability of attorney fees was affected. This has made it even more important than ever for family law and bankruptcy law

practitioners alike to understand a little bit about each other's field, at least enough to spot issues and know when to seek help.

While these issues can be problematic, they can also provide solutions. Contemplating the changes that a bankruptcy can make to a dissolution agreement or judgment can prevent potential problems later in time. A corollary to this would be attempting to bankruptcy-proof a dissolution agreement to avoid problems later. Finally, the effective use of bankruptcy can make a dissolution proceeding much easier by removing the debt element from family law negotiations or trial or even make it easier for a former spouse to pay support.

Family law attorneys always look for some type of general guideline as to whether it is better to deal with the family law issues or the bankruptcy issues first. Unfortunately, the answer is that it depends and really needs to be determined on a case-by-case basis. It depends upon the nature of the community and separate assets, the nature of the debts, income, and the cooperation, or lack thereof, between the parties and their counsel.

This article will discuss five different issues for family law counsel to consider in almost every dissolution proceeding, at least as it relates to the potential effect of a bankruptcy filing. Not only will this help protect counsel from potential liability, but it may also allow them to be more effective advocates of their client's position by thoughtfully removing debt from an otherwise contentious dissolution proceeding.

The five big crossover issues in the fields of family and bankruptcy law that should be considered are income, property of the bankruptcy estate, exemptions, non-dischargeable debt, and the automatic stay.

Income

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) was billed as a significant restriction on an individual's ability to file bankruptcy and specifically to discharge consumer debt. It really did not end up turning out this way. In fact, in 2010, an all-time record number of individuals filed bankruptcy in the United States. Rather than making bankruptcy less available, BAPCPA increased the steps necessary to get a discharge, thus increasing the cost (including fees) of going through bankruptcy.



David R. Hagen co-founded Merritt & Hagen (now Merritt, Hagen & Sharf, LLP) in 1988. Hagen also served as a Chapter 7 Bankruptcy Trustee in the Central District for eight years and administered approximately 12,000 cases during that time. He is a Past President of the San Fernando Valley Bar Association. He may be reached at drh@forbankruptcy.com.



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The centerpiece of BAPCPA, at least as it related to individuals, was something called the means test. The means test was designed to preclude some individuals who had an ability to pay something on their debts from filing a Chapter 7 bankruptcy. It requires that an individual or couple take all income from whatever sources during the six full months immediately preceding the bankruptcy filing and then doubling it, creating an imputed annual income. If this imputed annual income is less than the median income for a household of their size, they pass the means test and they are eligible to file a Chapter 7 bankruptcy.

MEDIAN INCOMES IN THE GREATER LOS ANGELES AREA

1 Person Household	\$49,983
2 Person Household	\$64,779
3 Person Household	\$68,917
4 Person Household	\$79,418
5+ Person Household	\$79,418 plus \$8,100 for each additional individual in excess of 4³

If the imputed annual income is greater than the median income listed above, the individual or couple must complete the second part of the means test. The second part requires that the six-month income total be divided by six, producing an imputed monthly income. Deductions are then taken from this monthly imputed income. Some deductions are based upon the actual amount of money spent, such as a mortgage payment or court-ordered support payments. However, other deductions, such as food and utilities, are based upon guidelines set forth by the Internal Revenue Service when they seek to collect taxes.

A person needs to be relatively skillful, or have good software, to determine exactly what deductions are allowed or not. If the imputed monthly income, minus the allowed deductions, are about \$200 or less, the individual or couple will pass the means test and be allowed to file Chapter 7. If the means test is not passed, a debtor will need to file a repayment type of bankruptcy, usually a Chapter 13 or even Chapter 11.

It needs to be emphasized that the means test only applies to individuals filing consumer bankruptcy cases. A consumer bankruptcy case is defined as one in which 51% or more of the debt is a result of the operation of a household. This includes the total amount of any outstanding mortgage. Bankruptcy filings that are not consumer cases will be subject to much less scrutiny in terms of income, although the U.S. Trustee's Office takes the position that a motion to dismiss can still be filed under

11 USC §707 in non-consumer cases with income over expenses using the simple standard of abuse.⁴

Why does this matter to the family law practitioner? First, if the opposing party is threatening bankruptcy, the attorney may be able to discern whether the threat of bankruptcy is a bluff if he or she has an idea of the opposing party's income and expenses. Certainly, if the debt is 51% consumer and an individual's income is much higher than the median income without significant allowable deductions, a threat of Chapter 7 bankruptcy may be just a threat.

Second, if the parties are cooperative and their income is such that they do not currently pass the means test, they may qualify later after the dissolution is complete or at least until after they are separated. This creates two separate incomes and they may qualify at that time for two separate bankruptcy filings.

Property of the Bankruptcy Estate

11 U.S.C. §541 provides that if one spouse files bankruptcy, all of the community property and the filing spouse's separate property become assets of the bankruptcy estate subject to administration by the trustee for the benefit of creditors. Obviously, this means that the non-filing spouse's separate property does not become property of the bankruptcy estate. The bankruptcy courts will usually use applicable non-bankruptcy law, meaning the state community property statutes, to determine what is community and what is separate.

There are several problems and also planning opportunities for the family law practitioner. First, if the non-filing spouse does indeed have separate property, it is possible that it might have a community property component. A bankruptcy trustee will use applicable state law, including the Moore Marsden calculation, to determine what this community property component might entail. If this is an issue, an expert should be retained to determine the community property component before a bankruptcy filing to determine what the risk of the trustee making such a claim might be.

Second, there is nothing that can stop one spouse from filing bankruptcy. Thus, if they don't like the way the family law proceeding is going and are willing to give up all assets except those that are exempt, they could file a bankruptcy. This would also mean that, with a few restrictions, the filing spouse would be able to choose which assets to exempt, or protect, from administration by the trustee.

On the other hand, if the parties are not entirely hostile, there may be some planning opportunities in the dissolution proceeding. For example, if it appears that only one spouse may need to file a bankruptcy, it may

be that that party chooses to take assets that are exempt, or otherwise less likely to be administered by a trustee, as part of an otherwise equal and non-collusive division of assets. For example, family law courts tend to value a small business by including a healthy sum for goodwill. In a bankruptcy context, a trustee usually will not put as much value on this because they really cannot compel a debtor to continue to operate a business. A trustee usually looks only to the value of the various assets of a business. Thus, the spouse that needs to file may choose to take the business as part of an otherwise equal division of assets.

The same would be true if the spouse that needed to file decided to take exempt assets as part of an otherwise equal and non-collusive division of community assets. Transfers such as this could certainly be evaluated in light of fraudulent conveyance statutes so any planning such as this needs to be done very carefully and in consultation with bankruptcy counsel. If debt could be a problem in a dissolution and there are assets that might not be exempt, at the very least, any marital settlement agreement and resulting judgment should clearly demonstrate what assets are separate property and that any division of assets is found by the family law court to be equal.

Exemptions

Exemptions protect assets from being administered by the bankruptcy trustee. This means that the individual or couple get to keep these assets at the end of the bankruptcy proceeding. Exemption laws had their beginning in English common law which did not allow creditors to take a debtor's clothing so as to avoid breaches of the peace caused by naked people wandering the streets.⁵ In fact, the California State Constitution requires the legislature to establish an exemption scheme to protect individuals from the "consequences of... economic misfortune."⁶

In California, individuals, or a couple, get to choose between two different sets of exemptions. One set is contained in CCP §703, the other in CCP §704. Joint debtors, generally husband and wife, are not entitled to two sets of exemptions. They must elect one set of exemptions as a couple.⁷

To be eligible to claim a particular state's exemptions, a debtor must reside in that state for two years preceding the bankruptcy filing. If they did not reside in any one state for that period, then the laws of the state in which they resided during the 180-day period before the two-year period applies (or during a longer portion of the 180-day period than in any other place). If this sounds confusing, it is. Courts and attorneys around the country struggle with the interpretation of these code provisions which were brought about by BAPCPA.

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The most important exemption in the CCP §703 set of exemptions is the wild card. It protects \$26,925 in any asset a person owns, even cash in the bank. This section then goes on to protect certain amounts of furniture, clothing, jewelry and other assets.

The most important exemption in the CCP §704 set of exemptions is the homestead. The homestead exemption protects equity in a person's primary residence. It protects \$75,000 for a single person, \$100,000 for a married couple or head of household and \$175,000 for a person 65 years of age or older, disabled, or over the age of 55 making less than \$25,000 (or \$35,000 if a married couple). The Bankruptcy Code now also requires that a person is only entitled to a maximum homestead of \$125,000 until such time as they have lived in that state for approximately 3.4 years. (This will obviously only relate to those claiming the larger \$175,000 homestead amount and recently moved.)

The exemption is for equity in the property. For exemption purposes, equity is determined by taking the fair market value of the property and subtracting the value of any consensual liens (mortgages and deeds of trust). This section then goes on to protect certain amounts of furniture, clothing, jewelry and other assets. This set of exemptions is similar to the first series but has important differences. Thus, both sets must be analyzed to decide which one is more

advantageous to the debtor. However, there is no wild card available in the CCP §704 set of exemptions.

It should be noted that within the past several weeks, the California Senate approved legislation that would increase the homestead exemption to \$300,000 for all homeowners. If this legislation is passed by the California Assembly and ultimately signed by the Governor, it would substantially enhance a homeowner's rights in California. This change in the homestead exemption amount has been proposed in prior years but never made it out of either legislative body. The fact that it has now been passed by the Senate could be telling.

In addition to the CCP §703 and §704 sets of exemption described above, the U.S. Supreme Court has held that any retirement plan which is ERISA-qualified or contains a "spendthrift" provision can be kept by a person filing bankruptcy, regardless of the amount in the plan. Further, BAPCPA protects IRA related type accounts up to a current maximum of \$1,245,475.

State and federal governments have put a premium on protecting homesteads and retirement accounts. What this means to the family law practitioner when negotiating a division of assets in a dissolution is that homestead property and retirement accounts should be seen as premium assets. At the very least, in any dissolution with any appreciable debt, an analysis of what assets are exempt and not exempt needs to be addressed. Further, if there are too many assets to exempt, or multiple homes, and the parties are cooperative, they might consider dividing the community assets and complete the dissolution. Thus, when the two single people later file two separate bankruptcy proceedings, they would be entitled to two sets of exemptions, including potential homesteads.

Non-Dischargeable Debt

Historically, child and spousal support were non-dischargeable under 11 U.S.C. §523(a)(8). This is still true. Other obligations, including community property equalization payments, were dischargeable. This dischargeability of community property equalization was changed in 1994 so that non-support obligations would discharge unless the creditor filed a timely non-dischargeability action in bankruptcy court. The court was then required to use a balancing test considering the benefit to the debtor against the detriment to the creditor. Obviously, decisions using this balancing test varied widely. This is no longer the law.

Interestingly, there appears to be an exception to the non-dischargeability of equalization payments if a person chooses to file Chapter 13, makes all the payments required, and ultimately receives a discharge.



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BAPCPA now provides an exception to discharge under 11 U.S.C. §523(a)(15) for all obligations to a spouse or child arising out of a dissolution, whether it be by separation agreement or divorce decree. These are now called Domestic Support Obligations (DSO).

What does this mean to the dissolution practitioner? First, there is no longer any protection in bankruptcy for dissolutions that go awry with respect to community property equalization payments, with the exception of a discharge obtained in a Chapter 13 proceeding.⁸ Second, provisions between spouses to indemnify the other from certain debt may very well be determined to be a DSO and thus non-dischargeable. This needs to be taken into account when crafting a division of community property and debts as most marital settlement agreements typically include indemnity provisions.

Third, this has some implication with respect to an award of attorneys' fees. Fees between a debtor and his or her attorney will still be a dischargeable debt. However, fees paid to the other spouse's attorney might be made non-dischargeable if the payment is made directly to the other spouse, thus becoming a DSO. Further, an indemnity provision by the filing spouse to the non-filing spouse would also make this debt, at least as to the non-filing spouse, non-dischargeable. It is also possible in some cases to get a consensual security interest in some asset that would be retained after a bankruptcy proceeding.

If these provisions are not acceptable or deemed too problematic, the only way to make the fees non-dischargeable would be to make it clear in the marital agreement and resulting judgment that the fees are based upon need and are actually akin to traditional support. This provides a good argument that those fees would then be dischargeable under 11 U.S.C. §523(a)(8) as support. While this may be persuasive, it is not binding upon the bankruptcy court. Further, it is also necessary to file a timely adversary proceeding in bankruptcy court to obtain this determination.

Automatic Stay

11 U.S.C. §362(a) traditionally held that almost all actions against a debtor were stayed by virtue of the bankruptcy filing. The stay is typically quite broad and even includes actions by the state and federal taxing authorities to collect funds.

BAPCPA created a number of exceptions to the stay, especially with respect to family law matters. These exceptions now include actions to establish paternity, to establish or modify support, to collect domestic support obligations from property that is not property of the estate, child custody and visitation issues, or domestic violence issues.⁹ Obtaining a property division continues to require modification of the stay.

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The stay continues until property is no longer property of the estate, until the case is closed or dismissed, or debtor is discharged.¹⁰ In a Chapter 7 proceeding, a stay is typically in effect for three to four months. In Chapters 12 and 13, it is in effect until the plan is completed, typically three to five years. In a Chapter 11 proceeding, the stay is in effect until the plan is confirmed. After the stay expires or is terminated, the discharge injunction under 11 USC §524(a) applies.

Relief from a stay can be obtained for cause, including allowing a state court to adjudicate rights of the spouses in property disputes, even though distribution of property of the estate is under the jurisdiction of the bankruptcy court. If a family law practitioner has any doubt as to whether the automatic stay applies, it is always best to file a motion in bankruptcy court asking for relief from the stay. It is always easier to get an order from the court as a precautionary matter as opposed to having to explain yourself to a bankruptcy judge at a later point in time.

For the family law practitioner, cooling down a dissolution proceeding by filing bankruptcy and getting an automatic stay is not usually a good strategy. The stay is, in most cases (in Chapter 7, at least), short lived. Further, the property issues in the dissolution now involve a third party—the Chapter 7 trustee—thus making matters much more complicated.

Bankruptcy law and family law simply do not fit well together. A bankruptcy filing, either during or after a

dissolution, can generate unintended results for the parties and their counsel. In any dissolution with debt, or even contingent liabilities, the consequences of a potential bankruptcy should be considered. Further, in situations where the parties are at least somewhat cooperative, some planning opportunities exist to make it a bit easier for two households to financially survive.

At the end of the day, parties going through a divorce or a bankruptcy are both, in a manner, seeking a fresh start. The two systems just have a different definition of that term and how to go about achieving that objective. It is hoped that this article provides the family law practitioner with some ability to spot some of these issues and potential opportunities and provide increased value to the representation of their clients. 🏠

¹ *Grogan v. Garner*, 498 U. S. 279, 286, 287 (1991).

² 500 U.S. 291 (1991).

³ U.S. Department of Justice, Census Bureau Median Family Income By Family Size, available at http://www.justice.gov/ust/eo/bapcpa/20150515/bci_data/median_income_table.htm (last accessed June 11, 2015).

⁴ See *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913 (9th Cir. 1988).

⁵ See *Koger & Reynolds, Is Pre-Filing Engineering Prudent Planning or §727 Fraud? (Or When Does a Pig Become a Hog?)*, 93 Commercial LJ 465, 467 (1988).

⁶ See Cal. Const. Art. 20, §15.

⁷ *In Re Baldwin*, 70 BR 612; 9th Cir. BAP 1987.

⁸ See 11 USC §1328.

⁹ See 11 U.S.C. §362(b)(2).

¹⁰ 11 U.S.C. §362(c).



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Test No. 81

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. According to U.S. Senator Elizabeth Warren, the top three causes of bankruptcy are loss of job, uninsured medical problems, and the breakup of a marriage.
☐ True ☐ False
2. The principal purpose of the Bankruptcy Code is to give the "honest but unfortunate debtor" a fresh start.
☐ True ☐ False
3. The Bankruptcy Abuse and Prevention and Consumer Protection Act (BAPCPA) of 2005 significantly restricted an individual's ability to file bankruptcy and specifically to discharge consumer debt.
☐ True ☐ False
4. The means test included in the BAPCPA only applies to cases with consumer debt.
☐ True ☐ False
5. 11 USC §541 provides that if one spouse files bankruptcy, all of the community property and the filing spouse's separate property become assets of the bankruptcy estate subject to administration by the trustee for the benefit of creditors.
☐ True ☐ False
6. Exemptions protect certain types of assets from administration by the bankruptcy trustee.
☐ True ☐ False
7. In California, each spouse can elect to choose a different set of exemptions.
☐ True ☐ False
8. The current homestead amount in California is \$300,000.
☐ True ☐ False
9. Original exemption statutes were created in England to exempt a debtor's clothing so as to prevent breaches of the peace caused by naked people wandering the streets.
☐ True ☐ False
10. ERISA qualified retirement accounts are typically not subject to administration in bankruptcy.
☐ True ☐ False
11. Under Federal statute, IRA accounts are exempt up to approximately \$1.2 million.
☐ True ☐ False
12. Spousal and child support are always non-dischargeable in bankruptcy.
☐ True ☐ False
13. Obligations between spouses, including community property equalization payments between spouses, are dischargeable.
☐ True ☐ False
14. In a Chapter 13 proceeding, obligations to spouses can be dischargeable.
☐ True ☐ False
15. Attorneys' fees, payable to one's own attorney, are not dischargeable in a bankruptcy.
☐ True ☐ False
16. Attorneys' fees, payable by the non-client spouse, can potentially be non-dischargeable.
☐ True ☐ False
17. A non-filing spouse's separate property is not included in the filing spouse's bankruptcy proceeding.
☐ True ☐ False
18. Current homestead laws provide for exemptions of \$75,000 for a single person, \$100,000 for a married couple or head of household, and \$175,000 for individuals over the age of 65 or disabled.
☐ True ☐ False
19. When representing a spouse in a marriage with significant debt, it's important to always be the first spouse to file.
☐ True ☐ False
20. So long as the spouses are legally married, one spouse cannot file bankruptcy by themselves.
☐ True ☐ False

MCLE Answer Sheet No. 81

INSTRUCTIONS:

1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
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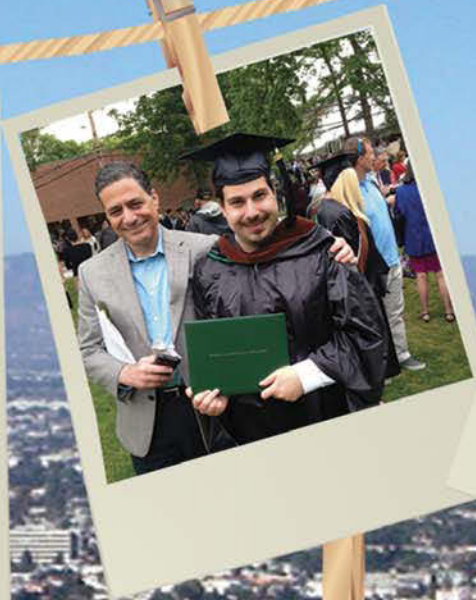
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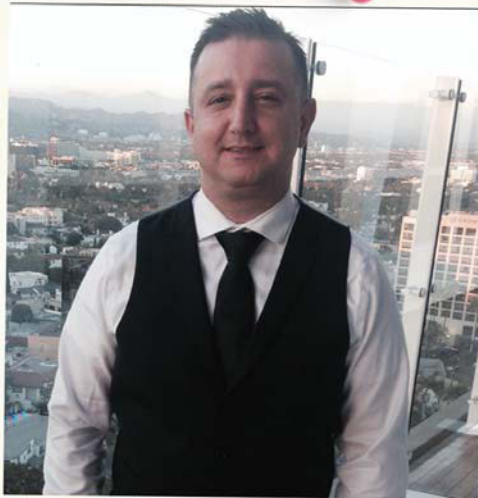
Candid with the Candidates: Meet the 2015 Trustee Candidates

By Irma Mejia



SFVBA members will soon vote on the newest set of Trustees to guide the Bar's programming and policies in 2015-2016. The photos in this feature show the candidates celebrating accomplishments, posing with their family, or simply enjoying a fun weekend. Their photos and profiles are meant to highlight their unique personalities and the strengths they have to offer the SFVBA.





Michael Avanesian



Jonathan Birdt

What is your favorite movie? *The Lost Boys*

What is your favorite book? *John Adams* by David McCullough. The HBO mini-series was amazing but even it didn't do the book justice!

As a child, what did you want to be when you grew up? I wanted to be an astronaut and volunteer to ride a spaceship through a black hole in the hopes that it was not one of those with a singularity. Then I realized I am deathly scared of heights, and even worse, of the dark.

Avanesian has been practicing bankruptcy law since his admission to the State Bar in 2011. His practice at Simon Resnik Hayes, LLP in Sherman Oaks is primarily focused on commercial bankruptcy. An active member of the SFVBA Bankruptcy Law Section, Avanesian is a regular fixture at the section's monthly meetings.

Since 2008, he has served as an adjunct professor of mathematics at East Los Angeles Community College, where he teaches all levels of mathematics, from algebra to calculus and statistics. His volunteer work in the Los Angeles Bankruptcy Self-Help Desk and Legal Clinic has earned him recognition on the U.S. Bankruptcy Court, Central District's Honor Roll every year since becoming an attorney.

Avanesian believes his diverse background, commitment to community service and facility for numbers will be great contributions to the Board. "To the extent that finances and the organization's statistics are involved, I deal with those types of issues all the time and will be able to contribute my expertise," he says.

When reflecting on the Bar's activities and need for improvement, he finds it important for the Bar to highlight the many great programs and services it offers. "The Bar is doing an outstanding job. In particular, it has one of the best bar publications. It also hosts great and affordable events," he says. "We need to continue these successful programs while improving their marketing. We need to do a better job at spreading the word."

What is your favorite restaurant in the Valley?

Joe's Cafe in Granada Hills

If you could no longer be a lawyer, what would you want to be? I wouldn't trade it for anything. I love being a lawyer.

How have you managed to balance your work responsibilities with your family obligations?

From the beginning of my career I have made it clear to clients and employers that family comes first. As a sole practitioner now, it is much easier to rearrange and balance my schedule to maximize time with my daughter and wife.

With 19 years of experience, Birdt has established himself in the Valley legal community as a successful litigator with a commitment to public service. Through his law firm in Porter Ranch, he represents individuals and businesses of all sizes in matters ranging from business disputes, personal injury, and Second Amendment-related litigation. He was appointed to the SFVBA Board of Trustees in 2014.

His public service commitments include serving as a Judge Pro Tem for the Los Angeles Superior Court, volunteering as a pro bono litigator for Public Counsel, and serving as Guardian ad Litem in Juvenile Court.

As an active member of the Attorney Referral Service Committee, Birdt has been tremendously helpful with the program's newly launched website and search engine optimization campaign. "We have gotten a lot of work done, but have a long way to go building out our program for the benefit of our members," he says. "Now that we have crossed the website and SEO hurdles, we have to turn our attention to local advertising and marketing to make sure clients are able to find us."

He is eager to continue serving on the Bar's Board. "I enjoy helping to build an organization and seeing positive changes take effect. Being a Trustee allows me to volunteer my time while working with and benefiting members of my own community."



Christopher W. Blaylock

As a child, what did you want to be when you grew up? I always knew at a very young age that I wanted to become an attorney. Most of my heroes growing up had a legal background, and I loved the idea that a person could make a real difference by argument, logic, and charisma. For me, persuading someone to accept my position on a given subject is extremely rewarding—and almost unparalleled.

If you could no longer be a lawyer, what would you want to be? One of my other great passions is policy and public service. If I was no longer an attorney, I would want to be a public servant in my community.

What book are currently reading? *Revival* by Stephen King

Blaylock is a criminal defense and personal injury attorney with a practice based in Santa Monica. A Sherman Oaks resident, Blaylock has been a member of the SFVBA since his admission to the State Bar in 2012. He serves as Co-Chair of the revitalized New Lawyers Section and has contributed articles to *Valley Lawyer*.

Brimming with a passion for service, Blaylock's dedication to the community is an asset to both his practice and to his work outside the office. When he's not working or organizing mixers and MCLE seminars for the New Lawyers Section, Blaylock can be found actively participating in other professional organizations and volunteering as a religious educator at his local church.

Blaylock highlights the many benefits he has enjoyed through Bar membership as a reason for wanting to give back. "The SFVBA has helped me as a new lawyer in a number of ways, including offering networking opportunities and Fastcase, a great online library for those starting out with limited resources," he says. "It has allowed me to meet experienced attorneys who have become mentors."

His goals as Trustee include improving the Bar's outreach to more attorneys in the Valley by providing educational seminars on novel legal topics. He also wants to help improve the Bar's social events and increase its community service and pro bono activities.



Vito A. Costanzo

What has been your favorite summer vacation? A fishing trip to the Sea of Cortez. They have some of the best and largest tuna in the world.

What do you do for fun? I make my own wine. I learned how to make wine from my grandfather, who grew grapes and made his own wine in Italy.

If you could no longer be a lawyer, what would you want to be? An engineer. This is a very exciting time to be involved in technology.

Costanzo is a Partner at Holland & Knight, LLP in Los Angeles. With 28 years of experience, his practice is focused on business litigation, including the litigation of software and technology licensing disputes, infringement and misappropriation of intellectual property rights, trade secrets, and breach of contract claims. His previously served as a trial attorney in the Los Angeles County District Attorney's Office.

In addition to his thriving practice, Costanzo is dedicated to giving back to his community. His contributions to charitable organizations include serving on the Board of Directors of St. Anne's Home, a social service agency for at-risk pregnant young women, mothers and children. He also dedicates time to volunteer for the UCLA Alumni Association.

His experience representing technology companies will bring a different perspective to the Board, which he hopes will influence the Bar's programming. "The SFVBA can provide more seminars on developing areas of the law in order to keep our members current on the latest trends," he explains. "Presentations by local businesses regarding their industry and legal needs would also be beneficial to attorneys considering new areas of practice."



William A. Daniels



Barry P. Goldberg

As a child, what did you want to be when you grew up? A fireman

What do you do for fun? I go camping with my family, dogs and horses; pilot small aircraft; and participate in racing challenges (running/Tough Mudder/cycling).

What are your plans for this summer? Jury trial in Superior Court, then maybe my wife and I will sneak off to Yosemite.

Daniels is a litigation attorney handling a variety of matters, including personal injury, employment law, product liability issues, contract disputes and class actions. In practice for over 20 years, he has demonstrated a commitment to providing exemplary service and results to his clients while devoting time to help improve the reputation of the legal profession in the community. He has operated his own successful practice in Encino since 2009.

A proven leader in the legal community, Daniels distinguishes himself by having what he describes as a "reputation for devising creative, out-of-the-box solutions to organizational challenges." He has devoted his time to successfully launching the Civil Justice Program at Loyola Law School, which in turn inspired the school's Advocacy Institute. He also was responsible for restructuring *Advocate Magazine*, the *Journal of Consumer Attorneys Associations for Southern California*, into a financially successful publication.

Daniels does not believe in maintaining the status quo when so much can be improved. "I see participating in the SFVBA as an opportunity to help increase the reputation of Valley lawyers in the Southern California legal community," he explains. "It is time we take our place with the preeminent leading bar organizations. But that means work, some risk and honest introspection."

What is your favorite movie? I have always loved *Casablanca*.

What do you do for fun? Besides playing music almost every night, I am a regular at the gym and an avid blogger!

What is your favorite restaurant in the Valley? Love the Curry Up Café in Woodland Hills!

Among his peers, Goldberg is known not only for his 31 years of experience as a personal injury lawyer but also for his musical talent. In addition to running a successful Woodland Hills-based firm for ten years, Goldberg is the lead trombonist in the popular LA Lawyers Philharmonic and Big Band of Barristers.

His commitment to these award-winning musical groups is illustrative of his overall dedication to activities that enrich his local community. He plays concerts for charitable events and has volunteered in various youth sports organizations. Since 2011 he has served as Co-Chair of the Attorney Referral Service Committee. Under his leadership, the ARS has launched a new website and an improved search engine optimization campaign to better serve the public. As an ARS panel member, he has also volunteered his time to the Bar's Blanket the Homeless program and Ask-a-Lawyer free legal clinics.

"We need programs geared towards new members so that they can see the benefits of immediate education and training. This provides the SFVBA the opportunity to involve those with leadership capabilities and spread the word about organic networking," he explains. "The young lawyers I have come in contact with in the Valley are not the same as they were when I came up. Many did not get jobs and training in big law firms but rather have undertaken contract work and hung out their own shingle. We need to get to these lawyers to increase competency and improve the experience of being a lawyer in the Valley. We need to provide more 'how to' programs and as much mentoring as possible."



Peta-Gay Gordon

What is your favorite restaurant in the Valley?

Tipple & Brine in Sherman Oaks or Girasol in Studio City

If you could no longer be a lawyer, what would you want to be? A TV critic or a dancer

What are your plans for this summer? What's summer?

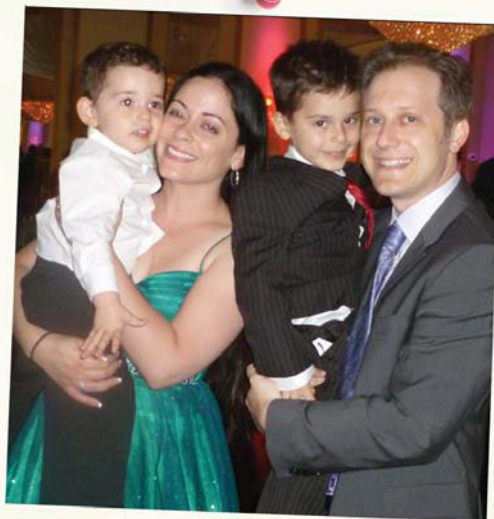
Gordon is a probate and estate planning attorney with President's Circle firm Oldman, Cooley, Sallus, Birnberg & Coleman, LLP in Encino. With nearly ten years of experience, her practice has grown to include trusts and estates administration and litigation, conservatorships, guardianships, estate planning and family law.

Her desire to serve on the Board is tied closely to her commitment to community service and her belief in the continued relevancy of bar associations. "Bar associations are still the best way for attorneys to meet other attorneys in their practice area," she explains. "They are also good liaisons between the community and attorneys."

An active member of the Probate & Estate Planning Section, Gordon sees room for improvement. "I would love improved lunch options at section meetings and events to be held at new and interesting locations in the Valley, allowing people to experience places they may have wanted to go to but have not had the time."

Changes in event programming would help the Bar achieve what she identifies as two important goals: attracting new members and increasing the SFVBA's visibility in the community. "I want to help the Bar attract new attorneys and secure its reputation in the community as a conduit between those in need of assistance and attorneys who can meet that need."

Her community service commitments include serving as President of the Jamaica Awareness Association of California, an organization which provides health and educational aid to people in need. She also serves as a Board Member of the USC Gould School of Law Alumni Association.



Alexander J. Harwin

What is your favorite restaurant in the Valley?

Fab's for Italian; Joseph's for quality inexpensive deli; Octopus and Gyu-Kaku are great family Japanese restaurants; Little Brother's for sushi; Wood Ranch for BBQ; Sagebrush Cantina for chips and salsa; and The Cheesecake Factory for everything else.

If you could no longer be a lawyer, what would you want to be? Talk show host

How have you managed to balance your work responsibilities with your family obligations?

It's definitely a work in progress.

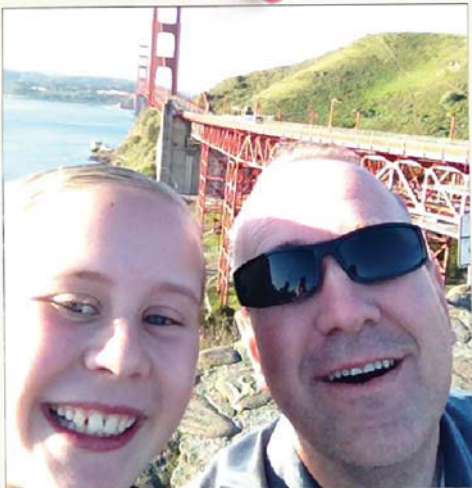
A downtown lawyer with a heart rooted in the San Fernando Valley where he was born and raised, Harwin has made a commitment to promote the local professional community which he calls home. He was appointed to the SFVBA Board of Trustees in 2014.

"On a personal level, I was attracted to the SFVBA's philanthropic endeavors and the fact that my children could actively participate in events such as Blanket the Homeless," he says. "On a professional level, Valley attorneys should expect that being an SFVBA member has business generation value."

Indeed, when considering the benefit of membership, Harwin highlights the personal connections offered by bar associations that can't be replicated elsewhere. It's those tangible relationships which he considers to be the Bar's strongest appeal.

As a Partner at Lewis Brisbois Bisgaard & Smith LLP, Harwin's practice concentrates on advising and defending employers from claims of wrongful termination, discrimination and wage violations.

"My clients recognize the personal investment I make in their cases and, more importantly, in their well-being. For example, I personally perform my own investigative work and frequently knock on doors to find and gain the trust of valuable witnesses. It is with the same enthusiasm that I became active with the SFVBA. After our first family home purchase, it was both personally and professionally prudent to become more Valley-centric."



David G. Jones



Marlene Seltzer

What is your favorite movie? It's a tie between *Caddyshack* and *Secretariat*. My family, including my father, a Hall of Fame thoroughbred trainer, and my brother, a Southern California horse trainer, have given me an unending love of horses and their stories.

What has been your favorite summer vacation? *Las Ventanas al Paraíso* resort (literally translated as "Windows to Paradise") on the white sandy beaches of Cabo San Lucas, Mexico is the all-time favorite getaway for me and my wife.

What do you do for fun? Wine tasting and surf fishing

Jones is a partner at the litigation firm of Santiago & Jones, APC in Woodland Hills. His practice focuses on civil litigation, employment law, and appellate work. His extensive litigation experience has resulted in innovative legal arguments and landmark decisions before appellate courts and the California Supreme Court.

Jones is an active member of the Employment Law Section and the Attorney Referral Service and serves as a Los Angeles Superior Court settlement officer. When not working or attending Bar events, Jones can be found volunteering as a coach for youth softball programs, which he has been doing for the last ten years. He also supports various charitable organizations, including the Tour de Pink to increase breast cancer awareness.

Jones credits his even-tempered and patient demeanor for his ability to reach the goals he sets for himself. "I bring positive energy and creativity to the table," he says. He hopes his interpersonal skills can help create consensus among the Board and SFVBA staff.

As a Trustee, he will aim to re-energize member participation and the Bar's offering of professional activities. "I want to improve on the already excellent MCLE presentation seminars through expansion to other areas of the law. Additionally, I will work to further improve bench-bar relations to create a stronger connection between Valley judges and attorneys."

What is your favorite fictional TV lawyer? *The Good Wife's* Elsbeth Tascioni

As a child, what did you want to be when you grew up? A nurse

What are your favorite Valley restaurants? Bistro Gardens in Studio City, Oliva in Sherman Oaks, and Roy's in Woodland Hills

Seltzer is a probate and estate planning attorney with 19 years of experience serving the local community. Her work at the Wasserman Law Group in Tarzana includes all aspects of probate, trusts and estates, conservatorships, and elder law. Her volunteer activities include providing free educational seminars at local senior centers, assisted living facilities, churches and hospitals. She has also served as past Chair of the Women Lawyers Section and past Co-Chair of the Probate & Estate Planning Section.

Seltzer is a current Trustee running for reelection. She describes her experience serving on the Board as extremely rewarding and believes bar associations remain vitally important to the legal profession. "In unity there is strength. Working with other attorneys is a great way to become skilled and more professional while obtaining more qualified business."

An active member of the Attorney Referral Service Committee, she is currently working to help update the ARS' database to better serve the public and efficiently refer qualified business to ARS members. In reflecting on the Bar's most pressing needs, she identifies the Bar's outdated website and member database as items that are in need of urgent improvement. "Upgrading the Bar's online presence and digital organization will vastly improve its reach to potential new members and the general public," she explains.



John F. Stephens



Toni Vargas

What is your favorite legal movie? *Witness for the Prosecution*

What has been your favorite summer vacation?
My trip down the Danube

What is your favorite restaurant in the Valley?
Topanga Pizza in Woodland Hills

Stephens is a partner at Sedgwick LLP in Los Angeles. With 20 years of experience, his practice focuses on media law, intellectual property and cyber security. He dedicates his time outside the office to further the issue of diversity in the legal profession. In past years, he has served as the Chair of the Intellectual Property, Internet & Entertainment Law Section and has held several leadership positions within GLAAD, including serving as the organization's Co-Chair.

As the current Chair of the Bar's Diversity Committee, Stephens sees increased diversity as essential to the success of any professional group. "Diversity of thought, in effect, different viewpoints from people of different backgrounds, prevents groupthink which can be fatal to an organization," he explains. "A diverse group operates more creatively and is more likely to generate the best solution to any given challenge." As Trustee, his goal would be to expand diversity within the SFVBA and its leadership roles.

Working to improve the SFVBA is in line with his belief that bar associations remain important for the advancement of the legal profession. "Bar associations bring together talented attorneys for the purpose of bettering the profession and helping the local community. They help foster positive changes and offer the opportunity for all the members to learn and assist one another to succeed."

What is your favorite Valley restaurant? Inn of the Seventh Ray in Topanga

What inspired you to become a lawyer? I had never dreamed of doing any kind of work other than healthcare. When the practice of medicine became overwhelmed with third party payer rules, I became interested in finding a way to protect providers and patients and the natural course was to become a lawyer.

If you could no longer be a lawyer what would you want to be? I would love to have my own gardening service and nursery where I would create the kind of magical garden I think everyone could love (even with this drought).

Vargas is a public interest attorney with 18 years of experience. Her practice is focused exclusively in the area of health law at Neighborhood Legal Services of LA County. She was appointed to the SFVBA Board of Trustees in 2014.

She describes her experience on the Board as illuminating. "I have a much different perspective of the legal profession than private attorneys. As a Trustee I have gained great respect and understanding of issues facing private sector attorneys," she says. "Participation in the SFVBA is especially valuable to new attorneys. It's not just the building of professional relationships but the gaining of support, input, sharing and development that all attorneys must struggle through as they enter the profession."

When considering areas the Bar can improve, she expresses her belief that the Bar should make its marketing efforts a priority. "The way to increase membership is to heighten awareness of key programs and services," she says. "Bar associations are important because the networking, practice development, and professional dialogue they provide can lead to a far more vibrant practice enhanced by the development of professional relationships that extend far beyond the courtroom doors."

NEW MEMBERS

The following were approved as members of the SFVBA in June 2015:

Jacqueline Y. Blade
Law Office of Jacqueline Y. Blade
Westlake Village
Family Law

Daniel A. Cantor
Glendale
Civil Litigation

Zuleima Chavarria
Chavarria & Associates, PC
Van Nuys
Immigration and Naturalization

Vito A. Costanzo
Holland & Knight, LLP
Los Angeles
Intellectual Property

Lauren Fahlbeck
NBC Universal
Universal City
Entertainment

Naser J. Khoury
Van Nuys
Criminal

Deanna Noe
Docu-Pros
Los Angeles
Paralegal/Legal Secretary
Administrative

Shawnell J. Russell
Nemecek & Cole
Sherman Oaks
Professional Liability

Jeffrey Salvesen
Encino
Banking and Finance

Sapana K. Shah
Shah Grossi
Sherman Oaks
Business Law

Robert Simmonds
Studio City
Litigation

Benjamin Soffer
The Soffer Law Firm PC
Woodland Hills
Civil Litigation

Ian G. Sterling
West Hills
Labor and Employment

REPORT OF THE NOMINATING COMMITTEE

PRESIDENT SANDERS ANNOUNCED THAT TREASURER DAVID KESTENBAUM does not wish to be nominated for secretary. A Committee member proposed making secretary the entry position in the officer ladder instead of treasurer since the Committee needs to nominate candidates for both positions. There was support for the idea but the committee felt that if the treasurer did not move up to president elect, the position would be only one year away from the presidency and it would be detrimental to the Bar to make a change at that point.

The Committee nominated the following officers:

Alan E. Kassan	Secretary
Anie N. Akbarian	Treasurer
Kira S. Masteller	President Elect
Carol L. Newman	President (automatic)

The Committee considered candidates for Trustee. The Executive Director reported that there was an inquiry from a retired member who is inactive with the State Bar and wants to know whether they are eligible to run for trustee. The SFVBA bylaws indicate that a member who retires from the State Bar is an active SFVBA member and can be a candidate. However, the Committee determined that retired is not a State Bar status; the term used is inactive, so the member could run for office, and the bylaws should be updated.

The Committee nominated the following members for Trustee:

Michael Avanesian	Peta-Gay Gordon
Jonathan Birdt	Alexander J. Harwin
Christopher W. Blaylock	David G. Jones
Vito A. Costanzo	Marlene Seltzer
William A. Daniels	John F. Stephens
Barry P. Goldberg	Toni Vargas

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VALLEY COMMUNITY LEGAL FOUNDATION OF THE SFVBA COLUMBUS DAY GOLF TOURNAMENT

Proceeds fund grant and scholarship programs of the VCLF of the SFVBA

*Monday, October 12, 2015**

BRAEMAR COUNTRY CLUB • TARZANA

**Columbus Day. Courts closed.*

9:00 AM – 11:00 AM Check-in / Continental Breakfast
10:00 AM – 11:00 AM Putting Contest
11:15 AM Shotgun Start—Best Ball Format per Group
 Bar-B-Que Lunch Served at the Course / Open Bar
5:00 PM Awards Reception and Dinner

GOLFER'S PLAYER PACKAGE

-  **\$150** "Early Birdie" Special
(Purchase before September 1st)
-  **\$175** (Purchase after September 1st)
-  **\$560** "Early Birdie" Foursome Special
(Purchase before September 1st)
-  **\$540** Sponsor Active Military Personnel Foursome
(32 Invited)
-  **\$140** Sponsor One Active Military Personnel
-  **\$600** Foursome (Purchase after September 1st)
-  **\$150** Sitting/Retired Judges

Includes green fees, cart, tee gifts, beverages, continental breakfast, luncheon and awards reception and dinner.

FREE GIFT BASKET to each golfer: \$275 Value, including one custom built pitching wedge and one hybrid fairway metal custom built courtesy of WARRIOR CUSTOM GOLF.
(shipping not included).

SPONSORSHIP OPPORTUNITIES**

Eagle Sponsor **\$5,000**

Includes two golf foursome packages, two additional tickets for awards dinner, on-course beverage station with sign, sign at tee, name/logo prominently displayed in promotional material and banner.

Birdie Sponsor **\$2,500**

Includes one golf foursome package, one additional ticket for awards dinner, name/logo included in promotional material and sign at tee.

Hole-in-One Sponsor **\$1,500**

Sponsorship sign will be placed on a par 3 hole on course. May hand out gifts and info to the golfers at sponsored hole. Includes two tickets for awards dinner.

Tee Sponsor **\$250**

By sponsoring a tee/green sign on the course your firm or company can show support for the VCLF's goodworks. May hand out gifts and information to the golfers at sponsored hole. Includes two tickets for awards dinner.

Contact Bill Speer (818) 999-5197 or email bspeeriii@yahoo.com for player and sponsorship information.

**All sponsors receive recognition on the VCLF website, in Valley Lawyer magazine and acknowledgment at awards dinner.



OTHER SPONSORSHIP OPPORTUNITIES**

Cocktail Reception Sponsor **\$2,000**

The awards reception will be a fun filled event! We will place sponsorship signs on the bar. Includes two tickets for awards dinner.

Lunch Sponsor **\$1,500**

Let us announce your generosity in "picking up the tab" for lunch. We will place sponsorship signs at the lunch site and give you a table for you to hand out gifts and information to the golfers. Includes two tickets for awards dinner.

Photo Sponsor **\$1,700**

Every golfer will receive a framed picture of their foursome and an individual shot of each golfer. Your logo will be included on the frame. Includes two tickets for awards dinner.

Beverage Station Sponsor **\$1,500**

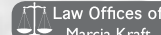
Golf Cart with cold beverages so you may hand out beverages and your gifts or info to golfers around the course. Includes two tickets for awards dinner. Tee Sign at hole of your choice.

Putting Contest Sponsor **\$1,000**

We'll display a sign at the putting contest showing your support. We'll mention your sponsorship when we announce the winner of the putting contest. Includes two tickets for awards dinner.

Sponsor a Veteran **\$140 per veteran** **\$560 per foursome**

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Valuing Businesses for Family Court: Rules of the Road

By Chris L. Hamilton



ONE OF THE ENDURING MYSTERIES FOR most participants in family law litigation is “What is the business worth?” It is a complex question and the search for that answer drives litigation that otherwise could be resolved. In non-divorce litigation, the question of business or intangible asset valuation is limited to reconciling the opinion of opposing experts who each make numerous and materially subjective judgments in arriving at their opinion. The standard of value in those cases is rarely in question. In family court, an additional layer of uncertainty must also be reconciled because of the ambiguity of the law, precedential court decisions, and court procedures and practices.

The threshold question for any business valuation is the “standard of value.” That term is defined by the International Glossary of Business Valuation Terms as “the identification of the type of value being utilized in a specific engagement; for example, fair market value, fair value, or investment value.”¹

The practical impact of the standard of value is the definition of how certain decisions will be made in valuing the business. For example, will the business appraiser be considering discounts for lack of marketability or control? Or will the valuation be based on highest and best use of

the assets or simply valued as is? By definition, a standard means there is uniformity of analysis and processes. The standard becomes the “rules of the road” for the valuation expert and the users of the valuation opinion.

In most civil litigation, the standard is usually called “fair value” and that standard is defined statutorily for the litigation. For tax litigation, the standard of value is “fair market value” and it is even more clearly defined. However, for divorce cases in California, there is no clearly stated or defined standard of value.

The starting point for most participants in divorce litigation is the belief that they need to know the fair market value (FMV) of the business. The definition of this standard was codified by the Internal Revenue Service in 1959² and that definition has stood the test of time. The FMV definition in the International Glossary of Business Valuation Terms states it as follows:

The price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms-length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.



Chris L. Hamilton is a Certified Public Accountant, Certified Fraud Examiner, and a Certified Valuation Analyst. Most of his professional time is spent in the areas of business valuation, forensic accounting, and litigation related consulting. He has served as an expert in civil, criminal, probate, and family court matters. Hamilton can be reached at chamilton@arxisgroup.com.

That definition establishes very specific assumptions to be used when placing a value on a business. These include a hypothetical buyer and seller with no regard given to the current owner; a willing and able buyer and seller who are equally motivated, and of equal means, to close the transaction; and arms-length distance, with no synergistic or relational influences. It also calls for an open and unrestricted market with no transactional or ownership transfer impediments and no compulsion with neither the seller nor the buyer being forced into the transaction. Finally, the definition requires reasonable knowledge held by both parties to the transaction, with both having all the same facts and information.

None of those elements of the standard actually exist concurrently in real world transactions. The FMV standard was established to simulate transaction metrics for a business that is not actually for sale. It is a process to arrive at an academic result and, for tax purposes, it is an ideal definition.

In family court, a business interest that is not for sale in a public market is for sale in a private transaction. The court has described it in one case as "...the practitioner [being] judicially forced to buy an intangible asset at a judicially determined value and compelled to pay a former spouse her share in tangible assets."³


In a divorce context, the buyer and seller are both known (not hypothetical); one or both parties are not willing and/or able; it is definitely not an arms-length transaction; there is judicial compulsion; and by the very nature of contentious discovery, both parties do not have reasonable knowledge of all relevant facts. It does not fit the FMV assumptions on any level. Therefore, fair market value as defined by the IRS and the International Glossary of Business Valuation Terms is not applicable in family court.

A valuation expert that prepares a valuation report or testifies to the use of that standard of value for a divorce matter has made a fundamental decision that will lead them to a value that might be correct for tax purposes but not necessarily for divorce litigation. As noted by the courts in 1974, "[t]he value of community goodwill is not necessarily the specified amount of money a willing buyer would pay for such goodwill. In view of the exigencies that are ordinarily attendant a marriage dissolution the amount obtainable in the marketplace might well be less than the true value of the goodwill."⁴

In cases where FMV was declared to be inappropriate, the court did not replace it with another standard. And a review of cases will confirm that the standard in divorce court has been called going concern value, investment value, marketable value, intrinsic value, or just simply value. A recent case has defined a standard of value called "marital value" as "the economic value of the business to the spouse retaining it, and who will continue to operate it in the future."⁵

This differs greatly from the general principle of determining the investment value (on the open market) as a basis to determine value for division.

Family court is an equity court and that fact probably precludes the establishment of a single standard of value. If there was one standard that best fit every family court valuation it would be found in the standard of value established for eminent domain cases in the California Code of Civil Procedure. There the standard of value is defined as "[t]he fair market value of property taken for which there is no relevant market is its value on the date of valuation as determined by any method of valuation that is just and equitable."⁶

Standard of value ambiguity in California family courts is often a source of frustration but it also highlights the need for valuation experts who not only understand concepts such as personal goodwill and community versus separate value but also understand appropriate standards of value and the impact of those decisions on the valuation methodologies and conclusions. 

¹ International Glossary of Business Valuation Terms available at <http://www.aicpa.org/interestareas/forensicandvaluation/membership/downloadabledocuments/intl%20glossary%20of%20bv%20terms.pdf> (accessed June 5, 2015).

² Rev. Rul. 59-60, 1959-1 CB 237 -- IRC Sec. 2031.

³ *In re Marriage of Lopez* (1974) 38 Cal. App. 3d 93, 110.

⁴ *In re Marriage of Foster* (1974) 42 Cal. App. 3d 577, 584.

⁵ *In re Marriage of Honer* (2015) Partial publication 5/15/15 California First Appellate District, Division Four.

⁶ California Code of Civil Procedure §1263.320.



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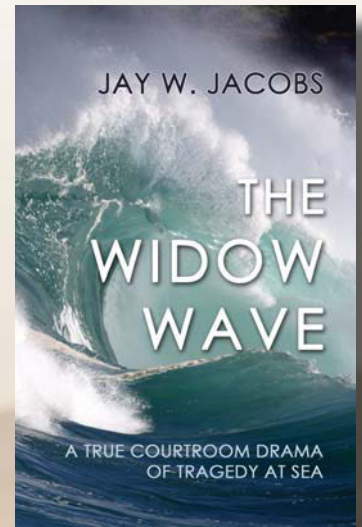
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Examining a Tragedy at Sea

By Randi R. Geffner



MANY ATTORNEYS CAN RELATE TO THE experience of being asked at a social gathering to tell the story of their most interesting case—and the immediate blank feeling of having to dig deep to come up with something in response that will sound exciting or noteworthy. Not that what we do isn't interesting, it just isn't often the stuff of drama or suspense, despite what Hollywood might lead non-attorneys to believe. Unfortunately most of us will never experience a dramatic "You can't handle the truth!" moment on cross-examination.

If asked to share war stories at a party, Northern California attorney Jay W. Jacobs will never be unsure about his most interesting case. In 1986 Jacobs was a young trial attorney assigned to defend the worst recreational fishing boat accident in San Francisco maritime history. Jacobs' experiences throughout the investigation and trial are related in his compelling book, *The Widow Wave: A True Courtroom Drama of Tragedy at Sea*.

Although the case is indisputably tragic, Jacobs' narrative draws the reader in as he is equally adept at relating the emotion, legal strategy and technical maritime

details that were all so critical to the defense of this once-in-a-career litigation. This is a story that draws the reader in, and once told, can never be forgotten.

Five lives were lost on March 9, 1984 when the 34-foot fishing boat, *Aloha*, disappeared at sea off the coast of San Francisco—the captain, Francis Dowd, his 19-year-old son, Gerald, who was home from college for spring break, Dowd's brother-in-law, John Kennedy, a co-worker of Dowd's, Werner Buntmann, and a friend and business colleague, H. Tho Ang, who was visiting from Manila.

On the morning that went so horribly wrong, Dowd was taking his friends out on a salmon fishing trip to the Duxbury Reef area, a day trip he had taken successfully many times before, and, in fact, a fishing spot that Jacobs had visited several times as well. There were no eyewitnesses to the disappearance of *Aloha*, nor were she or any of her passengers ever recovered, save the body of Dowd, which was recovered weeks after the loss. Fear and speculation ran rampant in the Bay Area fishing communities as answers were sought to explain the devastating and seemingly inexplicable loss of life.



Randi R. Geffner is a senior associate attorney at Esensten Law in West Los Angeles, specializing in all types of civil and business litigation. Randi may be contacted at rgeffner@esenstenlaw.com

Jacobs was tasked with explaining the inexplicable to a jury when the widow of Ang filed a negligence action against Dowd's estate just one day prior to the expiration of the statute of limitations. Ang sought substantial damages for the wrongful death of her husband and the father of her children. The emotional wreckage experienced by the Ang family was very familiar to the defendant, Janet Dowd, who lost her husband, her teenage son and her brother-in-law in the disappearance of *Aloha*.

As crushed as Janet Dowd was by the loss of her loved ones, she was adamant that her husband would never have acted recklessly or negligently, and would not even consider a settlement as to do so might leave the impression that her husband had somehow contributed to the tragic deaths at sea. Janet told Jacobs on their first meeting that her husband "... was not a perfect man, but he was never careless and never negligent, ever." Despite what his experience as a defense attorney was telling him about the risks of defending such an emotional case, Jacobs had no choice but to prepare to litigate the case through trial.

Jacobs' rendition of his investigation, preparation and trial of the *Aloha* case takes the reader on a fascinating, heartbreaking and enlightening journey. He uses skill, experience, humor and some luck in weaving his way through the contentious litigation, in which he was opposed by one of the most prominent firms in the Bay Area, leaving Jacobs outnumbered and facing an opponent with substantially more experience with litigation of this magnitude. The story told by Jacobs is accessible and fascinating, whether or not the reader has a legal or maritime background.

From a legal standpoint, Jacobs is generous with his sharing of legal theories and strategy, and is not averse to admitting when mistakes were made or favorable results were as likely the result of luck as of exemplary legal performance. Particularly interesting were Jacobs' stories regarding the complex process of jury selection, which any trial attorney will attest is equal parts preparation, intuition and the luck of the draw.

Jacobs also weaves the captivating tales of uncooperative witnesses, many of whom were lifelong sailors and fishermen who were unwilling to break a code of silence, were inherently suspicious of attorneys and the legal process, or, in one instance, were illegally living aboard a fishing boat in the marina and were fearful of being evicted from their floating home based on the testimony that was critical to Jacobs' defense of the case.

From a maritime standpoint, Jacobs takes the reader through the intricacies of competing theories as to the demise of *Aloha*. As a onetime sailor and officer in the merchant marine, Jacobs is conversant in the language of the sea and shares his expertise with the reader. Theories as to the cause of the accident ranged from negligence by

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Dowd to the *Aloha* being struck by a large cargo ship, a rogue wave, or a large piece of debris, to Jacobs' theory as presented by his expert witnesses that a rare occurrence known as a coincident wave (which occurs when nearly identical waves wrap around an islet or shallow bar and meet, creating a destructive wave which can be twice the height and quadruple the force of an ordinary wave) was the cause of the demise of the boat and the five lives aboard. Although the technical details abound, even the least seaworthy reader can follow along and is left with an understanding of how the environmental factors could have combined to contribute to the destruction of *Aloha*.

Jacobs, who had never tried a case of this magnitude, was concerned not only that his career might be destroyed by this high profile case, but worse, that a plaintiff's verdict would add to the immeasurable devastation experienced by Janet Dowd and her family. Jacobs has been quoted as reflecting that he had never had a case with greater legal or factual complexities, or a client who was more emotionally invested in the outcome of the trial. The pressure was astronomical, and Jacobs is expert at taking the reader along for the terrifying, mystifying and emotional ride.

The Widow Wave provides a gripping chronicle from beginning to end. No spoilers here, but suffice it to say that Jacobs without a doubt wins as a storyteller, regardless of the outcome of the trial. 🪄



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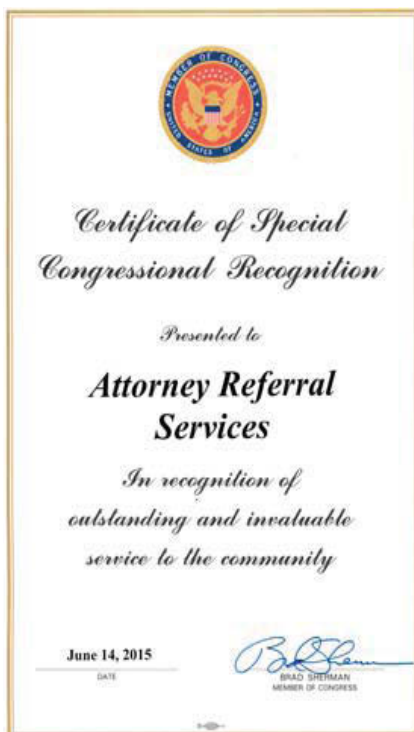
On June 12, the SFVBA hosted a casual dinner for members at The Stand in Encino. Along with giveaways from the SFVBA and Versatape, members participated in a raffle drawing for prizes provided by Hutchinson and Bloodgood, Narver Insurance, The Matloff Company and more.



FAREWELL LUNCHEON HONORING RETIRING WCAB JUDGE JEROLD S. COHN

On May 20, the SFVBA Workers' Compensation Section hosted a farewell luncheon in honor of retiring Judge Jerald Cohn, who served on the Workers' Compensation Appeals Board in Van Nuys for more than 20 years. The event, attended by more than 240 attorneys and court personnel, was sponsored by Rowen, Gurvey & Win; Koszdin, Fields, Sherry & Katz; and Sparagna & Sparagna.

Photos by Bob Reiter



ARS HONORED AT CONCERTS ON THE GREEN

On June 14, the ARS received special recognition from Congressman Brad Sherman and Assemblymember Matt Dababneh for its invaluable service to the community and the ARS's sponsorship of the Valley Cultural Center's 40th Anniversary Concerts on the Green. Throughout the summer, the ARS will be on hand at Warner Center Park to provide concertgoers with referrals to ARS panel members, popular promotional giveaways, and a breadth of legal resources available to the public.



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SANTA CLARITA VALLEY BAR ASSOCIATION

Hello Summer!

AMY M. COHEN

SCVBA Immediate
Past President



amy@cohenlawplc.com

IT FEELS LIKE JUST YESTERDAY that I was writing about the end of another school year. I am continually amazed at how fast time seems to be flying, especially as we put the cap on one daughter's fourth grade year amidst a flurry of year-end activities, awards and parties, and begin to look forward to the fifth grade. But first, summer vacation!

As much as I remember and long for the days of my own summer vacations from school, spent hanging out with friends in backyards around town, reading lots of books and generally doing nothing, things today are much different.

Aside from what seems to be a shorter break, summer vacations these days are filled with one camp or another, sports teams, and travel. They require scheduling months in advance. I'm exhausted just thinking about it. For many of us who work full time, the pressure of scheduling our children's summer vacations is compounded by the guilt we feel for not being able to simply enjoy the time with them, whether by going on vacation or simply playing in the backyard or going to the pool. We juggle as best as we can and hope that the days and weekends where we can squeeze in the fun will be enough.

Whatever you are doing this summer, and whether you are enjoying one last break with your children before they head off to college, or one

last summer before a little one starts kindergarten in the fall, I hope you have a safe and enjoyable time.


As for the Santa Clarita Valley Bar Association, its year is in full swing. We swore in our new Board and celebrated the tenth anniversary of our organization at our annual Installation Dinner last November. Earlier events this year have included networking mixers in January at Salt Creek and in April at Rustic Burger; an ethics

presentation in February; and a practical survey of DUIs, presented by member Jeff Armendariz in March.

Our upcoming events (subject to change) include the following: a CLE dinner on July 16, presented by trial attorney Aimee Kirby;

a Member Mixer in August; the Fourth Annual Author Dinner on September 17, featuring author and attorney Robert Rotstein; our annual Employment Law Update, presented by member Brian Koegele on October 15 (currently scheduled as a lunch event); and our annual Installation Dinner on November 19.

Our continuing education events, Author Dinner and Installation Dinner are held at the TPC-Valencia and our mixers are held at various locations around Valencia. Please visit our website, www.scvbar.org, for more information on upcoming events and to purchase tickets.

We look forward to seeing you through the rest of the year and hope that you have a great summer! 



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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!

Friends and Opposing Parties

Dear Phil,

I was approached by a potential client in what may be a contentious litigation matter. The opposing party is a close relative of a friend of mine. I don't want my friend to be upset with me, or worse, get dragged into the dispute if the relative thinks he can use my friend to get to me. What should I do?

Sincerely,

Lawyer Caught Between a Rock and a Hard Place

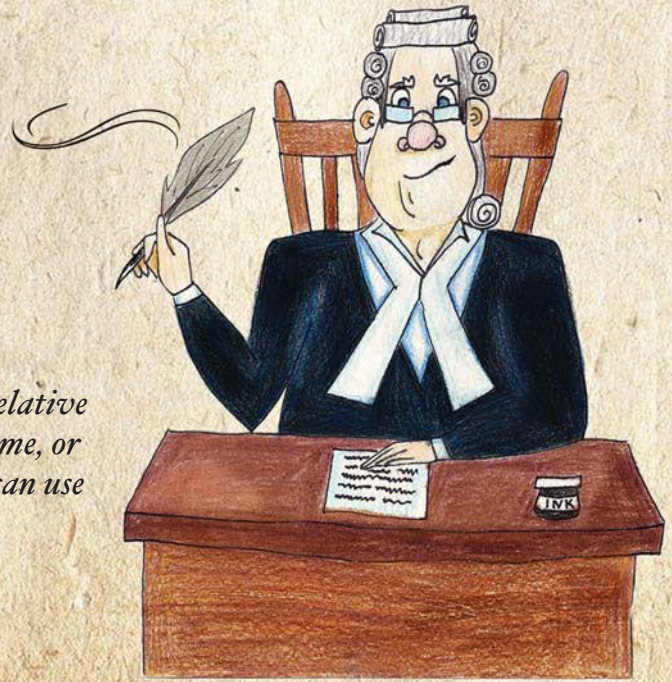


Illustration by Gabriella Sendorov

WELL, IT'S A SMALL WORLD AFTER ALL. Although somewhat rare, it can happen that people you know personally—relatives, friends, acquaintances—are somehow connected to the opposing party. It's good to know this up front, if possible, which is why it is good practice to get the names of as many people involved or potentially involved in a matter as you can.

When you learn that you know someone connected with the other side, you first need to decide whether you will be able to “zealously represent” your client under the circumstances, assuming no actual conflict bars your involvement. If your relationship with the other person and nature of the case will affect your representation, do right by your client and yourself by declining the matter. If you have already been retained, consider the ethics rules to determine if you are ethically prohibited from withdrawing or required to withdraw. If you can't withdraw, you must make the best of the difficult situation.

If you decide you can handle the matter (or you have been retained and can't get out), let your client know about the relationship. It is important to be proactive and not have the client find out on his or her own. If you want to stay in, make sure the client is agreeable. If you want to withdraw,

invite the client to consent and cooperate in the transition. Whichever decision is made, confirming it in writing, even if informally by email, can help avoid a misunderstanding.

You might also speak to the person with whom you have a relationship (unless you are ethically prohibited from doing so) to let them know you are handling the matter, and that you cannot talk to them about the case, even “off the record.” Of course, don't reveal anything confidential. Try to help the person understand you are only doing your job and there is nothing personal about the representation. It is important to vigilantly maintain a wall around the subject between you and your friend.

These situations give you the chance to be a true professional. As a professional you must do your duty, especially when it is difficult. Don't expose your client or yourself to embarrassment by having friends or family hear you acted unprofessionally. Perceptions are hard to control, but do your best to aggressively represent your client without crossing the line.

Best wishes,

Phil

Dear Phil is an advice column appearing regularly in *Valley Lawyer Magazine*. Members are invited to submit questions seeking advice on ethics, career advancement, workplace relations, law firm management and more. Answers are drafted by *Valley Lawyer's* Editorial Committee. Submit questions to editor@sfvba.org.

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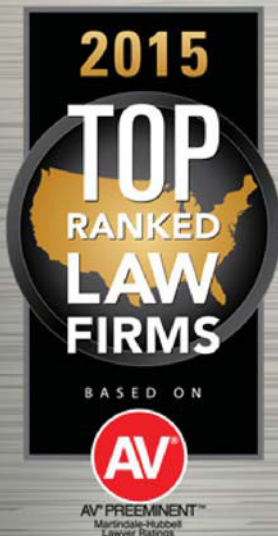
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