VALLEY LAWYER

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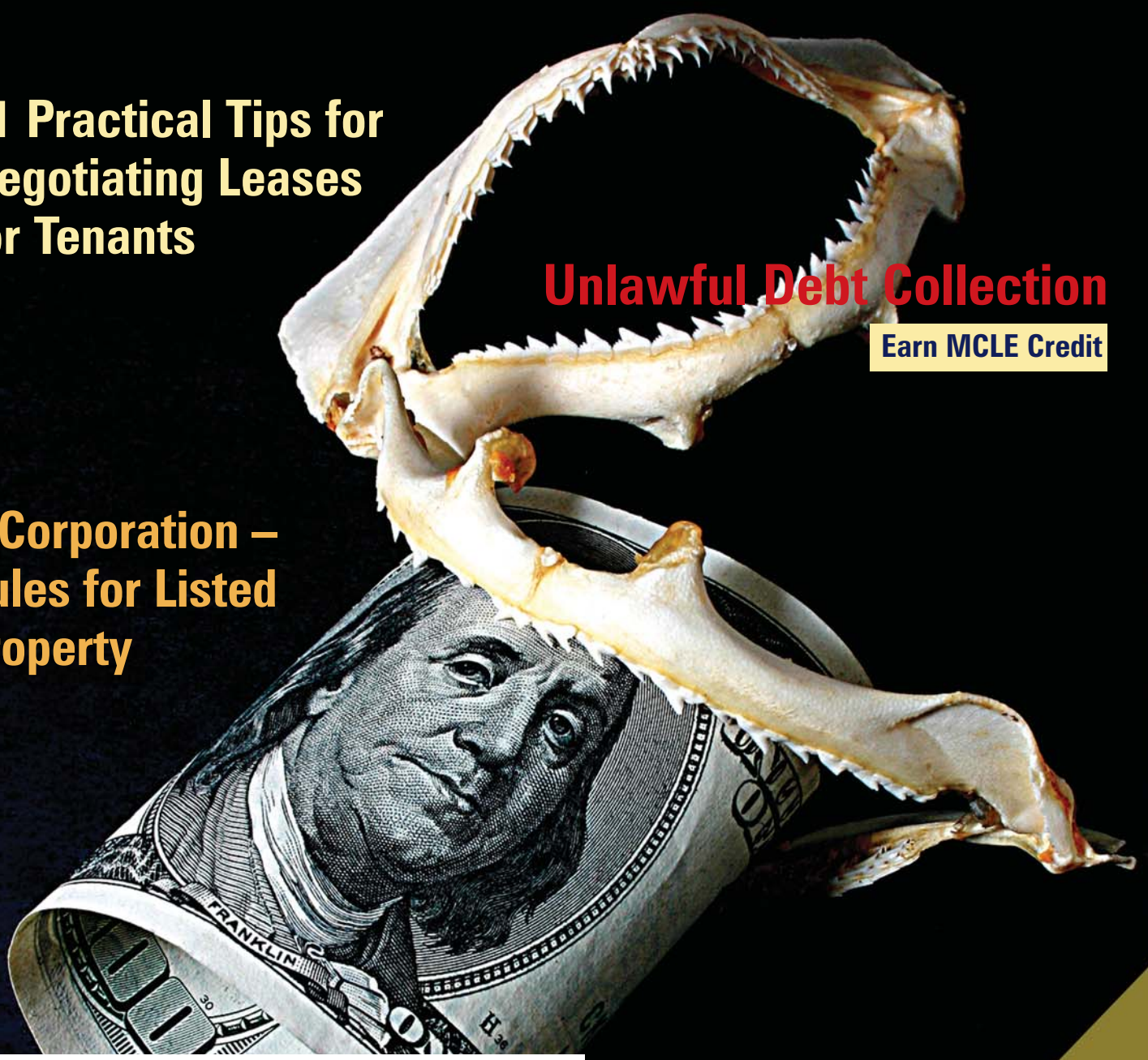
A Publication of the San Fernando Valley Bar Association

11 Practical Tips for Negotiating Leases for Tenants

Unlawful Debt Collection

Earn MCLE Credit

S Corporation – Rules for Listed Property



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Lawyers as Storytellers

ROBERT FLAGG, SR.

"YOU DON'T KNOW ABOUT ME WITHOUT YOU have read a book by the name of The Adventures of Tom Sawyer; but that ain't no matter. That book was made by Mr. Mark Twain, and he told the truth, mainly. There was things which he stretched, but mainly he told the truth. That is nothing. I never seen anybody but lied one time or another, without it was Aunt Polly, or the widow, or maybe Mary. Aunt Polly – Tom's Aunt Polly, she is – and Mary, and the Widow Douglas is all told about in that book, which is mostly a true book, with some stretchers, as I said before." – Mark Twain. The Adventures of *Huckleberry Finn* (1884)

Huck Finn's introduction reminds me of my father, Robert Flagg. (We, not coincidentally, share the same name.) As with Mr. Twain, dad told the truth, mainly, with some stretchers. This brings to mind a historical tale of his, a tale I've never been able to verify, "Great Aunt Luteola and the REA." The Rural Electrification Administration (REA), now known as the Rural Utilities Service, is a federal agency created under the Roosevelt administration in 1935 to foster distribution of electric power and utilities to rural America.

According to dad, Great Aunt Luteola, who lived in a farmhouse in a very rural area of Texas, was one of those who benefitted from the advance of electric lines into the countryside. Former U.S. President Lyndon Johnson, who in 1937 was a Congressman representing a Texas district, was instrumental in seeing that electric power was extended to Texas farms.[1] When Great Aunt Luteola's farmhouse and barn were wired for power and the lights were turned on for the first time, it was a wonderful thing to behold! However, to the end of her days, Great Aunt Luteola remained suspicious of "the 'lectricity," insisting that light sockets and wall outlets always be fitted with bulbs (even dead bulbs) and plugs, because she was convinced "the 'lectricity" would leak out of any open socket or outlet and pool on the floor, a shock hazard for the family cat and any stray humans.

Alas, I never met Luteola, nor did I have a chance to meet Mr. Johnson. But my dad claimed the distinction of having been fired by the future president. In the early 1950s, when Mr. Johnson was a U.S. Senator from Texas, my dad was among a group of bright, young Democratic Party activists who were aides to the senator. Mr. Johnson, known for both his expansive hospitality and earthy humor, threw a party at his ranch in Central Texas. The senator's staff and aides were in attendance, as well as some honored guests. Mr. Johnson decided to exhibit his brand new, prize Hereford bull for his guests and asked my dad to arrange for the bull and a cow to conduct a "demonstration." The long and the short of it was that the cow was willin', but the bull was not. Mr. Johnson blamed my dad for the bull's failure to perform and fired him (not the bull) on the spot.

I've never been able to confirm that one, either, but anecdotes in Robert Caro's multi-volume biography[2] of Lyndon Johnson strongly suggest that this sort of thing would have been entirely in character for the former president.

> "The ability to tell a story well is an essential attribute of a good lawyer. [...] a lawyer's ability to persuade is directly connected with her ability to convey the essence of her point."

The ability to tell a story well is an essential attribute of a good lawyer. Whether the circumstance is a presentation to a jury, a client, a homeowner's association or a board of directors, a lawyer's ability to persuade is directly connected with her ability to convey the essence of her point.

Storytelling predates humans' ability to write. Some stories are so familiar and so beloved that they can be told to us again and again, always keeping our interest: George Lucas' *Star Wars* from Akira Kurosawa's *The Hidden Fortress*; Kurosawa's *Ran* from William Shakespeare's *King Lear*; *West Side Story* from *Romeo & Juliet*; and, *The Princess Bride* from every European fairy tale.

The rules for presentations (storytelling), legal and otherwise, can be summed up as: tell the audience what you plan to tell them, tell them, and at the end, tell them what you told them. And set it on fire at both ends, while cutting it short in the middle. But stay away from "stretchers!"

Robert F. Flagg *can be contacted at robert.flagg@farmersinsurance.com.*

[1]Caro, R.A. (1983). The years of Lyndon Johnson: The path to power: Chapter 27 (Pp 502 – 515). New York: Vintage

[2]Caro, Robert A., The Years of Lyndon Johnson: The Path to Power. 1982. Alfred a Knopf Inc., New York. (ISBN 0394499735). xxiii + 882 p. + 48 p. of plates: illus. Caro, Robert A., The Years of Lyndon Johnson: Means of Ascent. 1990. Alfred a Knopf Inc., New York. (ISBN 0394528352). xxxiv + 506 pp. Caro, Robert A., Master of the Senate: The Years of Lyndon Johnson. 2002. Alfred a Knopf Inc, New York. (ISBN 0-394-52836-0). xxiv + 1167 pp.

From the Editor

ANGELA M. HUTCHINSON
Editor

For questions, comments or candid feedback regarding ***Valley Lawyer*** *or* ***Bar Notes****, please contact Angela at (818) 227-0490, ext. 109 or via email at Angela@sfvba.org.*

It's Tax Time!

Yes, I know your absolute favorite time of the year. Inside this Business Law issue of *Valley Lawyer*, we address an array of topics related to business, tax and debt collection. Particularly, you may find of interest our feature articles on tips for negotiating leases for tenants, dealing with client competency issues, fraudulent conveyance action and S corporation tax statutes and rules.

As an update from our Communications department, the new SFVBA website has officially launched. Please visit us at www.sfvba.org. We would love to receive your feedback on the site. Also, if you have an interest in advertising on our website or e-newsletter *Bar Notes*, our advertising rates are listed on our website; we offer very reasonable rates. To move forward with placing an ad or if you have further questions regarding advertising, contact Liz Post at (818) 227-0490, ext. 101 or epost@sfvba.org. Advertising with SFVBA may help take your practice to the next level.

I would like to thank all of our members for the great response to our request for articles. We are still in need of a few more features, so please be sure to contact me regarding any articles you propose based on your area of practice and our calendar of topics below.

For future issues, we are very much interested in receiving more stories for our LOL (Laughing Out Loud) section. If you have any light-hearted or funny stories that you would like to share about your experiences in court or with your clients or associates, please email them to me. We also accept comedic poems and collections of quotes for our LOL section.

Our goal for *Valley Lawyer* magazine is to make sure we inform and engage SFVBA members and the legal community-at-large. We strive to provide you with relevant editorial content focused on the law practice experience in the San Fernando Valley.

Have a stressed-free month!

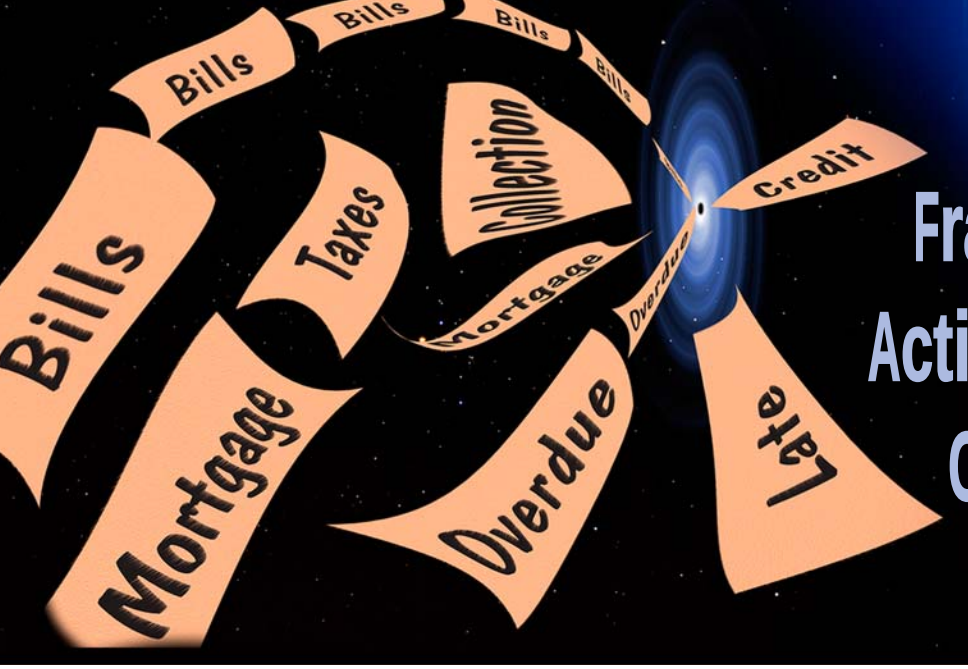
Angela M. Hutchinson

VALLEY LAWYER

2010 EDITORIAL CALENDAR*

MONTH	ISSUE FOCUS/MCLE TOPIC	DUE DATE
JUNE	Alternative Careers/Attorneys Giving Back	April 15
JULY/AUG	Sports Law/Contract Negotiation	May 14
SEPT	Law and Technology/Law Practice Management	July 15
OCT	International Law/Human Rights	Aug. 13
NOV	Work and Balance/Workers' Compensation	Sept. 15
DEC	Members in the News/Year-in-Review	Oct. 15

**Submit completed articles or ideas via email. Word count for Feature Articles is 1,000-2,000. MCLE Articles are 2,500-3,500 words including 20 True and False questions.*



Fraudulent Conveyance Action is a Viable Collection Option

By Craig B. Forry

WHEN REPRESENTING A creditor seeking to recover against a debtor who transfers all of its assets prior to filing bankruptcy or contending it is judgment proof, counsel should consider a cause of action for fraudulent conveyance under Civil Code, sections 3439.04 and 3439.05, against the transferee. Although the statutory causes of action are unique from a general cause of action for fraud under common law or Civil Code, section 1710, they are not the exclusive remedy, and such transfers may also be contested with the common law action.

The Uniform Fraudulent Transfer Act ("UFTA"), codified in Civil Code section 3439, et seq., "permits defrauded creditors to reach property in the hands of a transferee." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663.) A fraudulent conveyance under the UFTA involves "'a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.' [Citation]" (*Kirkeby v. Superior Court* (2004) 33 Cal.4th 642, 648.)

A transfer made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made, if the debtor made the transfer with actual intent to hinder, delay, or defraud any creditor of the debtor. (Civil Code, section 3439.04, subd. (a).) There is no element of the cause of action that requires that the transferee must have actual intent to defraud the transferor's creditors. The element of actual intent applies to the debtor/transferor, and not the transferee. (See CACI 4200 and 4201.)

Whether a conveyance was made with fraudulent intent on the part of the debtor is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer. (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1294 (landlord unsuccessfully sued individual partners of defunct law firm alleging they drained assets by taking partnership draws instead of paying rent.)

Over the years, courts have considered a number of factors, the "badges of fraud" described in a Legislative Committee comment to section 3439.04, in determining actual intent. Effective January 1, 2005, those factors are now codified as section 3439.04, subdivision (b), and include considerations such as whether the transfer was made to an insider (subd. (1)), whether the transferee retained possession or control after the property was transferred (subd. (2)), whether the transfer was disclosed (subd. (3)), whether the debtor had been sued or threatened with suit before the transfer was made (subd. (4)), whether the value received by the debtor was reasonably equivalent to the value of the transferred asset (subd. (8)), whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred. (subd. (9)), and similar concerns.

Setting aside the question of whether defendants properly count the number of factors present, these factors do not create a mathematical formula to establish actual intent. There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other. (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 834 (judgment debtor conspired with her former husband to transfer property to prevent collection on the judgment.)

A claim under the UFTA is not based in contract. Instead, it involves tortious conduct, and claims of conspiracy can be based upon the timing of transfers and the circumstances relating to those transfers. (Filip, supra, 129 Cal.App.4th at 837.)

Civil Code, section 3439.04(a) provides that a transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred.

A well-established principle of the law of fraudulent transfers is that a transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond reach property the creditor otherwise would be able to subject to the payment of the debt. (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 (plaintiff must prove the value of the property fraudulently transferred exceeded encumbrances and senior liens).)

Civil Code, section 3429.08(a) provides a defense to an action under section 3439.04 to a person who took in good faith and for a reasonably equivalent value.

The UFTA and its remedies are cumulative to other remedies available to plaintiffs and not exclusive, and whether an action to set aside a fraudulent transfer is barred by a statute of limitations has to be evaluated under both section 3439.09(c) (four years after transfer was made, or a maximum of seven years if belated discovery), and Code of Civil Procedure, section 338(d) (three years, with no accrual of cause of action until discovery of the facts constituting the fraud).

A separate cause of action is available under Civil Code, section 3439.05, that provides that a transfer by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer, and the debtor was insolvent at that time or became insolvent as a result of the transfer.

There is a split of authority regarding the appropriate standard of proof of fraudulent intent with the Sixth District requiring clear and convincing evidence (*Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123.), and the Second District (*Whitehouse v. Six Corp.* (1995) 40 Cal. App.4th 527, 533-534) and the Fourth District requiring preponderance of the evidence (*Gagan v. Gouyd* (1999) 73 Cal. App.4th 835, 839; *Annod, supra,* 100 Cal. App.4th at 1293.).) In *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 286-293, the California Supreme Court stated that fraud must be proved by a preponderance of the evidence, with the creditor having the burden to prove a fraudulent transfer.

The remedies available are outlined in Civil Code, section 3439.07, and they may include voiding a transfer to the extent necessary to satisfy the creditor's claims, and the equitable remedies of injunction and receivership. In addition, the court has the power to award any other relief that the circumstances may require, which may include punitive damages and attorney's fees. (Section 3439.07(a)(3)(C).) If the only remedy sought is the return of particular assets, and not monetary relief, the action is equitable without a right to a jury trial. However, if the value of the assets is sought, then there is a right to a jury trial. (*Wisden v. Superior Court (Sims)* (2004) 124 Cal. App.4th 750, 757.)

A fraudulent conveyance claim affects title to or the right to possession of specific real property, and it supports the recording of a notice of pendency of action that is more commonly referred to as a lis pendens. (*Kirkeby v. Superior Court (Fascenelli)* (2004) 33 Cal.4th 642.) Recording of a lis pendens is essential to provide notice of the action affecting the real property and thereby preclude its sale during the action to a bona fide purchaser.

Under the right circumstances, the UFTA remains a viable collection effort that should be considered whenever a debtor transfers its assets to prevent collection of a debt. It should always be considered when the transfer precedes the filing of bankruptcy by the debtor because the claim can be made directly against the transferee.

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Dealing with Client Competency Issues

What's An Attorney To Do?

By Jonathan I. Reich

AFTER MANY YEARS OF working together, what happens when an attorney begins to realize that one's client has aged, he (or she) is no longer as sharp as he once was or, even worse, may be starting to loose the ability to properly manage his affairs. Whether it is questionable business or investment decisions, excessive or questionable spending, or nothing more than forgetfulness regarding important matters, an attorney wants to do whatever he can to help protect one's client from himself. What, however, can be done in light of the express restrictions which California law places on an attorney's ability to communicate with others without the express consent of the client?

Must an attorney sit idly by while the client takes actions which are clearly not in his best interest? Can the attorney alert the client's family? Can the attorney discuss the client's affairs and the events that have caused a concern? Sadly, in most instances, California law prohibits attorneys from taking any of these steps even though the client, if he was thinking clearly, would very likely have encouraged his attorney to do so.

The Rules

The starting point in this analysis is understanding the restrictions which California law places on an attorney's ability to discuss client matters with others. A strong network of rules in California limits an attorney's ability to communicate with others, even close family members, regarding a client's affairs absent the express, informed, consent of the client. One of the most basic duties of an attorney is "(t)o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."[1] A member's duty to preserve the confidentiality of client communications is of "paramount" importance and a "hallmark" of the attorney-client relationship.[2] Such confidences cannot be revealed "without the informed consent of the client …"[3]

In addition to these strict controls on the circumstances under which an attorney may disclose the confidences of a client, the attorney-client privilege prohibits an attorney from disclosing a confidential communications from clients. "In California the privilege has been held to encompass not only oral or written statements, but additionally actions, signs, or other means of communicating information."[4] The mandate to maintain the confidentiality of client communications is so strong that in some instances the courts will even dismiss claims by or against a lawyer where the case cannot be prosecuted or defended without revealing confidential client information.[5] While there are a few exceptions to these rules, none of them directly address the situation of an attorney who wants to alert the family of a long time client to the client's potential inability to manage his affairs.[6]

Sadly, there is a dearth of authority in this area to guide attorneys. The closest thing to direct authority on the issue is an opinion of the California Bar Standing Committee on Professional Responsibility.[7] This Opinion considers the question of whether an attorney may institute conservatorship proceeding on a client's behalf, but without the client's consent, where the attorney believes that it is the client's best interest. The Standing Committee concluded, based primarily on Business & Professions Code §6068(e), that to do so would violate the attorney's absolute obligation to keep safe the confidences of the client and would, in short, be "unethical". The Standing Committee further concluded that to institute such a proceeding would also create a conflict of interest, in violation of Rule 3-310, and prevent the attorney from competently carrying out the purpose for which he was employed, a violation of Rule 3-110.[8] While initiating, or even assisting in, a conservatorship proceeding for one's client is a far more extreme course of action than a call or calls with a client's family, the principal would appear to be the same. Speaking with a client's family without the client's consent necessarily requires a disclosure of the client's confidences.

The Solution

All, however, is not lost. Two different doctrines allow an attorney some latitude to try and protect a client from himself while, at the same time, satisfying his professional obligations. The first is the joint client exception to the attorney-client privilege. Business & Professions Code §962 provides that:

> "Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, or the successor in interest of any of them, may claim a privilege under this article as to communications made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest)

and another of such clients (or his successor in interest)."

In other words, where two clients, such as a husband and wife, consult an attorney together, neither may invoke the attorney-client privilege against the other. In situations where a husband and wife consult an attorney with respect to their estate planning and other shared legal needs, the attorney has latitude to discuss matters of their common interest, such as diminishing capacity of one spouse, with either of them. A similar situation may exist where two business partners have retained an attorney for their common legal needs.[9] If an attorney becomes concerned about the conduct of one spouse, which necessarily impacts the other, the attorney has the latitude to discuss this concern with the unaffected spouse.[10]

The second, and perhaps surer, avenue by which an attorney may act is to address the issue head on and to obtain the client's informed consent to disclose the client's confidences to others, such as the client's family members, before the need to do so arises. While it may be difficult to obtain a client's consent to speak with family members after a potential problem (which the client likely does not acknowledge exists) has developed – i.e., it is always difficult to approach a client and tell him that it is believed he is suffering from diminished capacity, it is much less difficult to do so when the client is clearly thinking clearly.

Such consent could be obtained in a variety of different ways. In appropriate situations, such as in discussing estate planning matters, it is not a great leap to discuss with the client what the client would like the attorney to do if, sometime in the future, the attorney begins to believe that the client may be in trouble. Whether it is something as simple as a written instruction that the attorney is, in such cases, authorized to discuss the client's affairs with designated family members, or it is a more complex set of instructions to follow, this approach would allow the attorney to act when necessary to protect his client.

Another option would be to incorporate language allowing the attorney to communicate with family members into the client retainer letter or into some other document being prepared for the client, such as a will or trust. Just like the letter of instructions, incorporating language into the client's will or trust that will allow the attorney, in appropriate circumstances, to discuss the clients affairs with his family or other designated individuals and assist them in protecting the client at the time that the client may be most in need of help.

A variation of incorporating this type of language would be to include in a client's estate plan documents the appointment of a "protector" who the attorney (or others) could approach if they felt the client was in need of assistance. The protector, who is chosen by the client, could then, subject to whatever guidelines the client may have established, act with the assistance of the client's counsel. While some clients may object to the need to appoint someone to that role, many will undoubtedly recognize the wisdom of doing so.

The benefit of letters of instruction, provisions in a client's estate planning documents, or even the appointment of a protector, is that they provide greater freedom of action, and less actual power, than other devices such as a springing durable power of attorney or an advance health care directive. Rather than conferring any real power or control over the clients affairs (which it is assumed that the client might not want to do), instructions of these type simply allow the attorney to bring issues to the attention of the client's family, and to discuss those issues, so that the client's family can, if they so desire, take steps to protect their loved one.

Likewise, instructions of this type do not require a finding of "incapacity" on the part of the client. A finding of incapacity is often difficult to obtain, requiring doctors and possibly even court proceedings, it is one which may be resisted by the client.[11] Additionally, it is often the case that a client, while not legally incompetent, can still be sufficiently impaired as to need assistance and/or protection.

Most people would probably acknowledge that if they became impaired to the point of being unable to manage their affairs, they would want someone, usually their family, to assist them. Most people would probably also acknowledge that they would want their attorney to assist and advise their family in providing the assistance that they needed. All of this can be accomplished with a few simple strokes of the pen (or the word processing keys). Without those strokes, the attorney, at least, cannot act.

Jonathan I. Reich *is a member of De Castro, West, Chodorow, Glickfeld & Nass, Inc. in Westwood and has tried numerous cases in both court and arbitration. He can be reached at jreich@dwclaw.com.*

[1]Business & Professions Code §6068(e).
[2]Rules of Professional Conduct Rule 3-100, Discussion Note [1].
[3]Rules of Professional Conduct Rule 3-100(A). While Rule 3-100 contains an exception where the disclosure is "necessary to prevent a criminal act that the ... [attorney] ... reasonably believes is likely to result in death of, or substantial bodily harm to, an individual..." that exception applies in only limited circumstances, requires a number of hurtles to be satisfied, and is not applicable to situations where the client needs to be protected against his own failing faculties.
[4]*Dietz v. Meisenheimer & Herron*, (2009) 177 Cal. App.4th 771, 786, citing *Solin v. O'Melveny & Myers*, (2001) 89 Cal.App.4th 451, 456.
[5]See: *McDermott, Will & Emery v. Superior Court*, (2000) 83 Cal.App.4th 378 (shareholders of a corporation could not bring a malpractice action against the corporations outside counsel because the attorney-client privilege, held by the corporation and not the plaintiffs, prevented the attorneys from defending themselves), and *General Dynamics Corp. v. Superior Court*, (1994) 7 Cal.4th 1164 (in-house attorney's suit for wrongful termination dismissed because his claims could not be established without breaching the attorney-client privilege).
[6]The exceptions include the prevention of criminal acts discussed in Rule 3-100(B) and the limited waiver of the attorney-client privilege set forth in Evidence Code §958 for malpractice actions.
[7]Formal Opinion No. 1989-112.
[8]A subsequent ruling by the Bar Association of San Francisco, Opinion 1992-2, reaches somewhat of a different conclusion, specifically that "[a]n attorney who reasonably believes that a client is substantially unable to manage their own financial resources or resist fraud or undue influence, may, but is not required to, take protective action with respect to the client's person and property." While it is well intentioned, it is unlikely that this opinion will protect an attorney from claims of violating Business & Professions Code §6068(e) or Rule 3-100(A).
[9]Just how far the joint client exception will allow an attorney to go is uncertain, especially in situations involving other than a husband and wife. Additionally, even in joint client situations an attorney must, under Rule 3-310 avoid any representation which is adverse to either one the joint clients.
[10]Of course, if one of the "joint" clients dies or is not longer a client, this exception does not apply.
[11]Because of the rules which limit a doctor's ability to discuss patients and their medical issues with others, doctor's are likewise limited in their ability, and reluctant, to become involved in such issues.

S Corporation – Rules for Listed Property

How It Affects an Employee's Tax Treatment

BY C. VALERIE IBE

TAX SEASON IS THE MOST dreaded time of the year for most Americans, be it the April 15 deadline, for individuals, March 15 for corporations or whatever the tax year-end may be. Knowing what and when to deduct is another issue. For S corporations, the deadline for filing the 2009 taxes is March 15, 2010, unless an extension is sought.

An S corporation election is made by filing a Form 2553 (Election by a small business corporation) with the Internal Revenue Service (IRS) signed by all the shareholders. The election to be an S corporation is attractive to eligible small businesses that want to retain a separate corporate existence while avoiding the double taxation that comes with being a C corporation. An S corporation's income, losses, deductions and credits flow through to the shareholders' personal tax returns and are taxed at the individual's tax rate. This could be a significant tax savings for an individual on his or her personal tax return especially if there are losses in the early stages of an S corporation's life. These losses act to deflate or reduce the income that could have been otherwise taxed on the personal tax return.

To be eligible as an S corporation, the corporation must have only one class of stock, have no more than 100 shareholders, be a domestic corporation and not be a partnership, corporation or non-resident alien.

Listed Property

Listed property according to IRS Publication 946 includes the following:

- Passenger vehicles that weigh 6,000 pounds or less
- Any other property that is used for transportation unless it is an excerpted vehicle such as clearly marked police cars, fire trucks, ambulances, etc.
- Cellular telephones
- Property generally used for entertainment, recreation or amusement
- Computers and other peripheral equipment unless they are used only at a regular business and owned or leased by person operating the business.

An employee of a business can claim a depreciation deduction for the business use of his vehicle whether he owns or leases the vehicle. Two requirements must be met: 1) the use must be for the employer's convenience; and 2) the vehicle must be required as a condition of employment.

To determine if the vehicle use is for the employer's convenience, one has to look at all the facts and circumstances surrounding the employment. The test is met if it is for a substantial business reason of the employer. Another test would be to determine if the employee can adequately perform his regular job without the use of the vehicle? If the answer to the question is no, then it is presumed that it is a condition of employment and therefore meets the business use requirement. An example would be a pizza deliveryman that works for a pizza company. Without a vehicle, he would not be able to deliver pizza to customers, which is his regular job. Therefore, the use of his vehicle is for a substantial business reason of the employer. It is also for the employer's convenience and condition of his employment.

Allocation of Business Use

An employee determines the percentage of business use of his automobile by calculating the total mileage that was driven for business purposes and dividing them by the total number of miles that was driven for all purposes (business and personal) during the year. Commuting miles which are the mileage it takes one from home to place of employment or vice-versa are not included in the calculation of business mileage. If the business use is not more than 50%, one cannot claim section 179 expense or the special depreciation allowance(additional depreciation deduction one can claim in addition to the regular depreciation).

Generally, the IRS requires a written statement to support the business purpose of a trip. But, it can generally be determined from the surrounding facts and circumstances. An adequate log is required to keep track of the mileage that the employee incurred in meeting clients/customers. It is advisable to get a book or trip sheet that is used to keep track of all the goings and comings to support the business purposes.

Depreciation Deduction

The basis for depreciation of Modified Accelerated Cost Recovery System property (MACRS) is the property's

cost or other basis multiplied by the percentage of business/investment use. A property's basis in this case, an automobile would include all the expenditure whether cash or the value of items that were paid in order to acquire the automobile including the sales tax, shipping and freight. To figure the depreciation deduction under MACRS, one has to determine the depreciation system, property class, placed in service date, basis amount, recovery period, convention, and depreciation method that applies to the property. Recovery period is the number of years over which one recovers the cost of his property or basis. The recovery period for a passenger automobile is five years.The depreciation deduction one can claim for a passenger automobile is limited each year with the exception of leased vehicles.

The IRS each year brings out the maximum depreciation allowable on automobiles based on the date they were placed in service. If the business use of the automobile is less than 100%, then the maximum depreciation allowable is reduced by the business use percentage. For instance, assuming the maximum depreciation allowable on an automobile that was placed in service in 2008 for the 2009 tax year is $10,960. Assuming also that the business use was 70% determined from the business mileage calculation in the previous section, then the depreciation deduction will be reduced by the 70% business use, making the maximum allowable depreciation deduction to come out to $7,672.

There are so many different rules on the tax treatment of passenger automobiles. More information on the tax treatment can be found at the IRS website (www.irs.gov/publications/p946). Also, rules for an S corporation's employee's tax treatment of listed property also apply to other forms of business entities.

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Business Owners Weigh Options
Can Incorporating Save Money?

By Carrie L. Cresante

ENTERING A NEW TAX SEASON, BUSINESS owners weigh the question of whether they can save money by incorporating. There are multiple reasons why now may be the best time to start a business. For some, it is because a reshuffling of the economy has left them inspired to do something new. For others, they are tired of what they have been doing and are ready for a change. There are still others who are just ready to be their own boss and take control of their own destiny. Finally, there are some who just want to save money on taxes.

Many who are looking to start a new business want to know whether they should form a corporation, LLC or an S corporation. They want to know which one is best, which one will save them money, or which one will make them money. The answer depends on what kind of business, how the business owner would like to arrange their tax liabilities and the other realities that come with business ownership and operation.

The corporation is America's most popular and oldest form of business entity. However, with the tax advantages of limited liability companies and S corporations, other types of business entities are quickly becoming more popular.

Corporations are an excellent way to protect owners against personal liability for losses and taxes, because they function as separate legal entities. More than just a legal entity, corporations can own property, file taxes, sue, be sued, sign contracts, and exist apart from its owners. A corporation which is properly formed and operated as a corporation assumes a separate legal and tax life distinct from its shareholders. A corporation pays taxes at its corporate income tax rates and files its corporate tax forms each year. However, when the profits are passed on to the shareholders in the form of dividends, the individual stockholders are responsible to pay taxes on these. This is both a benefit because the corporation is responsible for its own profits and losses, and a detriment because taxes are paid twice (once by the corporation for profits and once by the shareholder for dividends). Because of these two levels of tax, some find corporations less desirable than other business entities (sole proprietorships, partnerships, S corporations, or LLCs).

Depending on one's business and income levels, sole proprietorship or partnerships may offer tax savings. Because the taxation of sole proprietorships and partnerships is determined by the tax bracket that applies to each individual owner, a comparison of tax rates that apply can give an idea of which form of business would save taxes at a given income level. However, the downside of sole proprietors and partnerships and sometimes deterrent is the lack of limited liability protection.

Those looking for limited liability protection and pass-through taxation often turn to the S corporation. An S corporation begins its existence the same way that a C corporation begins its existence. However, after the corporation has been formed, it may elect S corporation status by submitting IRS form 2553 to the Internal Revenue Service. Once this filing is complete, the corporation is taxed like a partnership rather than as a separate entity. The income is "passed-through" to the shareholders for purposes of computing tax liability. Therefore, a shareholder's individual tax returns will report the income or loss generated by an S corporation.

However, not everyone can qualify for S corporation status. There are certain threshold requirements that must be met. First, a corporation must timely file IRS Form 2553 with the IRS. To take effect for the current tax year, the S corporation election must be made by March 15 of the current year. However, a "new" corporation may make the filing at anytime during its tax year so long as the filing is made no later than 75 days after the corporation has begun conducting business as a corporation, acquired assets, or issued stock to shareholders (whichever is earlier). To qualify for S corporation status, the corporation must: be filed as a U.S. corporation; maintain only one class of stock; maintain a maximum of 100 shareholders; be comprised of shareholders who are individuals, estates or certain qualified trusts, who consent in writing to the S corporation election; and not have a shareholder who is a non-resident alien. Failure to observe any of these requirements could revoke S corporation status.

Similar to the S corporation is the LLC, which fits somewhere between a partnership and a corporation. LLCs offer liability protection similar to a corporation, but has operational and tax advantages similar to a partnership. An LLC combines the limited liability shield, the structural and financial flexibility of partnerships, and the tax benefits of "pass-through" taxation. As a pass-through entity, the LLC pays no income tax. Instead, items of taxable income, gain, loss, and deduction pass through the LLC to its owners, and are reported by them on their separate income tax returns. Similar to the corporation, an LLC is recognized as a separate legal entity from its "members." Thus, an LLC can own property and commit itself to contractual obligations.

IRS Treatment of the One-Member LLC

An LLC with only one member/owner is automatically considered to be a sole proprietorship unless an election is made to be treated as a corporation via IRS Form 8832. Thus, the sole member of an LLC will file Form 1040 (U.S. Individual Income Tax Return), and will include Form 1040, SCHEDULE C (Profit or Loss from Business) with his/her tax returns. Regardless of how many members the LLC has, the LLC may file an Election to be Treated as a Corporation for Purposes of Taxation by using IRS Form 8832.

IRS Treatment of the Multiple-Member LLC

An LLC with two or more owners will automatically be considered a partnership unless an election is made to be treated as a corporation as described above. A partnership that has not elected to be taxed as a corporation will file Form 1065 (U.S. Partnership Return of Income). Where an election is made to be treated as a corporation, Form 1120 (U.S. Corporation Income Tax Return) is filed.

Corporations, S corporations and LLCs all offer liability protection and ways of arranging profits and losses that can be more beneficial than plain partnerships. Although, for those not looking for limited liability protection, the simple structure of the sole proprietor or partnership may be ideal.

The issue of business formation tends to surface around tax season each year. Many legal practitioners may be faced with client questions regarding new businesses and having a basic understanding of the types of entities and potential tax savings may come in handy. In making the decision as to which would best suit a business's needs, some factors need to be weighed such as whether stock will be issued publicly, how tax liability will be dealt with, and how much organizational maintenance is manageable. The bottom line is that for those thinking about starting a business there are many options available depending on the unique business and taxation needs.

Carrie L. Cresante, *Director of Legal for My Corporation Business Services, Inc., a company that focuses on forming corporations and LLCs, practices corporate and intellectual property law. She can be reached at ccresante@mycorporation.com.*

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MCLE ARTICLE AND SELF-ASSESSMENT TEST
By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 23.

Unlawful Debt Collection

By Nate Bernstein

RECENTLY, AN ATTORNEY represented a creditor in a complex breach of contract and fraud action. Without consulting counsel prior to setting up the loan transaction, the creditor loaned a substantial amount of money with an interest rate of 5% per month on a short term basis of six months.

The creditor's attorney sued the debtor for repayment on the loan, demanded a lawful rate of interest (less than the contract amount), and the debtor filed a cross-complaint based on the state usury laws, and based on the federal RICO unlawful debt statute. This was the first time the attorney encountered the RICO unlawful debt statute. The clients had no idea that their interest rate for the short term loan may be unlawful, and the clients were neither "loan sharks" nor "shake down artists" in any sense of the term. The opposing counsel painted the creditors as "loan sharks."

During the course of defending the RICO statute, and in filing two demurrers, a lot was learned about how one law and motion court approached its analysis of the RICO statute, and why the statute is a very powerful scheme to counter attack an aggressive creditor.

The RICO Unlawful Debt Statute – Elements of the Prima Facie Case

The federal RICO statute has a criminal law component, and a civil law component. A party could be charged criminally by the United States Attorney, and or sued civilly by a private injured party for damages.

Generally speaking, the amorphous federal RICO statute addresses many racketeering activities including bribery, theft from interstate shipment, extortionate credit transactions, laundering of monetary instruments, and union corruption. All of the RICO related offenses cannot be named in this article, but one can review 18 U.S.C. Sec. 1961(1) for the definition of "racketeering activity." What was once viewed as an anti-mafia statute, designed to break hierarchical crime families, organized crime, and syndicates, RICO has been used as a civil weapon to sue for civil damages over variety of non-mafia activities allegedly conducted by small and large businesses and corporations. See generally 70 ALR Fed. 538. Because of the wide web of the statute, there have been calls by academics for "RICO reform" to scale back the breadth of the statute.

The federal unlawful debt statute, 18 U.S.C. Sec. 1962(a), reads, "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer."

Section (b) states, "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

Section (c) states, "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt."

Section (d) reads "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

The federal definitional companion statute, 18 U.S.C. Sec. 1961(6) defines

"unlawful debt" as a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate."

The federal definitional companion statute, 18 U.S.C. Sec. 1961(4) defines "enterprise" to include any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

In reviewing these statutes, the RICO statute defines an "unlawful debt" to be gambling related activity or lending that is usurious under State or federal law. The term "enterprise" is defined rather broadly and loosely.

Subject Matter Jurisdiction

The RICO unlawful debt cause of action could be filed in state or federal court. State courts have jurisdiction over cases arising under federal laws unless Congress has made express provision to the contrary, or there is a disabling incompatibility between the federal claim and state court jurisdiction. Concurrent jurisdiction is therefore presumed unless rebutted by a strong showing of the need for exclusive jurisdiction. See *Cianci v. Superior Court* (1985) 40 C. 3d 903, 221 C.R. 575, 710 P.2d 375.

The Related State Usury Law

The usury law prohibits certain creditors from contracting and charging unlawful interest to debtors. The source of the state usury law and some exemptions are stated in Article XV Section 1 of the California Constitution. As amended in 1979, Section 1 sets the maximum rate as follows: (a) for money, goods, or things in action for use for personal, family, for use primarily for personal, family or household purposes 10 %; (b) for any other uses the higher of (1) 10 % or (2) 5 % plus the Federal Reserve of Bank of San Francisco's rate on the 25th day of the month preceding the earlier of the date the contract was contracted for or was executed. The law provides a cause of action for a debtor to sue a creditor to recover usurious interest payments, and for treble damages. Recovery of loan principal is not an available remedy.

The law also may be used defensively as an affirmative defense to reduce the amount of interest that is being sought by a plaintiff creditor. The usury rule of law has largely been swallowed by exceptions, which make many types of creditors, immune from its provisions.

One important usury law exemption to know if an attorney practices real estate law is the constitutional exemption for loans made or arranged by licensed real estate brokers. This law was codified and implemented by Cal. Civil Code Sec. 1916.1, added in 1983, and amended in 1985. The statutory exemption applies for loans whether they are secured directly or collaterally by liens on real property, and also provides that "made or arranged" includes any loan made by a licensed real estate broker acting as a principal or as an agent for others, whether or not the broker is acting within the course and scope of his or her license. *Garcia v. Wetzel* (1984) 159 C.A. 3d 1093, 1097, 1098, 206 C.R. 251.

Federal preemption of state usury laws is governed by 12 U.S.C.A. Sec. 86a, Note (Pub. L. No. 96-221, Sec. 512), 12 U.S.C. Sec. 1735f-7, 12 U.S.C.A. Sec. 1735f-7, 12 U.S.C.A. Sec. 1735f-7 Note (Pub. L. No. 96-221, Sec. 501, as amended, and Pub. L. No. 96-221, Sec. 528, 529), and 15 U.S.C. Sec. 687(i)(3). The interest rates allowed by federal law, and the loans to which they apply are governed by 12 U.S.C. Sec. 86a, 1785, and 1831d, and 15 U.S.C. Sec. 687. See Cal. Pleading and Practice, Usury.

The federal RICO usury law works in conjunction with the state usury law because 18 U.S.C. Sec. 1961(6) defines "unlawful debt" as a debt usurious under state or federal law, where the usurious rate is at least twice the enforceable rate. Thus the federal RICO unlawful debt law does not preempt the state law, but rather it can incorporate the state interest rate ceiling limits.

Civil Remedies Available under Federal RICO Statute

11 U.S.C. Sec. 1964 states, "(c) Any

person injured in his business or property by reason of a violation of section 1962 of this chapter may sue there for in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final." The federal unlawful debt statute has teeth because of the liability for costs and reasonable attorney's fees incurred by the injured party.

Practicing with the Federal RICO Unlawful Debt Statute

Some courts treat the statute as one of strict liability. There is no "scienter" or "intent" requirement. It is easier to prove than intentional tortuous conduct because there is no subjective notions of state of mind – either the interest rate is unlawful or it is not. If the interest rate is unlawful, then damages are trebled.

With the earlier mentioned claim in superior court, the requirement of "interstate commerce" is a rather weak, de minimus requirement, and it was easy for the plaintiff to satisfy the pleading requirement. In the case, the law and motion court would not throw out the debtor's cross-complaint based on the fact that both parties were intrastate, completed their loan transactions in Los Angeles County, and the loan transaction had nothing to do with crossing state lines or interstate commerce. The law looks at such innocuous factors as if the defendant purchased office supplies from an out-of-state supplier or if the defendant uses the telephone for long distance calls. These facts have nothing to do with the loan transaction, but the plaintiff used them to establish the "interstate commerce" pleading requirement.

The "enterprise" requirement may also be easy for a plaintiff to survive demurrer – even a mom and pop business, or a married couple, could quality under the statutory definition. But is this what Congress intended when it wrote the statute to combat organized crime families when mob bosses can delegate loan sharking and extortion to street lieutenants?

Thus, in a California superior court, a civil RICO claim for an unlawful debt may be hard to defeat on demurrer for failing to state a cause of action.

The remedies section of the statute permits the debtor to sue for treble damages and attorney's fees. Because of the threat of attorney's fees, the federal RICO law is a stronger "threat" to a creditor than the California usury law. By contrast, the California usury law does not provide attorney's fees for the injured party.

The statute at section 18 U.S.C. Sec. 1961(6) refers to the law of usury under state or federal law. The debt does not have to be associated with gambling or with mafia extortion situations.

Strategic Planning For Creditors and Debtors

As an attorney representing a creditor who is not a credit card company or a finance company, and who is not exempt under the usury laws, be sure to review client's interest rate and loan term prior to executing the loan transaction. Make the loan docs "usury proof." Calculate the interest on an annual basis even if the loan that is given is "short term" – i.e., 3 months or even 6 months. Also, look carefully if the loan or transaction has penalties (i.e., 2% fee per month for late payments – on an annual basis this can be interpreted as usurious). If usury can be eliminated or RICO problem on the front end, the client will be grateful.

A creditor's base damages exposure depends on the amount of usurious interest charged, and the trebling of that amount – that amount could be small or large depending on the amount of interest collected and the time since the inception of the loan. If the RICO action goes to trial, the biggest threat of the RICO usury statute could be that it allows for the recovery of reasonable attorney's fees. This may be substantial at the end of the day.

If an attorney represents a debtor that may be the victim of a "RICO" violation, attorney should consider bringing a cross-complaint under the state usury law, the RICO unlawful debt statute, and another cause of action for common count "money had and received." The client will have more leverage in settlement negotiations to resolve the outstanding debt.

Nate Bernstein is the managing attorney of Nate Bernstein & Associates, a law firm in Encino which specializes in the areas of complex real estate litigation, commercial litigation and bankruptcy matters. He can be reached at (818) 995-9475 and natebernstein@netzero.net.

MCLE Test No. 21

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

1. The RICO unlawful debt statute is only a criminal law charging statute.
   True
   False

2. The RICO unlawful debt statute can only be filed in federal district court.
   True
   False

3. The RICO unlawful debt statute only involves gambling debts.
   True
   False

4. The RICO unlawful debt statute may bootstrap and incorporate state usury laws.
   True
   False

5. The RICO interstate commerce requirement is a tough burden for a plaintiff to meet.
   True
   False

6. The RICO unlawful debt statute is not filed with a state usury claim.
   True
   False

7. RICO only covers mafia extortion activity.
   True
   False

8. RICO violations may include activities pertaining to "union corruption."
   True
   False

9. RICO statutes may provide liability for double the lawful rate of interest.
   True
   False

10. Under the RICO statute, the plaintiff must prove an intent to defraud the debtor.
    True
    False

11. Interest rates allowed under federal law may trump state usury laws.
    True
    False

12. Banks and credit card companies have no clout in Sacramento when it comes to crafting usury law loopholes.
    True
    False

13. There is a California statutory usury law exemption for loans arranged by real estate brokers.
    True
    False

14. The source of the state usury law and some exemptions are stated in Article XV Section 1 of the California Constitution.
    True
    False

15. Under California usury laws, the injured party can obtain punitive damages.
    True
    False

16. Under the California usury laws, the injured party can recover loan principal as well as interest.
    True
    False

17. Under the California usury laws, the injured party can recover attorney's fees.
    True
    False

18. If an attorney represents a creditor who is not a credit card company or a finance company, and who is not exempt under the usury laws, attorney should review client's interest rate and loan term prior to executing the loan transaction.
    True
    False

19. Filing a cross-complaint under federal RICO may give the debtor some leverage in settlement negotiations.
    True
    False

20. The real estate broker usury exemption is codified under Cal. Code of Civil Procedure Sec. 1916.5.
    True
    False

MCLE Answer Sheet No. 21

INSTRUCTIONS:

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

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METHOD OF PAYMENT:

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5. Make a copy of this completed form for your records.
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Phone_____
State Bar No._____

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

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

11 Practical Tips for Negotiating Leases for Tenants

By Jeffrey A. Kohn

LEASES CAN BE CRITICAL assets that enable a business to have long-term geographic advantages over competitors. But, leases can also be obligations that drain profit from a business. And, even if a lease merely provides a place for a business to exist, leases are often the most significant single long-term obligation of a business.

It is important to understand each provision and negotiate diligently, especially because the initial lease draft is often favorable to the landlord. However, counsel for the tenant may have an opportunity to strike a meaningfully, more favorable agreement, especially if counsel knows what to look for in the agreement, knows what terms are reasonable/unreasonable for the particular lease type/location and brings experience and creativity to negotiating the key provisions.

Here are some practical considerations for tenant's counsel to explore when negotiating a lease:

1. Tenant Entity and Guarantees. It is critical to determine who the tenant can or should be. Terms of the lease which may have relatively minimal importance if the tenant is a thinly capitalized LLC or corporation may take on tremendous importance if the tenant is a well-capitalized corporate entity or individual. Try to eliminate personal guarantees. If they are required, try to limit them in time or amount.

2. Lease term. Confirm the length of the lease, including start date, end date, and if there are renewal or termination options. The tenant may not want to be locked into a long-term lease. So, a shorter term lease with renewal options may be a better solution. Or, if it is a long-term retail lease, try to include kick-out provisions.

3. Rent. Review the estimated total cost of leasing with the potential tenant, including all charges and expenses over the term. If the estimated total cost of leasing is above the client's expectations, use this as an opportunity to attempt to negotiate lease pricing down. The price per square foot may be a very important factor but is not always the most important factor. A lease with a higher price per square foot may actually be a better deal. For instance, a particular location with a high price per square foot may have space that is much more efficient for the business (like a more efficient layout), may have much lower additional charges (lower CAM, taxes or insurance) or may not require any expenditure by the tenant for tenant improvements.

4. Gross Lease or Net Lease. The total cost of the lease will be determined, in part, by the type of the lease. In a gross lease, the tenant pays a flat monthly amount, and the landlord pays all (or most) expenses normally associated with ownership, such as utilities, repairs, insurance and taxes. In a net lease, the tenant pays certain charges in addition the "base" rent paid by the tenant. There are many different types of net leases. If the lease is a net lease, be sure to fully understand what happens when costs change over time and who is responsible for cost increases.

5. Common area maintenance ("CAM") charges. If the tenant is responsible for CAM expenses, understanding the tenant's percentage of the CAM charges and excluding inappropriate CAM charges can be very important. There are stories about landlords passing some strange expenses through to tenants in the CAM expenses (like their children's mortgage payments). So it is prudent to review the allowable CAM language carefully and to have this section be as clear as possible with regard to exclusions. Also, check the lease to determine how the total square feet of the building will be determined for purposes of calculating the percentage share of the CAMs that the tenant is obligated to pay. Tenants will likely want their share of CAM charges to be based on the total square footage of the building rather than on the leased square footage or some other amount. And, it is important for tenants to have at least basic audit rights with regard to CAM charges.

6. Taxes and Insurance. Check to see if tax and insurance costs pass directly through to the tenant. If the owner has

owned the property for a long time, be aware that the property may have a very low assessed value for property tax purposes (for instance, in California, due to Proposition 13). And, if the building is sold, the cost of taxes and insurance for the tenant could increase substantially depending on the tenant's rights and obligations under the lease.

7. Indemnification. Counsel should be sure to fully understand all of the indemnification rights and obligations in the lease. Indemnification can be a large contingent liability. But, the need for indemnification by the landlord can be critical. Although each situation is unique, a general guideline is that the tenant should strive to avoid providing indemnification for things that are wholly outside of the tenant's control. Once the indemnification provisions have been negotiated, it is important that the tenant clearly understand how to conduct their operations strictly in accordance with its responsibilities under the lease so as not to trigger its indemnification obligations. Also, be aware that indemnification provisions often appear in various sections in the lease and there are likely to be different levels of responsibility for each party depending on the type of lease, the type of business of the tenant and the specific provision of the lease.

8. Subleases and Allowable Uses. Understand whether the tenant has the option to sublease or assign the lease to another business, and if so, on what conditions. Counsel for the tenant should attempt, at a minimum, to require that the landlord not unreasonably withhold consent to a sublease or assignment of the lease. Also consider whether the tenant is allowed to change its type of business at the leased premises, since the tenant's business may change or expand during the life of the lease.

9. Exclusivity and Nondisturbance. If the tenant is counting on the fact that it will be the only business to perform a certain service or sell a certain product at the property, the lease should prevent the landlord from leasing space to a competitor. Also, be on the lookout for leases that force tenants to relocate within a project, or that require tenants to move or sign a new lease if the property is sold or undergoes foreclosure. This may not be what the tenant had in mind.

10. Special Requirements. Does the tenant's business require any special accommodations? If so, make sure they are specifically described and approved by the Landlord in the lease. For instance, if the tenant is using radiation oncology equipment and needs special concrete walls and floors to meet regulatory guidelines, counsel will want to make sure that the lease gives the tenant the authority to improve the walls and floors so that they meet regulatory guidelines.

11. Landlord Approval. Counsel will want to confirm what type of approval rights the landlord has with regard to tenant improvements, and if such rights are reasonable. If the landlord's approval rights are unlimited and the landlord is not reasonable, the tenant could experience a real problem. In a recent office lease (negotiated by another firm), the landlord retained full and unlimited discretion to approve all tenant improvements. So, after the Tenant installed the agreed color of carpet in its space, the landlord came by to see the tenant improvements, and did not like the carpet because of the type of stitching (which was cut pile). The tenant was obligated to replace all the carpet in the entire suite with carpet that had loop stitching. This was a major disruption and a significant unexpected expense. So, be sure to know what to expect going in.

Jeffrey A. Kohn specializes in real estate and business law. He currently practices with Halling + Sokol LLP and previously practiced with Manatt, Phelps & Phillips. He can be reached at (818) 222-4994 or jkohn@hallingsokol.com.

Santa Clarita Valley Bar Association

"Hard To Find" CLE Credits

BRIAN E. KOEGLE
SCVBA President

WHEN THE SCVBA'S EXECUTIVE COMMITTEE was preparing the annual schedule for the monthly membership meetings in 2010, the focus turned to what member attorneys most want and need from these presentations. Yes, the food is outstanding at the TPC Valencia on the third Thursday of the month (rotating between a lunch and dinner menu). Certainly, the opportunities to network and mix and mingle with fellow attorneys are also incredibly beneficial. However, at the end of the day, the Committee realized that many SCVBA members attend the events in order to obtain their required continuing legal education (CLE) credits necessary to maintain their good standing with the State Bar of California.

Every three years, California attorneys are required to complete a total of 25 hours of continuing legal education as a condition of continued active membership in the bar. Of those 25 mandatory hours, at least half (12.5 hours) must be earned during a live presentation by an approved CLE provider, and a minimum of four (4) hours of Legal Ethics, one (1) hour of Detection/Prevention of Substance Abuse or Mental Illness, and one (1) hour of Elimination of Bias in the Legal Profession must be incorporated into those 25 hours.

As such, all attorneys, regardless of practice area, regardless of specialty and regardless of experience are required to satisfy these threshold obligations.

Unfortunately, the three specific categories of required continuing education (Ethics, Substance Abuse and Elimination of Bias), are often the hardest to find, especially in a live study forum.

Consequently, the SCVBA decided to focus on providing these three "hard-to-find" credits to members (and non-members for an increased fee) during regular monthly membership meetings in 2010.

In February, the SCVBA welcomed Professor Robert Barrett, who instructs a course on professional responsibility at the University of West Los Angeles School of Law. Professor Barrett's presentation, "Avoiding the Bar's Attention: A Quiet Client is a Happy Client," provided all attendees with one hour of legal ethics credit.

In April, the SCVBA will be welcoming Stephanie Weiss from Strategies for Success and ACTION Family Counseling to present a one-hour presentation on "Substance Abuse in the Workplace." This event will satisfy the attendees' entire three-year obligation for substance abuse prevention credit, and will take place at TPC Valencia (26550 Heritage View Lane, Valencia) on April 15 beginning at 6:00 p.m.

Finally, in June, the SCVBA will be presenting a one-hour seminar which will satisfy the required elimination of bias credit. The speaker and event time have not yet been finalized, but please check SCVBA's newly re-vamped website at www.scvbar.org for more information as the event draws closer.

Bringing value to members is one of the primary focuses for the SCVBA, and providing members with the opportunity to obtain three hours of those difficult specialized credits is one way the Santa Clarita Valley Bar Association is striving to raise the bar in 2010!

For more information, please visit www.scvbar.org.

Child Waiting Room Grand Opening

On March 5, attorneys and judges celebrated the grand opening of the San Fernando Courthouse Child Waiting Room. The San Fernando Valley Bar Association, Attorney Referral Services and the Valley Community Legal Foundation of the SFVBA donated $50,000 in seed money to build the room.

L-R: SFVBA President Robert Flagg, North Valley Supervising Judge Robert Schuit, County Supervisor Zev Yaroslavsky, SFVBA Secretary Alan Sedley and Trustee Adam Grant

Photos by Scott L. Harms, County of Los Angeles Photographer

SFVBA Director of Public Services Rosie Soto playing with Hannah Post Friedman

Supervisor Yaroslavsky watching over 4-year-old Hannah Friedman

L-R: VCLF President Steve Holzer, Supervisor Yaroslavsky, Judge Schuit and Robert Flagg

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29-year San Fernando Valley Family Law practice; huge client list; untapped potential for post-judgment income. Owner retiring. Call (818) 891-6775 for details.

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CANOGA PARK
Three separate first floor window office suites available. Square footage from 625 to 1350, monthly rent from $750 to $2,000. B-class building with covered parking and security system. Call Joanne at (818) 264-0610.

ENCINO
CPA firm with window offices available for sublease. Call Michael at (818) 385-4999.

WOODLAND HILLS
Two 11'x14' window offices available in terrific penthouse suite on Ventura Blvd. Great views. Receptionist, library, kitchen and conference rooms. Call Jim (818) 716-7200, ext. 141.

Beautiful Building in WarnerCenter. Sublease space in Woodland Hills. 500-1000 s.f.; 3 separate offices, plus open area. $2/s.f. New build-out with new carpet and paint. Will consider splitting between two tenants. Please call Jane Plant at (818) 501-2833 for information.

Window office in newly built suite. Amenities include internet and shared conference room. Secretarial space and receptionist available. Some referrals. Call Michelle or Julie (818) 884-9700.

SUPPORT SERVICES

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SFVBA Member	$40	$1.60
Non-Member	$80	$3.20

All classified ads must be submitted typed and received by the first day of the month preceding publication. Mail contract and first month payment (downloadable from www.sfvb.org) to Valley Lawyer, 21250 Califa Street, Ste. 113, Woodland Hills, CA 91367 or fax to (818) 227-0499. Call Liz Post for information on display advertising at (818) 227-0490, ext. 101.

Calendar

Probate & Estate Planning Section
Pet Trust Law to Protect Pets

APRIL 13
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorney Kenneth Kossoff will discuss this issue of growing concern not only to pet owners, but the attorneys who must represent them.

MEMBERS
$35 prepaid
$45 at the door
1 MCLE HOUR

NON-MEMBERS
$45 prepaid
$55 at the door

ADR Section
Practice Development Tactics

APRIL 15
6:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

This Section returns under the chairmanship of Darryl Graver, who will discuss what tactics you should use in ADR and how to get the results you desire.

MEMBERS
$30 prepaid
$40 at the door
1 MCLE HOUR

NON-MEMBERS
$40 prepaid
$50 at the door

Santa Clarita Valley Bar Association
Substance Abuse in the Workplace

APRIL 15
6:00 PM
TOURNAMENT PLAYERS CLUB
VALENCIA

Stephanie Weiss from Strategies for Success and ACTION Family Counseling gives a one-hour presentation on "Substance Abuse in the Workplace." Please RSVP to rsvp@scvbar.org.

MEMBERS
$40 prepaid
$50 at the door
1 MCLE HOUR PREVENTION OF SUBSTANCE ABUSE

NON-MEMBERS
$50 prepaid

Intellectual Property, Entertainment & Internet Law Section
Valuing Intellectual Property

APRIL 16
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Chris Hamilton of Arxis Financial will discuss business valuation particularly in regard to intellectual property. This seminar should be of interest to anyone practicing in the intellectual property, business law or litigation arenas.

MEMBERS
$30 prepaid
$40 at the door
1 MCLE HOUR

NON-MEMBERS
$40 prepaid
$50 at the door

Women Lawyers Section
Marketing Your Practice on $1 a Day

APRIL 20
12:00 NOON
OLIVA RESTAURANT
SHERMAN OAKS

Lisa Miller will instruct the group on how to best market your practice without breaking the bank.

MEMBERS
$30 prepaid
$40 at the door

NON-MEMBERS
$40 prepaid
$50 at the door

Criminal Law Section

APRIL 20
6:00 PM
UNCLE CHEN RESTAURANT
ENCINO

MEMBERS
$35 prepaid
$45 at the door
1 MCLE HOUR

NON-MEMBERS
$45 at the door
$55 at the door

Workers' Compensation Section
Internal Medicine: Cause v. Risk

APRIL 21
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Dr. Arthur Lipper will discuss the elements of internal medicine that are applicable to workers' compensation cases.

MEMBERS
$35 prepaid
$45 at the door
1 MCLE HOUR

NON-MEMBERS
$45 at the door
$55 at the door

Litigation Section
Navigating the Courts

APRIL 22
6:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Los Angeles Superior Court Administrator Terri Johnson and Civil Division Manager Rick Thrall will discuss defaults and how to avoid getting your paperwork kicked back!

MEMBERS
$35 prepaid
$45 at the door
1 MCLE HOUR

NON-MEMBERS
$45 at the door
$55 at the door

Family Law Section
The *Elkins* Case: How Is It Going to Change Your Discovery and Evidentiary Hearing

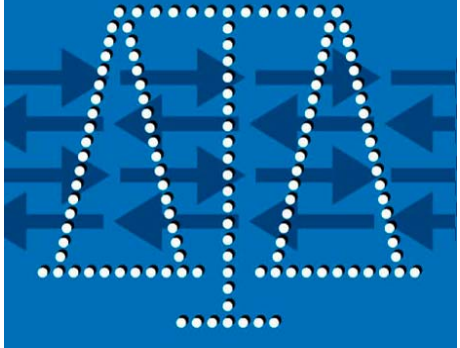
APRIL 26
5:30 PM
MONTEREY AT ENCINO RESTAURANT
ENCINO

One of the most watched cases by family law attorneys, Commissioner Steff Padilla and attorney Christine Gille of Goldberg & Gille will discuss how the *Elkins* case is going to impact your discovery and evidentiary hearings.

MEMBERS
$45 prepaid
$55 at the door
1 MCLE HOUR

NON-MEMBERS
$55 prepaid
$65 at the door

Valley Community Legal Foundation of the SFVBA Annual Law Day Dinner



Building a Better Community Amidst The Challenges of the 21st Century

Saturday, June 5, 2010
at 6:00 PM
CBS Studios, Studio City
Silent and Live Auction

The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. To register for an event listed on this page, please contact Linda at (818) 227-0490, ext. 105 or events@sfvba.org.

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Friday, April 23, 2010 12:00 Noon – 1:00 PM PDT
(Register at https://www1.gotomeeting.com/register/495524920)

Wednesday, June 16, 2010 12:00 Noon – 1:00 PM PDT
(Register at https://www1.gotomeeting.com/register/315303329)

Monday, October 25, 2010 12:00 Noon – 1:00 PM PDT
(Register at https://www1.gotomeeting.com/register/994545769)

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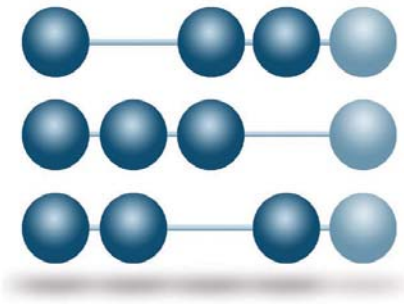

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