VALLEY LAWYER

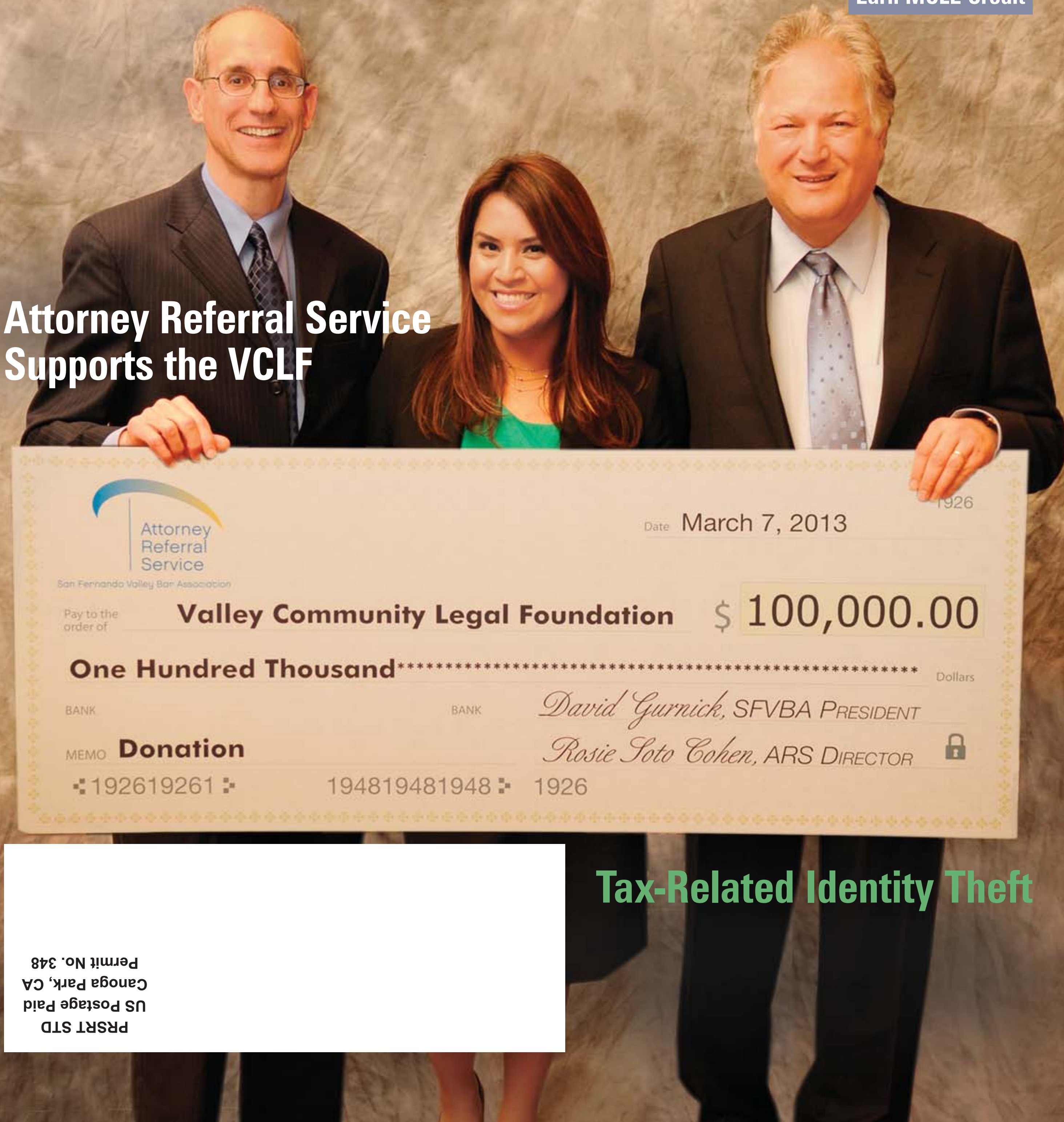
APRIL 2013 • $ 4

A Publication of the San Fernando Valley Bar Association

2013 Tax Law Changes

Earn MCLE Credit

Attorney Referral Service Supports the VCLF

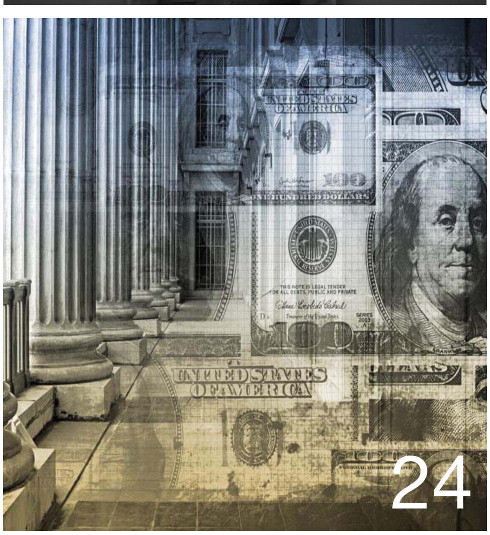


Tax-Related Identity Theft

PRSRT STD
US Postage Paid
Canoga Park, CA
Permit No. 348

www.sfvba.org

VALLEY LAWYER
Taxation
A Publication of the San Fernando Valley Bar Association



On the Cover: SFVBA President David Gurnick (left) and Director of Public Services Rosie Soto Cohen (middle) presented VCLF President Etan Lorant (right) with a check for $100,000 at Judges' Night on March 7, 2013.

VALLEY LAWYER

SAN FERNANDO VALLEY BAR ASSOCIATION

5567 Reseda Boulevard, Suite 200
Tarzana, CA 91356
Phone (818) 227-0490
Fax (818) 227-0499
www.sfvba.org

EDITOR
Irma Mejia

Valley Lawyer is published 11 times a year. Articles, announcements, and advertisements are due by the first day of the month prior to the publication date. The articles in Valley Lawyer are written for general interest and are not meant to be relied upon as a substitute for independent research and independent verification of accuracy.

Graphic Design Marina Senderov
Printing Southwest Offset Printing

State of the Valley Bar

DAVID GURNICK
SFVBA President
dgurnick@lewitthackman.com

APRIL IS THE MIDDLE OF THE SFVBA'S fiscal year. How are we doing? So far this year, it feels like our Bar Association is doing quite well. We have 17 substantive law sections. Nearly all are meeting regularly. Look on page 8 for a calendar of this month's section meetings. Our sections provide our members opportunities for involvement in substantive areas of law and are good places for continuing education and networking. It is not too hard to become a leader of our sections, which is a service to colleagues and may also help your career. Our sections are an important service which the Bar delivers to members.

Our magazine, *Valley Lawyer*, continues to be a good communication tool for members and the printed voice and image of the SFVBA. Recently expanded to 48 pages, *Valley Lawyer* provides members a place to be a published author, which is another way to make you a leader in your field. Our magazine is also a source of revenue from advertising sales. We very much appreciate our advertisers and encourage SFVBA members to consider patronizing them.

Atkinson Baker Court Reporters, Narver Insurance and the Krycler Ervin Taubman & Walheim accounting firm are wonderful sponsors of our bar association. They provide quality services to our members and are always willing to assist in our programs. Sponsors help us financially too. SFVBA members should likewise consider patronizing our sponsors. Scott Ervin from the Krycler Ervin firm (818-995-1040), Andrea Gale and Joi Jibotian from Atkinson Baker (800-288-3376) and Wes Hampton, Samantha Chung and Debra Mondragon from Narver Insurance (626-943-2200) are delighted to hear from you.

Fewer than 25 referral services in Los Angeles County are properly certified by the State Bar. Our Attorney Referral Service (ARS), now in its 65th year of certification, has provided referrals continuously since 1948. We accept calls from the public and refer cases to capable attorneys who serve on our substantive law panels. This is a community service, helping individuals solve problems through our legal system. And it is a service to our colleagues. Our referrals generate fees for panel members. In our adversary legal system, our referrals of legal matters to ARS panel members often have the side effect of also generating legal work for lawyers on other sides of disputes. And our ARS receives 15% of the lawyer's fee.

We use these referral fees to pay for operations and public services. Last year our ARS received a particularly large fee, which enabled us to donate $100,000 to the Valley Community Legal Foundation last month. The Foundation will use that money for charitable purposes here in the Valley. Valley lawyers can be proud of our Attorney Referral Service and should consider joining one or more of our referral panels.

Our Bar committees provide more involvement opportunities for members. A committee of lawyers led by Barry Goldberg and Anne Thompson oversees the ARS. Litigators participate in our Bench-Bar Committee, led by Jim Felton and Caryn Sanders, which meets regularly with judges. Our delegates to the Conference of California Bar Associations, led by Steve Holzer, work on legislation. Our Diversity Committee, chaired by John Stephens, seeks to increase diversity in our profession. An Editorial Committee oversees this magazine. The Horace Mann Committee, led by Seymour Amster and Anie Akbarian, operates a youth program for future lawyers. The Programs Committee, chaired by Kira Masteller, plans our major events. The Membership & Marketing Committee, led by Carol Newman and Mark Shipow, promotes our Bar Association and attracts new members.

The list feels endless. Wonderful Natasha Dawood chairs our section for New Lawyers. Three fine family law attorneys—Barry Harlan, Cynthia Berman and Sandra Etue—arrange for family lawyers to serve as mediators in our courts, helping litigants resolve disputes, and helping to reduce court caseloads. Trusts lawyer Alice Salvo performs the same role with probate lawyers in the Probate Court.

Six years ago we started an attorney-client fee arbitration program. On those unfortunate occasions when a dispute over fees arises, the attorney and client can have the matter resolved, without going to court, by our arbitrators who are volunteer lawyers and lay persons from this community. The Mandatory Fee Arbitration Committee, chaired by Myer Sankary and Sean Judge, oversees this program.

The SFVBA offers continuing legal education to members through various means: section meetings, our annual MCLE Marathon, MCLE articles in *Valley Lawyer* and a wonderful wide-ranging lending library of recorded MCLE presentations. Recently, Linda Temkin, our Director of Education & Events, opened the cabinet and wowed me with the number and variety of recorded MCLE Programs our members can borrow. We also provide Fastcase, the legal database, as a free resource to members.

I am happy to report that we have a balanced budget. Our financial resources are modest, but have been sufficient for our operations. We depend on membership dues and revenues from sponsors, advertisers and events to fund our ongoing programs.

A range of information and services can be accessed through our website, www.sfvba.org. Also our seven member professional staff is at the SFVBA office Monday through Friday to serve you. I have asked our staff to be as accommodating as possible to our members' requests. They are skillful, efficient and friendly representatives of our Bar.

It seems that every year our SFVBA presidents report we are doing well. It turns out, these reports are all true. That is why our Bar Association has been serving our members and representing the lawyers of the Valley for 87 years.

Calendar

Employment Law Section
Manage Without Fear

APRIL 3
12:00 NOON
SFVBA CONFERENCE ROOM

Attorney Jeffrey Thomas discusses counseling, disciplining and terminating employees. This program gives employers and their counsel key practical guidance. When should the employer take action on poor performance, bad attitudes and dishonesty? How can employers terminate employees with a minimum of risk? When should counsel get involved? (1 MCLE Hour)

Probate & Estate Planning Section
A Homerun Approach to Data Security

APRIL 9
12:00 NOON
MONTEREY AT ENCINO RESTAURANT

Protecting client data and IP is the basis for running the bases in this presentation. SingerLewak Business Risk & Technology Services Manager Rick Mark gives a presentation that will illuminate the boundaries of data security and how to compute more safely outside the office. (1 MCLE Hour)

Business Law Section
Are you Giving More than You Get?

APRIL 10
12:00 NOON
SFVBA CONFERENCE ROOM

Does your firm or client's business have a website? Are you aware of the current laws regarding mobile app and online privacy? Attorney Adam D.H. Grant addresses the privacy laws involved in maximizing your online presence and discusses what you and your clients need to know about avoiding the imposition of statutory penalties and attorney fee awards. (1 MCLE Hour)

Litigation Section
Keys to Persuasive Writing: Write Better Briefs!

APRIL 10
6:00 PM
SFVBA CONFERENCE ROOM

Think you know everything you need to know about legal writing? Think again. Most judges decide a motion or petition just "on the papers." Attend this seminar and pick up valuable tips that could help you win your case! Attorney Blair Schlecter, who has extensive experience in appellate work and legal research, will lead attendees through a brief writing bootcamp. (1 MCLE Hour)

Intellectual Property, Entertainment & Internet Law Section
Trademark Basics

APRIL 11
12:00 NOON
SFVBA CONFERENCE ROOM

Attorneys Bob Finkel and John Stephens lead a discussion on the basics of trademark law. They will cover from how, when and why one should file a trademark application to what to do when someone else is using a mark that is identical or confusingly similar. (1 MCLE Hour)

Diversity Committee
Update on Same Sex Marriage Cases

APRIL 12
12:00 NOON
SFVBA CONFERENCE ROOM

Carol Newman and John Stephens will discuss the latest on the two same sex marriage cases pending before the U.S. Supreme Court. The speakers discuss what the cases are about, what could happen in the Supreme Court and why this is the central civil rights issue of our time. (1 MCLE Hour)

University of West Los Angeles
Bloodless Litigation

APRIL 15
6:00 PM
UWLA CHATSWORTH CAMPUS

Judge Huey Cotton and attorney Mark Emeli will help attorneys recognize cultural differences; improve attorneys' communication with their clients; improve communication between litigants, mediators and judges; and reduce bias or the appearance of bias in the judiciary. Register online at https://www.uwla.edu/uwla/campus/mcle-bloodless-litigation. (2 MCLE Hours Elimination of Bias)

Taxation Law Section
Whistleblowers and the IRS

APRIL 16
12:00 NOON
SFVBA CONFERENCE ROOM

Certified Tax Specialist Kneave Riggall gives an update on the IRS's significant whistleblower programs. (1 MCLE Hour)

Workers' Compensation Section
Case Law Update

APRIL 17
12:00 NOON
MONTEREY AT ENCINO RESTAURANT

Former Chief Judge Mark Kahn gives an overview of the latest workers' compensation case law decisions. (1 MCLE Hour)

Santa Clarita Valley Bar Association

APRIL 18
12:00 NOON
TOURNAMENT PLAYERS CLUB VALENCIA

Seminar presented by DUI attorney Douglas H. Ridley. (1 MCLE Hour)

Family Law Section
Valuation of Marital Standard of Living

APRIL 22
5:30 PM
MONTEREY AT ENCINO RESTAURANT

Judge Christine Byrd and CPAs Paul White and Susan Carlisle offer an update on the marital standard of living. Attorney Arna Pillemer will moderate. (1 MCLE Hour)

Bankruptcy Law Section
Ins and Outs of Section 1129

APRIL 25
6:00 PM
SFVBA CONFERENCE ROOM

Attorney Raymond Aver discusses how to confirm a plan in Chapter 11. The program will give a step-by-step analysis of section 1129(a)(1) to (16) and relevant case law. (1 MCLE Hour)

The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. Visit www.sfvba.org for seminar pricing and to register online, or contact Linda Temkin at (818) 227-0490, ext. 105 or events@sfvba.org. Pricing discounted for active SFVBA members and early registration.

Executive Director's Desk

ELIZABETH POST
Executive Director
epost@sfvba.org

Spring Celebrations and New Beginnings

ADMINISTRATIVE PROFESSIONALS DAY CELEBRATES administrative assistants, office managers and other office professionals for their contributions to the workplace. According to Hallmark, U.S. Secretary of Commerce Charles Sawyer proclaimed the first National Secretaries Week as June 1-7, 1952 and designated the original National Secretaries Day as Wednesday, June 4, 1952. In 1955, the dates were changed to the last full week of April and in 2000, the name of the unofficial holiday was updated to Administrative Professionals Day/Week to reflect the changing job titles and responsibilities in today's office.

The SFVBA will recognize the administrative professionals of the Valley's law firms at our Annual Administrative Professionals Day Luncheon on April 24 at Braemar Country Club. The event will honor an Attorney Boss of the Year and Administrative Professional of the Year. Valley lawyers are encouraged to attend with, and show your appreciation to, your staff.

Once again the Bar team will be in attendance to celebrate our own professional staff, recently expanded by one. Noemi Vargas is the SFVBA's new Member & Client Services Coordinator. Noemi provides administrative support to the Bar's membership and Attorney Referral Service programs. She was born and raised in the San Fernando Valley. Noemi is currently pursuing a Masters in Public Administration from CSUN after earning a B.A. and Masters in Political Science at Chatham University in Pittsburgh. She also aspires to go to law school and become a public interest attorney.

"As the Member & Client Services Coordinator, I hope to help expand the resources available to a broader range of members and clients," said Noemi in accepting her new position. "It is important to reach out to a wider net. There are still many people who do not know about the resources the San Fernando Valley Bar Association has to offer. That is why I will reach out to new individuals and will work to increase our current membership. Thank you for this great opportunity!"

Consensus ad idem

Valley Lawyer is pleased to announce the results of our February survey:

What is the all-time greatest legal movie?

1. *To Kill a Mockingbird* (1962) 27.2%
2. *Twelve Angry Men* (1957) 19.3%
3. *My Cousin Vinny* (1992) 16.3%
4. *A Few Good Men* (1992) 7.2%
5. *Philadelphia* (1993) 5.4%
6. *Witness for the Prosecution* (1957) 4.2%
7. *Anatomy of a Murder* (1959) 3.6%
8. *Erin Brokovich (2000)* 2.4%
9. *Legally Blonde (2001)* 1.8%
10. *Michael Clayton (2007)* 1.2%

Honorable Mentions: *The Verdict* and *The Paper Chase*

Congratulations to Otis Hayes III, Law Student Member from UWLA! Hayes is the lucky survey participant who won the drawing for gift cards to Fandango and the Yard House.

Lessons from Mandatory Fee Arbitration

The Case of the Unconscionable Fee and Missing Attorney

By Sean E. Judge

This column summarizes cases that have been resolved through the SFVBA Mandatory Fee Arbitration Program. The goal of this column is to provide brief case studies of fee disputes in the hope that these examples will help Bar members avoid similar situations in their own practice.

Factual Summary

A client initially filed a breach of contract action in *pro per* arising from the breach of an artist's publicity agreement. A few months later, the client retained an attorney to represent her on a contingency fee basis. The case was ultimately tried and the client received a judgment of just over $20,000.

The client contended that the fee agreement provided for 25% of the net recovery if the case was resolved 45 days or more before trial and 35% if the case was resolved thereafter. The attorney contended that the percentage was 35% if the matter was resolved 45 days or more before trial and 60% thereafter. Based on the attorney's disbursements from his trust account, he received just under $14,000 and client received just over $6,000.

The Law

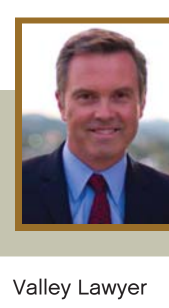
The dispute centered on two issues: the failure of the attorney to provide a copy of the fully executed agreement to the client as required under Business and Professions Code Section 6147 and allegation that the fees charged were unconscionable.

Section 6174 requires that an attorney who contracts to represent a client on a contingency fee basis shall, when the contract is entered into, provide a duplicate copy of the agreement, signed by both the attorney and the client or the client's guardian or representative. Attorney's failure to comply with Business and Professions Code Section 6147 made the agreement voidable at the option of the client. As a result, the attorney's fees were calculated on the basis of quantum meruit.

The arbitrator ultimately found the 60% contingency fee to be unconscionable. California Rules of Professional Conduct Rule 4-200 prohibits an unconscionable fee to be charged. Under subsection B of Rule 4-200, unconscionablity of a fee shall be determined by eleven factors, including the experience of the attorney, the novelty of the matter (where the case is based on novel or complex facts or theory) and the amount of time involved and the result. In this case, this was a straightforward breach of contract case, with simple evidence and testimony that did not come close to justifying a 60% fee.

The attorney, while filing an objection to the SFVBA's jurisdiction and later requesting removal of the case to the California State Bar's program, did not follow the correct process for requesting such a removal. The attorney requested removal to the State Bar program on the basis of Rule 12.1 of the SFVBA Rules of Procedure for Fee Arbitrations, which requires the submission of a declaration under penalty of perjury asserting the factual basis for removal, and the timely submission of any further information to the State Bar. Attorney failed to comply with either of these requirements, so the matter proceeded with the SFVBA.

Perhaps thinking that he could simply ignore the SFVBA arbitration and request a trial after arbitration, attorney failed to appear at the hearing. The arbitrator found that this failure to appear was willful. The arbitration proceeded as non-binding, allowing either party to reject it in accordance with Business and Professions Code Section 6204. However, where a proceeding is non-binding and



Sean E. Judge is the principal of Judge Mediation in Woodland Hills and a Trustee of the SFVBA. He is currently co-chair of the Mandatory Fee Arbitration Committee. Judge can be reached at sean@judgemediation.com.

Bulletin Board

The Bulletin Board is a free forum for members to share trial victories, firm updates and other professional accomplishments. Email your 30-word announcement to editor@sfvba.org by the fifth of every month for inclusion in the following month's issue. Late submissions will be printed in the subsequent issue. Limit one announcement per firm per month.

Daniel Park and **Julia Sylva** are pleased to announce the formation of Park & Sylva. The firm has an office in Encino and specializes in business law. www.parksylvalaw.com

---

Jan Frankel Schau announces the publication of her first book, *View from the Middle of the Road: A Mediator's Perspective on Life, Conflict and Human Interaction* (AuthorHouse, February 2013).

Mark Melton has joined Kurtz Law Group, APC as Of Counsel and will be working at the firm's offices in Woodland Hills and Santa Barbara. mmelton@kurtzfranchiselaw.com

---

Certified Immigration Specialist **Ron Tasoff** obtained a 3 year extension of H-1B status for a "capped out" engineer based on her husband's approved I-140 petition. Previously, 3 year extensions would have only been granted to the husband.

Ken Rose has launched Rose Mediation to mediate employment and business disputes throughout California: www.rosemediation.us. (619) 822-1088. Rose also is President of The Rose Group, an employment law firm.

Debra L. Sheppard & Associates has relocated their office to 6355 Topanga Canyon Boulevard, Suite 235, Woodland Hills, CA 91367. Debra practices community association, real estate and business law.

George N. Seide, an AV-Rated, Certified Family Law Specialist in Calabasas was peer voted a Family Law Super Lawyer for the seventh straight year. (818) 222-0010 gseide@adelman-seide.com

---

Victoria D'Cotledge has launched Victoria D'Cotledge Legal Research & Writing, specializing in drafting persuasive motions, briefs, writs and appellate papers for attorneys/law firms/legal departments. (818) 835-3553. Victoria@DCotledgeLRW.com

a party willfully fails to appear, "that party shall not be entitled to a trial after arbitration."

The Takeaway

Attorneys must remember to comply with Business and Professions Code Section 6147 when entering into a contingency fee agreement. To avoid ambiguity, both the attorney and client must sign it and each must have a copy. While the issue of unconscionable fees is fairly easy to understand, attorneys should review Rule 4-200 of the California Rules of Professional Conduct to ensure their fees are in compliance.

The SFVBA's Rules of Procedure for Fee Arbitrations, approved by the State Bar Board of Governors in 2007, provides that the program may have jurisdiction over MFA cases if at least one of the attorneys involved in the dispute has an office within Los Angeles County or Ventura County or maintained an office in those counties at the time the legal services were rendered. If removal to the State Bar program is sought, strict compliance with the removal process must be followed. Removal to the State Bar program is granted only under limited circumstances, namely if evidence exists that a fair hearing cannot be obtained through a local bar's program.

Finally, even in non-binding arbitrations, simply thinking that a request for trial after arbitration is automatic is no justification for a failure to attend a hearing. If such failure is found to be willful, that right becomes unavailable to the party who refused to appear.

Say **Thank You** to your valued staff by treating them to the

San Fernando Valley Bar Association Administrative Professionals Day Luncheon

& Presentation of Attorney Boss of the Year and Administrative Professional of the Year

- Buffet Lunch
- Networking and Fun
- Door Prizes
- Goody Bags

Wednesday, April 24, 2013

12:00 Noon to 1:30 PM

Braemar Country Club

4001 Reseda Boulevard • Tarzana

Sponsored by

LexisNexis® · The Matloff Company, An Insurance and Financial Services Company · Atkinson Baker, America's Court Reporters · Narver Insurance · NOW Messenger Service

Make your reservation today, and let us take care of the rest!

Please reserve ______ $45 Attorney Ticket(s) and ______ $35 Staff Ticket(s).
Reservations received after Friday, April 19, 2013 are $10 more per person.

Firm ____________________

Name(s) ____________________

Phone ____________________ Email ____________________

Credit Card # ____________________ Exp. Date ____________________

Authorized Signature ____________________

Fax registration to (818) 227-0499 or return this coupon with check or credit card payment to: SFVBA, 5567 Reseda Boulevard, Suite 200, Tarzana, CA 91356.

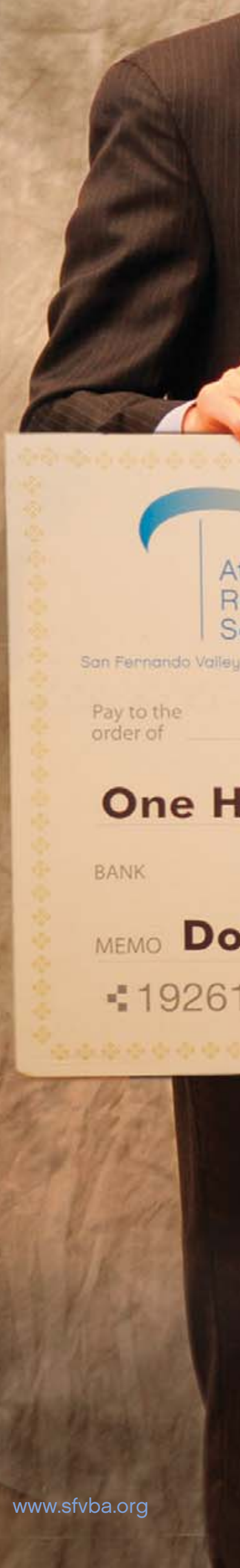
Call (818) 227-0490, ext. 105 for reservations and sponsorship opportunities.

To nominate an Attorney Boss of the Year or Administrative Professional of the Year, please submit to the Bar offices the following: (1) your name and the name of your boss or staff; (2) letter of recommendation; and (3) a short biography of the individual being nominated. Honorees are selected by a panel of three judges (comprised of members of the SFVBA Membership & Marketing Committee, Board of Trustees and staff). Judges' selections are based solely on the letters submitted. Attorney bosses must be members of the SFVBA. DEADLINE FOR SUBMISSIONS IS APRIL 20, 2013. WINNERS TO BE ANNOUNCED DURING LUNCHEON.

Attorney Referral Service Gives $100,000 to the Valley Community Legal Foundation

By Irma Mejia

After a year of phenomenal success, the Attorney Referral Service of the SFVBA gives back by supporting the Valley Community Legal Foundation, the Valley's preeminent charitable organization for the promotion of the law and its institutions.




ttorney
eferral
ervice
Bar Association
Date March 7, 2013
1926
Valley Community Legal Foundation
$ 100,000.00
lundred Thousand***
Dollars
BANK
David Gurnick, SFVBA President
nation
Rosie Soto Cohen, ARS Director
19261
194819481948
1926

AS THE SAN FERNANDO VALLEY BAR Association (SFVBA) honored Valley judges at last month's Judges' Night, it also celebrated a monumental announcement: the donation of $100,000 by the Bar's Attorney Referral Service (ARS) to the Valley Community Legal Foundation (VCLF). Director of Public Services Rosie Soto Cohen presented VCLF President Etan Lorant with the check amid loud applause from the audience. "The ARS may not be wealthy but its reserves are healthy," said Soto Cohen during the presentation.

Receiving the check on behalf of the Foundation, Lorant expressed the gratitude felt by the VCLF's Board: "The Foundation is very grateful for the donation and are excited to put it to use funding scholarships and community programs."

The donation was spurred on by the largest settlement ever reported by an ARS panel attorney. In 2011, the ARS received news that one of the personal injury cases it referred had settled for $6 million. With an extra skip in his step, the panel attorney who worked on the case hand delivered the 15% referral fee to the ARS office.

That case is only one of thousands in which the public has turned to the ARS for legal assistance. "There is a heartening lesson to be learned here," says Soto Cohen. "When very serious harm occurs, the public turns to the ARS for legal assistance." The ARS has been licensed by the State Bar of California for 65 years and is approved by the American Bar Association.

Indeed, the ARS is a valuable public service—one that also pays dividends to the attorneys involved. Many of the cases referred by the ARS earn significant fees for the panel attorneys. In turn, the ARS receives a percentage of those fees and gladly reinvests it in public programs and organizations, like the VCLF. VCLF will ultimately return the gift to the Valley community in the form of scholarships and grants to law-related programs. "It's the gift that keeps on giving," says Soto Cohen. "The ARS takes pleasure in its philanthropic endeavors; it is a measure of the program's success."

The decision to make such a large donation to the VCLF was an easy one for the SFVBA Board of Trustees. The VCLF was formed in 1979 as the charitable arm of the Bar. Since then, the Bar has been a tremendous supporter of the Foundation's programs. For more than 30 years, the Foundation has worked tirelessly to promote respect for the law and its institutions. It has supported the legal education of hundreds of local aspiring attorneys and awarded grants to many deserving organizations, including Haven Hills, West Valley Boys & Girls Club and the Northridge Hospital's Center for Assault Treatment Services.

By making the donation without restrictions, the ARS and the Bar's Board of Trustees confirm its strong faith in the Foundation's vision and direction, as well as in its Board of Directors. "I hope this donation will bring out the very best ideas from the Foundation's volunteers," says Soto Cohen. "And those ideas will help inspire even more people in the community—individuals who often have so much promise but so few opportunities."

The VCLF Board, comprised of volunteers, several of whom are SFVBA Past Presidents, sitting judges, attorneys, CPAs and community members, is ready to put the money to good use. While the Board is currently reviewing several potential projects, one of its main goals is to expand its work with veterans. "We are very interested in launching a legal workshop for veterans, a project we've considered since our inaugural Veterans Day Golf Tournament last year," said Lorant.

VCLF will also strengthen its scholarship program, one of its cornerstone projects. Currently, the program funds scholarships for University of West Los Angeles students who work or live in the San Fernando Valley. The ARS's donation will allow the Foundation to expand the program to other local schools and increase the number of Valley students who will benefit from the scholarships. Lorant also hopes to establish an endowment to make the scholarship program self-sufficient.

Another project on the Foundation's slate is the continuing support of the Children's Waiting Rooms in the Valley's courthouses. The Foundation was instrumental in establishing these safe havens for children in Van Nuys in

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

2008 and San Fernando in 2010. The Children's Waiting Rooms offer children safe care and protection from the often bitter litigation in which their parents are engaged. "I specifically joined the VCLF because of the Children's Waiting Room," explains Lorant. "It was that great project which made me and many others want to get involved."

Lorant hopes to be able to work with the courthouses to ensure this vital service continues to benefit the many children that visit our local courthouses.

In addition to its existing programs, the Foundation will be taking over the Bar's Blanket the Homeless project and will be working closely with the ARS to continue operating the "Ask a Lawyer" legal clinic. "It makes sense for the VCLF to take over Blanket the Homeless because as a charitable organization, it is best equipped to handle this community program which is funded entirely by donations," explained Soto Cohen.

Blanket the Homeless is one of the oldest and most popular charitable Bar event. The ARS's "Ask a Lawyer" clinic operates during the blanket distribution day and is run by volunteer attorneys who are eager to offer assistance to the public. The Foundation's involvement will help increase public turnout and provide greater opportunities for attorneys to get involved in this important project

While the VCLF Board considers various projects, one thing is certain: 100% of the donation will be dedicated to funding the VCLF's public programs. Lorant was very clear: "All of our events, like the upcoming Law Day Gala, generate enough proceeds to cover their own expenses. This donation from the ARS will not be used to pay any of the Foundation's operating costs."

The impact of the donation will truly be felt throughout the VCLF's programs. Already the Foundation has a busy line-up with two major fundraisers planned for June and November. The June event is the return of its Law Day Gala, set to take place at the Autry National Center, celebrating the law and honoring local heroes of law enforcement. The November event will be its Annual Veterans Day Golf Tournament, a popular and successful fundraiser.

Whatever projects the Foundation will add to its current busy repertoire, they will be carried out with great commitment and much passion by its volunteers. Readers who are interested in volunteering for the VCLF are encouraged to contact Lorant at esq8ton@aol.com. The VCLF's newly expanded coffers can only do so much; it's the volunteers that truly make the programs a success and a benefit for the community at large.

Annual Judges' Night Dinner

Thursday, March 7, 2013 • Warner Center Marriott

Photos by Paul Lester

1. 38 judges pose with the evening's honorees. **2.** SFVBA President David Gurnick (left), Director of Public Services Rosie Soto Cohen and Immediate Past President Alan Sedley (far right) presents VCLF President Etan Lorant with a check for $100,000. **3.** Judges Jerold S. Cohn and Mary Thornton House receive city proclamations by Los Angeles City Councilman Dennis Zine (center). **4.** From left to right, Judge Huey Cotton, Judge Joseph Brandolino and Judge Tom Robinson. **5.** SFVBA Trustee Gerald L. Fogelman (left) with SFVBA Past President Robert F. Flagg. **6.** SFVBA member William J. Kropach presenting Judge Jerold S. Cohn with the *Stanley Mosk Legacy of Justice Award*. **7.** *Judge of the Year* Hon. Mary Thornton House (left) with Los Angeles Superior Court Presiding Judge David Wesley and SFVBA member Cheryl Templeton. **8.** SFVBA President David Gurnick (left) and Judge Richard H. Kirschner (right) honor Retired Judge Richard Adler (center). **9.** 500 Valley judges, attorneys and professionals in attendance to celebrate the work of our local judiciary. **10.** *Legacy of Justice Award* Recipient Judge Jerold S. Cohn with Dr. Lester Cohn. **11.** Presiding Judge David Wesley interacts with students of the SFVBA-sponsored Law Post Program. **12.** Judge Mary Thornton House with husband, retired LAFD Arson Investigator, James Thornton. **13.** Nancy Cohn with husband Judge Jerold S. Cohn. **14.** Judges' Night honorees Judge Jerold S. Cohn and Judge Mary Thornton House. **15.** (L to R) SFVBA Member Barry Hammond, Dorita Ahoubim and William Hardy. **16.** SFVBA Members Laura Conti (left), Marlene Seltzer (center) and Howard Schnee (right). **17.** SFVBA Members James Blatt and Len Comden. **18.** New Lawyers Section Chair Natasha Dawood (third from the left) and firm members of Parker Milliken Clark O'Hara & Samuelian APC, the evening's wine sponsor. **19.** Presiding Judge David Wesley (third from the left) and SFVBA Past President Seymour Amster (far right) with students of the SFVBA-sponsored Law Post Program.


8


9


10


11


13


12


14

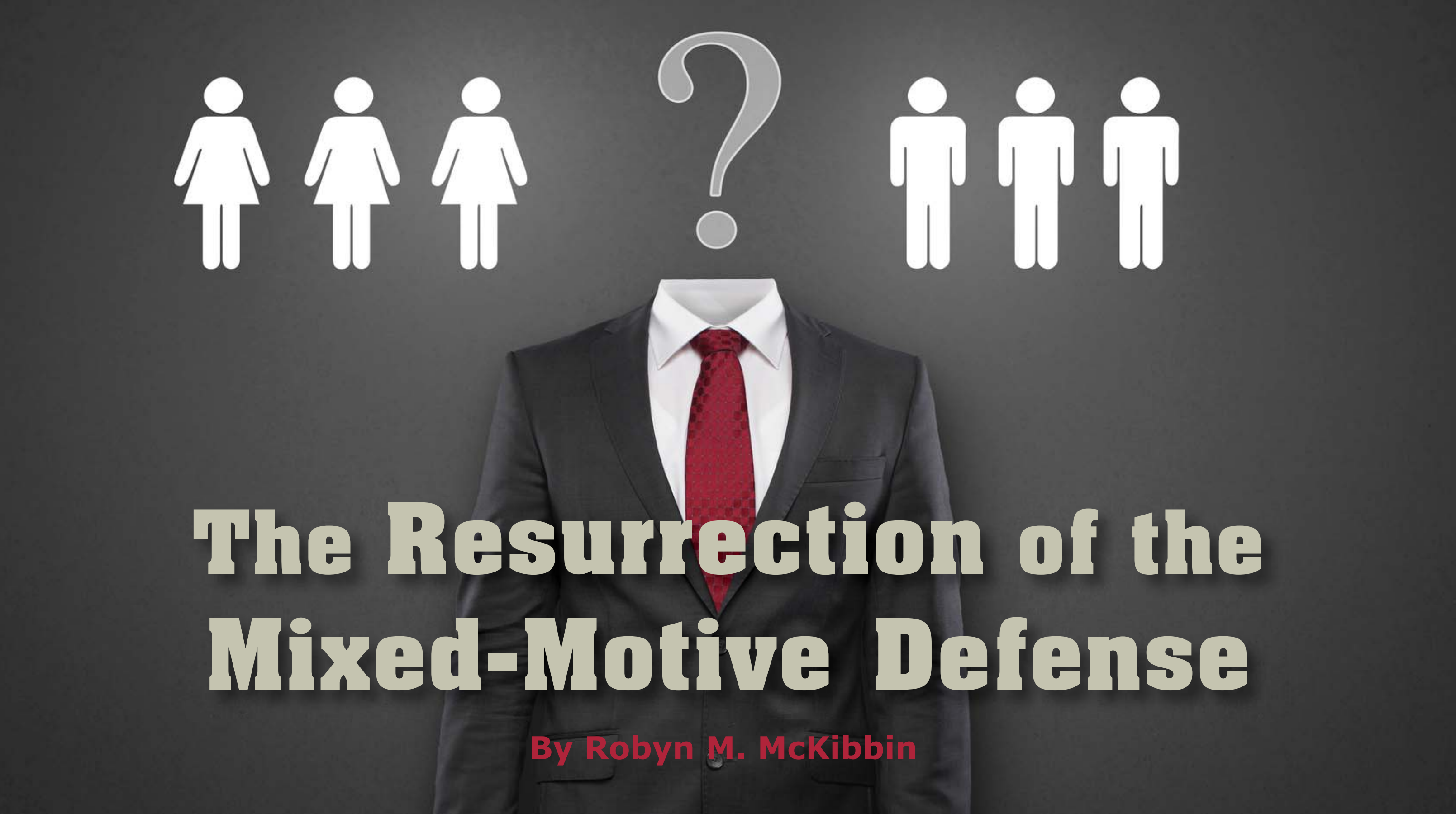

15


16


17


18


19



The Resurrection of the Mixed-Motive Defense

By Robyn M. McKibbin

INTENTIONAL DISCRIMINATION that motivates employment decisions is unlawful. But what if discriminatory motives play no role in the decision to terminate a poorly-performing employee? Should an employer be held liable for intentional discrimination if the employee would have been terminated anyway for legitimate business reasons? As written, the Judicial Council of California Civil Jury Instructions (CACI) directs jurors to find the employer liable. In *Harris v. The City of Santa Monica*, the California Supreme Court held otherwise and "resurrected" the mixed-motive defense.

CACI are the official instructions approved by the Judicial Council for use in jury trials in California. The goal of these instructions is "to improve the quality of jury decision making by providing standardized instructions that accurately state the law in a way that is understandable to the average juror."[1] The use of CACI instructions is strongly encouraged. However, just because the Judicial Council approved a certain instruction does not mean a court is obligated to use it. Courts must ensure that whichever instructions are used, they reflect accurate statements of the law.[2]

In some Fair Employment & Housing Act (FEHA) discrimination cases, the evidence establishes that there were "mixed motives" for an employment action where both lawful and unlawful factors contributed to the termination decision.[3] FEHA prohibits an employer from taking an employment action "because of" a protected characteristic.[4] Thus, a plaintiff in a discrimination case based on sex, national origin, disability or other protected characteristic has the burden of proving that there was a causal link between his or her protected status and the defendant's employment decisions.[5]

The previously approved set of instructions, California Jury Instructions, Civil (BAJI), contained the mixed-motive defense. The BAJI instruction stated that one of the essential elements proving disparate-treatment discrimination was the use of the plaintiff's protected status as a motivating factor in the defendant's termination.[6] A "motivating factor" is defined as "something that moves the will and induces action [even though other matters may have contributed to the taking of the action]."[7]

However, if the jury found that the employer's action "was actually motivated by both discriminatory and non-discriminatory reasons, the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision. An employer may not, however, prevail in a mixed-motive case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it when the decision was made. An employer may also not meet its burden by merely showing that when the decision was made, it was motivated only in part

Robyn M. McKibbin, a Partner with Stone Cha & Dean LLP in Woodland Hills, counsels clients on all aspects of employment law and defends clients when litigation is unavoidable. McKibbin can be reached at rmckibbin@scdlawllp.com.

by a legitimate reason. The essential premise … is that a legitimate reason was present, and standing alone, would have induced the employer to make the same decision."[8]

The CACI instructions include a similar definition of a motivating reason.[9] However, CACI does not include any language or reference to an employer's legitimate business reasons or the mixed-motive defense. A jury may hear evidence that the defendant had legitimate business reasons for its actions but under the CACI instructions, if a jury finds any evidence of discrimination, including plaintiff's own self-serving trial testimony, the employer is liable. The CACI instructions provide a causation standard for discrimination that does not comport with the law and deprives employers their right to adequately present their defense to the jury.

In *Harris*, a bus driver alleged that she was fired because of her pregnancy in violation of FEHA's prohibition against sex discrimination. The City claimed she was terminated due to poor performance, including causing two "preventable" accidents and failing to give her supervisor at least one hour's notice that she would not be reporting to work. Her performance was evaluated as needing "further development."

After the performance issues were documented, Harris told her manager that she was pregnant. The manager asked her to provide medical certification advising whether she could continue to work. The same day that plaintiff provided a doctor's note, a list of probationary drivers not meeting standards for continued employment was distributed during a managers' meeting. Harris was on the list. She was terminated two days later.

In a jury trial, the City's request for the BAJI instructions pertaining to its mixed-motive defense rather than the CACI instructions was denied. By nine-to-three, the jury found that Harris's pregnancy was a motivating reason for the City's decision to terminate her and awarded her $177,905 in damages, the majority of which ($150,000) were for non-economic losses. Plaintiff was also awarded $401,187 in attorney's fees.

The City appealed. The Court of Appeal concluded that BAJI was an accurate statement of the law and that the refusal to give the instruction was prejudicial error, remanding for a new trial. The California Supreme Court granted Harris's petition for review.

The *Harris* litigants agreed that under FEHA, plaintiff had to prove a causal connection between her protected status and the termination. What was disputed was the required kind or degree of causation. The *Harris* court analyzed state and federal case law and determined that there were at least three plausible meanings of the phrase "because of": discrimination was a "but for" cause of the employment decision; discrimination was a "substantial factor" in the decision; and discrimination was simply "a motivating factor."

The court reviewed FEHA's legislative history but found no guidance on the kind or degree of causation required. Title VII of the Civil Rights Act also makes it unlawful for an employer to discriminate "because of" a protected characteristic.[10] However, neither the federal legislative history nor the case law interpreting it offered any insight.

The *Harris* court then focused on what the California legislature sought to accomplish in enacting FEHA to give effect to the law's purpose. FEHA endeavored to "protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination … the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general."[11] It further called for "effective remedies" to "prevent and deter unlawful employment practices and redress the adverse effect of those practices on aggrieved persons."[12]

The court considered whether FEHA's purpose would be impacted if an employer proves that it would have made the same decision absent any discrimination. FEHA does not outlaw discriminatory thoughts, beliefs or stray remarks that are unconnected to employment decision-making. Rather, it outlaws actions taken because of discriminatory animus. Were it otherwise, FEHA's "because of" causation requirement "would be eviscerated."[13] However, FEHA's preventative and deterrent purposes would be undermined if an employer could be absolved of liability upon proof of a legitimate business reason even though discrimination existed. Thus, a plaintiff must prove that the employment decision was substantially motivated by discrimination.

In its decision, the court wrote that "requiring … that discrimination [be] a substantial motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time … proof that discrimination was a substantial factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at that time."[14]

So, what remedies are available to a plaintiff who would have been terminated anyway? The *Harris* court held that if legitimate, nondiscriminatory reasons would have led to the employee's firing in any event, awarding economic damages would give plaintiffs an "unjustified windfall and unduly limit the freedom of employers to make legitimate employment decisions."[15]

The same conclusion was reached with respect to non-economic damages. Practically, it is impossible for a trier of fact to distinguish between the plaintiff's emotional distress resulting specifically from discrimination or from the termination itself. If there is evidence of a mixed-motive, the primary reason for the discharged employee's emotional distress is the discharge itself, which is not compensable under FEHA. Compensation would be an unjustified windfall to the plaintiff.

Accordingly, when a jury finds that unlawful discrimination was a substantial factor motivating a termination, and when the employer proves that it would have made the same decision absent such discrimination, a court may not award damages, back-pay or a reinstatement order. The employer, however, does not escape liability.

Based on FEHA's express purpose to redress, prevent and deter unlawful discrimination in the workplace, the plaintiff could still be awarded declaratory or injunctive relief to stop discriminatory practices, where appropriate. In addition, the plaintiff may be eligible for reasonable attorney's fees and costs and may take into account the scale of the plaintiff's success. An award of fees must not encourage "unnecessary litigation of claims that serve no public purpose either because they have no broad public impact or because they are factually or legally weak."[16]

Thus, the *Harris* decision revives the mixed-motive defense and limits intentional discrimination liability to situations where employment decisions are substantially influenced by unlawful reasons. Requiring plaintiffs to prove more than any evidence of discriminatory animus will allow employers to make necessary job-related decisions without fear of triggering liability.

---

[1] Cal. Rules of Court, rule 2.1050(a)(emphasis added).

[2] Cal. Rules of Court, rule 2.1050(e)(emphasis added). See also *Christian Research Institute v. Alrtor* (2007) 148 Cal.App.4th 71, 82 [pattern jury instructions, however, while designed to accurately reflect the law, are not the law itself] (citation omitted); *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 298 & fns. 5, 6 [Courts review de novo whether a challenged jury instruction correctly states the law without deference to the CACI drafters].

[3] In FEHA employment discrimination cases that do not involve mixed motives, we have adopted the three-stage burden-shifting test established by *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. Plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer took an adverse employment action based on a prohibited criterion. A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of discrimination disappears. Plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff. *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 354–356.

[4] *Govt. Code* §12940(a).

[5] *McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 388.

[6] BAJI 12.01.

[7] BAJI 12.01.1.

[8] BAJI 12.26.

[9] CACI 2500, 2507.

[10] It is well established that Title VII and FEHA are similar statutes, enacted to further similar public policies. The language of these two statutes is identical in prohibiting employment discrimination on the basis of race or national origin. California courts look to pertinent federal precedent to interpret similar state statutes. *Guz, supra*, 24 Cal.4th at 354.

[11] CA Govt. Code §12920.

[12] CA Govt. Code §12920.5.

[13] *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, __, 152 Cal.Rptr.3d 392, 411.

[14] *Id.* at 412.

[15] Id. at 413.

[16] *Id.* at 415.

INSURANCE PROGRAM FOR SFVBA MEMBERS

Heffernan Professional Practice
Insurance Brokers
Law Firm Program
A DIVISION OF HEFFERNAN INSURANCE BROKERS

Heffernan's Professional Practices Insurance Brokers (PPIB) team, serving **law firms** for over 25 years, offers one-on-one client service and insurance programs to SFVBA Members. Heffernan offers the experience and industry clout needed to secure the most comprehensive and cost effective insurance programs available.

Business Insurance

General Liability, Automobile, Property, Workers' Compensation, Umbrella, Management Liability and International Coverage

Employee Benefits

Group Medical, Dental, Vision, Life, LTD, EAP

Financial Services • Personal Insurance
HR Consulting • Claims Consulting

Angela McCormick
Vice President
Commercial Insurance
714.361.7718
AngeliaM@heffins.com

Todd LaRue
Vice President
Employee Benefits
714.361.7720
ToddL@heffins.com

Haven't met us yet? Why not?
Our Accolades

- VIP Broker for the *Association of Legal Administrators* (ALA) Insurance Program
- Named a *Best Places to Work* in Orange County in 2012
- Ranked 31st Largest Broker of US Business by *Business Insurance Magazine* in 2010
- Ranked 14th Largest Independent Agency by *Insurance Journal* magazine in 2011
- Named a Top Corporate Philanthropist by the *San Francisco Business Times* since 2003

The Association does not endorse, sponsor or approve any insurer or outside insurance program.

Contact

Heffernan Insurance Brokers
6 Hutton Centre Drive
Suite 500
Santa Ana, CA 92707
714.361.7700
800.234.6787
Fax: 714.361.7701
www.heffins.com
License #0564249

Office Locations

Walnut Creek,
San Francisco,
Petaluma, Palo Alto,
Los Angeles and
Santa Ana, CA;
Portland, OR;
St. Louis, MO and
New York, NY

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 31.

Changes to Tax Law in 2013

By Deborah S. Sweeney

Many significant changes to tax law went into effect in 2013, some of which are retroactive, affecting the 2012 tax liability of many individuals and corporations. Attorneys should be aware of how these major changes will affect their business clients.


THE UNITED STATES OF AMERICA
ONE HUNDRED DOLLARS
UNITED STATES FEDERAL RESERVE SYSTEM
THIS NOTE IS LEGAL TENDER
FOR ALL DEBTS, PUBLIC AND PRIVATE
Treasurer of the United States.
SERIES 2003 A
Secretary of the Treasury.
FEDERAL RESERVE NOTE
UNITED STATES OF AMERICA

THE AMERICAN TAXPAYER RELIEF ACT (ATRA) of 2012, more colloquially known as the Fiscal Cliff Deal, has many business owners wondering how, if at all, the changes and additions to the tax law included within ATRA might affect them. In the midst of tax season, attorneys and accountants are fielding questions from clients concerned about their business's 2012 returns and their 2013 tax obligations.

According to the Small Business Association (SBA), 97% of small businesses will not see their income taxes go up in 2013, which should have many small business owners sighing with relief.[1] However, ATRA is rife with extensions and deductions, many of which could help businesses make the expansions or investments that economic conditions had forced them to postpone. ATRA is also not the only legislation affecting tax law in 2013. Payroll withholdings, for example, may increase in certain cases, and employers should be made aware of possible new withholding obligations. As tax law and legislation is, by its nature, excessively complex, below is a summary of some of the more applicable parts of the law for businesses around the San Fernando Valley.

Some parts of ATRA are retroactive, which might affect 2012 returns.

Among the thirty-one extensions outlined in Title III of ATRA, two have received the most attention, and are the most widely applicable: the extension of the higher Section 179 limit[2] and the extension of the R&E Tax Credit.[3] Section 179 is in place to allow businesses to invest in vital, oftentimes expensive, equipment and software.

Back in 2010, the limit for Section 179 deductions was raised all the way to $500,000. Originally, that limit was set to shrink to $139,000 in 2012, and then to $25,000 in 2013. However, Section 315 of ATRA raised the limit back up to $500,000 through 2013, retroactively raising the 2012 limit as well. That means that if a business invested in equipment or software and put that investment into service within 2012, they will be able to deduct those expenses, up to $500,000. In the case of software investments, the absence of this extension would have required that it be depreciated over three years, rather than included with other Section 179 expensing.[4]

Of course, there are some limitations in place for Section 179 deductions. If a business's total capital purchases exceed $2 million, the amount that can be claimed is reduced dollar for dollar. For example, if a business spends $2,200,000 on capital purchases, that business is limited to claiming only $300,000 of Section 179 deductions. Businesses looking to claim a Section 179 deduction must also have produced taxable income. Nevertheless, this extension can save any business looking to make a major investment in vital equipment a lot of money.

The Research and Experimentation Tax Credit, which expired at the end of 2011, was also extended through 2013. If a company spent time researching and prototyping a business component using methods that relied on engineering, computer science or the physical and/or biological sciences, then a percentage of those qualified expenses that exceed a base amount can be claimed as a credit. There are different ways to calculate that base amount. The traditional way, which allows a deduction of 20% of qualified spending over the base, involves multiplying average gross receipts over the last four years by a ratio of research expenses to gross receipts from 1984 to 1988, or by a fixed ratio of three percent if the company did not exist during that base period.

Businesses can also elect to use the "simplified" calculation method which allows them to claim 14% of qualified, current year expenses that exceed half of the average qualified expenses for the past three years. Utilizing the simplified calculation method is much more useful for a business that did not increase their R&E spending, but if a business chooses to use the simplified method, all future claims must also be calculated using that method. At any rate, if a business did continue research through 2012, despite the R&E credit expiring at the end of 2011, that business will now be able to claim their 2012 credit if they qualify for one.

An extension of special expensing rules could affect Section 179 deductions.[5]

While improvements to personal property, such as a restaurateur buying new ovens for the kitchen and putting them into service, normally qualify for Section 179 deduction status, improvements to real property do not. However, ATRA extended a provision that allows businesses making improvements to restaurant property, retail property, or qualified leasehold property to claim the associated expenses as Section 179 deductions.

Only certain types of improvements qualify. For retail improvements, section 168(e)(8) of the Internal Revenue Code lists certain investments that cannot be included, such as the enlargement of a building or the addition of an elevator.[6] Restaurants are also unique because, unlike for retail or other leasehold property, the addition of a building can be considered qualified restaurant property as long as "…50% of the building's square footage is devoted to preparation of and seating for on-premises consumption of prepared meals."[7] Now under normal circumstances, the property could be depreciated over a, typically long, period of time, but allowing these improvements to be considered Section 179 eligible accelerates the deduction of the costs.

This provision was originally included in the Small Business Jobs Act of 2010, but was set to expire in 2011.[8] Luckily, as ATRA is retroactive, any qualifying improvements made in 2012 can be claimed under Section 179 deductions. For businesses currently considering improvements to their property, this extension applies throughout 2013 as well. However, there is one very important limitation: a business can only deduct up to $250,000 of real property improvement expenses, and any unused part of the deduction cannot be carried over past 2013.

Bonus Depreciation has been extended and modified.[9]

Depreciation can typically be claimed against the cost of a new capital asset based on its class life. Office furniture, for example, is considered to have a 7-year recovery period under the regular depreciation system and that recovery period, along with the cost of the furniture, is used to determine depreciation rate. After calculating the rate of

depreciation, it is simply a matter of multiplying it by the original cost in order to determine how much can be claimed each year.

Bonus depreciation, however, is typically enacted when Congress is looking to spur businesses to invest in themselves. With the enactment of the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, certain types of property qualified for a 100% bonus depreciation rate.[10] That rate was set to fall to 50% by the beginning of 2012. While ATRA did not bring the bonus depreciation rate back up to 100%, it did extend the timeframe for the 50% rate. So through 2013 and, in some cases, 2014, 50% extra depreciation can be claimed against a qualifying investment during the first year of its service, meaning 50% of the total cost of that new asset can be listed as a deduction.

The five-year built-in gain tax period has been extended.[11]

Many C-Corporations elect to convert to S-Corporations for tax purposes, as the pass-through structure of an S-Corporation avoids the problem of double taxation. However, if a C-Corporation does become an S-Corporation, they have to pay a built-in gain tax (also known as a B.I.G. tax) on the appreciation of any asset that they subsequently sell. In other words, if a business held a particular asset as a C-Corporation and that asset appreciated while the business was a C-Corporation, a tax will be levied against the appreciation, or built-in gain, if the business sells the asset within a certain period of time after electing to become an S-Corp. Normally, that period of time is ten years.[12] However, ATRA extended a provision in the Small Business Jobs Act of 2010, which lowered that period of time to five years for the taxable year beginning in 2011.

At least for tax years beginning in 2012 and 2013, an S-Corp will only have to pay B.I.G. tax on assets sold within the five years after it elected to convert from a C-Corp.[13] However, it is important to note that this law is not permanent and, if this provision is not extended again, taxable years after 2013 will again require S-Corps to pay B.I.G. tax on assets sold within the standard ten-year period.

The 100% capital gains tax exclusion has also been extended.[14]

In the hopes of spurring investment in small business, ATRA authorized a provision that allowed investors to exclude from their tax obligations 100% of the capital gain they earned from the stock's eventual sale. Originally, the 100% exclusion appeared in the 2010 Small Business Jobs Act and applied to investments made between September and December of that year.[15] After the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, the exclusion was extended through 2011.[16] Now, with the passing of ATRA, that exclusion has been made applicable for qualifying stock acquired from September 2010 (which was the original starting date set by the Small Business Jobs Act) to January 1, 2014.

It is extremely important to remember that this exclusion applies solely to Qualifying Small Business Stock (QSBS). There are a few different requirements for stock to be considered QSBS but the two most general ones are that the business issuing the stock must be a C-Corporation and must have had gross assets below $50 Million at all times between August 10, 1993 and the time the stock was issued.[17]

The investor cannot be a corporation, must hold the stock for at least five years and the company that issued the stock has to be considered active during those five years by either engaging in business and trade or performing qualifying research and experimentation. If all of these conditions were met, a small business would be a much more attractive investment, even if its stock price was not expected to skyrocket anytime soon. All businesses attempting to secure investors should be made aware of this extension and determine whether or not their stock could be considered QSBS.

Other tax credits have been revived and extended as well.

Not every small business will be able to qualify for the tax credits extended by ATRA but there are a few worth highlighting. The Work Opportunity Tax Credit (WOTC) was extended through to 2018 after being set to expire in 2012.[18] Businesses that hire employees from groups that have traditionally faced significant barriers to employment—food stamp recipients, ex-felons, SSI recipients and long-term unemployed, disabled veterans, for example—can claim a percentage of that employee's first year of wages as a tax credit.[19] If the employee hired had previously qualified for Long-term Temporary Assistance for Needy Families, the employer can also claim a percentage of the employee's second year of wages. Employers looking to qualify must complete and submit the first page of IRS Form 8850 on the day a job offer is made and then the second page on the day of hire. They also must submit ETA Form 9061 or 9062 if the employee is a conditionally certified member of a qualifying WOTC group.

A wage credit for small businesses that employ active members of the military was also extended.[20] To qualify, the employee has to have worked for the business for a period of no less than 91 days before a differential wage payment was made and the business has to have fewer than 50 employees.[21] The differential wage payment can represent all or a portion of the wages that an employee would have earned had they not been on active duty and employers can claim a 20% credit on payments made during the taxable year.[22]

Businesses within Native American reservations also have two important extended tax credits that they can claim. The first is the Indian Employment Credit, though it requires that the employee perform their services to their employer within the confines of a reservation. It also requires that the employee either be a Native American or the spouse of a Native American and that they must live on or near the reservation.[23] Businesses run on tribal land also qualify for an accelerated depreciation rate for their property.[24]

Payroll withholdings could go up for some employees.

Most people were aware that they would, once again, be paying a social security tax of 6.2% after a tax holiday that lowered the rate by 2% was allowed to expire. However, there are changes to the tax law outside of ATRA that are set to begin in 2013 which may affect payroll withholdings. The Patient Protection and Affordable Care Act, passed in 2010, has certain provisions that kicked in at the beginning of the year. Starting in 2013, employers must withhold 2.35% of an employee's income in excess of $200,000 for a single person, $250,000 for married individuals filing together, or $125,000 for married individuals filing separately. This Additional Medicare Tax is also applicable to income earned through self-employment.[25]

So, if an employer pays an employee, who is not married, $300,000 a year, everything below the $200,000 threshold is subject to the 1.45% rate, and the extra $100,000 is taxed at 2.35%. For everyone else, the standard 1.45% rate applies, and there is no employer matching requirements for the .9% Additional Medicare Tax, meaning employers will simply continue paying the 1.45% rate as well. Of course, most small businesses will not have someone earning over $200,000 a year on their payroll but if they do, it is important to make sure the amount they are withholding is the amount required by law.

This is far from an exhaustive list of all the changes set to go into effect in 2013. As mentioned above, Title III of the American Taxpayer Relief Act lists 31 different extensions for business taxes—among them are specific deductions for restaurants, film and television productions, mining companies and even an extension that solely applies to income earned through domestic production in Puerto Rico.

Clearly, for many businesses, the majority of these extensions will be irrelevant, but attorneys should take care to review each client's industry, size and unique practices to see if any other Title III extensions apply. There is never any harm in running through the most generic and widely applicable changes, simply so business owners know what to expect. Doing so will mean that business attorneys will better prepare their clients and business owners will be ready and willing to take advantage of this extremely conducive legislative environment in order to begin expanding again.

1 Karen Mills, "Small Business Tax Incentives in the Fiscal Cliff Deal," *Official SBA News and Views*, January 05, 2013, http://www.sba.gov/community/blogs/official-sba-news-and-views/open-business/small-business-tax-incentives-fiscal-cliff.
2 U.S. Congress. House. The American Taxpayer Relief Act of 2012. H.R. 8. 112th Cong., 2nd sess. (January 1st, 2013). Section 315. http://www.gpo.gov/fdsys/pkg/BILLS-112hr8enr/pdf/BILLS-112hr8enr.pdf
3 Ibid. Section 301.
4 IRS Tax Code §179(d)(1)(A)(ii).
5 The American Taxpayer Relief Act of 2012. Section 315.
6 IRS Tax Code §168(e)(8).
7 Ibid., §168(e)(7).
8 U.S. Congress. House. Small Business Jobs Act of 2010. H.R. 5297. 111th Cong., 2nd sess. (September 27th, 2010). Section 2021. http://www.gpo.gov/fdsys/pkg/PLAW-111publ240/pdf/PLAW-111publ240.pdf
9 The American Taxpayer Relief Act of 2012. Section 331.
10 U.S. Congress. House. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010. H.R. 4853. 111th Cong., 2nd sess. (December 17th, 2010). Section 401. http://www.gpo.gov/fdsys/pkg/PLAW-111publ312/pdf/PLAW-111publ312.pdf
11 The American Taxpayer Relief Act of 2012. Section 326.
12 IRS Tax Code §1374(d).
13 Ibid., §1374(d)(7)(C).
14 The American Taxpayer Relief Act of 2012. Section 324.
15 Small Business Jobs Act of 2010. Section 2011.
16 U.S. Congress. House. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010. H.R. 4853. Section 760. 111th Cong., 2nd sess. (December 17th, 2010). http://www.gpo.gov/fdsys/pkg/PLAW-111publ312/pdf/PLAW-111publ312.pdf
17 IRS Tax Code §1202.
18 The American Taxpayer Relief Act of 2012. Section 309.
19 IRS Tax Code §51.
20 The American Taxpayer Relief Act of 2012. Section 308.
21 IRS Tax Code §45P.
22 Ibid.
23 IRS Tax Code §45A(c)(1)(B).
24 IRS Tax Code §168(j).
25 U.S. Congress. House. Patient Protection and Affordable Care Act. H.R. 3590. 111th Cong., 2nd sess. (March 23rd, 2010). Section 10906. http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf

Deborah S. Sweeney is the CEO of MyCorporation. After six years practicing in a law firm environment, Ms. Sweeney became in-house counsel at MyCorporation Business Services, Inc. and supported the company's acquisition by Intuit. Under Intuit, Ms. Sweeney became the general manager of MyCorporation, managing the overall business operations, before undertaking her current responsibilities as CEO. Sweeney can be reached at dsweeney@mycorporation.com.

Test No. 55

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. Since ATRA was not passed until the beginning of 2013, it cannot raise the $139,000 deduction limit for 2012 tax returns.
   ❑ True ❑ False

2. Prior to ATRA, off-the-shelf software could be considered a Section 179 deduction.
   ❑ True ❑ False

3. Total capital purchases can affect how much a business can claim in Section 179 deductions.
   ❑ True ❑ False

4. If a business chooses to calculate its Research and Experimentation Tax Credit using the simplified method, it can return to the traditional method for future credit calculations.
   ❑ True ❑ False

5. No form of real property can qualify as a Section 179 deduction for 2013.
   ❑ True ❑ False

6. Under the current law, the earliest an investor would be able to sell a QSBS and be eligible for the 100% tax exclusion on capital gain is in 2015.
   ❑ True ❑ False

7. The amount of money that a retail business spends on installing an elevator does not qualify for a Section 179 deduction.
   ❑ True ❑ False

8. A corporation that invests in a small business that issues QSBS is eligible for the 100% tax exclusion on capital gain, provided that the corporation holds onto the stock for at least five years before selling it.
   ❑ True ❑ False

9. In 2013, built-in-gain tax only has to be paid for assets sold within the first five years of a C-Corp's election to be an S-Corp.
   ❑ True ❑ False

10. Stock sold by an S-Corp with gross assets below $50 million at all times between August 10, 1993 and the time the stock was issued can qualify for a 100% capital gains tax exclusion.
    ❑ True ❑ False

11. Section 179 deductions can be claimed, even if the business claiming the deductions did not generate any taxable income.
    ❑ True ❑ False

12. Businesses that are run on recognized Native American reservations can qualify for an accelerated rate of depreciation on their property.
    ❑ True ❑ False

13. Thanks to ATRA, retail business can claim up to $500,000 of the cost of improvements to real property as Section179 deductions.
    ❑ True ❑ False

14. Employers can claim a tax credit of up to 30% of differential wage payments made to employees who are active members of the military.
    ❑ True ❑ False

15. An employer can claim a tax credit based on the second year of wages paid to any employee hired from a qualified WOTC group.
    ❑ True ❑ False

16. Under the current law, restaurants can claim the purchase of an additional building as a Section 179 deduction as long as more than 50% of the building is devoted to preparing and providing seating for the on-site consumption of food.
    ❑ True ❑ False

17. Employers do not have to match the extra .9% of Medicare tax that they withhold from income above $200,000/year for single employees.
    ❑ True ❑ False

18. An employer can receive a tax credit if it hires a Native American living on or near a reservation, even if the work the employee does is not on the reservation.
    ❑ True ❑ False

19. Businesses that qualify for real property Section 179 deductions can roll over any unused portion of the deductions to 2015.
    ❑ True ❑ False

20. The American Taxpayer Relief Act extended a 50% bonus depreciation rate that can be claimed against the cost of qualifying capital assets.
    ❑ True ❑ False

MCLE Answer Sheet No. 55

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

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

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

____
Credit Card Number Exp. Date

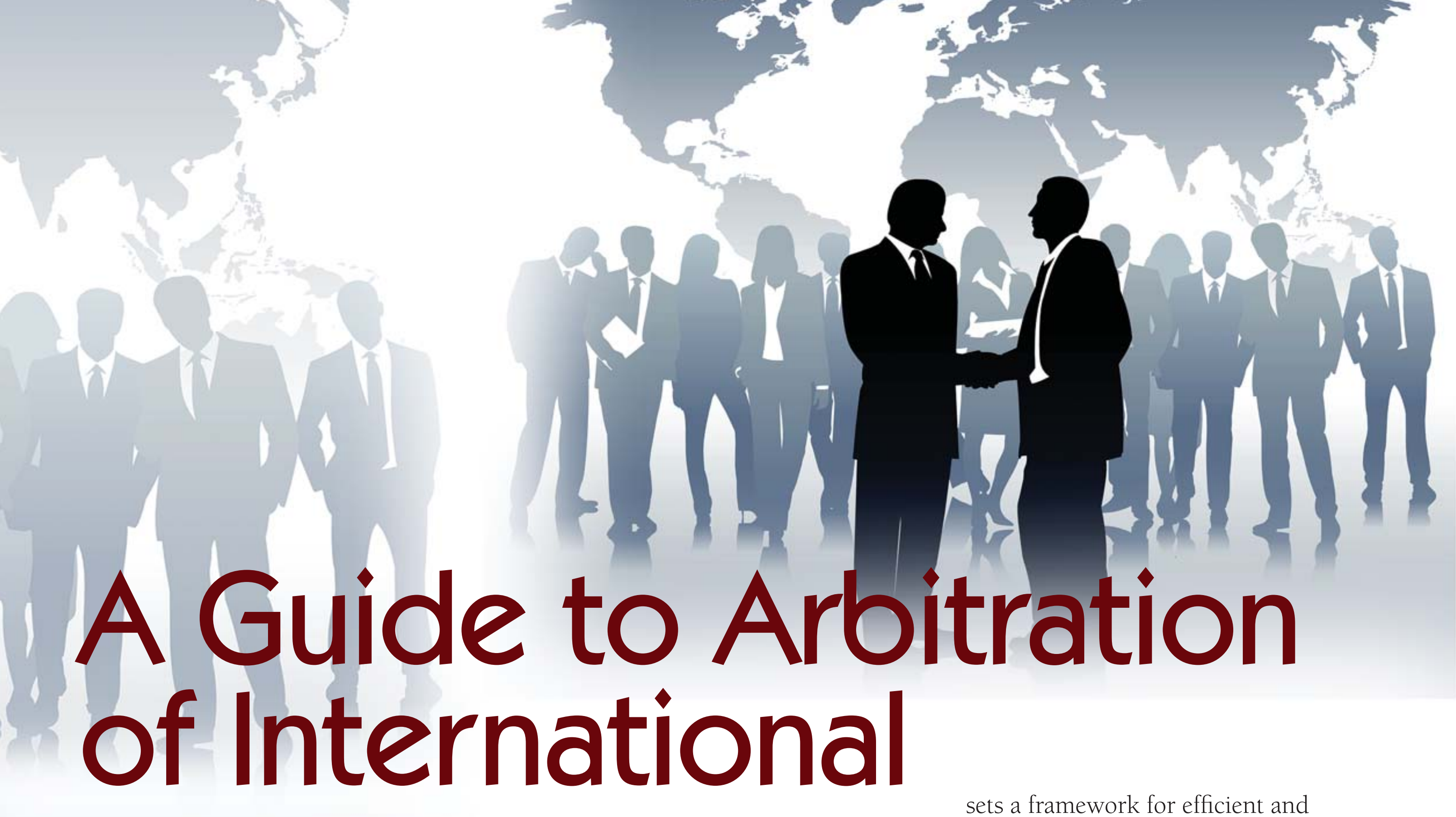
____
Authorized Signature

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

Name________________________________
Law Firm/Organization________________
____
Address______________________________
City_________________________________
State/Zip____________________________
Email________________________________
Phone_______________________________
State Bar No.__________________________

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

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



A Guide to Arbitration of International Business Disputes in Developing Economies

By Lisa Miller

THE RAPID ECONOMIC growth and explosive expansion of the roles of post-communist countries in the world financial and business communities have created a demand for efficient dispute resolution mechanisms. It is increasingly important for businesses in these emerging economic markets to establish and enforce methods for efficiently resolving international business disputes.

International arbitration is a voluntary process of dispute resolution. In arbitration, a neutral third party (individual or multi-person panel) renders a final and binding decision after all sides present their positions. Arbitration is especially attractive in international business disputes because not all parties are familiar with the foreign legal systems of their international business associates.

When international business disputes arise, most businesses leaders prefer private, informal resolution, affected in a businesslike fashion. International arbitration is designed to achieve this result. This approach can help maintain business relationships with partners, vendors, licensees and other important players. It is an attractive option to protect business's best interests because it is a private, contractual creature that can be uniquely designed and controlled by the parties to foster fast, practical, tailored resolutions.

A thoughtfully structured arbitration provision in a contract sets a framework for efficient and private resolution. The parties choose the specific process, structure, format, location and scope of the arbitration. Ideally, these details will be memorialized in the arbitration clause of the parties' underlying contract. The parties usually negotiate the arbitration clause at the same time they develop the initial contract. Of course, the parties can agree to modifications at any time.

Because arbitration is entirely the product of private negotiation and agreement, the parties to the arbitration agreement have more flexibility than a court proceeding would be able to accommodate. For example, parties can decide to shorten time periods, change locations or limit discovery of documents or other information if they would like to do so.

Advantages of International Arbitration

The expansive growth of international arbitration has been greatest since the emergence of vibrant national economies as a result of the break-up of the former Union of Soviet Socialist Republics and the expansion of the European Union. Sophisticated international businesses see international arbitration as the natural dispute resolution mechanism for conflicts arising out of international transactions since it offers a number of advantages over formal court proceedings.

Neutrality of the Decision Maker

Arbitration allows international parties to choose their own arbitrators to address their concern that a traditional court in a foreign country may not be truly neutral in its attitudes toward a foreign business in a dispute with a domestic entity. As a result, neutrality is critically important in international arbitration proceedings, so all parties work to avoid the national courts of its opponent. This is one of the most attractive features of international arbitration.

To foster a truly neutral setting for decision-making, international arbitration proceedings generally take place in countries with which neither party has links. The issues before the arbitrator(s) are usually analyzed in line with transnational rules, or may be considered under the national law of a neutral, pre-determined country. Arbitrators are usually appointed from different countries and are of a variety of nationalities.

In most cases, arbitration tribunals consist of either one arbitrator (jointly selected by both parties) or three arbitrators (each party appoints one arbitrator, who together choose a third arbitrator to act as the panel chair). The parties can appoint arbitrators who are familiar with their legal or cultural backgrounds and who have relevant technical backgrounds with special insights into the specific issues of the case. They can select arbitrators with the expert subject-matter knowledge required by the unique characteristics of the dispute.

Procedural Freedom

Arbitration proceedings are governed to a great extent by the arbitration agreement of the parties. This procedural flexibility and party autonomy make arbitration a particularly attractive dispute resolution mechanism for international commercial transactions. Based on this freedom to contract, the parties have broad options when crafting the important aspects of their individual dispute resolution processes. The terms can be jointly tailored to meet their individual needs and the particular demands of their disputes.

Confidentiality of the Process and the Result

Arbitration proceedings, and the resulting awards, are normally entirely private matters. This is in contrast to traditional court, where proceedings, evidence and judgments are usually publicly reported. The existence of the arbitration itself, the evidence considered and the documents produced or exchanged in the arbitration, and the final award cannot be divulged to third parties, absent consent. Confidentiality is required of the arbitrator(s), the parties, the witnesses and the lawyers. This is an important advantage of arbitration over court proceedings.

Limited Evidentiary Discovery

Parties may jointly choose to limit or focus discovery in their arbitration agreement. Generally, discovery refers to the pre-hearing phase in a legal dispute in which parties obtain evidence from the opposing party by means of requests for answers to interrogatories, requests for production of documents, requests for admissions and depositions. Discovery can be obtained from non-parties using subpoenas. As a result, the arbitration process can be less burdensome on businesses and individuals, causing less interference with business productivity.

Speed
The parties can ensure a faster resolution than traditional court litigation because they can agree to shorter deadlines. However, three-member panels of arbitrators usually move more slowly than sole arbitrators, because it is more challenging to convene meetings, arrange hearings or reach a final agreement when three arbitrators are involved.

Controllable Expenses
Although the parties must pay for the arbitrator(s)'s time, arbitration can nevertheless be less expensive than traditional litigation based on streamlined processes and other time-conscious agreements. The number of arbitrators involved in the process directly affects the ultimate cost. While a panel of three arbitrators improves the quality of the award and reduces the risk of an arbitrary decision, three-arbitrator tribunals are more expensive.

Enforceability of Awards
Arbitration awards are final, unlike court decisions which are subject to post-trial motions and subsequent appeals. Arbitration awards can be legally challenged only in limited factual circumstances. Interestingly, international arbitration awards are more easily enforced than national judgments, based on the terms of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Almost 150 countries have adopted the New York Convention.

As a result, the New York Convention has created an internationally harmonized regime for the enforcement of arbitral awards. Under the New York Convention, recognition and enforcement of awards are only disallowed on limited grounds. In contrast, there are no international conventions that support the enforcement of national judgments.

Maintenance of Relationships
Unlike traditional litigation, arbitration can be less bitterly adversarial. This can help preserve valued, long-term business relationships, to the extent possible.

Potential Disadvantages of International Arbitration

Arbitration's increasing popularity has fostered increasingly costly and time-consuming proceedings. In some situations, international arbitration is more expensive than litigation. The international arbitration community is concerned about this problem. Some arbitration institutions have issued guidelines in an attempt to reduce the time and cost of arbitration proceedings.

Arbitration costs fall into two categories: fees for private counsel and direct arbitration costs. Fees for private counsel would be incurred in the ordinary course of traditional litigation, witnesses' travel costs and expert fees. Direct arbitration costs include arbitrator fees, institutional administrative fees (if any) and expenses related to the hearings (meeting space, translation costs and anything else that might arise).

Case Studies

Grün Wirkt! v. Große Gebäude
Grün Wirkt!, a green energy company in Berlin and a Czech construction company, Große Gebäude, entered into an agreement in which the former would sell the latter components necessary for installation of energy-saving heating and cooling units, as specified in a Czech government building contract that Große Gebäude won through competitive bidding. Große Gebäude began construction as scheduled and contacted Grün Wirkt! about payment and delivery of the components.

Grün Wirkt! informed Große Gebäude for the first time that its suppliers had experienced an interruption in manufacturing and delivery due to local civil unrest. Grün Wirkt! hoped to find an alternate supplier but this would result in a 30-

Fostering Successful Arbitrations

Choose the Right Arbitrator for the Particular Matter
Arbitrators need to be immediately available for the proceedings. Arbitrators are busy, which can lead to delays in the hearing and issuance of the final award. Parties should thoroughly research the skills of all possible arbitrators before selecting one. It is a generally accepted practice for parties to interview potential arbitrators and gather information relating to their previous work.

Choose the Right Institution for the Parties' Budgets
In ad hoc arbitrations, which are not administered by an institution, parties are expected to directly negotiate the arbitrator(s)'s fees. But in institutional proceedings, fees are calculated in accordance with predetermined rules, which vary among institutions. Some institutions outline recommended ranges of hourly rates, while others calculate the arbitrator(s)'s fees as a proportion of the sum in dispute (the "ad valorem" method).

Draft Thoughtful Arbitration Clauses
Business executives focus closely on the substantive clauses of their contracts. But sometimes they fail to focus on the arbitration clauses in those agreements. Because arbitration clauses are usually the last provisions the parties consider, they are drafted without much discussion or consideration of the specific needs of the particular contract in which they are incorporated. Even worse, unclear arbitration clauses trigger litigation. Delays and increased costs of arbitration proceedings are the unfortunate result.

Use Technology
Considering that arbitration proceedings are supposed to be flexible, and can be crafted to suit the particular case, hearings do not need to be conducted in person, or at any specific venue. Arbitrators and parties should use technology, such as Skype, tele-video conferencing, email, as well as even newer communications technologies, to limit time and costs.

Because arbitration is a party-driven mechanism, it is within the power of the parties to take steps to ensure that the proceedings take less time and money.

day delay. Große Gebäude's contract with the Czech government assessed a monthly penalty for late completion at any stage of the construction process, so the delay cost €10,000. Fortunately, the Grün Wirkt!-Große Gebäude contract provided for arbitration.

The agreement called for the use of a single arbitrator from a European Union nation, chosen jointly by each party's designated arbitrator. Per the agreement, the scope of the arbitrator's duties included assessing liability and awarding damages, if any, flowing from any breach of the agreement. The agreement also designated the situs of the proceeding as Kosovo, the language of the proceedings as English and any award to be paid in Euros. The contract stated that arbitration would be administered *ad hoc* by the parties, applying the administrative and procedural rules of the International Chamber of Commerce.

The resulting arbitration award in favor of Große Gebäude was recognized by the local German court in a summary proceeding, which then allowed enforcement of the award against Grün Wirkt!, including all methods for collection allowed under German law. Große Gebäude was also able to proceed against Grün Wirkt! in other international locales where the company has assets.

CampbellCo v. Savoy Hotel

CampbellCo, an Austrian company, contracted with the Savoy Hotel in San Francisco to reserve a block of rooms to house interview candidates and CampbellCo interviewers. The reservation was guaranteed on an American Express credit card. However, once the participants arrived, they realized that the hotel was undergoing significant construction, causing dust, vibrations, noise and unavailability of the pool and spa.

CampbellCo tried to negotiate a discount with the Savoy, but the parties did not reach an agreement. CampbellCo directed American Express not to pay the charge. The Savoy and CampbellCo negotiated an arbitration process, agreeing to an institutional arbitration administered by the London Court of International Arbitration, applying United Nations Commission on International Trade Law (UNCITRAL) rules.

The London Court of International Arbitration administered the proceedings according to UNCITRAL's published rules, resulting in an award in favor of CampbellCo. This award was recognized in most jurisdictions where the Savoy's parent company has assets, and is enforceable against the Savoy in most jurisdictions.

Lisa Miller is a civil litigator in California and New York and an adjunct professor at the University of Southern California and the Masaryk University Fakulty of Law in the Czech Republic. She is a busy litigator and arbitrator, including international matters. Miller can be reached at llm@marcin.com.

Tax-Related Identity Theft

By Sharyn M. Fisk and Cory Stigile

THE INTERNAL REVENUE SERVICES IS combating a huge increase in incidents of tax-related identity theft. During the first nine months of 2012, the IRS identified approximately 642,000 instances of tax-related identity theft—more than double the number for all of 2011.[1] Identity theft is at the top of the IRS's annual "Dirty Dozen" list of tax scams.[2]

There are three major forms of tax identity theft: the filing of false refund claims using a legitimate taxpayer's name and Social Security number (SSN); employment tax fraud; and using the IRS name to steal identities through phishing[3], malware[4] and other means. The most common type of tax-related identity theft, and the focus of this article, is the filing of fake returns claiming refunds.

To file a fake return, an identity thief uses a legitimate taxpayer's name and SSN on a tax return seeking a refund early in the filing season before the legitimate taxpayer files his or her actual return and before the IRS conducts its first matching of W-2 information with taxpayer SSNs. If the IRS determines the name and SSN on the tax return are valid (the IRS checks all returns to see if filers' names and SSNs match before issuing refunds) and it passes through the IRS' other filters, the IRS will issue the refund to the thief. The thief requests that the refund be paid out to a debit card or direct deposit to a checking account that is then promptly emptied. The legitimate taxpayer may not be aware he or she has become a victim until filing his or her own return and receiving a letter from the IRS stating that more than one tax return was filed with their information.

In 2004, the IRS developed a strategy to address the problem of identity theft-related tax administration issues. This strategy, while still evolving, continues to serve as the basis for all of the IRS' efforts to reduce the effects of identity theft on tax administration and to provide services to victims of identity theft. Currently, the IRS is implementing a two-pronged strategy that focuses on fraud prevention and victim assistance.

Fraud Prevention

Beginning in 2011, the IRS launched the Enhanced Return Processing Program. Under this program, a cross-functional group was formed made up of various IRS divisions that work to develop enhanced revenue protection processes and policies beginning with the 2012 filing season. The IRS has committed more than 3,000 employees to identify and address theft issues through the use of filters to screen for potential identity theft tax fraud; the use of Identity Protection Personal Identification Numbers (IP PINs); updated registries of deceased taxpayers and prisoners; and increased focused by the IRS Criminal Investigation Division.

On average, the IRS processes more than 100 million income tax refunds each year. It has implemented screening filters to improve its ability to spot false returns before they are processed and before refunds are issued. During the 2012 fiscal year, the IRS prevented $20 million in tax refunds from going to criminals—up from $14 million in 2011.[5] Given the number of changes that many taxpayers experience in a year, it is a challenge for the IRS to develop effective filters. Until optimal filters are in place, the current filters may cause delays as refund claims for more taxpayers get extra screening prior to the issuance of the refund.

The IRS has also recently begun issuing special IP PINs to taxpayers whose identities are suspected of or known to have been stolen, to facilitate the filing of their returns and to prevent others from utilizing their identities on future returns. Taxpayer use of IP PINs is more fully described below.

The agency is currently developing new mechanisms to stop the growing trend of fraudulent tax returns being filed under deceased taxpayers' identities. Identity thieves surf the internet for the names, addresses and SSNs of recently deceased individuals. Until recently, Ancestry.com reported the SSNs of deceased individuals. But after being alerted to the problem of identity theft, the company changed this practice with respect to individuals who have died in the past 10 years.[6]

The IRS is expanding its successful 2010 pilot program of marking the accounts of deceased taxpayers to prevent misuse by identity thieves. Currently, the IRS has marked 230,000 accounts of decedents. In addition, the agency is working with the Social Security Administration (SSA) to improve the utilization of the information the SSA makes available to the IRS. It is also expanding the use of its list of prisoners to stop problematic returns. In 2011, the IRS received additional help under the United States-Korea Free Trade Agreement Implementation Act which included language requiring federal and state prisons to provide information on the current prison population.

The IRS' Criminal Investigation (CI) Division has increased its efforts as a fraud prevention measure. Within the last year, in conjunction with the Department of Justice (DOJ) and the U.S. Attorney's offices, the CI Division has conducted 734 enforcement actions against 389 suspects in 32 states and Puerto Rico. Currently, the CI Division has four Scheme Development Centers (SDCs) across the United States whose primary mission is to detect refund fraud.

These SDCs have uncovered numerous identity theft-related schemes. These schemes are forwarded to one of CI Division's 26 field offices for criminal investigation and/or its civil counterparts to resolve victim accounts. After the CI Division conducts its investigation, it recommends prosecution, when appropriate, to the DOJ.

The CI Divisions also work with other federal, state and local law enforcement agencies on joint investigative efforts involving identity theft tax fraud (e.g., the CI Division participates in the DOJ's Identity Theft Interagency Working Group). Ironically, some of the IRS' initiatives to combat identity theft are limited because tax returns and other information submitted to the IRS—and, in some cases, generated by the IRS—are confidential and protected from disclosure by the IRS unless specifically authorized by statute.[7]

These new enhanced revenue protection processes and policies are a double-edged sword for the IRS. The IRS must balance its duty to prevent the public from fraud, while also maintaining its duty to issue refunds to taxpayers as quickly as possible. With an ever-evolving criminal element, this trade off will continue to be an issue for the IRS. With more than 100 million income tax refunds to process each year, the IRS acknowledges it will never be able to quell identity theft tax fraud completely.[8]

Taxpayer Assistance

The IRS has implemented several initiatives to detect and assist the taxpayer in resolving tax-related identity theft, including account indicators, IP PINs, employee training and taxpayer outreach and education.

The IRS has implemented the use of "indicators" to detect and resolve identity theft.[9] Different indicators are used depending on the circumstances by which the IRS receives an indication of an identity theft–related problem.[10] Once the IRS substantiates any taxpayer-reported information, it places the appropriate indicator on the taxpayer's account and notifies the taxpayer. These account flags, which are visible to all IRS personnel with account access, speeds resolution of identity theft issues by making a taxpayer's identity theft problems visible to all IRS personnel with account access. Thus, the taxpayer is relieved of having to repeatedly explain their identity theft issues or prove their identity to multiple IRS units (e.g., Examination Division, Collection Division, etc.). The indicators also alert IRS personnel that a future account problem may be related to identity theft. After three consecutive years of no identity-theft incidents on a taxpayer's account, the IRS will remove an indicator or the taxpayer can request that it be removed sooner.

In January 2011, the IRS began piloting an IP PIN program aimed at cutting repeat fraud for taxpayers who have been victims of identity theft. Taxpayers who have been victims of identity theft will receive an IP PIN to verify their identities at the time they file their return. The IRS will only process a return containing the IP PIN and reject any return filed without it. The agency intends to send a new IP PIN annually to the affected taxpayer. It has issued IP PINs to over 50,000 taxpayers who have been victims of identity theft and anticipates issuing more than 200,000 for the 2012 filing season.[11]

As another measure to improve taxpayer assistance, the IRS recently conducted a thorough review of the training it provides to its employees to ensure that they have the tools and sensitivity they need to respond to a taxpayer who has become a victim of identity theft.[12] The agency has specifically updated the training course for its telephone representatives to ensure they maintain the proper level of sensitivity and understand the serious financial problems that identity theft poses for these taxpayers. The agency has also broadened the scope of training to cover those IRS employees who are not telephone assistors but who nonetheless interact with taxpayers or work identity theft cases.

In an effort to improve taxpayer outreach and education, the IRS created a new section on its website dedicated to identity theft matters.[13] This section provides guides, videos, podcasts and news regarding identity theft as well as links to other agencies that address identity theft (e.g., the FTC). It also includes contact information for the IRS' Identity Protection Specialized Unit where taxpayers can receive assistance in resolving identity theft issues with the IRS.

What Tax Professionals and Taxpayers Can Do to Prevent Identity Theft

There are numerous precautions both tax professionals and taxpayer can take to avoid having confidential private information from being stolen.

Protective Measures by Tax Professionals

Statutory rules, as well as accounting and attorney legal and ethical guidelines, govern the handling of taxpayer information. For example, the knowing or reckless disclosure or use by a tax return preparer of information obtained in preparing a return is a misdemeanor pursuant to IRC §7216.[14] Per §7216, return preparers include not just persons in the business of preparing returns, but also those who provide auxiliary services in connection with the preparation of tax returns. Tax return preparers may also be subject to the privacy provisions of the Gramm-Leach-Bliley Act, PL 106-02, 11/12/99, which imposes requirements on financial institutions to protect personal information. The American Institute of Certified Public Accountants (AICPA) provides additional background and useful information about the Gramm-Leach Bliley Act.[15]

Professionals such as attorneys and accountants have ethical and legal guidelines that keep them from using or disclosing information to their own advantage or their clients' disadvantage. Rule 1.6 of the Model Rules of Professional Conduct addresses the confidentiality of client information and states that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.

Similarly, disclosure of confidential client information without the permission of a client is prohibited by the California Rules of Professional Conduct §54.1.[16] Additionally, the AICPA provides useful information for firms implementing policies to safeguard taxpayer data.[17] IRS Publication 4557, *Safeguarding Taxpayer Data*, sets forth some best practices for handling taxpayer information.

A starting point is to assess the risks that are present in the attorney or tax professional's office. This includes evaluating the operations, physical environment, computer systems and employees. Assess where you keep information, whether it is physical files onsite or stored remotely in storage or electronic files on networks, computers, laptops or other forums. Make sure you have appropriate security protocols built into your electronic systems and administration process to avoid being a source of information that thieves can use to steal taxpayer's identities.

If employees can work remotely from home, their home computers should have the same protections as their work computers. Care also should be taken with respect to using file-sharing programs. In addition, simple security controls, such as locking doors, creating more complicated passwords, encrypting data and shredding records, can reduce opportunities for client information to be stolen.

While some of these safeguards are common sense, a disciplined policy for safeguarding taxpayer data can reduce privacy-related risks in your practice and protect your clients at the same time.[18] Write a plan for safeguarding taxpayer information, placing appropriate safeguards in place, then assign responsibility for these safeguards to an individual or individuals in the firm or business. These safeguards need to be monitored, evaluated and adjusted as your business grows or changes. Additionally, use only service providers who have policies in place to also maintain an adequate level of information protection.

Lastly, identity theft does not apply only to individuals. There have been reported instances where company and benefit plan identities have been stolen.

Proactively Minimizing Taxpayers Risk

There are several ways a taxpayer can minimize the risk of becoming a victim of identity theft. Most importantly, individuals should protect their computers—and their smartphones[19]—by using anti-spam/virus software, updating security patches and firewalls and employing sufficiently complicated passwords. Virus protection software should be set to automatically update each week. An individual should not open files or click on hyperlinks or download programs from questionable emails that may contain malware or viruses that could infect their computer. Individuals should also avoid phishing schemes purporting to be from the IRS[20] or release financial information over the internet.[21]

Care also should be taken with respect to using file-sharing programs. If a person is using a high-speed internet connection that leaves their computer constantly connected to the internet (e.g., cable), they should use a firewall program to stop uninvited access to their computer. Without it, hackers can access personal information stored on the computer or use it to commit other crimes

While preparing a tax return for electronic filing, a taxpayer should make sure to use a strong password to protect the data file. Once the return has been e-filed, the electronic return should be saved on a password-protected CD or flash drive and removed from the hard drive. The CD or flash drive should be stored in a safe place, such as a lock box or safe. If a taxpayer is working with a return preparer, they should ask the return preparer what measures they take to protect their client's information.

Steps an Identity Theft Victim Should Take

If a taxpayer's identity has been stolen, prompt and thorough actions must be taken to minimize the damage and speed the recovery of the theft.

A victim of identity theft should first complete the FTC's *ID Theft Complaint* form.[22] The FTC maintains a database of identity theft cases used by law enforcement agencies across the nation to track down identity thieves. In addition, the FTC can refer victims' complaints to other government agencies and companies for further action and can investigate companies for violations of laws the agency enforces. Be sure to follow the directions on the ID Theft Complaint form and be as detailed as possible in completing the form. Once complete, the victim should file the ID Theft Complaint form with the FTC. A victim should also call the FTC's hotline to update their complaint if they have any additional information or problems.

An identity-theft victim should also contact their local police or sheriff's department to file a report of identity theft. It is important to document the theft at an early stage in order to obtain greater legal protection.[23] Bring supporting documentation of the identity theft and a copy of the completed *ID Theft Complaint* form along with the FTC's *Law Enforcement Cover Letter* explaining the necessity of a police report.[24] The victim should ask the officer to attach or incorporate the *ID Theft Complaint* into the police report as the victim will need a copy of the Identity Theft Report (i.e., the police report with the *ID Theft Complaint* attached or incorporated) to dispute fraudulent accounts and debts. A victim receives greater legal protection by obtaining an Identity Theft Report.[25]

Of course, a victim should contact the fraud department of one of the three nationwide consumer-reporting companies—Equifax, Experian or TransUnion—and request a fraud alert[26] be placed on their credit report.[27] Fraud alerts can help prevent an identity thief from opening any more accounts in the victim's name. Further, a fraud alert on a credit report will cause creditors to contact the individual prior to the opening of any new accounts or making any changes to the individual's existing accounts.

The contacted consumer-reporting company is required to contact the other two consumer-reporting companies, which should also place a fraud alert on the victim's other credit reports. However, if an identity theft victim does not receive a confirmation from a company, the victim should contact that company directly to place a fraud alert. Victims should keep a record with the details of their conversations and copies of all correspondence with enclosures.

The victim should also request a copy of their credit report from each of the three consumer-reporting companies.[28] A victim should review the reports carefully for fraudulent activity and to verify that all personal information reported is accurate (e.g., SSN, address, name and initials, employers, etc.). If fraudulent or inaccurate information is found, the victim should request that the consumer-reporting companies remove it.

When seeking to correct a credit report, a victim should provide a copy of their Identity Theft Report with a cover letter explaining their request. The victim should continue to check their credit reports periodically, especially for the first year after discovering the identity theft, to ensure no new fraudulent activity has occurred.

An identity theft victim should close accounts known or believed to be tampered with or opened fraudulently. He or she should speak with someone in the security or fraud department of each company and follow-up in writing. Letters should be sent by certified mail, return receipt requested, so the victim can document the correspondence. If the identity thief has made charges or debits on the individual's accounts, or has fraudulently opened accounts, the victim should ask the company for the forms to dispute those transactions.

For fraudulent charges or debits on existing accounts, a victim should request the company send its fraud dispute forms. If the company does not have special forms, write a letter disputing the fraudulent charges or debits and send it to the company at the address given for "billing inquiries," not the address for payments.[29] For new unauthorized accounts, the identity theft victim should file a dispute directly with the company or provide a copy of the Identity Theft Report to the company.[30]

Once an account has been closed, a victim should request a letter from the company confirming that the disputed account is closed and the fraudulent debts have been discharged. This letter is the victim's best proof if errors relating to this account reappear on his or her credit report or if he or she is subsequently contacted about the fraudulent debt.

If a victim's tax records are not currently affected by identity theft, they can still contact the IRS Identity Protection Specialized Unit[31] and request an IP PIN. The victim will need to provide the IRS with proof of identity (e.g., a Social Security card, driver license or passport) along with a copy of a police report and/or a completed IRS Form 14039, *Identity Theft Affidavit*.[32]

If a taxpayer believes that their personal information has been stolen and used for tax-related fraud, they should immediately contact the IRS Identity Protection Specialized Unit. A taxpayer's identity may have been stolen if the IRS sends them a letter or notice indicating that more than one tax return was filed for the taxpayer; the taxpayer has a balance due, refund offset or collection action taken against the taxpayer for a year they did not file a return; or wages were reported to the IRS by an employer the taxpayer did not worked for. If a taxpayer receives communication from the IRS indicating identity theft, they should respond immediately to the name, address or phone number on the IRS letter and follow the instructions in the letter or notice.

---

[1] GAO, *Identity Theft: Total Extent of Refund Fraud Using Stolen Identities is Unknown*, GAO-13-132T (Washington, D.C.: Nov. 29, 2012).
[2] IR-2012-23, *IRS Releases the Dirty Dozen Tax Scams for* 2012, Feb. 16, 2012.
[3] "Phishing" is the act of sending an e-mail under the auspices of a legitimate enterprise in an attempt to "lure" the recipient into surrendering private information.
[4] "Malware" is a malicious code that can take over a victim's computer hard drive, thus giving someone remote access to the computer, or it could look for passwords and other information and send them to the scammer.
[5] Comments of acting IRS Commissioner Miller, *Miller Hails Identity Theft Crackdown, But Olson Critiques Victim* Assistance, Tax Notes Today, 2013 TNT 27-4 LEXIS (2/8/13).
[6] *IRS faces surge in identity theft tax fraud*, MSNBC.com (2/17/12), *http://lifeinc.today.com/_news/2012/02/17/10428874-irs-faces-surge-in-identity-theft-tax-fraud?lite*
[7] See I.R.C. §6103.
[8] "The IRS cannot stop all identity theft. However, we are committed to continuing to improve our programs." Written Testimony of Steven T. Miller, Deputy Commissioner for IRS Services and Enforcement before the House Committee on Oversight and Government Reform Subcommittee on Government Organization, Efficiency and Financial Management On Identity Theft, pg. 1 (Nov. 4, 2011).
[9] GAO, *Tax Administration: IRS Has Implemented Initiatives to Prevent, Detect, and Resolve Identity Theft-Related Problems, but Needs to Assess Their Effectiveness*, GAO-09-882 (Washington, D.C.: Sep. 2009).
[10] GAO, *Taxes and Identity Theft: Status of IRS Initiatives to Help Victimized Taxpayers*, GAO-11-721T (Washington, D.C.: Jun. 2, 2011).
[11] Written Testimony of Steven T. Miller, Deputy Commissioner for IRS Services and Enforcement before the House Committee on Oversight and Government Reform Subcommittee on Government Organization, Efficiency and Financial Management on Identity Theft, pg. 7 (Nov. 4, 2011).
[12] Written Testimony of Steven T. Miller, Deputy Commissioner for IRS Services and Enforcement before the House Committee on Oversight and Government Reform Subcommittee on Government Organization, Efficiency and Financial Management on Identity Theft (Nov. 4, 2011).
[13] See www.IRS.gov/identitytheft.
[14] 16 Cal. Cod. Reg. 54.11.
[15] http://www.aicpa.org/InterestAreas/InformationTechnology/Resources/Privacy/FederalStateandOtherProfessionalRegulations/GrammLeachBlileyAct/Pages/default.aspx
[16] IRC §7216(a); Reg §301.7216-1(a).
[17] http://www.aicpa.org/InterestAreas/InformationTechnology/Resources/Privacy/FederalStateandOtherProfessionalRegulations/Pages/SafeguardingTaxpayerData.aspx
[18] See Frequently Asked Questions about Privacy Services published by the AICPA http://www.aicpa.org/interestareas/informationtechnology/resources/privacy/privacyservices/pages/frequently%20asked%20questions%20about%20privacy%20services.aspx
[19] Smartphone users are approximately 30 percent more likely to report being hit by ID fraud. 62 percent say they do not use a screen password to protect their devices. http://redtape.msnbc.msn.com/_news/2012/02/22/10471719-survey-id-theft-on-the-rise-again-card-victims-jump-by-2-million-annually.
[20] Promptly report suspicious e-mails claiming to be from the IRS or an organization closely linked to the IRS (e.g., the Electronic Federal Tax Payment System (EFTPS)), by *forwarding the original e-mail to:* phishing@irs.gov and to the FTC at spam@uce.gov. The IRS can use the information, URLs and links in suspicious e-mails forwarded to them to trace the hosting website and alert authorities to shut down the fraudulent sites.
[21] When the IRS contacts a taxpayer, it generally sends a letter or notice via U.S. Mail, and every such communication includes a telephone number that the recipient can call for confirmation. The IRS does conduct customer satisfaction surveys by telephone, mail and online to obtain taxpayer and tax practitioner opinions. However, IRS surveys received via mail contain an Office of Management and Budget (OMB) number. IRS surveys conducted by telephone and online provide an IRS contact person so the authenticity of the survey can be verified. An IRS survey will never ask for personal identifying information such as a social security number or financial information. http://redtape.msnbc.msn.com/_news/2012/02/22/10471719-survey-id-theft-on-the-rise-again-card-victims-jump-by-2-million-annually
[22] The form is available online at www.ftc.gov/idtheft or via telephone at the FTC's Identity Theft Hotline: 1-877-ID-THEFT (438-4338).
[23] If the police are reluctant to take a report, the victim should ask to file a "Miscellaneous Incident" report or try another jurisdiction (e.g., the state police). Check with the state Attorney General's office to find out if state law requires the police to take reports for identity theft.
[24] The FTC ID Theft Complaint Form and the Law Enforcement Cover Letter can be obtained from the FTC's website at: http://www.consumer.ftc.gov/articles/0281-sample-letters-and-forms-victims-identity-theft
[25] The Identity Theft Report can be used to: (1) permanently block fraudulent information from appearing on a victim's credit report; (2) ensure that debts do not reappear on the credit report; (3) prevent a company from continuing to collect debts that result from identity theft; and (4) place an extended fraud alert on the victim's credit report).
[26] There are two types of fraud alerts: an initial alert and an extended alert. An initial alert stays on an individual's credit report for at least 90 days. An initial alert is appropriate where an individual's wallet has been stolen or has responded to a phishing scam. An extended alert stays on a credit report for seven years. An extended alert is placed on a credit report if an individual is the victim of identity theft and provides the consumer-reporting company with an Identity Theft Report. If an extended alert has been placed on a credit report, the individual is entitled to two free credit reports within 12 months from each of the three consumer-reporting companies. The companies will also remove the individual's name from marketing lists for pre-screened credit offers for five years unless the individual requests to be placed back on the list.
[27] Equifax: 1-800-525-6285; www.equifax.com; P.O. Box 740241, Atlanta, GA 30374-0241. Experian: 1-888-EXPERIAN (397-3742); www.experian.com; P.O. Box 9554, Allen, TX 75013. TransUnion: 1-800-680-7289; www.transunion.com; Fraud Victim Assistance Division, P.O. Box 6790, Fullerton, CA 92834-6790.
[28] The Federal Fair Credit Reporting Act requires each of three nationwide consumer-reporting agencies to provide individuals with a free copy of their credit reports, at their request, once every 12 months. In addition, under Federal law, individuals are entitled to a free report if a company takes adverse action (e.g., denying an application for credit, insurance, or employment) and they request the report within 60 days of receiving notice of the action. The notice will provide the name, address and phone number of the consumer-reporting agency that supplied the information. To order a free annual report, the individual should visit www.annualcreditreport.com or complete the annual credit report request form available at www.FTC.gov/credit.
[29] FTC provides a sample dispute letter for existing accounts entitled "Ask a Business to Remove Fraudulent Charges From Your Existing Accounts" located at: http://www.consumer.ftc.gov/articles/0282-ask-business-remove-fraudulent-charges-your-existing-accounts
[30] FTC provides a sample dispute letter for existing accounts entitled "Ask a Business to Close a New Account Opened in Your Name" located at http://www.consumer.ftc.gov/articles/0283-ask-business-close-new-account-opened-your-name.
[31] The IRS Identity Protection Specialized Unit can be reached at (800)908-4490.
[32] The completed IRS Form 14039, *Identity Theft Affidavit,* should be faxed to the IRS at (978)684-4542.


Sharyn M. Fisk is a Principal at Hochman, Salkin, Rettig, Toscher & Perez, P.C., a California State Bar Certified Specialist in Taxation Law and a Professor at the College of Business and Economics at CSUN. She can be reached at sf@taxlitigator.com. **Cory Stigile** is a Principal at the firm specializing in tax controversies. Mr. Stigile is also a CPA licensed in California. He can be reached at stigile@taxlitigator.com.

Tax Filing Status during Divorce

By Peter S. Muffoletto

THE QUESTION THAT COMMONLY COMES up in divorce matters is what filing status a couple should consider in filing their tax returns during the process of divorce. Generally the answer to this question is determined by a number of factors, but the overriding issue, of course, is what the Internal Revenue Service allows, which can get rather technical depending upon the circumstances.

Generally, a couple should avoid letting the government win in terms of taxes when they are at odds with each other. While this may seem like an easy task, many couples are so polarized during the divorce process that they lose sight of their overall objective of ending the marriage and engage in behavior that is detrimental to their best interests. In such situations, it is important that the attorneys involved engage both parties along with their accountants in finding the appropriate solution. Many times the parties are at such odds that this aspect of the divorce becomes more of a tactical arena for spite rather than logic. A more objective approach will enable them to find a middle ground that benefits them both.

Benefit of Married Filing Jointly (MFJ) Status

Unless there are criminal or tax evasion issues, ongoing liability relating to one or both spouses' financial irresponsibility, or other reasons to avoid filing together, the tax assessed will be lower if the couple files what is technically termed Married Filing Jointly (MFJ). It must be remembered that when filing MFJ, each spouse assumes complete liability for the tax assessed for that return. Only when each spouse files Married Filing Separately (MFS) does each spouse separate their tax liability from the other.

Married Filing Jointly (MFJ) is an election by both spouses to file together, although there is no requirement to do so. It is important to remember, of course, that there is a requirement for each spouse to file their own tax return each year, whether together or separately, if there is a requirement to file. In a community property state such as California, a highly misunderstood issue is that even a non-earning spouse is required to file a tax return, picking up half of the other spouses' earnings and half of the deductions, or file jointly with the earning spouse, to satisfy the tax filing requirement.

A married couple can elect to file their return together if they are not legally separated under a decree of divorce or separate maintenance order on the last day of the tax year. When a couple is not living together as of the last day of the tax year, they may still continue to file jointly if they are not legally separated under a decree of divorce or separate maintenance. Spouses who are not separated under an interlocutory decree of divorce are still considered under tax law husband and wife and may still elect to file jointly until such decree becomes final.

Married Filing Separately (MFS) Decoded

One of the most misunderstood provisions in the tax code is the MFS process, especially in a community property state such as California. Should one or both spouses elect to file separately during any year that they cohabitated, they must allocate half of the total earnings of both spouses to each tax return no matter who earned the income. The same applies to deductions and deductible expenses unless there is a prenuptial or post nuptial agreement or there exists agreed upon separate property where earnings and deductions inured per a written agreement. In some marriages there are situations where one spouse may have owned a business, career or income earning asset that is covered in a prenuptial agreement and has not subsequently been commingled. Those earnings are reported separately, and will continue to be reported as such during the divorce process.

Lacking such elements, both parties, if they lived together during the year, must allocate the appropriate earnings and deductions to each tax return no matter who earned or incurred the expenses. Many accountants make the mistake of filing returns that reflect only the earnings and deductions of the separated spouse, not reflecting the allocation of earnings and deductions as required in a community property state. The allocation generally is based upon the time that the couple cohabitated during the year. The resulting tax generally will be higher than if the couple filed their returns together through the MFJ status. Consequently, these approaches should be analyzed very carefully and, to the extent there is a benefit in filing together, the potential savings should be considered in the marriage settlement agreement or during the divorce process.

If a couple has filed separately and it is found later that it is more beneficial, in terms of overall tax liability, to amend the tax returns to file jointly, the couple may do so within three years of filing the original returns. However, the reverse is not true. Once an MFJ return is filed, a couple may not thereafter file separate returns for that same tax year unless done so by the annual deadline for filing that return, generally April 15.

Before amending an MFS status to an MFJ status to obtain a lower tax liability, great consideration should be given to any and all taxes that may result from the MFS filing. If done properly, the taxes due remain separate. Amending an MFJ filing will incur complete and total liability for each party once filed. This can come back to haunt an individual later on if unpaid liabilities exist or if the other spouse files bankruptcy and is dismissed of those liabilities, leaving the individual liable for unpaid taxes.

Annual Election to File MFJ or MFS

The complications in divorce are myriad but the financial and tax problems increase exponentially as the divorce process drags on. Divorces that span many years involve other questions about the choice of tax filing status. In those situations, if the spouses have been separated for over a year and both have maintained separate households, both parties can continue to elect to file together if a separate maintenance order or final interlocutory decree has not been issued.

With the assistance of accountants computing the benefits of filing jointly for each party, those benefits should be considered in the overall settlement process. The problem that arises in long drawn out proceedings over multiple years is that financial information is less likely to be readily volunteered, making it more difficult to determine the overall benefits of filing jointly. In many cases, the spouses may not want the other spouse to continue to be aware of his or her finances. In those rare long term divorce proceedings, the MFJ status may be improbable but should still be considered in case there is benefit. The benefit analysis can be done by an independent third party accountant without disclosing certain financial information to the parties if a clear written engagement is agreed to beforehand. This can be tricky but, if the benefit is large enough, the independent accountant can report accordingly and the parties can determine what they may or may not want to do about their filing status.

In divorce proceedings in which the parties choose to file separately–and it only takes one spouse to make that decision which is binding on the other–the earnings and deductions that are earned or paid by any given spouse can be claimed separately, assuming that the parties did not live together during the tax year.

The analysis for filing separately or jointly should also take into account each party's legal fees. Legal fees paid in relation to a divorce are not deductible to the party resisting the monetary demands of the other spouse, while those legal and accounting fees properly attributable to the obtaining, producing or collection of spousal support are deductible. All other legal, accounting and expert assistance in relation to the divorce process are not deductible. These factors should be considered by both parties in their decision to file separately or together. If the choice is to file jointly, none of the professional fees in connection to the divorce proceedings are deductible, no matter what the purpose.

Filing after Separation

Once a final court order establishing separate status is issued, or legal separation, both parties are required to file separately, making the appropriate allocations for the periods before and after the court order for the year since MFJ status is no longer available from the date of the order. If children are involved and the individual fulfills the criteria for maintaining a home and more than 50% of the support, the Head of Household status might be an option. Otherwise, the available choices are Married Filing Separately or, if the parties lived separately all year long, Single may be the appropriate filing status depending upon the possible tax liability. How one spouse files after that point does not dictate how the other files.

For the Head of Household status, one must be considered unmarried as of the last day of the tax year. A married taxpayer will be considered unmarried and eligible to file as Head of Household if the taxpayer's spouse was not part of the household for the six months prior to the last day of the year and if the household is the principle household of at least one child for whom the taxpayer is entitled to the dependency exemption for that child. Further, a taxpayer is considered unmarried if he or she is legally separated from his or her spouse under a decree of divorce, or separate maintenance agreement as of the last day of the tax year. A taxpayer under an interlocutory decree of divorce is not legally separated and therefore would not be eligible for filing as Head of Household.

Under Internal Revenue Code (IRC) Section 66, a person living separately from his or her spouse, earning income while living apart for the entire year, and filing a separate return shall treat his or her earned income as his or her separate income. California law contains no such provision. In some instances where the intention is not determinable, California law will apply, but as a practical approach, this may be a moot issue unless the parties reconcile.

Tax rates for couples undergoing separation are generally most beneficial with the utilization of the Married Filing Jointly status but must be weighed against issues of ongoing joint tax liability of both parties, tax compliance of both parties and the need for the separation of financial interests of the parties. These issues should be jointly considered and determined by the attorneys and accountants representing the clients. In some instances, if the marital estate is large and complex, consideration should be given to engaging a competent independent CPA for an objective tax evaluation.

The tax consideration, while important, is not always governing. In some instances, Married Filing Separately can produce relatively strange results that may or may not be desirable depending upon the requirement in a community property state such as California. For tax years subsequent to any cohabitation year, this issue becomes less complex but may result in higher taxes that could be avoided with proper planning, guidance and cooperation on this point. The Head of Household status for the parties that qualify (in a multiple child family this option may work for both taxpayers with some advance planning) may be the lesser of the better choices between MSJ but, with the proper planning, may gain each individual sufficient tax efficiency to be satisfactory. While cooperation is not always evident in divorce proceedings, it is best that, at least on this issue, the parties cooperate with proper guidance for their own best interests.

Peter S. Muffoletto is a Certified Public Accountant who has owned an accounting and tax practice firm in Woodland Hills for 38 years. Muffoletto primarily practices in the arena of tax planning, compliance, defense and preparation for business clients. He also has substantial experience in tax matters relating to trust and estates and regularly advises on numerous tax issues relating to divorce matters. He can be contacted at pete@petemcpa.com.

Classifieds

ATTORNEY-TO-ATTORNEY REFERRALS

APPEALS AND TRIALS

$150/hour. I'm an experienced trial/appellate attorney, Law Review. I'll handle your appeals, trials or assist with litigation. Alan Goldberg (818) 421-5328.

APPEALS AND WRITS

Sophisticated law and motion. 1981 U.C.L.A. School of Law graduate. Certified appellate specialist. 3-time Super Lawyer. Reasonable rates. Gerald Peters. (818)706-1278. gppeterslaw@roadrunner.com.

STATE BAR CERTIFIED WORKERS COMP SPECIALIST

Over 30 years experience-quality practice. 20% Referral fee paid to attorneys per State Bar rules. Goodchild & Duffy, PLC. (818) 380-1600.

APPEARANCES AND MOTIONS

All criminal courts. Experienced in special appearances and drafting motions. High quality work at reasonable rates. Brian Smith (310) 824-3576, bsmithlaw46@gmail.com.

EXPERT

STATE BAR DEFENSE & PREVENTATIVE LAW

Former: State Bar Prosecutor; Judge Pro Tem.Legal Malpractice Expert, Bd. Certified ABPLA & ABA. BS, MBA, JD, CAOC, ASCDC, A.V. (818) 986-9890 Fmr. Chair SFBA Ethics, Litigation. Phillip Feldman. www.LegalMalpracticeExperts.com. StateBarDefense@aol.com.

SPACE AVAILABLE

BURBANK

Two new offices with reception area. Signage of your law firm in Burbank tree-lined neighborhood. Amenities include conference room, copier/scanner, kitchen, storage. Call Louis (818) 478-2822.

ENCINO

INTERIOR WINDOW OFFICE (approx. 300 sf.) with 1 sec. space. Includes reception room, shared kitchenette, 3 common area conference rooms, paid utilities, janitorial, security building with 24/7 access. Call George or Patti (818) 788-3651.

SHERMAN OAKS

Executive suite for lawyers. One window office (14 x 9) and one interior office (11.5 x 8) available. Nearby secretarial bay available for window office. Rent includes receptionist, plus use of kitchen and conference rooms. Call Eric or Tom at (818)784-8700.

TARZANA

Furnished suite (10.5 x 15) w/ sec. space. Floor-to-ceiling window. Open to contract work (PI) for rent. Includes reception room and shared kitchenette. (818) 606-0107. LBH@halpernlawcorp.com.

THOUSAND OAKS

2 Offices available 190 feet each; professional building, premier setting Thousand Oaks; janitorial, utilities, internet, receptionist, incl. Conference room. Secretarial bay available. $700/month, Dave (805) 374-8777.

WOODLAND HILLS

Trillium Towers, Warner Center. One large window office at personal injury firm with secretarial desk, receptionist and conference room. Phone included. Rent negotiable. Call (818) 888-6614.

SUPPORT SERVICES

PROFESSIONAL MONITORED VISITATIONS AND PARENTING COACHING

Family Visitation Services • 20 years experience "offering a family friendly approach to" high conflict custody situations • Member of SVN • Hourly or extended visitations, will travel • visitsbyIlene@yahoo.com • (818) 968-8586/(800) 526-5179.

New Members

The following were approved as members by the SFVBA Board of Trustees in March 2013:

Isabel A. Ashorzadeh
Encino
isabel_ash@yahoo.com
Estate Planning, Wills and Trusts

Peter C. Burton
LexisNexis
Northridge
(818) 297-4016
peter.burton@lexisnexis.com
Associate Member

Kevin D. Cauley
Kevin Cauley, P.C.
Los Angeles
(213) 444-6036
Kevin@kevincauley.com
Healthcare

Victoria D'Cotledge
Victoria D'Cotledge Legal Research & Writing
Pasadena
(818) 835-3553
Victoria@DCotledgeLRW.com
Paralegal

Wendy Forrester
Calabasas
(818) 225-7039
wendyforrester85@gmail.com
Family Law

Dr. Edmond Gilardi
Dr. Edmond Gilardi, D.C.
Northridge
(818) 832-9800
Dr.Gilardi@yahoo.com
Associate Member

Kelvin P. Green
South Jordan, UT
(801) 432-0461
Kelvin@kelvingreenlaw.com
General Practice

Jason Y. Gross
Encino
(818) 414-3727
Jasgross79@hotmail.com
Intellectual Property

Alan Gurvey
Rowen Gurvey & Win
Van Nuys
(818) 981-9960
agurvey@rgwlawfirm.com

Morgan M. Halford
Carlson & Cohen, LLP
Encino
(818) 986-4979
mhalford@carlsoncohen.com
Litigation

Steven I. Harris
Stockwell Harris Woolverton & Muehl
Los Angeles
(323) 935-6669
dolores_schutzman@shwm.com
Workers' Compensation

Betty Karmirlian
Horvitz & Levy
Encino
(818) 634-8203
bkarmirlian@gmail.com

Charles W. Lin
Goldfarb, Sturman & Averbach
Encino
(818) 990-4414
clin@gsalaw.com
Estate Planning, Wills and Trusts

Linda F. Lydon
Law Office of Linda F. Lydon
Woodland Hills
(818) 716-2776
lydonlaw@att.com
Family Law

Lisa H. Mattern
Mattern & Mendoza, LLP
Sherman Oaks
(310) 342-8254
lisa@matternmendozalaw.com
Criminal

Douglas A Minor
Westlake Village
805-267-1118
dougminor@easycreditrelief.com
Associate Member

Nazanin Mostafavi
Calabasas
mostafavinaz@gmail.com
International Law

Michael P. Murray
Howell
(517) 618-9538
mikemurrayesq@gmail.com
General Practice

Alice M. Neumann
Manufacturers Bank
Woodland Hills
(818) 227-4509
aneumann@manubank.com
Associate Member

Quang Nguyen
Manufacturers Bank
Woodland Hills
(818) 380-0912
gnguyen@manubank.com
Associate Member

Brandon K. Nunez Esq.
West Hills
(818) 642-4481
bknunez@gmail.com
Estate Planning, Wills and Trusts

Daniel E. Park
Lurie & Park
Encino
(818) 949-6000 2001
dpark@lurieparklawfirm.com
Civil

Mark D. Pastor
Encino
(818) 906-1900
lataxlaw@gmail.com
Tax Litigation and Controversy

Anat Resnik
Law Offices of Anat Resnik
Encino
(818) 990-1405
anat@anatresnik.com
Family Law

Anthony J. Rinaldi
Glendale
(818) 999-9003
ajrlaw@pacbell.net
Probate

David William Sforza
New York
(818) 915-1706
dsforz@gmail.com
Law Student

Jan D. Somers
Tarzana
(818) 231-1940
jangeriatriccare@yahoo.com
Eldercare Consultant

Steven C. Wilheim
Wilheim & Wilheim PC
Glendale
(818) 550-7890
steve@wilheimlaw.com
Elder Abuse