VALLEY LAWYER

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A Publication of the San Fernando Valley Bar Association

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Year-in-Review

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Futility in the 21st Century

ALAN J. SEDLEY
SFVBA President

THE TERM FUTILITY CONJURES UP A VARIETY of meanings depending upon the context of its use. For example, futility is an apt description for any avid Cleveland sports fan, such as myself, who has the foolish notion that any of Cleveland's professional sports team will win a championship soon. Or, ever ("delusional" is a term that, in this example, can be freely substituted for futility).

Though this example of futility is not, I can tell you through personal experience, limited to the 21st century, the following examples of futility bear closer resemblance to new millennium phenomena, or at the very earliest, the waning years of the past century.

In American politics, I would submit that the 21st century has been most characterized by acts of futility. During the Bush II years, a Republican lawmaker could often be heard offering what he or she considered a most critical bill, only to have a Senate vote taken with predictable results—44 yeas and 56 nays.

These past three years of congressional progress under President Obama is often characterized as 49/51; the Democrats support the President's request, while the opposition party is expected to reject. Honest political discourse and voting with one's conscience has most often been replaced with partisan loyalties, and efforts of the government to effectively legislate has, for the most part, become an exercise in futility.

Such closed-mindedness has trickled down to the electorate as well. By way of example, have you recently tried to engage in a non-heated, level-headed, open-minded discussion with someone on the opposite side of the political spectrum? Futile.

The effort to establish any semblance of bipartisan political consensus is more complicated to achieve nowadays, some might say futile with the technological advances that have taken hold in this 21st century—the internet with its offerings on Facebook, webpage accessibility and the blogosphere, not to mention Twitter and LinkedIn, as well as enough 24/7 cable news coverage to satisfy even the most casual political junkie.

It's nearly impossible to get reliable information concerning a political candidate's background and views when each source of 'information' is most assuredly tainted with the biases and opinions of the disseminator. Any hope or expectation of finding a source for honest, unbiased, straightforward information with which to form an educated and meaningful political view is, frankly, futile.

To that end, and in an effort to bring badly needed civility and prospective towards governance and our political system back to community leaders, I have asked that at each month's Board meeting a designated trustee present a meaningful quote, phrase or thought of an orator, political leader or historian that speaks to governance, policy making or process. In addition, I ask that he or she initiate a thoughtful discussion with fellow board members as to what lessons we must take from the past to eliminate the perceived futility of our present and our future, and suggest ways to re-establish society's emphasis on the importance of character, leadership and values.

The term futility has a most formidable meaning in 21st century medicine. In my role as both hospital attorney and instructor of biomedical ethics to oncology physicians, the concept of medical futility raises a plethora of ethical, philosophical, religious, scientific and legal issues on a frequent, if not daily basis. The real-life circumstances involving the question of futile patient care are at once fascinating, challenging, daunting, troubling and fraught with emotion (for the patient or the family), debate (amongst physicians) and complicated decision-making.

In the context of health care, the term futility is subject to a variety of interpretations. Treatment is deemed to be scientifically futile when it cannot achieve the medical result that is expected by the patient (or decision-maker) making the request. As a general matter, physicians are entitled to determine which treatments are scientifically futile (e.g.,

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physician need not order a CT scan on a patient with a cold; a child with a viral illness need not be prescribed an antibiotic, even if requested by the parent, because as a matter of science, the antibiotic will not be effective in treating a virus).

A more difficult question, and one that is frequently the topic of passionate debate in the hospital setting, arises when a patient (or decision-maker) requests treatment that is not scientifically futile, but that is, in the opinion of the health care provider, ethically futile. Treatment is ethically futile if it will not serve the underlying interests of the patient. For example, some physicians believe that it is ethically futile to keep a patient's body hydrated and nourished when that patient is in a persistent vegetative state (irreversible cessation of higher brain function—think of the Terri Schiavo case).

Some health care providers believe that it would be ethically futile to engage in CPR under circumstances in which the most that can be accomplished through that intervention would be to prolong the patient's life by a few hours. However, as is sometimes the case, families may disagree with physicians over what constitutes ethically futile treatment. After all, we can all agree that what constitutes the underlying interests of a patient vary from one patient to another.

The cause of these and similar debates that are commonplace in hospitals today, and posing difficult and often heart-wrenching decision making by both the health care provider and frightened family members is the rapid advancement of technology that has simply outpaced the abilities of society to comprehend and deal with the life and death decisions raised by such advances. If a person drops dead of cardiac arrest, there is nothing further to be done. If a person is deprived of oxygen for several minutes such that the brain is irreversibly damaged, life can be sustained indefinitely by keeping the heart pumping and the lungs expanding by artificial means.

Technology has brought about exciting advances yet has raised the stakes immensely; hence the debate—how society chooses to define, and cope with situations involving medical futility. It's a tough question that many of us as children of aging parents have, or will soon have to face.

Alan J. Sedley *can be reached at Alan.Sedley@HPMedCenter.com.*

MENTORSHIP COMMITTEE SEEKS VOLUNTEER MEMBERS

One of President Alan Sedley's most exciting initiatives is a Mentorship Program. Our Bar's seasoned members will pair new lawyers with experienced lawyers who may be looking to transition into a new area of law.

We are looking for at least five members of the SFVBA to serve on our Mentorship Committee. Our committee will develop our long-term mentorship program, and begin to recruit mentors and mentees. Bar members interested in serving on the committee should contact President Alan Sedley (ajs@sedleylaw.com), Committee Chair David Gurnick (dgurnick@lewitthackman.com) or Co-Chair Charles Shultz (cshultz@wcclaw.com).

15th Annual MCLE Marathon

LINDA TEMKIN
Director of Education & Events

ATTORNEYS FROM MILES AWAY, FAR BEYOND our state borders, trek to the San Fernando Valley for the San Fernando Valley Bar Association's Annual MCLE Marathon event each January. It is called a marathon, but there's actually very little running—even if attorneys are running late for a seminar. In addition to being one of the most economical ways to earn MCLE credits, the marathon is a great opportunity for attorneys to relax, network and increase their knowledge base, all in a country club setting.

The State Bar of California mandates that attorneys must complete a total of 25 hours of approved continuing legal education credit every three years. According to the Bar, "to ensure that lawyers receive quality legal education, the State Bar approves MCLE providers and education activities." The SFVBA has been an approved licensed provider since the onset of MCLE in California and strives to offer seminars that are relevant to attorneys in real world terms, meaning attendees are there, in person, it's live and it's happening.

The two-day marathon provides attorneys with the mandatory 12.5 hours of participatory credit and includes the much sought after four hours of legal ethics, one hour of elimination of bias and one hour prevention of substance abuse.

The Bar is thrilled attorneys are there in person and welcome the opportunity to meet new members and talk with long-term members as well. It's a great mix of the old and new. The SFVBA also strives to keep to the timeline so that attendees can painlessly put in a day's worth of educational activity without spilling over into the night. And some industrious attorneys have done more than earn their mandatory credits over the two-day period. They complete things like the *New York Times* crossword puzzle and hand-made knitted sweaters for their grandkids (as long as the attorneys are attentive to the lecture and retain the pertinent facts).

As an indication of how successful the MCLE marathon is, some attorneys actually attend year after year, even though they have previously fulfilled their MCLE requirements. Why do they do this? They tell us they find the lectures consistently illuminating, that year after year, they garner pointers that assist them in their practice. That continues to be SFVBA's objective to book speakers who are the best in their field and can offer members relevant information.

Attorneys work tirelessly and it is only fair that the Bar work tirelessly on behalf of its members. The MCLE Marathon is one of the many member benefits to explore. And the price is right, thanks to the sponsors that help bring this annual event to members. As usual, it will be held over Martin Luther King weekend, Friday, January 13 and Saturday, January 14 at Braemar Country Club in Tarzana.

What about the rest of 12.5 hours of mandated credits? That can be earned through self-study and the SFVBA offers many options. Members can borrow from the Bar's extensive collection of CDs and listen to the taped seminars at one's leisure, or purchase a flash-drive to read *Valley Lawyer's* MCLE articles and complete accompanying self-study tests.

The SFVBA endeavors to help attorneys with their practice. Members and non-members are encouraged to attend monthly meetings and seminars; it's a nice way to earn mandated credits over a period of time. But for those who need those credits in a hurry and no longer have the three years to collect them, come to the marathon. Yes, it is 12.5 hours of education over two days, but the lunches are tasty and snacks readily available. Members will be pleasantly surprised how fast twelve and a half hours of education can go, especially when in the company of like-minded peers. It's not a day at the beach, but at least it's a day (actually two) at the country club.

Linda Temkin *can be reached at events@sfvba.org or (818) 227-0490, ext. 105.*

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January 13 and January 14, 2012

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Two-Day Seminar to help attorneys meet the requirements of minimum continuing legal education mandated by the State Bar of California.

Friday January 13

9:30 a.m.
Nuts and Bolts of Estate Planning
Alice Salvo, Esq.
Law Offices of Alice Salvo
1.5 Hours MCLE

11:00 a.m.
How to Tailor Your Employment Mediation to Maximize Outcome and Client Satisfaction
Max Factor, Esq. Steven Paul, Esq. and John Weiss, Esq.
ARC
1 Hour MCLE

12:00 Noon
Lunch

1:00 p.m.
Is That Considered Malpractice?
Terri Peckinpaugh and Wesley G. Hampton
Narver Insurance
1 Hour MCLE (Legal Ethics)

2:00 p.m.
How to Tell When Your Client is Lying to You, and How to Get Them to Tell You the Truth, With...or Without the Polygraph
Jack Trimarco
1 Hour MCLE

3:00 p.m.
The Ethical Collection of Fees
Myer Sankary, Esq.
1 Hour MCLE (Legal Ethics)

4:00 p.m.
Bias in the Legal Profession
Myer Sankary, Esq.
1 Hour MCLE (Elimination of Bias)

Saturday January 14

9:30 a.m.
Law Firm Productivity Seminar
Annie McQuillen, Esq
Thomson Reuters Westlaw
1 Hour MCLE

10:30 a.m.
Top Ten Insurance Agent Mistakes: What to Advise Your Clients
Elliot Matloff
The Matloff Company
1 Hour MCLE

11:30 a.m.
Intellectual Property 101
John Stephens, Esq.
1 Hour MCLE

12:30 p.m.
Lunch

1:30 p.m.
The Danger Zone: Escaping Bar Discipline
Professor Robert Barrett
2 Hours MCLE (Legal Ethics)

3:30 p.m.
Dealing with Stress: How to Prevent Substance Abuse
The Other Bar
1 Hour MCLE (Prevention of Substance Abuse)

Registration Form and Membership Application

(Pre-Registration Deadline is January 6, 2012)

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Fax _____

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Bar Admission Date _____

MCLE MARATHON REGISTRATION FEES

	Member	Non-member
2-Day Seminar	$159	$369
or		
Friday, January 13	$89	$199
Saturday, January 14	$89	$199
or		
Per MCLE Hour	$25	$50
✔ Class Attending		
Late Registration Fee	$40	$60
MCLE Self-Study Key Drive (with Marathon Registration)	$79	$79
MCLE Self-Study Key Drive Only	$129	$199

Membership Dues: $ _____

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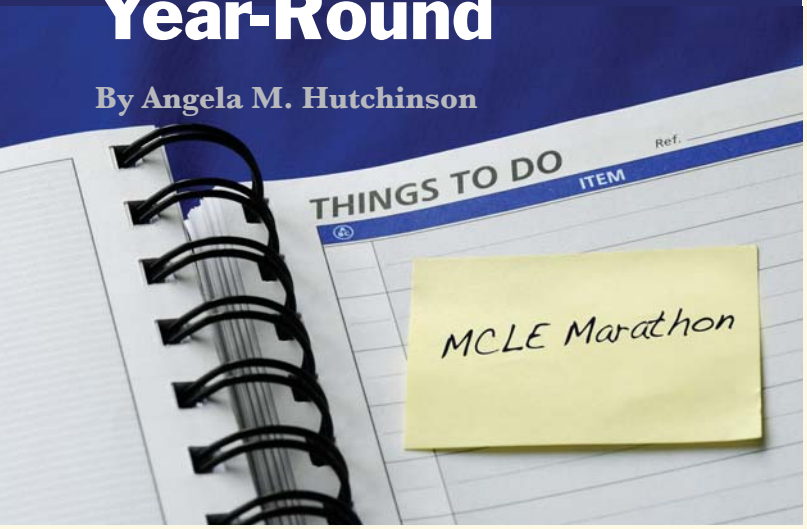
Earning MCLE Credit Year-Round

By Angela M. Hutchinson



THE SAN FERNANDO VALLEY BAR ASSOCIATION takes pride in offering a variety of ways that their members can earn Minimum Continuing Legal Education (MCLE) credit. The SFVBA provides convenient access to MCLE seminars and articles, which are made relevant to the attorney's area of law practice, and are offered at a reasonable fee. Below are some of the various membership resources that attorneys can use year-round to earn their MCLE credit through the SFVBA.

Digital Library

Consisting of CD recordings of past SFVBA events, such as section seminars and MCLE Marathons, the MCLE library is a useful resource for members. Members are able to use the CDs to satisfy MCLE self-study requirements or to simply catch up on a seminar they missed. Members are allowed to check out up to four CDs at a time. The library listings are also in the process of being updated on the SFVBA website.

Flash Drive

Members are able to fulfill their self-study requirement by reading the MCLE cover story article in *Valley Lawyer* and submitting answers to the accompanying test of true and false questions. As a convenient tool for members, 12.5 hours of MCLE self-study articles and tests have been placed onto a flash drive.

For members who do not have time to listen to CDs, the flash drive is especially useful. Also, it is a great bargain because members pay a single price for the flash drive instead of individual test fees to complete the self-tests. In addition, the flash drive contains extra storage space so it can be reused by members for personal use to carry documents between office and home.

Educational Marathon

The MCLE marathon is an event held annually to help attorneys get their necessary credits before they submit to the State Bar that they have met their 25 hours of mandatory education. The Bar provides all the specialized units: 4 hours of ethics, 1 hour of elimination of bias, 1 hour prevention of substance abuse and 6.5 hours of general MCLE. The other 12.5 hours of MCLE can be self-study.

For those members who attend the marathon, we provide the flash drive at a reduced price. And as always, all SFVBA members can check out CDs for self-study at no additional cost.

Section Events

The Bar has ten sections and each SFVBA member can attend section events at the member price even if they are not involved with that particular section.

The various sections include: Business Law, Real Property & Bankruptcy; Criminal Law; Family Law; Intellectual Property, Entertainment & Internet Law; Litigation; New Lawyers; Probate & Estate Planning; Small Firm & Sole Practitioner; Women Lawyers; and Workers' Compensation.

Section events not only offer MCLE credits, but also provide an opportunity for attorneys to network and socialize with their peers. Some sections meet once a month for a lunch or dinner and others meet every other month. Be sure to visit the SFVBA website to view the regularly updated calendar of events for all section events. Also, section events are listed in *Valley Lawyer* within the calendar toward the end of the magazine.

Staff Perspective

According to Irma Mejia who serves as the SFVBA's Member Services Coordinator, it is important for members to utilize the Bar's MCLE services because it is a convenient and economical way to complete the requirements. "Use of the MCLE library is free to all members and is available throughout the year. Members are also able to attend MCLE seminars at a discounted rate. And these benefits are conveniently located in the San Fernando Valley, close to members' homes or offices."

When it comes to members' favorite method of earning MCLE credit, Mejia shares that members find the MCLE Marathon to be the best deal in town. "They also find the MCLE library as an easy alternative for completing their self-study requirements. Compared to other Bar Associations, SFVBA seems to maintain diverse and accessible options for its members," she says.

Now, if looking for the easiest way to get MCLE credit, it behooves attorney members to take the advice of Linda Temkin, SFVBA's Director of Education & Events. She says, "It truly depends on the attorney. For those that have the time, attending seminars not only keeps you up to date on the latest information, but provides opportunities to converse with your peers and this truly adds to your general knowledge base in very significant ways."

Another common way to earn MCLE credit is with *Valley Lawyer*. "The article must be about a substantial legal issue and the attorney who writes the article can then claim one hour of self-study MCLE for each hour it took to write the article. Otherwise, all members are welcome to take the self-study test and that usually earns them one hour of self-study credit," says Temkin.

Angela M. Hutchinson *is the Editor of Valley Lawyer magazine and has served the SFVBA in this capacity for almost 4 years. She also works as a communications consultant, helping businesses and non-profit organizations develop and execute various media and marketing initiatives. She can be reached at editor@sfvba.org.*

2011 BANKRUPTCY LAW OVERVIEW

By Steven R. Fox

BANKRUPTCY OPINIONS ARE ISSUED BY THE bankruptcy courts, district courts, the Bankruptcy Appellate Panel ("BAP"), the Ninth Circuit and the U.S. Supreme Court. In addition, the bankruptcy courts often issue lengthy unpublished memorandum and tentative opinions. This article highlights a few published opinions from the Bankruptcy Appellate Panel in 2011 and offers some take away suggestions.

The Late Filed Proof of Claim

The bankruptcy court sets a bar date for creditors to file proofs of claim and a creditor filed its claim late. In *Pioneer Investments v. Brunswick Assoc.*, 507 U.S. 380 (1993), a late filed proof of claim was allowed due to excusable neglect.

This problem arose more recently in a Chapter 13 case, *Pacific Resources v. Fish (In re Fish)*, --- B.R. ----, 2011 WL 4482210 (9th Cir.BAP 2011). The creditor's practice was to file its own proofs of claim and not to have its counsel file the claims. The creditor missed the deadline and instead filed a late claim. The bankruptcy court disallowed the claim.

During the case, the attorney for the creditor had filed various pleadings in which the creditor had asserted the fact and amount of its claim. The creditor was an active participant in the plan confirmation process.

The BAP determined the creditor satisfied the test for filing an informal proof of claim: a presentment of a writing; within the deadline to file a claim; by the creditor; bringing it to the court's attention; and the nature and amount of the claim. This creditor had done so through its counsel. The BAP reversed the lower court's holding.

This case is important because it provides a good road map to cure legal malpractice when it is the attorney who files the late claim.

Prayer for Attorney's Fees?

Here is good guidance regarding how much praying an attorney should do to successfully include a claim for fees in a complaint. F.R.B.P. Rule 7008 requires that a request for an award of attorney's fees be stated in the complaint as a claim. F.R.C.P. Rule 8 requires that a claim for relief must contain a short and plain statement of the claim and show the pleader is entitled to the relief. An allegation that the pleader is entitled to the attorney's fees must be stated sufficiently to raise this right to relief above a level of speculation.

Here, the complaint in the bankruptcy court stated in various paragraphs that the pleader sought attorney's fees. The text identified a note and a guarantee as the basis for the claim for fees and identified a prior complaint in a non-bankruptcy action where the pleader had sought the same attorney's fees from the same debtor. In its closing prayer, the pleader requested a judgment for damages, including attorney's fees. The BAP held this was sufficient notice to the debtor that the pleader was seeking attorney's fees. *Charlie Y., Inc. v. Robert Carey (In re Carey)*, 446 B.R. 384 (9th Cir. BAP 2011)

The take away? Plead fees carefully and frequently.

The Absolute Right to Convert is Not Absolute, or is It?

In *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007), the U.S. Supreme Court held debtors do not have an absolute right to convert a case from Chapter 7 (liquidation) to one under Chapter 13 (individual reorganization). This opinion upended the common wisdom that Chapter 7 debtors had an absolute right to convert to Chapter 13.

In *Nady vs. DeFrantz (In re DeFrantz)*, 454 B.R. 108 9th Cir.BAP 2011), the BAP addressed the flip side of the issue—does a debtor have an absolute right to convert a case from Chapter 13 to one under Chapter 7? Section 1307(a) states a debtor may convert the case at any time and any waiver of this right is unenforceable. (As to a dismissal, §1307 does not have the same absolute language.)

Statutory analysis should have resolved the issue but it did not. The creditor argued *Marrama* controlled. *Marrama* held that conversion to Chapter 13 would not be permitted because the debtor, having acted in bad faith, could not be a debtor in Chapter 13. In the instant matter, the BAP noted there were mechanisms in Chapter 7 (objecting to the discharge of all debts or to specific debts) to address any bad faith.

The creditor cited *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764 (9th Cir. 2008), for the proposition that a Chapter 13 debtor did not have an absolute right to dismiss a Chapter 13 case. This must mean that conversion too was not absolute.

The BAP disagreed and held the right to convert to Chapter 7 was absolute.

Scope of the Automatic Stay in Serial Cases

In 2011, two opinions addressing the scope of the stay in serial bankruptcy cases were published, one by the BAP, and a second case at the bankruptcy court level. Their analysis cannot be reconciled.

Section 362(c)(3)(A) states that in a second serial bankruptcy filing, the stay terminates 30 days into the case as to the debtor and the debtor's property unless the court enters an order extending the stay for cause. In *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362 (9th Cir. BAP 2011), a debtor filed a serial case (Chapter 13) and did not seek to extend the stay which expired. Then a creditor garnished the debtor's wages (property of the estate). Though the statute references the debtor and the debtor's property, the BAP held that the stay terminated as to the wages (property of the estate).

In *Rinard vs. Positive Investments (In re Rinard)*, 451 B.R. 12 (Bankr. C.D. Cal 2011), the debtor filed a second bankruptcy case, both under Chapter 7; the debtor took no steps to keep the stay in place and the stay expired. A secured creditor then moved to foreclose its interest in certain real property. The bankruptcy court determined that while the stay had terminated, it had terminated only as to the debtor and his property, but not as to the real property because the real property was property of the estate.

The bankruptcy court considered *Reswick* and concluded that it was not correctly decided. The bankruptcy court grounded its decision on the plain reading analysis of the statute, noting that the statute terminates the stay as to the debtor but not as to property of the estate. These two opinions are important for the state court practitioner concerned about the scope of the stay.

The take away from these two cases? Be careful. The law is unsettled in the Ninth Circuit.

Lien Stripping and Date of Valuation

In Chapter 11 or 13, a debtor can strip off or strip down a lien secured by real property. Where the property is not a debtor's personal residence, the senior lender's lien can be stripped down to a judicially determined fair market value. If the property is a debtor's personal residence, the debtor may not strip off or strip down any lien which is secured by even one dollar of equity in the residence.

For example, if a personal residence's determined value is $500,000, the holder of the senior deed of trust is owed $600,000 and the holder of the junior deed of trust is owed $300,000, then the senior deed cannot be stripped but the junior deed can be stripped off. The junior lienholder will hold only an unsecured claim.

If one takes the same numbers but the property is rental property, then there are no protections for the senior lienholder. Its $600,000 claim will be bifurcated into a secured component, $500,000, and an unsecured component, $100,000. (The terms of the note can be modified too.) Lenders secured by the personal residence have more protection from lien stripping.

In one case, the debtors resided in the property on the date they filed their Chapter 11 petition. They moved out during the case and declared that this property was now a rental property. They convinced a bankruptcy court that the status of the house was determined as of the date of the plan confirmation hearing, not the date the bankruptcy case began.

Not surprisingly, the senior lender argued that the petition filing date was the measuring date. The lender argued (1) estoppel because the debtors had stated in their loan papers that they would live in the residence and (2) while the Bankruptcy Code does not specify on which date the house's nature should be determined, the petition date was the correct date because the amounts of claims are determined as of the petition filing date. The lower court agreed with the debtors and stripped down the senior lienholder's deed. On appeal, the BAP held the date a bankruptcy petition was filed was the date when residency is determined.

Why does this case matter? First, the fact the borrowers attested they would live in the residence when they purchased the home did not much matter. Second, while this case creates an opportunity to preplan lien stripping, lenders will raise bad faith arguments. A debtor cannot confirm a Chapter 11 or Chapter 13 plan if bad faith exists. *BAC Home Loans vs. Abdelgadir (In re Abdelgadir)*, --- B.R. ----, 2011 WL 4482656 (9th Cir. BAP (Nev.) (August 16, 2011)

Steven R. Fox *limits his practice to bankruptcy matters, in particular chapter 11 business reorganization and litigation. He can be contacted at srfox@foxlaw.com.*

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A DISTRESSED YEAR for Real Estate

By Richard Gibson

THREE YEARS AFTER THE CRASH OF 2008, the Southern California real estate market remains deeply depressed. Homeowners and others continue to have mortgages that exceed the value of their properties and which they have difficulty paying. How can lawyers help?

Well, what most property owners need is some way to reduce the principal amount of their mortgage. Under some circumstances, this can be done in bankruptcy, although it is easier for commercial properties than owner-occupied residences. Non-bankruptcy law provides property owners with no legal right to reduce their mortgages. There are, of course, federal programs to encourage banks to modify loans. California law makes it very difficult for lawyers to assist with loan modifications, which are seldom successful in any event.

An issue that frequently arises in the current market is foreclosure defense and helping clients avoid personal liability for any shortfall between the value of the property and the total of the mortgage. Understanding this issue requires knowledge of California's intricate and multi-layered system of judicial and non-judicial foreclosures, as well as the complex system of Anti-Deficiency Laws. Special issues, which often arise, include the legality of the Mortgage Electronic Registration System ("MERS") and the position of junior liens.

Mortgage Reductions

A large number of property owners face the same basic problem. They bought real property—a house, an apartment building or something else—for a high price, during the boom. They took out one or more mortgages against the property. The value of the property has now fallen drastically, leaving it worth less than the total mortgage debts. To make things worse, the client's income has also usually fallen, so he or she can no longer afford to make mortgage payments.

What such clients need is to have the principal amount of their mortgages reduced. Lowering the interest rate would help but the real issue is usually that the principal is too high for the property or the client to carry. One solution, of course, is for the client to walk away from the property. If the client is open to that approach, then the question becomes, how can he or she walk away without being stuck with any liability for the excess of the debt over the property value? This issue will be discussed below.

Many clients, however, do not want to walk away. For them, the job of the lawyer is to find some way to reduce the mortgage payments, preferably by reducing principal. This can sometimes be done in bankruptcy.

Debt Against Commercial Property

According to Bankruptcy Code (Title 11 U.S.C.) Section 506, debt secured against real property is permitted to be "stripped down" to the current fair market value of the property. Section 506 strip down divides the debt into two pieces. First, that part of the debt, which is supported by the current value of the property, remains a secured debt; it must be paid 100 cents on the dollar, principal and interest. Second, that part of the debt, which is not supported by the current value of the property, becomes an unsecured debt; it can often be paid less than 100 cents on the dollar.

For example, a client who owns 27 single-family residences around the United States provides a good illustration of how strip down can be used. Each has one or more mortgages, which total more than the current value of the property. Except for the client's home, each property

produces monthly rental income, which is not enough to cover the mortgage payments plus operating expenses.

When the client was on the verge of losing his properties in foreclosure, he went to his attorney who then filed a Chapter 11 bankruptcy for him. Although Chapter 11 is intended for business reorganizations, individual debtors can also file it. The attorney obtained appraisals of each property and then moved to "strip down" each mortgage to fair market value. With the mortgages so reduced, the attorney then proposed a Chapter 11 plan, under which the client paid his new, reduced mortgages out of his cash flow, and had some money left over to pay unsecured debt.

This is how Chapter 11 is supposed to work in distressed real estate cases. The same logic also works for office buildings, apartments and other types of commercial property with excess debt. One serious caveat should be noted. Merely proposing a Chapter 11 plan does not mean that client will be able to confirm it. Chapter 11 is a complex body of law, and confirming a plan—particularly over creditor opposition—is always difficult.

Debt Against Debtor's Principal Residence

The client previously mentioned was only able to strip down the mortgage on 26 of his 27 houses. He was not able to strip down the mortgage on his principal residence. Bankruptcy Code Section 1123(b)(5) prohibits using Chapter 11 to modify "a claim secured only by a security interest in real property that is the debtor's principal residence…" Bankruptcy Code Section 1322(b)(2) has identical language applying the same prohibition in Chapter 13 cases. (Chapter 13 is consumer debt reorganization.)

These statutes present a huge practical problem. The vast majority of property owners needing debt relief are homeowners, whose mortgage is higher than the value of their home and who can no longer afford their monthly payments. Thanks to these statutes, bankruptcy seldom provides any useful relief to ordinary middle-class homeowners. There are, however, two exceptions to this rule, which permit attorneys to sometimes help homeowners.

Exception #1: Wholly Unsecured Junior Liens

Many homeowners have both junior and senior liens. If the current value of the property is less than that the senior lien, then a Chapter 13 can "strip down" the junior lien. *In re Zimmer* (9th Cir. 1220) 313 F. 3rd 1220. Such strip-down is done via noticed motion. The debtor must obtain an appraisal of current fair market value. The secured creditor can, and often does, present its own appraiser with a different value.

Exception #2: Property Not Used Only as a Principal Residence

The second exception to the ban on lien stripping against principal residences is for liens that are not only secured against the principal residence. This exception comes directly out of the language of the statute.

If the debtor once lived in the house, but no longer lives there, then it is not his or her principal residence, and the mortgage can be stripped down. *In re Abdelgadir* (Bankr. 9th Cir. August 16, 2011)2011 WL 4482656. Moving out of the house, after the bankruptcy is filed, will not help; whether the house is the debtor's principal residence is decided on the date of filing the bankruptcy. Id.

If the debtor lives in a multi-unit property, he or she only lives in one unit, and the other units are rented out, then strip down is allowed. *In re Scarborough* (3rd Cir. 2006); 461 F. 3d 406 *Lomas Mortgage, Inc. v. Louis*, (D. Mass. 1995) 185 B.R. 636 aff'd 82 F. 3rd 1. The logic in that case is that, while the lien is against the debtor's principal residence, the lien is also against the other units.

Some debtors have argued that the deed of trust against their residence is also a lien against other things, and thus strip down should be allowed. If the other collateral that the lien is against does not have significant value, this argument tends not to be accepted. That a debtor had a home office in his residence was held not good enough, absent evidence that the home office added significant value to the bank's collateral. *In re Lievsay*, (Bankr. 9th Cir. 1996199 B.R. 705). That the secured creditor's lien attached to incidental items, in addition to the house, such as a washer and drier, did not permit strip down either. *In re Lee*, (Bankr. 9th Cir. 1997) 215 B.R. 22.

The dividing line is determined on a case-by-case basis. The general idea, however, seems to be that if the bank's collateral is the debtor's principal residence, and nothing else of any significance, then strip down is not allowed. If the bank's collateral, however, is the debtor's principal residence, plus something else, which has significant value, then strip down is allowed. Running a business out of one's kitchen is not enough for strip down; renting out half of the property to a third party is enough.

Loan Modification Fiasco

When the mortgage crisis first hit, the hot new area of legal practice was loan modifications. There are a variety of federal programs, which are supposed to encourage banks to assist homeowners by modifying mortgages. The best known of these programs is the Home Affordable Mortgage Program ("HAMP"). For some time, the radio waves were blanketed with attorney ads promising homeowners that the law firm would get them a loan modification or they would get their money back.

Those ads are unheard of these days. There are two reasons for this. First, the California Legislature passed Civil Code Section 2944.7, which regulates those who assists others to obtain loan modifications, including attorneys. Section 2944.7 prohibits lawyers from being paid in advance for loan modification work, or taking any power of attorney from the borrower. As a practical matter, if a lawyer is not paid in advance for this work, he or she is not likely to be paid at all.

Further, the banks will not talk to a lawyer, trying to negotiate a loan modification, unless he or she has a power of attorney, which Civil Code Section 2944.7 forbids lawyers from obtaining. In short, Civil Code Section 2944.7 effectively outlaws attorney-assisted loan modifications.

Second, loan modifications have been a disaster for all concerned. As a number of studies have shown, the banks give very few loan modifications, and those few they give are usually trivial in scope. See e.g. Goldfarb, Zachary A. "Obama's Efforts To Aid Homeowners, Boost Housing Market Fall Short Of Goals," *Washington Post*, October 24, 2011;

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Hagerty, James R. "Foreclosure-Prevention Program Struggles to Make Impact", *Wall Street Journal*, April 14, 2010.

As a rule, if a consumer seeks a loan modification, he or she is in for an extended stay in purgatory. The banks ask for documents, and then lose them, over and over. The consumer has to make dozens, and sometimes hundreds of phone calls, to move the process forward. The file tends to get shifted from one department to another, over and over. While the banks do sometimes modify loans, everything about the process is time-consuming, frustrating and abusive toward the consumer.

For these reasons, very few lawyers still handle loan modifications. On top of everything else, the State Bar is persuaded, rightly or wrongly, that many lawyers who offer to help with loan modifications are scam artists, and the State Bar has made a special effort to track down and disbar lawyers in this area.

Foreclosure and Anti-Deficiency Basics

Lawyers now are often approached by property owners who want help defending against foreclosures. To assess whether to help a potential client, attorneys need to be familiar with the basics of California foreclosure and anti-deficiency law.

California has two kinds of foreclosure: the relatively rarely seen judicial foreclosure, and the more common non-judicial foreclosure. Judicial foreclosure requires the filing of an action in Superior Court. It is ordinary litigation.

Non-judicial foreclosure occurs outside the court system. After a borrower defaults, the lender must send to the borrower, and record in the County Recorder's Office, a Notice of Default. If the borrower still does not cure the default, then three months after the Notice of Default, the lender may send to the borrower and record a Notice of Sale. An actual foreclosure sale can then occur at least twenty days after the Notice of Sale.

California law has a number of statutes collectively known as the Anti-Deficiency Laws. These laws limit a lender's ability to pursue the borrower for any shortfall between the amount of the loan, and the value of the property:

- Code of Civil Procedure ("CCP") Section 580b prohibits deficiencies after the foreclosure of a purchase-money mortgage or deed of trust against a residential real property, of four unitsor less, which is occupied in whole or in part by the borrower.
- CCP 580d prohibits deficiency judgments after non-judicial foreclosures.
- CCP 580e prohibits deficiencies after a short sale, for senior liens held against the borrower's residence, if it is not more than four units.
- CCP 726, the One Form of Action Rule, requires a lender, who holds real property collateral, to foreclose upon the collateral, first, or risk losing either the collateral or the ability to pursue a personal judgment.

Fighting Foreclosure

Clients will frequently want to fight foreclosures. This is usually a waste of time. If the loan was actually made, if the deed of trust or mortgage was properly recorded, and if the borrower really has not paid, then, as a rule, foreclosure is going to happen, if the lender goes forward with it.

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It is often the case that, if a lawyer carefully examines a foreclosure, he or she can find technical problems with the Notice of Default, the Notice of Sale or some other aspect of it. Courts will sometimes require that an improper foreclosure be re-noticed and re-done; courts will virtually never set aside a foreclosure because of technical defects in the process. *Knapp v. Doherty*, (2004) 123 Cal. App. 4th 76, 20 Cal. Rptr. 3d 1. It is different, of course, if the client's grievance is more substantial. *Millennium Rock Mortgage, Inc. v. T.D. Service Co.* (2009) 179 Cal. App. 4th 804, 102 Cal. Rptr. 3d 544. (Technical defect in foreclosure, combined with gross inadequacy in sale price, justified setting aside foreclosure sale.)

Clients will frequently say that the lender promised to work out a loan modification, the borrower relied upon that promise (by, for example, not filing bankruptcy) and that the lender then broke its word by foreclosing anyway. Under these facts, *Aceves v. U.S. Bank, N.A.* (2011) 192 Cal. App. 4th 218, 120 Cal. Rptr. 3rd 507, held that, while the borrower could sue the bank for damages, the foreclosure would not be set aside.

Attacking MERS

Traditionally, whenever a mortgage or deed of trust was transferred or assigned, the transfer or assignment would be recorded in the real property records. Recently, lenders have gotten into the habit of transferring deeds of trust or mortgages (or fractional interests therein) so frequently that they no longer record each assignment. Instead, the deed of trust is held in the name of MERS, a nationwide registry system. When the interest is transferred, the deed of trust stays in the name of MERS; the transfer is made in the internal records of MERS.

MERS is still new and strange. The idea has arisen, in many quarters, that MERS is illegal, and that foreclosures done for deeds of trust held by MERS are improper and can be set aside. Before this year, there was little California authority on this issue. Recently, however, there have been three Court of Appeal decisions to come down in quick succession. *Ferguson v. Avelo Mortgage, LLC* (2d Dis. 2011) 195 Cal. App. 45th 1618; *Gomes v. Countrywide Home Loans* (4th Dis. 2011) and *Fontenot v. Wells Fargo* (1st Dis. August 11, 2011) 2011 WL 3506177. All three rejected attacks on MERS. These decisions indicate that California homeowners are unlikely to prevail with arguments that MERS is not valid, or that the foreclosing lender has to prove the validity of its assignment.

Junior Liens

Most foreclosures in California are non-judicial. Under CCP 580d, a lender, after a non-judicial foreclosure, is not entitled to a deficiency. Thus, most of the time the issue of fighting a deficiency does not arise in foreclosure cases.

A major exception to this rule concerns junior liens. Let's say a homeowner has two deeds of trust against his or her home. Let's say the senior deed of trust holder forecloses non-judicially. The homeowner has no potential deficiency exposure to the senior, because it foreclosed non-judicially.

Does the homeowner have potential liability to the holder of the junior lien? The general answer is "yes." A sold-out junior mortgage holder can sue under the note after its lien is wiped out by the senior foreclosure. *National Enterprises, Inc. v. Woods* (2001) 94 Cal. App. 4th 1217. Note, however, that if the junior lien was a purchase-money lien then CCP 580b protects the homeowner from a deficiency, even if the senior foreclosed. *Brown v. Jensen* (1953) 41 Cal. 2d 193; *Spangler v. Memel* (1972) 7 Cal. 3rd 603.

What this means, as a practical matter, is that Home Equity Loans or HELOCS are particularly dangerous in a foreclosure. If the homeowner took out two or more loans, as part of the purchase price of the home, he or she is protected from personal liability to those junior loans. If, on the other hand, he or she took out a home equity line of credit secured by a junior lien, the homeowner probably has personal liability on the junior note if the senior forecloses.

Junior liens are particularly treacherous in short sales. Newly enacted CCP 580e protects homeowners against deficiency liability by senior lenders. It provides no protection against junior liens. Thus, a homeowner with two more liens should not agree to a short sale, unless the junior loan holders expressly waive in writing any right to seek a deficiency.

Richard Gibson *is the principal of Gibson Law, P.C. of Woodland Hills, which specializes in real estate, business and bankruptcy law. In practice since 1983, Gibson has been published in The American Bankruptcy Law Journal, the California Bankruptcy Law Journal, the California Real Property Journal and the Ventura Star. He can be reached at rickgibsonlaw@gmail.com.*

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1. Section 506 of the Bankruptcy Code (Title 11 United States Code) permits property owners to "strip down" some liens to the current fair market value of the property.
   True
   False

2. Strip-down of liens is only permitted in cases of a debtor's principal residence; it not allowed for other types of property.
   True
   False

3. Unsecured debts sometimes are not paid in full in Chapter 11 or Chapter 13 bankruptcy cases.
   True
   False

4. Individuals are not permitted to file Chapter 11 bankruptcies.
   True
   False

5. Chapter 13 was created to permit cities and counties to file bankruptcy.
   True
   False

6. Junior liens against a debtor's principal residence can be stripped down under Section 506, if the value of the property is less than the total secured by senior liens.
   True
   False

7. If a senior deed of trust against the debtor's principal residence also secures items such as a washing machine and a drier, the deed of trust can be stripped down under Section 506.
   True
   False

8. Under the HAMP loan modification program, the vast majority of homeowners who need assistance have been provided help.
   True
   False

9. Lawyers who want to help consumers with loan modifications are permitted by California law to take retainers up front and to ask for written powers of attorney.
   True
   False

10. Judicial foreclosures in California involve the filing of litigation in Superior Court.
    True
    False

11. Non-judicial foreclosures in California require the filing of an action in Bankruptcy Court.
    True
    False

12. A non-judicial foreclosure is initiated by the filing and recordation of a Notice of Default.
    True
    False

13. In a non-judicial foreclosure, the Notice of Sale may not be sent until nine months after the Notice of Default is sent.
    True
    False

14. CCP Section 580b prohibits lenders from seeking a deficiency judgment against a homeowner after foreclosure of a purchase-money deed of trust or mortgage against real property of four units or less which is occupied in whole or in part by the borrower.
    True
    False

15. CCP 580d permits deficiency judgments after non-judicial foreclosures.
    True
    False

16. CCP 580e prohibits deficiency judgments by junior lienholders after a short sale.
    True
    False

17. If there is the slightest technical defect in a foreclosure, a California court is highly likely to set aside the foreclosure and to deem the deed of trust void.
    True
    False

18. The California appellate courts have held that the Mortgage Electronic Registration System ("MERS") is illegitimate, and that foreclosures done by MERS are void.
    True
    False

19. A sold-out junior lienholder can sue the borrower on its note, after a non-judicial foreclosure by the senior lender.
    True
    False

20. The holder of a sold-out junior purchase money deed of trust cannot sue on its note after the senior lienholder forecloses.
    True
    False

MCLE Answer Sheet No. 40

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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

IRS Amnesty for Worker Misclassification

By Zane S. Averbach and Cynthia L. Rubin

EMPLOYERS CLASSIFY WORKERS AS independent contractors for a variety of reasons, the most prevalent being the savings to employers in unemployment insurance, worker's compensation insurance, employment taxes and benefits.

The Internal Revenue Service estimates that it loses one billion dollars a year in revenue due to the improper classification of workers as independent contractors, and the IRS is actively seeking the lost revenues. However, to avoid the taxes and penalties for misclassification of workers as independent contractors, the IRS has announced a "Fresh Start" amnesty program to allow employer/taxpayers to voluntarily reclassify their independent contractors as employees and receive a tax savings.

Misclassification Initiative

In 2010 the Department of Labor ("DOL") announced its Misclassification Initiative, stating that it will be targeting for audit companies using independent contractors. The DOL hired 100 auditors specifically for this program, with the goal of examining 6,000 companies over three years.

IRS and DOL Work Together

On September 19, 2011, the DOL, in order to more efficiently target misclassified workers, signed a Memorandum of Understanding with the IRS, whereby the two agencies will work together on more levels to stop the wrongful classification of workers as independent contractors. Additionally, several states, California not included, have also joined the program. These entities will be sharing information, making an audit by one agency potentially lead to other audits as well.

Amnesty Program for Worker Misclassification

In September the IRS announced an amnesty program for unpaid taxes based upon the misclassification of workers as independent contractors. Participation in the Voluntary Classification Settlement Program ("VCSP") can save an employer/taxpayer substantial amounts, but as explained below, can also trigger other costly consequences.

Tax Savings

Without reference to the VCSP, if the IRS determines that a business' independent contractors are actually employees, the employer/taxpayer will be responsible for payroll taxes based on the total compensation of all misclassified workers during the year(s) they were employed, as well as FICA, FUTA and SUTA (collectively "employment taxes"). For example, if a business has four persons paid as independent contractors, each making $25,000 per year for the past two years, and the IRS determines that the workers should have been employees, the employer will be liable for employment taxes based on the $200,000 of wages paid, as well as penalties and interest, which can be as much as 25% of the total wages paid.

However, if an employer qualifies for and agrees to the terms of the VCSP, the employer will pay 10% of the employment tax liability that may have been due on compensation paid to the workers, calculated at the reduced rates of IRC section 3509(a), for the most recent year, with no liability for any interest or penalties. Using the same example as above, if the employer had taken advantage of VCSP, only employment taxes for the past year must be paid, and even then the taxpayer is required to pay only 10% of what the actual tax liability would have been, with no interest or penalties. The IRS estimates that the amount employers will pay under VCSP will be approximately 1% of the wages paid to the misclassified independent contractors.

VCSP Eligibility

To be eligible to participate in VCSP, the employer/taxpayer must have been paying workers as independent contractors and want to voluntarily change the classification. The employer must have treated the workers as independent contractors and filed form 1099 for each worker for the past three years. Additionally the taxpayer cannot currently be under audit by the IRS, DOL or any state agency regarding the misclassification of workers.

If the above criteria are met, the employer/taxpayer must agree to the VCSP terms. Specifically, the taxpayer must agree to (1) treat the workers as employees in the future and (2) extend the statute of limitations on the assessment of employment taxes from 3 years to 6 years for each of the first three calendar years beginning after the date the workers become employees.

An employer/taxpayer wishing to take advantage of the VCSP must file an application with the IRS at least 60 days before converting the workers to employees. Currently the amnesty program has no termination date.

Potential Consequences of Participation

Now that the IRS, DOL and several states are sharing

information, it may mean that while the employer enjoys the financial benefit of the amnesty program, the IRS informs the DOL, and the DOL audits the classification of those workers. If the information is shared with the taxpayer's state, the taxpayer could be liable for state employment taxes and workers compensation penalties as well.

In addition to taxes, if the employees understand the importance of their classification change from independent contractors to employees, they could sue for lost benefits, which may include overtime, health insurance, sick, holiday and vacation pay and other benefits offered to employees.

Using Independent Contractors

Employers who use independent contractors and decide not to participate in VCSP should still review the requirements for workers to be properly classified as independent contractors and determine whether or not they have misclassified any independent contractors. With the downturn in the economy both federal and state governments are searching for ways to generate funds and protect workers, and since they estimate the misclassification of independent contractors to cost the IRS $1 billion per year, it is imperative that employers are in compliance with the regulations for independent contractors.

Indices of Independent Contractors

In determining if a worker is an employee or independent contractor, the IRS looks at specific facts in three main categories—behavioral control, financial control and relationship of the parties.

Behavioral control concerns who has the right to direct or control how the worker performs the work. If the business has the right to direct the worker regarding how to do the work, including but not limited to when the work must be done, how the work must be done, the tools or equipment required, and where supplies must be purchased, the worker has all the characteristics of an employee. Even if the business does not control the way work is to be done, if it has the right to control, the worker is more like an employee than an independent contractor.

The general rule is that an individual is an independent contractor if the business owner has the right to control or direct only the result of the work and not what will be done and how it will be done.

For example, take Manufacturing Company M who retained Worker W as a management consultant for the sales department. W's responsibilities are to ensure that the sales department is fully staffed, to ensure that all materials used by the sales agents are stocked and available, and to review all sales contracts. As part of its agreement with W, M informs W that all actions taken by W must have prior approval from M, including hiring or terminating employees within the sales department, purchasing additional materials needed by the sales agents, and accepting any sales contract prepared by the sales department.

Since M is retaining complete control over not only the result but the methods and decisions, W has the indices of an employee. Using the same example as above except that in this instance M hired Worker C with the same responsibilities as W. In this case M also gave C the sole authority for hiring or firing personnel in the sales

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department, purchasing the materials needed by the sales agents, and in accepting sales contracts prepared by the sales department. Since C has control over the methods used, the means and details of the work to be performed, and for all decisions relating to the work, C has the behavioral characteristics of an independent contractor.

Giving up control of how work is to be accomplished is difficult for business owners and managers, but the issue of who has the ability to control the work is critical to determining if the worker is an independent contractor.

Economic aspects of the relationship between workers and business owners are also frequently analyzed in determining worker status. Independent contractors should have financial control of their own businesses, which can be measured by whether they have a significant investment in the business, whether expenses incurred by the worker in performing the services are reimbursed by the business or part of the cost of doing business of the contractor, whether or not the worker seeks out other business opportunities, the method of payment to the worker, and the ability of the worker to realize a profit or loss.

Independent contractors will have made an investment in their own businesses, such as purchasing equipment, forming and maintaining a business entity, and/or having an office or vehicle. Independent contractors are normally responsible for their own business expenses, including travel, equipment, consumables, and other expenses incurred in performing services.

If the worker has the opportunity to make a profit or incur a loss by performing services more efficiently, it is a good indication that the worker could be an independent contractor. The more decisions that the worker has the authority to make which affect the worker's profit or loss, the more the worker looks like an independent contractor.

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Working Relationship

The last category, the relationship between the business and the worker relates to the intent that the parties had in entering into the relationship. While the intent of the parties might be one factor, it is not the label that the parties have agreed to that is determinative, but rather the substance of the relationship which determines the status of the worker.

Characteristics of the relationship include: (1) whether or not the worker is entitled to benefits afforded to employees of the business, including health insurance, workers compensation, pensions, vacation and sick pay; (2) the circumstances under which a business can terminate the relationship with the worker or the worker can terminate services; and (3) the term of the agreement.

Additionally, the courts have found that workers whose services are key aspects of the regular business of the company are more like employees, versus workers who provide a service to the company which is not part of the company's regular business activity. For example, the work of an attorney is part of the regular business of a law firm. If a law firm hires an outside attorney to assist with its work, and intends on presenting the work as its own, there is an increased probability that the law firm will direct and control the activities of the outside attorney. However, if the law firm has hired an outside attorney who is a specialist and who is given authority and discretion to handle the matter, the outside attorney could be an independent contractor even though it is performing services relating to the regular business of the firm.

There are multiple factors which go into the determination of whether a worker is, in fact, an independent contractor. Any businesses that use independent contractors should review the behavioral control, financial control and relationship issues set forth above and should be familiar with the requirements of the IRS.

Classification of workers is an issue which also arises with the Worker's Compensation Appeals Board, the Employment Development Department, the California Franchise Tax Board, the California Department of Fair Employment and Housing and the Department of Labor. Each have their own articulated test for determining the status of a worker, and each have their own set of penalties for improperly determining that status.

Government agencies are looking for misclassified workers, so knowing the factors to be aware of is critical before classifying a workers as an independent contractor.

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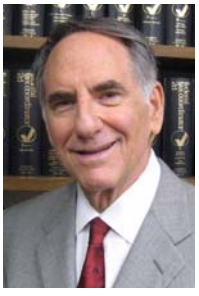

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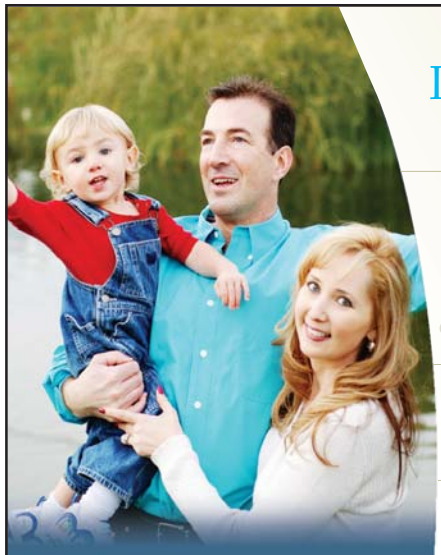

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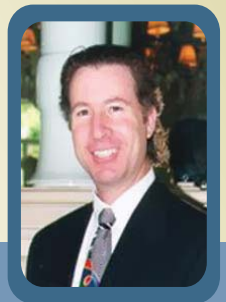

Elliot Matloff

Five Law Practice Management Tips

What New Lawyers Can Learn from the Wizard of Westwood

By Jerome Fogel

THE LATE JOHN WOODEN won ten national championships from 1964 to 1975 as the men's basketball coach at UCLA. Wooden was renowned for his words of wisdom both on and off the court. The Hall of Fame coach frequently provided short, yet inspirational messages to his players–including Bill Walton and Kareem Abdul Jabbar–which are applicable lessons for today's legal professionals to be successful. New attorneys can uncover five law practice management tips drawn from the philosophy of Coach Wooden.

1. Business Development: "Be prepared and be honest."

Don't rely on faking it until making it–be trustworthy. New attorneys can separate themselves from the pack by applying a simple business development skill learned at Fortune 500 companies. Early on in their careers, most in business development gain experience by going into the field. These are critical lessons. What is waiting for them is rejection, but if they can learn from the inevitable mistakes, they can rise to become rainmakers.

Novices may often focus early on presentations of knowledge and conveying information. There is very little success to be had with these tactics unless the decision makers are analysts (most often, the decision makers are not analysts). However, as the novices gain experience, they learn that lunch meetings and more informal conversations lead to successful deals being closed. In addition, adding a thorough level of preparation for the background of the prospective client helps frame the discussion. The results have everything to do with focusing on the client rather than on knowledge.

During the first meeting or introduction, clients will consciously or subconsciously ask themselves, "Can I trust this person?" The prospective client is being asked to trust the attorney with his or her business and in some cases life. If an attorney spends time conveying information and knowledge in an attempt to gain business, then already the perceptive client will see through this attempt to build trust and likely pass. On the other hand, if the attorney takes the time to understand the client, his or her needs, and the problem, then the attorney is in a better position to provide a solution. The prospective client will be listening attentively.

2. Client Management: "Consider the rights of others before your own feelings, and the feelings of others before your own rights."

Most law schools do not teach attorneys how to empathically step in the shoes of their clients and navigate the inherent psychological issues in the practice of law. In school, law students focus on the law. In practice, attorneys for the most part focus on people. Attorneys can give their clients a sense of peace if they know what the client's concerns are. These concerns may or may not be related to the details and complexities attorneys focus their time and energy on.

Whether a client is involved in a transaction or a lawsuit, often the client may be dealing with fear. Attorneys are as much psychologists as legal practitioners at this point. Fear is what the client expects is really going to happen and may be unrelated to reality. The attorney's job is to communicate reality and best navigate the client through the unknowns. This builds the client's faith and trust in his or her attorney, and the client will follow the attorney's lead.

3. Stress: "Never mistake activity for achievement."

Attorneys are in a stressful profession. The relationship between their physical bodies and the effectiveness of their activity cannot be overlooked. Less exercise leads to less productive work which requires more time and stress at the office.

One effective method for reducing stress is getting regular exercise, but not for the reason that one might think. Here is the cycle: attorneys get overworked and stressed. Attorneys feel "too tired" so they skip their exercise. This then impacts their mental and emotional stamina and they begin to work less effectively, leading to more work and more stress. Then they may find that they have no time to exercise. Attorneys can break the cycle by committing to an exercise plan which keeps them physically, mentally, and emotionally sharp. Exercise is an investment.

4. Personal Development: "It's what you learn after you know it all that counts."

Attorneys learn something new virtually every day in the field of law. Yet how often do attorneys take the time in their personal development to learn something new? Even if there was the desire, most attorneys would be wondering when they have the time.

Automobile University is a possible solution. Automobile University refers to books on CD. Books on CD can be an invaluable aid in calmly and productively traversing Los Angeles traffic. Local libraries have hundreds of titles on a myriad of subjects from personal development to leadership to sales. And they are free to library members (library membership is also free). For instance, time can pass enjoyably during two hours or more of roundtrip driving listening to the likes of Ken Blanchard and Zig Ziglar.

5. Reputation: "Be more concerned with your character than your

reputation, because your character is what you really are, while your reputation is merely what others think you are."

The most important asset of new attorneys is their reputation, and that asset is built on the back of the daily work of their character. This character drives both issues of integrity and ethics, among others.

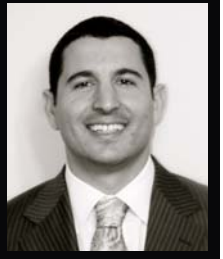
For integrity, the question could be stated: "How does one's walk match one's talk?" Similarly, corporations quantify this number in the marketplace by calculating their "hit rate", or how often they deliver on their promises to consumers.

New attorneys want to deliver both to the attorneys they work for and the clients they serve. This involves setting realistic expectations and then delivering on them. For instance, if a deadline was missed, was there an unrealistic expectation set, was there a failure to deliver on the expectation, or some combination of both? Asking these questions can help identify areas for improvement when dealing with supervising attorneys and clients.

As for ethics, the question could be stated: "What does one do when no one is looking?" The truth is that often no one is looking. Imagine for a moment if the work of attorneys was under the same scrutiny as athletes, subject to commentators and instant replay. When a player makes a mistake, this player can be made aware of the mistake and has the opportunity to change this behavior. There is an intense amount of self-awareness and accountability. Even in practice, there are coaches and staff keeping a careful watch on their players.

While attorneys may have supervising attorneys that take an interest in their development, for the most part they are left to themselves in the day-to-day practice of law. This especially holds true for solo practitioners. They have to set the standards for themselves.

Jerome Fogel *is an attorney specializing in entertainment and business transactions. Prior to becoming an attorney, Fogel was in business development for Fortune 500 companies such as GE. He is a graduate of NYU Law and has dual degrees in Business Administration and Rhetoric from UC Berkeley. He can be reached at jerome@fogellegal.com.*



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Finding an Expert

Retirement Planning for Law Firms

By Serria Bishop

RETIREMENT IS A COMPLICATED issue for many attorneys. Unlike most people who retire due to physically taxing careers, that is not an issue that concerns most legal professionals. Many legal professionals will "never retire" or will "take fewer cases after 65." As a result, some attorneys neglect to plan for retirement, since by definition, it is not personally desired.

There are retirement vehicles that fit any firm regardless of size and income. Retirement planning should be a priority to ensure financial security for individuals and their families.

Consider the size of the firm and income when considering which retirement plan option is appropriate. Income includes company income and the average income of the attorneys as well as the assistants.

Medium/small law firms can get lost in a retirement shuffle due to the lack of consistent profits. The owners may not understand and may not be able to financially support the fees associated with a 401k plan. Usually when profits drop, the 401k is the first expense to go. But there is hope in the near future to help make the retirement plans more recession friendly.

Fees Transparency

In 2012, two new regulations related to expense disclosure will have significant impact on fiduciaries (a person legally appointed and authorized to hold assets in trust for another person) of qualified retirement plans. This means that a law firm will have better transparency when shopping for their 401k plan. Any service provider receiving more than $1,000 from a qualified plan has to comply with the new regulations.

In the future, the plan provider must disclose: (1) all of the plan providers affiliates and subcontractors; (2) schedule of fees with identification of recordkeeping fees; (3) summary of services provided; (4) investment option expenses; (5) advisor compensation; and (6) fiduciary status.

Disclosure must be provided before entering into a contract. Again, the new fee transparency will allow more law firms to keep competitively priced 401ks even when sales are slow by allowing more money to go to the actual plan instead of plan costs.

For example, if business owners reject 401k plans because of the termination fees, the plan providers will have to adapt to survive. Whereas if the fees are overlooked by the provider during the sales meeting, a worst case scenario would be the firm purchases the plan, finds a better deal somewhere else but are afraid to enter into it because of the high termination fees.

That is a common scenario for advisors who target attorneys of small law firms with 401ks housed at the big brokerages. It's not to say that full disclosure will slow the sale of retirement plans or cause firms to sever ties with the current service provider, however, information allows educated and informed decisions; once the amounts are known, plans can be made to allow for adjustments from the firm. With business in general, complaints after the fact don't affect the bottom line as much as not getting the sale in the first place.

Highly Compensated Employees

Medium to large firms work best with 401ks when there are many highly compensated employees who are aggressively seeking retirement income and tax deferrals. The 401k should be the foundation of the plan, not the plan. The 401k should be combined with other tools to shelter more income like the safe harbor, profit sharing, etc. The fees and complexity do not support the set up if contributions are low and sporadic.

Simple Individual Retirement Accounts

If a firm wants the tax deferral of a 401k but without the ERISA reporting, consider a Simple Individual Retirement Account (IRA). Simple IRAs are similar to 401ks but the contribution ceiling is lower, $11,500 per year as oppose to $16,500. There are small to no set up fees for most brokerages, a required match of 3% (only if the employee contributes) and no fee to terminate.

The small costs and contributions to this plan also equal a small commission for financial professionals. Many brokers and Third Party Administrators (TPAs) do not discuss this option with small business owners; however, it is a great vehicle for a law firm that wants to start a retirement plan but is unsure how the employees will respond.

The most options for retirement planning vehicles are reserved for solo and small firms. Simplified Employee Pension (SEP) Plan have been used in the past and are very popular. SEP IRAs tend to work better for individuals with up to $250,000 in income. Solo 401ks are very popular and allow single attorneys to create a retirement vehicle similar to the 401ks used by big firms, but the maximum deferral for SEP and solo 401ks are still $49,000. Simple IRAs are a viable option, as well as traditional IRAs, which have a maximum contribution of only $5,000, for attorneys who are building a practice.

The more money the company makes, the more complex your retirement plan may need to be to help

maximize the tax deferral. There is a price associated with these plans but shop around and find the best value. Also, remember plans have different cutoff dates. For example, the last date to contribute to a 401k is December 31, whereas the traditional IRA is April 15. Consult with a financial advisor to see which plan is best; there is no one plan that works right for everyone all the time.

More options exist to fund retirement for financial independence, but the objective is to do something at every stage of one's career and remember the tax advantages to retirement planning.

This article should not be construed as investment or financial advice related to one's personal situation. Waddell & Reed does not provide legal or tax advice.

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BARRY EDZANT
SCVBA President

AS THE YEAR WINDS DOWN, the SCVBA reflects upon the accomplishments seen this year. Immediate past president, Paulette Gharibian, certainly had her hands full, managing her law practice, the Association and her new baby boy.

Year in Review

The SCVBA continues its tradition of offering outstanding MCLE programs for members, which are always held at the TPC Valencia Country Club. Past president Brian Koegle, who spoke on the latest changes in employment law, provided the highlight for our programs. Brian once again educated members on how to navigate the daunting employment laws in this state. This annual discussion is a must for any employer, and Brian's knowledge in this area of law is remarkable.

One of the SCVBA's goals each year is to have two major mixers. The first was held in the beginning part of the year at Salt Creek Grill and was a great success. For the second mixer, the Association teamed up with the SFVBA and met at Gordon Biersch for food, beer and networking between our two bar associations. It was terrific to be introduced to some new faces and to learn about bar practices. The turnout was great, and without doubt this melting between the two organizations will be done again soon.

The Annual Law Day took place on October 7, 2011 at the Hyatt Hotel in Valencia. This event honors and recognizes Santa Clarita local representatives, first responders and local attorneys. The turnout was better than anticipated, having been attended by about 120 people.

Our keynote speaker was John March, whose son David March, a sheriff's deputy, was gunned down during a routine traffic stop on April 29, 2002 by a well-known gang member. After the murder, the suspect fled to Mexico where because of California's death penalty and life without parole laws, Mexico refused to extradite the suspect.

For the next four years, John March sought justice for David's killing. He rallied and lobbied the California and U.S. legislatures to work with Mexico to change Mexican law. After devoting his life to this cause, March was successful. In February of 2006, the suspect was extradited to California and pled guilty to murder. He's now serving life without parole.

March's journey, which he shared in great detail, was inspiring, compelling and fascinating. Following March's speech, there were very few dry eyes in the room. The SCVBA members are very fortunate to have people like March to impact daily lives.

Law Day is an enormous undertaking and without the great work of Sam Price, April Oliver, Amy Cohen, Jim Lewis, Caryn Sanders, Mark Young, Paulette Gharibian and Brian Koegle, it would not be possible. Thanks to everyone for putting on an amazing event.

This year, the SCVBA is pleased to have added a new staff member to the Association, Sarah Angleastro. She single-handedly reorganized the entire billing process, mailing addresses, membership roster, emails, etc., and has made members' lives a lot less stressful. She may very well be the most organized human being on the planet. The SCVBA looks forward to having Angleastro for years to come.

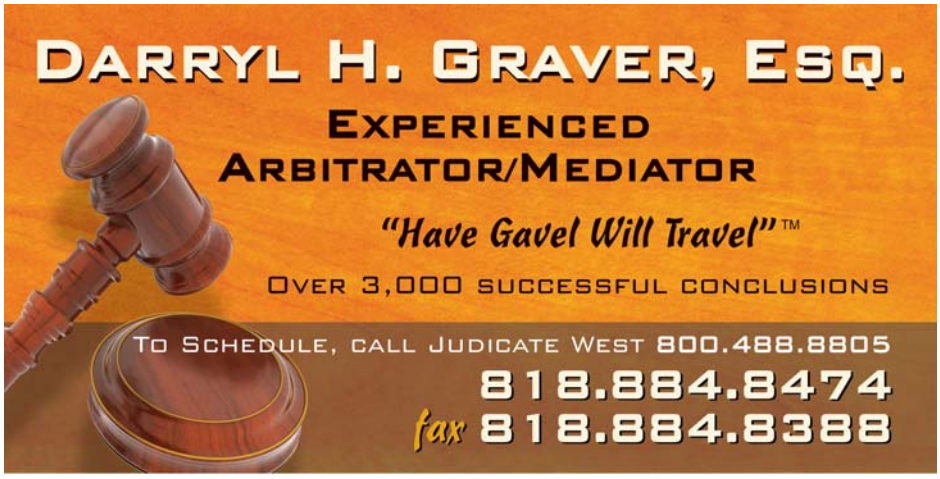
The Year Ahead

Goals for next year are exciting and challenging. The SCVBA is going to focus on membership with the lofty goal of increasing our membership by 30%. The Association would also like to become an important source to local high schools and college students. Beginning the journey of college, law school, or paralegal school is a stressful time for students, and SCVBA members would like to help guide students in search of their bright futures.

As with all communities, Santa Clarita is in need of a comprehensive pro-bono program. The community has brilliant practitioners who are already excited about making this necessary program a success. The SCVBA is already in the works for adding a mentoring program for new attorneys. Finally, the Association will continue to offer excellent MCLE programs, which are of course open to all members of the SFVBA as well as the SCVBA.

Special thanks are owed to Paulette Gharibian for her outstanding commitment to the Association, having done a stellar job this year. Don't go too far, Paulette—pro-bono advice may be needed!

***Barry L. Edzant** is a Valencia attorney specializing in lemon law, auto fraud and personal injury cases. He can be contacted at (661) 222-9929 or BarryE@Valencialaw.com.*



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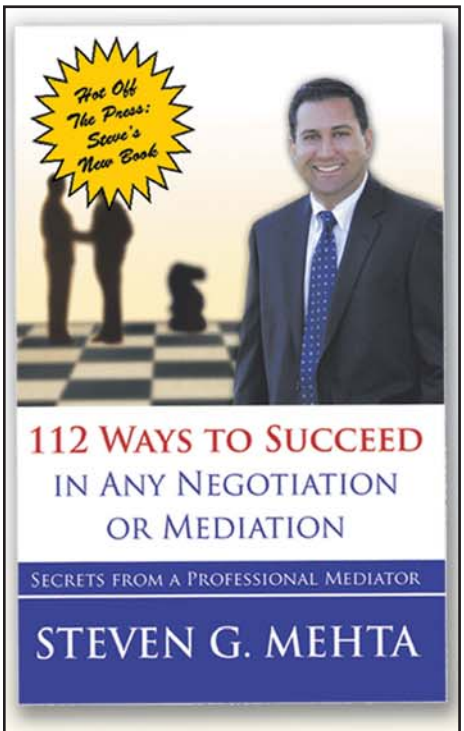

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Calendar

All-Section Meeting
How to be Proactive in Your Practice!

DECEMBER 2
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Noted client retention expert, Douglas Kolker, will be hosting a lunch to share with members a proactive system that will help you retain clients. This interactive workshop will give insight into how you can become better at retaining clients without compromising the high standards of your practice. RSVP soon, space is limited!

Free to SFVBA Members!

Business Law, Real Property & Bankruptcy Section with the U.S. Trustees Office
Mandatory Requirements for Debtors in Chapter 11

DECEMBER 7
12:30 PM
TRUSTEE MEETING ROOM
21051 WARNER CENTER LANE NO. 105
WOODLAND HILLS

This seminar will discuss new procedures for electronic submission of the 7-Day Package and monthly operating reports to the Woodland Hills Office of the U.S. Trustee.

1 MCLE HOUR
Free (Brown Bag Lunch)

New Lawyers Section
Tools To Help You in Your Practice

DECEMBER 9
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

This is a sponsored lunch hosted by Lexis Nexis to assist new lawyers in managing their practice. RSVP soon, space is limited!

Free to SFVBA Members!
1 MCLE HOUR

Probate & Estate Planning Section
New Laws

DECEMBER 13
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorney James Birnberg of Oldman Cooley Sallus Gold Birnberg & Coleman will give us the latest legislative update and review what's ahead for 2012.

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

NON-MEMBERS
$45 prepaid
$55 at the door

Intellectual Property, Entertainment & Internet Law Section
The Year in Review

DECEMBER 14
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Attorneys Mishawn Nolan and John Stephens will give their annual review of the standout cases of the year.

MEMBERS
$30 prepaid
$35 at the door
1MCLE HOUR

NON-MEMBERS
$40 prepaid
$50 at the door

All-Section Meeting
Get Found on Google: Are You Making the Most Out of Your Site!

DECEMBER 15
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

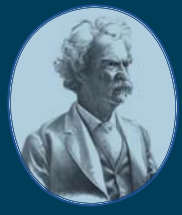
Renowned web marketing specialist Dave Hendricks–one of our most popular speakers–returns. Dave will also discuss the latest in social media. RSVP soon, space is limited!

Free to SFVBA Members!

Valley Community Legal Foundation of the SFVBA Invites You to Attend

MARK TWAIN TONIGHT

Starring HAL HOLBROOK



Valley Performing Arts Center
California State University Northridge
February 4, 2012 at 6:15 PM

$150 per Person
(Includes ticket, dinner at the Orange Grove Bistro and parking)

Proceeds to benefit VCLF's Grants, Scholarships and Special Projects

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

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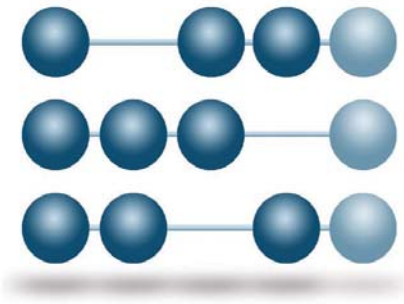

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