VALLEY LAWYER

DECEMBER 2012 • $4

A Publication of the San Fernando Valley Bar Association

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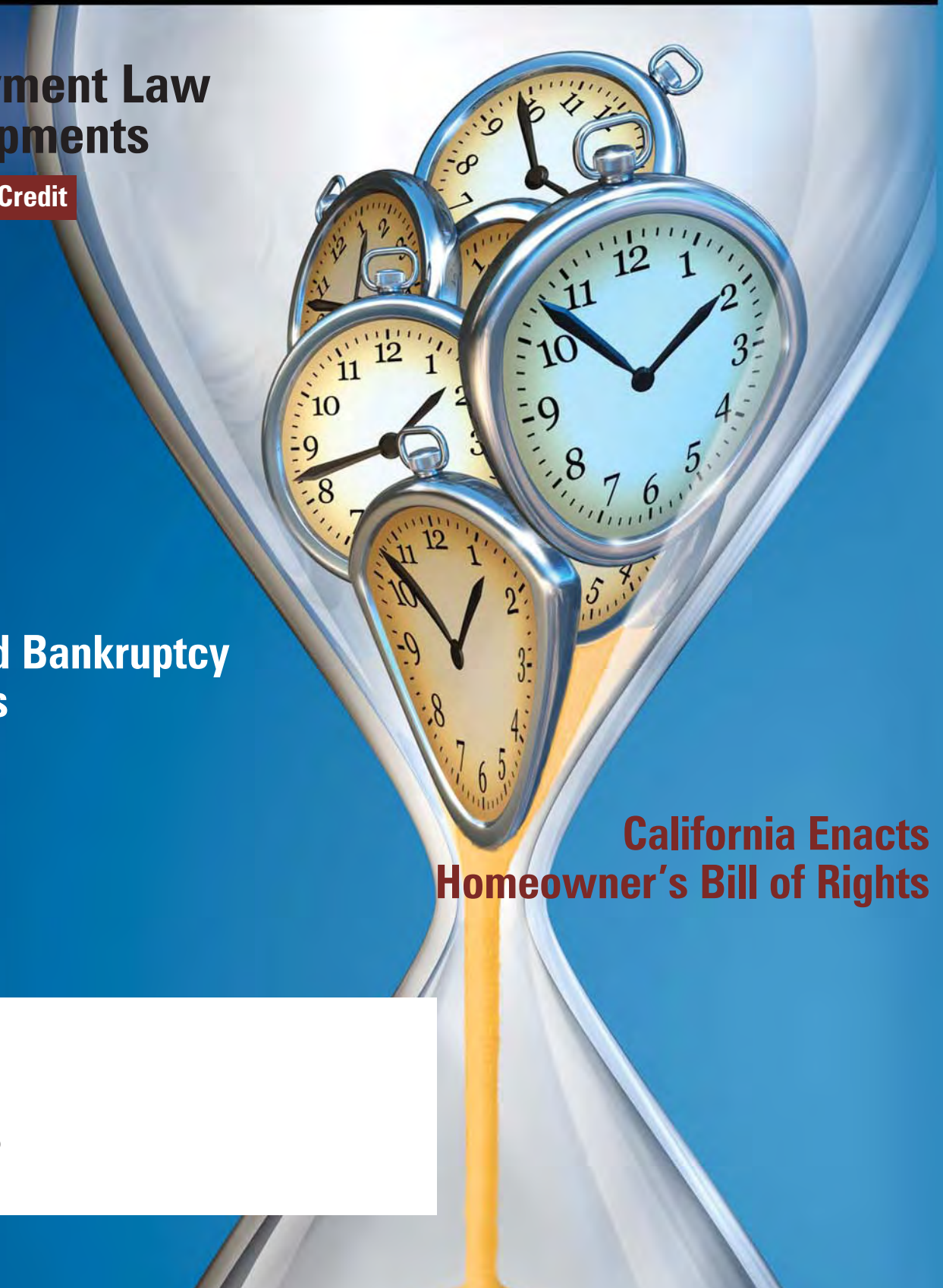

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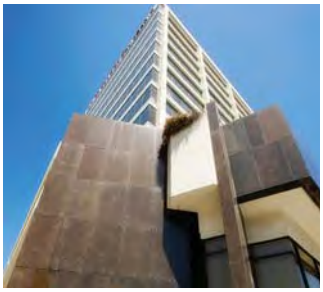
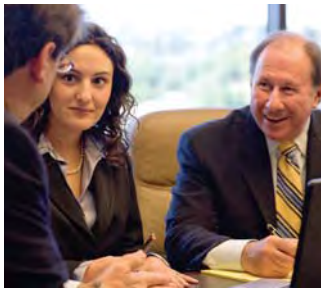

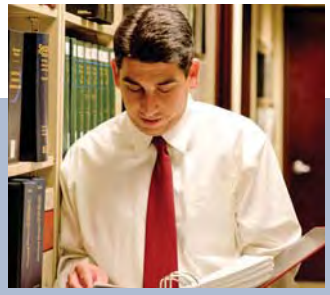

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Wesley Hampton
whampton@narver.com

Debra Mondragon
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Diane Wood
dwood@narver.com

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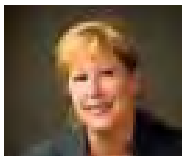

Terri Peckinpaugh
Vice President
Commercial Insurance
818.370.2609
TerriP@heffins.com

Todd LaRue
Vice President
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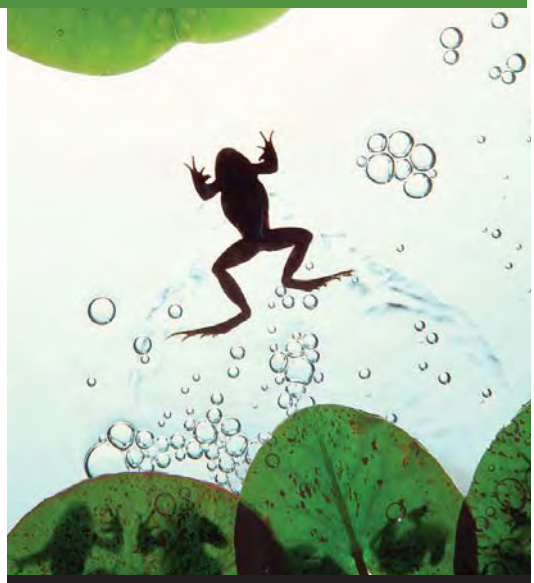

Contact

Heffernan Insurance Brokers
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Year-in-Review
A Publication of the San Fernando Valley Bar Association

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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

MANAGING EDITOR
Angela M. Hutchinson

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Law and the Holidays

DAVID GURNICK
SFVBA President
dgurnick@Lewitthackman.com

THE HOLIDAYS ARE SPECIAL. THEY BRING the best feelings, acts of charity, smells and tastes of luscious foods, sweets and ciders, winter outside, crackling fireplaces inside, the cheer of "Feliz Navidad," "Happy Chanukkah," "Joyous Kwanzaa" and "Happy New Year," remembrance of saviors and gifts, and good company of loved ones, coworkers and friends.

Some years ago, David Hagen asked in a column if the season's goodwill could last longer, if we could wish "Merry Christmas" equally in mid-summer as this time of year. In wishing SFVBA members Happy Holidays, I invite you to enjoy all the gifts, sensations, collegiality and love this season offers, and let these last. Let's stretch our goodwill beyond Martin Luther King Day, and charity beyond Valentine's Day. Perhaps next summer, we can wish each other Merry Christmas.

There's a story, apocryphal, of a defendant being sentenced Christmas Eve. Defense counsel sought leniency, it being the season of goodwill. Once, a busy lawyer was invited to meet right away with a potential client. The lawyer would have to travel far and the meeting would last a while. And it was New Year's Eve. Once in a matter, a manufacturer terminated a distributor on New Year 's Eve, ending the notice with "Wishing you the Best and a Happy New Year."

> "In wishing SFVBA members Happy Holidays, I invite you to enjoy all the gifts, sensations, collegiality and love this season offers, and let these last."

Each holiday season a business lawyer works late to close a deal by year-end. Around Christmas a spouse and children are in emergency need of shelter. A lawyer is there to help. An estate planning lawyer gets property transferred before the calendar turns to the new year. In-house counsel is asked a wrenching question, partly legal, partly not, by a company employee—not the client. Her heart does not let her turn the employee away. A company forced to downsize asks employment law counsel how to act both lawfully and humanely.

As lawyers, the holidays are more than a sweet time of year. They bring holiday challenges and opportunities for us to make a difference serving clients, as lawyers.

For holiday fun, I looked for any traceable history of Christmas, Chanukkah and Kwanzaa in published decisions. In the 1890s, an employer had always given his employee a $2,500 Christmas gift. Then he raised the employee's salary. At Christmas the annual gift was given again. The employee said thanks and the boss said he was glad the employee was pleased.

Later, the boss told a bookkeeper to charge the check back to the employee. The employee questioned the deduction and the boss said he had forgotten the new salary and not intended a $2,500 gift on top of the raise. The employee sued.

New York's highest court called this case peculiar, saying it was clear the employer intended to give a Christmas gift and clear the boss later realized his mistake. But when the boss handed over an envelope with $2,500 and expressed good wishes, all the elements of a gift were present: intent to give, and delivery of the gift. The court ruled for the employee. *Pickslay v. Starr* (1896) 44 N.E.163.

Another Christmas case is a good read for whoever thinks only the internet created long back-and-forth message strings. The Illinois Supreme Court in *Dow & Hurd v. Phillips* (1860) 24 Ill. 249 reprints telegrams between partners. The last of the series, a Christmas Day message, directs the partner to send a third party $300, followed by "Merry Christmas." It is the first "Merry Christmas" in reported American decisions. But not so merry for the defendant who sent the message and tried to avoid liability. The court found them obligated to pay. The 150 year-old communications read like today's email strings.

Chanukkah dates back 2,100 years, but wasn't in a published decision until 1962. Mr. Oxenhandler suggested a bank create a Chanukkah Savings Plan, like Christmas Clubs already available to the public. The bank did so. Oxenhandler thought he should be paid for the good idea but the evidence showed five other banks had Chanukkah savings plans. The idea was not novel, so the claim was denied. *Oxenhandler v. Dime Savings Bank* (1962) 227 N.Y.S.2d 642.

Kwanzaa, created in the 1960s, appeared in an opinion in 1993 when parents challenged a school policy of displaying calendars of ethnic and religious holidays and symbols. A court ruled the policy had a secular purpose, did not promote religion or entangle the government in state-church relationships, and denied the claim. *Clever v. Cherry Hill Bd. of Ed.* (D.N.J. 1993) 838 F.Supp. 929.

This month, we'll host a Holiday Party on December 11, a nice occasion to enjoy each other's company and partake in some joy of the season. It's also a chance to visit our new offices. We'll also hold our Blanket the Homeless event on December 8. Created years ago by David Hagen and Bob Weissman, and now overseen by Mark Blackman and Christine Lyden, we provide warm wool blankets to folks who very much need them, as well as free legal clinics. Come to both events to say and hear "Feliz Navidad!" "Joyous Kwanzaa!" "Merry Christmas!" and "Happy Chanukkah!"

Calendar

Intellectual Property, Entertainment, and Internet Law Section

Copyright Termination

DECEMBER 5
12:00 NOON
SFVBA CONFERENCE ROOM

Bill Hochberg of High Mountain Law and Tal Grinblatt of Lewitt Hackman et al. will discuss the transactional and litigation issues that arise due to the fact that copyright authors and their heirs can, after a statutorily prescribed number of years, terminate a third party's ownership of rights to the work.

MEMBERS	NON-MEMBERS
$30 prepaid	$40 prepaid
$40 at the door	$50 at the door
1 MCLE HOUR	

Probate & Estate Planning Section

Post-Election Legislation

DECEMBER 11
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorney Reynolds Cafferata will discuss the impact of the presidential election on federal tax policy in regard to philanthropy and estate planning.

MEMBERS	NON-MEMBERS
$35 prepaid	$45 prepaid
$45 at the door	$55 at the door
1 MCLE HOUR	

Business Law Section

Starting, Operating and Exiting the Practice of Law

DECEMBER 12
12:00 NOON
SFVBA CONFERENCE ROOM

Michael Narvid of Narvid Scott LLP and Wesley G. Hampton, President of Narver Insurance, discuss setting up a law practice, options for the initial structure, operating the practice, partner remuneration and dissolution of the practice. Lunch sponsored by Narver Insurance.

FREE TO CURRENT MEMBERS!
1 MCLE HOUR

Bankruptcy Law Section

How to Get Your Chapter 13 Plan Confirmed

DECEMBER 20
12:00 NOON
SFVBA CONFERENCE ROOM

A panel of experienced Chapter 13 practitioners with participation from the Chapter 13 trustee's office will discuss creditor issues, motions to value and objections to proofs of claim and tax claims.

MEMBERS	NON-MEMBERS
$30 prepaid	$40 prepaid
$40 at the door	$50 at the door
1 MCLE HOUR	

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Conference Resolution to Law

ELIZABETH POST
Executive Director
epost@sfvba.org

SFVBA PAST PRESIDENT TAMILA JENSEN has reported that long-time member Roger Franklin was recognized by the Conference of California Bar Associations (CCBA) at its annual meeting in Monterey in October.

Each year, in conjunction with the State Bar Annual Meeting, the Conference meets to review resolutions submitted by local bar associations which address legal issues of concern to lawyers. Successful resolutions are then brought to the State Legislature. Over the years, many conference resolutions have become law.

Franklin was honored for his resolution modifying the procedure which landlords use to deal with the personal property tenants leave behind when they vacate a residential rental unit. The resolution, which was introduced in the Assembly as AB 2521 by San Fernando Valley Assemblyman Bob Blumenfield, was signed into law by Governor Jerry Brown and chaptered on September 25, 2012 as Chapter 560, Statutes 2012.

AB 2521 amends various Civil Code sections to provide that a landlord may give notice of a tenant's right to reclaim personal property left in the premises and that where such property is worth less than $700, it can be kept, sold or used by the landlord without further notice to the tenant. This simplifies the procedure where a tenant abandons personal property and increases the value limit for the simplified procedure from $300 to $700.

Franklin testified in front of the Senate Judicial Committee in support of AB 2521. His testimony drew the attention of the Apartment Owners Association, which came forward to support the bill.

Franklin's resolution was among 14 bills sponsored by CCBA which became law in 2012, making CCBA the single most successful organization in the California for moving its bills through the legis1ature. Other CCVA bills passed include AB 1164, 1707, 1727, 1865, 1927, 1985, 2106, 2273, 2521, 2674, 2675 and 2025 (corrections included in the omnibus bill). 2012 was the Conference's most successful year ever and it is recognized as a major and respected source of meaningful legislation advancing the administration of justice in California.

The SFVBA is proud of Franklin and his accomplishments and thank him for his many years of service to our delegation. He will be recognized at the SFVBA Holiday Party on December 11.

The SFVBA has eleven seats at the Conference and eleven more alternates. Members interested in joining the delegation should contact Executive Director Liz Post.

Valley Lawyer 2013 Editorial Calendar

2013 Issue	Content Focus	Editorial Deadline
January	The Courts	December 3
February	Litigation/Alternative Dispute Resolution	December 3
March	Business and Corporate Law	January 2
April	Taxation	February 1
May	Family Law	March 1
June	Bankruptcy/Real Property	April 1
July	Criminal Law	May 1
August	Attorney-to-Attorney Guide	May 1
September	Elder Law/Probate and Estate Planning	July 1
October	IP, Entertainment and Internet Law	August 1
November	New Lawyers/Law Practice Management	September 3
December	Employment Law	October 1

Articles are not limited to content focus. *Valley Lawyer* seeks articles covering all areas of law, plus articles focusing on the courts and judiciary, lifestyle, law practice management, social media and legal marketing, as well as humorous commentary about the practice of law. Submit articles and ideas to editor@sfvba.org. Word count for feature article is 1,500-3,000 words; word count for MCLE article is 3,000-4,000 words, including 20 true and false questions for MCLE test. Word count for column (i.e., Case Study, Law Practice Management, Social Networking, Dear Counsel) is 1,000-1,500 words.

A Bitter Sweet Symphony

ANGELA M. HUTCHINSON
Managing Editor
angela@sfvba.org

IN DECEMBER 2007, I WALKED INTO THE SAN Fernando Valley Bar Association's office for an interview as a part-time Editorial Assistant. Like most job applicants I was nervous, but not because of the interview itself. I wondered if the interviewer would discount my qualifications and experiences since I was about three months pregnant. As I sat in the Executive Director's office, I kept wondering if she could tell that I was pregnant. I felt obligated to mention it so I did.

Needless to say, it didn't matter because I was offered the job! The SFVBA staff welcomed me with open arms and supportively accepted my first (and second) maternity leave. Being hired at the Bar association is one of the best opportunities I have been given in my career. I especially would like to express my sincere gratitude to the interviewer I spoke of, Liz Post. As a supervisor and mentor, she nurtured my skills, provided guidance and expected nothing less than excellence.

So, why am I leaving? Well, I titled this article "Bitter Sweet Symphony" by the rock band, The Verve, because it is one of my favorite songs. Some find the lyrics depressing but the theme that resonates with me is the celebration of life and new beginnings. After serving the Bar for four years, it was mutually agreed to close this cherished door, a decision that not only benefits the Bar, but also allows me to focus on my career passions within the entertainment industry.

Many of you may know that I originally moved to Los Angeles (10 years ago) to become a screenwriter. And in May of 2005, I founded the 501(c)(3) non-profit organization, BReaKiNG iNTo HoLLyWooD (BiH), which helps creative and business professionals pursue their entertainment careers. I will now be focusing my attention on BiH, which consists of various endeavors, including a magazine and a feature film. As a result of the skill set I gained working with *Valley Lawyer*, last summer I launched a 44-page publication, *Hollywood & Vine*. It is a print magazine that receives 102,000 clicks a month to its online version, and is now read in over ten countries.

In addition, I am excited to announce that the script that I had in my then Geo Tracker back seat when I drove cross-country from Chicago to Los Angeles is a film that I raised the financing for and recently co-produced with BiH; it's now in the post-production phase. Alexander Graham Bell say it best: "When one door closes, another opens; but we often look so long and so regretfully upon the closed door that we do not see the one which has opened for us."

Many who know me well know that I am certainly not one to miss an open door. I love exploring new beginnings. Recently, I also accepted an invitation to become an Adjunct Professor at USC to teach in the School of Journalism for fall 2013. No matter what my future holds, I am humbled by what *Valley Lawyer* is today—from a newsletter to a 48-page publication. I am honored to have a portfolio of over 50 *Valley Lawyer* magazines, which include an estimated 300 edited articles over the course of my position. My last issue as Managing Editor will be the January 2013 issue. After January 1, if you'd like to stay in touch with me, please feel free to email me at angela@breakingintohollywood.org.

> "To the SFVBA staff, Board and members, thank you so very much for your cooperation over the years."

To the SFVBA staff, Board and members, thank you so very much for your cooperation over the years. It's been a pleasure to have served such an amazing community-based organization. While it is a bitter sweet moment, the symphony of all the good (and even challenging) times will always be remembered for positively impacting my life.

Selected Bankruptcy Opinions

By Steven R. Fox

IN THE PAST YEAR, THE BANKRUPTCY COURTS, district courts, appellate panels and the Ninth Circuit have issued a large number of published opinions as well as slip opinions in the Ninth Circuit or unpublished opinions. Due to the hundreds and hundreds of opinions, highlighted are issues that attorneys who do not regularly practice bankruptcy law may find useful.

Are Arbitration Clauses Enforceable in Bankruptcy?

Contracts, both business and consumer, contain arbitration clauses, but in certain circumstances the bankruptcy court will not enforce arbitration clauses. In the past year, the Ninth Circuit has issued two opinions discussing the circumstances and the legal standard for bankruptcy courts to consider when requested to compel arbitration. In *Ackerman v. Eber (In the Matter of Eber)* 687 F.3d 1123 (9th Cir. 2012), the debtor filed a bankruptcy petition under Chapter 7. Certain creditors filed first a complaint objecting to the dischargeability of their claims (state law claims for breach of contract, fraud and breach of fiduciary duty) and thereafter the same creditors moved to compel arbitration (actually the continuation of prepetition arbitration proceedings) under the terms of a contract between the parties. The certain creditors also moved for relief from the automatic stay.

The bankruptcy court denied both motions, finding in part an arbitrator would be determining one of the bankruptcy court's core functions—whether claims were dischargeable. The bankruptcy court held these matters, core bankruptcy matters, implicated pressing bankruptcy concerns outweighing any interest in arbitration. Also, the bankruptcy court was concerned about the collateral impact an arbitrator's award could have on the bankruptcy court's subsequent decisions.

The Ninth Circuit, under an abuse of discretion standard, affirmed the bankruptcy court's refusal to compel arbitration of the moving creditors' state law claims. The Ninth Circuit considered the provisions of the Bankruptcy Code placing exclusive jurisdiction to determine the dischargeability of the types of claims at issue in the *Eber* case against the provisions of the Federal Arbitration Act (establishing a federal policy favoring arbitration). Under the FAA, the party opposing arbitration has the burden of persuasion. In both *Eber* and another Ninth Circuit opinion from 2012, *Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation)*, 671 F.3d 1011, 1021 (9th Cir.2012), the Ninth Circuit held that on its face the Bankruptcy Code did not evince a congressional intent to bar arbitration in a bankruptcy case. Despite this, the bankruptcy court has discretion to deny a request to compel arbitration based on the facts before it.

In *Thorpe*, as in *Eber*, the Ninth Circuit upheld the bankruptcy court's holding denying the motion to compel arbitration because the matter at hand was the validity of a claim being presented in the bankruptcy court. The validity of a claim is a core matter for the bankruptcy court and "the nature of the allegations were such that adjudication of [the insurance company's] claim in any forum other than a bankruptcy court would conflict with fundamental bankruptcy policy." *Thorpe* at 1022.

Relief from the Stay - Twists and Turns

Obtaining relief from the automatic stay is usually not a very difficult matter. What follows is a discussion of three recent cases which considered stay relief issues.

In *In re Blixseth*, 684 F.3d 865 (9th Cir. 2012), a recent and significant change to the Bankruptcy Code tripped up the bankruptcy trustee. As to personal property, including vehicles, the Code requires a Chapter 7 individual debtor to file a statement of intention indicating whether the debtor intends to surrender or retain personal property and to perform the stated intention within a certain time frame. §521(a)(2)(A).[1] If the debtor fails to timely perform, the stay terminates without further order and the property is removed from the estate unless the trustee obtains an order that the property has consequential value or benefit to the estate. §521(a)(2)(c), 362(h)(1) and (2). In plain English, as to collateralized personal property, a debtor must state what action the debtor intends to take (e.g., retain, surrender, redeem the personal property) and, failing making the statement and performing, the automatic stay is lifted. In many or most Chapter 7 cases, the statute's impact

is limited because the personal property has limited value or the lenders want the stream of money, not the collateral. Often the collateral has no re-saleable value to the lender.

In *Blixseth*, the value of the personal property was worth millions of dollars, much of it had not been scheduled in her bankruptcy papers; the individual debtor did not state an intention and she did not perform an intention. The lender sought relief from the stay to foreclose on personal property collateral. The trustee, unaware that the debtor had not scheduled a significant portion of her valuable personal property, did not oppose the motion. The value of the personal property exceeded the amount of the loan. Relief was granted.

As the time for the lender's sale approached and the trustee learned about the valuable undisclosed assets, he sought an order from the bankruptcy court stopping the sale. The bankruptcy court declined to stop the sale because the stay had been terminated as to the personal property. This is a harsh result for the trustee who could have liquidated the personal property and a harsh result for the creditor who were out the monies they should have received. For attorneys representing creditors secured by personal property, §§521(a)(2)(c), 362(h)(1) and (2) offer possibilities of recovery despite bankruptcy filings.

In *People of the State of California v. Yun (In re Yun)*, 476 B.R. 243 (9th Cir. BAP 2012), the lower court, the Honorable Alan M. Ahart, terminated the stay to permit the State of California to continue certain enforcement activities but did not terminate the stay to permit the State to continue proceedings to determine and to assess administrative penalties and restitution. On appeal by the State, the BAP considered the lower court's ruling on an abuse of discretion standard. The BAP ultimately ruled against the State because it had not provided the BAP with an adequate record, including a transcript, for the BAP to rule on the appeal. One common trap on appeal is an insufficient record.

There is a common scenario where an interest(s) in real property subject to foreclosure is transferred one or multiple times to frustrate and to delay efforts to conduct foreclosure proceedings. Section 362(d)(4) addresses this conduct. In *In re 4th Street East Investors, Inc.,* 474 B.R. 709 (Bankr. C.D. Cal. 2012), the court found that though the court could not conclude on the record the debtor had participated in a scheme to transfer interests in the real property, the court could grant in rem relief under §362(d)(4) because the debtor's act to file his petition was part of a scheme to delay, hinder or defraud creditors. This opinion highlights the difficulties bankruptcy judges in the Central District have with bankruptcy cases which are filed solely to delay foreclosures.

Judicial Estoppel

State court practitioners may see the fact pattern where a debtor files a bankruptcy petition, does not schedule a potential cause of action against some third party (often a personal injury claim), does not disclose the cause of action during his/her bankruptcy case and, after the bankruptcy case is over and closed, brings suit on the prepetition cause of action against the third party. If the third party is aware of the bankruptcy filing, the third party should assert judicial estoppel as a defense against the former debtor and have the suit dismissed under at least two theories:

1. The undisclosed asset is an asset of the bankruptcy estate. As the asset was not disclosed in the bankruptcy case, the asset remains a part of the bankruptcy estate, it is not owned by the former debtor and the debtor lacks standing to assert the cause of action.

2. The debtor was obligated under federal law to fully list his/her assets including potential legal causes of action. A debtor's failure to do so, while under oath in the bankruptcy case, has a price. By not disclosing the cause of action, that debtor has affirmatively represented the cause of action does not exist.

Judicial estoppel is an equitable doctrine which precludes a party from gaining an advantage over another, asserting one position in one action but later taking an inconsistent position in a second action. A three-part test inquires as follows: "(1) whether a party's later position is 'clearly inconsistent' with its original position; (2) whether the party has successfully persuaded the court of the earlier position; and (3) whether allowing the inconsistent position would allow the party to 'derive an unfair advantage or impose an unfair detriment on the opposing party." (*Granados v Supervalu, Inc.*, 2012 WL 3562521 at page 3 (C.D. Cal. 2012) (unreported opinion). Courts impose judicial estoppel as a matter of integrity. The Bankruptcy Code requires full and complete disclosure including claims which may be contingent or unliquidated.

In *Granados v. Supervalu, Inc.*, the debtor worked for Supervalu for a period of years, then alleged physical and mental disabilities, filed a workers compensation action, was then fired and then later filed a bankruptcy petition. The petition requires that debtors disclose all property interests, including potential causes of action. The debtor did not

schedule any claims against Supervalu. After the bankruptcy case closed, the debtor filed suit against Supervalu for discrimination, wrongful termination and other causes. Supervalu filed a motion to dismiss the action, asserting judicial estoppel because the causes of action where not listed in the bankruptcy schedules.

The district court found that the 3-part test for judicial estoppel had been met. The debtor/plaintiff contended that even though the 3-part test had been satisfied, judicial estoppel should not be applied because at the time of the bankruptcy case, he lacked sufficient information to know that he had claims against Supervalu. The relevant legal standard inquires whether the debtor had sufficient information at the time his bankruptcy petition was filed to know if he had a potential claim. The district court found that the debtor knew sufficient facts pre-bankruptcy that he should have disclosed the potential cause of action in his bankruptcy papers.

The result, at first glance, seems just. The debtor lied in his bankruptcy papers and so is estopped from suing his former employer. However, by denying the debtor the ability to pursue the action, the alleged wrongdoer, Supervalu, faces no consequence. A better result would be to permit the suit to go forward with the debtor acting in trust for his now discharged creditors. The Ninth Circuit standard focuses so strongly on integrity of the system that it forgets the real victims, the debtor's creditors.

The Single Asset Real Estate Debtor

Often, bankruptcy petitions are filed for artificial entities which own one asset—one house, one building or raw land. The entities have no sources of income other than that derived from the real estate, typically a stream of rental monies, and were probably formed to own and operate the real estate. In tough economic times, Single Asset Real Estate (SARE) debtors run out of money to complete construction projects or the cash flow for an established real estate entity is insufficient to pay the lender(s) and to meet other cash flow needs. They face foreclosures.

In the Central District, there are many, many SARE filings. With some notable exceptions, SARE debtors tend to linger in Chapter 11 for a period of time awaiting dismissal with lenders then pursuing state law remedies. The Bankruptcy Code contains a three-part definition of what constitutes a SARE: (1) the property is a single property or project but not residential real property with fewer than four residential units; (2) the property generates substantially all of the debtor's gross income; and (3) no substantial business is being conducted by the debtor other than operating the real property and activities incidental thereto. (§101(51B))

Under the automatic stay statute, there are certain consequences, bad consequences, for SARE entities which must either begin making payments to the secured lender(s) in the first 90 days of the case (at the non-default rate of interest) or, in the first 90 days of the case, file a plan which has a reasonable possibility of being confirmed in a reasonable amount of time. §362(d)(3) If neither occurs (payments or plan filing), then the stay is lifted. Given the draconian result, the stay being lifted, there has been considerable litigation to determine if an entity is or is not a SARE.

Meruelo Maddux v. Bank of America (In the Matter of Meruelo Maddux) has been a hard fought SARE Chapter 11 case filed in the Woodland Hills Bankruptcy Court. The

debtor/ developer and its 53 subsidiaries filed petitions under Chapter 11. During the case, a fight arose whether two of the 54 entities were SARE entities. (Again, remember the SARE designation has consequences that are not good for a SARE debtor.) Here, the two SARE entities were apparently not making the payments nor had they filed a plan of reorganization.

The bankruptcy court believed that the two entities themselves had the characteristics of a SARE but held that when considering the 54 related entities as a whole enterprise, the two entities lacked the characteristics of a SARE. The bankruptcy court's ruling, relying on this whole enterprise concept, makes sense from a practical perspective. The district court reversed the bankruptcy court and the Ninth Circuit affirmed the district court, holding there was no whole enterprise exception to the definition of a SARE.

Life in Chapter 11 for a SARE is tough enough. Striking this whole enterprise argument makes it that much tougher for a SARE entity to survive in Chapter 11. For non-bankruptcy practitioners who dabble in bankruptcy, they often seem to miss the SARE angle, either when representing the debtor or representing a lender.

Chapter 11 Plan Issue—Absolute Priority Rule

The absolute priority rule states that in a Chapter 11 plan no junior class of creditors or equity (ownership) can receive a dividend unless the unsecured creditor class(es) is to be paid in full through the plan. If full payment of this class is not provided for, and unless an exception applies, the interests of the class, junior to the unsecured creditors—the stockholders or equity class—should be extinguished and the unsecured creditor class will hold the ownership interests in the reorganized debtor. There are exceptions to this rule, e.g., consent of the unsecured creditor class and/or infusion of new value monies. As many creditors do not want to own companies, they will vote to accept a plan which proposes that the current stock holders retain their equity interests even though the unsecured creditors are being paid even a small dividend over time.

In the wake of the amendments to the Bankruptcy Code in 2005, courts have struggled with the question whether the absolute priority rule still applies to individuals filing for relief under Chapter 11. The question is key because if the absolute priority rule does not apply, then the individual debtor's plan can propose to pay junior classes (e.g., unsecured creditors) less than payment in full and the individual debtor can retain his/her assets. (This is what occurs in chapter 13.) For individual debtors, application of the absolute priority rule with unsecured creditors not being paid in full often means their plans are not confirmable and their cases are then converted or dismissed. While exceptions exist, most individual debtors do not have new value monies to infuse into the plan—their assets, estate assets, cannot be used for new value—so the new value exception does not help.

In 2012, two courts, one in the Central District and the other the BAP, reached contrary conclusions whether the absolute priority rule applies in individual Chapter 11 case. See *In re Arnold*, 471 B.R. 578 (Bankr. C.D. Cal. 2012) (Honorable Robert Kwan) (rule applies) and *Friedman v. P+P, LLC (In re Friedman)*, 466 B.R. 471 (9th Cir. BAP 2012)(rule does not apply). The analysis of these courts is very technical.

For the non-bankruptcy practitioner, knowledge of the absolute priority rule is important because more and more, non-bankruptcy practitioners are trying their hands at individual Chapter 11, little realizing that their individual clients probably cannot confirm a plan. A malpractice claim may result.

Subordination

Corporate divorces sometimes make their way to the bankruptcy court after the state court has determined the entity should be dissolved or an equity holder should be bought out by the entity. In *In re Orange County Nursery, Inc.*, 687 F.3d 1123 (Bankr. C.D. Cal 2012), a minority shareholder brought a dissolution action. The superior court determined the value of the minority interest, provided a period of time for the debtor to purchase the minority interest and, if the purchase did not timely occur, held the corporation should be dissolved. Before the deadline to purchase the minority interest had expired, the entity filed a Chapter 11 petition. In the bankruptcy case, the minority shareholder filed a proof of claim asserting it was an unsecured creditor and was owed the value of its judicially determined interest plus interest.

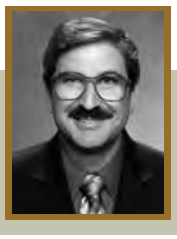
The debtor proposed a plan which subordinated the minority's claim to all other unsecured claims and sought to treat the minority's claim as equity. Unsecured creditors were able to vote to accept or reject a plan. The minority interest wanted to block confirmation of the plan by casting a rejecting ballot as a member of the unsecured creditor class. As a member of the unsecured creditor class, the minority interest had leverage; as a member of the equity class, it has no leverage. The minority shareholder would not be able to leverage its position in the equity class to stop confirmation.

The bankruptcy court determined the minority shareholder's claim would be subordinated to equity. The court considered the state court judgment which provided for alternative relief, either payment on account of the value of the minority interest or proceeds from the dissolution of the corporation. The minority shareholder had an expectation it would be paid through dissolution (as equity). Further, creditors of the debtor relied on the minority's status as an equity holder, and not as a large creditor, when extending credit to the debtor.

As a tactical move, subordinating the minority interest from unsecured to equity, meant the minority lost its leverage to control voting and the plan would be confirmed. For non-bankruptcy practitioners, caution clients that a bankruptcy filing could upset a hard fought victory in superior court.

[1] All statutory references are to the Bankruptcy Code, Title 11 of the United States Code, unless otherwise stated.

Steven R. Fox has practiced bankruptcy law, primarily in Chapter 11, representing both debtors and creditors, locally and nationally, for 23 years. He can be reached at srfox@foxlaw.com.



California Enacts Homeowner's Bill of Rights

By Mark S. Blackman

ON JULY 11, 2012, California Governor Jerry Brown signed into law Senate Bill 900/Assembly Bill 278, the Homeowner's Bill of Rights (HBOR) as an extension and follow up to 2008's California Senate Bill 1137, which was set to expire on December 31, 2012. The HBOR becomes effective on January 1, 2013, and will expire on January 1, 2018, unless extended or amended.

Under SB 1137, before a Notice of Default could be recorded, lenders were required to (1) contact the borrower to assess the borrower's financial situation; (2) explore options for the borrower to avoid foreclosure; (3) notify borrower of the borrower's right to request a second telephone contact (meeting) with the lender within 14 days of the initial telephone contact; (4) provide borrower with the toll-free number for a HUD certified housing counseling agency; and (5) maintain the above information regarding foreclosure alternatives on the lender's website. The law also provided loan servicers with a due-diligence alternative when the debtor could not be contacted (the initial contact requirements).

SB 1137 was enacted due to skyrocketing residential foreclosures. In 2007, 85,000 California homes were lost to foreclosure, with another quarter million home loans then in some stage of default. SB 1137 was designed to stem the tide of foreclosures; however, another 815,000 homes were lost to foreclosure between 2008 and 2011 (approximately 204,000 foreclosures annually), more than doubling the number of foreclosures after SB 1137 was enacted.

The new legislation applies only to loans secured by a senior deed of trust but is not limited to loans made between 2003 and 2007 as the prior law specified. Like SB 1137, the law only covers owner-occupied residential real property containing no more than four dwelling units. The newly adopted law also requires that the real property secured by the deed of trust was used as collateral for a loan made for personal, family or household purposes.

The term "borrower" in the HBOR excludes: (1) individuals who surrender their property evidenced by a written notification or delivery of the keys to the lender or its agents; (2) individuals who have contracted with persons or organizations whose primary business is advising people how to extend the foreclosure process and avoid their contractual obligations; and (3) individuals who have filed personal bankruptcy cases unless the cases are closed or dismissed or unless the lender has obtained relief from the automatic stay.

The definition for borrowers is also specifically limited to natural persons. Business entities and trusts are excluded from the protections of the HBOR. The term "mortgage servicer"

("servicer" or "mortgage servicer") has been defined to include persons/entities who directly service loans, who are responsible for interacting with the borrower, managing loan accounts on a daily basis (including collecting payments, managing escrow accounts and enforcing the note and deed of trust) and acting as a servicer's sub-servicing agent. Unlike the prior legislation, the term mortgage servicer does not include foreclosure trustees. If a foreclosure trustee acts as the agent for a mortgage servicer, that trustee might be held responsible for compliance with these laws.

One of the primary purposes of the HBOR is to facilitate a borrower's efforts to obtain a loan modification, short sales or other foreclosure prevention alternative (FPA) without worrying that a lender will foreclose during the loan modification process. A FPA is a first lien loan modification (LM) or other FPA.

The determination of which foreclosure provisions in the HBOR apply will depend upon whether the servicer completed more or less than 175 California foreclosures in the preceding year, as defined by the servicer's governing regulatory agency (Departments of Corporation, Financial Institutions or Real Estate).

Procedures for Servicers with Fewer than 175 Foreclosures

If a mortgage servicer conducted less than 175 foreclosures in the prior reporting period, that servicer may not record a Notice of Default (or take any other action towards foreclosure) until the mortgage servicer has complied with the initial contact requirements. The Civil Code section prevents a servicer from recording a Notice of Default, a Notice of Sale or from conducting a Trustee's Sale while a completed loan modification application is pending, while the borrowers are in compliance with the terms of a written trial or permanent loan modification, forbearance or repayment plan or if a FPA is approved in writing by all parties and proof of funds or financing has been provided to the servicer.

Procedures for Servicers with More than 175 Foreclosures

If the mortgage servicer completed more than 175 California foreclosures during the relevant reporting period, the HBOR will permit a borrower who potentially has no ability to obtain or pay for a loan modification to remain in his or her home for an additional three to six months without paying the lender.

Prior to Recordation of a Notice of Default (California Civil Code §2923.55)

A mortgage servicer may not record a Notice of Default until the borrowers have been notified in writing of (1) their rights (if applicable) under the Service Members Civil Relief Act; (2) their right to request copies of the promissory note, deed of trust, assignments establishing the servicer's right to foreclose and the borrower's recent payment history; (3) the opportunity to apply for loan modification; and (4) the opportunity to appeal any LMA/FPA denial (if applicable) and the right to be advised of the reasons for the denial of the LMA/PA application.

The mortgage servicer must also have complied with the initial contact requirements and executed a declaration attesting to such completion (or the borrower's ineligibility).

Foreclosure May Not Proceed if Loan Modification/FPA Application is in Process and Completed (California Civil Code §2923.6)

If a borrower submits a completed application for a first lien loan modification, a servicer is prohibited from recording a Notice of Default or Notice of Sale or conducting a trustee's sale until any of the following occurs: (1) servicer makes a written determination that a borrower is not eligible for a LMA; (2) borrower is offered a loan modification but fails to accept it within 14 days; or (3) borrower accepts a loan modification but defaults or otherwise breaches obligations under a loan modification agreement.

If a LMA is denied, the borrower has 30 days from date of written denial to appeal and provide evidence that the servicer's determination was in error. If the LMA is denied, the servicer may not proceed until the later of 31 days after the borrower is notified of the LMA denial, if borrower appeals, 15 days after denial of appeal, or if borrower is offered a LMA, 14 days after offered but declined or the borrower fails to submit a payment under the LMA.

Additional rules apply. For example, the LMA denial must state in the denial letter the amount of time from the date of denial to appeal and must include instructions as to how to appeal. If based on investor disallowance, the servicer must provide specific reasons for the disallowance. If denial is based on a net present value calculation, the borrower must be provided with the monthly gross income and property value used and a statement that the borrower may requests and obtain all of the inputs used in the calculation.

When applicable, the denial letter must state a finding that the borrower was offered a loan modification and failed to pay. Also when applicable, the letter needs to include a description of FPAs for which the borrower may be eligible and steps the borrower must take to be considered for a FPA. If previously evaluated and rejected prior to January 1, 2013, there is no need to reevaluate the borrower unless there is a material change in the borrower's financial condition and the borrower provides documentation for such change.

Establishment of a Single Point of Contact (California Civil Code §2923.7)

At the request of a borrower, the mortgage servicer is required to promptly establish a single point of contact for the borrower to communicate the LMA/FPA process to the borrower; coordinate receipt of all LMA/FPA documents and notify borrowers of deficient LMA packages; have access to all information necessary to adequately inform the borrower of the current status of a LMA /FPA application; ensure the borrower is considered for all FPAs offered by the mortgage servicer; and have access to the individuals who are in a position to halt a foreclosure when necessary.

Notification of FPA Unless Borrowers Have Previously Exhausted FPA (California Civil Code §2924.9)

After a Notice of Default has been recorded, if a borrower has not exhausted the loan modification application process, within five business days after recording the Notice of Default, a mortgage servicer must send a written communication to the borrowers containing all of

the following information: (1) the borrowers may be evaluated for other FPAs; (2) whether an application is required to be considered for FPA; and (3) the means and process for the borrower to obtain an application for a FPA.

Loan Modification Communication (California Civil Code §2924.10)

When a borrower completes a loan modification application or otherwise submits any document in connection with a LMA, the mortgage servicer must provide written acknowledgment of receipt of the documentation within five business days of receipt, and include on the initial acknowledgement of receipt a description of the loan modification process after a complete application has been submitted that contains (1) a time estimate for a decision on the LMA; (2) the length of time borrower will have to consider an offer or a proposed loan modification or other FPA; (3) deadlines to submit missing documents affecting the processing of the application; (4) expiration dates for submitted documents (i.e., date sensitive documents); and (5) any deficiencies in the borrower's loan modification application.

Prevention of Double Tracking (California Civil Code §2924.11)

A significant criticism of the loan modification process over the last four years has been double tracking by lenders whereby a borrower is involved in some stage of a LMA and, at the same time, the lender's foreclosure continues to move forward. In many cases, borrowers lost their homes when their LMA was rejected and the foreclosure sale took place.

The HBOR sets restrictions and requirements when some form of FPA is approved. Here are some of those provisions.

Prevention of Double Tracking

The mortgage servicer may not record a Notice of Default, a Notice of Sale or conduct a Trustee's Sale (as applicable) if the FPA is approved in writing and the borrowers are in compliance with the terms of a written trial or permanent loan modification, forbearance or repayment plan, or a FPA has been approved in writing and proof of funds or financing has been provided to the servicer.

Provision of Written FPA Documents

When a borrower accepts a loan modification or other FPA, the mortgage servicer must provide the borrower with fully executed copies of the loan modification or the FPA agreement.

Rescission of Foreclosure Notices

Upon execution of a FPA agreement or upon approval of a short sale and proof of funding/financing, the servicer must record a Rescission of the Notice of Default or cancel a Trustee's Sale.

Other FPA rules include: (1) servicers may not charge application or processing fees for loan modification or FPA applications; (2) servicers may not charge late fees while loan modification/FPAs are under consideration, denials are being appealed, borrowers are making loan modification payments or an FPA is being evaluated; and (3) if a borrower is approved in writing for a loan modification or other FPA and the servicing of the loan is transferred or sold, the subsequent servicer must honor the agreement.

Private Right of Action (California Civil Code §§2924.12 and 2924.19)

A significant change in California's foreclosure law and one of the centerpieces of the HBOR is the creation of a private right of action which the courts had previously rejected under SB1137. In light of several undefined terms in the HBOR, such as the phrase "material violations" of the provisions of the HBOR, the new law may ultimately result in a flood of frivolous lawsuits or threaten litigation to unreasonably extract settlement funds or loan modification agreements (to unqualified borrowers) from lenders or servicers even where the claim has no merit.

Injunctive Relief

If a Trustee's Deed Upon Sale (TDUS) has not been recorded, a borrower may seek injunctive relief if he or she can establish that there was a "material violation" of any of the provisions described above. The injunction may remain in place unless or until the court determines that the servicer has corrected/remedied the violation. Alternatively, a servicer may move to dissolve an injunction based on a showing that the material violation has been corrected and remedied.

Monetary Damages

After a TDUS has been recorded, if a borrower can establish that the servicer committed a "material violation" of the law, the borrower may bring suit to recover damages resulting from a "material violation" of the provisions describe above where the violation was not corrected or remedied prior to recordation of the TDUS.


Eleanor Barr, Esq.


Christine Masters, Esq.

Treble Damages
If the court finds that the "material violation" was intentional, reckless or resulted from willful misconduct, the court may award the greater of treble actual damages or $50,000.

Safe Harbor
A servicer cannot be liable for any violation that it has corrected and remedied the defect prior to the recordation of the TDUS. However, a servicer may remain responsible for the debtor's attorney's fees.

License Violation
Violation of the provisions described above will also deem to be a violation of that licensee's license.

No Affect on Validity of Foreclosure Sale
Even where there was a violation of the HBOR, the improprieties cannot invalidate the foreclosure sale to a bona fide purchaser or encumbrancer for value.

Attorney's Fees
A court may award a "prevailing borrower" reasonable attorney's fees and costs if the borrower obtained injunctive relief or damages. The statute contains no provision for a lender to recover its legal fees when the borrower's claim proves to be frivolous.

Other New Foreclosure Protections

In addition to the foreclosure protections and loan modification/FPA requirements, the legislature has enacted several related provisions.

Sale Postponements in Excess of Ten Days Must be in Writing (California Civil Code §2924(5)
If a trustee's sale is postponed ten business days or more, the mortgagee, beneficiary or authorized agent must provide written notice to the borrower regarding the new sale date and time within five business days following postponement. The trustee must still make the public declarations of postponement.

Limitations on Who May Initiate Foreclosure (California Civil Code §2924(a)(6))
After January 1, 2013, the foreclosure process may only be initiated by the holder of the beneficial interest under the mortgage or deed of trust; the original or substituted trustee; or the designated agent of the holder of the beneficial interest.

Penalties for Signing Inaccurate Foreclosure Documentation (Robo Signing) (California Civil Code §2924.17)
The HBOR has enacted provisions to deal with the claims against lenders and servicers that they allegedly signed Notices of Default, Notices of Sale, Assignments of Deeds of Trust, Substitutions of Trustee, Declarations and Affidavits related to foreclosure proceedings without knowing whether the information contained in such documents were correct and accurate and that the documents were signed without actually reviewing the loan file first (often referred to as robo-signing). This provision requires that declarations signed in connection with the recordation of Notice of Default, Notice of Sale, Assignment of Deeds of Trust, and Substitutions of Trustees and recorded by or on behalf of a servicer in connection with a foreclosure be accurate, complete and be supported by "competent and reliable evidence" (another undefined and vague term).

Before recording any of these documents, a mortgage servicer is required to ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default, the right to foreclose including the borrowers' loan status and loan information.

Prior to this enactment, a deed of trust assignee might initiate the foreclosure and then record the substitution of trustee before the Notice of Sale. The HBOR will now require what may be no more than form over substance.

The law also authorizes the mortgage servicers' regulatory agencies and others to levy fines of up to $7,500 for each recorded or files document when it has been determined that a servicer has engaged in multiple and repeated uncorrected violations of these requirements.

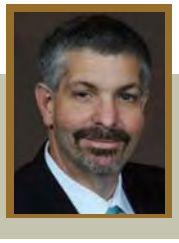
Conclusion

The mortgage crisis is real and almost one million families in this state have lost their homes to foreclosure. The prior enactment, SB 1137, did nothing to accomplish the goals of reducing foreclosures and enacting a similar bill with additional burdens on lenders without addressing the root cause for the foreclosures will not solve the problem.

Instead of letting SB 1137 expire on December 31, the legislature enacted a more onerous version of the same law, which will most likely not resolve the mortgage meltdown any better than its predecessor. Nothing in the HBOR will help borrowers who qualify for loan modification if the borrowers cannot afford to make the payments. The legislature simply ignored the fact that many homeowners who lost their homes since 2007 could not qualify for loan modification under any of the various government programs.

Nothing in the HBOR requires a servicer or lender to offer homeowners a loan modification or FPA (although the reasons for denial must now be explained). In many cases, the statute will only serve to delay foreclosures for those who cannot afford to pay and/or to permit a disgruntled or disappointed borrower to file a potentially groundless lawsuit claiming a "material violation" of the law.

While the legislature's intent may have been well-meaning, the HBOR may ultimately only serve to further burden the already over-extended state courts with lawsuits filed under the new laws or otherwise permit debtors to use its vague terms and the threat of litigation to exact payments from their lender's substantial litigation expenses.



Mark S. Blackman, a principal at Alpert, Barr & Grant in Encino, represents clients in creditors' rights matters, including bankruptcy proceedings, foreclosures and other property disputes. He can be contacted at mblackman@alpertbarr.com.

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 26.

Employment Law Developments: Review of 2012 California Supreme Court Decisions and New Legislation

By Kenneth J. Rose

The California Supreme Court devoted a portion of its 2012 docket to the interpretation of the state's legislatively enacted wage and hour laws. Governor Jerry Brown and the California Legislature were busy in 2012 enacting new employment laws that will impact business beginning in 2013 and perhaps will become the subject of future rulings by the Supreme Court.

DURING THE PAST YEAR, THE CALIFORNIA Supreme Court decided three important wage and hour law cases. The court addressed the elusive administrative exemption to California's overtime pay requirements, our state's unique meal and rest period laws and entitlement to prevailing party attorney's fees in meal and rest period cases. Each of these decisions is summarized below, followed by a list of important employment law cases now on the court's docket.

Harris v. Superior Court (Liberty Mutual Ins. Co.), 53 Cal.4th 170 (December 29, 2011)

Section 1(A) of various California Industrial Welfare Commission (IWC) Wage Orders provides an exemption—from the daily and weekly overtime, minimum wage and meal/rest break requirements—applicable to employees who are properly classified as professionals, executives or administrative employees. The administrative exemption applies to employees who: (1) are paid at least twice the minimum wage; (2) perform administrative work, defined as office or non-manual work "directly related to management policies or general business operations of his/her employer or his/her employer's customers;" (3) have primary duties that involve that administrative work; and (4) discharge those primary duties by "customarily and regularly exercising discretion and independent judgment."

At issue in *Harris v. Superior Court* was the exempt status of a class of insurance claims adjusters, who the Court of Appeal found were not exempt as a matter of law under the administrative exemption. The Supreme Court held that the Court of Appeal misapplied the "administrative/production dichotomy." The court remanded the case to the Court of Appeal for reconsideration in light of its ruling.

In July 2012, on remand, the Court of Appeal again held that the company's insurance claims adjusters are not exempt administrative employees. The Court of Appeal determined that the adjusters' day-to-day tasks of investigating and estimating claims, making coverage determinations, setting reserves, negotiating settlements and making settlement recommendations are all part of the day-to-day operations of their employer's business, which did not satisfy the administrative exemption test because none of that work is carried out at the level of management policy or general business operations. Not surprisingly, the employer insurance company filed a Petition for Review (on September 4, 2012). As of the writing of this article, the court had not decided whether to grant review.

Brinker Restaurant Corp. v. Superior Court (Hohnbaum), 53 Cal.4th 1004 (April 12, 2012)

Under California law (IWC Wage Orders and Labor Code sections 226.7 and 512), all non-exempt employees are entitled to uncompensated meal periods of 30 minutes when working shifts of more than five hours (a second 30 minute meal period kicks in if employee's shift exceeds ten hours), and a ten minute paid rest period for each four hours worked (or major fraction thereof). The penalty for failure to provide a mandated meal and rest period is one hour's pay at the employee's regular hourly rate.

In *Brinker Restaurant Corp. v. Superior Court*, the Supreme Court provided long-overdue guidance on the proper interpretation of California's meal and rest period laws. The court's decision also addressed certification issues in wage-hour class action lawsuits, especially where meal and rest period violations are claimed.

Meal Periods

The court determined that to comply with California's meal period statute, absent the limited waivers permitted, employers must provide employees with a 30-minute uninterrupted meal period by relieving employees "of all duty for the designated time period." However, employers do not have to ensure that the employee does no work when allowed to take a meal period. Thus, an employer complies with its meal period obligations by relieving the employee of all duty, whether the employee continues to work or not.

If the employer knows or reasonably should know that the employee of his/her own volition continued to work through the meal period, the employer will have to compensate the employee for the time actually worked, but will not have to pay the one hour of wages penalty that is required when an employer violates the meal period requirement.

With respect to the required timing of meal periods, the court concluded that, "absent waiver, section 512 requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work." As such, the employer is not barred from requiring employees to take their meal periods early in their shifts.

Rest Periods

The court also held that California law requires employers to "authorize and permit rest breaks." Determination of the appropriate rest period is based on the total hours worked in a day at a rate on ten minutes net rest for every four hours, or major fraction thereof, worked. Thus, to comply, employers must authorize and permit its employees to take one rest period every four hours or major fraction thereof, unless the daily work time is less than 3 ½ hours. Effectively then, employees are entitled to 10 minutes rest for shifts from 3 ½ to 6 hours in length, 20 minutes for shifts of more than 6 hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, etc.

Class Certification in Wage-Hour Class Actions

The court clarified what a trial court's approach must be in determining whether to certify meal period and rest break class action claims. The court explained that in many instances, whether class certification is appropriate or inappropriate may be determined irrespective of which party is correct on the merits. The court held that in such circumstances, it is not an abuse of discretion for the trial court to postpone resolution of the disputed issues.

The court ruled that a trial court can resolve threshold legal or factual issues that are necessary to a determination whether class certification is proper. But a trial court is not required to resolve the merits of the dispute in all instances, only when the issues affecting the merits of a case are intertwined with class action requirements. According to the court, the trial court's analysis should be to determine whether the elements necessary to establish liability are susceptible of common proof, and, if not, whether the proof of elements that may require individualized evidence can be effectively managed.

Kirby v. Immoos Fire Protection, Inc., 53 Cal.4th 1244 (April 30, 2012)
The availability (or not) of prevailing party attorney's fees are an important consideration in litigating wage and hour lawsuits. California attorneys are well aware that, as a general matter, a prevailing party may recover attorney fees only when a statute or a fee-shifting agreement so provides. California Labor Code section 218.5 provides that the court "shall" award attorney's fees and costs to the "prevailing party" in any "action brought for the nonpayment of wages." And Labor Code section 1194 allows successful plaintiffs to recover attorney's fees in actions for the "legal minimum wage or the legal overtime compensation."

In *Kirby v. Immoos Fire Protection, Inc*. the Supreme Court considered whether a prevailing defendant in an action for meal and rest period compensation under Labor Code section 226.7 can recover its attorney fees pursuant to Labor Code section 218.5. The court held that the answer is neither defendant nor prevailing plaintiffs are entitled to statutory attorney's fees in an action brought under Labor Code section 226.7.

The court decided that claims under section 226.7 are not "action[s] brought for the nonpayment of wages" within the meaning of section 218.5. Rather, section 226.7 is "primarily concerned with ensuring the health and welfare of employees by requiring that employers provide meal and rest periods as mandated by the [Industrial Welfare Commission]." Thus, an action brought under section 226.7 is for the "nonprovision of meal and rest periods, not for the 'nonpayment of wages.'"

Pending Cases

As of the writing of this article, the following employment law cases and issues are pending decision by the California Supreme Court.

Iskanian v. CLS Transportation of Los Angeles, 206 Cal.App.4th 949 (2012)
Petition for review was granted on September 19, 2012 after the Court of Appeal affirmed an order granting a motion to compel arbitration and dismissing class claims. This case presents the following issues: Did AT&T *Mobility LLC v. Concepcion* (2011) 563 U.S. __ , 131 S. Ct. 1740, 179 L.Ed.2d 742], impliedly overrule *Gentry v. Superior Court* (2007) 42 Cal.4th 443 with respect to contractual class action waivers in the context of non-waivable labor law rights? Does the high court's decision permit arbitration agreements to override the statutory right to bring representative claims under the Labor Code Private Attorneys General Act of 2004 (Labor Code section 2698 et seq.)? Did defendant waive its right to compel arbitration?

Duran v. U.S. National Bank Association, 203 Cal. App 4th 212 (2012)
Petition for review granted on May 16, 2012 after the Court of Appeal reversed the trial court judgment. This case presents issues concerning the certification of class actions in wage and hour misclassification litigation and the use of representative testimony and statistical evidence at trial of such a class action.

Harris v. City of Santa Monica, 181 Cal. App. 4th 1094 (2010)
Petition for review granted on April 22, 2010 after the Court of Appeal reversed the trial court judgment. This case presents the following issue: Does the "mixed-motive" defense apply to employment discrimination claims under the California Fair Employment and Housing Act (Govt. Code section 12900 et seq.)?

Salas v. Sierra Chemical Co., 198 Cal.App.4th 29 (2011)
Petition for review granted on November 16, 2011 after the Court of Appeal affirmed the judgment in a civil action. This case presents the following issues: Did the trial court err in dismissing plaintiff's claims under the Fair Employment and Housing Act (Govt. Code section 12900 et seq.) on grounds of after-acquired evidence and unclean hands, based on plaintiff's use of false documentation to obtain employment in the first instance? Did Senate Bill No. 1818 (2001-2002 Reg. Session) preclude application of those doctrines in this case?

Sonic-Calabasas v. Moreno, 51 Cal.4th 659 (2011)
This case initially came before California Supreme Court via a petition for review after the Court of Appeal reversed an order denying a motion to compel arbitration and presented the following issues: Can a mandatory employment arbitration agreement be enforced prior to the conclusion of an administrative proceeding conducted by the Labor Commissioner (a "Berman" hearing) concerning an employee's statutory wage claim? Was the Labor Commissioner's jurisdiction over employee's statutory wage claim divested by the Federal Arbitration Act?

On February 24, 2011, the California Supreme Court held that requiring employees to waive their right to an administrative hearing before the California Labor Commissioner was against public policy and, therefore, unconscionable. The defendant filed a Petition for Writ of Certiorari with the U.S. Supreme Court. The U.S. Supreme Court granted the petition.

On October 31, 2012, the U.S. Supreme Court vacated the California Supreme Court's decision and remanded to the California Supreme Court for further consideration in light of *AT&T Mobility LLC v. Concepcion*, 563 U.S.__, 131 S. Ct. 1740, 179 L.Ed.2d 742 (2011). In Concepcion, the U.S. Supreme Court ruled that the Federal Arbitration Act preempts California case law prohibiting arbitration agreements that exclude class actions.

Wisdom v. Accentcare, Inc., 202 Cal.App.4th 591 (2012)
Petition for review granted on March 28, 2012 after the Court of Appeal affirmed an order denying a motion to compel arbitration. This case includes the following issue: Is an arbitration clause in an employment application that provides "I agree to submit to binding arbitration all disputes and claims arising out of the submission of this application" unenforceable as substantively unconscionable for lack of mutuality or does the language create a mutual agreement to arbitrate all such disputes? (See *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462.)

New California Employment Laws

Below is a summary of noteworthy employment-related legislation signed into law by Governor Brown that take effect on January 1, 2013.

SB 1038: Eliminating California Fair Employment and Housing Commission and Transferring Duties to California Department of Fair Employment and Housing

SB 1038 was signed by the Governor on June 27, 2012 and takes effect on January 1, 2013. This bill eliminates the Fair Employment and Housing Commission (FEHC), transfers its duties to the Department of Fair Employment and Housing (DFEH) and makes certain other changes to the Fair Employment and Housing Act (FEHA). DFEH will now be able to go directly to court (rather than being limited to seeking administrative relief through the now defunct FEHC) and seek all remedies available there without a specified cap of actual damages, but must first engage in mandatory dispute resolution through DFEH's internal Dispute Resolution Division, free of charge. The bill also establishes a Fair Employment and Housing Enforcement and Litigation Fund in the State Treasury for purposes of depositing attorney's fees and costs awarded to the DFEH in certain civil actions, which will then be appropriated by the Legislature to offset the costs of the Department.

AB 1964: Workplace Religious Freedom Act of 2012
AB 1964 was signed by the Governor on September 8, 2012 and takes effect on January 1, 2013. This bill, which amends California Government Code sections 12926 and 12940, specifies that religious dress and grooming practices shall be considered a protected religious observance or belief under FEHA. The bill broadly defines "religious dress practice" to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts and any other item that is part of the observance by an individual of his or her religious creed, and "religious grooming practice" to include all forms of head, facial and body hair that are part of the observance by an individual of his or her religious creed.

The bill specifies that an accommodation of an individual's religious dress practice or religious grooming practice that would require that person to be segregated from the public or other employees is not a reasonable accommodation.

AB 1844: Limits Employer Access to Employee Social Media Accounts
AB 1844 was signed by the Governor on September 27, 2012 and takes effect on January 1, 2013. This bill prohibits an employer from requiring or requesting an employee or applicant for employment to (1) disclose a username or account password to access a personal social media account; (2) access personal social media in the employer's presence; or (3) divulge any personal social media. However, the bill permits employers to request that an employee divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, as long as the social media is used solely for that or a related investigation or proceeding.

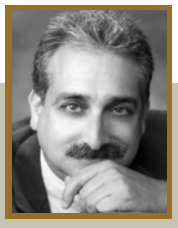
The exception for employee investigations applies if the employer reasonably believes that the personal social media is relevant to the investigation or to a related proceeding, and does not use the personal social media for any other purpose. Also, AB 1844 will not restrict an employer from requesting or requiring an employee disclose username, password or other method of accessing an employer-issued electronic device. AB 1844 expressly prohibits retaliation against an employee or applicant who declines to comply with a request that violates its terms. AB 1844 will be codified as new California Labor Code section 980.

AB 2386: Expansion of Definition of Sex Discrimination under California Fair Employment and Housing Act
AB 2386 was signed by the Governor on September 28, 2012 and takes effect on January 1, 2013. This bill, which amends California Government Code sections 12926, expands and/or clarifies the definition of protected status based on "sex" under the FEHA. Under the FEHA, it is unlawful to engage in specified discriminatory practices in employment on the basis of sex. Under existing law, "sex," for purposes of the FEHA, has included gender, pregnancy, childbirth and medical conditions related to pregnancy or childbirth. This bill provides that, for purposes of the FEHA, the term "sex" also includes breastfeeding or medical conditions related to breastfeeding. This bill also states that it is declaratory of existing law.

AB 1396: Written Commission Agreements
This bill was signed into law on October 7, 2011, but the effective date was postponed until January 1, 2013. The bill provides that an employer who enters into an employment contract with an employee for services to be rendered in California and that provides for commissions as a method of payment must put the employment contract in writing and set forth the method by which the commissions will be computed and paid. The bill states that the employer shall give a signed copy of the contract to the employee and shall obtain a signed receipt for the contract from the employee.

In the case of a contract that expires and where the parties nevertheless continue to work under the terms of the expired contract, the contract terms are presumed to remain in full force and effect until the contract is superseded or employment is terminated by either party. The bill excludes from its definition of commissions "short-term productivity bonuses such as are paid to retail clerks and it does not include bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed." This bill amended Labor Code section 2751 and repealed former Labor Code section 2752.

As with any new pronouncements by the California Supreme Court and newly passed legislation concerning the state's employment law landscape, businesses should be advised to take the appropriate steps to bring their employment policies and practices into compliance.



Ken Rose is the founder and President of The Rose Group, APLC, a global employment law and HR consulting firm. Rose has practiced employment and labor law for over 35 years. He can be reached at krose@rosegroup.us.

Test No. 51

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

1. The California Wage Orders exempt employees who are properly classified as professionals, executives or administrative employees from the daily and weekly overtime, minimum wage and meal/rest break requirements.
❑ True ❑ False

2. The Court of Appeal in *Harris v. Superior Court*, 53 Cal.4th 170 (2011) ruled that the employer's insurance claims adjusters were exempt employees under California law and, therefore, not entitled to receive overtime pay.
❑ True ❑ False

3. Regardless of an employee's job duties, the California Wage Orders' administrative exemption for employee entitlement to overtime compensation does not apply to employees who are paid three times the California minimum wage.
❑ True ❑ False

4. All employees classified as non-exempt under the California Wage Orders are entitled to uncompensated meal periods of 30 minutes when working shifts of at least four hours.
❑ True ❑ False

5. To comply with California's meal period requirements, employers must relieve their employees of all duty during the scheduled 30 minute meal period and, furthermore, take affirmative steps to prevent those employees who voluntarily elect to work through the meal period from performing any work during their allotted meal period.
❑ True ❑ False

6. An employee, classified as non-exempt under the California Wage Orders, working a six hour shift is entitled to only one 10 minute rest period.
❑ True ❑ False

7. The penalty for failure to provide a mandated meal or rest period is payment of a $100 fine to the California Labor Commissioner.
❑ True ❑ False

8. Employees who work a shift in excess of 10 hours are entitled to two 30 minute meal periods.
❑ True ❑ False

9. An employer can require an employee who is entitled to a 30 minute meal period to take his/her meal period beginning just one hour after the employee's shift begins.
❑ True ❑ False

10. The California Supreme Court in *Brinker Restaurant Corp. V. Superior Court*, 53 Cal.4th 1004 (2012) ruled that trial courts have discretion to rule on motions for certification of a class action before ruling on the merits of the case except where the issues affecting the merits are intertwined with the class action requirements.
❑ True ❑ False

11. In an action brought by an employee alleging that the employer denied him meal periods as required by California law, the prevailing party has a statutory right to recover attorney fees.
❑ True ❑ False

12. One of the issues for which the California Supreme Court granted review in *Iskanian v. CLS Transportation of Los Angeles*, 206 Cal.App.4th 949 (2012) is whether a pre-dispute employment arbitration agreement trumps the employee's statutory right to bring representative wage law claims under the Private Attorneys General Act of 2004, Labor Code section 2698.
❑ True ❑ False

13. The U.S. Supreme Court affirmed the California Supreme Court's ruling in *Sonic–Calabasas v. Moreno*, 51 Cal.4th 659 (2011), which held that a pre-dispute employment arbitration agreement requiring employees to waive their statutory right to an administrative hearing before the California Labor Commissioner was against public policy and, therefore, unenforceable.
❑ True ❑ False

14. The Court of Appeal's decision in *Wisdom v. Accentcare*, Inc., 202 Cal.App.4th 591 (2012), now under California Supreme Court review, affirmed an order denying enforcement of a pre-dispute arbitration clause contained in the employment application signed by the employee.
❑ True ❑ False

15. SB 1038 transferred the responsibilities of the California Fair Employment and Housing Commission to the California Labor Commissioner.
❑ True ❑ False

16. Although California law prohibits employers from discriminating against employees based on their religious preferences, AB 1964 allows for employers to have uniformly enforced dress code policies that make no exception for employees whose religious beliefs mandate that they wear certain clothing.
❑ True ❑ False

17. An employer who refuses to hire new mothers who breastfeed their babies violates the California Fair Employment & Housing Act.
❑ True ❑ False

18. AB 1844 prohibits an employer from requiring a job applicant disclose his/her Facebook username and account password.
❑ True ❑ False

19. AB 1844 prohibits an employer from requiring an employee to provide it access to the employee's Facebook page even if the employer reasonably believes that the employee's Facebook page may have information relevant to an investigation of allegations of employee misconduct.
❑ True ❑ False

20. AB 1396 requires that, if an employee's compensation includes commissions, the method by which the commissions will be computed and paid must be set forth in a written employment contract.
❑ True ❑ False

MCLE Answer Sheet No. 51

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

GROWING TRENDS

By Irma Mejia

The San Fernando Valley Bar Association is committed to engaging its members via social media, as well as offering online networking tools and social media workshops to help its members market themselves and their practice.

Connect with SFVBA on Facebook and Twitter!

THE HOT TICKET ITEMS ON THE SHOPPING lists of many SFVBA members this holiday season are the newest smartphones and tablets. These items are nearly indispensable for many attorneys because of the immediate access they provide to digital content and the ease with which they allow users to share data.

It is gadgets like these that allow our members to access Fastcase while on the go or give a quick status update, informing colleagues or friends they are running late. These devices are enabling more individuals to interact with others in ways that were not considered possible a few years ago.

The SFVBA itself has improved significantly in the way it interacts digitally with its members and supporters this year. Recently, the SFVBA achieved a major milestone with its 500th Twitter follower; 500 members, legal organizations and non-member attorneys have connected with the SFVBA through Twitter for the latest SFVBA news and event announcements.

The SFVBA has also maintained a strong following on Facebook with more than 250 supporters and great interaction from the Bar's fans. The SFVBA's digital communications have also improved in design, relevancy and frequency. Even *Valley Lawyer* is now available as an interactive flipbook viewable on iPads and personal computers.

This year also saw the growth of various other social networks such as Pinterest and Instagram, the arrival of cloud computing into the mainstream, and innovations in credit card processing through companies such as Square. Some of these new developments provide tremendous professional value. For instance, cloud computing can enable an attorney to retrieve documents while in court or help preserve data in the event of damage to a physical office. Other new developments may not readily provide professional value but may help in simply widening an attorney's social circle, which later on can turn into tangible professional links.

Whatever new developments in social media and technology appear in the new year, the SFVBA will continue to highlight the latest innovations for members, provide valuable legal technology information and expand its engagement in social media. The SFVBA will keep providing important information through its popular social media and marketing workshops. It is also researching options for revitalizing its website to allow for improved member interaction.

The SFVBA's commitment to engaging members through social media and providing important technological updates will remain strong through the coming year.

Irma Mejia is the Member Services Coordinator at the SFVBA. She also administers the Mandatory Fee Arbitration Program and manages the Bar's social media efforts. She can be reached at irma@sfvba.org.

A Fulfilling Family Law Practice:
Giving Clients a Choice to Resolve Cases Collaboratively

By Michelle Daneshrad

ATTORNEYS FEEL A SENSE OF FULFILLMENT when they achieve accomplishments such as winning a case, meeting a client's expectations or making partner at a law firm. Lawyers also feel a great sense of purpose when the money they earned comes from their law practice. These fulfillments feed the attorney's peace of mind, personal satisfaction and enjoyment.

Although winning a case can be a fulfillment, the joy is temporary when the attorney has to stay in gear and compete in other matters. The stress, anxiety and anger after a surprising order or judgment linger on for a long time, and those negative feelings may never leave.

Today, there exists a whole new level of long-lasting fulfillment for an attorney's law practice. The fulfillment that comes from practicing collaborative law gives attorneys the confidence and the patience that will feed the other collaborative cases.

When an attorney knows he or she is doing what is best for his or her client, there is a sense of fulfillment that is undeniable. Looking at the world that attorneys provide for clients from the client's perspective can be enlightening. Imagine being a client in a divorce case.

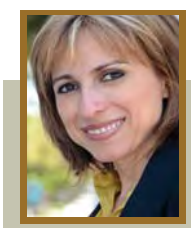
For example, Annie is sitting on the bench outside Department 65 of the Los Angeles Superior Court. She is anxious, nervous, scared and worried about what the other side has in store for her, what she will be accused of, and what will the judge decide that day. Her fate is in the hands of a stranger who is judging her. Her attorney is laughing and joking with the other attorneys in the hall. She feels alone and out of place. After being accused and blamed by opposing counsel and her spouse, she now feels embarrassed, belittled and humiliated on top of everything else.

Imagine going through these experiences for the years that litigation takes, as a client watches all the savings they built throughout their marriage is being spent fast on attorney fees, expert fees and legal costs. The worst of it is that the client's children are dealing with hostility and complaints from each parent toward the other. Johnnie, their 13-year-old son, is having behavioral issues at school and his report cards show a tremendous decline in grades. Michael, the dad, believes Johnnie needs stricter boundaries and seeks to have Johnnie live with him so he can control his environment. Both mom and dad are afraid that if they are strict, Johnnie will want to live with the other parent. Johnnie now has the right to testify as to his preference. The client feels like they are losing everything, including the power to parent.

All the things that matter most to the client, their health, family and finances are compromised. They feel like they have no control, and far too often that feeling is true. They are and will be paying an unpredictable amount of money and will have to wait an unpredictable amount of time to receive an unpredictable and uncontrollable outcome.

Now, let's compare litigation to the collaborative process. A husband and wife meet with both of their collaborative attorneys. They are all sitting in a small conference room. Each client's attorney has a communication specialist sitting with the client. Both attorneys' attention are with both clients. They are offered fruits, sweets, tea and coffee, making sure all parties are comfortable.

Everyone is respected. Wife is asked by her spouse's attorney to speak about her concerns, needs and wants. When she says all the things she needs to say, all the people in the room listen to her and validate her. Husband does not interrupt, because both of them were taught how to



Michelle Daneshrad is the founder of Smart Divorce Options and founder of San Fernando Valley Collaborative Professionals. She can be reached at michelle@smartdivorceoptions.com.

listen and not interrupt. He also knows that he will have his turn and he does. If one of them interrupts the other, the communication coach is right there redirecting him or her to listen. When one of them speaks about his or her concerns, needs and wants, the other has the peace of mind that they don't have to defend themselves. This is not an adversarial system. Both clients know the process will not end in an outcome unless the outcome is acceptable to both of them. They have control over the outcome

Wife learns to listen without worrying about herself. She finally can hear him, maybe for the first time after many years, because the communication specialists and the collaborative attorneys reiterate what each client's commitment and interests are with what they are saying. The client realizes and learns what has been the real experience of his or her spouse. A lot of weight is lifted off of them as they each realize what they added to what their spouse has been saying. They realize they added so much unnecessary stress that now they can release.

The clients practice open communication with each other with the help of the team in the collaborative divorce process. The clients work together to plan for the children, their common interest. They learn to respect each other in the process, so they take it home to their kids.

The collaborative process is not all peace and roses. In fact, many times, collaborative attorneys deal with anger, rage and upset clients. All of that has to come up in the process and does come up. The great value of the process is that each attorney is not alone dealing with all of it; the attorneys support each other and are supported by the communication specialists. The collaborative team provides a safe space for all that needs to transpire.

The collaborative process has a psychological aspect to it. There is at least one mental health professional in a collaborative team (communication specialist). The psychological aspect of divorce is always there. Attorneys can be set up to deal with it properly for the benefit of the clients, or they can pretend the emotions are not there or not important and let it be destructive in whatever medium the divorce is taking place—whether it is the court, in mediation or a four-way conference.

The fulfillment of practicing collaborative practice comes from attorneys providing complete support for their clients. The collaborative team consisting of collaborative lawyers, mental health professionals and an impartial financial expert provide all that the clients need to resolve their issues collaboratively. Working with the team in creating options that meet both clients' needs is very fulfilling. A relationship is built between all parties and professionals involved. The attorney caring and respecting their client's spouse goes a long way. The attorney and the other collaborative attorney also serve as role models for the parties. The parties learn to build a new relationship with the other spouse through respectful and responsible communication. They also learn to have a new respect for their spouse by the way the professionals relate to them.

Practicing collaboratively is not easy. Attorneys have been trained to be competitive. A lot of times, it takes a great effort for an attorney to listen and understand. All of that hard work and effort is worth the attorney's wellbeing and the wellbeing of clients and their children.

SFVBA 16th Annual MCLE Marathon

January 18 and January 19, 2013

Braemar Country Club
4001 Reseda Boulevard, Tarzana

ARXIS FINANCIAL, INC.

ATKINSON BAKER
America's Court Reporters
The SFVBA's Official Court Reporter Sponsor

The Matloff Company

LAW OFFICES OF ALICE A. SALVO
Elder Law Professionals

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NARVER INSURANCE

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

MCLE Key Drive

Only $89 for MCLE Marathon Registrants!

Contains 15 Popular *Valley Lawyer* MCLE Articles

Earn the Maximum 12.5 Hours of Self-Study Credits (Including All Specialty Credits)

Friday January 18

◆ 9:30 a.m.
Nuts and Bolts of Estate Planning
Alice A. Salvo
Law Offices of Alice A. Salvo
1 Hour MCLE

◆ 10:30 a.m.
Understanding Financial Disclosures
Chris L. Hamilton, CPA, CFE, CVA
Arxis Financial, Inc.
1 Hour MCLE

◆ 11:30 a.m.
Is That Considered Malpractice?
Steven R. Yee, Esq., Debra Mondragon and Diane Wood
Narver Insurance
1 Hour MCLE (Legal Ethics)

◆ 12:30 p.m.
Lunch

◆ 1:30 p.m.
Ethics Regarding Collection of Fees
Myer J. Sankary
1 Hour MCLE (Legal Ethics)

◆ 2:30 p.m.
Elimination of Bias and Diversity in the Legal Profession
Myer J. Sankary and
Professor Christine Goodman
1.5 Hours MCLE (1 Elimination of Bias and 0.5 General)

◆ 4:00 p.m.
California's New Foreclosure Law-The Homeowner's Bill of Rights
Mark S. Blackman
1 Hour MCLE

Saturday January 19

◆ 9:30 a.m.
Legal Technology and LexisNexis
Kevin A. McConnell, J.D.
Lexis Nexis
1 Hour MCLE

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

◆ 11:30 a.m.
Prevention of Substance Abuse: Clearing Common Misconceptions about D.U.I. Laws
Ronald N. Hoffman
1 Hour MCLE (Prevention of Substance Abuse)

◆ 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.
Intellectual Property 101
John F. Stephens
1 Hour MCLE

Registration Form and Membership Application

(Pre-Registration Deadline is January 11, 2013)

Name _____

Firm _____

Address _____

City, State _____

Zip Code _____

Phone _____

Fax _____

E-Mail _____

State Bar No. _____

Bar Admission Date _____

MCLE MARATHON REGISTRATION FEES

	Member	Non-member
2-Day Seminar	$169	$399
or		
Friday, January 18	$99	$219
Saturday, January 19	$99	$219
or		
Per MCLE Hour	$35	$60
✔ Class Attending		
Late Registration Fee	$40	$60
MCLE Self-Study Key Drive (with Marathon Registration)	$89	$89
MCLE Self-Study Key Drive Only	$139	$229

Membership Dues: $ _____

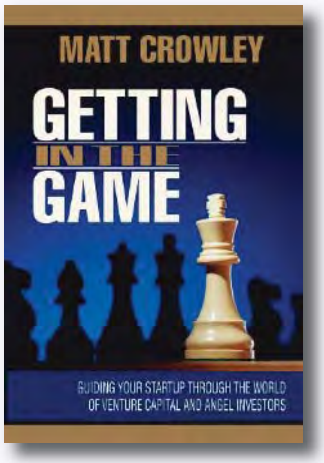
Total Enclosed/To be Charged: $ _____

If paying by credit card:

Credit Card #____ - ____ - ____ - ____

Expiration Date ____ / ____ / ____

Signature _____



Get in the Game!

By Angela M. Hutchinson

THE BOOK *GETTING IN THE GAME* IS A GUIDE for entrepreneurs who are looking to start a business and raise start up funds through venture capitalists or angel investors. Author Matt Crowley, a Valley corporate lawyer, provides relevant content that assists entrepreneurs with creating companies and achieving their goals for the business. *Getting in the Game* teaches how to build and finance a startup company. Each chapter is explained in a simple yet detailed manner that will likely resonate with aspiring and mid-level entrepreneurs. Crowley shares personal lessons from his clients and other startups to help the reader avoid common pitfalls made by entrepreneurs. The book contains valuable examples of business documents and other insightful information that every new business owner should know.

In the opening of every chapter, Crowley writes a "What We will Learn" section which is useful for the reader to know exactly what the chapter will discuss. The writing style is very straight forward and makes the book an easy read. After reading the book, an entrepreneur will have more than enough relevant information needed to start their business or even restructure their existing business. The exhibits at the end of the book consist of detailed diagrams, charts and agreements. While it took some studying to understand them, the content was accurate.

For the entrepreneur who desires to *get in the game*, reading Crowley's book is a must read. The book can also be used as a reference tool for business terminology. From a motivational standpoint, the tone of the book is more serious and business orientated, meaning, it is not a book for an entrepreneur to read to get an inspired to create a business. The reader should know 100% that they want to be an entrepreneur and have a clear business idea in mind or in the early start up stage.

Since raising capital is a challenge for most entrepreneurs, a favorite aspect of the book is the mention of networking organizations and places where entrepreneurs can go to meet venture capitalists. *Getting in the Game* is a book that certainly will not remain on one's book shelf, and instead will be bookmarked on the desk of any serious entrepreneur. The book is available on Amazon.com and has a 5-star rating from customer reviews.

About the Author

Matt Crowley is a venture lawyer focused on assisting entrepreneurs in Los Angeles to launch their businesses. He began his career practicing law for eight years with the corporate finance groups of Pillsbury Madison & Sutro (now Pillsbury Winthrop) and Morrison & Foerster in San Francisco. Crowley has participated in over $6 billion in deals while at these international firms. In 2006, he founded Crowley Corporate Legal Strategy to offer corporate legal services to entrepreneurs. Currently, Crowley serves as the general counsel of Total HR Solutions. As a frequent lecturer, he speaks on topics related to startups, venture capital and mergers and acquisitions. Also, Crowley has invested in two early stage technology businesses. He serves on the board of the Los Angeles Venture Association.

Review of 2012 Immigration Law Developments

By Ronald J. Tasoff

IN 2012, DEPORTATIONS reached record levels in the United States, up 33% from 2007 to over 400,000 this year. There were also major court and regulatory developments in 2012 effecting immigration law.

Deferred Action for Childhood Arrivals (DACA)

On June 15, 2012, President Obama announced that he would make an executive order that would extend "deferred action status" to people who:

- Illegally came to the United States or had their legal stay expire when they were under 16 years old
- Were physically in the United States and under 31 years old on June 15, 2012
- Continuously resided in the United States since June 15, 2007
- Are currently in school, graduated or obtained a certificate of completion from high school, obtained a GED, or are honorably discharged veteran of U.S. Coast Guard or U.S. Armed Forces
- Have not been convicted of a felony, a "significant misdemeanor" (such as drunk driving), three or more other misdemeanors, or do not otherwise pose a threat to national security or public safety (such a gang membership)

Deferred action status, which is a long established program similar to prosecutorial discretion, will be granted for two years and bars removal from the United States. Upon a showing of "economic need" (almost a given), successful applicants will receive work permits and will be eligible to receive social security cards. In most states, including California, they will also be eligible to receive driver's licenses. Of the estimated 1.7 million people who may qualify (over 460,000 in California), over 90,000 have already applied.

Provisional Waivers for Spouses and Children Applying for Immigrant Visas Abroad

In another modification of existing regulations, the Obama administration changed the waiver application process for a small but significant group of immigrant visa applicants. Previously, if a person came to the United States illegally and remained here for over one year and then left the United States, they would become subject to a 10 year bar from legally returning to the United States unless they qualified for a waiver.

This meant that undocumented people who married U.S. citizens or were the children of U.S. citizens had to apply for an immigrant visa at an American Consulate abroad and would then become subject to the bar. They would have to apply for "hardship" waivers while they were abroad. The waiver processing could take anywhere from 8 weeks to 15 months, during which time the applicant would have to remain abroad.

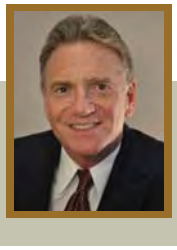
Under the new rule, applicants can apply for provisional waivers before leaving the United States and legally after a short two-day trip abroad to apply for their immigrant visas/green cards. This will benefit thousands of people (mostly from Mexico) in the Los Angeles area who have been reluctant to apply for green cards based on marriages to U.S. citizens because of their fear of getting stuck in Mexico.

Stateside Processing of Waivers

Those immigrant visa/green card applicants who don't qualify for provisional waivers will have their waiver applications processed faster, or at least more uniformly, under a new program that will require that they file their waiver applications at a central USICS processing center in the United States instead of at an American Consulate abroad. However, they will still have to remain abroad until their waiver applications have been approved.

Prosecutorial Discretion Program

Continuing from last year, U.S. Immigration and Customs Enforcement (ICE) prosecutors are reviewing pending immigration court cases and new filings to give priority to the removal of "criminal aliens," new illegal arrivals and serious immigration law violators. The flip side is that cases involving long term U.S. residents, those with U.S. family ties and other equities are being dismissed in order to conserve limited legal resources.



Ronald J. Tasoff is a State Bar of California Certified Immigration Law Specialist, a past Chair of the Southern California Chapter of the American Immigration Lawyers Association (AILA) and has exclusively practiced immigration law since 1975. He can be reached at ron@tasoff.com.

No other benefits, such as work authorization, are granted. The agency has been criticized by the immigration bar for its slow progress and low numbers of dismissals. Practitioners should note that "criminal aliens" include those who have drunk driving, drug possession or domestic violence convictions.

Arizona v. United States

In June, the Supreme Court issued its much-anticipated decision in ruling that some aspects of an Arizona statute intended to deter unlawfully present aliens from remaining in the state were preempted by federal law, but also holding that Arizona police were not facially preempted from running immigration status checks on persons stopped for state or local offenses. In reaching these conclusions, the Supreme Court made clear that opportunities for states to take independent action in the field of immigration enforcement are more constrained than some had previously believed.

De Osorio v. Mayorkas

In an en banc decision, the Ninth Circuit Court of Appeals ruled that the Child Status Protection Act (CSPA) actually means what it says. The court held that derivative beneficiaries (e.g., the then under 21-year-old single children) of all family-based preference categories, including married sons and daughters of U.S. citizens and brothers and sisters of adult U.S. citizens, are entitled to automatic conversion and priority date retention under CSPA. The fact that these aged-out "children" may need new petitions does not deprive them of the benefits of automatic conversion and priority date retention. This decision, at odds with other Circuit decisions, will benefit many families from countries such as Mexico and the Philippines where family based quotas are backlogged for decades.

Secure Communities Program

This controversial ICE program claims its main objective is to locate, detain and deport aliens with serious criminal records, fugitives with pending deportation orders or those who could represent a threat to the public. This happens through cooperation between local law enforcement agencies and ICE. Fingerprints of those arrested are compared against the biometric system of the Department of Homeland Security, which expedites the identification process of foreigners who lived in the United States and whose criminal record makes them candidates for deportation. However, critics complain that any person who is detained for any minor crime or infraction is subject to the same procedure, that in effect this is a deportation dragnet program, masquerading as a public safety program.

Federal figures show that more than 25,000 people deported under the program since October 2008 have no criminal convictions, here or abroad. And many were deported after charges against them were dropped. However, in the furtherance of better community relations between the LAPD and the Hispanic community, Police Chief Charlie Beck announced in October that the LAPD will first review the seriousness of the offense, prior arrest history and gang involvement of the individual before honoring a detainer request to transfer the person to ICE's custody.

What's in Store for 2013

President Barack Obama mentioned in his re-election night acceptance speech that one of the four challenges he will take up will be "fixing our immigration system." With a divided Congress, it is unclear whether any major legislation can be passed, but the fact that the Hispanic vote was key to President Obama's re-election will not be forgotten by either party.

It is unlikely that any significant legislation involving immigration will be passed until the economy improves. There is a chance, however, that the Dream Act, which would create a path for DACA recipients to become lawful permanent residents and eventually citizens, will be brought up again. More likely, there may be legislation benefiting aliens with "STEM" (Science, Technology, Engineering and Mathematics) degrees. Also, continuing with the administration's current strategy of changing regulations and enforcement priorities, which do not need Congressional approval, may benefit select groups of aliens.

For more information on the above and other recent developments in immigration law, readers can refer to www.aila.org and www.americanimmigrationcouncil.org.

Mission Driven

ROSIE SOTO COHEN
Director of Public Servicecs
referrals@sfvba.org

YEAR AFTER YEAR, PANEL MEMBERS GO above and beyond to serve ARS clients. Why do they do this? While public service is a motivating factor for the ARS and panel attorneys, membership with the ARS provides an opportunity to build a client base and receive good referrals. The ARS has expanded its marketing and community outreach efforts to increase the calls and referrals, and panel member should continue to provide excellent service.

There is a major, yet relatively easy way the Attorney Referral Service of the San Fernando Valley Bar Association is increasing its visibility in the community. ARS staff and panel members are hitting the streets to educate as many people as possible about the ARS, and give Valley residents and businesses access to competent legal representation.

Since the start of this fiscal year beginning October 1, ARS consultants Aileen Jimenez and Lucia Senda have met several thousand potential clients at community events and resource fairs, all while Director of Public Services Rosie Soto is reaching out to the Valley's opinion leaders: clergy and churches, schools, politicians, social workers, therapists, doctors, city council representatives, mayor's office, etc. Soto is connecting with local officials, state representatives and their aides so they become more familiar with the ARS and utilize the program as a resource for their constituents.

In order to meet a real need, it will be up to ARS staff and Bar Leaders to identify the interests of the public and track evolving laws. Current legal issues of interest to the community include immigration policy, e.g., Deferred Action for Childhood Arrivals; debt crisis, e.g., student loans, bankruptcy, foreclosures, collections; Limited Scope Representation; LGBT family law matters and domestic partnerships; small business startups; and new laws that protect specific groups of people, i.e., hearing disabled, ex-convicts, immigrant groups.

The ARS is building a strong alliance with Los Angeles Unified School District. Close to 60 parents attended the

first Deferred Action for Childhood Arrivals (DACA) informational meeting on November 1 at Alta California Elementary School in Panorama City. The workshop was taught by immigration attorney and ARS panel member Braden Cancilla and was sponsored by the ARS and LAUSD Parent and Community Engagement Unit, ESC-North.

The appeal to the public is that the ARS of the SFVBA is their program; it has been since 1948. Although it is up to Soto and the ARS Committee to assure each attorney applicant is rigorously vetted and meets the highest standards according to the rules of the State Bar and ABA pertaining to lawyer referral services, the program relies on client feedback to ensure the quality of the service.

The ARS relies on complete and honest feedback from the public pertaining to their impressions and satisfaction with the ARS process, ARS staff and the attorney referred by the ARS. The 98 percent client satisfaction rate is reassuring, particularly because endorsements from clients that have used the service before is priceless.

The occasional negative client survey responses cannot be ignored; instead, the negative feedback is properly

analyzed and used to help the ARS and panel members improve. How panel members treat clients reflects on the ARS—great service is mutually beneficial while poor service can damage the reputation of the ARS with the public.

Lastly, SFVBA members should not forget the added value that can result when members refer clients outside their practice areas to the ARS. Attorney-to-Attorney referrals from SFVBA members frequently rank as the best source of referrals for the ARS.There are plenty of outreach materials available for attorneys to make the responsible referral to the SFVBA's ARS.

New Members

The following applied as SFVBA members in October 2012:

Amy Asher
Los Angeles
(818) 599-2014
amyasher32@gmail.com
Law Student

Jessica N. Atkinson
Los Angeles
(954) 598-4828
jatkins921@gmail.com
Law Student

Harout Bagdasaryan
Panorama City
HB33LAW@gmail.com
Law Student

Cinthya Bernabe
Los Angeles
(323) 440-2217
bernabe.cinthya@gmail.com
Law Student

Arman H. Boyadjian
Burbank
(818) 307-0119
armanb89@gmail.com
Law Student

Traci Bryant
Canoga Park
(818) 692-4286
dtraci@sbcglobal.net
Law Student

Anita L. Castellanos, Ret.
West Hills
anitac1@mac.com

Chung S. Chung
Burbank
(818) 669-2030
cchung67@gmail.com

Gail Cohen
Nemiroff & Cohen LLP
Encino
(818) 901-8900
gcohen@nemcolaw.com
Family Law

Richard W. Daugherty
Legal Writes
Van Nuys
(818) 908-8830
publicadvocate@msn.com
Landlord/Tenant, Paralegal

Sammy A. Donabedian
West Hills
(818) 437-2471
sdonabed7@gmail.com
Law Student

Kim S. Flowers
Reseda
(818) 752-7466
kymflowers2011@hotmail.com
Law Student

Lawrence P. Freeman
Woodland Hills
(818) 710-2777
freemanlaw@earthlink.net
Family Law

Andrea Gale
Atkinson-Baker, Inc.
Glendale
(800) 288-3376
agale@depo.com
Associate Member, Court Reporting

Esme E. Ganz
Law Offices of Marcia L. Kraft
Woodland Hills
(818) 883-1330
esme@kraftlawoffices.com
Family Law

Arin G. Janjik
Encino
janjiklove@yahoo.com
Law Student

Monica Jara
Van Nuys
(818) 742-7279
mrsjara@hotmail.com
Law Student

Winifred C. Jow
North Hollywood
(626) 975-1915
winniejow@gmail.com
Law Student

Karine Karadjian
Wadhawani & Shanfeld
Sherman Oaks
(818) 784-0500
karine@thewsfirm.com
Bankruptcy

Pourya Keshavarzi
Law Offices of
Marcia L. Kraft
Woodland Hills
(818) 883-1330
pourya@kraftlawoffices.com
Family Law

Amarillys Loustalot Laclette
(818) 795-2575
lacletteamarillys@yahoo.com
Los Angeles
Law Student

Joseph R. Lopez
JRL Consultants
Simi Valley
(805) 583-8233
jrlconsult@aol.com
Law Student

Kristen J. Mason
Burbank
kristenjmason@gmail.com
Law Student

Grzegorz Michalak
Los Angeles
(323) 963-3331
gregm147@gmail.com
Estate Planning, Wills and Trusts

Nader A. Nader
Tarzana
(818) 574-8300
naderlaw@yahoo.com
Law Student

Steven J. Prager Esq.
Tarzana
(310) 694-2330
sjp440@gmail.com
Civil Litigation

Robert Reganyan
Dykema Gossett, LLP
Los Angeles
(213) 457-1800
rreganyan@dykema.com
Bankruptcy

Susan L. Rognlie
Law Office of
William C. Staley
Woodland Hills
(818) 936-2652
susan@staleylaw.com
Paralegal, Business Law

Kori L. Schneider
Gettleson, Witzer & O'Connor
Encino
(818) 574-0703
kschneider@getwitz.com

Francine Teitelbaum
Tarzana
(818) 907-6097
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Associate Member, Conservatorships

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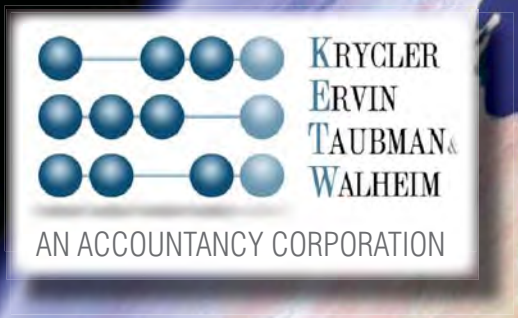

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Sherman Oaks, California 91403

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