VALLEY LAWYER

JULY/AUGUST 2010 • $4

A Publication of the San Fernando Valley Bar Association

Horses in Entertainment, Sports and the Law

Earn MCLE Credit

Placing Form Over Substance: Opposing Counsel Cannot Rely on Attorney's Approval

When a Client Commits a Crime and Asks for Help

Summer Issue

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Correction: A case citation in the article "Ranch Damages for Trespass-by-Fire" by Douglas G. Gray in the June 2010 issue of *Valley Lawyer* was incorrect. The correct citation is: In *Kelly v. Chicago Bridge and Iron*, **179** Cal.App.4th 442.

VALLEY LAWYER

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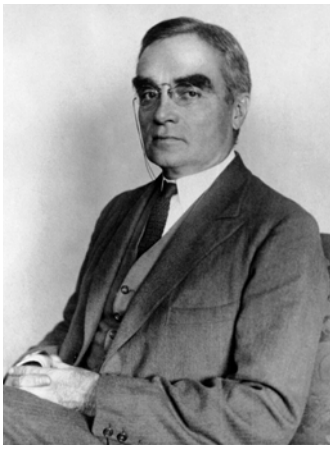
President's Message

Spirit of Liberty

ROBERT F. FLAGG
SFVBA President

EVERY YEAR IN JULY WE celebrate the birth of our nation. With picnics and fireworks, barbecue and s'mores, we join in a national holiday to recall the faith and dedication of those who gave us the liberty we enjoy today.

At this time, it seems fitting to recall the words of one of the most famous lawyers and judicial officers in our history, Learned Hand. On May 21, 1944 in Central Park, New York City he gave a speech entitled, "I am an American Day."



Learned Hand (1872-1962)

"We have gathered here to affirm a faith, a faith in a common purpose, a common conviction, a common devotion. Some of us have chosen America as the land of our adoption; the rest have come from those who did the same. For this reason we have some right to consider ourselves the picked group, a group of those who had the courage to break from the past and brave the dangers and the loneliness of a strange land. What was the object that nerved us, or those who went before us, to this choice? We sought liberty – freedom from oppression, freedom from want, freedom to be ourselves. This we then sought; this we now believe that we are by way of winning. What do we mean when we say that first of all we seek liberty?

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few – as we have learned to our sorrow.

What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. This spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned, but has quite never forgotten – that there may be a kingdom where the least shall be heard and considered side by side with the greatest.

And now in that spirit, that spirit of an America which has never been, and which may never be – nay, which never will be except as the conscience and courage of Americans create it – yet in that spirit of that America which lies hidden in some form in the aspirations of us all; and the spirit of that America for which our young men [and women] are at this moment fighting and dying; and that spirit of liberty and of America I ask you to rise and with me pledge our faith in the glorious destiny of our beloved country."

Liberty lies in the hearts of the people. *"While it lies there, it needs no constitution, no law, no court to save it."* May we never forget!

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

SFVBA Nominating Committee Report

On May 17, 2010, The San Fernando Valley Bar Association Nominating Committee met and announced its slate of candidates for the 2010-2011 Board of Trustees. After thoroughly reviewing the participation and experiences of the applicants, the Committee nominated ten members for six open trustee positions on the Board.

The Committee unanimously nominated current SFVBA Trustees Natasha Dawood, Phillip Feldman, Lisa Miller, Robert Silver, Anne Thompson, Diane Trunk and John Yates, and new candidates Gerald Fogelman, Craig Forry and Mark Shipow.

According to the SFVBA Bylaws, although the nomination process by the Committee has concluded, members who are interested in having their name added to the ballot can do so by submitting an alternative nomination to be a trustee or for any officer position (except President or President-Elect). Prospective candidates must file a written nomination that has been signed by at least 20 active members of the association. The nomination packet must be filed with SFVBA's secretary Alan Sedley no later than July 25, 2010.

Ballots will be mailed to attorney members the second week of August and Election Day is September 10, 2010.

The new Board of Trustees will be sworn in at the Installation Gala on Saturday, October 2, 2010 at the Warner Center Marriott.

The 2010-2011 Board of Trustees Nominees are:

President:	Seymour I. Amster (Automatic)
President-Elect:	Alan J. Sedley
Secretary:	David Gurnick
Treasurer:	Adam D.H. Grant
Trustees:	Natasha N. Dawood
	Phillip Feldman
	Gerald L. Fogelman
	Craig B. Forry
	Lisa Miller
	Mark S. Shipow
	Robert Silver
	Anne L. Thompson
	Diane Trunk
	John Yates

From the Editor

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

ANGELA M. HUTCHINSON
Editor

Summer greetings!

This July/August issue of *Valley Lawyer* has articles on family law, criminal law and business litigation. Definitely check out our MCLE article on Horses in Entertainment, Sports and the Law. If you are interested in writing for our magazine, please review the editorial calendar on this page and contact me with your proposed article idea.

Summer is indeed the season to take a vacation or spend more time with family and friends for the purpose of nurturing and maintain healthy relationships with our loved ones. Similar to the Bar, our staff encourages you to unite with your fellow members. You should strive to not only maintain current business relationships, but also develop new ones.

This summer, we hope you network more with your fellow SFVBA members by attending an upcoming event that you weren't necessarily planning to attend. To stay in the loop about our various events, we encourage you to frequently check out the Calendar of Events on our website. Also, if you have an interest in getting more involved with a Committee or Section, please contact Linda Temkin, Director of Education and Events, at ext. 105.

For those of you looking to increase your business and would like to have potential clients referred to you by our Attorney Referral Service, you should absolutely join our ARS. Or if you receive calls from a potential client that you are not able to help, please be sure to refer them to our ARS and they may be able to find a more suitable attorney to take on the case. To renew or apply for ARS membership, please contact Rosie Soto, Director of Public Services, at ext. 104.

Lastly, I'd like to remind about the success of our Mandatory Fee Arbitration program. We encourage members to use the Bar's MFA program as your preferred fee arbitration program. If you would like more information on our MFA program or have an interest in becoming either a lay or attorney arbitrator, please contact Aileen Jimenez, Attorney Referral Service and Member Services Coordinator, at ext. 100.

Together, the Bar will thrive if our members unite and take ownership of their SFVBA membership. We offer a plethora of member benefits and resources for attorneys and legal professionals to excel at their careers, save money and give back to the community. As leaders of the San Fernando Valley with a vision of bettering our society, united we must stand.

Have a serene summer!

Angela M. Hutchinson

VALLEY LAWYER
2010-2011 EDITORIAL CALENDAR*

MONTH	ISSUE FOCUS/MCLE TOPIC	DUE DATE
OCT	International Law/Human Rights	July 15
NOV	Work and Balance/Workers' Compensation	Aug 13
DEC	Members in the News/Year-in-Review	Sept 1
JAN	Public Policy/Government	Nov 15
FEB	Criminal Law/Contract Negotiation	Dec 15

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

Proverbial Lessons from a State Bar Suspender

By Jill A. Sperber

SERIOUS CONSEQUENCES AWAIT NONCOMPLAINT lawyers under California's statutory scheme for State Bar enforcement of unpaid fee arbitration awards requiring a refund of attorney's fees or costs to the client. The State Bar Court will enroll an attorney on involuntary inactive status (non-disciplinary administrative suspension) until the award is paid. (Bus. & Prof. Code section 6203(d).)[1]

Demonstrating that a little knowledge is (often) a dangerous thing, in the vast majority of unpaid fee arbitration awards against lawyers which cross my desk, some lawyers make grave procedural errors, thwarting their attempt to prevent the arbitration award from becoming final. Let's consider these mistakes, for educational purposes, to be the result of bona fide misunderstandings by those lawyers of post-fee arbitration procedure.

"Losing" a Fee Arbitration Award is a Relative Term

Mandatory fee arbitration is designed to provide a neutral forum for clients and attorneys to resolve their disputes over attorney's fees and costs outside of court in a more informal, speedier, and less costly manner than litigation. Most fee arbitrations are either binding by agreement of the parties or become binding by law after the passage of 30 days from service of the award if neither party has filed for a new trial. (Bus. & Prof. Code §6203(b).) For the most part, the mandatory fee arbitration program successfully resolves many attorney fee disputes without litigation.

Should a lawyer lose in fee arbitration, this could mean several things: 1) the lawyer is awarded attorney's fees, but less than the amount claimed; 2) the lawyer keeps what has already been paid, but is awarded no additional fees from the client; or 3) the lawyer must refund "unearned" fees (or costs or both) to the client.

The lawyer will need to assess whether losing in fee arbitration is something that he or she can live with, or whether the potential gains of litigation to pursue the fee dispute outweigh the risks presented. Some of the risks go beyond pure financial considerations – airing a fee dispute against a client will be of public record. Protecting one's credibility with the court and reputation in the local legal community are additional factors to consider.

On occasion, parties initiate post-fee arbitration litigation. Given the potential consequences facing lawyers for nonpayment of a fee arbitration award, however nominal[2], careful attention should be paid to one's post-fee arbitration rights and responsibilities. Following mandatory fee arbitration, either party can file an action for a trial de novo following non-binding arbitration or a petition to vacate the award following binding arbitration. For a trial de novo to proceed, the action must at least be timely. For a petition to vacate, filing and service must be both timely and based upon one or more of the limited grounds required by statute.

A Minefield for the Misguided

While many lawyers eventually pay a final and binding fee arbitration award requiring a refund to the client, others don't or won't pay. When the State Bar steps in to enforce an unpaid award that has become final and binding, some lawyers will try to challenge the award, albeit belatedly or incorrectly.

Flawed challenges block enforcement of the award only temporarily. Inevitably, they create more downsides for the unsuccessful lawyer. Litigation encourages the client to seek a judgment confirming the award (assuming it is made within the four year statute of limitations. (C.C.P. §1288.) A judgment confirming the award is often higher than the original arbitration award: it may include prevailing party's attorney fees and costs, as well as post-award interest. The judgment amount is what the State Bar enforces if it remains unpaid. (Bus. & Prof. Code §6203(d).) Apart from State Bar enforcement, a judgment confirming the award carries the same enforcement remedies available to a civil judgment creditor. (C.C.P. §1287.)

How to Correctly Challenge a Fee Arbitration Award in Court

If an attorney is unhappy with a non-binding award, one must walk the walk. There is no crying in fee arbitration. If attorney wishes to reject a non-binding fee arbitration award, one must do so something, and do so promptly. To prevent a non-binding award from becoming binding, attorney must file an action in court within 30 days of the date of service of the award. Filing an action in small claims court is simple because Judicial Council form SC-101 [Attorney Fee Dispute After Arbitration] constitutes the action attached to form SC-100.

For claims in superior court, however, attorney must file and serve an actual lawsuit, even if one is seeking only declaratory relief (rejection of award but no money damages are sought) and attach optional Judicial Council form ADR-104[Rejection of Award and Request for Trial after Attorney-Client Fee Arbitration.] If one waits past 30 days, the award becomes binding by operation of law. (Bus. & Prof. Code §6203(b).)

If attorney blows it, own it. There is no C.C.P. 473 relief available for excusable error if attorney misses the 30th day to file an action to reject a non-binding fee arbitration award. *Maynard v. Brandon* (2005) 36 Cal.4th 364. If one misses the deadline, don't try to cover up by filing something else, such as a petition to vacate the award, unless one plans to prove one of the limited grounds set forth in C.C.P. §1286.2.

An idle lawsuit is the devil's workshop. After a lawsuit for a new trial has been filed following non-binding fee arbitration to prevent the award from becoming binding, the lawyer may fail to prosecute or will voluntarily dismiss the action. The courts have not looked kindly on such "mischievous lawyering." They

will treat a voluntary or court ordered dismissal of a de novo action as an effective repudiation of the initial request to reject the award, resulting in a final and binding arbitration award. *Corell v. Law Firm of Fox and Fox* (2005) 129 Cal. App.4th 531.

Deliver the goods. Attorneys will have a more leisurely 100 days from service of the award to file and serve a petition to vacate. (C.C.P. §1288) Judicial Council forms SC-101 in small claims court and ADR -103[Petition after Attorney-Client Fee Dispute Arbitration Award] in superior court are available.

Unlike a request for a trial, a petition to vacate an award must be based on very limited grounds, such as arbitrator corruption, fraud, or misconduct, substantial prejudice to the party by failing to grant a continuance where good cause existed to postpone the hearing or hear evidence material to the dispute, or failure of the arbitrator to disqualify himself or herself when required to do so. (C.C.P. §1286.2.) These narrow grounds are generally difficult to prove, and deliberately so, since the courts rarely second guess an arbitrator's rulings.

Before filing a petition to vacate, Grasshopper, summon one's most Zen-like state and ask oneself: can one of the limited grounds actually be demonstrated or is this angst really about something else?

Look before one leaps. Determining which court has jurisdiction after fee arbitration can be tricky. Depending on what attorneys are seeking in terms of relief, one's litigation may take place in a court other than the one that has jurisdiction over the amount of the award. When filing an action for a new trial after non-binding fee arbitration, "the amount of money in controversy" determines which court has jurisdiction. (Bus. & Prof. Code §6204(c).)

For a petition to vacate, in contrast, "the amount of the arbitration award" controls. (Bus. & Prof. Code §6203(b).) Another nuance is that the former small claims court limit of $5,000 still applies to post-fee arbitration litigation. (C.C.P. §116.220(a)(4).) The statute was never amended to apply the current $7,500 jurisdictional limit for claims by natural persons to post-fee arbitration cases.

As in life, be wary of getting punked. Assess the financial risk of not "prevailing" in court. Attorney could end up owing more money than the fee arbitration award requires. In mandatory fee arbitration, an award of prevailing party fees and costs is prohibited, notwithstanding a pre-existing agreement between the parties for same. (Bus. & Prof. Code 6203(a).) However, in post-fee arbitration litigation, all bets are off.

The statutes specifically provide for a judicial award of attorney's fees and costs to the prevailing party. After a trial de novo following non-binding arbitration, the party seeking the trial is the prevailing party only if he or she "…obtains a judgment more favorable than that provided by the arbitration award." (Bus. & Prof. Code § 6204(d).) For post-binding arbitration, the party obtaining judgment confirming, correcting or vacating the award is the prevailing party. (Bus. & Prof. Code §6203(c).)

Attorney who fails to update his State Bar address of record shalt not cast stones over lack of notice. The fee arbitration program's rules of procedure providing for service require that the lawyer will be served by mail at his or her address listed with the official membership records of the State Bar. Before basing a challenge on purported lack of notice of the arbitration hearing or that attorney moved and never received the award, ensure that one's official State Bar membership address of record was current at the time of service.

If the court determines that failure to appear for the arbitration hearing was willful, attorney will not be entitled to prevailing party attorney's fees and costs even upon vacation of the award. (Bus. & Prof. Code §6203(c).)

If attorney plays, they may need to pay. When a final and binding award requires a refund of unearned fees and/or costs to the client, the lawyer should promptly pay it. Attorney will avoid formal enforcement proceedings by the State Bar and the client. The value of a final resolution with a former client over a fee dispute? Priceless.

***Jill A. Sperber** is the Director of the State Bar's Office of Mandatory Fee Arbitration, providing mandatory fee arbitration and enforcement of award services, overseeing the state's 44 local bar association programs, and staffing the State Bar's Committee on Mandatory Fee Arbitration. She can be reached at Jill.Sperber@calbar.ca.gov.*

The San Fernando Valley Bar Association's Mandatory Fee Arbitration (MFA) Program provides cost-effective and timely resolution of client-attorney and attorney-to-attorney fee disputes. All MFA forms and documents are available at www.sfvba.org.

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[1] A lawyer may avoid State Bar enforcement of an unpaid arbitration award only by showing either: 1) he or she is not personally responsible for repayment or 2) an inability to pay the award, even in monthly installments. (Bus. & Prof. Code §6203(d)(2)(B).)

[2] The record for the smallest unpaid award resulting in the involuntary inactive enrollment of an attorney by the State Bar is $387.

Advising Senior Clients

BY KIRA S. MASTELLER

WORKING WITH SENIOR clients is a very rewarding aspect of an estate planning attorney. The wisdom and patience shared by senior clients is never ending and truly a gift to receive. However, working with senior clients presents its own set of challenges that do not appear when working with young families.

As an example, a young couple expecting their first or second child does not yet have sibling rivalry issues or parental restrictions for spendthrift adults, nor is their son married to a lazy moneygrubber, or their daughter married to a no good gambler. Further, the young couple is usually married for the first time and does not yet have estate tax issues. The planning is not tax driven, is speculative with respect to children and very simple in context to those who have lived full lives.

Senior clients do not come to estate planning attorneys with such a clean slate. Often, attorneys have known their senior clients for years and watched their families grow up, get married, have children, divorce, deaths, remarriages, etc. Attorneys have guided these clients through special needs planning, asset protection planning, retirement planning and tax planning at the death of the first spouse.

Some of the most challenging estate planning today is to work with a client who might have the beginnings of dementia, who may be brought in by a new spouse, a child or a caretaker, and who is not the self-confident, fully aware client the attorney came to know and worked with in the past. Instead, attorneys are now seeing a person relying on others, not always certain of what's what, but who may still seem very capable of discussing opinions, and who knows where their income is coming from and what assets are in existence.

More challenging yet is the senior client who is coming to an attorney for the first time, whose estate plan was done by another attorney, and they are coming to a new attorney to make changes to their estate plan. The relationships in this client's life are a mystery to the new estate planning attorney and it may be difficult to distinguish from the prior documents alone a pattern of intent, the dynamics of the various relationships previously and the dynamics of the relationships now.

Whether a senior client is a prior client or a new client, it is important to understand the factors that have driven him or her to come in to the estate planning attorney now. Did the client come in on their own or has a new spouse, child or caretaker scheduled the appointment and brought the client in?

Exploring whether or not there has been an incident that has triggered the request for the meeting or a change to the estate plan, or circumstances that would warrant changes, such as a death, a marriage or divorce, or grandchildren needing assistance in college or to purchase a home, or a proposed drastic change in the distribution provisions for one beneficiary, will assist the attorney in determining whether or not the client is acting as a result of a clear understanding of the circumstances, or if the client is being manipulated in some way by a family member or others.

If the senior client will meet with the attorney alone, it is possible to delve into these questions and find out what is going on and whether or not the client understands their request and its affect, and ultimately if he or she understands the full consequences of his decision.

If, however, the client does not want to meet with the attorney alone and insists his or her new spouse or child or caretaker is present in the meeting, the attorney's investigation is not so simple.

The attorney should control the meeting and determine who is driving the meeting (i.e., the client or the child who brought him or her in). Ask to meet with the client alone and proceed to ask the client open questions, rather than leading questions, so that the client has to tell the attorney that the client owns a house on Main Street, a rental property on Park Avenue and a brokerage account with his advisor. The attorney should not put the client in a position to agree with what the attorney tells the client he or she owns.

In attempting to get a sense of the client's organization, memory and thinking, the attorney can determine whether or not the client is able to make decisions with respect to their estate plan, or whether a geriatric psychiatric evaluation may be necessary. A client who understands the reason he or she is at the meeting and the extent of their assets, or who scheduled the appointment themselves and was merely driven by someone else to the meeting, is more likely acting of their own accord.

If the client has no idea why he or she is meeting with their attorney, particularly with a new attorney, or if the client is resistant to speak with the attorney alone, looks to their child or caretaker for answers to questions, or is unable to organize or clearly discuss their planning, an exploration of the client's present medical conditions or the drugs he or she is taking may be appropriate to find out if this is a temporary condition, if there is a better time to meet when the client is clearer, or if it is necessary to obtain a geriatric psychiatric evaluation to determine whether or not the client can make financial and planning decisions on their own behalf. Often, there are conditions that are very temporary with respect to capacity matters, such as dehydration, where the

client may be fine to discuss financial matters two days later.

Incapacity and undue influence do not have simple "bright line" tests that enable an attorney to determine a client's capacity in a short interview. Often a client has no idea that any influence is being imposed upon them because the family member or caretaker is kind, caring and giving attention to the client, and the client wants to be generous in response to that attention. The fact that the other family members are not present may be brought up repeatedly and the client may on their own come to the realization that other children are not helping and loving like his caretaker child is. The client wants to keep the caretaker child happy so he or she will continue to receive attention from that child.

A client may become exhausted by continued discussions regarding how much the new spouse does for the client and how awful those ungrateful children are who are not present to help them. The client may "cave in" to creating a change so he or she can have some peace from a constant controversy.

The symptoms of dementia can be very subtle and the inability to resist influence may be the only symptom evident (client is organized and memory is good, no medications being taken), but client wants to give all to the new spouse with no regard to kids (as an example).

An aware advisor who takes the time to investigate the client's state of mind and understanding of the circumstances can assist the client in maintaining their assets and their desired estate plan in place by not making changes when the client is not in a capacity position to do so, or to refuse to create a change for a client when the client does not appear to be driving the requested change in the first place. Recommending an outside evaluation and explaining to the client that if this change is what the client wants, and the client is truly in a clear position to make that change, a geriatric evaluation will only add to the enforceability of that change in the event it is contested in the future. But, if the client is not in a position to make the change, the evaluation will be a deterrent to a potentially unwanted change, again protecting the client from unwanted results that he or she could not resist.

Professional advisors should pay special attention to our senior population, including our most brilliant clients. We have seen the need to monitor driver's licenses so that seniors have more stringent testing requirements keeping them and others on the road safe. We have seen that seniors are constantly pursued for identity theft, credit card fraud, construction fraud and bait and switch scams which we need to diligently be aware of and guard against by staying in touch with and educating seniors, asking questions and sending them information to protect them.

Seniors are often victims of neglect, financial abuse and physical abuse, from family members, caretakers and strangers (but most often family members). The elderly sometimes neglect themselves, and often the victim of their own paranoia or delusions with respect to circumstances that may affect their daily care and needs as well as financial care, such as their investing or estate planning.

Attorneys can assist senior clients by meeting with them frequently to review their estate plans, and potentially staying in touch with the accountant and financial advisor to create a "safety net" in order to prevent or catch any problems with family or caretakers. Taking the steps to have a thorough investigation/interview with a senior client when he suddenly appears for changes, or if the client is not acting when the attorney has suggested to because of a change in the law as an example, and potentially requesting a psychiatric evaluation, or an independent review, will help to insure that the client will not implement coerced changes or changes based upon paranoia or delusional thinking.

An estate plan completed well in advance of dementia is the greatest guard against an unintended result in the midst of the conditions that change when one ages.

Kira Masteller *is a partner at Michelman & Robinson's Los Angeles office and leads the firm's Estate Planning & Trust Administration Practice Group. She can be reached at (818) 783-5530 or kmasteller@mrllp.com.*

When a Client Commits a Crime and Asks for Help

By Ronald D. Hedding

IT IS NOT AN UNCOMMON scenario for an attorney who does not practice criminal law to face an emergency communication from a client who has committed or is being investigated for a crime. The response a particular attorney gives can sometimes impact the client's freedom and/or criminal record at that moment, or down the road in a future criminal prosecution.

There are potential responses that can be given to a client in trouble and the process surrounding a criminal investigation and prosecution. It is not meant to be all encompassing considering the fact that the world of criminal defense has endless twists and turns.

The less the client says when confronted by the police, the more likely he or she is not going to incriminate themselves. There is a reason a person has a right to remain silent when law enforcement has them in custody and begins asking questions that could illicit incriminating responses. It is extremely rare that someone being interviewed by the police regarding their involvement in a crime actually says something that will help them.

If a person being questioned by the police asserts their right to an attorney, it is important to note that their silence cannot be used as an omission of guilt by the prosecution. This all-important right to remain silent provides a very effective safeguard for a person who is savvy enough to not fall prey to the temptation to talk and explain their story.

The United States Supreme Court recently ruled, in a 7-2 decision, that the police can ad lib a person's Miranda Rights. This gives the police further flexibility in their ability to convince a person to talk. This is not the first erosion of the protections allegedly afforded by Miranda. For example, upon contact with officers investigating a criminal case, a person is typically told that they have a right to have an attorney present during questioning. However, if someone is bold enough to ask for an attorney, they are typically told that there are no attorneys available at the police station. In essence, the warning that tells the suspect that they can have an attorney present during questioning is deceptive.

Law enforcement has been specially trained to convince a person to talk after they are given their Miranda Rights. There are no if, ands or buts about it. Some of their tactics are lawful while others are not. They of course never mention their unlawful tactics in their police reports, which the prosecutors rely on to prosecute a person.

One lawful tactic is to immediately start questioning someone after the last Miranda right is read. One would think that once the rights are read, the police must ask the person if they would now like to speak to them, but that's not the case! Most sophisticated officers simply say, "Ok, now let's hear your side of the story?"... or something to that effect.

A not so lawful tactic that is employed is to undermine the Miranda Rights before they are given which make them meaningless. Real life general tactics include:

1. The police discuss the subject crime with the suspect following the arrest on the car ride over to the police station and convince the suspect to give a full statement pre-warnings or get them to confess right before they interview them at the police station and then give the warnings and have the suspect repeat their confession. Sometimes they tell the suspect that they have the whole incident captured on video, which is not true, and they just want to know why they did it. Once the client starts to talk, they turn on the video tape, read them their Miranda rights and take the statement.
2. Uniformed officers indicate to the suspect that the detective(s) will Mirandize them and if they do not answer their questions they will go to prison for a long time.

It is not uncommon for a client's family to hire an attorney following their loved one's arrest. Typically, the attorney will go to the police station to visit the client and the officer at the front desk will tell the attorney to have a seat and he will let them know when they can go back to see the client. While the attorney waits, the desk officer will usually call the detective(s) in charge of the case and tell them that the attorney is there to see the client. The detective(s) will then go and interview the client before the attorney, and attempt to acquire incriminating statements before the attorney can talk to the client and advise their client not to answer any questions.

A well-respected jurist once said, "The police are in the competitive business of ferreting out crime." This quote was meant to justify his ruling permitting certain questionable tactics employed by the police in that particular case. Many times law enforcement officers treat their dealings with suspects and attorneys as calculated business transactions that they must win.

If an attorney tells a police officer anything about the client, whom the officer perceives as incriminating, don't be surprised if they repeat it in the report that they later submit to the appropriate prosecutorial agency. This has happened when civil attorneys attempt to assist a friend in an arena they did not specialize in.

So what should an attorney tell a client that calls and says, "The police are at my home with a search warrant and they want to ask me some questions?" If it is someone the attorney is interested in assisting, tell them not to answer any questions, request an attorney, and cooperate with the police in the search of the home. If the police have a valid search warrant, they are going to search regardless of whether consent is given. The person whose home is being searched does not have an obligation to answer any questions that might incriminate them.

There are a multitude of reasons why a person being investigated for a crime should not speak to law enforcement. A simple conversation off topic can lead to an admission that can later be used as the key evidence to convict them at trial.

Many people under the pressure of questioning feel compelled to talk to the police. However, what ultimately ends up happening is that the police will tactfully confront them with some information they have about the person's involvement in a crime. If the person then remains quiet, their silence can be view as a tacit admission of guilt. In other words, an innocent person would have defended themselves under similar circumstances and denied that the information were true.

Often times the police already have information before they start questioning a particular person or the police are able to gather additional information in future investigative efforts that undermines the suspect's original version.

Most attorneys have great respect and admiration for the law enforcement officers that risk their lives every day to protect citizens and keep streets safe. The moral of this story is that if a client puts an attorney on the spot regarding law enforcement wanting to question them about their involvement in a crime, tell them to ask for an attorney and remain quiet until they have talked to a seasoned criminal defense attorney.

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MCLE ARTICLE AND SELF-ASSESSMENT TEST
By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 19.

Horses in Entertainment, Sports and the Law

By B. Paul Husband

HORSES AS ATHLETES AND performers entertain in conjunction with their human co-participants. The legal aspects of representing horse owners and breeders are diverse. The entertainment and sports portion of the law parallels applicable law in other sports. But there is more.

In addition to intellectual property issues, legal needs of horse business people range from entity formation to tax, tort liability issues, stable lien foreclosures, land use issues and many other various and sundry legal needs arising in their unique contexts. There are some important questions to address on the issue of horses in entertainment.

Do Horses Have a Right of Publicity?

"A horse is a horse, of course of course, and you cannot exploit a horse of course unless of course, to stave off worse, you agree to fill his owner's purse."
– attributed to the personal manager of television actor "Mr. Ed."

The late great intellectual property scholar, Professor Melville B. Nimmer, wrote that animals can have a Right of Publicity. In his seminal essay, The Right of Publicity, 19 Law & Contemporary Problems 2003 (1953), Professor Nimmer wrote: "[I]t is common knowledge that animals often develop important publicity values. Thus, it is obvious that the use of the name and portrait of the motion picture dog Lassie in connection with dog food would constitute a valuable asset. Yet an unauthorized use of this name could not be prevented under the right of privacy theory . . .

"The right of publicity must be recognized as a property (not a personal) right, and as such, capable of assignment and subsequent enforcement by the assignee. . . Moreover, since animals may be endowed with publicity values, the human owners of these non-human entities should have a right of publicity in such property . . . [emphasis added] 19 Law Contemp. Prob. 203, 210, 216 (1954)

The insightful observations of Professor Nimmer were a significant factor in the establishment of the Right of Publicity as a recognized and judicially protected intellectual property right. His observations concerning animals, and recognizing animals as having a right of publicity exercisable by its owner, are worthy of equal dignity.

An early leading case in this area was *Rogers v. Republic Productions, Inc.,* 104 F.2d Sup. 328 (S.D. Cal. 1952) rev'd on other grounds 213 F.2d 662 (9th Cir. 1954). In *Rogers*, supra, cowboy star Roy Rogers sued Republic Productions to stop Republic's use of his name and likeness for commercial purposes, and also, to stop Republic from using the name and likeness of his horse Trigger, The District Court found as facts: "The plaintiff is the sole and exclusive owner of his name 'Roy Rogers' and his voice and likeness and of the name and likeness of his horse 'Trigger' for any and all commercial advertising purposes whatsoever, as said term 'commercial advertising purpose' is defined in Finding No. 13.

For more than thirteen years plaintiff has continuously used a horse named 'Trigger' in his various professional appearances, as well as certain 'doubles' for said horse which doubles have been known as 'Trigger'; and the said name and horse 'Trigger' has been during said entire period and now is associated in the public mind exclusively with the plaintiff Roy Rogers. For many years the said Trigger and said doubles have been and they now are owned, maintained and trained by the plaintiff at his own sole cost and expense. The rights of the respective parties to the within action, as herein determined, apply equally both to Roy Rogers and to Trigger, and hereinafter in these Findings, for convenience and brevity, all references to the use of, or the rights or obligations of the parties hereto with respect to the use of, the name, voice and likeness (or any thereof) of plaintiff shall also be deemed to include and apply equally to the name and likeness (or either thereof) of plaintiff's horse Trigger. [emphasis added] 104 F. Supp. at 331, 332)

Some have argued that the Roy Rogers case turned on contract rather than Right of Publicity and therefore does not stand for the proposition that a Right of Publicity exists for a horse.

Nonetheless, the commercial value of the name and likeness of a horse on the same basis as those of a human actor were recognized in that case.

In 1953, the year following *Rogers v. Republic, supra*, the watershed case of *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d cir. 1953), cert. den. 346 U.S. 816, was decided. In Haelen Laboratories, Judge Jerome Frank recognized the Right of Publicity as a property right in addition to and independent of a right of privacy which he described as a "Right of Publicity."

Professor J. Thomas McCarthy, in his treatise *The Rights of Publicity and Privacy,* acknowledges inclusion of animals within the right of publicity, although perhaps not enthusiastically as follows: "I would . . . be willing to tolerate a 'slight stretching' of the Right of Publicity to include animals within the scope of the right. But I would tolerate what to me is twisting of the basic policy only because it is probably harmless. I doubt that it will open the floodgates to a menagerie of plaintiffs. It is hard to believe that Noah's Ark will empty out and a herd of animal plaintiffs come snorting and barking into the courts. I cannot believe that it makes much practical difference whether animals have a Right of Publicity. Probably the only strong objections will come from legal purists who are not pet owners."

Racetrack operators have utilized contract language in stall applications, race entry forms and stakes nomination forms to assign to themselves the rights to use a horse's likeness, name and appearance and to photograph, video, film the horse for the purpose of broadcasting or otherwise transmitting the images and sounds of races, as well as making and selling goods bearing horses names and likeness. See *HEETER: Media and Publicity Rights in the Equine Setting: The Owners' Perspective*, University of Kentucky National Equine Law Conference Syllabus 1995. These rights, concerning which the racetrack operators seek to extract a license from owners, including rights which are effectively rights of publicity.

But a horse's right of publicity is not without bounds. With respect to the fine art, the First Amendment comes into play. Certainly no owner should be permitted to forbid a painting, sculpture or even a photograph of a horse as an expression of free speech. Case law has recognized the priority of First Amendment considerations over the Right of Publicity. *See, e.g., Hicks v. Casablanca Records*, 464 F.Supp 426 (S.D.N.Y. 1978), where a biographical book and movie about Agatha Christie were held not to violate her Right of Publicity. It should be noted that the Hicks court did differentiate between books or movies on one hand, and posters, bubble gum cards and merchandise of the other hand.

Is There a Horse Industry?

Horse racing and horse showing are sports which are enjoyed all over the world. Horse racing and showing also constitute two of the branches of horse industry. The economic effects in the United States of the horse industry were studied in 2005 by DeLoitte Consulting for the American Horse Council. That study revealed that the U.S. horse industry provides 460,000 full-time equivalent jobs in the U.S. economy.

That same study found that the horse industry has a direct effect of $39 billion annually on the U.S. economy, and a $102 billion annual impact when the multiplier effect of spending by horse industry suppliers and employees is considered.

Olympic equestrian competition and international equestrian competitions such as the Alltech FEI World Equestrian Games ("WEG"), which will take place in Lexington, Kentucky September 25 – October 10, 2010, are popular with television audiences and audiences online as well as with live spectators at the WEG site. In the case of the WEG, immigration lawyers can rejoice; 60 countries have expressed interest in sending competitors to the games in Kentucky and as many as 800 competition horses are expected to arrive from Europe, South America, Australia, Asia and Africa. The equine athletes will enter the United States and go through quarantine procedures at facilities in Ohio prior to being moved to the Kentucky Horse Park, the site of the competition. Tourism will be vigorously stimulated.

Horse sports can be dangerous. Riders and/or horses can be injured in competition and spectators as well. Thoughtful owners often seek a limited liability vehicle for owning horses involved in competition. The law involved in equestrian sports includes a lot of work related to entity formation.

What is the Form of the Enterprise?

Race horses and show horses are owned by individuals, partnerships, LLC's, corporations and trusts. Entity formation, sales of interests in those entities and dissolutions are involved in the practice of equine law.

The ownership organizations include "syndicates." A "syndicate" is not a specifically defined entity, but merely refers to group ownership. A stallion syndicate can be a general partnership, a limited partnership, an LLC or a corporation. It may or may not be a "security" under the definition of "security" set forth in *SEC v. W.J. Howey,* (1946) 328 U.S. 293, depending substantially on the degree of management control and whether profits are shared in common.

The most common legal complaint made by horse owners, including those with liability limiting ownership business entities, is that they are being

audited by the IRS and the examiners do not understand the horse business.

They Tax Horses, Don't They?

The tax issues most frequently faced by horsemen in response to the IRS are:

1. Whether the horse business is profit-motivated or is a hobby. If the activity is found *not* to be motivated primarily by profit, then no deductions in excess of income are allowed. *See* Internal Revenue Code Section 183.
2. Whether the owners of a horse business "materially participate" in it, i.e., participate in the business in a "regular, continuous and substantial basis." If not, then the income or losses are considered "passive" and in the case of losses, made unusable as an offset against "active" income in that year, but rather are carried forward until there is passive income to offset the carried forward losses, or until the owner totally disposes his/her/its interest in the activity in a fully taxable transaction.

Taxable losses are frequently incurred in early stages of a horse business. *See Engdahl v. Commissioner*, 72 T.C. 659 (1979). But simply the existence of taxable losses may not tell the whole story.

Since horse businesses are considered to be farming enterprises, the cash method of accounting may be used. In "cash method" accounting, expenses can be deducted in the same year that they are paid, instead of capitalized and deducted later as depreciation deductions. For example, under the cash method, when Hilda Horsebreeder pays stud fees and breeding expenses such as board, veterinary care, and if applicable, lease fees for a mare, Hilda will properly deduct those expenses in the year they are paid. The entire cost of creating a foal (young horse of either sex) can be deducted in the year *prior* to the year that the foal is foaled (born).

If Hilda holds her homebred colt, Gallopin' Greatwon, for 24 months or more for "sport, breeding or draft purposes," the gain achieved when she sells or syndicates Gallopin' Greatwon is eligible to be taxed at long capital gains rates. Tax savings, if the owner is active in the business (i.e. materially participates – *see* discussion *infra*), will be achieved at the taxpayer's top ordinary income rate. The most significant profits can be taxable at lower capital gains rates. The availability of tax savings at ordinary income rates and taxation of some profits at long term capital gains rates presents favorable tax planning opportunities.

What Does the Tax Man Say?

Rudolph Revagent, trusty IRS stalwart says: "This is a hobby. No losses can be deducted. But if it is not a hobby, then it is a passive activity and the losses cannot be used this year."

If the primary motivation of the business owner is actually, in good faith, to make a profit, then the losses incurred can be used to offset other income, under the rule of Internal Revenue Code §183 (the so-called "Hobby Loss Rule") subject to the application of the "Passive Activity" rules of Internal Revenue Code §469.

The Passive Activity rules are a concept enacted by Congress with the purpose of ending "tax shelters." Under this concept, all income and expense must go into one of three "baskets": active, passive and portfolio. With a few exceptions, only active losses can be used to offset active income; passive losses can offset only passive income, etc. Since most income from primary occupations is "active" under the §469 paradigm, horse business owners want to be considered "active" in their horse businesses so that if they have losses in the horse business they can be used to offset income from their primary occupations.

To be considered "active," a person must "materially participate" in their horse business. "Material participation" means to participate in a "regular, continuous and substantial basis." What constitutes "regular, continuous and substantial basis" is the subject of thousands of pages of commentary and seven safe harbor tests in the Treasury Regulations. One of the "safe harbor" tests specifies that 500 hours per year must be spent operating the business, and for married couples, time spent by both spouses is aggregated.

What is a Boarding Stable Lien?

One of the most common service businesses in the horse industry is the boarding stable. Boarding stables need written service contracts, and should also use written releases and/or hold harmless agreements. California is one of the only three states in the U.S. that has not enacted an equine liability limitation act.

The biggest legal problem experienced by boarding stables is nonpayment by customers, while their expenses for feeding and providing care for the customer's horse continue. California has a livestock service lien law codified in Civil Code §3080 *et seq.* which provides for a statutory security interest, perfected by possession, in customers' horses. Civil Code §3080, *et seq* also provides for specific judicial procedures for foreclosure of the statutory security interest.

Under the Civil Code §3080 *et seq* statutory framework, a stable owner must commence an action and obtain either an interlocutory court order or a judgment to enable them, as a "livestock service provider" to use the statutory term, to sell the horse, take the proceeds of sale, and apply those proceeds first to the costs of the sale and suit, including attorney's fees (which are recoverable under the statute) and then apply the remaining balance to the board bill.

Is This the End?

Equine law also includes general civil litigation in a plethora of contexts. Many of the actions involve purchases and sales. Horses are considered "goods" under the Uniform Commercial Code. Equine law is similar to other parts of entertainment law in that all substantive areas of law may be involved in the context of a specialized industry with its own mores and folkways.

B. Paul Husband *practices equine law, encompassing entity formation, tax planning, tax controversies including audits, administrative appeals and trials in the U.S. Tax Court, and equine industry civil litigation, as well as entertainment law and tax law. He is co-author of Craigo & Husband: Tax Planning for Horse Owners and Breeders, published by University of Kentucky School of Law in its Monograph Series. Husband is a Fellow of the American College of Equine Attorneys. He can be reached at (818) 955-8585 or paul.husband@husbandlaw.com.*

MCLE Test No. 24

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. In *Rogers v. Republic Productions*, the court found the rights to the names and likeness of Roy Rogers and Trigger to be equal.
   True
   False

2. The right of publicity will preempt a fine artist from doing an oil painting of a champion show horse.
   True
   False

3. Stallion syndicates are always securities, subject to S.E.C. registration.
   True
   False

4. Horse activities that are motivated primarily by profit are businesses for I.R.C. §183 purposes.
   True
   False

5. Gains on sales of horses held for sporting or breeding purposes for 24 months or more can be taxed at long term capital gains rates.
   True
   False

6. Losses deducted from a horse business in which the owner materially participates can be used to offset active income.
   True
   False

7. It is necessary to commence an action in a court for a horse boarding business owner to foreclose a livestock service lien under Civil Code §3080 *et seq*.
   True
   False

8. A horse can be sold prior to entry of judgment pursuant to the California livestock service lien.
   True
   False

9. A horse can be sold to foreclose a California livestock service lien ten days after advertising the lien sale in a newspaper of general circulation in the County in which the horse is kept, regardless of whether an action has been commenced.
   True
   False

10. The cost of paying stud fees and breeding-related expenses are deductible in full when paid by a horse breeding business.
    True
    False

11. A horse business in which the owner has a good faith primary motive of making a profit can deduct losses of the horse operation.
    True
    False

12. When applying the passive activity loss rules of Internal Revenue Code §469, time spent by a husband and wife in an activity will be combined for purposes of determining whether the "safe harbor" 500 hour test is met or not.
    True
    False

13. Horses are "goods" for purposes of the Uniform Commercial Code.
    True
    False

14. California does not have an equine liability limitation act.
    True
    False

15. Limited liability companies are never appropriate business forms for horse businesses.
    True
    False

16. When determining whether a stallion syndicate is a security or not under the *Howey* test, management control is irrelevant.
    True
    False

17. Participation in a horse business on a regular continuous and substantial basis will make an owner a "material participant" for IRC §469 purposes.
    True
    False

18. Publicity Rights of horses are owned by the horse's human owners.
    True
    False

19. Farmers may use the cash method of accounting.
    True
    False

20. Attorneys' fees are available by statute in actions to foreclose livestock service liens brought under Civil Code §3080.
    True
    False

MCLE Answer Sheet No. 24

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
   21250 Califa Street, Suite 113
   Woodland Hills, CA 91367

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

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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

When a Parent Moves Away

By Renee Leff, J.D., LMFT

A CHILD CAN FACE A MULTIPLICITY OF losses when a parent moves away. Yet, if both parents work together, they can help soften the impact and create healthy coping skills in their child, which will help the child with the ability to adjust to life changes over a life time.

The Residential Parent

Even though there is no legal obligation to do so, it is the residential parent's responsibility to keep the non-residential parent involved with the activities of the child's daily life: report cards, activities and encouraging the child to communicate with the non-residential parent. It is up to the residential parent to help the child not to feel abandoned.

It is important that the residential parent allow the child the freedom to express feelings of sadness, anger, fear and resentment, without "fueling the fire." The child will miss a lot of little things and will need a listening and sympathetic ear.

Although the residential parent may feel overwhelmed, it is extremely important not to make the child feel guilty if the child spends a holiday with the non-residential parent. It is important to encourage and arrange visits with the non-residential parent and to assure the child that the residential parent has friends and activities that will keep him/her occupied and happy while the child is away.

Non-Residential Parent

The parent who moves away must continually re-enforce that the move has nothing to do with the child. He/she must be able to listen to the child's anger, sadness and fear without being reactive. This parent must be able to contain the child and reassure the child he/she is loved. This parent must agree that the move hurts the child and express sorrow about that and state that he/she will always stay in the child's life, be a part of the child's life, and will love the child; even though the parent will be far away, he or she will be thinking of the child.

The parent who is moving away must re-enforce the words by initiating contact with the child. The non-residential parent will often feel cut off from their child; it is up to both parents to keep the connection strong. In order to prevent the child from feelings of abandonment, the parent must:

- Call on a regular basis at a regular time so the child can rely on it
- Focus all his/her attention on the child during the call
- Have regularly scheduled visits
- Allow the child to contact him/her at unscheduled times
- Have the child know the schedule
- Let the child know he/she remembers the child
- Create new traditions with the child to make up for missing holidays
- Decrease the child's possible resentment and jealousy of the move away by minimizing conversation about new house, family location and activities that are not part of the child's life – and by focusing on the child's life and activities
- Have a set time and schedule that returns the missing parent to the child's life.

Both Parents

Both parents must allow the child to grieve, in what ever form it comes out, by acknowledging and accepting the child's feelings. If the child cannot contain feelings or acts out, encourage outside help from a professional. The child may feel guilty about expressing love of one parent to the other and need a third party to feel safe with expression.

Both parents must be especially careful not to make disparaging remarks about the other because the child's double ring of protection is now especially thin. Each parent is in a separate place. The child has only one of you in present time.

Although conflict that often comes from divorcing parents may be reduced by a move away, the child has traded one set of stressors for another – absence. Each parent must encourage connection to the other, and each parent must help the child

with the contact and connection. The child cannot be expected to do this alone.

Holidays and Birthdays
Even though the residential parent may have the child most of the time, the majority of that time is spent helping the child with the activities of daily life. It is important that the residential parent, as well as the non-residential parent, get to enjoy some "down time", "holiday" time also. The parents must work together to create a fair schedule for all to enjoy important holidays and birthdays.

What the Child Needs

- To hear from both parents over and over again that this move has nothing to do with the child. It is not the child's fault that the parent is moving away.
- Permission from both parents to love and miss the other.
- The ability to express feelings of anger, sadness, and fear with a sympathetic ear.
- To hear over and over again, from both parents, that the child is not being abandoned, left behind, forgotten.
- The child needs to know who and how she will be cared for in an emergency if a parent is not available. Who to call? Who will come take care of the child? The child needs to know there is a secure back up in an emergency.
- The child needs regular, consistent contact with the move-away family to supply that missing piece in the child's life. Such contact must be loving and interest in the child and the child's life.
- The child needs new flexible traditions to celebrate holidays and birthdays with the parent who is absent when they occur. Additionally, the child needs contact with the other parent on the exact date of the holiday or birthday, also.
- The child needs to be clear about what the schedule will be. Children feel safe when there is a consistent structure and routine in place for them. Elimination of the unknown for children reduces their anxiety.

Renee Leff *is an LMFT with a J.D. She has offices in Woodland Hills and in Brentwood, where she specializes in assisting divorcing families through the process of divorce-related issues: parenting plans, refusal of a child to visit a parent, parent-child re-unification. She can be reached at (818) 734-9602 or lefforensic@yahoo.com.*

Placing Form Over Substance:

Opposing Counsel Cannot Rely on Attorney's Approval

By Jonathan B. Cole, Michael McCarthy and Susan Baker

ATTORNEYS HAVE DONE IT dozens of times in their legal career. They regularly sign off on agreements, stipulations, orders and settlements approving them "as to form and content." But what does that mean? Is some sort of actionable representation being made? And if so, to whom? Some attorneys make it their policy only to approve documents "as to form," possibly sensing the potential for trouble by addressing the content of an agreement. Others approve agreements as to both form and content, presuming their duties are limited to their clients.

The law lies somewhere in between. On one side of the spectrum, an attorney's duty of care does not extend to third parties with whom the client may deal. (See, e.g., *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684 ["An attorney's duty to his or her client depends on the existence of an attorney-client relationship. If that relationship does not exist, the fiduciary duty to a client does not arise."].) On the other end, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient. (*See, e.g., Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal. App.4th 54, 69.) Just like a layperson, if a lawyer speaks or volunteers information, he is obligated to tell the truth. (Cicone v. URS Corp. (1986) 183 Cal.App.3d 194, 201, 211.)

But what constitutes a "statement" or a "representation"? In *Gary A. Freedman v. Mark Brutzkus*, a case of first impression in California, the Second District Court of Appeal recently decided that whatever else it may stand for, an attorney's approval of an agreement between his or her client and a third party "as to form and content" is not an actionable representation of any kind to the other party's counsel.

Los Angeles attorney Gary A. Freedman served as outside counsel for Teddi of California, Inc. (Teddi), an apparel manufacturer. Freedman also provided legal services to Carol Anderson, Inc (CAI). In June 2002, Freedman allegedly brokered a deal between his two clients whereby Teddi would license the "Carol Anderson" name and trademark. Freedman contended that he told CAI's agents that he would withdraw if they were uncomfortable with his joint representation of CAI and Teddi in the transaction, but no objection was raised.

Freedman allegedly continued to represent both sides of the transaction during negotiations over the next three months. The final agreement recited that Freedman represented only the interests of Teddi in the transaction with the consent of CAI, and that all conflicts of interest related to Freedman's previous representation were waived. The agreement also contained an integration clause that specified that no agreements, statements, or promises between the parties not contained in the agreement were valid or binding. Attorney Mark Brutzkus was retained to represent CAI while the deal was documented. The final signed agreement included a signature block signed by Freedman and Brutzkus, "Approved as to Form and Content."

A dispute later arose between CAI and Teddi and CAI filed suit, forcing Teddi into bankruptcy. CAI then sued Freedman, claiming he had represented CAI in the negotiations leading up to the agreement and that he had told CAI that Teddi had the ability to pay the amount due under the agreement. During the course of the litigation Freedman deposed Brutzkus, who testified after the attorney-client privilege was waived that CAI had told him that, during the negotiations, CAI had relied on Freedman and their "long standing professional relationship." After Freedman filed several motions seeking dismissal of CAI's action, his malpractice insurance carrier settled with CAI prior to trial.

Freedman then sued Brutzkus for fraud, alleging that by approving the agreement "as to form and content," Brutzkus made an actionable representation to Freedman – the attorney for the other party – as to the accuracy of the agreement.

It is settled that an attorney cannot approve an agreement or give a legal opinion on behalf of an opposing party. (See, *B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 839). To find otherwise would upend the meaning of

a common legal practice and potentially interfere with the attorney's absolute duty of loyalty to their own clients. (See, *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg* (1994) 30 Cal.App.4th 1373, 1383-1384 ["Because of the inherent character of the attorney-client relationship, it has been jealously guarded and restricted to only the parties involved"].) Nonetheless, the question of what the attorney's approval of an agreement "as to form and content" means had never been addressed by a California court.

The California Court of Appeal for the Second District determined that the only reasonable meaning to be given to a recital that counsel approves the agreement as to form and content is that the attorney, in so stating, asserts that he or she is the attorney for his or her particular party, and that the document is in the proper form and embodies the deal that was made between the parties. It is not an actionable representation to the attorney for the opposing party.

The court stopped short of finding that the recital is not a representation to the opposing party; however, declining to decide the unpresented question of whether Freedman's client would have a cause of action against Brutzkus. Although made in dicta, the court's warning sounds just as loudly: exercise caution when communicating with the opposing party in any setting. Freedman is a fraud action and is factually unique, but representations giving rise to tort liability may lurk in the most unlikely of places.

Jonathan B. Cole *specializes in defense of professional liability claims and is a founder and the managing partner of Nemecek & Cole in Sherman Oaks.* ***Michael McCarthy*** *is a shareholder in the firm's professional liability defense practice.* ***Susan S. Baker*** *is a junior partner with the firm's appellate department. The authors can be reached at www.nemecek-cole.com.*

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The following members joined the SFVBA in May 2010:

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Santa Clarita Valley Bar Association

Upcoming Events and Programs

BRIAN E. KOEGLE
SCVBA President

THE SANTA CLARITA VALLEY Bar Association has completed its program schedule for 2010, and would like to extend an invitation to all SFVBA members to join us for one of our upcoming events.

So far this year, the SCVBA has proudly featured speakers and programs which allowed members to earn those "hard to find" live course credits in ethics, elimination of bias and substance abuse prevention. In the second half of the year, the Bar will focus more on its annual events, while continuing our commitment to provide relevant, topical and valuable CLE courses.

Please mark your calendars, and RSVP to attend one or more of the following:

July 15 – "Views from the Bench"
Los Angeles Superior Court Judges Charles McCoy and Graciela Freixas report on the current state of the court system, trends and outlook for 2011. The event begins at Noon at TPC Valencia, located at 26550 Heritage View Lane in Valencia. Cost of the event is $35 for members who register in advance and $45 for non-members or those without reservations. *One hour of general CLE credit will be provided to all attendees.*

August 19 – Member Appreciation Mixer
Come socialize with local attorneys, learn more about your colleagues and their practice areas, and enjoy a glass of wine or beer on us! The event begins at 6:00 p.m. at Salt Creek Grille, 24415 Town Center Drive, #115 in Valencia. There will be no cost for members and $20 for non-members and guests.

September 16 – "Attorney Collection Practices"
Presented by local attorney Bob Weinberg, this event will focus on minimizing your practice's accounts receivable, and increasing your firm's billing efficiency and helpful hints on collecting from slow paying clients in a difficult economy. The event begins at Noon at TPC Valencia, located at 26550 Heritage View Lane in Valencia. Cost of the event is $35 for members who register in advance and $45 for non-members or those without reservations. *One hour of general CLE credit will be provided to all attendees.*

October 1 – Sixth Annual Law Appreciation Day
As the SCVBA's headline event, "Law Day" will once again recognize those individuals who have contributed to our community by going above and beyond the call of duty. This year will feature a very special guest as the keynote speaker. More details to follow. The event will begin at 11:30 a.m. at the Hyatt-Regency Valencia, located at 24500 Town Center Drive in Valencia. An announcement in the next *Valley Lawyer* will include information regarding sponsorship opportunities, individual ticket sales and volunteer opportunities.

November 18 – Awards and Installation Banquet
The year concludes with the annual celebration recognizing our outgoing board for their contributions, and installing new leadership for 2011. President-Elect Paulette Gharibian will assume control of the organization, as your author moves into the record books (and arguably SCVBA lore) becoming Immediate Past President. If you have an interest in stepping up into a leadership role with the SCVBA or would like more information on how to become involved, please contact Brian Koegle at bkoegle@pooleshaffery.com.

To RSVP for an event, please contact Katie Norris at (661) 414-7123 or send an email to rsvp@scvbar.org.

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

All classified ads must be submitted typed and received by the first day of the month preceding publication. Mail contract and first month payment (downloadable from www.sfvb.org) to Valley Lawyer, 21250 Califa Street, Ste. 113, Woodland Hills, CA 91367 or fax to (818) 227-0499.

New Lawyers Section Networking Mixer

JULY 28 • 6:30 PM
OLIVA RESTAURANT
SHERMAN OAKS

Financial adviser Serria Bishop of Waddell & Reed will host this mixer.

FREE TO NEW LAWYER SECTION MEMBERS

INCLUDES APPETIZERS AND GLASS OF WINE!

RSVP to Linda at (818) 227-0490, ext. 105 or events@sfvba.org.

Calendar

SAVE THE DATE

San Fernando Valley Bar Association

Annual Installation Gala

Installation of 2010 SFVBA President
Seymour I. Amster
and
VCLF President
Michael R. Hoff

Saturday Night
October 2, 2010
Warner Center Marriott
6:00 PM

$95 Individual Tickets
$950 Table of Ten

Sponsorship and advertising opportunities are available. Call (818) 227-0490, ext. 105 for further information.

All-Section Meeting
Marketing Your Practice Via the Web

JULY 13
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Due to the overwhelming response to the original session held in May, Dave Hendricks, renowned marketing specialist, returns to guide members in getting the most out of the web. Space is limited so RSVP as soon as possible.

FREE to SFVBA Members

Joint Meeting with CalCPAs

JULY 15
12:00 NOON
BRAEMAR COUNTRY CLUB
TARZANA

RSVP to Sandy.Benitez@calcpa.org or (818) 546-3509.

MEMBERS	NON-MEMBERS
$35 prepaid	$45 prepaid
$45 at the door	$55 at the door
1.5 MCLE HOUR	1.5 HOUR CPE

Santa Clarita Valley Bar Association
Views from the Bench

JULY 15
12:00 NOON
TOURNAMENT PLAYERS CLUB
VALENCIA

Los Angeles Superior Court Judges Charles McCoy and Graciela Freixas report on the current state of the court system, trends and outlook for 2011.

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

Litigation Section
Fraud Litigation

JULY 15
6:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Attorneys Barak Vaughn and Jason Cohen of Vaughn Cohen will discuss best strategies and practices.

MEMBERS	NON-MEMBERS
$35 prepaid	$45 prepaid
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1 MCLE HOUR	

New Lawyers Section
Networking Mixer

JULY 28
6:30 PM
OLIVA RESTAURANT
SHERMAN OAKS

Financial adviser Serria Bishop of Waddell & Reed will host this mixer. Free Appetizers and glass of wine!

FREE to New Lawyer Section Members

Litigation Section
Voir Dire and Jury Selection

AUGUST 19
6:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Attorney John Rosenberg will address this critical aspect of your case.

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

Multicultural Bar Alliance of Southern California
Annual Summer Networking Reception

August 19, 2010
6:00 PM to 9:00 PM
Taipan Restaurant
330 South Hope Street, Los Angeles

Join us as we celebrate diversity, encourage participation in our bar associations and honor those who have made outstanding contributions to the legal profession.

INVITED GUEST SPEAKER
John A. Perez, Speaker of the California Assembly

This event is free for members in good standing of the San Fernando Valley Bar Association and MCBA affiliates. Please RSVP by August 15 to agolding@fragomen.com or jbollinger@plljlaw.com.

Special thanks to the State Bar of California Litigation Section for their support of this event.

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

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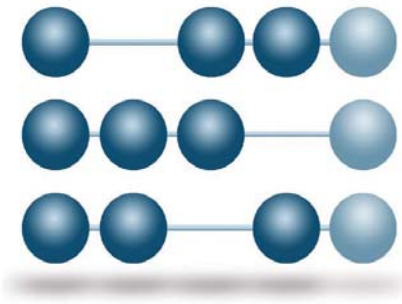

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