VALLEY LAWYER

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A Publication of the San Fernando Valley Bar Association

Putting the "Family" Back in Family Law

Earn MCLE Credit

SFVBA Succeeds in Protecting Membership List

Jonathan Cole and Mark Schaeffer Represent SFVBA in Court

Business Valuation Services for Marital Dissolution

Family Law

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VALLEY LAWYER

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Law, Family and Preserving the Union

ROBERT F. FLAGG
SFVBA President

AS I BEGAN TO WRITE THIS COLUMN, I HELD in my hand, and now have on the desk beside me, a book titled "Senate Journal 1865 - 1867" ("Senate Journal of the 2nd Adjourned Session of the General Assembly of the State of Tennessee – Convened at Nashville, Monday, the 5th day of November, 1866") by H. G. Flagg, Principal Clerk. Henry Gaither Flagg is my great-grandfather.

Henry's older brothers, Thomas and John, who in mid-19th Century lived in Virginia, both served on the Confederate side in the Civil War. John was a member of the Virginia militia and served as a colonel. Thomas, a veteran of the Mexican War, raised a company of volunteers and served with the 11th Virginia Cavalry under Generals Turner Ashby and "Stonewall" Jackson. Henry, who had moved to and become a resident of Tennessee in 1855, was a staunch supporter of the Union.

Major Henry Gaither Flagg
1st Tennessee Cavalry
1828 – 1905

Prior to the War, Henry taught school and studied the law in an attorney's office. He was admitted to the Bar in 1856 or 1857 and set up a law practice in Rogersville, Hawkins County, Tennessee. In early 1862, after Confederate forces occupied the Cumberland Gap, about 50 miles from Rogersville, Henry moved his wife and infant daughter to her father's farm 7 miles outside of town. He then crossed the mountains into Kentucky, where he joined the Union army. Henry was elected captain and assigned to the 4th Tennessee Infantry. That unit was disbanded and merged into the 1st Tennessee Cavalry the next year. At that time, Henry was promoted to major, commanding the second battalion of the regiment until the end of the War. The regiment saw combat as part of the Army of Ohio and then the Army of the Cumberland in the campaigns at Cumberland Gap, Tullahoma, Chickamauga, East Tennessee, Atlanta and the Hood. After mustering out at the end of the War, Henry was chosen Principal Clerk of the Senate for the Tennessee General Assembly of 1865-1867.

The names of those battlefields: Cumberland Gap, Chickamauga, Tullahoma and the rest, are now largely forgotten by the general public, remembered, if at all, as pleasant parks or historical way stations. Those who have seen the ravages of war do not speak of glory, so it is perhaps fitting that these former fields of battle no longer echo with the crash of cannon and the cries of wounded horses and men. And so, I think of my great-grandfather, not as a soldier, but as a teacher, a lawyer and as the record keeper for the body of legislators charged, after the War ended, with restoring the State of Tennessee to its place in the Union.

This Law Day, I regard that great struggle, the Civil War, as the final, brutal test of whether this nation would be subject, as one nation, to the rule of law. The compromises necessary to adopt the U.S. Constitution set the stage for the conflict to come, as the inhuman practice of slavery could not be made to cease despite the best efforts of the Framers. And so, to defend the rule of law, my great-grandfather laid down his law practice and took up the sword, even though in doing so he turned his hand against his own brothers. In so doing, Henry became forever estranged from Thomas and they never spoke again, though each lived about 40 years after the end of the War. But John came, in his later years, to live with his younger brother at Henry's home in Whitesburg, Tennessee, and remained there until his death in 1900.[1]

On this Law Day, in remembrance of the sacrifice of so many who gave all they had to secure our liberties and to ensure, in these United States, the rule of law for their posterity, we can speak the following, not as a rote recital, but as a forceful declaration of our determination to carry the torch yet further forward:

"I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands; one Nation, under God, indivisible, with liberty and justice for all."

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

[1] I came know about my great-grandfather, who passed away almost 50 years before I was born, due to a remarkable book commissioned by my grandfather, Henry's son, Joseph W. Flagg.: *Descendents of Josiah Flagg of Berkeley County, W. Va.;* 1920; Compiled by Charles Alcott Flagg; T. R. Marvin & Son, Boston; (Republished in 1994 by Higginson Books, ISBN: 0832845299). I inherited 1 of the 120 copies printed for the first edition from my father, Robert F. Flagg, Sr., Joseph's only child. The book has been digitized by Google and can be read, in its entirety, via Google Books. The book can be located by searching Google Books for "Henry Gaither Flagg." The first result is *Descendents of Josiah Flagg, etc.*

WELLS FARGO

Lawyers Professional Liability Insurance Program Available to SFVBA Members

Wells Fargo Insurance Services in partnership with the San Fernando Valley Bar Association offers an exclusive **Lawyers Professional Liability** insurance program for law firms of 1-10 attorneys.

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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

Dear Members,

Inside this month's *Valley Lawyer*, we focus on the family. Our feature issues cover a range of topics from family law mediation to business valuation to pet trusts. As a special tribute to children, we asked each of our columnists and contributing authors to celebrate their childhood by sharing with us a picture of them as a baby or child. So be sure to check out the adorable photos adjacent to authors' bios.

Also, you may notice that on the front cover we feature two of our members, Jonathan Cole and Mark Schaeffer of Nemecek & Cole, who recently successfully represented the San Fernando Valley Bar Association in the Court of Appeal of California. Be sure to read this feature to learn more about the case and the court's decision, which will affect Bar associations nationwide.

As for updates from the SFVBA Communications Department, we have officially launched our newly designed website. We would love to receive your feedback about the site. If you have any trouble accessing pages or forms, please do not hesitate to call our office or email us. We will be sure to address the issue immediately.

And finally, we are still in need of a few *Valley Lawyer* submissions, particularly for our July/August, October and November issues. Review the editorial calendar below and let me know the area that most interest you. **Please note that the submission deadlines for *Valley Lawyer* have changed**, due to my September maternity leave. Yes, that's right! My husband Arthur, I and baby Alexander are soon to have another addition to our family; doc says it looks like a girl…keep you posted.

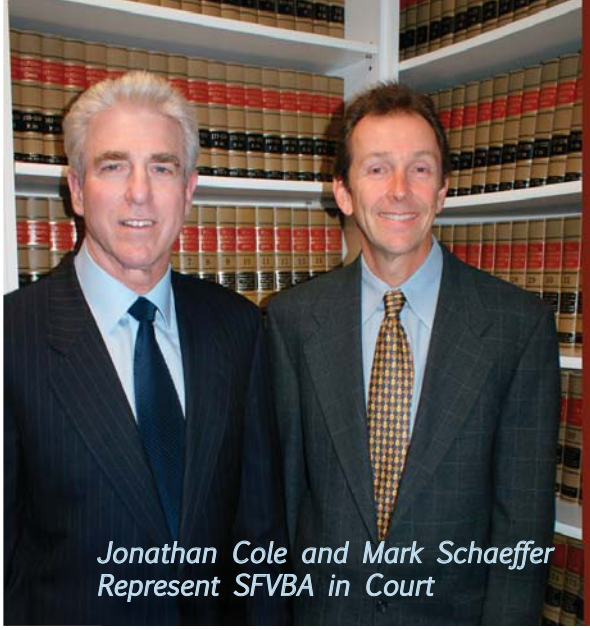
Have a cherished month!

Angela M. Hutchinson

VALLEY LAWYER
2010 EDITORIAL CALENDAR*

MONTH	ISSUE FOCUS/MCLE TOPIC	DUE DATE
JULY/AUG	Sports Law/Contract Negotiation	May 14
SEPT	Law and Technology/Law Practice Management	June 15
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

**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.*



Jonathan Cole and Mark Schaeffer Represent SFVBA in Court

SFVBA Succeeds in Protecting Membership List

Precedent Decision Benefits Trade Associations Nationally

By Jonathan B. Cole, Mark Schaeffer and David Gurnick

EARLIER THIS YEAR, THE California Court of Appeal ruled in favor of the San Fernando Valley Bar Association, in a precedent setting decision. The case concerned rights of a trade association to control the use of its member mailing list. The court of appeal's opinion will be looked to by organizations nationwide for guidance on their authority to control the use and dissemination of such lists. The is also a precedent decision in the field of antitrust law. The court ruled that the an association may lawfully act to advance the interests of its members, including member interests in maintaining prices for services at higher levels. The court ruled that an association may refuse to provide its mailing list to a competitor who seeks to undercut pricing of association members.

Historically, the SFVBA has restricted the availability of any mailing list of members. The member list is not posted on the SFVBA website. The list is made available during SFVBA elections to candidates running for SFVBA offices. Otherwise, it is made available only to carefully screened vendors and members looking to market their services. The Association does not believe its list of members is a commodity to be freely available to vendors.

In 2007, Joel Drum sought to purchase the SFVBA's member list. He wished to send a mailing to SFVBA members, offering his services as a mediator. SFVBA staff checked his SFVBA and State Bar membership status and learned he was not an SFVBA member, and was a suspended (soon-to-be disbarred) former attorney. Staff declined his request to purchase the member list. Staff did not want to allow a disbarred former attorney to solicit members to provide mediation services.

Drum then brought a lawsuit against the Bar Association. He alleged that the refusal to sell him the mailing list was an unfair business practice. The Superior Court sustained the SFVBA's demurrer to Drum's complaint. Drum then appealed the dismissal of his complaint.

On appeal Drum challenged whether the Association's refusal to sell him the mailing list was because he was disbarred. He claimed the Association had an ulterior purpose – to hinder him from competing to provide mediation services to members; and to prevent him from undercutting members who performed mediations at higher prices. Because the appeal was decided based on the Superior Court's dismissal of Drum's lawsuit, the Association was never required, or permitted, to refute the false allegations of Drum's complaint. In this instance, the Association's sole purpose in refusing his request had been due to his status as a disbarred former attorney.

Nonetheless, in a strong opinion for the SFVBA, and for all trade associations, the court of appeal upheld the longstanding rule that a private entity may choose to do or not do business with whomever it pleases. The court also ruled that the association could act "to protect the interests of its members in maintaining prices." There was no indication of any agreement or conspiracy to fix prices. So, the court ruled, if the association had acted to advance a goal of members to maintain higher prices, nothing was wrong in doing so.

Most trade associations maintain member lists and typically wish to control use of the lists, to restrict who may solicit or contact their members. The court of appeal noted there was no indication that "the Association's refusal to sell to any particular person its membership mailing list would be "immoral unethical, oppressive, unscrupulous or substantially injurious to consumers." Trade Associations nationwide can be expected to look to and rely on this decision in support of their own right to protect and advance the interests of their members by controlling their mailing lists. The court's precedent setting decision will be published in the Official Reports of the Court of Appeal. The case citation is: *Drum v. San Fernando Valley Bar Ass'n* (2010) 182 Cal.App.4th 247.

Jonathan B. Cole *and* ***Mark Schaeffer*** *are with Nemecek & Cole. Jonathan and Mark represented the SFVBA in the trial court and on appeal in the case discussed in this article. They can be reached at www.nemecek-cole.com.* ***David Gurnick*** *is with the Lewitt Hackman firm, and his franchise law practice includes antitrust and other trade regulation matters. David is also SFVBA Treasurer and he can be reached at DGurnick@lewitthackman.com.*

A Prodigy Offspring

ROSIE SOTO
Director of
Public Services

Success

At age 4 success is . . . Not piddling in your pants.
At age 12 success is . . . Having friends.
At age 17 success is . . . Having a driver's license.
At age 35 success is . . .Having money.
At age 50 success is . . . Having money.
At age 70 success is . . .Having a driver's license.
At age 75 success is . . . Having friends.
At age 80 success is . . . Not piddling in your pants.
~ Author Unknown

THE SFVBA, FOUNDED IN 1926, DELIVERED A prodigy offspring – at the age of 22. The year was 1948 and this prodigy was named Lawyers Reference Service, now known as Attorney Referral Service (ARS) of the San Fernando Valley Bar Association (SFVBA).

The prodigy, now 62, is one the SFVBA can be proud of. It's a well-structured program that continues to meet high standards set by the ARS Governing Committee, SFVBA leadership, the State Bar Model Supreme Court Rules Governing Lawyer Referral and Information Services, and Rules Pertaining to Lawyer Referral Services, including Minimum Standards for a Lawyer Referral Service in California. Those Governing Rules could be compared to stringent guidelines set by a parent that would want the best for their child. Most prominently, they would mold the ARS to become the best service it could be.

As a qualified service, it operated in the public interest, providing information regarding government and consumer agencies which may assist the client, as well as providing referrals to lawyers, pro bono programs and other legal service providers. The program is good at what it does best because it knows who it serves, particularly in today's economy. It was designed to assist persons who are able to pay normal attorney fees but whose ability to locate appropriate legal representation is ineffective due to lack of experience with the legal system, a lack of information about the type of service needed, or a fear of the potential costs of hiring a lawyer.

It offers two important services to the public. First, it helps the client determine if the problem is truly of a legal nature by screening inquiries and referring the client to other service agencies when appropriate. The second, and perhaps more important function of the attorney referral service, is to provide the client with an unbiased referral to an attorney who has experience in the area of law appropriate to the client's needs.

How it Works Today

When clients call the ARS, they speak with an ARS consultant who is experienced in analyzing potential legal problems. ARS staff members are not lawyers and, therefore, cannot give legal advice. However, they are very experienced in determining whether the situation requires the services of a lawyer or if the matter is better suited for another type of assistance. Referrals may also be submitted on-line.

Clients are encouraged to depict the legal matter they're trying to address. The basic who, what, where, when facts of the matter, including the other parties involved, what happened, and what the client would like an attorney to do. The type of legal issue, along with foreign language spoken and geographic location, will be taken into consideration so that the most appropriate and convenient referral is made. The information is cross-referenced to the database to find an attorney to refer.

ARS consultants then strongly suggest an in-office consultation, but phone consultations may be coordinated. An appointment is scheduled with an experienced and insured ARS attorney who can help.

A $30 administrative referral fee for the first 30-minute in-office consultation applies for most areas of law. The attorney will not charge clients for the first half-hour of the initial consultation. If the consultation goes over the half-hour, or if the client decides to engage the attorney's services, clients will need to discuss legal fees and payment arrangements directly with the attorney.

A half-hour may be enough time for an attorney to assess if the legal issue fails to meet criteria for legal action, or if a statute of limitations is up, or suggest what further work might entail and help clients decide if a case is worth pursuing. Clients are reminded, however, that attorneys can seldom give substantive advice in the space of a half-hour, considering legal issues are very seldom simple, and a responsible attorney will need to review information carefully, and perhaps do additional research, before feeling able to offer any advice.

Clients who use the ARS receive Satisfaction Surveys. The ARS pays close attention and takes the necessary actions to ensure that clients receive service that is expected and deserved. The ARS is one of the longest running bar association sponsored referral services in the nation. Now there are almost 300 not-for-profit lawyer referral service programs associated with state and county bar associations across the country, but fewer than 70 are authorized to use the ABA's logo and slogan, "The Right Call for the Right Lawyer." The Attorney Referral Service of the San Fernando Valley Bar Association is proud of its history and remains a leader in this arena.

Unlike individuals, where aging and death are eminent, the ARS of the SFVBA is a program full of life. Under good leadership, the ARS continues to flourish, so much so that at 62, it is by no means looking to retire early. The ARS has many friends, it remains licensed (certified), it's financially stable, and by no means will piddle.

Attorneys who would like to join the ARS can download an application from our website at www.sfvba.org.

Spouses' Liabilities to Third Parties:

California Creates a Problem and Provides a Solution

By Robert F. Klueger

ASSUME THAT A SPOUSE in California becomes liable to a third party, either as a result of a tort claim, a business debt or any other source. To what extent may the other spouse (the "non-debtor spouse") be held liable for the debts of the "debtor spouse"? Unfortunately, California statutory law is mostly good news for creditors and bad news for married debtors. But the Family Code provides spouses who engage in some early planning with an escape hatch, permitting the non-debtor spouse to avoid the debts of the debtor spouse.

The problem has two sources. The first is that most of the assets of married spouses in California are community property. A spouse's earnings are community property, and assets acquired during the marriage with the earnings of one or both spouses are also community property. Even if an asset started out as a spouse's separate property, either having been received by one spouse as a gift or an inheritance or having been owned by one spouse prior to marriage, it is likely that the asset will, over time, be commingled with community property and thus became community property.

It is the second source that really creates the problem. Section 910 of the Family Code provides that, with limited exception, "the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt." As a result of §910 – and contrary to widespread belief – there is no such thing in California as a "community debt" or a "separate debt." The issue is not the nature of the debt but the nature of the asset. If the asset is part of the "community estate," the asset will be subject to seizure by a creditor of either spouse.

The confusion probably results from the experience of family law practitioners. In the context of a divorce proceeding, the court is required to determine which of the debts that arose during the marriage were "separate or community and confirm or assign them to the parties…" Family Code §2551. But outside of the context of a divorce (and, to a lesser extent, in probate) there are no "community" or "separate" debts. Community property will stand to answer for the debts of the debtor spouse even if the debt was incurred for the debtor spouse's exclusive personal benefit. See *In re Soderling*, 998 F.2d 730 (9th Cir. 1993).

The rule for spouse's separate property is very different. Except for "necessaries of life," the separate property of a non-debtor spouse is not liable for the debts of the debtor spouse, whether the debt arose prior to or during the marriage. Family Code §§913-914.

The harshness of the rule embodied in §910 is slightly mitigated by Family Code §911, which provides that the marital earnings of the non-debtor spouse will not be held to answer for the premarital debts of the debtor spouse. In effect, this means that a creditor cannot garnish the wages of a nondebtor spouse for the premarital debts of the debtor spouse. Once the nondebtor spouse has received the wages, the wages are liable for the premarital debts of the debtor spouse unless the nondebtor spouse deposits the wages in an account to which the debtor spouse has no access.

It is interesting to note how radical a departure Family Code §910 is from the forty "common law" states that do not have a community property regime. In these states, the general rule is that assets, including earnings, titled in the name of a non-debtor spouse are not liable for the other spouse's debts. *See, e.g.* Ill. Compiled Statutes ch. 750 §65/5 ("…neither the wages, earnings or property of either [spouse] nor the rent or income of such property, [shall] be liable for the separate debts of the other.")

Moreover, many common law states have retained "tenancy by the entirety," a form of ownership for real property. If property is titled as such, and only one spouse is a debtor, that spouse's creditors cannot seize or encumber the property as long as the marriage persists. *See, e.g.* Mich. Code §600.6023a ("Property… held jointly by a husband and wife as a tenancy by the entirety is exempt from execution under a judgment against only 1 spouse.") The essence of tenancy by the entirety is that it cannot be severed without the consent of both spouses, and the nondebtor spouse will never consent to a severance of the tenancy.

The Family Code, having created the problem in §910, provides a solution in §850, which permits spouses to "transmute" their assets from community to separate. By means of simple "transmutation agreement," spouses may effectively remove themselves from the entire California community property regime, as fully as of they had never set foot in California. The result is, of course, that only the separate assets of a debtor spouse can be seized by that spouse's creditors to satisfy that spouse's debts. Presumably, even after a

transmutation agreement, the separate assets of one spouse could be reached by a creditor who provided "necessaries of life" to the other spouse.

There are only two requirements for a valid transmutation agreement, one that is easy to comply with and the other which is fraught with difficulties. In order for the transmutation of real property to be effective against third parties, the transmutation must be recorded. Family Code §852(b). Presumably, a deed transferring title from both spouses to one spouse, as that spouse's "sole and separate property," should be sufficient to satisfy this requirement, but the better practice is to record a "Memorandum of Transmutation Agreement," making explicit just what has occurred.

The second requirement poses the challenge for practitioners. Family Code §851 provides that "A transmutation is subject to the laws governing fraudulent conveyances." Fraudulent conveyances in California are governed by the Uniform Fraudulent Transfer Act, Civil Code §3439 et seq. What is and what is not a fraudulent conveyance is way beyond the scope of this article. However, it is safe to assume that a transmutation agreement that transmuted all of a married couple's assets into the separate property of the low-risk spouse, leaving the high-risk spouse with nothing, would be a fraudulent transfer, since no one gives away assets and receives nothing in return unless the avoidance of creditors is the motivation.

However, it is equally safe to assume that if each spouse were to cede a community property interest in *half* of the assets to the other, with the result that each spouse were to emerge from the transmutation agreement with a separate property interest in half of the marital assets, such a division could not be considered a fraudulent conveyance. This places a premium on fairly valuing and carefully dividing the assets. It is recommended that each spouse emerge from the transmutation agreement with a sufficient amount of liquid assets. If one spouse receives nothing but cash, and the other spouse receives a separate property in interest in unproductive raw land, the spouse with the raw land cannot pay his or her debts as they come due, resulting in that spouse's *insolvency*, a hallmark of a fraudulent conveyance.

One might assume that, at best, a transmutation agreement solves only half of the problem, leaving a high-risk spouse's separate assets vulnerable to creditors. But not all assets are equally desirable to creditors. Assume that a married couple owns only two assets, a parcel of commercial real estate fairly valued at $1,000,000, and a business fairly valued at $1,000,000. If both assets are community property, both may be seized by the creditors of each spouse. A creditor may effectively seize the real estate simply by recording a judgment.

The creditor may, but need not, foreclose upon the property. Eventually the debtor will have to deal with the creditor, because the real estate cannot be sold or refinanced without the creditor's judgment being removed. But the business is another matter entirely. It might be sold to a willing buyer at arm's length for $1,000,000, but it might be worth far less in the hands of a creditor, especially if the debtor is willing and able to compete with the business following the seizure. In order to satisfy a judgment, a creditor will have to install a receiver in the business, an expensive and not always effective remedy. Creditors generally are not interested in operating businesses. They want assets that are either cash or are readily reduced to cash. These are the assets that should be transmuted into the separate property of the low-risk spouse.

Finally, transmutation agreements share one thing in common with almost every other asset protection device: The "earlier" it is done, the more likely it will hold up.

Robert F. Klueger specializes in asset protection law at Klueger & Stein, LLP in Encino. He can be reached at bob@LAtaxlawyers.com.

Above photo is a fictional stock photo to represent author as a baby.

Animal Pragmatism: Tips for Pet Trusts

By Susan Share

CONSIDER THE CAT WHOSE MEOWS SAVED A family of five from a house fire, or the African grey parrot who got lost and recited his name and address to a helpful stranger and was reunited with his family. Pets are special, and their owners may wish to ensure that their companion animals will be well cared for even when those owners are no longer able to do so because of the owners' illness or death. Recently the California legislature has recognized that companion animals are more than property and codified a pet trust law in section 15212 of the California Probate Code, entitled "Trusts for the care of animals."

Formerly a pet was viewed as property, and probate laws generally did not permit a person to leave property to property. Trusts that provided for the care of a pet following an owner's death were merely honorary and subject to the whims of the trustee. Where the trust property was significant, the deceased owner's wishes were often dismissed by a relative who preferred to use the money for the relative's own care and feeding.

What animals may be the subject of a California pet trust? The statute defines "animal" to mean "a domestic or pet animal" and all sections of the statute are to be liberally construed. This definition affords a broad interpretation as to what types of animals are contemplated by the statute; apparently pet trusts may benefit any domesticated animal, from cats and dogs, to horses, birds, and reptiles.

How long do the trusts last? Pet trusts are not meant to continue forever, only for the life of the owner's current pets. If the term is not specified in the trust, "the trust terminates when no animal living on the date of the settlor's death remains alive." This reinforces the intent that these trusts are created to care for one or more specific pets who hold a special place in their owner's heart.

The foundation of the statute rests on the language that "a trust for the care of an animal is a trust for a lawful non-charitable purpose." Therefore the trust, whether a stand-alone pet trust or a provision for the care of the pet within another trust instrument or will of the owner, can lawfully benefit a pet. While will provisions can bequeath a testator's pet, this only takes effect on death. By contrast, a living trust provides the flexibility and control to make specific provisions for the pet's care when the settlor is either incapacitated, disabled or in a care facility that does not permit pets. Alternatively, special provisions can be made to keep the settlor and pet together for as long as possible, with specific recommendations for facilities that allow pets. In addition, the trust sets forth care and funding for the pet when the settlor dies. These trusts do not provide for offspring of the beloved pet that are unborn at the time of the settlor's death.

The trust may be funded with transfers of money or, if funded at death, with an insurance policy payable to the trust. Some thought may be given to taxes. Transfers to an irrevocable pet trust are subject to gift taxes for transfers made while the settlor is living or estate tax if made at the settlor's death. If the owner creates a revocable trust, taxes on the income from trust assets are paid by the settlor. When the trust becomes irrevocable, such as on the settlor's incapacity or death, or even during life if the settlor so chooses, the assets of the trust are subject to income tax. A caregiver who receives income from the trust will pay income tax. A pet trust with a remainder going to charity is not subject to an estate tax deduction.

The pet trust law will tend to encourage elderly people to acquire pets, which have been shown to provide enormous benefits to their owners in terms of companionship, improving their quality of life, and often giving special needs assistance. Often older, responsible individuals do not get pets because of their fear of predeceasing their pet or becoming incapacitated and not being able to adequately care for their pet. Now, the availability of an enforceable pet trust can afford the elderly owner some peace of mind.

Will the legality of pet trusts encourage or even permit outlandish bequests to settlor's pets? The odd bequest of inordinately large gifts to a beloved pet, like the gift by Leona Helmsley to her dog "Trouble", will still arise from time to time, however the practitioner should discuss realistic parameters with the pet owner during drafting. Considerations such as shelter (and even the cost of modifications to a caregiver's home), caregiver, necessities (such as food, treats and toys), health care, taxes and unforeseen exigencies should be calculated when determining the appropriate bequest. Even if the estate is very large and the recipient is a pet, the trust will only remain in force for the life of the pet or another pet alive at the settlor's death. Therefore, the drafter could encourage the pet owner to leave the remainder, if one exists, to a charity or to fall to the residuary clause of the trust to be distributed in a manner consistent with the settlor's wishes.

The devise of real estate along with the specific provisions for the care and benefit of the pet often ensure that the settlor's wishes will be carried out by providing a nice home for the caregiver. Where the animal or animals in question are horses or the like, certain specialized living quarters such as stables are a necessity and often require a significant sum of money to perpetuate.

The statute shows the California legislature's commitment to upholding pet trusts and further ensuring the appropriate care of the pets by providing a variety of monitoring and enforcement procedures. In fact, it appears that almost anyone interested in the welfare of the animal has standing to make sure that pet is receiving the benefits of the trust. "Any beneficiary (unclear whether man or animal), any person designated by the trust instrument or the court to enforce the trust, or any nonprofit charitable corporation that has as its principal activity the care of animals" may "inspect the animal, the premises where the animal is maintained, or the books and records of the trust."

Not only can an accounting be demanded and the pet's living conditions inspected, but the actual pet can be examined to see if it is receiving appropriate care. Some drafters recommend a provision requiring appropriate accounting procedures down to $5,000 in assets as a safeguard to both the pet and the pet trustee. The statute, however, only directs that an accounting must be provided where assets exceed $40,000.

California Probate Code section 15212 has raised the bar regarding the care of pets. The statute recognizes the importance of pets to their owners, recognizes the legality of an instrument that designates a pet as a beneficiary of a trust for its care and benefit, and provides oversight by authorizing virtually any interested party to ensure the pet's well-being.

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Business Valuation Services for Marital Dissolution

By Chris Hamilton

IN A DIVORCE MATTER, THERE are two primary financial questions: "What are the assets and debts of the marital estate?" and "What is the income available for support?".

In most divorces these two questions can be resolved without the use of a forensic accounting firm. This is generally true where the spouses derive their income through employment. However, in cases where a business (or several) is owned by the marital estate, the complexities involved can increase exponentially. The value of the business is almost always a difficult issue. Income earned from the business also becomes an elusive issue that often requires extensive discovery and analysis.

It often surprises divorcing couples that they own a business that needs to be valued for purposes of determining an equitable asset split. For example, a business activity where there are no employees and it generates self-employment income is, in fact, a business. To the degree there is any goodwill value in the business it is subject to the asset split.

Business appraisal in the context of divorce is a function of both of the primary financial issues – income and assets. The business itself is an asset subject to an equitable split. Often, the business is also the primary source of income for the family and, as such, is the primary source for marital and child support. This is why, for most family court lawyers, retaining the same expert to address both issues is the most efficient solution.

The most common method used to value a business is an income approach. In simple terms, this approach capitalizes cash flow generated by the business after payment of all business expenses and taxes. This is done by either capitalizing income or determining "excess income" and capitalizing the portion of income associated with intangible assets.

Under either method, business expenses should include the market value of services provided to the business by the divorcing spouse. To the extent profit distributions are included in the compensation of the business owner, there is an adjustment to increase the operating cash flow from the business. Or, said another way, a buyer of the business would want to determine the cash flow that is available from the business before any profit distributions are made. That cash flow is what would be used to value the business.

The interaction between income and asset value comes down to this single adjustment. The challenge in a divorce matter is that alongside the issue of valuing the business is the question of spousal and/or child support. You cannot use the same income to value the business as you use to determine support – this is commonly known as double-dipping and is generally viewed as unfair. Understanding the separation of cash flows between those produced by the business and those produced via the personal efforts of the owner is key to grasping the potential results of a marital dissolution. Failure to understand, or to retain an expert that does, can result in unfair and inaccurate results.

It is very common, almost automatic, to expect to see profits in a closely held business at or near zero. There are powerful tax and cash flow motivations to eliminate taxable income from the business. This is done a number of ways that involve increasing the income of the owner: bonuses, perks, personal expenses, etc. Therefore, the valuation expert will attempt to determine the total compensation of the owner. This, as noted above, has a dual purpose in a divorce matter. Once total compensation has been determined, there is ultimately an allocation made between "reasonable compensation" for services to the business vs. profit distribution. The profit distribution is used to value the business. The compensation is used to determine support.

For example, if Husband draws $500,000 per year from the business each year leaving a profit of zero, the appraiser will determine whether the services provided to the business would be fairly valued at $500,000. It is very likely that some portion of the compensation will be deemed as profit distribution rather than payment for services. In this example, assume that reasonable compensation is determined to be $200,000. The value of the business would be based on annual net income for the business of $300,000. Support calculations would then reasonably be based on annual compensation of $200,000. While this is a simplified example, it illustrates the point that using the $500,000 draws for support and business valuation would work out to an unfair result.

To illustrate the interaction of the two elements assume that the appropriate capitalization rate for the

business in dispute is 25%. In the example given above, the value of the business would be $1,200,000 ($300,000 ÷ 25%) and the income available for support is $200,000. If, however, the determination was that reasonable compensation is $75,000. The resulting business value is $1,700,000 and the income available for support is $75,000.

The temptation is to approach this kind of an allocation from the standpoint of asset split vs. support calculation. While that kind of "trading" is unavoidable, counsel is best served by a valuation/accounting expert that can provide the opinion of what will be the likely conclusion of the court. If it becomes a matter of negotiation the valuation expert can be utilized to assist in the calculations of the impact to each party on the proposed allocation.

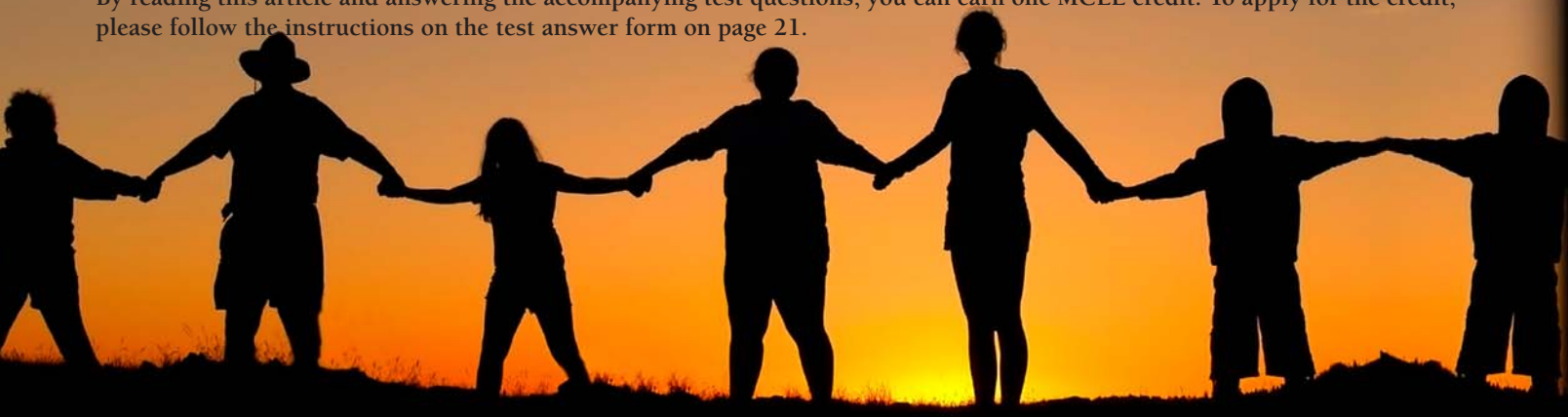
The dynamics of these calculations in a small closely-held business can be confusing and difficult to grasp. The extreme of expectations between the "out-spouse" and the "in-spouse" (directly involved in the business) are a primary factor driving litigation in this area. The expectation gap is often a function of the lack of understanding that income can only be used once.

The gap is also due to the difference in knowledge about the affairs of the business. The spouse who will retain the business invariably insists that all revenue has been reported and all expenses are true business expenses. Suspicions on the other side revolve around revenue not being reported (particularly in cash businesses) and personal expenses being deducted for tax reasons as business expenses. This is another reason that most family law practitioners use a single expert to assist with income and business expenses. A single process of discovery is more efficient when the expert is assisting in the development of document request lists that will result in information supporting income and business value conclusions.

Chris Hamilton *is a Certified Public Accountant, Certified Fraud Examiner, and a Certified Valuation Analyst. He spends most of his professional time assisting lawyers with complex financial litigation and has testified in family, civil, criminal and probate courts. He can be reached at CHamilton@arxisgroup.com.*

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 21.



Putting the "Family" Back in Family Law

By Marshall W. Waller and Veronika Melamed

ANYONE WHO PRACTICES family law in Los Angeles and the surrounding counties will tell you that getting in front of a judge has become a daunting and frustrating task. In its 2001 survey of proceedings involving children and families, the Judicial Council reported discouraging figures with regard to the devotion of judicial resources to family law matters: while civil and criminal cases were allocated 61% of all judicial officers, family law cases received a mere 14%.[1]

Although essentially anecdotal in this article due to the lack of raw data and statistical analyses available, this situation is far worse today than it was back in 2001. For example, recently in Simi Valley a party requesting an evidentiary hearing on a child support matter was given a date six months out, and in the Los Angeles Central District trials are being set out sometimes as far as twelve months.

The Supreme Court's ruling in *IRMO Elkins*[2] underscored the dismal state of the family law court system and the limited access litigants are afforded. In an effort to address the problems recognized in *Elkins*, and the current actual state of the court system, the Elkins Task Force has been formed to give laypersons, attorneys, judicial officers and lawmakers input into possible solutions to this overwhelming problem.

Family law practitioners find themselves in the midst of a crisis that has no easy remedy. The State of California and the individual counties border on bankruptcy, court rooms are being closed, judicial officers who retire are not being replaced, entire district courts are being shut down and the resources available to families in transition and in distress are dwindling. The age of "scorched earth" litigation is over, especially where children are involved. The practice of family law as it is known in 2010 is going the way of the dinosaurs. If attorneys are to survive as family law attorneys, they need to be prepared to evolve along with it.

One area most in need of change is child custody, traditionally one of the most expensive areas of family law litigation – both emotionally and financially. As might be imagined, the fallout associated with highly contested and hostile divorce proceedings represents a dramatic potential for disaster for children. As such, family law litigators, when faced with a custody litigation, must be diligent to look beyond the concept of "winning at all costs" and instead be willing to take steps necessary to ensure the protection of the best interests of the children who are involved.

It is, therefore, of paramount importance that the family law bar recognize the need to practice "child-focused family law" and to encourage parents to maintain their relationships in a civil manner so as to ensure that their children are protected in their future relationships and to ensure financial disclosure and parity to prevent the children ending up below the poverty line, a problem that is all too often a by-product of the "parent-focused" approach to custody and support matters, as is typically seen in the legal system.

Although attorneys often simply approach custody matters by starting directly with judicial intervention before any attempts at informal resolution, given the limited, and quite frankly diminishing, capacity of the California family courts to address the deluge of cases, attorneys must open their minds to realize that zealous, competent and effective representation of clients in cases involving custody disputes must focus on the children, and must start with, and include, the multiple non-litigation resources available to the family law community.

Historically, in the context of a divorce, children were considered "chattel," little more than background aspects of the overall landscape of the legal proceedings.[3] Over the years, of course, this approach to the management of the child-related aspects of a divorce proceeding has evolved considerably[4] and California stands proudly as one of the more enlightened jurisdictions in this area. The California court system provides services for children and their families, ranging from on-site child care to guardianship and emancipation proceedings and almost everything in between.

Almost 100% of the courts in California provide family court mediation and family law facilitators and roughly 85% provide child custody investigation or evaluation services.[5] Children of divorcing parents are seriously at risk, even in the context of litigated matters that appear to be "amicable." Children from divorced families have a higher chance of behavioral problems, are six times more

likely to be abused (in their stepfamilies) than children in intact families, and have a greater chance of living in poverty. Studies have also shown that children of divorce are at greater risk for suicide, criminal behavior, and some level of dysfunction as adults as well.[6] It is for these very reasons that in family law cases involving children, those issues must be addressed from a "child-focused" standpoint.

Family law attorneys are not, however, without resources available to the "child-focused" practitioner. More and more courts are acknowledging the importance of the appointment of minor's counsel to represent the interests of children whose parents have lost the ability to shift their focus away from the dissolution of their marriage, and maintain their focus on their children's best interests – children whose voices through their parents have become lost. Sections 3150, *et seq*., of the California Family Code[7] provide the basic statutory framework for the appointment of a lawyer to represent the child in a custody proceeding, independent of the interests of the mother and father, if the court determines it to be in the minor child's best interests. (Sec. 3150).

Overall, the duties and the rights of the private lawyer appointed to represent the minor child in this context are subject to rather expansive interpretation. Section 3150(a) generally states that "the child's counsel appointed under this chapter is charged with the representation of the child's best interests." Admittedly, this is a fairly sweeping "mandate" that is subject to varying interpretations as to the breadth and scope of the representation.

One of the more important aspects of these code sections is found in Section 3151 (b), which instructs the minor's counsel, at the court's request, to prepare a written statement of "issues and contentions setting forth the facts that bear on the best interests of the child." As might be imagined, the nature, scope and extent of these written reports are subject to interpretation by both the courts and the lawyers involved.

The minor's counsel is given broad access to medical records, educational records, and persons of interest in the context of investigating the best interests of the child, can be appointed as the holder of any patient privileges held by the minor child, and cannot be called as a witness to testify in these proceedings; this has been the source of some consternation on the part of attorneys representing a parent in the proceedings.

Nonetheless, too many times it has become necessary to seek out a more "objective" perception of the reality in which the minor child finds him or herself, generally due to the lack of credibility and reliability seen by the judicial officer on the part of the mother and the father due to the high level of hostility and conflict between them and their inability to move beyond their own needs and to focus on their children's needs. A conscientious Minor's Counsel provides just such an element of objectivity.

Another resource to which the child-focused family law practitioner can guide a client is the mediation services of the family courts. These services provide a safe and non-confrontational environment in which parents can meet with a skilled mediator to discuss the needs and desires of the children and parents in the context of caring for their children. These services are offered free of charge, and in Los Angeles County are handled without the expense of having a lawyer present. When an agreement is reached through mediation, provision is made for review of the agreement by the parties' attorneys prior to it being entered as a court order.

Through the court's mediation services, the parents are free to work with an experienced counselor in developing a personalized parenting plan that addresses *those parents'* issues and concerns, including specific items such as the work schedules of the parents, the school and extracurricular activity schedules of the children, child care needs, finances, travel, holidays and other matters important to the best interest of the children.

The issue of support is not addressed during the mediation, leaving the parties free to make the best decision for their children without regard to the financial consequences otherwise looming; that is an aspect of the process that can be left to the judicial officer and to the attorneys. Nor are the conclusions of the mediators in Los Angeles County made known to the judge (although in some counties, such as Ventura, the mediators do make written recommendations to the judicial officer).

It is the job of child focused family law attorneys to encourage the use of this resource by clients. By guiding clients to the court-provided

mediation, attorneys give their clients the environment and support to focus on their children, leaving the non-child issues, such as money, to the attorneys and the courts.

As a practical matter, prior to the conduct of a hearing on a custody and visitation issue, the parties are required to participate in a mediation session as described above. All too often, however, the "parent focused" family law attorney simply prepares, files and serves an Order to Show Cause on custody and visitation without first attempting an informal resolution of these issues through mediation. The "child-focused" family law attorney should first explore every avenue of a non-litigated custody resolution and should turn to judicial intervention only as a last resort.[8]

Another invaluable resource to be used by the child focused family law practitioner is found on the Parent Education Referral List for High Conflict Parents available on the Los Angeles Superior Court's website.[9] This non-inclusive list provides a source of referral to parenting programs, counselors and therapists who can assist parents going through a divorce with these issues involving their children.

Yet another valuable resource for parents is the "PACT" program offered through Family Court Services of the Los Angeles Superior Court. It is generally a requirement of nearly all custody and visitation orders coming out of Los Angeles Superior Courts that parents attend these classes, often prior to a mediation. The Los Angeles Superior Court also maintains a non-inclusive list of child custody evaluators and therapists to which reference can be made.

Additionally, "parenting coordinators" are extremely valuable and helpful to parents who are having difficulty coordinating decision-making regarding their children. These are typically experienced child custody professionals (therapists, evaluators, etc.) who help facilitate conflict resolution in the context of decisions arising out of and pertaining to children.

In addition to the various resources available through the Superior Court directly, and typically without requiring the direct involvement of the parties' attorneys, thus saving them costs associated with that extra expense, referral to child custody evaluators for an extensive child custody evaluation and report (pursuant to Family Code section 3111[10]) provides an in-depth and highly detailed assessment of the child custody situation and an invaluable resource for the judicial officer in a contested custody case. These referrals generally tend to be very, very expensive, however (typically $7,500 and up), so of course they may have limited application. They can, however, be important in attorneys' attempts to focus their client on their children's needs and what is objectively best for them.

If agreed to between the parents and attorneys early in a custody dispute, the report and recommendations arising from a child custody evaluation can help obviate the need for bringing custody and visitation issues to the courts, and can bring to a quick resolution the custody portion of a case, greatly limiting any damage that may come to the children, parents, and parental relationship from a long and drawn out custody battle.

Finally, for those parents who are able to place their children first, despite the breakdown of their marriage, and who are able to engage in full financial disclosure, share the costs of the process and proceedings, and who recognize that the end of a marriage is vastly different from the end of a parental relationship, collaborative law may be the process best for them. Described as the "no court" process, collaborative law completely takes the specter of litigation out of a divorce, with the parents and their attorneys signing contracts that they will not resort to court intervention to resolve the issues present in the divorce; the attorneys engaged in the collaborative process often go so far as to disqualify themselves from the case should either or both parties choose to litigate the divorce.

The Family Code addresses the use of the collaborative process in dissolution proceedings in Section 2013, which specifically provides authority for parties to resolve those issues falling within the traditional purview of the court's jurisdiction "without resorting to adversary judicial intervention."

The days of simply putting on armor to fight the custody battle are fast drawing to a close. Given the condition of the family court system in California combined with the looming financial inability to engage in "scorched earth" wars and changing societal mores moving away from treating children as property and pawns, family law attorneys must transform their practice to put the "family" back in family law and focus on the children, rather than on the litigants.

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Veronika Melamed *is an Associate with Feinberg & Waller and has been practicing law in California for 7 years, and practiced law in Illinois for 3 years before coming to California. She can be reached at vmelamed@lectriclaw.com.*

[1] These statistics are obtained from a 2001 "Survey of Proceedings Involving Children and Families" by the Judicial Council of California. The Report of Survey Results can be viewed at www.courtinfo.ca.gov/reference/4_18fam_surveys.htm.

[2] *Elkins v. Superior Court* (2007) 41 Cal4th 1337

[3] This concept dates as far back as the time of the Roman Empire, and was often characterized by parents (fathers) oftentimes selling their children into slavery or indentured servitude and apprenticeships.

[4] An interesting case in this regard is *Pennsylvania v. Addicks*, an 1813 case that is credited as being the first case to give judicial recognition to the concept of the best interest of the children in the context of a custody proceeding. In that case, the court chose to go against the conventional wisdom of the day and refused to award custody to a father, preferring instead mother because even though they found her adulterous behavior to be subject to their "disapprobation," they nonetheless recognized that "as far as regards her treatment of her children, she is in no fault. They appear to have been well taken care of in all respects. It is to *them*, that our anxiety is principally directed; and it appears to us, that considering their tender age, they stand in need of that kind of assistance, which can be afforded by none so well as a mother." Not exactly the level of enlightened thinking that we have come to know in the 21st Century, but all things considered, a pretty good start.

[5] 2001 "Survey of Proceedings Involving Children and Families" by the Judicial Council of California.

[6] See generally [Fagan 2000]. Fagan, Patrick F. and Robert E. Rector. "The Effects of Divorce in America." Backgrounder #1373. The Heritage Foundation, June 5, 2000.

[7] All statutes referenced in this article, unless otherwise noted, are to the California Family Code.

[8] Obviously, such is not necessarily the case in instances involving domestic violence and other emergency situations.

[9] www.lasuperiorcourt.org/familylaw/pdfs/referrallistforparents.pdf

[10] Traditionally these have been referred to "730 evaluations" due to the authority given the Court under Evidence Code section 730 to appoint such evaluators.

MCLE Test No. 22

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 majority of judicial officers in California are assigned to family law matters.
   True
   False

2. A task force has been established to address the crisis present in family law court in California, asking for input from laypersons, attorneys, judicial officers and lawmakers.
   True
   False

3. Additional budgetary financial resources for family law courts are being allocated by the State of California.
   True
   False

4. Child custody disputes are traditionally the most expensive aspects of family law cases.
   True
   False

5. Children are unaffected by their parents' hostile divorce.
   True
   False

6. Historically in divorce proceedings, children needs were seen as being of paramount importance.
   True
   False

7. California family law courts provide a wide range of service to families, including mediation and on-site child care.
   True
   False

8. Children of divorce are at lower risk for suicide, criminal behavior, and some level of dysfunction as adults as well.
   True
   False

9. There is no statutory framework for the court's appointment of minor's counsel.
   True
   False

10. The mediation services provided by the California courts in custody matters are done so at a reduced-fee basis without the necessity of filing a request to waive fees.
    True
    False

11. Minor's counsel can be called to testify as any other third party in a family law proceeding.
    True
    False

12. Minor's counsel can be empowered as the holder of patient privileges on behalf of the minor child.
    True
    False

13. There is a cost for parents seeking mediation services through the court without having an Order to Show Cause pending.
    True
    False

14. The Los Angeles Superior Court offers a Parent Education Referral List for High Conflict Parents on its website.
    True
    False

15. The Los Angeles Superior Court has responded to the current financial and budgetary crisis by empowering court-supervised mediators with referral power on custody and visitation issues.
    True
    False

16. If parties to a disputed custody matter attend family law mediation services through the Superior Court, they will typically not be required to attend PACT classes.
    True
    False

17. Evidence Code section 730 remains the sole authority for the appointment of a child custody evaluator in custody matters.
    True
    False

18. The concept of "collaborative law," while popular in certain family law circles, lacks any formal support of the courts or the legislature in California.
    True
    False

19. The mediation services offered by the Superior Courts are only available if an Order to Show Cause re Custody or visitation is on file and a hearing has been set.
    True
    False

20. Lawyers seeking therapeutic intervention for their clients in a custody matter are required to select a referral from the list of possible candidates maintained by the court.
    True
    False

MCLE Answer Sheet No. 22

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

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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
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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

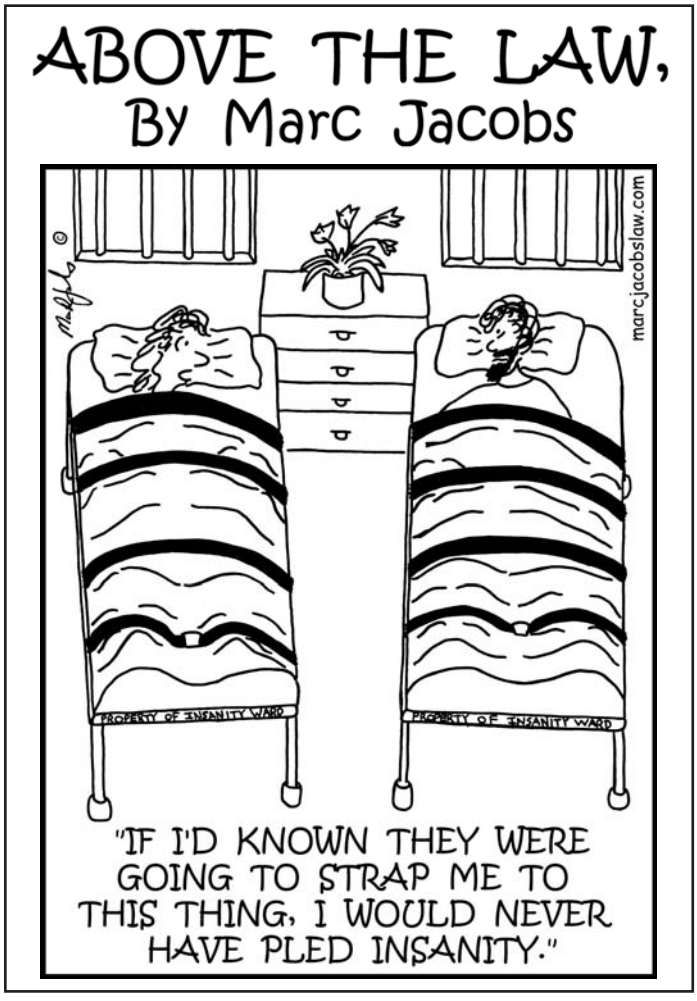
Mediation Mirrors the Marriage

Relationships

By Susan Carlisle

WHEN A DIVORCING COUPLE IS FACING dwindling assets and ballooning debt, the usual family law litigation tactics of scheduling court appearances, stalling, sending threatening letters, and taking extreme positions have become unsustainable. As a result of the recession, more than 80% of divorces are being filed *in pro per.* Many people are opting to defer the divorce. They continue to live under the same roof, because establishing and maintaining two separate households is unaffordable. The primary breadwinner may have lost his or her job. The revenues of the previously flourishing small business may be down by thirty percent or more. The "stay-at-home mom" cannot, or will not, adjust to the new economic reality. At the same time, family law attorneys are accumulating uncollectible accounts receivable.

Until recently, litigation has often been financed by borrowing against the equity in the parties' residence. Now that real estate values have plummeted, and there is little or no equity remaining in their homes, most couples cannot refinance. Instead they may be desperately negotiating short sales, staving off foreclosure, or even contemplating bankruptcy. So they are opting for mediation instead, because they have heard that it is a cheaper alternative.



Mediation may be an optimum approach for child custody and visitation issues. A sensitive attorney-mediator can usually help the couple arrange suitable and flexible scheduling for the children, because, for the most part, families do put the needs of their children first. Mental health practitioners can be brought in for more complicated child issues. Their meetings often yield excellent results, especially in special needs or move-away cases that require more experience and training.

Mediation is a superior method to use to resolve financial issues when both parties have information regarding their income and assets and the wherewithal to negotiate. However, when there is a power imbalance in the family, mediation can exacerbate the inequity of the parties and be another venue for intimidation and submission. Mediation mirrors the marriage.

A few years ago, the typical mediation couple had a civil relationship and presented themselves at the mediator's office to finalize some details in the parenting plan and property division and to calculate support. Their attitude demonstrated a desire to come to terms with their dissolution in a nonadversarial manner. After a few sessions of negotiating back and forth, the mediator wrote up their agreement.

Today's couple who present themselves in mediation may have a different demeanor. Their motivation is more likely to have an inexpensive divorce, not necessarily a peaceful one. The recent financial downturn has put an extra layer of strain on the marriage. The "out-spouse" has little or no information about the business. He or she distrusts the partner's assertion that they are suddenly poor, when only a few years ago they bought a large home in an upscale neighborhood, drove expensive cars, and took frequent vacations.

The goal of mediation is to wind up with a marital settlement agreement with input from both sides. The problem is that one spouse may have managed and controlled the couple's finances with little or no oversight from the other spouse. They may have come from a culture where the woman takes responsibility for the home life and lives on an allowance, while the husband is in charge of the business life. Even in American homes, true egalitarian relationships are still rare.

Typically one party has laid out a self-serving plan for asset division and support that he or she wants the mediator to write up. The more knowledgeable party comes to the meeting prepared with detailed spreadsheets and the self-confidence of someone who knows exactly how much money has come into and out of the accounts for all the years of the marriage. He or she may have glossed over some of the less than stellar investments that were made or even some transfers that benefitted his or her separate property.

The stronger party is armed with rationalizations that support his or her position. The object is to get the weaker one to agree – often to less than half the property and to low or no support. The less knowledgeable party looks at those spreadsheets in confusion and disbelief. He or she makes an effort to understand what appears to be a foreign language or responds by throwing out unsubstantiated accusations – "By the way, how much did you spend on that girlfriend/boyfriend?" or "It's your fault we lost $200,000 in the stock market."

When there is a power imbalance, the stronger member gets his or her way by overt or covert intimidation. Good mediators work hard to move the parties toward an equitable settlement; however, they cannot reverse a pattern of control and surrender that has persisted for years.

Sometimes consulting attorneys are invited to attend the mediation. They commonly align with their own client while adding substantially to the cost of each meeting. After several sessions consisting of one spouse stubbornly demanding a more favorable agreement, even the most experienced, celebrity mediator takes the weaker party aside in caucus and says, "Take this deal or you're going to court." Except that now there is no money left to retain a litigator.

If you have a couple that exhibits an apparent power imbalance, please urge your clients to consider an alternative to mediation known as collaborative law. It offers legal protection along with keeping the costs down in three major ways:

1. Both attorneys are focused on an equitable settlement, and they are committed to staying out of court without posturing and playing games. They will give the more controlling spouse a reality check while giving more support to the weaker spouse. They will demand full disclosure up front. They will schedule civil, productive meetings instead of mini melodramas full of *Sturm und Drang*.

2. The parties hire one neutral CPA for financial issues and business valuations. The CPA can interview the couple to make recommendations regarding the family's realistic needs balanced by an ability to pay. He or she can create a set of various options for property division for the attorneys to negotiate with their clients.

3. The couple's emotional issues and child-centered details are discussed with experienced mental health professionals at their lower hourly rates. More time can be allocated to create specific schedules to suit the needs of the children instead of cookie-cutter parenting plans. The mental health professionals can give invaluable coaching to the party who is having difficulty accepting the dissolution. This will help the attorneys move the case forward.

If you have a new couple who want to mediate only because they cannot afford litigation, or a client who is unfamiliar with the family's finances or has been walking on egg shells during the marriage, urge them to consider collaborative law.

Susan Carlisle *is a forensic accountant specializing in family law, business valuations and tax/financial planning. She is a fee arbitration panel volunteer. Her offices are located in Woodland Hills, Westwood and Pasadena. She can be reached at carlislecpa@sbcglobal.net or (818) 888-3223.*

Preparing for a Family Law Mediation

By Richard F. Sperling

MEDIATION IS UNFAMILIAR TO MANY LAWYERS and often seems risky, partly because in the mediation process, it is difficult to control a client's comments and protect a client's position. Many attorneys are more comfortable choosing litigation over consensual dispute resolution. Although litigated outcomes are unpredictable, trial is more structured, and the rules are more familiar. Family law cases can be intensely emotional, so they appear to be poor candidates for a mediated solution.

Nevertheless, clients are choosing mediation more than ever before. The growing use of mediation in divorce cases reflects today's economic realities. Clients are less able to pay attorney fees. There often is no savings account or home equity available to finance litigators and trial experts. Court budget problems have required employee furloughs and court closures; the result is degraded court access. To many disputants, trial means intolerable expense and delay. Increasingly, clients are asking their attorneys for advice about mediation. An understanding of the mediation process helps attorney to advise their clients, and it adds mediation to the tool belt of busy practitioners. This article seeks to present an overview of the modern mediation process.

Is it ethical to suggest mediation? Los Angeles County Bar Association's Litigation Guideline 11(c) provides: "In every case, counsel should consider whether the clients' interest could be adequately served…by arbitration, mediation, or other forms of alternative dispute resolution." Even litigators who have been hired because of their reputation as advocates should suggest mediation as a less expensive, lower conflict alternative to litigation. Here are some suggestions for preparing to mediate:

1. Interview Potential Mediators. Mediation begins with choosing an impartial mediator. The parties, or at least both attorneys, should be involved in the selection process from the beginning. It can be helpful to invite the party or lawyer most resistant to mediation to suggest the mediator. Mediation has a better chance of success if it is properly convened. Experienced mediators circulate a mediation agreement to protect confidentiality and arrange for payment, and most mediators invite a joint telephone call or interview to answer initial questions and address preliminary details.

When interviewing a mediator, counsel may ask how she convenes her mediations. Will the mediator provide a neutral, safe site? Experienced mediators create an environment for good talking. There should be privacy and confidentiality. Everyone must feel safe. It is helpful to have a second room available nearby, because separation of mediating clients at the right time during mediation is strategic.

Food and drink are critical in a prolonged discussion so energy does not ebb. Knowledgeable mediators arrange for refreshments throughout the process.

Will the mediator contact the parties and describe the process in advance? Will she be available to review briefs or initial statements? Will she set guidelines and an agenda at the first meeting? Will each party have an opportunity to speak at the outset of the mediation? Discussing these questions

helps make the selection process more effective. Clients who understand the mediation process are better prepared to use it successfully.

Civil cases are usually convened in "single-session" format, and the mediator may extract a commitment that the mediation session will continue until settlement or until the mediator ends the session. Family law mediations, on the other hand, usually involve highly emotional issues, and the parties may reach exhaustion in one two-hour session. Frequently, potential solutions deserve reflection. Consequently, family law mediations usually are scheduled for multiple sessions. Sessions should run at least 90 minutes so there is adequate time to talk, and they can run up to several hours, depending upon the preference of the parties.

2. Know the Mediator's Approach. While the art of mediating is unique and individual, most mediators use a combination of two approaches, and the mediator should be able to discuss and explain each. In a "facilitative" approach, the mediator facilitates discussions and negotiations by asking questions, suggesting ideas, and offering distractions, breaks, and encouragement at times of progress, agreement, and impasse. The focus of the mediator is to aid communication, correct misunderstanding, and keep the process moving forward without offering intrusive opinions or judgment.

An "evaluative" approach tends to be more formal, and tends to focus on each party's competing rights. When using this approach, mediators evaluate the strength and weaknesses of each party's case as "doses of reality" to generate flexibility. Experienced mediators can make ad hoc adjustments and use each approach optimally depending upon the needs, desires, and progress of the parties.

3. Clients Should Be Ready for "Active Listening" and "Interest-Based Negotiating." Skillful mediators use a set of skills to help clients feel they are being heard and understood. These skills include the art of restating and "reframing" what each party says. When clients feel heard and understood without reaction or devaluation, the result is a climate of compromise and agreement. At the right moment in mediation, having one participant restate the other's concerns can be ground-breaking. It can bring about a resonance between two people who have come to mediation to settle.

Clients who feel heard and understood have readiness to shift from deal-negotiating to agreement-building. As issues are discussed, skillful mediators use questions and ideas to guide negotiations so they shift from positions to interests. When a party demands that a spouse pay $10,000 per month in spousal support, the mediator might ask questions which assist in translating that statement of position to "What I need is to know I can pay my bills each month."

A mediator then will ask questions to move clients from an acknowledgement of interests to a discussion of options. When options are discussed, they become the basis of settlement. Interest-based negotiating is fundamental to moving family law cases from conflict to resolution. As veteran mediator Forrest Mosten says, a good mediator is "a professional re-stater and an option generator."

Interest-based negotiation is a transparent process. The statements of the parties are inadmissible, so attorneys can encourage the free expression of ideas and interests by their clients. Cases settle when clients are permitted to express their thoughts and feelings without limitation.

4. Attorneys Should Define Their Role Early in the Mediation. Initially, attorney approval of the mediation process can invigorate clients entering mediation. This is helpful, because at the outset, the mediator is often the only

person who believes the case will settle. Clients look to their attorneys for clues as to the value of mediating and the chance for success, so counsel can be a catalyst for movement, compromise, and agreement throughout the process. In this regard, attorneys can inform their clients that private mediators report a success rate of 80% to 90% in family law cases.

Attorneys can choose to attend the mediation, or act as consulting attorneys. In either role, they can provide information and coaching. Practically, attorneys should suspend litigation so the mediation has a chance to succeed. Attorneys should also establish communication ground rules for client/attorney/mediator telephone and email contact.

In the mediation process, attorneys can explain the law and create realistic expectations for litigated outcomes should mediation fail. They can help mediating clients by prioritizing interests before mediation. Attorneys also help the process when they arrange to hire neutral financial professionals to develop and analyze stipulated facts for discussion. This is particularly helpful because mediating clients prefer to severely limit or avoid discovery.

Most mediators establish from the outset that there is no agreement until all issues are resolved and the parties have signed an agreement which has been pre-approved by each party's counsel. Attorneys can prepare orders, stipulations, and final agreements, and most mediators prefer counsel to assume that responsibility.

5. Who "Owns" the Agreement?

Whether attorneys attend the mediation, or consult and advise as the mediation proceeds, a challenging aspect of mediation is accepting client measures of an acceptable resolution. This measure is often different from an advocate's concept of success. A true paradigm shift for counsel is called for when the terms of a mediated agreement which serves the interest of the client does not reflect the expectations of the attorney or what might have been accomplished in a "victorious" litigated case. In the end, parties become ready to settle, and they tend to choose outcomes "they can live with" without regard for whether either party won or lost. They truly "own" their agreement.

If most cases settle anyway, why use mediation? Agreements reached through a creative mediation process are more lasting, because resolution is created largely by the parties themselves. Clients who reach agreement through mediation build common interests and common ground. They avoid the damaging consequences of damning declarations and other aspects of litigation. Clients who mediate tend to successfully resolve future differences without litigation.

Understanding the mediation process helps attorneys resolve conflict, and assisting a client to reach agreement can be gratifying. In her new book *The New Lawyer: How Settlement is Transforming the Practice of Law*, author Julie Macfarlane identifies traditional "winner/loser" advocacy as a major cause of lawyer burn-out. She suggests that lawyers who add mediation and "conflict resolution advocacy" to their tool belt enjoy their work and live happier lives. And there is nothing wrong with that.

Richard F. Sperling *focuses his practice on divorce and real estate mediation and on non-litigated solutions to divorce. He teaches community property, family law, and mediation at the Southern California Institute of Law in Ventura; and Business Law at CSUN. He can be reached at richard@rfsperlinglaw.com or (818) 991-0345.*

Santa Clarita Valley Bar Association

A Networking "Open House"

BRIAN E. KOEGLE
SCVBA President

IN AN EFFORT TO REACH OUT TO LOCAL attorneys who are not yet members of the Santa Clarita Valley Bar Association, the group will be hosting its first Networking Open House on Thursday, May 20. The event, which will take place at Salt Creek Grille (24415 Town Center Drive, Valencia) beginning at 6:00 p.m., will be open to current, as well as prospective members, of the SCVBA.

Admission to the event will be free for current SCVBA members, newly-admitted members to the California State Bar (2008 or later) and for those who sign-up for SCVBA membership on the night of the event. Guests and non-members who do not elect membership will be charged a $20 admission fee. Heavy hors d'oeuvres will be served, and your first glass of house wine or beer is included in admission.

During the open networking portion of the event, attendees are encouraged to meet with their colleagues in order to learn more about their areas of legal expertise, as well as their lives outside of the legal arena. The SCVBA believes that the more familiar and comfortable members become with one another, the more frequent business referrals will become. The evening concludes with several rounds of "speed networking," where members are encouraged to continue mingling (on a much more expedited basis). Each pairing of attorneys is provided 2-3 minutes to learn more about the other attorney, his/her area(s) of practice, and the "ideal client referral."

The May Networking Open House will be the second business after-hours networking event of 2010. The previous event in January drew nearly 50 attorneys (in spite of inclement weather). Sponsorships for the event are still available, and more information can be requested by e-mailing bkoegle@pooleshaffery.com.

The SCVBA continues to provide a number of exclusive member benefits including: a discounted rate on continuing legal education programming (including hard-to-find live instruction on ethics, substance abuse prevention and elimination of bias); networking opportunities with other local attorneys and attorney-service providers; discounts on goods and services from local vendors and professionals; leadership opportunities on the Board of Directors or committees; and community involvement.

SCVBA members have already been provided the opportunity to earn one hour of Professional Ethics CLE credit in February and one hour of Substance Abuse Prevention credit in April, all while enjoying a delicious lunch or dinner at the Tournament Players Club in Valencia. In June, the SCVBA will be offering one hour of Elimination of Bias CLE credit during a lunch event at the TPC.

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

Classifieds

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

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

Valley Community Legal Foundation

Help is Needed Even in Troubled Waters

STEPHEN T. HOLZER
VCLF President

ON THE EVENING OF SATURDAY, JUNE 5, 2010, the Foundation will hold its annual Law Day Gala. Once again, we will be at the fabulous CBS Studios.

This year, the Heroes in Law Enforcement and Firefighter's Award will be given to Los Angeles County District Attorney Steve Cooley. The Award will be presented to the District Attorney by California Court of Appeal Justice Judith Ashmann-Gerst.

The Armand Arabian Law & Media Award will go to Jerrianne Hayslett, author of *Anatomy of a Trial: Public Loss, Lessons Learned from The People v. O.J. Simpson*, former public information officer of the Los Angeles Superior Court and a national speaker and writer on media in the courts.

The Masters of Ceremonies for the evening will be the famed show-business couple Shirley Jones and Marty Engels.

So the evening will be both impressive and fun. Just as importantly, attending the event will demonstrate a continued commitment to the Foundation's valuable charitable work – providing scholarships to students seeking a career in the law, providing grants to institutions doing legally-related chaitable work and enabling the Foundation to move forward in supporting projects like the Van Nuys and San Fernando Children's Waiting Rooms.

Although these are not the best of times in which to be seeking charitable contributions, the true quality of a community is judged not by how it behaves when times are good but rather by how the community helps its members when times are hard. It is in hard times that character is tested. Sacrificing a little can help others a lot.

When SFVBA members get their Gala invitation, don't just put it aside or, even worse, throw it out. Members not able to be an event sponsor should consider sponsoring a table; if unable to sponsor a table, then just buy a ticket! Every little bit will help the Valley community a lot.

The VCLF looks forward to seeing all SFVBA members at the Gala on June 5.

Calendar

Probate & Estate Planning Section
Saving the Family Homestead

MAY 11
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Obtaining Medi-Cal assistance for an older or disabled client is only half the battle. There is also the State's recovery program which can put assets, like the family home, at risk upon the death of a Medi-Cal recipient. Attorney Terry Magady will address how to respond to the State when it calls and, if appropriate, to defend and protect the family against recovery.

MEMBERS
$35 prepaid
$45 at the door

NON-MEMBERS
$45 prepaid
$55 at the door

1 MCLE HOUR

Women Lawyers Section

MAY 18
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

MEMBERS
$30 prepaid
$40 at the door

NON-MEMBERS
$40 prepaid
$50 at the door

1 MCLE HOUR

Workers' Compensation Section
Prosthetics – Iraq Technology to Help Injured Workers Here

MAY 19
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Richard Chavez of Vogue Prosthetics will review the latest concepts in upper extremity prosthetics, both body-powered and myo-electric, and discuss the new possibilities for your clients.

MEMBERS
$35 prepaid
$45 at the door

NON-MEMBERS
$45 prepaid
$55 at the door

1 MCLE HOUR

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.

Litigation Section
Obtaining Damages in Personal Injury Cases at Trial

MAY 20
6:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Plaintiff's attorney Chris Ardalan will discuss how best to present the evidence and the most effective means to employ to favorably impact the verdict for your side.

MEMBERS
$35 prepaid
$45 at the door

NON-MEMBERS
$45 prepaid
$55 at the door

1 MCLE HOUR

Santa Clarita Valley Bar Association
Networking Mixer

MAY 20
6:00 PM
SALT CREEK GRILLE
VALENCIA

Bring plenty of business cards. Includes appetizers and a beer or wine. RSVP to (661) 414-7123 or rsvp@scvbar.org.

MEMBERS
FREE

NON-MEMBERS
$20 prepaid

Family Law Section
Family Law and Probate Crossover Issues

MAY 24
5:30 PM
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorneys Caren Nielsen and John Rogers and Judge Reva Goetz will discuss cross-over issues between family law and probate, including guardianships.

MEMBERS
$45 prepaid
$55 at the door

NON-MEMBERS
$55 at the door
$65 at the door

1 MCLE HOUR

Business Law, Real Property & Bankruptcy Section
Short Sale, Foreclosure and Post Foreclosure Strategies

MAY 26
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

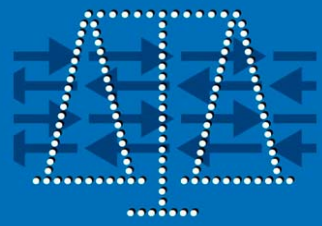
Attorneys Lou Esbin and Lewis Landau will discuss how to stop or delay a sale and what are the best post-foreclosure strategies you should use to attack the sale.

MEMBERS
$35 prepaid
$45 at the door

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

1.5 MCLE HOURS

Valley Community Legal Foundation of the SFVBA Annual Law Day Dinner



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

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

Family Law Section
Self-Defense Techniques for Lawyers

JUNE 12
1:00 PM – 3:30 PM
TARZANA KARATE STUDIO
TARZANA

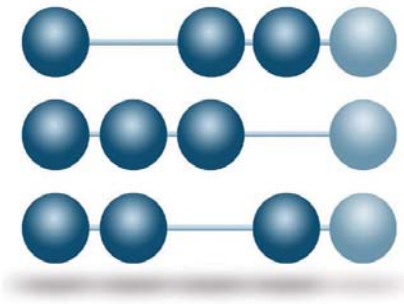
Learn how to defend and protect yourself in your office, car and on the street. The hands-on training will be taught by Grand Master Ho Sik Pak and includes a discussion about self-defense led by Gary Weyman, Irene Mak and Michelle Robins. Must RSVP by May 15.

MEMBERS
$30 includes a book showing simple self-defense techniques

SFVBA is participating in the *Food from the Bar drive* to raise funds and food for the Los Angeles Regional Foodbank.

Our efforts will help feed our hungry seniors, families and especially children at risk of going hungry during the summer months when afterschool meals are not available.

Support this drive by bringing a can or box of nutritious food to your next section meeting or at the SFVBA offices through May 14.



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