VALLEY LAWYER

FEBRUARY 2018 • $4

A Publication of the San Fernando Valley Bar Association

SFVBA Judge of the Year Elizabeth Lippitt: Blazing a Legal Trail

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On the cover: *Judge Elizabeth Lippitt*
Photo by Ron Murray

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Honoring the Honorable

ALAN E. KASSAN
SFVBA President

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AS LAWYERS, MOST OF US have spent a fair amount of time in courtrooms, but I bet most of you have never really spent much time thinking about the mechanics of the system itself.

It's amazingly large and complex. The Superior Court of Los Angeles County (LASC) maintains about 560 courtrooms in some 38 courthouses across the county, and is the largest single unified trial court in the United States, operating with a budget of $770 million and employing about 4,500 people. The court is authorized to have 580 judicial officers, but at any given time, typically has about 20 vacancies.

Within that structure, LASC currently manages some 29,000 unlimited civil lawsuits. While many cases are filed in pro per, most of those suits are filed by the 56,000-plus lawyers who practice in Los Angeles County. Contrast that with the total of 633 legal actions filed in 1880 when there were only 57 lawyers in the entire county. Things have changed dramatically over the last 137 years.

Still, the LASC has confronted more than its fair share of challenges. When the Superior and Municipal Courts were merged in 2000, the combined system had 63 courthouses. Budget cuts forced LASC to reduce that number to 38. Even worse, the Judicial Council adopted a funding formula based on filings which calculates each court's funding need. Statewide, the trial courts are funded at only 75 percent of their calculated need. As lawyers, we've all felt that pinch, and while it's natural to lay blame on the court system itself, it's legislators and regulators who are largely at fault.

Fortunately, the LASC continues to innovate and learn to do more with less and is currently in the midst of replacing all its outdated and inefficient case management systems. This will allow e-filing and paperless courtrooms, bringing efficiencies to the court and better service to attorneys and litigants. So far, the court has completed this replacement in probate, family law, small claims, limited civil and dependency and anticipates moving to the new case management system in the unlimited civil courtrooms in the summer.

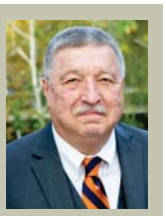
I offer this background only to underscore the debt of gratitude we owe our judicial officers. The position of judge is one that engenders respect and prestige, but it also requires an awful lot of hard work, diligence, and patience. Given the challenges of budget cuts, courtroom reductions, and increasing filings, LASC bench officers are required to handle huge dockets. Devoting appropriate time and attention to their work is a monumental task and daily calls on a reserve of intellectual and organizational discipline.

For these reasons, the SFVBA is happy to observe our annual Judges' Night Gala on February 22, 2018 at the Woodland Hills Marriott. I take this opportunity to personally thank all of our bench officers, and to congratulate the Honorable Elizabeth Ann Lippett, who we recognize as our "Judge of the Year," LASC Presiding Judge Daniel J. Buckley as our "Administration of Justice" honoree, and U.S. Bankruptcy Court Judge Geraldine Mund as our "Legacy of Justice" recipient.

Please join us on this very special evening as we honor these dedicated and committed community servants.

A Real Hoot

MICHAEL D. WHITE
SFVBA Editor



michael@sfvba.org

I'VE TALKED WITH A LOT OF people during the course of my career. It's my job. I like to think of the interviews I conduct as conversations—two way give-and-take, listening more than talking, learning about where someone comes from, what they think, how they feel, their aspirations, disappointments, proud moments, and what they personally bring to what they do. It's my job.

I have to say, when I walked into Judge Elizabeth Lippitt's chambers… well, one has certain expectations. Shelves lined with legal books, an occasional family picture, diplomas from prestigious law school and universities.

But this time, it was hardly what I expected. Preparing for her move from the Van Nuys Courthouse East to a new probate assignment in downtown Los Angeles, the judge greeted me amid stacks of books and files, a partially packed collection of Western Americana and a properly displayed Western riding saddle. It was like walking into the Gene Autry Museum of the American West.

Like I said, not what I expected and, somewhat chagrined, I told her so. Extending her hand, she at once put me at ease with a laugh, profusely apologizing for "the mess" and an approach toward what she does and how she does it that was both refreshing and welcoming.

We talked about a lot of things and her candor and forthrightness, frankly, made my job a whole lot easier than it sometimes is—her Colorado upbringing, her move West, her love of horses and "cowboy civility," her work to help victimized women who've lost their way find it again, and her devotion to the law.

> "It was like walking into the Gene Autry Museum of the American West."

I have to say, it was one of the most enjoyable conversations I've ever had and I've had a few over the years. No superficiality, no posing, no pretense. Just the real deal and spending a few minutes with the good Judge was, simply put in cowboy lingo, a real hoot.

Many thanks to attorneys Steven R. Fox and David R. Hagen for an outstanding piece on the perils of recovering legal fees from bankrupt client, and Hannah Sweiss, Chair of the SFVBA New Lawyers Section, Matthew Gurnick, Peta-Gay Gordon and Nicole Fassonaki for their contributions to this month's roundtable article on the value of more experienced lawyers mentoring newcomers to the legal profession.

All in all a good issue with hope that, as always, when you lay the issue down, you'll be better informed than you were when you picked it up.

CALENDAR

FEBRUARY 2018

SUN	MON	TUE	WED	THU	FRI	SAT
BLACK HISTORY MONTH						
				Membership & Marketing Committee **1** **6:00 PM** **SFVBA OFFICES**	2	3
4	VBN VALLEY BAR NETWORK **5** **5:30 PM** **CHABLIS RESTAURANT TARZANA**	6	7	8	9	10
11	12	Probate & Estate Planning Section **13** Foreign Beneficiaries and Foreign Assets **12:00 NOON** **MONTEREY AT ENCINO RESTAURANT** Attorney Maria Soledad-Otero will discuss decedent's estates and trusts with foreign beneficiaries and foreign assets. (1 MCLE Hour) Board of Trustees **6:00 PM** **LA FAMILY HOUSING NORTH HOLLYWOOD**	14 Happy Valentine's Day	New Lawyers Section **15** New Cannabis Laws **6:00 PM** **SFVBA OFFICES** Criminal defense attorney Doug Ridley will update the group on the recent marijuana laws legalizing the sale and distribution of cannabis. Free dinner meeting for all SFVBA new lawyers. (1 MCLE Hour)	16	17
18	19 Presidents DAY **SFVBA OFFICES CLOSED**	Taxation Law Section **20** Tax Ramifications of an Irrevocable Life Insurance Trust **12:00 NOON** **SFVBA OFFICES** Estate planning attorney Kira Masteller will discuss the income, estate and gift tax ramifications of an irrevocable life insurance trust from A-Z. (1 MCLE Hour) ARS Committee **6:00 PM** **SFVBA OFFICES**	Workers' Compensation Section **21** Joint Replacements **12:00 NOON** **MONTEREY AT ENCINO RESTAURANT** Board certified orthopedic surgeon, Dr. Keith Robertson, will update the group on artificial joint replacement. (1 MCLE Hour)	**ANNUAL JUDGES' NIGHT DINNER** THURSDAY FEBRUARY 22 WARNER CENTER MARRIOTT See page 15		
25	26	Editorial Committee **27** **12:00 NOON** **SFVBA OFFICES**	28			

WOMEN'S HISTORY MONTH

SUN	MON	TUE	WED	THU	FRI	SAT
				1 Membership & Marketing Committee 6:00 PM SFVBA OFFICES	2	3
4	**5** VBN Valley Bar Network 5:30 PM CHABLIS RESTAURANT TARZANA	6	7	8	9	10
11	12	**13** Probate & Estate Planning Section Updates and Important Cases in Conservatorship Law 12:00 NOON MONTEREY AT ENCINO RESTAURANT Join John E. Rogers and Eugene Belous for a 60 minute review of important statutory and case law developments in California conservatorship law and related fields. (1 MCLE Hour) Board of Trustees 6:00 PM SFVBA OFFICES	14	15	16	17 St. Patrick's Day
18	19	**20** Taxation Law Section International Tax Law Enforcement 12:00 NOON SFVBA OFFICES Michel Stein, Certified Specialist in Taxation Law, will provide an overview of the current international tax law enforcement and available penalty relief programs. (1 MCLE Hour) ARS Committee 6:00 PM SFVBA OFFICES	**21** Workers' Compensation Section Internal Medicine 12:00 NOON MONTEREY AT ENCINO RESTAURANT Dr. Mark Hyman, an internist with more than 20 years of experience, will bring the group up to speed on the latest developments in internal medicine as it relates to workers' compensation cases. (1 MCLE Hour)			
25	26	**27** Editorial Committee 12:00 NOON SFVBA OFFICES	28			

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Recovering Attorney's Fees in Bankruptcy

By Steven R. Fox and David R. Hagen

When a client with financial problems owes attorney's fees and is contemplating bankruptcy, the best advice for attorneys is to act quickly to figure out their options and decisively act on them. This article looks at how lawyers may get paid and what funds might have to be returned to the bankruptcy estate.

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.

YOUR CLIENT IS THE DEFENDANT IN AN ONGOING complicated breach of contract matter in the superior court. As your client has a good defense to the action, you are looking forward to trial, which is set for 30 days from now. When you were hired a few years previously, you both signed a retainer agreement that provides that monthly statements should be paid upon demand once the initial retainer is exhausted.

The retainer, though, was used up in the first six months and the client has paid on your monthly statement each month since that time. However, to prepare for trial, you have invested many additional hours working on the trial brief, studying voluminous exhibits, preparing exhibit notebooks, conducting legal research, working with witnesses, and spending money for various high tech aids at trial. You have also retained and paid jury consultants from your own funds. Your client currently owes, on a past due basis, $50,000, which compensates you for the last 60 days of your efforts.

When you call your client to encourage him to bring your billing current as you head into trial, you are informed that, with the pressure and the cost of litigation, along with other financial problems, your client may need to file for bankruptcy.

Fairly quickly, your thoughts turn to the unpaid bill, a large hit for your firm. Your client indicates that they have some but not all of the money you are due. They want to pay you what they have, but do you take the money knowing that you might eventually have to pay it back?

This article looks at how you may, or may not, get paid and what, if any, funds might have to be returned to the bankruptcy estate.

Preferential Transfers

Preference is the most common theory that trustees use to recover funds for the benefit of the bankruptcy estate and ultimately the creditors of the bankruptcy estate. Preference does not require any finding of intent or fault and on its face seems very fair. It stipulates that if some creditors get paid at the expense of other creditors immediately before a bankruptcy filing, they should have to return those funds to be shared equally among all the creditors.

Though it may sound both simple and fair, it gets complicated fast when a transfer is defined and what the look back period might be. Also there are several substantial but complicated defenses. Further, when you are the one having to return money that you earned and may have already spent, it seems like the preference statutes are exceedingly unfair.

Remember that should you receive a letter from a trustee alleging a preference or are sued for same, it does not imply that you were involved in some fraudulent scheme or in some way did something wrong. It simply means that you were paid during a time that others were not, that is right before a bankruptcy was filed.

The authority for a bankruptcy trustee to recover a "preference" is clearly laid out in 11 U.S.C. §547(b), which states that a trustee may avoid, set aside, or recover any transfer of property—including money or even a security interest—by a debtor if the following five elements are established: 1) it benefits a creditor; 2) it is made on account of a debt which is past due; 3) it is made while the debtor is insolvent;[1] 4) it is made within 90 days of the filing of the bankruptcy petition or, if the firm is an insider of the debtor,[2] made within one year of filing of the bankruptcy petition; and 5) it allows the creditor to receive more than it would have received if the debtor had filed for relief under chapter 7 liquidation, the payment of the past due monies had not been made and instead the creditor received whatever distribution the creditor would receive from the trustee. This element compares what a creditor received from the debtor—the $50,000—with what the creditor would have received instead through a hypothetical liquidation.

The trustee has the burden, based upon a preponderance of the evidence, to establish each of those five elements in an action to recover a preferential transfer. Because the trustee carries the burden of proof for each elements, the lack of any element presents a potential defense. A detailed look at each of the five elements follows.

1. **Are you a creditor?** This element is usually easy to establish.

2. **Is the debt an antecedent or past due debt?** The bankruptcy court would look to the practices of the debtor and your firm. What payment arrangements did the retainer agreement require (e.g., due upon receipt, in 30 days, quarterly, etc.)? When exactly were payments actually made? What were the parties'

Steven R. Fox is the principal of the Fox Law Corporation in Encino. Fox limits his practice to bankruptcy matters, in particular, Chapter 11 reorganization. He can be reached at srfox@foxlaw.com. **David R. Hagen** has practiced in the area of bankruptcy law since 1988. His firm, Merritt & Hagen, is based in Woodland Hills. He can be reached at drh@forbankruptcy.com.

SAN FERNANDO VALLEY BAR ASSOCIATION

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practices and actual history? For example, it would not be helpful if the debtor's records contain emails from the firm reminding the debtor that it owes money on a past due basis.

3. **Made while the debtor is insolvent**.[3] Generally speaking, a debtor is insolvent when the sum of the debtor's debts is greater than all of debtor's property at a fair valuation. This is an accounting analysis. Usually there isn't a great deal of dispute on the amount of debt. Rather, the dispute usually involves the nature and value of assets, e.g., intellectual property. Litigating disputes such as this can be costly, but should not be minimized for analytical purposes.

4. **Made within 90 days of the filing of the bankruptcy petition or if the firm is an insider of the debtor, made within one year of filing of the bankruptcy petition.** An insider is someone with a relation to the debtor, e.g., a managing member, an officer, director, person in control, an actual relation when the debtor is an individual. Thus, absent insider status, the 90 day look-back period applies to all transfers a debtor makes. Of course, the converse of this provides a valuable defense. That is, a payment made by check or electronic transfer, which clears the debtor's bank account 91 days prior to the bankruptcy filing date, cannot be considered a recoverable preference.

Many times the date of a bankruptcy filing is one of the few things that a debtor can control, especially a debtor, or client, who is grateful for your work on their behalf and wants you to keep what you have been paid. In the above example, the attorney would have no concern for the return of any payments made more than 90 days prior to the bankruptcy filing. This would include the initial retainer as well as all other monthly payments, even if late, made outside the preference period.

5. **Did the law firm receive more than it would have received had the transfer not occurred and instead, the law firm was paid by a trustee after the trustee had liquidated the debtor's assets?** In easily 97 percent of all Chapter 7 bankruptcy cases filed, there are no distributions for creditors. In the remaining few, some small distribution may occur. Thus, it is usually easy for a trustee to show that a creditor received more than they would have received in the bankruptcy liquidation. This also usually involves an accounting. Litigating disputes such as this can be costly, but should not be minimized for analytical and potential settlement purposes.

> "A bankruptcy filing is one of the few things a client can control, especially a debtor or client who is grateful for your work…"

Assuming that the trustee has at least colorable claims as to the five elements, there are still defenses to a preference claim contained in the Bankruptcy Code and ultimately practical realities that can also serve as defenses. Here are three commonly asserted defenses:

1. **Contemporaneous Exchange.** Did the debtor and the law firm intend that the transfer be contemporaneous, for new value which the debtor actually received and were the transfers in fact substantially contemporaneous? Under the facts present here, this defense likely would not apply.[4]

2. **Ordinary Course.** This defense looks at the parties' ordinary or routine course of dealings, or that of the applicable industry. If, during the ordinary course of business between the client and your firm, payments would be received late, or you can show that in the legal profession, regarding disputes such as this, payments are frequently made periodically or late. Thus, if the client always paid 60–90 days late, ordinary course might be a valuable defense. Unfortunately, in the facts above, this would not be a viable defense as payments were pretty much made on time. However, if we skewed the facts a bit and two or three times over the course of the representation the client became 60–90 days late and then paid, this defense might have some strength.[5]

3. **New Value.** This defense acknowledges that a preferential transfer occurred, but recognized that after the transfer occurred, the law firm performed additional work for which it was not paid. As an example, the law firm received the five payments totaling $50,000, a preference, but then provided $22,000 in legal services for which it was not paid. The amount of the actual preference is reduced from $50,000 to $28,000. This defense has some value because if the amount of the likely preference is reduced enough, so too is the possibility of a preferential transfer lawsuit against the law firm.[6]

As a practical matter, a bankruptcy trustee will look at any and all transfers in the 90 days prior to a bankruptcy

filing. The trustee will review all bank statements with, initially, all payments during the preference period considered preferential. If they cannot identify a payment, or see a clear defense, they will send out a demand letter, usually with a high suggested settlement amount. It is then incumbent upon the preference recipient to point out the lack of one of the five elements, or one of the defenses, to the alleged preference claim. Do not ignore those letters as a lawsuit may result. Before sending any funds, conduct an analysis of the payment history and see what can be done to create a viable defense.

If a trustee sees and understands the whole picture and any potential weakness to a claim, they will negotiate. Keep in mind that to enforce their claim, the trustee will need to file a costly adversary proceeding in bankruptcy court. As with any settlement discussion, a quick payment is always preferable, but it needs to bear some relation to the strengths and weakness of the claim. The court will have to approve any settlement.

What about a client wanting to pay on an old invoice on the eve of trial or even when they are discussing a potential bankruptcy? We advise: Take the money. As stated previously, accepting a colorable preferential transfer does not mean you did anything wrong. It just means that you got paid before a bankruptcy when others did not. If there is any suspicion that a payment might later be claimed to a preference, put it aside in a separate account and don't spend it. Conduct an account analysis and have your arguments ready to go. The statute of limitations usually is two years from the date of the bankruptcy filing. The trustee must file an action to recover preferences within two years of the bankruptcy filing.[7]

Some Alternative Strategies for Payment of Fees and Costs

If you cannot be paid pre-bankruptcy, there are other possible means to secure payment:

- Take a security interest in property which is not the property of the bankruptcy estate. Taking security in non-estate property is not a preference or a fraudulent conveyance as to the estate so long as the security interest does not touch asset estates. For example, suppose the client balks at granting a security interest. Consider an arrangement where a third-party gives the law firm a deed of trust ready for recording against property, which is owned by another and recorded only if the client files a bankruptcy petition.

- Take guarantees from non-debtors. If done properly, they would not be preferential as to the debtor.

- Ask the bankruptcy court to approve a reaffirmation agreement with the debtor. The steps to obtain this agreement are cumbersome and the law firm will need to employ bankruptcy counsel.

  A debt which would otherwise be dischargeable can survive the discharge if the reaffirmation agreement is made in a timely fashion; the debtor timely receives certain disclosures; and the agreement is filed with the court, accompanied by a declaration of an attorney making certain required statements.[8] The virtue of a reaffirmed debt is that it will be one of few debts to survive the bankruptcy case. A downside: the law firm may have to concede a term, e.g., the principal amount, or the interest rate, to induce a debtor to enter into a reaffirmation agreement.

  The Bankruptcy Code desires that discharged debts not be collected ... unless as part of a court approved scheme as laid out in §524(c) and (d). Despite this, nothing can prevent a debtor from voluntarily repaying a pre-bankruptcy claim.[9] There is no legal requirement to repay a debt and the Code permits repayment in a debtor's sole discretion. A payment by a debtor after filing a bankruptcy case will not revive a debt, regardless of any law to the contrary. From the law firm's perspective, hoping that a debtor will pay its bill after a bankruptcy would be a poor business practice.

- Consider a post-bankruptcy agreement. A debtor, following his discharge, may need to retain the law firm again. Perhaps trial in the state court is quickly approaching and the debtor needs the law firm. If so, they can enter into a post-bankruptcy agreement, which is not a reaffirmation agreement, but where the law firm agrees to continue representing the debtor in exchange for agreeing to pay the $50,000 despite the discharge. The law firm must offer some valuable consideration, e.g. providing legal services, a lower hourly charge, or a reduced retainer. These post-bankruptcy agreements are tricky and can often fail. There is considerable case authority stating that these debts can survive a bankruptcy filing only through the reaffirmation process. There are a small number of bankruptcy cases which validate the post-bankruptcy agreement. These few cases have some things in common—the debtor entered into the agreement without pressure or coercion and on his own volition;[10] the creditor extended new value to the debtor;[11] and the subsequent agreement was considered a novation.[12]

- Consider getting employed by the bankruptcy estate as special counsel to litigate the state court litigation. You

are not required under the statute to waive your debt as a condition of being employed as special counsel.

If the law firm has special expertise or knowledge, that may improve the chance of prevailing at the trial, then not only can the law firm earn fees moving forward but it is also enhancing the chance that monies will be recovered and some or all of the law firm's pre-bankruptcy claim will be paid.[13]

Unfriendly Tactics When Relations with the Client Turn Sour

The amount of money previously considered was $50,000. The tactics discussed below will probably be too expensive for a debt of that size, so assume here that the amount of money at stake is much higher and that the debtor can actually pay.

The law firm can attempt to block the discharge of the unpaid fees but this can be very difficult. First, there are ethical issues and the questions of attorney client privilege. Second, to block the discharge of this specific debt, the law firm would typically argue that it was defrauded. That, however, is a difficult standard.[14]

As a result, law firms should usually try to block the discharge of all debts, not just the law firm's. First, an objection to the discharge of all debts is to be literally and strictly construed against the party objecting and it is to be liberally construed in the debtor's favor.[15] To deny the discharge, the court must find "specific and serious infractions."[16]

Despite this, the standard is not that difficult. For example, U.S.C 11 §727(a)(2) provides that a discharge can be denied where a debtor—acting with intent to hinder, delay or defraud a creditor or the estate has transferred or concealed property—or has permitted these acts to occur—in the year before the bankruptcy case began or after the bankruptcy petition is filed. One may establish intent by circumstantial evidence, or from inferences.[17] Public records can be searched to find any transfers, while independent discovery can be utilized to locate other transferred property.[18]

U.S.C. 11 §727(a)(3) provides for the denial of a discharge where the debtor does not keep or preserve recorded information from which his financial condition or business transactions might be ascertained. It requires that a debtor correctly present his financial affairs.[19] The standard does not require "absolute completeness," but the evidence must be reasonably sufficient for creditors to ascertain a debtor's present financial condition and also to trace his condition for some period into his past.[20] There is no set standard as to what information is required. It is a flexible standard based on the facts.[21] The law firm may

believe there is a lack of recorded information such that the discharge of all debts, including the law firm's debt, can be blocked.[22]

Under §727(a)(4), a debtor's discharge will be denied if it is proven that the debtor made a statement under oath which was false; the debtor made the statement knowing it was false; the debtor made the statement with fraudulent intent; and the statement had a material relationship to the bankruptcy case.[23]

Other Grounds to Block the Discharge of Debts

On occasion, the law firm may have non-confidential information about the client which can be passed on to a trustee. Trustees may or may not take action to block the discharge of all debts, but if the information provided leads to the discovery of hidden assets, then the law firm's claim may be paid in part or in whole.

The law firm may also develop non-confidential information enabling the law firm to file a motion to dismiss the bankruptcy case. If the case is dismissed, then there is no discharge of the law firm's debt.

The standards for dismissal are different depending on which chapter the debtor has chosen.

Chapter 7

This chapter has complicated and detailed dismissal requirements for a debtor whose debts are primarily consumer in nature.[24] Chapter 7 also provides that a case may be dismissed for cause—any reason under equity that acts as an abuse of the bankruptcy system.[25] In what may be an extreme example, the Seventh Circuit recently upheld the dismissal of a Chapter 7 case on the ground that the debtors had refused pre-bankruptcy to pay down their debts while enjoying a somewhat extravagant lifestyle.[26]

Chapter 11

The applicable statute requires that the court dismiss or convert a chapter case if good cause is shown unless the court identifies unusual circumstances establishing that dismissal or conversion is not in everyone's best interest. Cause includes, but is not limited to, ongoing losses, gross mismanagement, and failure to obey court orders.[27]

Chapter 13

The court may also dismiss a Chapter 13 case for cause. Cause includes, but is not limited to, a debtor's unreasonable delay which is prejudicial to creditors, failure to timely file a plan and failure to timely make payments under the plan.[28]

When found in the position of being owed a lot of money and a looming bankruptcy, the best advice is to act quickly to figure out all your options and decisively act on them.

[1] Defined at 11 U.S.C. §101(32).
[2] Defined at 11 U.S.C. §101(31).
[3] Defined at 11 U.S.C. §101(32).
[4] 11 U.S.C. §547(c).
[5] *Id.*
[6] *Id.*
[7] 11 U.S.C. §546(a) (1) and (2).
[8] 11 U.S.C. §524(c).
[9] 11 U.S.C. 524(f).
[10] *Mickens v. Waynesboro Dupont Employees Credit Union, Inc.* (*In re Mickens*), 229 B.R. 114 (Bankr. W.D. Va. 1999).
[11] *Watson v. Shandell* (*In re Watson*), 192 B.R. 739, 743-745 (9th Cir. BAP 1996).
[12] *Shields v. Stangler* (*In re Stangler*), 186 B.R. 460, 463 (1995).
[13] 11 U.S.C. §327 e).
[14] 11 U.S.C. §523 (a)(2) and (6).
[15] *Lansdowne v. Cox* (*In re Cox*), 41 F.3d 1294, 1297 (9th Cir 1986).
[16] *Martin Marietta Materials Southwest, Inc. v. Lee* (*In re Lee*), 309 B.R. 468, 476 (Bankr. W.D. Tex. 2004).
[17] *First Beverly Bank v. Adeeb* (*In re Adeeb*), 787 F.2d 1339, 1343 (9th Cir. 1986); *Wolkowitz v. Beverly* (*In re Beverly*), 374 B.R. 221, 243 (9th Cir. BAP 2007).
[18] Fed. Rules of Bk. Proc. Rule 2004.
[19] *Caneva v. Sun Communities Operating Ltd. P'ship* (*In re Caneva*), 550 F. 3d 755, 761 (9th Cir. 2008).
[20] *Id.*
[21] *U.S. Trustee v. Hong Minh Tran* (*In re Hong Minh Tran*), 464 B.R. 885, 893 (Bankr. S.D. Cal 2012).
[22] See generally *Hussain v. Malik* (*In re Hussain*), 508 B.R. 417 (9th Cir. B.A.P. 2014).
[23] *Stanley v. Hoblitzell* (*In re Hoblitzell*), 223 B.R. 211, 215 (Bankr. E.D. Cal 1998).
[24] 11 U.S.C. §707 (b).
[25] *In re Victory Constr. Co, Inc.*, 9 B.R. 549, 558-560 (Bankr. C.D. Cal 1981) (chapter 11 case).
[26] *In re Schwartz*, 799 F. 3d 760 (7th Cir. 2015).
[27] 11 U.S.C. §1112.
[28] 11 U.S.C. §1307.

Test No. 112

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. For a transfer to be found to be a preferential transfer under the Bankruptcy Code, five elements must be met, including that the recipient must be a creditor.
❑ True ❑ False

2. For a transfer to be found to be a preferential transfer, one element is that the transfer may occur when a debtor is solvent or insolvent.
❑ True ❑ False

3. For a transfer to be found to be a preferential transfer, it must be shown that the recipient creditor received less than it would have received if the debtor had not made the payment.
❑ True ❑ False

4. One common defense to a claim that a creditor received a preferential transfer is to assert that the debt is not an antecedent debt but instead was made in the normal practice of the debtor and the creditor.
❑ True ❑ False

5. The 90 day reach back requirement, as part of a claim for a preferential transfer, applies only to insiders.
❑ True ❑ False

6. If the parties intended the transfer to be contemporaneous, that is sufficient to meet the requirements of this contemporaneous exchange defense.
❑ True ❑ False

7. The new value defense requires that not only did a preferential transfer occur but following the preferential transfer, the law firm actually gave new value for which it was paid.
❑ True ❑ False

8. A good strategy when a trustee demands the return of the alleged preferential transfer is to do nothing. Trustees typically just go away and do nothing.
❑ True ❑ False

9. One way to encourage payment despite the bankruptcy discharge is to ask for and to take security in property which is not property of the estate.
❑ True ❑ False

10. Guarantees from non-debtors would be another way to increase the likelihood of being paid.
❑ True ❑ False

11. One alternative to receiving a transfer or payment pre-bankruptcy is to ask the debtor to reaffirm the unpaid bill.
❑ True ❑ False

12. A reaffirmed debt is one which could be discharged but the debtor agrees to reaffirm it through a specific process provided for by the Bankruptcy Code.
❑ True ❑ False

13. The reaffirmation agreement may be entered into by the debtor after the court grants the discharge to the debtor.
❑ True ❑ False

14. The parties do not need to file the reaffirmation agreement with the bankruptcy court.
❑ True ❑ False

15. A post-bankruptcy agreement, done outside the reaffirmation process, will be effective even if no new consideration is offered by the law firm to the debtor.
❑ True ❑ False

16. A discharge of debts may be denied if a debtor acts with intent to hinder, delay or defraud a creditor, has transferred or concealed property in the one year before the bankruptcy case was filed or in the one year after the petition is filed.
❑ True ❑ False

17. A discharge may not be denied simply because a debtor does not keep or preserve recorded information from which his financial condition or business transactions might be ascertained.
❑ True ❑ False

18. A discharge may be denied if a debtor made a statement under oath which was false; the debtor made the statement knowing it was false; the debtor made the statement with fraudulent intent; and the statement had a material relationship to the bankruptcy case.
❑ True ❑ False

19. A chapter 13 case may be dismissed for various reasons, including a debtor's unreasonable delay.
❑ True ❑ False

20. If a debtor offers to pay your bill in the 90 days before the debtor files his/her bankruptcy petition, do not take the money.
❑ True ❑ False

MCLE Answer Sheet No. 112

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 $20 testing fee for SFVBA members (or $30 for non-SFVBA members) to:**

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

METHOD OF PAYMENT:

❐ **Check or money order payable to "SFVBA"**
❐ **Please charge my credit card for $_____.**

_____
Credit Card Number **Exp. Date**

_____
Authorized Signature

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

Name_____
Law Firm/Organization_____
_____
Address_____
City_____
State/Zip_____
Email_____
Phone_____
State Bar No._____

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

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

SFVBA Judge of the Year Elizabeth Lippitt: Blazing a Legal Trail

By Michael D. White

SFVBA Judge of the Year Elizabeth Lippitt has invested the last three decades in administering her unique brand of fairness and cowgirl justice, both before and from the bench, traveling an evolving path that's stretched from Colorado to the Los Angeles Superior Court.

Photos by Ron Murray

IT'S A LONG, LONG TRAIL FROM Denver to Los Angeles, but it's one that Los Angeles Superior Court Judge Elizabeth Lippitt took with no regrets.

Work experience gained in the Denver District Attorney's office, a "big blue-chip law firm," and a semester abroad in Austria while studying at the University of Denver Law School cemented her decision to make the law her career, but not in Colorado where she found the chances of getting a job "pretty bleak" because of the economic downturn.

The chances of a position at the Denver DA's office evaporated when she was told that the office couldn't hire her because budget cuts were forcing the layoff of two attorneys. But Lippitt was told that she would be given a glowing reference and—taking the advice of one of her law school professors that if she was serious about making the law my career—she'd either have to move east to New York City or west to Los Angeles to gain the kind of experience she was looking for. Reference in hand, she chose the latter.

Despite a job offer from OPEC during her law school semester abroad in 1986, she moved west to California to take a job as an Assistant District Attorney in Los Angeles, where she spent a decade handling criminal serious felony, misdemeanor trials, and preliminary hearings.

"The Los Angeles District Attorney's Office is a great place that handles virtually every kind of case you can think of: bank fraud, sex crimes, insurance scams, you name it. Working in the DA's office seemed to be a natural fit for me, helping the victim, and sometimes, even the defendants need help. It wasn't always black and white, and just because someone was charged, it didn't mean they were good for it. Things go on out there that call for you to be part detective."

After a decade with the Los Angeles District Attorney's Office handling a broad range of felonies, Judge Lippitt was appointed to the Los Angeles Municipal Court in 1997, and three years later, elevated to the Los Angeles Superior Court, where she has served for the past 17 years. At the time of her appointment, Lippitt had tried to verdict close to 100 felony jury trials as a criminal trial attorney, specializing in sex crimes, domestic violence and related homicides.

> "Politics aside, the law, in a way, does evolve as we learn more about what affects people."

Before her recent move to the downtown Probate Division, Lippitt sat in Dept. W at the Van Nuys East Courthouse, the second busiest courthouse in Los Angeles County. She is also active in Teen Court and SHADES, a Teen Court program that handles incidents and crimes related to hate, bias and bullying among youth.

Hooked on the Western Lifestyle

Her move to California offered a chance to give rein to her "inner cowgirl." With maternal relatives ranching near Fresno, she found the perfect opportunity to give rein to what had been a dream since early childhood.

"I've been a cowgirl from the minute I could walk," says Lippitt, a mother of two adult sons. "My family near Fresno had horses and a lot of land and I had to work with the farrier and the vet and all of that. I found I was as hooked to the lifestyle as I was to the law."

Membership in the Cowboy Lawyers Association and taking care of her horse keeps her interest in the western lifestyle alive and offers her the chance to relax and deal with the "hecticness" of commuting in a busy city and an often "crazy court calendar."

"Sometimes I miss the slower pace of life in Colorado," says Lippitt. "Denver, by comparison to Los Angeles, is a small town, but I love where I live in a very rural part of Los Angeles County. When I get home, I'm surrounded by mountains, so, in some ways, I feel like I'm back in Colorado. I've got my horse a mile away and I get my serenity there. I've had a lot of opportunity I wouldn't have had elsewhere. All in all, Los Angeles has been very good to me. Here, I've been able to evolve as my own person, rather than be stereotyped somewhere else."

Evolving Times

That evolution involved seeing the application of the law change as societal attitudes have changed and a different approach to some weighty problems.

"Over the years," she says, "a lot of prostitution cases have come through here and my way to help was, instead of giving the mandatory 30- or

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60-day sentence depending on how many times the person had been arrested, I would stay the sentence if they went out and got ten legitimate job contacts and knocked off 15 days of community service. If they went back for a job interview, I'd knock off another 10 days. By then they could hopefully get a job and off the street."

Lippitt's approach was validated when a young woman walked into her courtroom with a little girl in hand. "I recognized her, but wasn't quite sure from where or when. The clerk told me that she had been one of our cases and had come in to say 'thank you' to tell me that she'd straightened her life out, was off drugs, had a good job, and got her child back. That was a good day."

The City Attorney's office at the time "wanted jail time for those women," she says. "Now we fortunately live in a different time with a different culture, with a variety of programs to help them out of that lifestyle. They are now officially recognized as victims. That's a big difference."

Another area of evolution, one that influenced her decision to become a judge, is the increasing use of mediation to resolve civil differences.

"When I was in the DA's office, I realized that not all cases could be heard…we could never hear them all. There just aren't enough courthouses, staff, judges and lawyers. It made a lot more sense to me to try to mediate and have people work things out rather than litigate. I felt I'd have more of an opportunity to do that on the bench.

"We live in a culture of litigation," she says. "People are inclined to think that 'I'm going to go to court and kill it in there. I want 100 percent or nothing.' But the truth is that even in the best case scenario, you're never going to get exactly what you want. Go to Vegas and you're lucky if

U.S. Bankruptcy Judge **Geraldine Mund**

Stanley Mosk Legacy of Justice Award

BANKRUPTCY JUDGE GERALDINE MUND is the recipient of this year's Stanley Mosk legacy of Justice Award. Past recipients include U.S. Court of Appeals Judge Harry Pregerson, U.S. Bankruptcy Judge Barry Russell, Workers' Comp Appeals Board Judge Jerold Cohn, Neighborhood Legal Services Executive Director Neal Dudovitz, and Superior Court Judges Michael Nash, Morton Rochman and Thomas Trent Lewis.

"Justice Stanley Mosk had a career that every lawyer and judge can hope to emulate," says Judge Mund. "But most of us fail to accomplish even a small iota of what he did. My claim to fame is that I was the 'first woman' to do many things. But that is a matter of timing since only one person can be first."

A native of Southern California, Mund played basketball at Brandeis University and earned a master's degree at Smith College in physical education before becoming coordinator of the intramural sports program at UC Santa Barbara. She also holds a master's degree in history from California State University, Northridge.

After studying law at night at Loyola University, she was admitted to the Bar in 1977 and joined the Beverly Hills law firm of Frandzel & Share, where she practiced as a partner for seven years.

She served as Chief Judge of the Bankruptcy Court, Central District of California, from 1997 to 2002 and was appointed as a Recalled Bankruptcy Judge in February 2011 and reappointed as a Recalled Bankruptcy Judge in January of 2012 and 2015.

Mund has been honored with a number of awards from the Central District Consumer Bankruptcy Attorneys Association, American Bankruptcy Law Journal, and the Loyola Law School, Board of Governor's Award. In 1999, she was named Judge of the Year by the San Fernando Valley Bar Association.

"Bankruptcy professionals, and likely pro se parties as well, appreciate appearing at the San Fernando Valley Division of the Bankruptcy Court, and that is due in large part to Judge Mund," says SFVBA President Elect Yi Sun Kim, who practices in the area of bankruptcy. "Each person immediately feels the level of respect and courtesy in that courtroom. She maintains a sense of compassion for those suffering from economic hardship, with an understanding of other parties whose rights and interests are being impacted."

Mund is affiliated with several professional and community organizations, including the National Conference of Bankruptcy Judges, the Ninth Judicial Circuit Historical Society, the Ninth Circuit Conference of Chief Bankruptcy Judges, and Temple Israel of Hollywood.

A prolific writer, Mund has contributed over the years to a numerous legal journals, including the American Bankruptcy Institute Law Review and the American Bankruptcy Law Journal.

"To be chosen to receive this award is humbling, but uplifting" she says. "It is one of the highlights of my legal career, made even more so because it is being presented on behalf of the attorneys who have appeared before me."

"Judge Mund exercises a particularly pragmatic approach to the bench, striving to find the most practical, fair and efficient resolution, while verifying that each action fully complies with the law," reveals Kim. "It is that special combination of skills and sensibility from which she built her legacy, and for which we honor her at Judges' Night."

Presiding Judge
Daniel J. Buckley
Administration of Justice Award

RECIPIENT OF THIS YEAR'S SAN Fernando Valley Bar Association Administration of Justice Award is Los Angeles Superior Court Presiding Judge Daniel J. Buckley. Past recipients of the award include Superior Court Judges Mary Thornton House, Randy Rhodes and James Steele.

"I am so honored and humbled to receive the Administration of Justice Award. I look at the other recipients and keep shaking my head with wonderment that I am included in that remarkable group," says Judge Buckley.

The San Fernando Bar Association, he says, "is a beacon in our legal community, with its vast contributions to the court, attorneys and litigants. The Association clearly helps attorneys develop and improve their practice, but every day I also see the positive impact on our court from the services and programs of the Association. I will be accepting this award from your Association with deep pride."

Judge Buckley was appointed to the bench by California Gov. Gray Davis and took his oath on May 3, 2002. Prior to becoming Presiding Judge of the Los Angeles Superior Court in January of 2017, Judge Buckley had served for two years as the Assistant Presiding Judge of the court and as Supervising Judge of the civil departments and managed all civil cases in the county's courthouses.

Previously, Judge Buckley sat in the Pomona courthouse, where he served as the Supervising Judge of the East District, and has more than 15 years' experience in criminal, limited and general jurisdiction civil, and probate courts. Judge Buckley chairs the Technology Committee and is actively involved in the court's efforts to improve its technology.

"Judge Buckley is a gift to the Los Angeles Superior Court. He is organized, innovative, positive, and approachable," observes SFVBA President Alan Kassan. "I didn't realize this until recently, but the LASC is the largest unified court system in America. Supervising it can be no easy task, especially with all the recent budget slashing. Still, Judge Buckley handles the job with impressive skill and poise. Under his supervision, LASC ranks as one of the best court systems in our nation."

Buckley has been an adjunct professor at the University of Southern California's Gould School of Law, Loyola Law School, and Southwestern Law School, and an instructor at Notre Dame Law School. He has taught many judicial education classes on evidence, ethics, technology and new judges' orientation.

He earned both his Doctor of Laws and Bachelor of Arts degrees from the University of Notre Dame and was admitted to the California Bar in 1980. Judge Buckley was a partner at Breidenbach, Buckley, Hutching, Halm & Hamblet, where he worked from 1980 to 2002, and served as managing partner for seven years. He is a member of the American Board of Trial Attorneys.

"While serving as Presiding Judge, I sincerely view this award as a recognition of the phenomenal work being done by all our judicial officers. During times of financial cuts and reduced resources, our judicial officers continue to serve the public with undying dedication and compassion," says Judge Buckley. "Thank you for recognizing all the judicial officers of the Los Angeles Superior Court."

you walk out with enough to cover your gas. Litigation is terribly stressful and it can go on for years. Having it put to bed once and for all, while saving a lot of money and stress, is so much more appealing."

The point, she says, "is to try to change the culture. As soon as I get a case coming through here, I'll ask if the parties are up for mediation and explain the process. I make it clear that in either a jury or court trial, you won't have much say in the matter. In a mediation, you may not get everything you want, but you'll be able to have a lot of input, so you can walk away from the table with more than would otherwise."

Civil court "offers a lot of opportunities to work on one's mediation skills," says Lippitt, who will soon be serving a second tour teaching mediation techniques to neophyte judges at the National Judicial College in Reno, Nevada.

"Politics aside, the law in a way does evolve as we learn more about what affects people. Various technologies, particularly the scientific advances with DNA, have had a tremendous impact on how the law is administered," says Lippitt. "Back in the day, it took months and months to get DNA results. Now it can be had in a few weeks, with the list of cold cases being reduced significantly as a result."

One of the last cases she tried before moving to civil involved the kidnapping at gunpoint and sexual assault of a young boy, one in which DNA played a major role in getting a child molester off the streets and sent to prison.

"An initial DNA test didn't match with anybody in the system," she recalls. "A couple of years later, though, there was a robbery in Sacramento; the perpetrator was convicted and his DNA was matched to the earlier child molestation case and justice was done. That to me was a tremendous improvement in the way we do business."

Photo provided by Elizabeth Lippitt

But there was a toll to be paid. "I've seen some tough cases," she says, referring to a Marine veteran who'd served a pair of combat tours in Iraq.

"He returned home only to be shot in the face as he walked across the street to a 7-11 convenience store. He survived only to have the mentality of a five or six year old," says Lippitt. "Some of my colleagues have the ability to leave it at the office, but cases like that really started to get to me and I had to make the switch to civil law."

People, she says, "have no idea what I do for a living. When I'm asked, I usually say I'm in counseling or mediation. That really helps with my being able to separate the two."

Her advice to new lawyers?

"Maintain a respect for the law and the process," says Lippitt. "Remember that a good reputation is a gold standard in this business, particularly if you're in litigation and going to court. Litigation is tough enough. Be professional and courteous, particularly to staff, opposing counsel and the bench."

By David G. Jones

Sexual Harassment and Confidentiality Agreements

THERE IS AN ONGOING WELL publicized explosion of sexual harassment claims and a fervent discussion of the implications of those claims on society as well as our legal system. From Harvey Weinstein[1] and a cast of dozens in the entertainment and news sectors, to John Conyers[2] and several other members of—and candidates for—the U.S. Congress, these powerful leaders have been accused of varying degrees of sexual misconduct, ultimately resulting in settlements which included confidentiality agreements.

The public reaction to such claims has placed new emphasis upon strengthening existing sexual harassment laws and new scrutiny upon the wisdom of enforcing full confidentiality agreements, which prevent the victim from speaking publicly about the identity of their alleged harasser and the nature and details of the conduct at issue.

Society and the Legal System Enforcement

For decades, society, courts and lawmakers have accepted the difficult tradeoff of the use of confidentiality agreements in sexual harassment cases as a mechanism by which both sides could efficiently resolve their differences without airing them in a public forum.

From the inception of modern sexual harassment laws,[3] parties have sought a vehicle to allow for maximum compensation for victims while providing incentive for alleged wrongdoers and their companies to confidentially move on from the alleged transgressions, with less damage to their finances and company reputations. Such clauses also allow the closure needed by each side, which in turn allows the parties to move on from the dispute.

The result has been an ever-changing and more complex version of confidentiality clauses—also occasionally referred to as non-disclosure (or NDA) agreements—which are included in settlement agreements that resolve sexual misconduct claims in the workplace.

These confidentiality clauses typically prohibit the disclosure of key facts involving the identity of the parties, settlement amounts, and details of the alleged misconduct to the extent it is not public record through the filing of a complaint. While these confidentiality agreements have proved useful between litigants, the more recent concern raised has highlighted the interests of other employees in the workplace and the public in having a right to know the identities of alleged harassers for purposes of prevention and also as a means to allow the public to pressure companies who, in theory, shield the accused harassers from public scrutiny.

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As advocates, a professional obligation remains for lawyers to achieve the best possible result for clients, with ethical considerations governing such advocacy. While lawyers representing companies may have personal opinions concerning confidentiality clauses in these contexts, the conflict between the public need for transparency and lawyers' obligations to serve their clients' needs remains a difficult conflict.

Further, legitimate arguments exist that weakening or eliminating confidentiality for sexual harassment claims would have an impact on victims as well. Removal of that option would certainly eliminate a portion of the leverage required to extract fair compensation for claims, as payments would likely diminish without the promise of secrecy. Confidentiality also prevents alleged harassers from smearing victims and mischaracterizing the allegations against them in their attempts to discredit their accusers.

The other concerns raised by many victim advocates and the media—that serial harassers be allowed to continue their misconduct without being checked—has proved to be a clearer example of where lawyers must, in advising clients to follow the law, take all reasonable steps to prevent ongoing harassment or face escalating consequences. Under the California Fair Housing & Employment Act, it is unlawful "[f]or an employer … to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."[4] The example of Fox News, in particular the alleged claims related to Roger Ailes[5] and Bill O'Reilly,[6] provide a stark example of the potential consequences of covering up alleged sexual misconduct.

A one-time incident sexual harassment involving a single employee can often be resolved at a reasonable level, taking into account lost wages, emotional distress and reputational damages. But any concealment and failure of the employer to address and prevent future harassment can exponentially increase the risk and settlement value of cases that follow.

Changing Laws in Response to Public Concerns

California, among other states, has taken a leading role in addressing concerns about the purpose and enforceability of nondisclosure agreements involving sexual harassment claims.[7] A decade ago, the California State Legislature changed the law to bar non-disclosure agreements in settlements of certain serious sexual abuse claims. The Legislature expanded it in 2016 to cover other types of claims with the passage of AB 1682.

More recently, California State Senator Connie M. Leyva (D-Chino) announced in October that—when the California State Senate reconvenes in early January—she will introduce legislation to ban secret settlements (i.e., confidentiality provisions in settlement agreements) in sexual assault, sexual harassment, and sex discrimination cases.[8]

"Secret settlements in sexual assault and related cases can jeopardize the public—including other potential victims—and allow perpetrators to escape justice just because they have the money to pay the cost of the settlements," said Senator Leyva. "This bill will ensure that sexual predators can be held accountable for their actions and ideally prevent them from victimizing others. As the vice chair of the California Legislative Women's Caucus, I look forward to working with my colleagues so that we can ensure that paths to justice are not closed for victims that have been robbed of their sense of safety by perpetrators. These secret settlements in workplace and other settings can ultimately endanger the public by hiding sexual predators from law enforcement and the public."[9]

This proposed legislation follows closely on the heels of a new state law passed in late September of 2016, dealing with a closely related topic. In 2016, California became one of the first states to declare, through legislation, that certain confidentiality agreements involving more serious sexual assaults and against vulnerable victims would be considered void as against public policy. Accordingly, California became the first state to bar non-disclosure agreements in civil cases that could be utilized to prosecute felony sex crimes.

As explained by the *Legislative Counsel's Digest*, the recently enacted law, located at California Code of Civil Procedure §1002, entitled *Settlement Agreements; Sexual Offenses*, "prohibit[s] a provision in a settlement agreement that prevents the disclosure of factual information related to the action in a civil action with a factual foundation establishing a cause of action for civil damages for an act that may be prosecuted as a felony sex offense …. The bill [] prohibit[s] a court from entering an order in any of these types of civil actions that restricts disclosure of this information … [and] [] repeal[s] the provision specifying that a settlement agreement or stipulated agreement that requires nondisclosure of the amount of money paid in settlement of a claim is not prohibited. The bill [] makes a provision in a settlement agreement that prevents the disclosure of factual information related to the action, … entered into on or after January 1, 2017, void as a matter of law and against public policy. The bill [] provide[s] that an attorney's failure to comply with these provisions by demanding that a provision be included in a settlement agreement that prevents the disclosure of factual information related to the action … as a condition of settlement or advising a client to sign an agreement that includes such a provision may be grounds for professional discipline and would require the State Bar of California to investigate and take appropriate action in cases brought to its attention."

While this particular bill is more narrowly tailored to prevent confidentiality as it relates to sexual assaults, the trend has realized itself in the legislation proposed by Senator Leyva. Importantly, this legislation seeks to impose significant obligations on plaintiffs' attorneys to refuse such provisions and advise the client that they should not be included, potentially imposing discipline on inexperienced or unwary counsel.

Legislatures in New York and Pennsylvania have also proposed legislation banning or limiting the enforceability of confidentiality clauses in sexual harassment and other employment-related cases which affect the public interest. New York lawmakers, meanwhile, recently introduced legislation that would void any employment contract that orders workers not to go public with harassment or discrimination claims.[10]

No settlement agreement can prevent a settling employee from testifying truthfully under oath in any proceeding or before a government agency. While some courts refuse to enforce confidentiality agreements that prohibit voluntary disclosure of litigation of specific matters, "[i]t has been recognized that at least in some circumstances, agreements obtained by employers requiring former employees to remain silent about underlying events leading up to disputes … can be harmful to the public's ability to rein in improper behavior."[11]

For example, an employer cannot offensively use confidentiality provisions in an effort to dissuade former employees from voluntarily participating in legitimate investigations into illegal workplace conduct, including investigations of sexual harassment.

In *E.E.O.C. v. Astra U.S.A. Inc.*, the First Circuit upheld a preliminary

injunction enjoining an employer "from entering into or enforcing settlement agreements containing provisions that prohibit settling employees both from filing charges of sexual harassment with the [EEOC] and from assisting the [EEOC] in its investigation of any such charges."[12] Noting that "'[a] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement,'" the court weighed the employer's interest in dispute resolution against the public interest in enforcing laws against sexual harassment.[13]

Concluding that abrogating the confidentiality clauses of the settlement agreements would be no disincentive to settling complaints, while enforcing them would seriously hinder the EEOC's enforcement of laws against sexual harassment, the court held that such settlement agreements were unenforceable as a matter of public policy.[14]

Courts have specifically recognized the significant societal value in preventing sexual harassment through the use of investigations to deter any future conduct. This recognition is the type of judicial pronouncement that provides support to those seeking to invalidate confidentiality clauses in sexual harassment cases.

"So long as employees' actions are not merely private or proprietary, but instead seek to further the public good, the decision to expose illegal or unsafe practices should be encouraged," the court wrote "We recognize that there is a tension between the obvious societal benefits in having employees with access to information expose activities which may be illegal or which may jeopardize health and safety, and accepted concepts of employee loyalty; nevertheless we conclude that on balance actions which enhance the enforcement of our laws or expose unsafe conditions, or otherwise serve some singularly public purpose, will inure to the benefit of the public …. In making this finding, we identify … situations where such agreements might not be enforceable: (1) if the interest in the agreement's enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement …."[15]

As such, legal authority exists for the position that confidentiality agreements which harm a significant public interest may be invalidated under the appropriate circumstances.

Monetary Liquidated Damages

The most common and most effective means by which confidentiality provisions are secured is by the use of a monetary liquidated damages clause, which typically identifies a specific amount as a penalty for either parties' breach of the terms of the confidentiality agreement. Although controversial and the subject of regular scrutiny by the courts, such provisions are deemed enforceable subject to certain restrictions.

A provision in an employment contract for the recovery of liquidated damages from an employee who breaches the agreement is not considered an unfair business practice. A liquidated damages provision in a settlement agreement is not invalid merely because it encourages a party to perform, so long as it represents a reasonable attempt to calculate the losses to be suffered in the event of a breach, and otherwise complies with the requirements of California Civil Code §1671, which indicates a presumption that liquidated damages clauses in non-consumer contracts are valid.[16]

The application of this concept is demonstrated by *In re VEC Farms, LLC*, which held that the amount of a default judgment of $1.1 million, or $364,000 over the settlement amount, was not an unenforceable liquidated damages penalty because under applicable California contract law, California Civil Code §1671(b), the liquidated damages amount "bore a

reasonable relationship to the range of harm that might have been reasonably anticipated by the parties to arise from breach of the settlement terms."[17]

The court in *VEC Farms* concluded that the amount of the alleged penalty at issue bore a reasonable relationship to the amount of actual damages from the breach of the settlement agreement—the alleged penalty of $364,000 to the settlement amount of $750,000, or a ratio of 0.5—and was "proportional" in amount to the magnitude of the claims asserted by the trustee who was the judgment creditor.[18] As such, liquidated damages remain a viable method by which to secure enforcement of otherwise valid confidentiality agreements.

Based upon the foregoing, it is apparent that the future enforceability of confidentiality clauses in sexual harassment cases is in serious doubt as the combination of strong public sentiment, pending legislative action on the topic, and court opinion trends suggest that such agreements will soon be severely restricted in their usage.

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[1] Ronan Farrow, "Harvey Weinstein's Secret Settlements: The mogul used money from his brother and elaborate legal agreements to hide allegations of predation for decades," *The New Yorker*, November 21, 2017, https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements.

[2] Susan Davis, "Democratic Congressman Acknowledges Settlement, But Denies Sexual Harassment Claim Ethics Committee Launches Inquiry into John Conyers, Longest-Serving House Member," *NPR*, November 21, 2017, https://www.npr.org/2017/11/21/565681045/rep-john-conyers-acknowledges-settlement-but-denies-sexual-harassment-claim.

[3] Sexual harassment law in California has developed from three primary sources: federal statutory law and state statutory law, and most importantly appellate opinions shaping the standards by which these claims are decided. On the federal level, Title VII of the Civil Rights Act of 1964 makes discrimination on the basis of a person's sex unlawful.42 U.S.C. §§2000e et seq. In 1980, the Equal Employment Opportunity Commission (EEOC) publicly took the position that sexual harassment is a form of sex discrimination prohibited by Title VII in interim guidelines. EEOC Website: 1980: Milestones https://www.eeoc.gov/eeoc/history/35th/milestones/1980.html. In 1986, in a landmark decision, the Supreme Court finds that sexual harassment can be sex discrimination prohibited by Title VII, and that workplace speech and conduct can itself can create a hostile environment which violates the law. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). In 1991, the Civil Rights Act of 1991 was enacted, modifying Title VII to add more protections concerning discrimination in the workplace. The Act provided a right to a jury trial in federal court for plaintiffs alleging harassment and discrimination and further authorized plaintiffs in such cases to recover compensatory and punitive damages for the first time. 42 U.S.C. §1981, et seq. On the state level, California has adopted the Fair Employment and Housing Act (commonly called "FEHA"), which expressly prohibits sexual harassment. Cal. Gov't Code, §§12900–12996; specifically, Cal. Gov't Code, §12940 subd. (j)(4)(c). Typically, FEHA provides greater protection for employees than Title VII. Traditionally, there have been two categories of sexual harassment: (1) quid pro quo sexual harassment and (2) hostile work environment sexual harassment. These categories do not exist in any statute. Rather, they were established through a number of state appellate court cases. See *Fisher v. San Pedro Peninsula Hospital*, 214 Cal.App.3d 590 (1989). Both types of harassment are found in the claims recently referenced by media sources and those referenced in this article.

[4] Cal. Gov. Code §12940, subd. (k); *see Northrop Grumman Corp. v. Workers' Comp. Appeals Bd*., 103 Cal.App.4th 1021, 1035 (2002). To state a claim for failure to prevent discrimination or harassment in the workplace, the employee must allege that she was subjected to discrimination, harassment, or retaliation, that the employer failed to take reasonable steps to prevent the harassment, and that this failure caused injury, damage, loss, or harm to the employee. (See *Trujillo v. North County Transit Dist*. (1998) 63 Cal. App.4th 280, 289; *Lelaind v. City & County of San Francisco* (2008) 576 F.Supp.2d 1079, 1103.)

[5] Sarah Ellison, "Fox Settles with Gretchen Carlson For $20 Million—And Offers an Unprecedented Apology," *Vanity Fair*, September 6, 2016, https://www.vanityfair.com/news/2016/09/fox-news-settles-with-gretchen-carlson-for-20-million.

[6] Emily Steel and Michael S. Schmidt, "Bill O'Reilly Thrives at Fox News, Even as Harassment Settlements Add Up." The New York Times, April 01, 2017, https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html. *The New York Times* reported that (now former) Fox News host Bill O'Reilly and/or Fox News parent company 21st Century Fox had made at least six settlements for sexual misconduct—including one for an astounding $32 million.

[7] Daniel Wiessner, "US lawyers reconsider confidentiality agreements in sexual harassment claims," *The Christian Science Monitor*, December 19, 2017, https://www.csmonitor.com/USA/2017/1219/US-lawyers-reconsider-confidentiality-agreements-in-sexual-harassment-claims.

[8] Danielle Paquette, "How confidentiality agreements hurt—and help—victims of sexual harassment," *The Washington Post*, https://www.washingtonpost.com/news/wonk/wp/2017/11/02/how-confidentiality-agreements-hurt-and-help-victims-of-sexual-harassment/?utm_term=.bbce802f5b46.

[9] "Senator Leyva: Ban Secret Settlements in Sexual Assault and Harassment Cases," *Senator Connie M. Leyva, October 19, 2017*, http://sd20.senate.ca.gov/news/2017-10-19-senator-leyva-ban-secret-settlements-sexual-assault-and-harassment-cases.

[10] Paquette, *supra*.

[11] *In re JDS Uniphase Corp. Secur. Litig*., 238 F.Supp.2d 1127, 1135 (N.D. CA 2002) (emphases added).

[12] *E.E.O.C. v. Astra U.S.A., Inc*., 94 F.3d 738, 740-41 (1st Cir. 1996).

[13] *Id.* at 744–45 (quoting *Town of Newton v. Rumery*, 480 U.S. 386, 107 S.Ct. 1187 (1987)).

[14] *Id.*

[15] *Saini v. Int'l Game Tech*., 434 F.Supp.2d 913, 923 (D. Nev. 2006).

[16] See *Californians for Population Stabilization v. Hewlett-Packard Co*., 58 Cal.App.4th 273, 287 (1997).

[17] *In re VEC Farms, LLC,* 395 B.R. 674, 690, 692 (Bankr. N.D. Cal. 2008).

[18] *Id.* at 690-91. ("A liquidated damages provision is not invalid merely because it is intended to encourage a party to perform, so long as it represents a reasonable attempt to anticipate the losses to be suffered") (citing *Weber, Lipshie, & Co. v. Christian*, 52 Cal.App.4th 645, 656 (1997)).


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ROUNDTABLE:
Mentoring New Lawyers

ABOUT TWO CENTURIES AGO, THE POLYMATH BENJAMIN FRANKLIN STARTING his career at the age of 12, laboring as a printer's apprentice though work days that routinely ran as long as 14 hours. Decades later, after a lifetime of discovery and experience, he reflected on the value of what he learned on-the-job from the older, seasoned ink-stained professionals he worked with in his youth, writing that "if you tell me, I will forget; if you teach me, I may remember; but if you involve me, I learn."

Fast forward at light speed to the here and now–a complex and infinitely more advanced age than even Franklin could have foreseen–with visionary film maker George Lucas noting that mentors "have a way of seeing more of our faults that we would like. It's the only way we grow."

Once asked about the core value of mentoring, director Steven Spielberg, said that, "The delicate balance of mentoring someone is not creating them in your own image, but giving them the opportunity to create themselves."

Mentors, another observer once wrote, are "the personification of the term value-added. They educate, stimulate growth, dialogue honestly, challenge misconceptions, provide encourage, serve as a sounding board, and, offer the wealth of their experience free of charge."

Several years ago, in fact, the *Harvard Business Review* published the results of what is considered the definitive survey on the impact of mentoring on career professionals. The research study concluded that those professionals "who have had them [mentors] earn more money at a younger age and are happier with their career progress."

Below four young attorneys share their views on the value of mentorship and the role—or lack thereof—that more experienced lawyers have played in the development of their professional and personal lives.

Hannah Sweiss
Associate Attorney
Lewitt Hackman, Encino

Building Strong Mentoring Relationships

"You've finished law school, passed the bar and are officially a lawyer! So now what?," asks attorney Hannah Sweiss. "You are either at your first legal job trying to get your bearings, volunteering or looking for a legal position. As you enter the world as a new lawyer, you may have already discovered that navigating many of the complexities of the legal world is more challenging than expected.

"One way to work through these new challenges is to build a strong mentoring relationship with someone that can help you as you begin the path of your professional career," says Sweiss, who currently serves on the SFVBA Board of Trustees and as Chair of its New Lawyers Section. Mentors, she says, "are critical to helping you bridge the gap that exists between the theory of law school and the reality of the workplace. The knowledge and guidance of a mentor can provide you with the tools to avoid many simple mistakes and can help you reduce the time it might otherwise take to direct yourself on the right career path. Almost all successful attorneys confirm their success is due, in part, to strong mentoring relationships. This is particularly true for women and minorities who often experience isolation in the legal profession."

Many new lawyers, says Sweiss, don't have mentors but why? Mentoring often starts early on and many law students who go on to graduate and pass the bar fail to take advantage of the opportunities to form mentoring relationships "because they are too busy, too shy, or have unrealistic expectations about what the mentor should provide."

But, she says, "if you haven't found a good mentoring relationship, it's not too late to start and it may be easier than you think. One of the most important mentorships in my life was formed when I decided to go to a legal event many of my peers were too busy to attend. At this event, I met my mentor who since meeting six years ago, helped me in my first law clerk position, my first legal position and has been an important person in my personal life, taking part in many special moments, such as my father's funeral and my wedding."

According to Sweiss, "a big part of finding this mentorship involved engaging in the community. "Both your legal community and larger community can provide the opportunity to find mentors that you can connect with," she says. "There are amazing mentors to be found in professional organizations, social groups and networking groups."

The best mentors, says Sweiss, "are those that you can talk openly and honestly with regarding any issues (legal or personal). And someone you can discuss strengths, challenges and feel safe from judgment while doing so. If you don't have a mentor yet, I hope this will encourage you to get engaged in your community and find a mentoring relationship to help you work through obstacles in your career, your life, or just be there for you when you need to talk. Getting and keeping a mentor is one of the most important investments you can make in yourself and your legal career."

Hannah Sweiss is an Associate Attorney in the Employment and Business & Civil Litigation Practice Groups at the law firm of Lewitt Hackman in Encino. She graduated from Southwestern Law School and was admitted to the State Bar in 2013. She can be reached at hsweiss@lewitthackman.com.

Nicole R. Fassonaki
Partner
Fassonaki Law Firm, LLP
Woodland Hills

Importance of a Mentor

"After I passed the bar, I did not know what I was going to do, whether it be applying for jobs at local firms or hanging my own shingle," recalls attorney Nicole R. Fassonaki. "I did not feel that I had any experience to go out into the big world on my own because I had little guidance on how to be a lawyer. I understood how to read and apply the laws that I learned in school, but I didn't know how to really use that information in the real world. Having a mentor after law school could probably have provided me the much-needed guidance most new lawyers should have after graduating."

Striking out on her own immediately after passing the bar, she "would have liked to receive some good solid advice and a strong shoulder to lean on when I felt lost and confused," she says.

"Instead, I made mistakes and learned what it meant to be a lawyer along the way. Some may think that this is the better approach—learn the hard way and gain strength in my failures. Unfortunately, when you have a client on the other end, your mistakes may have consequences that outweigh the lessons learned. Clients should never have to endure problems with their case due to a new lawyer's mistakes or lack of experience."

Fassonaki ended up taking a job at a firm a couple months after trying to go solo because she "wanted more experience and guidance." Once she had "gained enough footing, I ventured off and opened my own practice with my husband a little over eighteen months after passing the bar. I currently have the privilege of working in close proximity with many seasoned attorneys, and I am constantly picking their brains for information that only years of practice can build.

"I think the State Bar should invest in providing mentors to new attorneys. I do not think every new practicing attorney would need to utilize a mentor, but knowing that there are attorneys that can provide assistance for the first year as they transition into this new career can be beneficial. Not only will this provide confidence and ease to newly-admitted attorney, it may be beneficial to clients that trust new attorneys to offer the quality of service our industry should always provide."

Nicole R. Fassonaki, a partner at Fassonaki Law Firm, LLP in Woodland Hills, is a business law and civil litigation attorney. Fassonaki graduated from University of West Los Angeles and was admitted to the State Bar in 2016. She can be reached at nfassonaki@fassonakilaw.com.

Matthew D. Gurnick
Associate Attorney
Hawkins Parnell Thackston & Young, Los Angeles

Learning from the Past

"Like many legal issues, building a career can be challenging," says Matthew D. Gurnick.

Young lawyers, he says, "quickly learn the value of stare decisis, as past cases serve as guides for pending or future issues. Legal mentorships are similarly essential when building a legal career for the very same reason: the wealth of knowledge and experience mentors possess can assist lawyers in developing technical expertise, navigating difficult professional issues, and providing emotional support. No attorney is an island—active participation in the legal community will create opportunities to learn from others who have overcome similar obstacles and are happy to share their advice."

According to Gurnick, "There is no script for cultivating mentorship relationships. Most mentorships develop organically; however, planning ahead can serve young lawyers well. In the sports world, coaches work to put their athletes in the best position to succeed. Young lawyers can do the same for themselves: enroll in bar association mentorship programs, attend legal events, and engage with your co-workers and supervising attorneys. Sometimes the valuable connection results from several links in the network. As you get to know more people, and they get to know you, there will be opportunities to build rapport and cultivate relationships."

Most people, says Gurnick, are willing to help, "but busy schedules and large workloads can distract even the most genuine and caring individuals. For that reason, young lawyers must make it easy for a mentor to help. Social media can quickly and easily connect you with large groups of people. Use mutual connections to expand your network. In addition, sending messages or phone calls, conducting research, and being responsive will demonstrate that you are serious and invite similar efforts from a mentor. Responsiveness and flexibility exude interest, which is contagious. Mentors are far more likely to respond positively and offer assistance if they recognize that you value their time and energy and effectively communicate how they can help."

"Mentorship opportunities are not solely for the seasoned attorney with decades of experience," he says. "Young lawyers, too, have experiences and advice that can prove highly valuable. In fact, a recently barred attorney's insight into bar prep can be more relevant to a law school graduate preparing to sit for the bar than someone who took it years ago."

In other words, says Gurnick, "Young lawyers can be mentors too. That is the very epitome of legal mentorship—generations of attorneys passing on their knowledge, experiences, and advice to new generations for the betterment of the profession. In addition to using stare decisis to inform legal arguments, young lawyers can turn to generations of lawyers who have come before as they learn and grow, becoming increasing able to share their experiences with subsequent waves of legal minds."

Matthew D. Gurnick is an Associate at the litigation defense firm Hawkins Parnell Thackston & Young. He has also worked with NBCUniversal's in-house employment law department and volunteered with Bet Tzedek Legal Services. Gurnick graduated from University of Oregon School of Law and was admitted to the State Bar in 2016. He can be reached at matthewgurnick@gmail.com

Value of Informal Mentoring

Peta-Gay Gordon
Partner
Oldman, Cooley, Sallus, Birnberg & Coleman, Encino

"As a young attorney, I knew very little about how to work in a law office, or what would be required of me from day to day," says Peta-Gay Gordon. "Yes, I knew how to read cases and how to do research on Westlaw and Lexis, but I did not know the daily requirements and politics of working in an office. Due to this, I was very focused on trying to make it through the day without making any grave errors. The idea of leaving work around 5:00 or 6:00 p.m., which was considered early, to network with other attorneys, was impossible. Even the concept of attending a continuing legal education course rather than going into the office was untenable.

"I spent most of my first few years as an attorney in the office learning what was required and trying to get a grip on the practice of law. This is not to say that other attorneys at the firm or in the legal community at large did not suggest that I network, join various bar associations—basically leave my office. I thought those were great suggestions, but also thought that they just did not understand how impossible it was. I also felt like I had such little free time, and would prefer to spend it doing something non-law related. I was very concerned about burning out, or beginning to dread the career that I chose. In looking back, I cannot really say that I would do anything differently. I do think, however, that if there were different networking and education options, I may have been lured out of my office."

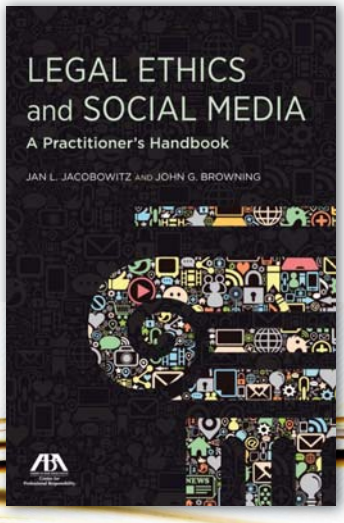
The key to engaging young attorneys, says Gordon, who currently serves on the SFVBA Board of Trustees, "is to think outside of the box. Instead of the usual networking events, where people stand around and introduce themselves to each other, maybe an outing to a play, or an activity such as roller skating, a hike, bowling, a billiards tournament, a poker tournament, board games, any activity that deviates from the norm may get a better response. As for CLEs, courses that focus on how to navigate the office environment would be extremely helpful. A big issue when a new associate starts at a firm is learning how to properly communicate with his or her legal secretary or assistant. This is a particularly important relationship that can play a huge factor in the attorney's success at the firm and in practice of law in general."

According to Gordon, "law schools now offer certain types of bridge classes after graduation that focus on preparing their students for law firms, especially in working for a small law firm where there is not much, if any, formal training available. For the new attorneys who do not have the opportunity to take such classes, the bar association could offer its own form of training. That would be an excellent way to get new attorneys involved with the bar association and also provide them with much-needed assistance.

Peta-Gay Gordon joined Oldman, Cooley, Sallus, Birnberg & Coleman in 2006 and was named a Partner with the firm in March 2013. She practices in the areas of trusts and estates administration and litigation, conservatorships, guardianships, estate planning and family law. Gordon graduated from USC Gould School of Law and was admitted to the State Bar in 2005. She can be reached at pgordon@oclslaw.com.

Book Review

Legal Ethics and Social Media: A Practitioner's Handbook



By David Gurnick

"Social Media is an environment of instantaneous sharing and connecting, while the legal profession prides itself on confidentiality and careful, analytical thinking."

THE ABOVE QUOTE, FROM *Legal Ethics and Social Media: A Practitioner's Handbook* (American Bar Association, 2017), addresses many tensions such as the clash between the lawyer's quest for professionalism and the public's freedom of speech; and the conflict between fast-paced, free-wheeling social media and the legal profession's commitment to high standards, deliberative analysis and methodical approach toward change.

The rapid expansion of online communications, networking, photo-sharing, cloud-computing, and a myriad of other uses of the internet have certainly created not only useful tools for the legal profession, but serious challenges to keeping up-to-date with ever-changing technologies and their accompanying ethical risks.

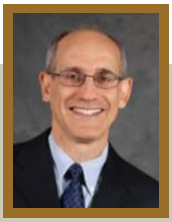
There are no safe harbors and no escape, and as the *Handbook* shows, lawyers face ethical risks from using, or not using, available technology to communicate.

The *Handbook* was published by the American Bar Association's Center for Professional Responsibility and written by Jan L. Jacobowitz and John G. Browning, both of whom have strong backgrounds in the law, academia, and organizations focusing on legal ethics and professional responsibility. Their work is a useful overview discussing many kinds of social media, and how these tools—created for social, informational and networking purposes—can be utilized by lawyers to improve results for their clients.

The work dissects various ways—good and bad, right and wrong, with many involving ethical questions—in which lawyers and judges use social media. In several eyebrow-raising discussions, particularly for those not versed in these new technologies, the writers examine why—as matters of competence, ethics and professional responsibility—lawyers have an obligation to make affirmative use of social media.

The *Handbook* does more than just identify issues—it provides well-formed and workable suggestions and resources for addressing the ethical and professional issues it raises.

The work is divided into thirteen chapters, with its early chapters covering the early background and development of social media. The authors are fond of noting that back in the day, technology caused lawyers to shift from employing scriveners—who hand-copied and proofread



David Gurnick is with the Lewitt Hackman firm in Encino. A two-time past president of the SFVBA, his practice emphasizes litigation and transactional matters for companies in franchising, distribution of products and services and licensing. He can be reached at dgurnick@lewitthackman.com.

documents—to using typewriters, telephones and copy machines. The conservative legal profession resisted new technology. For many years in the early 1900s, the storied law firm Cravath, Swain & Moore rejected telephones, and later when finally installed, told employees not to use them, but only to answer the phones when they rang.

Time-warp to today, with authors Jacobowitz and Browning noting that social media's investigative and informational tools are so powerful, that a competent lawyer must understand how to use technology and that a "duty to Google" is emerging in the practice of law.

The *Handbook* explores ethics issues in such developments as discovery, preserving social media evidence, client postings and jury research. Additional timely subjects covered include the ethics of judges befriending lawyers and parties, the prosecutorial uses—and misuses—of social media, attorney online advertising, social media's usefulness in estate planning, securities, bankruptcy and other transactional practices and responding, or not, to negative statements posted by clients.

In each area, the authors describe the circumstances and present a surprising range of interesting cases. For example, in a 2013 criminal case, the Ninth Circuit held that a lawyer's failure to find and use a purported sexual abuse victim's recantation on her social networking profile was ineffective assistance of counsel.[1] In the area of advertising, an Indiana bankruptcy attorney was suspended from practice for 30 days for advertising online "we have been screwing banks since 1992." The ACLU's defense of the attorney was unsuccessful. The same attorney has a bulldog pictured on his website. But the authors note another state—Florida—found it impermissible to show a pit bull, on the ground this sent the wrong message to the public.[2]

The *Handbook* thus summarizes or references numerous court and ethics opinions of the ABA and state and local bar associations, and packs a lot of useful information and resources into a readable 239 pages. Here are several examples of other interesting and informative points made in the *Handbook*:

- Advising a client as to social media postings before and after filing a lawsuit is an element of competent, diligent legal representation.

- A lawyer may properly advise a client to remove social media posts that may hurt the client's case or interest, even after a matter is pending. Relevant information should be preserved so it may be produced in discovery.

- Monitoring a client's activity on social media may be appropriate for an attorney to stay informed of developments affecting the client's legal dispute.

- Social media may be used to conduct informal and effective discovery. The *Handbook* notes that with almost 2 billion people engaged in social media networking, an internet search will likely reveal relevant information in many litigation situations.

- A lawyer may look at an opposing party's public social media postings. Propriety becomes more nuanced when the party's social media is inaccessible due to privacy settings. Restrictions against contacting a party who is represented by counsel remain in effect.

- The *Handbook* discusses the current state of the legal, practical and ethical issues involved when researching social media activity of prospective and sitting jurors, and monitoring social media activity of jurors during trial. The *Handbook* suggests there are circumstances

NEW MEMBERS

The following members joined the SFVBA in December 2017:

Edward Antonino
Law Office of Edward Antonino
Sherman Oaks, CA
Labor and Employment Law

Jayd Banuelos
Thousand Oaks, CA
Litigation

Nancy Emad Bassali
Northridge, CA
Criminal Law

Sedric Eugene Collins
Northridge, CA
Intellectual Property

David B. Connelly, CPA, JD
Freeman & Mills, Inc.
Los Angeles, CA
Forensic Accounting

Cherilynn Christina Heath
Granada Hills, CA
Nonprofit Organizations

Victor S. Korechoff
Granada Hills, CA
Civil Law

German U. Landeros
Law Offices of Ada R. Cordero Sacks
Encino, CA
Landlord/Tenant

Daniel R. McCoole
North Hollywood, CA
Criminal Law, Family Law

DeShawn McQueen
Los Angeles, CA

Christina Petrilak
Encino, CA
Estate Planning, Wills and Trusts

David W. Pies
Ventura, CA
Criminal Law

Richard Joseph Placido
Chowchilla, CA
Business Law

Kevin G. Reyes
Neighborhood Legal Services of LA County
El Monte, CA

Lauri Shahar
Woodland Hills, CA
Civil Litigation

Wayne C. Smith
Law Offices of Victor George
Torrance, CA
Personal Injury

Pavel Sterin
The Law Offices of Pavel Sterin, APC
Van Nuys, CA
Personal Injury

Alissa M. Vizzo
Ventura, CA

when the standard of practice makes it mandatory to do this research, and also discusses when doing such research on jurors may be prohibited.

- Criminal prosecutors have been disciplined for overaggressive investigative steps using social media. In Ohio, a prosecutor invented a fake online "baby mama" and used this fictitious persona to communicate on Facebook with a murder defendant's ex-girlfriend's alibi witnesses. The ploy convinced the witnesses not to testify. The defendant was convicted, but the lawyer was terminated from his position and suspended by the state bar. The suspension was later stayed by the state Supreme Court.[3]

- In California, a lawyer was nearly disciplined for an "incredible display of poor judgment" in commenting on Facebook about a pending criminal trial. But the attorney's "foolishness" did not rise to the level of misconduct warranting a new trial.[4]

- The *Handbook* discusses best advertising practices on several social media platforms such as LinkedIn, Facebook, YouTube and Avvo, as well as the use of Google AdWords, pay-per-click lawyer advertising and even Groupon promotions. Doubtless, many lawyers are not fully aware of the availability of these advertising opportunities. The *Handbook* is informative as to both methods and related ethics issues.

- Sometimes lawyers have posted rants or other candid comments they felt had no connection to any pending matter or even, in a broader sense, to the practice of law. But lawyers have faced discipline for such comments. The authors point out that a lawyer "is posting not only as a person, but also as a lawyer, a role that has a 24/7 connotation where legal ethics are concerned." It seems that anything a lawyer posts automatically has a connection to the practice of law.

- Addressing another increasing challenge for lawyers, the *Handbook* discusses the problem of online negative postings made by clients, and considerations in evaluating whether or not, and how, to respond.

Both the technology of social media and law concerning this technology are evolving rapidly, in real time. For this reason, in many areas the *Handbook* obviously can't provide definitive guidance. While it covers current incidents, recent cases and ethics opinions, many are not officially published and emanate from local and regional bar associations.

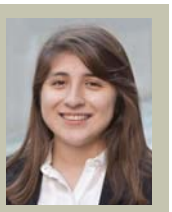
On some occasions, the book points out, different authorities have reached different conclusions. As a result, one senses that the *Handbook* will quickly need to be updated to reflect inevitable further developments in both technology and the law.

Lawyers are challenged to be aware of all the ways the internet and social media affect the practice of law; the ways these tools can and must be used; as well as the ethical dangers in failing to use or misuse available technological tools. Because there is, at present, no other single source, the *Handbook* is an important resource for lawyers to consult—informative and happily for non-savvy practitioners, easy to read and presented the old-fashioned, low-tech way with ink on paper, bound at the spine, and readily accessible to all.

[1] *Cannedy v Adams* (2013) 706 F.3d 1148.
[2] *Fla. Bar v Pape* (Fla. App. 2005) 918 So.2d 240, 243.
[3] *Disciplinary Counsel v Brockler* 48 N.E.3d 557 (Oh. 2016).
[4] *People v Armstrong* 2014 WL 125939 (Cal.App. 2014) (review denied Apr. 9, 2014).

A Far-Reaching Beacon of Hope

CATHERINE CARBALLO-MERINO
ARS Referral Consultant



catherine@sfvba.org

FOR A SCORE OF GENERATIONS, THE UNITED States has stood as a beacon of hope for a better future for countless millions. People migrate to the United States for the chance of an improved lifestyle.

Teenager Ivo (a pseudonym) is no different. Living with his parents in Bulgaria, his life—personal and otherwise—was a difficult one. His father was diagnosed with schizophrenia when Ivo was young, a condition that affected their relationship, as well as that with his mother, who was tasked with taking care of his father. His grades suffered as he was bullied in school, but with the help of a therapist, he was able to endure the pressure.

Eventually, Ivo was able to secure a tourist visa in late 2016 to visit his grandmother in Southern California for six months. To keep from interrupting his education, his grandmother Nikola (also a pseudonym) enrolled him in a local school. Five months passed, with Nikola seeing Ivo's outlook improve as he was excelling in school, making friends, and controlling his temper.

Nikola decided to acquire guardianship over her grandson, starting a process that began with a call to the Attorney Referral Service in May of 2017. With Ivo's visa due to expire, she wanted to apply for guardianship as quickly as possible. After an initial interview, she was referred to attorney Kenneth Nahigian, whose main area of practice is family law.

"Ivo seemed like a fish out of water in Bulgaria," Nahigian said, adding that he enjoyed working with Nikola to accomplish her guardianship of Ivo. "He's a bright kid who was just given a bad starting hand."

The guardianship proceeded smoothly, with Nahigian coaching Ivo through the process. Ivo's parents agreed that their son was better off in the United States, given the vast academic improvements he had made during the five months; the fact that his school vouched for his academic integrity and eagerness; and that the therapist in Bulgaria vowed that his emotional issues at home kept him from realizing his full potential.

Speaking of Nahigian professionalism, Ivo later said, "He knows how to deal with almost all sorts of problems, how to interact properly with teenagers like me and, most importantly, he's probably the nicest attorney I've met so far! Because of Mr. Nahigian, I am now a high school student, enrolled in a journalism magnet. My future seems brighter."

When all was said and done, said Nikola, "We had the best possible outcome, and we all have a pleasant memory of what could have been a very painful process."

Valley Community Legal Foundation
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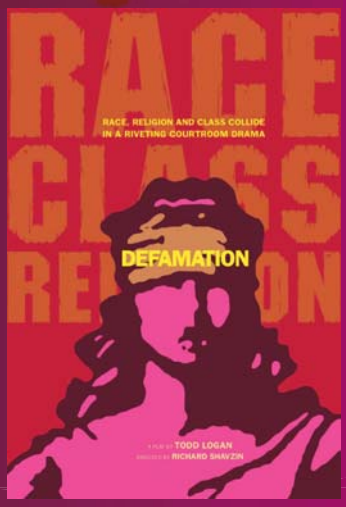

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Valley Community Legal Foundation

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Overlooked Victims of Domestic Violence

LAURENCE N. KALDOR
President

phenix7@msn.com

WHEN MOST PEOPLE THINK ABOUT DOMESTIC violence, they often assume that the survivor is a woman or a child. Often overlooked are the thousands of adult men in both heterosexual as well as same-sex relationships who are suffering physical, mental and sexual abuse as victims of domestic violence.

While shame and fear prevent many female and younger victims of domestic violence from making the changes that could save their lives, men typically have to deal with the added factor of both public and private humiliation that goes along with making a domestic violence claim.

According to the Center for Disease Control in Atlanta, one in four adult men in the United States will become a victim of domestic violence during his lifetime. That's approximately three million male domestic violence victims every year, or one man in America who will be abused by an intimate or domestic partner every 37.8 seconds. Anyone can be the victim of domestic abuse and everyone who needs protection deserves access to it.

One such man is Manuel, who along with his children, suffered abuse from his gang-affiliated wife for six years. When the abuse escalated, he took his children and left. They spent a month living on the streets before he sought help by calling Haven Hills' crisis hotline.

Haven Hills is supported by the generous contributions of individuals, companies, and organizations like the VCLF, which is proud to support their work and other similar and necessary Valley domestic violence shelters, programs and institutions.

Manuel has been a client and resident of the Haven Hills San Fernando Valley transitional shelter for just over a year and has already earned his high school diploma and a certificate in culinary arts.

Expressing heartfelt thanks for the program, Manuel "acknowledged the issues that led [him] to be in relationships that were not healthy and to work on making sure that [he] develop[ed] healthy boundaries."

He continued, "My children are happier and safer now. They went through a lot emotionally but thanks to the counselors, [my kids] have been able to acknowledge their emotions and have learned different coping mechanism, which I know will help them in the long run."

Manuel is also committed to helping others to understand that "domestic violence doesn't happen only to women. Men are victims too."

He eagerly wants people to know that, "it is something that should be talked about because the more we talk about it, the less taboo it will become."

Living independently with his children in what is a safer and healthier space, Manuel is thrilled to be employed in a local Valley restaurant, while he continues his practical on-the-job culinary education. His long-term goal is to own his own catering business.

Manuel is one of the over 3,500 men, women and children Haven Hills helps every year. For almost 40 years, Haven Hills has served as a community lifeline providing safety, shelter, and support to thousands of survivors of domestic violence. They save lives, inspire change, and transform victims to empowered survivors. In fact, victims who are murdered by an intimate partner are often killed soon after they leave their abuser, making that journey to safety that more dangerous. Haven Hills is dedicated to empowering victims to become survivors during those first 30 days and thereafter.

ABOUT THE VCLF OF THE SFVBA

The Valley Community Legal Foundation is the charitable arm of the San Fernando Valley Bar Association, with a mission to support the legal needs of the San Fernando Valley's youth, victims of domestic violence, and veterans. The VCLF also provides educational grants to qualified students who wish to pursue legal careers. The Foundation relies on donations to fund its work. To donate to the VCLF and support its efforts on behalf of the Valley community, visit www.thevclf.org and help us make a difference in our community.

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