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A Publication of the San Fernando Valley Bar Association

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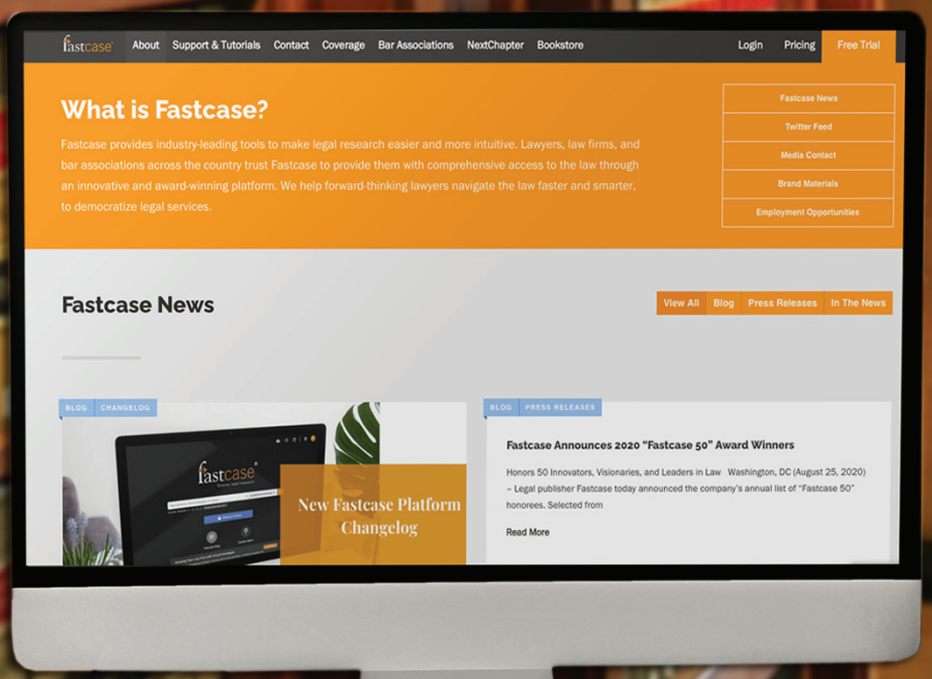

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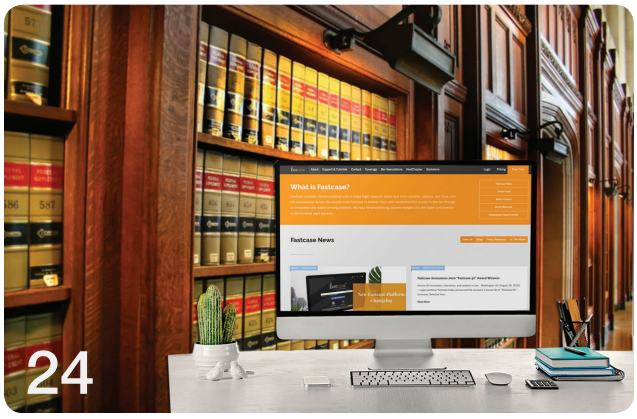

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Hello…I Must Be Going

BARRY P. GOLDBERG
SFVBA President

bpg@barrypgoldberg.com

"As to the presidency, the two happiest days of my life were those of my entrance upon the office and my surrender of it."—Martin Van Buren

AHHH…MY FINAL COLUMN AS PRESIDENT OF the San Fernando Valley Bar Association. For those of you that have occasionally read my column or followed my other scribblings, I thank you.

In past columns, I have tried to highlight what I thought was important about the Bar, the law, and our community, while, mostly, I have tried to be enthusiastic about our profession and the possibilities that await us. I was and still am hopeful for our future.

Indeed, my year as President did not turn out like I had planned. The biggest challenge for me was going from an agenda of expansion and optimism to an agenda of stark budgetary reality.

Perhaps, I was not equipped to sort through the negative news and immediately recognize the immense impact that COVID-19 would impose an organization that relies on the face-to-face comradery to generate revenue. As Harry S. Truman once said: "A President either is constantly on top of events or, if he hesitates, events will soon be on top of him."

While I had other ideas, I must say I feel a bit like events landed squarely on top of me.

That said, as an Association, we learned to adapt on-the-go. I am genuinely proud of the very well-attended remote events that we produced this year. If you are not attending our webinars, you are really missing out. The topics have varied from practice specific to how to run your virtual law office. In addition, SFVBA has been a valuable source of news for almost all practice areas and regarding the ever-changing status of our network of County courthouses.

As time goes on, despite the circumstances, SFVBA will continue to be an essential resource for our members.

As part of my legacy, we are still at an enthusiastic all-time high for Board of Trustee participation. The slate you will be asked to vote on this month is large in scope and very talented. Your vote will actually count and there will be no voter suppression or ballots lost in the mail. These Trustee candidates really need your votes. Last year, a candidate for a seat on the Board lost by a mere three votes. Thank you, 2020 Board of Trustees!

Our Board will be assuredly in good hands next year. Our slate for the executive officers is exceptional. I have worked with each of the candidates on countless projects over the years and have spent more time in meetings than you can imagine. Incoming President David Jones has been a "brother in arms" with me for a decade and will be a solid leader of this organization.

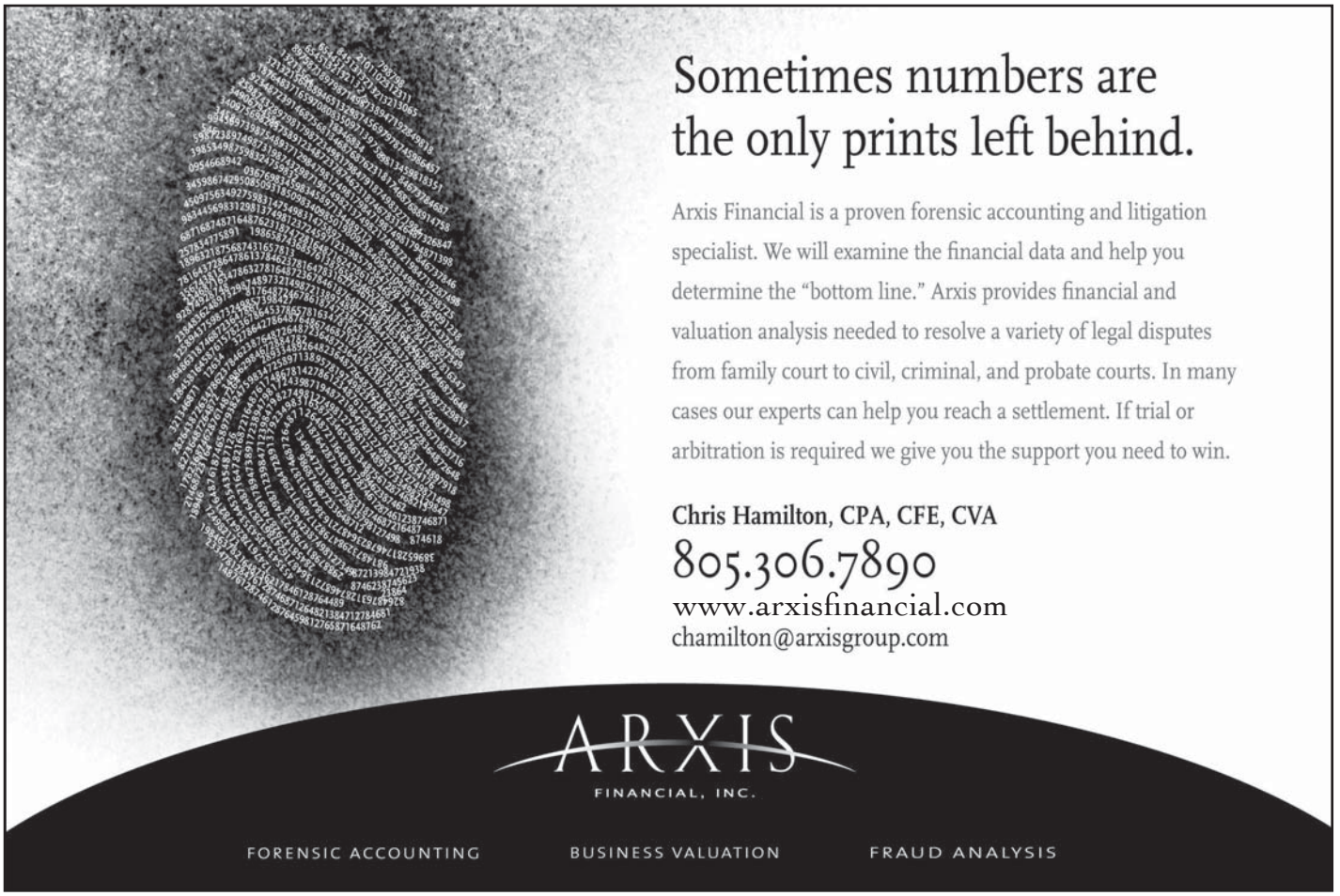
It would not be appropriate for me to sign off without thanking our exceptionally professional staff.

Rosie Soto Cohen is doing the impossible running the organization. I appreciate her from the bottom of my heart. Linda Temkin has produced so many successful events, including my "over the top" installation gala, that I owe her a huge debt of gratitude. Without Miguel Villatoro, and the past work of Favi Gonzalez and Sonia Bernal, the Bar simply would not function.

Finally, I want to give a special thanks to Michael White and graphic designer Marina Senderov who produce an award-winning *Valley Lawyer* publication month after month. Michael edits my work and always makes me look good.

Now, my final ask! We need every Valley lawyer to renew their membership right now. Don't wait. Don't make us chase you. Your membership dues will power the Bar into the post-COVID-19 era and give us the wherewithal to continue creating great programs and activities that promise to inform you and advance your practice.

If you are reading this, each of you knows the value that SFVBA brings. Better yet, personally ask a colleague to join today. Together, our future is bright!



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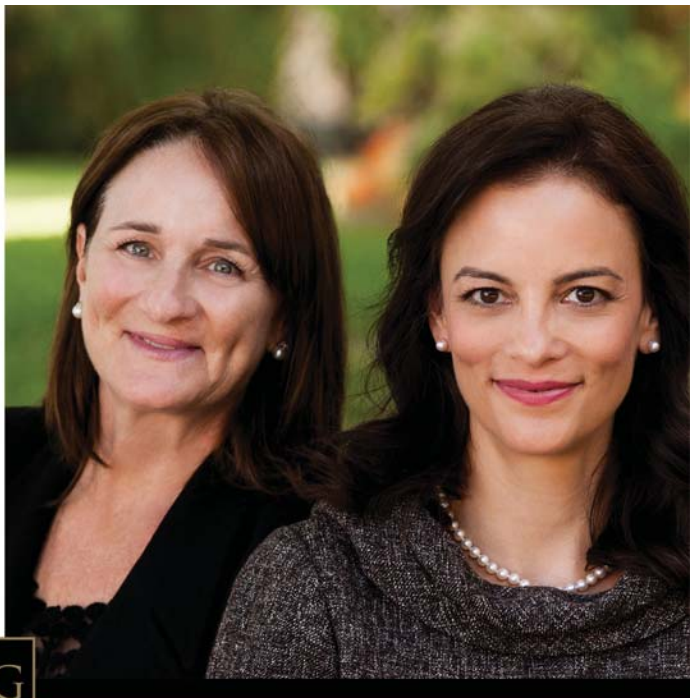

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Listen and Learn

MICHAEL D. WHITE
Communications Manager

michael@sfvba.org

A LOT OF THE WORK I DO REQUIRES MY spending much time on my computer doing research and perusing social media.

Sadly, many online social platforms have devolved into online gladiatorial competitions in which politically-charged factions—wanting nothing more than to monologue rather than dialogue—battle rather than listen, debate civilly, and, just maybe, see the value of someone else's opinions.

Two years ago, I wrote the following column and, given the emotionally-overloaded tone of today's discourse, I thought it might be an appropriate time to reprint it.

"I didn't have a lot of friends when I was a kid, and, though it may seem odd, the ones I considered my best, three to be exact, were all a whole lot older than me—my Dad, my maternal Grandmother and our cross-the-street neighbor, Mr. Edward Donnelly.

"A quiet gentleman of the old school, Mr. Donnelly was possessed of a shock of white hair and a stature and demeanor that spoke of his younger days as a lumberjack in the Canadian wilderness, several years as a merchant seaman under sail, and a spell defying the odds in the Ninth Circle of hell that were the trenches of World War I. He taught school for a while after the war, and finally retired to Southern California, a widower, after 30-plus years traversing Canada selling textbooks to schools from Nova Scotia to British Columbia.

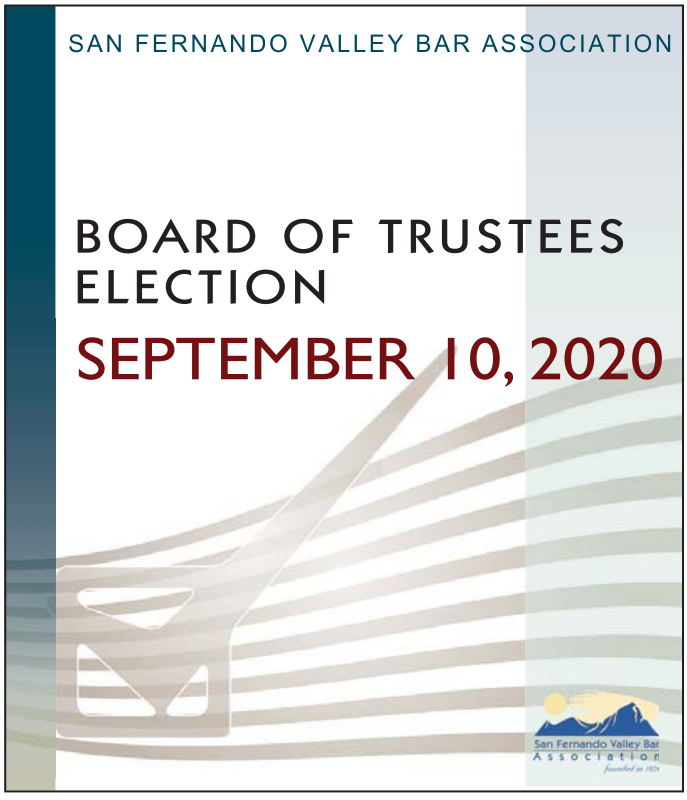
"He smelled of Prince Albert pipe tobacco; read voraciously; was never seen without a tie and his trademark red cardigan sweater; rarely, if ever, got angry; and could be observed every afternoon, taking his royal constitutional, steaming in stately fashion through the neighborhood like the Queen Mary, cane in hand, lifting his hand to one and all in a wave that seemed more of a heart-felt blessing that a cursory greeting. It, alone, was something to see.

"We would sit on his front porch and drink lemonade and he would relate stories of the way things were, not in the irritated, bitter way that some bemoan the inevitable passing of time, but in a way that conveyed a joy of living, lessons to be learned, and experiences to be shared and appreciated.

"I was eight when my grandmother—the only grandparent I ever knew—died in our home. She'd lived with us for several years and we were very close and it was Mr. Donnelly who, more than anyone else, seemed to understand my loss. He listened to me. He introduced me to reading anything and everything, and I owe to him that I wore out five library cards by the time I turned 10. He was a decent, kind and generous man.

"One warm Saturday in May 1962, fifth grade was almost history and I was walking, oddly enough, to the local library when, sure enough, Mr. Donnelly appeared around the corner headed my way. He stopped; he smiled and then collapsed on the sidewalk, not ten yards in front of me. I called out; a small crowd gathered and I cradled his head until the ambulance arrived. But it came too late. He was gone. Two of my three best friends passed on in as many years.

"It was a hard time, but, if I carried anything away from my all too brief time with each of them, I discovered how much can be gained from the stories and opinions, in synch with mine or not, that others have to share and how richer we can be for just taking a moment, perhaps, to just listen and learn."



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2020 Reflections

ROSIE SOTO COHEN
Executive Director
rosie@sfvba.org

AS THE BAR'S 2020 FISCAL Year nears an end, there is much to reflect upon.

In October 2019, we kicked off the fiscal year with an energetic Board under the leadership of Barry P. Goldberg, celebrating a successful membership campaign and the installation of new officers and Board members at a glamorous Gala 'Under the Stars.' Held at the Skirball Cultural Center, it was one of our most successful, well-attended events the Bar has ever held.

We were buzzing and, by the end of November 2019, we were pleased to have endured the wildfire season without significant damage, fires, unlike the previous year—a year significantly impacted by deadly wildfires that shifted the Bar's focus on emergency preparedness, volunteerism, community outreach and partnerships.

December 2019, the FY felt especially upbeat as we celebrated our first holiday party in the Bar's beautiful new Woodland Hills office space, where we managed both our annual MCLE Marathon and Blanket the Homeless Drive.

Come January 2020, the Bar celebrated one year in its new headquarters, and the following month, would organize a very well-supported and attended Judges' Night dinner to honor Judge Virginia Keeny as our 'Judge of the Year,' and give a special recognition to our local Court Commissioners.

Sadly, Judge's Night would prove to be the Bar's last social gathering of 2020.

On March 10, the SFVBA Board met with the realization that something potentially dangerous—namely COVID-19—was looming, and instituted necessary precautionary measures—an embargo on leadership travels, the Inaugural Mock Trial competition, Dinner at My Place, the Meet the Experts-Summer Party, and all in-person MCLE programming, while staff was authorized to work remotely and, all Bar events were reconfigured to online webinars.

April and May 2020 were, in retrospect, and perhaps most would agree, the most daunting and seemingly the longest months of the year.

Immediately after COVID-19 stay at home orders were mandated, we brainstormed timely employment law programming, did a lot of budget reappraisal, and maintained constant communication with the courts, other bar associations, and the Mayor's office to forward timely, COVID-19-related information with our members.

A typical SFVBA summer begins with an election campaign in June that continues through September 10; concurrent budget committee meetings, personnel reviews, the Bar's membership renewal campaign and fundraising for both the Valley Community Legal Foundation and the Blanket the Homeless, additional year-end meetings, preparations for the Installation Gala, Board Retreat, and community outreach efforts for the Bar's Attorney Referral Service (ARS) with boots on the ground to promote the Bar's public service work at local summer events and community gatherings.

The summer is the busiest time of the year for the organization, and this summer is no different, yet very unalike. This Board had to work extremely hard to address uncertainties, meet our responsibilities, and make the most of new opportunities.

Many of us have been keenly following the presidential campaigns, but this prompt is intended to serve as a reminder for Valley lawyers.

In mid-August, every SFVBA attorney members in good standing was sent an email from BallotBox Online with a link to cast their vote for the slate of new Trustees who will guide the Bar through the upcoming year.

Remember: Voting will close at 5:00 p.m. on Thursday, September 10, 2020, and don't forget: Your vote counts!

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ZOOM MEETING
Membership and Marketing Committee
6:00 PM

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7
HAPPY LABOR DAY

8
WEBINAR
Probate and Estate Planning Section
Monthly Webinar
12:00 NOON
(1 MCLE Hour)

ZOOM MEETING
Board of Trustees
6:00 PM

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SFVBA ELECTION DAY

WEBINAR
Business Law and Real Property Section
The Intersection of Law on Water Resources
12:00 NOON
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Watearth
Jennifer J. Walker at Watearth will discuss the environmental impact water resources might have on business. Free to All Members! (1 MCLE Hour)

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ZOOM MEETING
VBN VALLEY BAR NETWORK
5:30 PM

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WEBINAR
Taxation Law Section
Resolving Tax Disputes in Bankruptcy Court
12:00 NOON
Attorney Mark Bernsley will discuss pre-trial procedural techniques and strategies in bankruptcy adversary proceedings. (1 MCLE Hour)

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WEBINAR
Attorney Referral Service Presents
Prevention of Substance Abuse
2:00 PM
Sponsored by
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Special 1 hour webinar. Criminal Law Section Chair David S. Kestenbaum will review how to recognize and deal with any mental or physical issue — including dementia, mental illness and substance abuse that could affect an attorney's ability to practice. Free to all members.1 MCLE Hour (Competence Issues)
See ad on page 28

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WEBINAR
Probate and Estate Planning Section
Special Event
Till My Conservatorship Do Us Part
6:00 PM
Virtual dinner seminar free to all members. Hon. Glen Reiser, Ret. and Yevgeny L. Belous, Esq. lead the one-hour seminar. Sponsored by Flans & Weiner: Larry Weiner; Trust Properties USA: Paul Hargraves; Re/Max, Olson & Associates: Robert Graf. Also supported by Manufacturers Bank; David Rothblum of Re/Max One; and our official Section Sponsor Banc of California: Scott Kunitz. (1 MCLE Hour)
See ad on page 31

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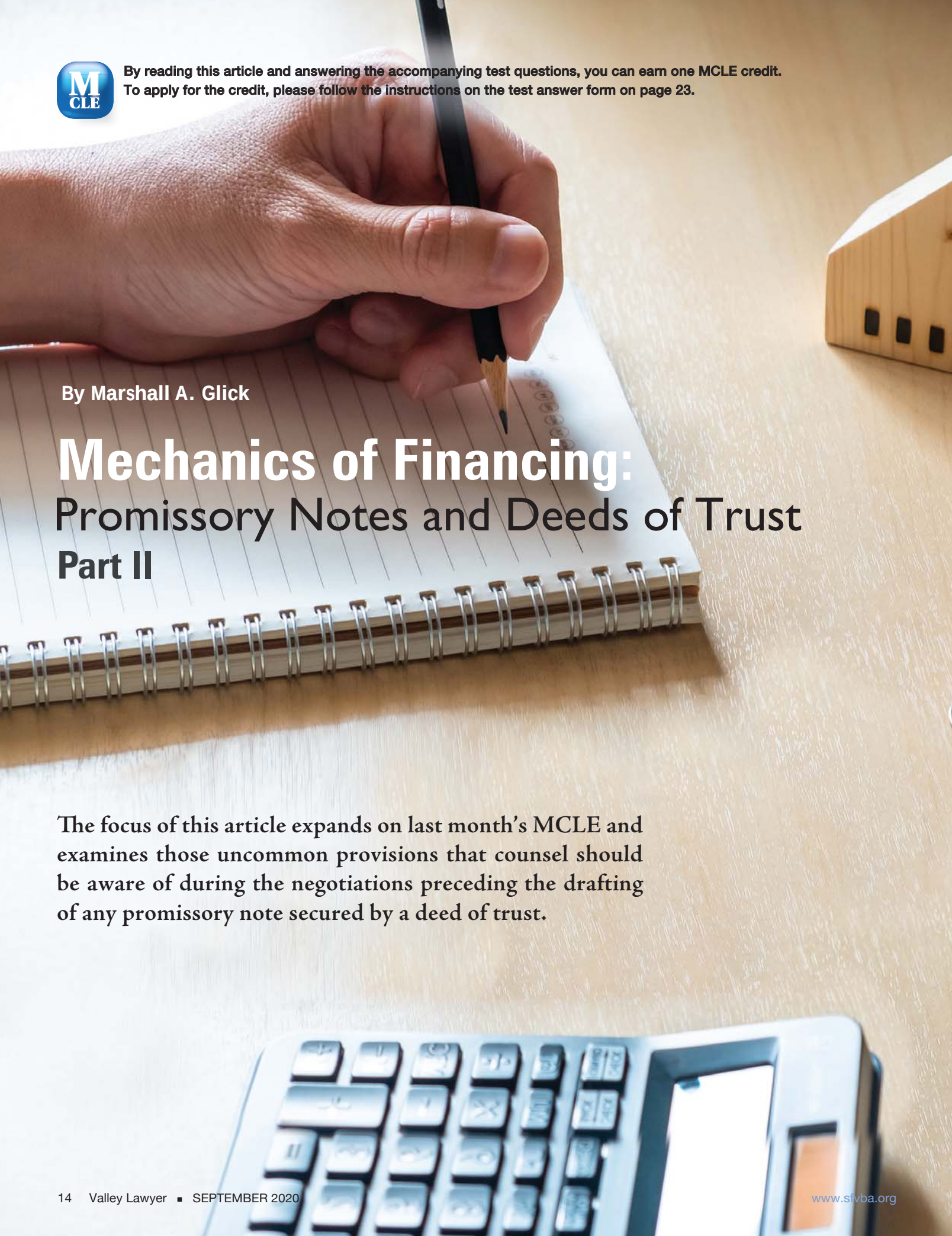


By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 23.

By Marshall A. Glick

Mechanics of Financing: Promissory Notes and Deeds of Trust Part II

The focus of this article expands on last month's MCLE and examines those uncommon provisions that counsel should be aware of during the negotiations preceding the drafting of any promissory note secured by a deed of trust.

MOST OF THE PROVISIONS FOUND IN promissory notes secured by deeds of trust are commonplace, while some, depending on the nature of the loan, are more uncommon but, nonetheless, required by statute.

The focus of this article expands on last month's MCLE and examines those uncommon provisions that counsel should be aware of during the negotiations preceding the drafting of any promissory note secured by a deed of trust.

Part III of this article–to be published in the October edition of *Valley Lawyer*–will complete the discussion of recommended provisions that should be considered from either a buyer's or borrower's perspective.

Common Provisions

The following provisions favor borrowers and may well be included in all forms of promissory notes:

- Prepayment Privilege: The early repayment of a loan is a privilege and not a right.[1]

  The ability to prepay the loan prior to its maturity should, for the borrower's protection, be made a part of every promissory note.

  In cases where there is no incentive for a lender to postpone receipt of early payment, there should be little if any opposition to including such provision.

  A typical prepayment privilege in a promissory note may be as follows: *"The privilege is reserved to prepay without penalty or bonus the balance or any installments of principal and then accrued interest at any time or times."*

- Offsetting of Claims Against Payments: From the lender's perspective, a borrower's offsetting of claims against principal and interest payments would be considered a major faux pas.

  However, while it may be possible to reach agreement on a modified claims offsetting provision when the borrower's attorney drafts the promissory note, it may also be feasible after negotiations with the lender's legal counsel.

Marshall A. Glick has been practicing business and real estate law for over fifty years and is Of Counsel to Glick Atalla, a professional law corporation in Encino, California.

A sample claims offsetting provision follows:

"By acceptance of this note, Holder acknowledges an agreement with Maker that Maker shall have the right to offset against principal and interest payments in the order of their maturity dates hereunder an amount equal to 100 percent of the damages, losses or liabilities ("claims"), if any, sustained by Maker in excess of $___ as to any claim, or any group of claims which are substantially identical in nature, which claims are actually incurred by Maker or which more likely than not may be sustained by Maker (in Maker's and its counsel's reasonable determination) (i) by reason of the incorrectness or inaccuracy of any of Holder's representations or warranties made under that certain _____, dated__ _____(the "Agreement"), wherein Holder is referred to as_____and Maker is referred to as_____, which Agreement pertains to the sale by Holder to Maker of that cerain_____business commonly known as_____ _(the "Business"), the provisions of which representations and warranties are by this reference incorporated herein, (ii) resulting from any reserves maintained or which should have been maintained by Holder in connection with the Business being inadequate or understated with respect to actual liabilities of the Business so reserved against or which should have been reserved against, or (iii) the nonperformance by Holder of an covenant of Holder set forth in the Agreement (including without limitation the covenant that Holder shall indemnify Maker against all non-assumed liabilities of Holder.

"Notwithstanding the foregoing, Maker shall not be entitled to any such offset in the event that Holder shall forthwith and in good faith and at Holder's sole cost and expense fully indemnify and hold Maker completely safe and harmless of, from and against any and all such claims, including the diligent and competent defense of Maker by Holder's legal counsel, provided further that if Maker should at any time be subject to any loss or liability by reason of a final judgment having been rendered against Maker by any court of competent jurisdiction, or as a result of a settlement between said parties, which judgment or settlement is in favor of any such claimant with respect to any such claim, Maker shall to the full extent of any such adverse judgment or settlement (which is in excess of $_____ as to any claim or group of claims substantially identical in nature) be entitled to such offset in the order of the installment dates for the payment of principal and interest hereunder without need for further documentation in this regard. In the event that any such offset is made, it shall include all payments of interest made on the amount so offset.

"Such offset right shall be in addition to and not in limitation of any other rights and remedies that may be available to Maker at law or in equity with respect to such claims by reason of Holder's breach of any such representations or warranties. In order to enable Holder to undertake such indemnification and defense of Maker, Maker hereby agrees to notify Holder within five business days of the occurrence of any such claims (to the extent Maker becomes aware of the same) and to cooperate reasonably with Maker and Maker's legal counsel (but at no cost or expense to Maker) in the defense thereof by Holder. Maker's counsel shall have the right to join in such defense but at Maker's expense in this regard. The preceding provisions of this Note are intended to and shall benefit the successors-in-interest and assigns of Holder."

- Limitation On Personal Liability For Payment: The opposite of a personal guarantee of a promissory note is the limitation or elimination of a lender's right—should the security posted for payment of the loan prove to be inadequate to satisfy the debt—to seek recourse against the borrower, or the principals of the borrower if the borrower is a business entity.

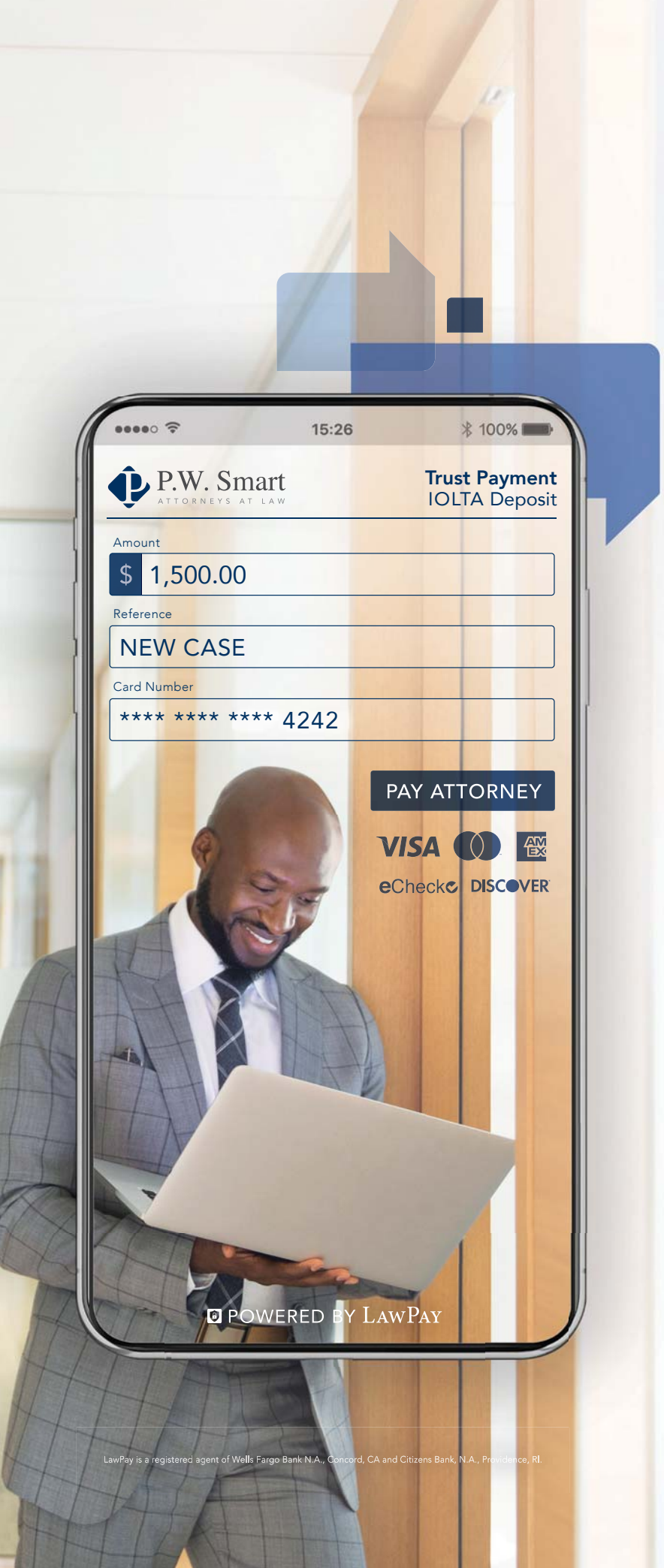
  In cases where a limitation on the borrower's liability can be successfully negotiated, the borrower remains liable for payment under the promissory note, but only for repayment of a fixed portion of principal and accrued interest.

  The lender would be limited to foreclosing on the security posted for payment of the promissory note, in addition to whatever fixed amount of unpaid principal that can be negotiated after foreclosure under the security agreement.

  In some circumstances, it may be possible, based upon the perceived high value of the security or the borrower's strong business reputation, to achieve the elimination of any right of recourse against the borrower should the posted security be inadequate to satisfy the debt.

  However, if payment of the promissory note is secured by a deed of trust instead of by a security agreement on personal property—such as equipment, accounts receivable, stocks, bonds, or a bank account—that modification should be made in the example provision that follows:

"Holder hereby acknowledges its understanding and agreement with Maker that in no event or circumstance whatsoever shall Maker have or incur any personal liability or obligation for the payment to Holder of all or any part of the principal or interest hereunder, or any cost, charge or expense referred to herein and/or incurred in the enforcement of Holder's rights hereunder. In the event of any default hereunder by Maker, the



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sole remedy and right of recourse available to Holder shall be to enforce the provisions of that certain security Agreement dated_____, covering_____ (the "Security Agreement"), a copy of which is attached as an exhibit to this Promissory Note, the provisions of which are by this reference incorporated herein. The Security Agreement is intended to and does serve as the security for Maker's performance under this Promissory Note, the adequacy of which security, now or at any time in the future, shall not be subject to challenge by Holder. Accordingly, Holder shall not have any right of personal recourse against Maker or against any of Maker's assets or properties other than with respect to the security posted under the Security Agreement, should any nonpayment by Maker occur in accordance with the requirements of this Promissory Note. None of Maker's real or personal properties, other than and except for the security pledged under the Security Agreement, shall be subject to any attachment, execution or levy to satisfy all or any portion of any judgment that may be rendered at any time against Maker by reason of Maker's failure to pay any amounts due and owing hereunder. The preceding provisions shall also apply with equal force with respect to Maker's officers, Directors, shareholders, agents, servants and employees, none of whom shall have or incur any personal liability under any circumstances for the payment of this Promissory Note."

- Limitation On a Note's Negotiability: A note's assignee becomes a "holder in due course" when a lender assigns, for value, a promissory note and its security for payment to an assignee acting in good faith and without actual or constructive knowledge of any claims or rights of offset that the borrower may be able to assert against the assignor, the assignee may receive the assignment free of all claims that the borrower might have brought against the assignor of the note.[2]

  It is important that, prior to making any assignment of the promissory note, the lender inform the borrower of any rights of offset that they may have or claim and thus notify the proposed assignee of same.

  From the borrower's standpoint, all promissory notes should contain a provision requiring a lender to give prior notice to the borrower of an impending assignment of the promissory note that might read:

  "This Note shall be fully negotiable in accordance with its terms, provided that as a condition precedent to any such negotiation, Holder shall give not less than ten (10) calendar days' prior written notice to Maker at Maker's said address, or to such other address as notice may be given by Maker pursuant hereto, by certified or registered mail, postage prepaid, return receipt requested, or by email to Maker, provided that Maker acknowledges by return email the receipt of such electronic notification, of Holder's intention to assign, transfer, pledge and/or negotiate this Note to any proposed holder in due course, and providing to Maker the name, address and telephone number of each such proposed assignee or transferee. No such negotiation of this Note shall occur or be valid or enforceable, or create any rights or remedies in favor of such assignee or transferee, until the provisions of this paragraph have been complied with by Holder."

- Right Of First Refusal Re Sale Of Promissory Note: In addition to receiving, in due course, prior notice from the lender of an impending assignment of the promissory note to a holder, the borrower's counsel should consider negotiating for a right of first refusal to acquire the note on the same terms and conditions as offered by the proposed assignee.

  Counsel then may point out that a borrower should be entitled to have a short period of time within which to refinance the loan on the same discounted terms that are being offered to the proposed assignee.

  A sample right of first refusal provision would read like the immediately preceding provision, but continue as follows:

  "In the event that any holder of this Note desires to sell or transfer this Note to any bona fide third party purchaser at a discount, then such holder shall also advise Maker in writing of the terms and conditions of such proposed purchase, sale and discount and Maker shall have ten (10) calendar days following receipt of such notice to preempt such purchase and sale and to exercise a right of first refusal to purchase and acquire this Note and the security for payment thereof from such holder upon the same terms and conditions of purchase and sale of this Note as are offered by any such bona fide third party. In the event that Maker fails to exercise such right of first refusal in writing delivered to such holder within said ten (10) calendar day period, then such holder may thereafter consummate such purchase, sale and discount of this Note with such bona fide third party within the next following ninety (90) calendar day period, provided that such purchase, sale and discount must be made on terms no more favorable to such bona fide third party than have been offered in writing to Maker. Any assignment, transfer or negotiation of this Note consummated by Holder or any subsequent holder of this Note other than in accordance herewith shall confer upon such subsequent holder of this Note no greater rights or remedies (in law or at equity) than would be available to the original Holder of this Note."

- **Balloon Payment Provision:** Balloon payment loans are loans made on real property containing one to four residential units, at least one of which at the time of the loan is made is or will be occupied by the borrower. The term of the loan must be for a period in excess of one year.[3]

  To be considered a balloon payment loan, the final payment as originally scheduled must be more than twice the amount of any immediately preceding six regularly-scheduled payments or whichever contains a call provision.

  All balloon payment notes must contain the following statutory provision: *"This note is subject to Section 2966 of the Civil Code, which provides that the holder of this note shall give written notice to the trustor, or his successor in interest, of prescribed information at least 90 and not more than 150 days before any balloon payment is due."*

  Although the lender's failure to provide such written notice to the borrower does not extinguish any payment obligation, the due date for any balloon payment is extended, by statute, "until written notice is given to the borrower" in the manner prescribed.[4]

- **Waivers:** It is commonplace for all sorts of waiver of rights provisions to be included in promissory notes.

  From a borrower's perspective, however, there is at least one waiver that should be objected to. A red flag is raised when a lender includes a provision that waives the borrower's right to receive notice of assignment, transfer or negotiation of the note.

  Admittedly, a borrower's ability to negotiate the provisions of the promissory note may be limited, especially if the loan is to be funded by a bank or another institutional lender, which often considers that all provisions of its loan documentation are set in stone and inviolable.

  Whatever the circumstance, however, the request should at least be made that the waiver provision be modified in order to erase any waiver of notice of transfer or assignment of the promissory note.

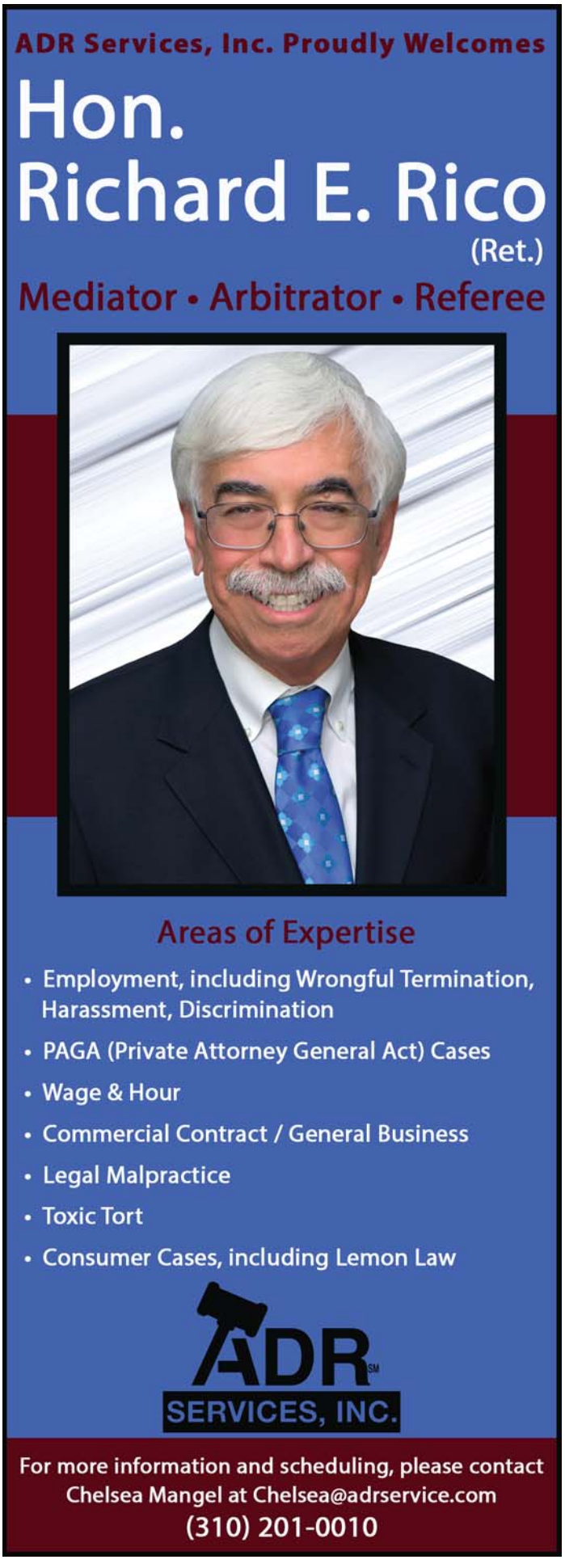
Optional Provisions

The following are some optional deed of trust provisions that should be considered during the loan drafting process.

All of these provisions are set forth in an addendum to the deed of trust, and may be slanted in favor of the lender or the borrower.

- **Priority of Lien:** From a lender's standpoint, the priority of the lien to be established on the real property following the recording of the deed of trust should be memorialized in the addendum to the deed of trust.

  For example, a sample provision could communicate that, *"This Deed of Trust is intended to be a first lien and charge created against the real property described herein."*



When the loan is substantial in amount, the lender should always require that a policy of title insurance be issued—the premium for which is usually paid by the borrower—that insures the intended priority of the lender's lien.

- Acceleration Clause In the Event of Sale: Most loans on real property include a provision commonly known as a "due on sale" clause, which allows the lender, at the lender's option, to accelerate repayment of the debt owed by the borrower if the property that secures the promissory note is sold or in some cases further encumbered.

  Such an acceleration clause advances the maturity, or due, date of the promissory note, when the balance of the unpaid principal and accrued interest must be paid.

  A "due on sale" clause, in effect, gives the lender the option of calling the loan due or waiving the right to do so. In order to be enforceable, a "due on sale" provision must be set forth in its entirety in both the promissory note and the deed of trust if the loan is on property containing four or fewer residential units or on which such residential units are to be constructed.[45]

  It is advisable that "due on sale" clauses be included verbatim in both the promissory note and the deed of trust regardless of the nature of the loan.

  A sample "due on sale" clause in a deed of trust could read:

  "This Deed of Trust is given and accepted, in part, upon the express agreement of Trustor and Beneficiary that in the event that Trustor should transfer voluntarily or by operation of law any interest in title to the real property described herein, whether such transfer or an interest in title occurs by deed or by contract of sale, or if the real property is leased for a term in excess of five (5) years, or if Trustor further encumbers the real property described herein without Beneficiary's prior written consent, Beneficiary shall to the maximum extent allowed by law have the right to accelerate the unpaid principal balance plus then accrued interest, if any, upon written notice to Trustor to such effect. Notwithstanding the foregoing, the following transactions shall not be deemed to constitute a transfer of an interest in title within the meaning of the preceding sentence: (i) a lease of the subject real property, the term of which does not extend beyond five (5) years, (ii) any transfer of an interest in title to a partnership or joint venture in which Trustor at all times maintains not less than a fifty-one percent (51%) beneficial and controlling interest, (iii) any transfer of an interest in title to a revocable living trust in which Trustor is the primary beneficiary during Trustor's lifetime, and (iv) with the prior written consent of Beneficiary, the creation by Trustor of any mortgage or deed of trust describing the subject real property, the lien and charge of which is junior in right and time to the lien and charge of this Deed of Trust. Any failure by Beneficiary to exercise the preceding acceleration right shall not be deemed to be a waiver of such right, and Beneficiary shall not be deemed to have waived such right of acceleration except in a writing signed by Beneficiary."

As mentioned above, the preceding acceleration clause should also be stated *verbatim*, except that in the promissory note secured by the deed of trust, references to Trustor may be changed to "Maker", and references to Beneficiary may be changed to "Holder".

It should also be noted that under a series of California cases beginning with *Wellencamp v. Bank of America*, so-called "due on sale" clauses may no longer be exercised solely for interest adjustment purposes.[6]

In *Wellencamp*, the court held that the only valid use of the "due on sale" clause exists where sale of the property by the borrower would impair the lender's security.

Under California law, a prohibition contained in a "due on sale" clause against further burdening of the property with junior deeds of trust is not enforceable if the loan is on real property containing only a single family, owner-occupied dwelling.[7]

Also, since *Wellencamp* is a California state court decision, federal law presumably preempts the statute with respect to loans originated by a federal savings and loan association or federal savings bank.

Regarding such federally originated loans, if the loan is made on residential real property containing less than five dwelling units a lender may not exercise its option under a "due on sale" clause in the following situations:

- The creation of a junior lien on the property, so long as occupancy rights are not transferred or the creation of a purchase money security interest for household appliances.
- A transfer that occurs by devise, descent or operation of law on the death of a joint tenant, a transfer to a relative resulting from the death of the borrower, or the granting of a leasehold estate of three years or less not containing an option to purchase.
- A transfer where the spouse or children of the borrower come to own the property, or a transfer resulting from a dissolution of marriage or legal separation or pursuant to a property settlement agreement.
- A transfer into an inter vivos trust in which the borrower is, and remains, a beneficiary and where occupancy

rights are not transferred, or any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board.[8]

- Demolition of Improvements and Waste: A prohibition on demolition of improvements or waste on the property should be included in the addendum to a deed of trust, unless the lender provides prior written approval.

  Waste is defined as "the harmful or destructive use of real property by an individual who is in rightful possession of the property."

  A sample clause could read:

  "Additional Default Provision. A material default by Trustor shall be deemed to have occurred hereunder in the event that (i) any of the improvements upon the real property described herein are demolished or substantially altered without the prior written approval of Beneficiary, which approval Beneficiary may give or withhold in Beneficiary's sole and absolute judgment and discretion, or (ii) Trustor commits any waste upon the real property described herein, or suffers the commission of such waste by others."

Insurance Requirements

The boilerplate provisions of printed form deeds of trust that are provided by title insurance companies may not include sufficient insurance provisions.

Such printed forms of deeds of trust come in two versions—a long form and a short form, which contains virtually identical provisions to those found in long form deeds of trust, except that they refer to and incorporate, by reference, the provisions of a fictitious deed of trust that has been previously recorded.

All beneficiaries—the lenders—under deeds of trust would like to be covered by adequate insurance for all insurable losses. The question then becomes: How much insurance coverage is available, and how much the trustor—the borrower—is willing to pay in insurance premiums?

Depending upon this version, a sample insurance requirements clause in an addendum to either a long or short form deed of trust might read:

- General Insurance Requirements: *"All insurance provided for herein shall name Beneficiary as an additional insured and shall contain a standard form loss payable endorsement in favor of Beneficiary. In the event there is a deductible clause in any standard form policy in use in the State wherein the property described herein is located, then the amount deducted from the coverage by said clause shall be borne*

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by Trustor. Any insurance containing a deductible clause of One Thousand Dollars ($1,000.00) or less in the standard form policy shall not, by virtue of said deductible clause, be regarded as unsatisfactory by Beneficiary. Trustor's obligation to obtain insurance hereunder shall not in any way diminish, alter or affect any obligation or liability of Trustor hereunder, or in the Note or any other instrument given as security for the Note. Beneficiary shall not by the fact of approving, disapproving, accepting, preventing, obtaining or failing to obtain any insurance, incur any liability for the form or legal sufficiency of insurance contracts, solvency of insurance companies, or payment of lawsuits, and Trustor hereby expressly assumes full responsibility therefor and any liability, if any, thereunder."

- Public Liability Insurance: *"Trustor shall procure and keep in force during the term of this Deed of trust comprehensive public liability insurance insuring trustor against claims for personal injury liability including, without limitation, bodily injury, death or property damage liability with such limits as Beneficiary may from time to time reasonably require. Such policy shall cover the property described herein and any liability Trustor assumes under this Deed of Trust or any other instrument given as security for the Note."*

- Fire And Other Casualty Insurance: *"Trustor shall procure an keep in force during the term of the promissory note secured by this Deed of Trust fire and other casualty insurance acceptable to Beneficiary insuring the real property described herein against loss or damage by those risks embraced by coverage of the type now known as the broad form "all risk" or special extended coverage, including but not limited to endorsements covering losses sustained by reason of fire and lightening, riot and civil commotion, vandalism and malicious mischief, plus a rental loss endorsement and a replacement cost endorsement. If the property described herein is also being insured against earthquake damage, such insurance policy shall also be perpetuated during the term of the Note, with Beneficiary designated as an additional insured party thereunder. The fire insurance policy and all endorsements thereto, except the rental loss endorsement, shall be in an amount not less than the unpaid principal balance of the promissory note and as may be required to prevent Trustor from becoming a co-insurer under the terms of the applicable policy (except that Beneficiary will accept fire and extended coverage insurance on a 90 percent co-insurance basis, provided that the policy amount is not less than the full insurable value thereof."*

- Other Insurance: *"Beneficiary reserves the right to request at any time during the term of this Deed of Trust that Trustor modify, in whole or in part, any of the foregoing described insurance policies as may be required by beneficiary from time to time, including but not limited to the extension of such policies to cover such additional risks as Beneficiary may require."*

- Insurance Policies: *"All insurance to be maintained by Trustor shall be procured from insurance companies rated AA or better in the most recent guide made available to the public by "A.M. Best Rating Services" and which are authorized to do business in the State wherein the property described herein is located. Prior to the execution of this Deed of Trust, Trustor shall delivery to Beneficiary acceptable evidence of all insurance policies and endorsements hereunder that shall be held by Beneficiary. The policies shall provide that they shall not be cancelled or modified except after thirty (30) days' prior written notice of intention to modify or cancel has been given by the insurance company to Beneficiary. At least thirty (30) calendar days prior to the expiration date of any policy to be maintained hereunder by Trustor, Trustor shall deliver to Beneficiary acceptable evidence of renewal or a written "binder" thereof."*

- Miscellaneous: *"Beneficiary shall not by the fact of approving, disapproving accepting, preventing, obtaining or failing to obtain any insurance, incur any liability for the form or legal sufficiency of insurance contracts, solvency of insurance companies, or payment of lawsuits, and Trustor hereby expressly assumes full responsibility therefor and any liability, if any, thereunder."*

- Conflict in Terms: *"The provisions of this Addendum are intended by Trustor and Beneficiary to supplement but not to supersede the provisions of the short form deed of trust and assignment of rents to which this Addendum is attached. However, in the event of any conflict between the terms and conditions of this Addendum and said short form deed of trust and assignment of rents, Trustor and Beneficiary intend that the provisions of this Addendum shall in each such case of conflict be controlling."*

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[1] *Williams v. Fassler* (1980), 110 Cal.App.3d 11.
[2] California Commercial Code §§ 3302 and 3306.
[3] *Id.* § 2924i(a).
[4] *Id.* § 2924(i)(e).
[5] *Id.* § 2924.5.
[6] *Wellencamp v. Bank of America* (1978), 21 Cal.3d 943.
[7] California Commercial Code § 2949.
[8] 12 U.S. Code § 1701j-3.

Mechanics of Financing: Promissory Notes and Deeds Of Trust, Part II

Test No. 143

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. Lenders are required by law to accept early payment of the loan if the borrower so desires.
❑ True ❑ False

2. A borrower has the right to offset claims against the lender by not paying principal and interest payments under the promissory note until the claim is satisfied in full. ❑ True ❑ False

3. A co-borrower's liability for payment of a $100,000 promissory note may be modified by an express agreement with the lender to whatever lesser amount is agreeable to the lender.
❑ True ❑ False

4. In California, in all cases a lender may seek a deficiency judgment against the borrower if the proceeds from the judicial sale of property that is security for the loan are not sufficient to pay off the promissory note.
❑ True ❑ False

5. Under the provisions of some promissory notes, the borrower may not be personally obligated to pay off the note, regardless of how foreclosure of the deed of trust may occur.
❑ True ❑ False

6. A security agreement covering only personal property is an alternative to having a deed of trust on real property.
❑ True ❑ False

7. When a lender assigns for value a promissory note and its security to an assignee in good faith and without knowledge of any claims that the borrower has against the lender, the assignee is said to be a "holder in due course."
❑ True ❑ False

8. Barring any special circumstances "holders in due course" receive an assignment of the promissory note free and clear of all claims that the borrower could assert against the lender.
❑ True ❑ False

9. In addition to receiving prior notice from the lender of an assignment of the promissory note, it is good practice for a borrower to negotiate for a right of first refusal to acquire the note on the same terms as offered by a proposed assignee.
❑ True ❑ False

10. Balloon payment loans are loans made on real property containing more than four residential units, at least one of which is or will be occupied by the borrower, and the term of the loan is for a period in excess of one year.
❑ True ❑ False

11. A lender's failure to provide the Civil Code Section 2966 notice of a balloon payment to a borrower extinguishes the borrower's payment obligation.
❑ True ❑ False

12. When representing a borrower, it is recommended that the promissory note include a standard provision that waives notice of the transfer or assignment of the note.
❑ True ❑ False

13. From a lender's prospective, the priority of the lien to be established on the real property should be memorialized in an addendum to the deed of trust.
❑ True ❑ False

14. In order to be enforceable, a "due on sale" clause must always be included in the promissory note and its always optional to include it in the deed of trust.
❑ True ❑ False

15. Under *Wellencamp v. Bank of America*, "due on sale" clauses may no longer be exercised solely for interest adjustment purposes
❑ True ❑ False

16. The *Wellencamp* court held that the only valid use of the "due on sale" clause exists where the sale of the property by the borrower would impair the lender's security.
❑ True ❑ False

17. With respect to federally-originated loans, the "due on sale" clause cannot be enforced because of the recordation of a junior lien if occupancy rights are not transferred.
❑ True ❑ False

18. A common definition of waste is the harmful or destructive use of real property by an individual who is in rightful possession of the property.
❑ True ❑ False

19. The boilerplate provisions of printed form deeds of trust provided by title insurance companies usually include adequate insurance provisions, and supplementing them in an addendum to the deed of trust is not recommended
❑ True ❑ False

20. The short form deeds of trust provided by title insurance companies provide virtually identical provisions to those found in long form deeds of trust provided by title insurance companies
❑ True ❑ False

Mechanics of Financing: Promissory Notes and Deeds Of Trust, Part II

MCLE Answer Sheet No. 143

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.**
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1.	❑ **True**	❑ **False**
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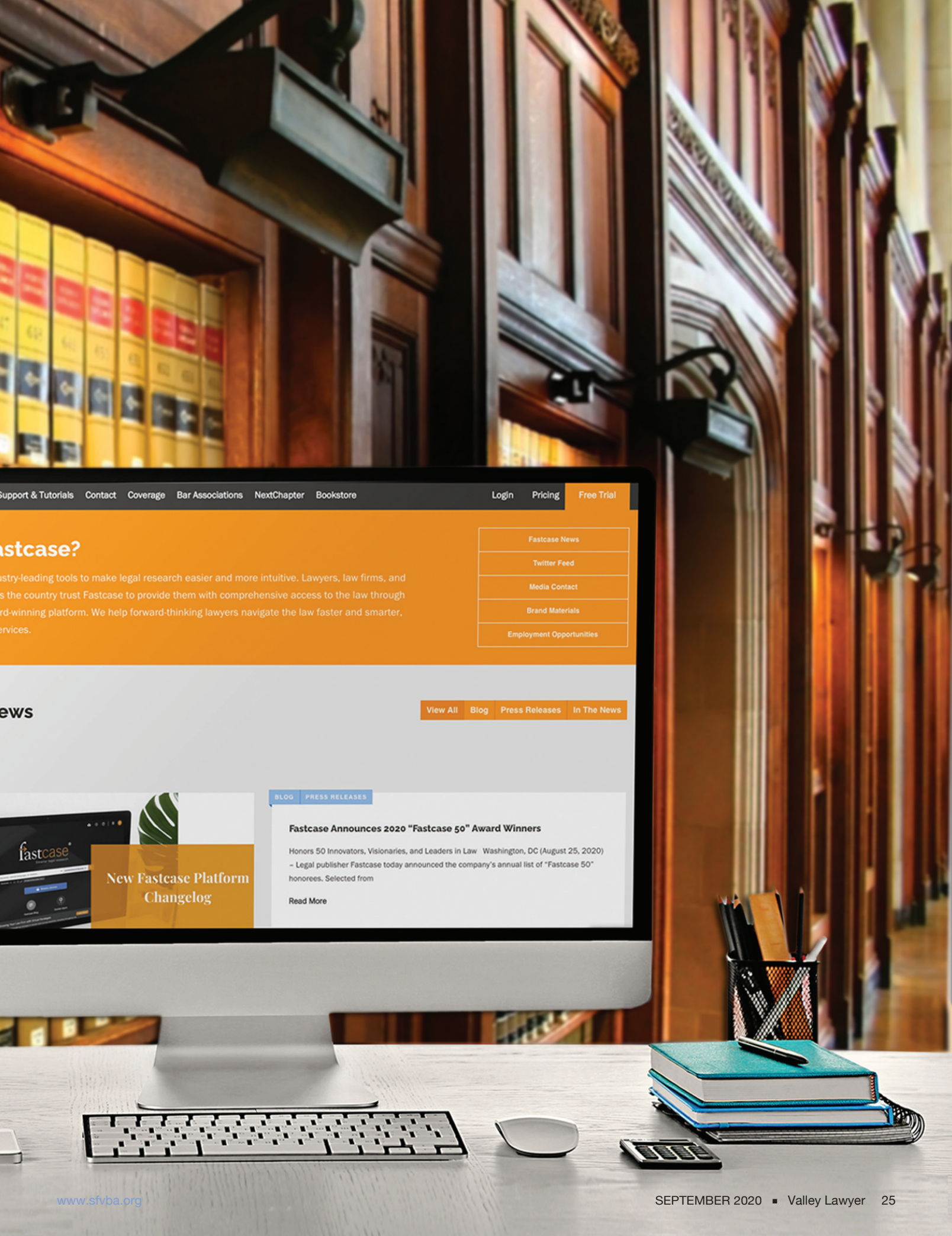
15.	❑ **True**	❑ **False**
16.	❑ **True**	❑ **False**
17.	❑ **True**	❑ **False**
18.	❑ **True**	❑ **False**
19.	❑ **True**	❑ **False**
20.	❑ **True**	❑ **False**

By Michael D. White

Legal Research in the Internet Age

Today, the information revolution has corralled trillions of bytes of facts and statistics that await a mere mouse click away at any given time, and, with twists and turns in the law appearing at an unprecedented rate, the role of research and how it is conducted has morphed dramatically.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INVESTING THE TIME AND EFFORT to conduct thorough research to find the appropriate legal statutes and mandates of the law—complex and elastic at all levels—and then overlay them onto the singular and routinely complex set of circumstances faced by a client is at the very heart of what a lawyer does.

The skill to effectively research is indispensable for all lawyers, be they sole practitioners or members of a law firm, regardless of area or type of practice.

Today, the information revolution has corralled trillions of bytes of facts and statistics that await a mere mouse click away at any given time, and, with twists and turns in the law appearing at an unprecedented rate, the role of research and how it is conducted has morphed dramatically.

According to a research paper published by the Cornell Law School in 2007, "The Internet and digital revolution have led…to information overload, with information coming from many different directions, and the simultaneous increased speed of information, where almost instantaneous responses are expected from the easy flow of information…"

This is particularly thought-provoking as the American Bar Association found in a recent survey that lawyers in the U.S. spend an average of 20 percent of their work time every week conducting legal research, mostly, if not all, on the internet.

The Impact of the Internet

There is "no doubt the internet has had a transforming impact on how legal research is conducted," says Kyle M. Ellis, an SFVBA Trustee, who serves as Supervising Research Attorney at the Los Angeles Superior Court. "Utilizing it do research is the backbone of what we do at the court."

Born and raised in San Diego, and before graduating from the Fordham University Law School in New York in 2015, Ellis received his undergraduate degree in History from the University of California, San Diego and a Master's in the History of Science from Oregon State University.

His position with the Court has him overseeing the work of 16 attorneys who assist the Court's bench officers with their research needs.

Some of the attorneys that Ellis supervises serve as independent calendar attorneys, while others specialize in specific areas such as family law.

"The best thing about it is that it's just pure research," he says. "You get to spend all day just figuring out the intricacies of what the law is, and how to correctly apply it given the circumstances that are presented."

Prior to becoming a supervisor with the Los Angeles Superior Court, Ellis worked at the Court as a term Law Clerk and as a permanent Research Attorney in several of its independent calendar courtrooms, plotting the ins-and-outs of law and motion—trials, pleadings, and "basically everything that deals with civil law that goes through state courts," he says.

"Typically, you have motions on all sorts of issues, all the time. And they're set up for oral argument base, and there's a briefing schedule and moving papers, opposition papers, and other documents. Then, once all those documents are in, the judicial officer has what they need to make a decision. My job would be to go in, before the hearing dates, review all the documents, and then, write up a memorandum addressing what the parties argue and here is what my research indicates with a recommendation to the judge."

It was a great training ground that, he says, helped him develop a more expansive knowledge of the law, as well as his critical research skills.

According to Ellis "There are usually two basic areas to explore when doing research. First, secondary sources. This is usually when preliminary research has to be done on topics that haven't been encountered before. It's a way of getting the background to get familiarized with the issue by using sources like the Carter Guides or others like that."

Otherwise, he says, "The next step is narrowing down the field, studying cases, and trying to find anything that's relevant to the legal issue at hand.

Occasionally, looking into the legislative history of a law is probably the best place where the internet has helped out a lot because before the internet, it was almost impossible to find legislative history unless one of the parties had done so and attached it as an exhibit or you wanted to travel up to Sacramento and plow through the state congressional documents yourself."

Now, utilizing the internet, "you can go online look up when a bill was passed, go into the legislative history, the committee reports on

Michael D. White is editor of *Valley Lawyer* magazine. He is the author of four published books and has worked in business journalism for more than 35 years. Before joining the staff of the SFVBA, he worked as Web Content Editor for the Los Angeles County Metropolitan Transportation Authority. He can be reached at michael@sfvba.org.

the issue and figure out why the legislature passed the law. I've done that probably three or four times to come down to the correct side of what a law is trying to do to try and get the results for a motion."

New Tools

There are some new internet tools that have developed in just the past year that, Ellis feels, "show some pretty decent promise."

For example, Westlaw has created a tool that helps figure out what direction to take a research task by finding relevant citations and automatically 'shepardizing' them into the brief in their proper locations.

Ellis says, "If you're not sure which cases the parties are deciding to use are particularly relevant, you can find the brief in there and see where the computer takes you. Then you can use that as a good place to start your research."

The biggest adjustment for research attorneys, "is actually all the e-filing that occurs," says Ellis.

"When I first started, everything was on a paper system, and then about a year or two in, everything switched over to electronic filing. On the one hand, it's great because you have ready access to all the appropriate papers 24 hours a day at home, even if you have the virtual private network set up, which everyone does at this point. You work at your own pace and everything's there for you."

The downside, he says, is that, "When you're dealing with really complicated motions, using the computer to sift through what could be hundreds if not thousands of pages of evidence is very difficult. When we had paper exclusively and we had these big motions, I would be flipping back and forth to different parts of each motion and the arguments with four different pieces of paper lined up and little tabs, bookmarking different pieces of evidence and I'd go back and forth between each one. It's much more difficult to do that sort of work on a computer."

Legal Archeologist

In his position and based on his background, does Ellis consider himself more a historian than a pure researcher?

"I would say more of a researcher than a historian these days," he says. "Some of the most important things I took from history were trying to figure out how to find reliable sources, how to evaluate what makes sense to use and what doesn't make sense to use, given the appropriate context."

One of the most important things that do translate over to doing research as a historian is "figuring out where to go to find the information," adds Ellis. "Even with everything online, if you don't know to go to the legislative info websites, you're not going to find legislative information about California laws or what-have-you."

What would be a good analogy to describe him and his team? Detectives, perhaps?

"No, not really," he says. "Detective work is based on finding something new. But here, the arguments are all presented to you and the universe of evidence is there for you to find it. It's just piecing it together from what's there."

The best analogy, he feels, would be an archaeologist. "You have all the pieces and you have different arguments and you're trying to figure out what pieces fit together where for the correct argument and whether one person or another is correct based on the facts."

Has the current COVID-19 pandemic impacted the work of his research team? "Yes. It's been

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a little bit of a challenge because you don't have that physical presence."

For instance, says Ellis, "The family law unit is based in downtown at Stanley Mosk. And that's where I would be, but because of the pandemic, everyone's in their own homes. So we've been trying to make up for that by using chat software, so we have team meetings. And it works somewhat, but it's not the same as being in person with the folks."

"Everyone is being challenged by the situation," he adds, "And, if you do have a group of people you normally work with, it's even more challenging because something like 80 percent of communication is non-verbal. You lose all that when you're on the phone all the time or relying on Zoom."

The upside of his work as a research attorney?

Practicing attorneys, says Ellis, "have to make more creative arguments about the law in order to advocate on behalf of their clients. A research attorney doesn't have to be as creative. Maybe that's putting it in an odd way, but you get to try to find what the correct position is, and it's nice not to have a client in the back of your mind, and, in a sense, not having to serve as an advocate."

There is, he says, "a lot less pressure and there are a lot of other things you don't have to deal with as a research attorney that you do when you're working with clients. You don't have to find clients like a private practitioner. As a researcher, everything comes to you, and you don't have to worry about billing, or the other issues that go into maintaining a private practice, except doing the legal research. It's just a lot of fun."

Old School

While countless attorneys rely almost exclusively on the internet for their research, there are others who, based on their areas of practice, are, for want of a better term, "old school" in their approach to legal research.

"I don't do much research on the internet," says attorney Heather Glick-Atalla, an Encino-based State Bar Certified Specialist in Estate Planning, Trust and Probate Law, and a member of the SFVBA Board of Trustees.

She gleans about 98 percent of her research from published books, codes, and seminars that she attends.

"I'm never in court as I have a non-adversarial law practice. So, as a transactional attorney, I'm not looking so much at case law," she says. "In my work with non-profits, for example, what I do is more fact-finding information about the entities involved. That may mean finding out if a non-profit is in good standing with the IRS or the Attorney General's office."

Glick-Atalla maintains an extensive library in her office that she routinely accesses for information, as well as a fairly authoritative collection of the CED practice guides that she regularly refers to.

"Just about everything I need in terms of research material is available in a book somewhere. If I need to refer to a book that I don't have in my library, I can always refer to it online."

If necessary, Glick-Atalla parlays her membership in the SFVBA to access FastCase and research some case law.

"It's dangerous as an estate planning attorney to Google-search the language to use in my documents. That's not advisable and it's not prudent. If I need the latest updated forms, I'll actually purchase a practice guide. It may be in an electronic format, but that just means its available as the online version of a book."

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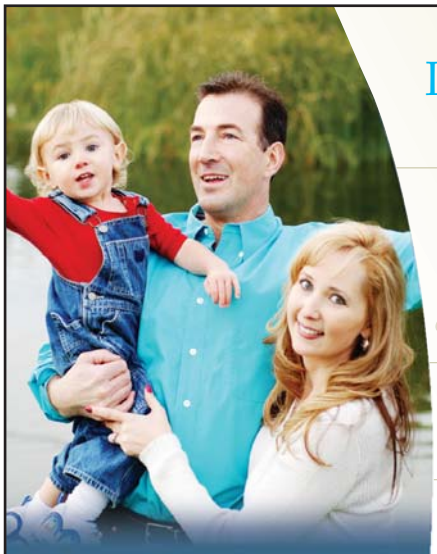

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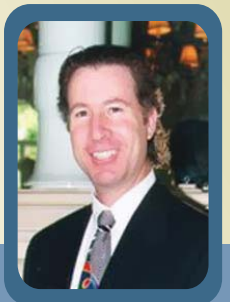


Elliot Matloff

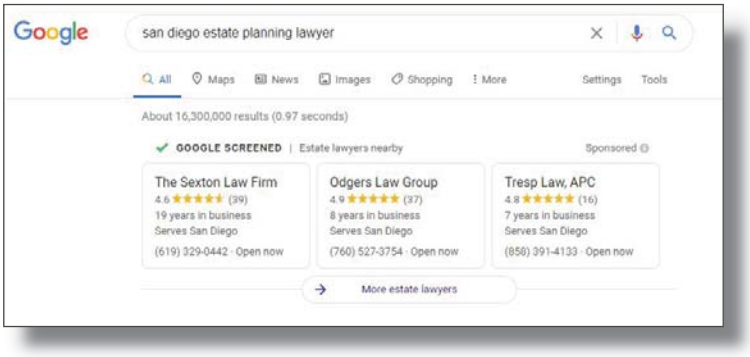
By Barry P. Goldberg

Google Comes Through:
Local Service Ads for Lawyers are Here

IMAGINE DOMINATING YOUR LOCAL LEGAL MARKET and beating out all the big advertisers on day one—for a reasonable price. All that is possible now that Google Local Service Ads (LSAs) for lawyers has finally arrived.

This marketing tool will change everything about being discovered on Google as law firms that successfully market through traditional Search Engine Optimization (SEO) and Pay Per Click (PPC) will be rethinking their marketing strategies in an increasingly competitive environment.

With your firm highlighted with five stars and a large green 'Google Certified' checkmark, this is the perfect marketing vehicle for Valley lawyers. Although available for all practice areas—such as estate planning, personal injury, and bankruptcy law—it is expected that consumer-driven areas will be the most competitive.



Google's Beta testing of LSAs over the past year has been limited to the practice areas of immigration and estate planning in a few cities across the country, but we should be seeing the introduction of LSAs in Southern California sometime in this month.

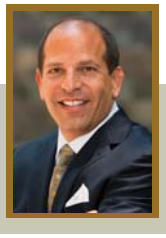
There are a few catches. First, participants must "qualify"; second, they must be "local"; and third, they must be willing to pay a reasonable fee to be included.

Social media marketing experts are almost unanimous in trusting that this new platform will be reasonably priced and that the expected return on occupying the top third of page one ahead of PPC ads and ahead of the map listings will be substantial.

From Google's standpoint, it is after a new revenue stream—namely, local lawyers who do not have the hundreds of thousands of dollars to compete with big advertisers—that recognizes the quantum shift of consumers who desire "local" legal services. The term "near me" in searches for legal terms has increased by over 900 percent over the last few years. This follows the local pattern that the days of Valley residents taking half-a-day to drive to downtown, Beverly Hills or Santa Monica to meet with an attorney are over.

LSAs serve to reward truly local law firms as large-scale advertisers who are likely to continue their existing marketing campaigns will be placed far down the list, according to Google's placement algorithm.

It is simple and easy to qualify and to become Google Certified. Go to Google Local Service Ads and start filling out the application with information such as your practice area, street address, phone number, and the bar license information for each of your attorneys. In addition, headshots



SFVBA President **Barry P. Goldberg** practices in the area of personal injury law from offices in Woodland Hills. He can be reached at bpg@barrygoldberg.com.

of every attorney in the firm and information on your malpractice insurance should also be provided.

Google will run a check on your firm to confirm the license and disciplinary status information. In addition, Google has contracted with the Pinkerton Agency to conduct background checks—which usually take two to five weeks—presumably to assure that there are no felony or fraud convictions.

Multiple physical offices where clients are actually served are permitted, but it is not clear yet how Google will handle virtual, shared space, barristers suites and other alternative office arrangements.

For Google Local Service Ads to work at maximum efficiency, it is recommended to start with a firm's "main" office that has been well indexed by Google and others for accuracy of the address.

Many lawyers have had a bad experience with all types of advertising and, in particular, with PPC and thousands of dollars used up in the blink of an eye with nothing to show for it.

The experts believe that LSAs will be much different as opposed to Pay Per Click (PPC). Callers are usually more serious than "clickers" and it is anticipated that the conversion rate—that is, lead to paying client—will be much higher than a standard "click" campaign.

Moreover, in order to connect, the potential new client must verify that they are linking up with a lawyer in the correct practice area.

In other words, if a client needs a bankruptcy attorney and gets an LSA connection with a personal injury attorney, there is no charge for that call.

There are things, of course, that can be done right now to maximize the success of utilizing LSAs and it is important to understand that a local presence online will impact the placement and frequency of your LSA ad. So, Search Engine Optimization (SEO) does still count and shouldn't be ignored.

Right now, a law firm can round out its free online Google profile by making sure it is accurate and the address is properly listed. Photographs and a complete description of the legal services offered should also be updated, or added if lacking.

Google reviews will play an important part in LSA ad placement and its success of the ad. Ask satisfied clients for their recommendations and it is also acceptable to obtain reviews from vendors and even other lawyers familiar with the service you provide. The more five-star reviews gathered will result in a slight advantage in Google's placement of your ad.

Finally, set a budget. Most law firms are cautious about investing in unproven advertising platforms, so it is acceptable to initially set a low working budget and see if it produces. Several experts have opined about the appropriate budget to earmark for LSAs. The answers have been a fairly uniform "How many new cases can you handle?"

By Barbara Bergstein

Estate Planning for Individuals with Special Needs

ESTATE PLANNING ATTORNEYS are called upon to deal with more than just preparing wills and trusts.

In many cases, they are called upon to act as counselors to their clients, advising on interfamily relationships, handling the gradual decline in mental function of a client, dealing with the death of that client, and often serving in the role of mediator for family conflicts.

One area that can be especially challenging for estate and trust attorneys is representing a family that has a special needs child, regardless of whether that child is a minor or an adult.

Parents of a special needs child may be struggling with numerous challenging issues, including the ongoing health needs of the child, finding responsible care providers who can offer much-needed respite relief, advocating for their child, and finding supplemental programs to enhance that child's quality of life.

In addition to those challenges, parents are especially concerned about the future, and wonder what will happen when they are no longer able to provide the much-needed care their child requires.

Available Government Benefits

Many individuals with special needs receive government assistance.

For those individuals who have never worked or been employed due to a disabling condition, Supplemental Security Income (SSI) and Medi-Cal are their lifelines. To qualify for SSI and Medi-Cal, the individual must have a qualifying disability and have no more than $2,000 in resources such as savings or checking accounts.[1]

Usually, when a special needs child turns age 18, an application can be filed for these means-tested government benefits. The SSI program provides a monthly stipend to cover the costs of food and shelter. California adds a supplemental amount to the federal benefit rate.[2]

In addition, a disabled adult who is the child of a worker who is receiving retirement benefits may qualify for Social Security Disability Insurance (SSDI). Qualification can also be based on a deceased parent's earnings record.

After a 24-month qualifying period, that child is also eligible for Medicare. In that case, the applicant must prove disability before the age of 22.

Such benefit programs are called entitlement programs because they are based on the earnings record of a worker. Because these benefits are not means-tested, one's assets and resources do not count in determining eligibility.

Barbara Bergstein is a sole practitioner in Sherman Oaks, California. Her practice includes estate planning, including estate planning for individuals with special needs, trust administration, and estate and gift tax planning. She can be contacted at bbergstein@sbcglobal.net.

However, it is possible for a child with a disability to receive both means-tested benefits and entitlement benefits. Even if a disabled child loses SSI due to a cost of living increase in the SSDI amount, that child cannot lose Medi-Cal benefits.[3]

Protecting Government Benefits

The Special Needs Trust or Supplemental Needs Trust (SNT) offers a unique opportunity to maximize the quality of life for a child with a disability.

The Trust is an opportunity for parents to plan for their child's future by ensuring that there will always be funds to hire advocates and care providers to take over when parents are no longer able to furnish the necessary care.

The SNT is designed to protect a disabled child's SSI and Medi-Cal government benefits, while providing a supplemental fund to pay for additional services and special programs.[4]

Many children with special needs require extraordinary medical care and specialized services. While Medi-Cal is often the only health insurance that children with disabilities are able to obtain, the SNT can pay for medical care not otherwise covered by Medi-Cal.

The Special Needs Trust may be drafted as part of the Family Living Trust or created as a stand-alone Irrevocable Gifting Trust.

In a typical Living Trust scenario, on the death of the parents or any other family member who has created an SNT under their estate plan, the family trust assets are distributed to the Trustee of the SNT to be used for the disabled child's special needs.

The SNT directs the Trustee to distribute funds for the benefit of the disabled child, but not directly to that child.

Distributions of trust funds directly to that child may result in the loss of the monthly SSI amount.

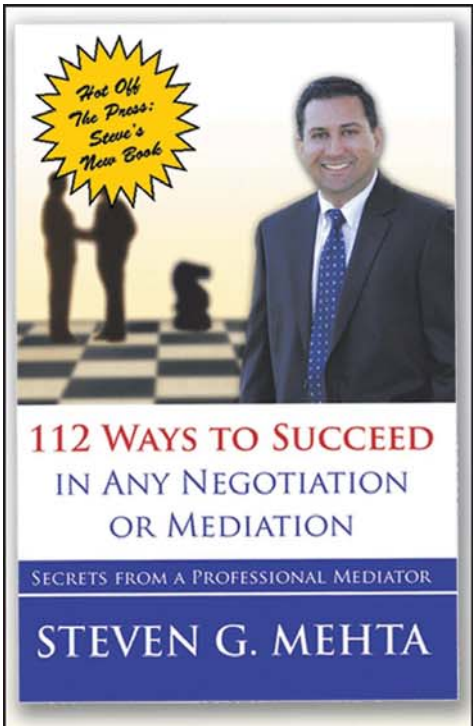
Accordingly, the Trustee purchases goods and services for the child's benefit thereby maximizing and enhancing the child's quality of life.

The SNT also allows parents to continue the care and support they provided for their child while they were alive.

For example, many parents supplement their adult child's basic necessities, food and shelter, without jeopardizing continued eligibility for means-tested government benefits.

The SSI amount of $940.72—the federal benefit rate plus the California supplement—severely limits the beneficiary's access to adequate housing, since the beneficiary also has to use this amount to pay for the basic necessities of food and utilities.[5] [6]

The SNT, however, provides an ongoing opportunity for families to continue to supplement food and shelter while maintaining a child's government benefits.



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Under the current law, paying for food and/or shelter may only reduce the beneficiary's SSI Federal Benefit Rate by one-third rather than dollar-for-dollar the cost of the food or shelter provided.[7]

Another way to provide quality housing is to have the SNT hold title to the family residence, a place that's safe and familiar to the child.

The Trustee of the SNT should be authorized to hire care providers on either a live-in or visitation basis to enable the beneficiary to live in the least restrictive environment.

Because title to the residence is held in the name of the SNT, the Trustee may allow the beneficiary to live there as long as she is willing or able.

In such a scenario, on the death of the trust beneficiary, the California Department of Health Services may not file an estate claim against the Trust for reimbursement for medical costs and services paid on behalf of the trust beneficiary.[8]

Finding the Right Trustee

The decision of designating the Trustee of the SNT can be perplexing. Siblings may not want the responsibility of managing a brother or sister's Trust during his or her lifetime. That sibling may be more willing or better suited to oversee care providers and specialized services.

A positive alternative to a family member, then, may be an institutional trustee or a private professional fiduciary.

However, because that institutional trustee or private fiduciary usually has not had the benefit of having known the disabled child and are unfamiliar with the disabled beneficiary's special needs, the use of a Trust Advisory Committee is a practical consideration.

Parents should choose trusted friends and/or family members who know and understand the beneficiary's particular circumstances and needs to serve as members of the Committee.

The role of the Committee is to procure services, programs, care providers, advocates, and therapies or treatments that each member agrees will enhance the beneficiary's quality of life and then direct the Trustee to purchase those services.

An Alternative to an SNT

An alternative to creating an SNT when a parent dies is to create an Irrevocable

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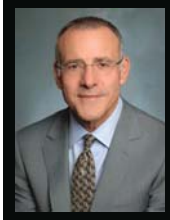

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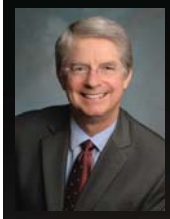

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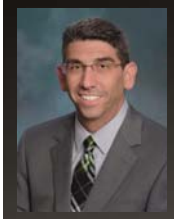

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Special Needs Trust during one's lifetime.

The purpose of such a Trust is to receive gifts of money or property so that there is an available fund now or in the future to pay for the therapies, schools, camps and care providers that otherwise might not be available to that child, and that the parents may not be able to afford.

This is an outstanding opportunity for grandparents and other relatives to direct gifts into a Trust for the benefit of a disabled family member.

Given that the COVID-19 pandemic has closed schools and, given that many children with special needs are unable to receive instruction by remote computer teaching and have limited access to qualified special education teachers, paying for tutors and therapists during this difficult time will help children receive the special education services they need.[10]

If invested properly, trust funds will provide a disabled child with a lifetime nest egg, especially at a time when parents are no longer able to care for their child because of aging and their own health care issues.

The Irrevocable Trust is drafted to receive gifts of a present interest in order to take advantage of the current annual gift tax exclusion amount of $15,000 per person each year. This provision allows numerous individuals to fund the Trust annually.[11]

Care and diligence must be taken when drafting the Trust to avoid jeopardizing the disabled child's beneficiary's benefits.

In addition, given the current gift and estate tax exemption amount of $11,580,000 per person, a Trust provides an opportunity for families with large estates to use their lifetime exclusion amount to fund the Trust, as that the IRS has stated that there will be no "clawback" of gifts made under the current law which is due to sunset in year 2025.[12]

Peace of Mind

For parents, the Special Needs Trust offers some peace of mind that their child will be taken care of and provided for after they are no longer here.

Raising a child with special needs can be challenging. Despite the laws that ensure a free public education to all children with disabilities, parents often have to fight with school districts to obtain services such as speech therapy, occupational therapy, physical therapy or a classroom aide, services that are, in fact, guaranteed under federal law.[13]

Hiring advocates to assist in obtaining these services can be costly and stressful. While most children are able to move into the world and function as independent adults, a child with special needs may need lifetime care and be dependent on their parents for the basic activities of daily living.

Planning an estate for families who have a child with a disability can present estate and trust attorneys with an unequaled opportunity to not only make a profound difference in both the life of the special needs child, as well as the lives of the parents who struggle every day responsibly caring for their special child.

---

[1] Medi-Cal covers those individuals who cannot afford health insurance through the Covered California Insurance Plan which includes Obamacare.
[2] 529 Plans and CUTMA accounts may disqualify the child from receiving SSI and Medi-Cal.
[3] The Federal Benefit rate for year 2020 is $783; the California State supplement amount is $160.72.
[4] 42 U.S.C. § 1396a.
[5] A Special Needs Trust is not necessary if the disabled child is receiving SSDI and Medicare only.
[6] Increased annually for cost of living changes.
[7] Access to Section 8 Housing in Los Angeles County can exceed 2 years or more. In addition Section 8 housing treats Special Needs Trust differently than the Social Security Administration.
[8] 20 CFR § 416.1130; Social Security Program Operation Manual System (POMS) SI 00835.
[9] 42 U.S.C § 1396p. Third party Special Needs Trusts, trusts funded with the assets of someone other than the disabled beneficiary, are not subject to estate claims. However, First Party Special Needs Trusts funded with the assets of the disabled beneficiary, usually from a personal injury award or settlement, are subject to estate claims.
[10] A family member may pay for these services directly, but a trust fund if invested well, accumulates and grows building a nest egg for that beneficiary.
[11] *Crummey vs Commissioner* 397 F. 2d 82 (1968) A 9th Circuit Court decision, and its progeny.
[12] On November 26, 2019, the Treasury Department and the IRS issued final regulations under IR-2019-189 confirming that there will be no "clawback" for gifts made under the increased estate and gift tax exclusion put in place by the Tax Cuts and Jobs Act of 2017 (the "Act")
[13] Individuals With Disabilities Education Act (IDEA) Section 504 of the Rehabilitation Act of 1973.

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By Terri L. Asanovich

Avoiding Compassion Fatigue, Vicarious Trauma and Secondary Traumatic Stress

THE OCCURRENCE OF secondary traumatic stress or vicarious traumatization is nothing new and has been described since the mid-1980s.

This phenomenon was originally diagnosed in therapists and roughly coincided with the growth in treatments focused on clients who were victims of trauma.

Secondary trauma occurs when the professional develops intrusive thoughts, avoidance and withdrawal, and symptoms of tension that disturb sleep related to exposure to traumatic material that is presented by the client.

Moreover, professionals may also develop changes in their "basic assumptions" about themselves, people, society, and even their personal safety.

Beware Burnout

In addition to secondary traumatic stress and vicarious traumatization, professionals—attorneys, for example—who work intensely with clients often develop burnout.

Burnout is defined as an accumulation of stress and the erosion of idealism characterized by fatigue, a lack of sleep, headaches, anxiety, irritability, depression, hopelessness, aggression, cynicism, and substance abuse.

According to one authoritative source, secondary traumatic stress is especially found in various categories of law, such as family law, where lawyers have to deal with high conflict clients and often their intimate partner violence issues; personal injury law, which entails interfacing with clients who have suffered physical, emotional or psychological injury or distress, as well as criminal law in which attorneys have to deal with individuals who are alleged to either have committed or been victims of crimes of violence or other trauma.

Revealingly, other studies have shown that attorneys demonstrate higher levels of secondary trauma and burnout that significantly correlates with high caseloads.[1]

Prolonged Stress

In another study, researchers found that, among lawyers, high occupational stress was associated with high levels of personal and work-related burnout.[2]

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Prolonged stress response causes ongoing damage to the emotional brain of the typical stressed lawyer.[3]

Due to prolonged stress, the level of cortisol rises and the executive functioning performed by the thinking brain is compromised during chronic stress response. As a result, emotional regulation in the face of real or perceived threats is very difficult.[4]

Many lawyers and law students find themselves immersed in a culture of stress response over-drive, and actually believe that the adrenaline rush that they feel enhances their performance.[5]

Research has proven, though, that memory and cognitive functions are impaired during the fight-or-flight stress response, but, by enhancing the rest-and-digest systems, it can actually help reverse the damage.[6]

The rest-and-digest parasympathetic nervous system restores balance by curtailing the release of stress hormones, slowing the heart rate, lowering blood pressure, and promoting good digestion.[7]

This renewal restores the feelings of contentment and calm.

Lawyers can reverse the stress response damage, build cognitive reserves, and foster resilience by improving their rest-and-digest parasympathetic nervous system.[8]

What to Do?

So what do we do with all this data? The good news is that other data and studies have demonstrated methods to help minimize and restore balance in one's life.

The following list is a synopsis of practical tips and practices to help mitigate burnout and stress:

- Developing emotional intelligence is defined as the "capacity for recognizing our own feelings and those of others, for motivating ourselves and for managing emotions well in ourselves and our relationships. Greater ratios of emotional intelligence lead to increased happiness, life satisfaction, and well-being rates and are thought to decrease lawyer burnout."[9]

  In developing emotional intelligence, it is suggested that a Gratitude Journal be kept that lists at least five things each day to be grateful for.

  They can be professional, "I won this case today!" or personal "I was able to connect with an old friend." Maintaining such a journal will help create a shift in perspective to one which is more positive and identify the good and valuable aspects of daily life.

- Aerobic exercise is the most powerful practice an attorney can engage in to optimize brain function because any exercise that raises a person's heart rate for an extended period of time increases blood and oxygen flow to the brain. Such activity elevates and balances key neurotransmitters, and causes the release of neurotrophins—the proteins that build and protect brain cells.[10] [11]

- Definitive research shows that adequate sleep greatly enhances memory. It is postulated that memory consolidation takes place during REM sleep, the time when memory consolidation genes that are responsible for forming new connections between neurons are activated.[12]

  Researchers recommend that lawyers optimally get eight hours of sleep per night to benefit from four REM sleep cycles, to enhance their memory recall.[13]

- De-stressed breathing techniques. There is one technique you can use when you need to calm yourself quickly or are experiencing anxiety.

  Take a long, deep breath in through your nose and hold the breath for a count of three seconds, i.e., 1001, 1002, 1003.

  The breath must come in through the nose and out through the mouth. Then slowly exhale through your mouth to the count of four. Do this process at least three times and a feeling of calm will develop. It is simple and science still does not know exactly how it works, but it does work.

  The best thing about this technique is that it can be done anywhere—in the office, before entering an important negotiation, or courthouse hall.

- Meditation. This one is very important as it can increase a lawyer's ability to serial task, (e.g., prioritize and focus on one thing at a time).

  A serial-tasker is present in the moment, listens actively to others, maintains a working flow on projects, and ignores (this is difficult) the false sense of urgency *that multi-tasking creates*.[14]

  Another component of meditation is mindfulness, which activates self-awareness rather than self-reflection.[15]

  Research on mindfulness has shown four benefits that could potentially lead to improved legal practice. They are: attention regulation, body awareness, emotion regulation, and change in self-perspective.[16]

The Resiliency Toolkit

Another option is creating a resiliency specific toolkit that you can keep in your briefcase or backpack, and you can use whenever and wherever needed.

The kit should contain something that can lend emotional strength—a photograph of a loved one, a book of prayers, a favorite quote, a list of supportive friends and relations.[17]

It can also be helpful to create a list of Self-Soothing Behaviors (SSBs), which can provide emotional calmness or release.

This might be difficult for some, as the self-soothing techniques they currently employ—such as emotional or binge eating, excessive drinking or using other substances to quiet down or attempt to forget the internal emotional state—are of themselves unhealthy.

Instead of unhealthy ways to self-soothe, it is critical to brainstorm about things that would actually serve as effective SSBs.

Some suggestions to consider:

- Listen to good music, perhaps in a new genre;
- Dust off an old hobby, or develop a new one;
- Prepare a healthy meal and enjoy it at your leisure;
- Take up walking or establish an exercise regimen;
- 'Listen' to nature, perhaps by gazing up at the stars;
- Pet your pet or companion animal;
- Start on that novel you've always wanted to write;
- Read a good book;
- Practice breathing and stretching exercises;
- Practice prayer or meditation;
- Practice mindfulness by focusing on the present, not the past or the future;
- Call or 'facetime' a friend or family member.

Quarantine Fatigue

These same coping strategies will work to help manage the quarantine fatigue that, to some degree, almost all of us are currently experiencing.

The current COVID-19 pandemic actually presents an opportunity to incorporate more calm, peace, and a sense of well-being into your life. It is imperative to protect yourself from the debilitating effects of the toxic stress that is unavoidable in the legal profession due to the high stakes environment in which lawyers work.

With some commitment and practice, those in the legal profession can once again experience the enthusiasm and joy of their life's calling.

[1] *Vicarious Trauma in Attorneys*, Levin AP, Greisberg, S. (2003), Pace Law Rev. 2: 245-257.
[2] *Occupational Stress and Burnout of Lawyers*, J. Occup. Health (2009); 51:443-450.
[3] *Booted Brain: The Practical Neuroscience of Happiness, Love and Wisdom*, 52 (2009) Rick Hanson at 52-53; *The Revolutionary New Science of Exercise and the Brain 37* (2008), John J. Ratey, Spark, Cohen at 66-67.
[4] *Booted Brain: The Practical Neuroscience of Happiness, Love and Wisdom*, 52 (2009) Rick Hanson, *supra*; See Id. at 50-53.
[5] *A Calm Brain: How to Relax Into A Stress-Free, High-Powered Life*, 37 (2012) Gayatri Devi at 7.
[6] *Booted Brain: The Practical Neuroscience of Happiness, Love and Wisdom*, 52 (2009) Rick Hanson, *supra*, at 52-60; The Revolutionary New Science of Exercise and the Brain 37 (2008), John J. Ratey, Spark, Cohen, supra, at 67-71; *A Calm Brain: How to Relax Into A Stress-Free, High-Powered Life*, 37 (2012) Gayatri Devi, *supra*, at 83-86; Anxious: Using the Brain to Understand and Treat Fear and Anxiety 17 (2015), LeDoux at 59.
[7] *The Science of Yoga: The Risks and the Rewards* 90 (2012), William J. Broad; *A Calm Brain: How to Relax Into A Stress-Free*, High-Powered Life, 37 (2012) Gayatri Devi, supra, at 53; *The Human Brain, supra* [fn 9 above] at 184; *See Brain: The Complete Mind: How It Develops, How It Works, and How To Keep It Sharp* 20 (2009), Michael S. Sweeney, at 41; *Sentimental Neuroscience* [not used before] at 734.
[8] *A Calm Brain: How to Relax Into A Stress-Free, High-Powered Life*, 37 (2012) Gayatri Devi, *supra* at 37; See also *Bouncing Back: Rewiring Your Brain For Maximum Resilience and Well-Being* 208 (2013), Linda Graham.
[9] *Working with Emotional Intelligence* (1998), Daniel Goleman, p. 317.
[10] See Reuben Bar-On, *The Impact of Emotional Intelligence on Subjective Well-Being*, 23 Perspectives in Educ.1, 1-22 (2005).
[11] *Change Your Brain, Change Your Body: Use Your Brain To Get and Keep the Body You Have Always Wanted* (2010) 110, Daniel G. Amen; see also, *Brave New Brain*, Barry J. Gibb; *The Rough Guide to the Brain*, 6-8 (2d ed. 2012), Judith Horstman, The Scientific American Brave New Brain 3-4 (2010); *Power Up Your Brain: The Neuroscience of Enlightenment* (2011), David Perlmutter & Alberto Villoldo, 16-21.
[12] *Why Zebras Don't Get Ulcers* (3d ed. 2004), Robert M. Sapolsky.
[13] *See The Human Brain, supra* [fn 9 above] at 184; See *Brain: The Complete Mind: How It Develops, How It Works, and How To Keep It Sharp* 20 (2009) Michael S. Sweeney, *supra*, at 189.
[14] *Id.*
[15] *Your Brain In Business: Te Neuroscience of Great Leaders* 50 (1st ed. 2011), Srinivasan S. Pillay.
[16] See *How Does Mindfulness Meditation Work? Proposing Mechanisms of Actions from a Conceptual and Neural Perspective*, 6 Perspectives on Psychol. Sci. 537, 539 (2011), Britta K. Hölzel, et al.
[17] See Dawn D'Amico, *Trauma and Wellbeing in the Legal Profession* (2020), London: Jessica Kingsley Publishers.

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By Kurt R. Mattson

Ninth Circuit Decision: Institutional Trustees Looking Over Their Shoulders

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https://attorneyatlawmagazine.com/ninth-circuit-decision-may-have-institutional-trustees-looking-over-their-shoulders

A NINTH CIRCUIT DECISION MAY have a significant impact on institutional trustees. The U.S. Court of Appeals held that the general rule that prohibits class actions concerning misrepresentations of material fact in the purchase or sale of a security and the alleged use of a manipulative device in connection with the purchase or sale of a security *does not* apply to actions against a trustee by the beneficiaries of an irrevocable trust.

The Ninth Circuit's ruling in *Banks v. Northern Trust, et al*. may alert institutional trustees that may have thought themselves immune from class action lawsuits relating to the purchase or sale of securities on behalf of a trust. In the past, these types of actions have only been brought individually.[1]

Institutional trustees have always used caution in their representations concerning the purchase or sale of securities, and the prospect of significant liability in class actions has not been a concern.

But a Ninth Circuit panel held that this general rule doesn't apply to claims brought against a trustee by beneficiaries of an irrevocable trust. As a result, large institutional trustees that provide investment products should be aware of a class action like the one in this case.

Summary

In an appeal from the U.S. District Court for the Central District of California, a Ninth Circuit panel reversed the district court's dismissal, as barred by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") of a putative class action brought against Northern Trust for violations of state law involving breaches of fiduciary duty by a trustee.

While the SLUSA deprives a federal court of jurisdiction to hear

certain state-law class actions, the panel held that the Act did not preclude plaintiffs' imprudent investment claims. Specifically, the panel held that SLUSA's "in connection" requirement didn't preclude claims brought by an irrevocable trust beneficiary with no control over the trustee who claims imprudent investments by the trustee.

Background

Lindie Banks was the beneficiary of the irrevocable Lindstrom Trust, created under California law. As trustee, Northern Trust Corporation ("Northern") had sole discretion in managing trust assets, and Banks couldn't participate in, direct, or be involved in those decisions. Banks and her daughter Erica LeBlanc sought to represent a class of plaintiffs and appealed from the dismissal of their putative class action lawsuit against Northern for violations of state law involving of fiduciary duty by a trustee.

According to the Complaint, Northern invested the trust's assets in its own affiliated "Funds Portfolio," instead of considering better investments outside its own financial umbrella.

As a result, Plaintiffs alleged that the trust suffered poor returns—a result that wouldn't have occurred if Northern prioritized the interests of the trust beneficiaries (and not merely its own). Banks argued that favoring these inferior affiliated funds — rather than better-performing non-Northern funds — benefitted Northern, which violated its duties of prudent investment and loyalty to Banks.

The Complaint also alleged that Northern, as part of an "undisclosed internal decision to create a new profit center," charged improper and excessive fees for "routine preparation of fiduciary tax returns" and failed to maintain records to justify these expenses. These new fees, which previously were "part of the base fee and a fundamental duty for a trustee," allegedly breached Northern's duty of prudent administration.

The Ninth Circuit Decision

Circuit Judge John B. Owens wrote the opinion for the panel that included Circuit Judge Jacqueline H. Nguyen and District Judge John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation. The Ninth Circuit held that the SLUSA does not preclude Banks' imprudent investment claims.

The judge explained that the SLUSA deprives a federal court of jurisdiction to hear: (1) a covered class action (2) based on state law claims (3) alleging that the defendants made a misrepresentation or omission or employed any manipulative or deceptive device (4) in connection with the purchase or sale of (5) a covered security."[2]

Owens went on to opine that when applying SLUSA to a complaint, courts must "look to the substance of the allegations" to ensure that "artful pleading" does not "remove[] the covered words . . . but leave[] in the covered concepts."[3]

The "In Connection With" Requirement

The Court recognized that the action hinged primarily on the "in connection with" requirement.[4]

Judge Owens noted that, even assuming Banks adequately alleged that Northern made a misrepresentation or omission or employed a manipulative device or contrivance, the panel had to decide if Northern's alleged activity was *in connection with* the purchase or sale of a covered security.

The Ninth Circuit panel explained that the Supreme Court has discussed the SLUSA and its "in connection with" requirement on two occasions.

In *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, Judge Owens said that the Supreme Court stressed that the "in connection with" requirement should be interpreted broadly, as "[a] narrow reading of the statute would undercut the effectiveness of the [PSLRA] and thus run contrary to SLUSA's stated purpose," which is to prevent state-law class actions from end-running the PSLRA.[5] [6]

The Court explained that "it is enough that the fraud alleged 'coincide' with a securities transaction — whether by the plaintiff or by someone else" – to meet the "in connection with" requirement.[7]

Judge Owens next noted that in *Chadbourne & Parke LLP v. Troice*, the Supreme Court held that the SLUSA didn't preclude the claims because the statute required "misrepresentations that are material to the purchase or sale of a covered security."[8] [9]

As to materiality, the Court addressed the "in connection with" requirement, which demands "a connection…where the misrepresentation makes a significant difference to someone's decision to purchase or to sell a covered security."[10]

The Supreme Court also held that, under SLUSA, "[a] fraudulent misrepresentation or omission is not made 'in connection with' . . . a 'purchase or sale of a covered security'" unless that fraudulent conduct "is material to a decision by one or more individuals (*other than the fraudster*) to buy or sell a 'covered security'."[11]

The Court stressed that "the 'someone' making that decision to purchase or sell must be a party other than the fraudster… If the only party who decides to buy or sell a covered security as a result of a lie is the liar, that is not a 'connection' that matters."[12]

Judge Owens stressed that the Supreme Court was careful to state that *Troice* did not overrule *Dabit*, noting: "*[I]n Dabit, we held that [SLUSA] precluded a suit where the plaintiffs alleged a "fraudulent manipulation of stock prices" that was material to and "'coincide[d]' [**9] with" third-party securities transactions, while also inducing the plaintiffs to "hold their stocks long beyond the point when, had the truth been known, they would have sold." We do not here modify Dabit.*"[13]

Nevertheless, the Court distinguished Dabit and other cases because they involved a victim who took, tried to take, or maintained an ownership position in the statutorily relevant securities via "purchases" or "sales" induced by the fraud.[14]

The Court pointed out that "[e]very one of these cases . . . concerned a false statement (or the like) that was material to *another* individual's decision to purchase or sell a statutorily defined security."[15]

The Application of Dabit and Troice to the Banks Action

Judge Owens and the Ninth Circuit panel noted that Banks presented a question of first impression in the circuit: whether allegations concerning a trustee's imprudent investments constitute activity "in connection with" the purchase or sale of securities when those allegations are brought by the beneficiaries of an irrevocable trust.

Banks contended that any false statements or deceptive activity by Northern couldn't have been material to a beneficiary's individual decision to purchase or sell a covered security because a beneficiary who's not also a trustee of an irrevocable trust can't make an individual decision to purchase or sell securities for the trust, and Banks had no control over Northern's decision to do so.

Applying *Troice* to the dispute in *Banks*, the Ninth Circuit panel held that, unlike an agent-principal relationship, beneficiaries who are not also trustees of an irrevocable trust can't direct Northern's actions as the trustee. Therefore, the Court held, even if Northern engaged in fraudulent conduct, that conduct didn't alter the fact that its beneficiaries were unable to purchase or sell covered securities.

Northern argued that this difference between an agent and a trustee is a meaningless one. But if Northern were acting as an agent—similar to a stockbroker—Northern's statements and allegedly deceptive conduct could meet SLUSA's "in connection with" requirement because Banks (and other beneficiaries) could have relied on Northern's statements to induce the purchase of the affiliated funds.

Conversely, if Northern was in fact acting as a trustee, and if Banks did not have control over investment of trust assets, Northern's deceptive or manipulative conduct resulted only in Northern—and no other party—purchasing affiliated funds. As *Troice* specifically notes, the SLUSA does not preclude cases where "the only party who decides to buy or sell a covered security as a result of a lie is the liar" because "that is not a 'connection' that matters.[16]

But the Ninth Circuit held that there was ample support for its conclusion that preclusion turns on the distinction between a trustee and an agent. An agent acts for and on behalf of his principal and subject to his control," while a "trustee acts for the benefit of the beneficiaries of the trust; he is an agent only if he agrees to hold title for the benefit and subject to the control of another, the Court said citing the Restatement 2d, Agency § 14B and the Restatement 2d, Trusts § 8.

Northern argued that the level of control between an agent and a trustee doesn't matter because a principal can give full control to an agent—just like a trustee has full control of a trust.

However, Judge Owens and the panel disagreed, stating that Northern overlooked the fact that the principal controls and directs the agent, who the principal likely has chosen. But in the irrevocable trust context, a principal can revoke control from an agent in the course of their relationship.

In the irrevocable trust context, by contrast, unless otherwise specified in the trust instrument, a beneficiary cannot alter the powers of a trustee or remove the trustee without petitioning a court of law.

In this case, the Complaint didn't allege that beneficiaries made any investment decision based on Northern's conduct or statements but that Banks had no control over how Northern invested the trust's assets because Banks was only the beneficiary of an irrevocable trust. The Complaint also alleged that Northern conducted all the relevant purchases of covered securities without direction from Banks or other beneficiaries.

As a result, *Troice's* discussion of the SLUSA's "in connection with" requirement was directly on point, Judge Owens wrote. The Complaint didn't allege that Northern's activities as trustee were "in connection with" any purchase or sale of covered securities by anyone other than Northern.

No "Game of Thrones"

Judge Owens opined that Northern wanted the Court to read *Dabit* without considering its clarification in *Troice*. However, Owens said the panel would not "render Troice meaningless the way that *Game of Thrones* rendered the entire Night King storyline meaningless in its final season."[17]

The circuit judge held that *Troice* directly supported the panel's conclusion that a trustee's misconduct—over which a beneficiary of an irrevocable trust has no

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control— cannot constitute misconduct "in connection with" the sale of covered securities where "the only party who decides to buy or sell a covered security as a result of a lie is the [trustee]."[18]

Using the language in *Troice*, the panel noted: "[T]he trustee is both the buyer and the 'fraudster' because the trustee can deceive only itself with any alleged misconduct, its misconduct does not require SLUSA preclusion.

Troice confirms that SLUSA's 'in connection with' requirement does not preclude claims brought by an irrevocable trust beneficiary—who has no control over the trustee—alleging imprudent investments by that trustee."[19]

Judge Owens found that in this case, the district court's dismissal relied entirely on its conclusion that Northern was an agent of the trusts' beneficiaries, which wasn't supported by the moving papers and the Complaint.

Owens and the panel went on to hold that "[n]ot only did the district court fail to consider Banks' allegations that the beneficiaries lacked any control over the trustees—an allegation supported by caselaw and secondary sources—but courts generally determine the existence of an agency relationship at the summary judgment stage, not in determining a motion to dismiss."[20]

Moreover, Owens found that the district court's brief discussion of *Troice* did not acknowledge its holding that the "in connection with" requirement was not met if the fraudster alone bought or sold the covered securities. As such, Judge Owens and the panel held that the district court erred in concluding SLUSA precluded Banks' imprudent investment claims.

Because the panel concluded Banks' imprudent investment claims did not meet the "in connection with" requirement for SLUSA preclusion, the Ninth Circuit said it need not decide whether the claims met SLUSA's fraudulent conduct requirement, i.e., whether Banks adequately alleged Northern (1) engaged in misrepresentation or omission of a material fact or (2) used or employed any manipulative or deceptive device or contrivance. The panel reversed and remanded all of Banks' imprudent investment claims.

Banks' Fee-Related Claims

The Complaint also alleged three claims related to management fees, asserting that Northern: (1) improperly charged tax-preparation fees, (2) failed to maintain records justifying those costs, and (3) overcharged fixed-fee trusts.

The district court dismissed these claims as precluded by the SLUSA but failed to explain how the alleged activities were "in connection with" securities transactions.

The Ninth Circuit panel said that "[t]he same concern that animates our holding as to the imprudent investment claims—that a trustee's misconduct, without more, cannot constitute misconduct 'in connection with' the purchase or sale of covered securities — applies equally to Banks' fee claims."[21]

Northern argued that the fee claims should be precluded because they were "inextricably intertwined" with the investment claims. But Judge Owens and the panel held that "[n]ot only are the fee claims not precluded by SLUSA because of the 'in connection with' requirement, the fee claims also lack any plausible relationship to covered securities."[22]

Unlike the investment claims, the judge found that the fee claims didn't allege conduct in relation to any securities transactions.

Judge Owens said that the district court's order did not address these considerations or discuss the fee claims in any substantive manner, nor did it explain why the SLUSA would preclude these claims. The Ninth Circuit concluded that the district court erred in dismissing the tax-preparation and overcharging claims on SLUSA-preclusion grounds.

Conclusion

The dismissal of the putative class action alleging breach of fiduciary duty by the trustee was reversed, and the case was remanded because it wasn't barred by SLUSA. The statute's "in connection" requirement didn't preclude claims brought by the irrevocable trust beneficiaries—who had no control over the trustee—alleging imprudent investments by that trustee.

Even if the trustee engaged in fraudulent conduct, the Ninth Circuit found that this conduct didn't change the fact that the beneficiaries were unable to purchase or sell covered securities, and that the *Troice* decision's discussion of the SLUSA's "in connection with" requirement was directly on point. The SLUSA did not preclude the beneficiaries' fee-related claims as they didn't allege conduct in relation to any securities transactions

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[1] 929 F.3d 1046 (9th Cir. 2019).
[2] *Banks*, at 1050, citing *Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 904 F.3d 821, 828 (9th Cir. 2018). The panel noted that the SLUSA does not preclude a plaintiff from filing an individual (i.e., non-class action) state-law securities claim in state court.
[3] *Id.*, citing *Freeman Invs., L.P. v. Pac. Life Ins. Co.*, 704 F.3d 1110, 1115 (9th Cir. 2013) (second alteration in original) (quoting *Segal v. Fifth Third Bank N.A.*, 581 F.3d 305, 311 (6th Cir. 2009)).
[4] *Id.* Northern's attempt to differentiate between subsections A and B of SLUSA was unpersuasive, the panel said, because the "in connection with" requirement is an element of both.
[5] 547 U.S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006).
[6] *Id.*, citing *Dabit* at 86.
[7] *Id.*, citing *Dabit* at 85.
[8] 571 U.S. 377, 134 S. Ct. 1058, 188 L. Ed. 2d 88 (2014).
[9] *Id.* at 387.
[10] *Id.*, citing *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 36-40, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011) (stating that a misrepresentation or omission is "material" if a reasonable investor would have considered the information significant when contemplating a statutorily relevant investment decision).
[11] *Id.* (emphasis added by the Court).
[12] *Id.*, 388.
[13] *Banks*, at 1051, quoting *Dabit* at 387 (citations omitted).
[14] *Troice*, at 389.
[15] *Id.* at 393 (emphasis added) (internal quotation marks and alteration omitted).
[16] 571 U.S. at 388.
[17] *Banks*, at 1054.
[18] Troice, 571 U.S. at 388.
[19] Banks, at 1054. The Ninth Circuit limited its opinion to claims involving a trustee-beneficiary irrevocable trust relationship in which the trust instrument does not grant the beneficiary financial management trustee powers. The panel did not opine on how *Troice* may affect other state-law claims. *Id.*, at 1054 n.6.
[20] *Id.*
[21] Banks, at 1055.
[22] *Id.*

Meet Tigranuhi Ter-Akopyan

HON. VIRGINIA KEENY
VCLF Vice President-Scholarships

THE 2020 RECIPIENT OF VCLF'S STUDENT Excellence Award, Tigranuhi "Tina" Ter-Akopyan graduated this past June during the COVID-19 pandemic to a strange new world.

But, despite that, Tina is well-prepared for just about any challenge. An honor student at James Monroe High School's Law and Government Magnet, her team placed fourth at the Constitutional Rights Foundation's Los Angeles County 2019 Mock Trial Competition. Following the competition, Tina was selected as her team's Most Valuable Member.

She also placed 7th in the State Qualifier Competition for Expository Speaking in Los Angeles County, and, as a freshman, wrote the winning essay for the California Legislative Annual Armenian Genocide Essay Contest.

As a result of her hard work and commitment, VCLF recognized her outstanding academic performance and significant community service with its $2000 Student Excellence Award that will help her attend the University of Southern California in the fall.

With her permission, we share her personal statement which captures her determination, maturity, and warm sense of humor.

"Living under the Soviet Union's totalitarian control, my Armenian family expected men to work and women to raise children. Once my family immigrated, their lack of English prevented them from finding good-paying jobs and adapting to American culture. Clinging to archaic beliefs, my grandparents expected me to pursue a gender-appropriate profession, like an office secretary, which I never questioned.

"However, my aspirations shifted the day I watched 'Adam's Rib,' a film where Katharine Hepburn plays a lawyer striving to have her voice heard and respected in a male-dominated courtroom. Hepburn fights to demonstrate how the justice system is based on a double standard that grants men greater access to due process than women. Witnessing gender discrimination at home, this movie invigorated my interest in how the Constitution protects civil rights. Hepburn's moxie inspired me to develop my own voice, but I kept my dream private until I discovered James Monroe's Law and Government Magnet.

"Once I enrolled, I auditioned for the school's championship Mock Trial team, where the coach told me

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that my voice was too high and my stature too petite to be an effective lawyer. Hepburn was over 5'7''- I am five feet on a good day. Although I could construct strong arguments, I couldn't prevent my voice from squeaking when nervous and I couldn't see above the podium. I had difficulty maintaining eye contact, and my verbal responses lacked conviction. Discouraged, I thought maybe I had neither the poise nor the confidence to become a lawyer.

"The next summer, I attended a free institute hosted by Loyola Law School. Although excited to meet students with a similar passion, I found it intimidating that many participants attended private schools and had parents in the legal profession. On the third day of the program, the coordinators took us to a legal networking event. I felt like I did not belong with such talented and accomplished attorneys, until a civil prosecutor approached me.

"Admiring her aplomb, I learned that she was the first in her family to attend college. She explained how she often felt like giving up because she constantly compared herself with the competition.

Despite initial setbacks, she persevered and developed confidence by taking on new challenges. She helped me realize that no one would take me seriously if I didn't believe in myself. This encounter motivated me to speak up for what I wanted, instead of deferring to others.

"Recognizing my dedication and improvement, my coach assigned me as pre-trial attorney, where I argued a First Amendment issue in front of a real courtroom judge. Before I presented my briefs, I took a deep breath and summoned my inner Hepburn. Whenever questions caught me off guard, I did not panic. I particularly enjoyed tackling questions on the limitations of free speech and whether controversial remarks can go unpunished. Throughout every competition, I never felt little or diffident. At the season's end, our team placed fourth in Los Angeles County.

"I once thought I had to overcome the biases of my culture and compensate for my physical shortcomings to succeed at my dream career. I was wrong—I had to overcome my own doubts. I did this by challenging myself when afraid and not remaining comfortable with the status quo. Now, I am no longer tempted to acquiesce so easily because I don't meet someone else's expectations of what I can become. Even my grandparents now accept my career choice.

"Ultimately, I can't let others dictate my future; I must decide for myself. After all, Katharine Hepburn wouldn't have it any other way."

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