VALLEY LAWYER
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A Publication of the San Fernando Valley Bar Association

Here They Come! New California Laws Effective January 1, 2023

Intellectual Property: The Critical Basics for Artists and Attorneys

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VALLEY LAWYER

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Yi Sun Kim – An Appreciation

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BACK IN TIME OUR BAR ASSOCIATION WAS VERY different than today. Remote from the metropolis, for most of six decades, we were a social club, an insular club, a men's club. One illustration comes to mind. In the annals of our association a photo shows men of the Bar Association, dining at the Playboy Club accompanied by wives and served by pom pom tailed bunnies.

Change can happen steadily, even after coming slowly. By century's end some barriers had broken, and more in the past two decades. Our bar welcomed members and leaders with diversities and other qualities, seen and unseen. We were not yet fully representative of our community and still are not. But we are on a pathway of progress. Yi Sun braved intrepid steps of our journey.

Since childhood, Yi Sun was asked where she was born and when she came to America. Yi Sun was born in Los Angeles. How painful those questions must be. As a child, Yi Sun tried to think of a new name, a different spelling, or a pronunciation to make her identity easier for others. That challenge many can appreciate who faced similar presumptions, and many can try to appreciate, who never had to consider changing their own name.

Here was a person who was calm, collected, serious and ambitious. After earning a degree at prestigious Wellesley College, Yi Sun began her journey in the law as a receptionist, later a file clerk and later still a law clerk. Yi Sun attended Loyola Law School. While known for bankruptcy expertise at Nolan Heimann and earlier at Greenberg & Bass, Yi Sun was not always or only a bankruptcy lawyer. Yi Sun handled startups and transactions.

Exemplifying her embrace of a challenge, one client was a well-known franchise brand, selling off company-owned restaurants to franchisees. This was new work for Yi Sun, who was a new lawyer. Yi Sun took on the task, preparing quality legal documents for these sales. The refranchising program was accomplished. The project's success make it no surprise that Yi Sun was respected in transactional as well as bankruptcy law.

Yi Sun braved our way with soft spoken confidence, steadfast perseverance and poise. Yi Sun remarked that after joining our board of trustees, for a year she listened and observed board members. Yi Sun was not sure she had sufficient historical knowledge to speak up. That too is an example to ponder.

Yi Sun became President in 2018, SFVBA's 92nd year, and was invited to reflect on being our first President who was Asian-American. Yi Sun said it was not about checking a box and saying, "*Great, now we've got a young Asian-American president!*." Yi Sun looked to the future, holding herself as an example, "*for the sake of encouraging anyone and everyone to get involved and be heard, and improving ourselves as advocates and members of this community*." And Yi Sun committed to make the year ahead a time of growth and decorum, expression and courtesy, acceptance and respect.

So much was achieved that year. Yi Sun oversaw the search and selection of Rosie Soto Cohen as Executive Director; the SFVBA offices were relocated; and we held a candidates forum for a special election to fill a Valley vacancy in the City Council.

That year *Valley Lawyer* Magazine was a finalist for two L.A. Press Club awards. Yi Sun, Rosie and I attended the ceremony, mingling with a Who's Who of Los Angeles media and entertainment icons. SFVBA did not win that night. The *Hollywood Reporter* and a USC publication won the categories we were nominated for. But driving home together, Yi Sun was still in a jovial, celebratory mood. The nominations were an honor. It was eye opening then and some consolation now to recall Yi Sun who was always in full control, had a playful, even giddy side. Yi Sun was happy, enjoying a fun professional event together, having a good time.

That side of Yi Sun many did not see. But happily it was there.

I knew Yi Sun as an attorney. So her views about being an attorney I most wish to recall and appreciate. Yi Sun wrote that we attorneys enjoy a true gift–the luxury of being able to express our thoughts to the extent and manner we intend. Ours is not a gift that makes us special or better people. It creates a duty on our part to help others. On another occasion, Yi Sun wrote that for our own health and quality of life, we must take time off to enjoy the people in our lives. We need to remain engaged to support and nourish each other. And at the end of a year as President, Yi Sun asked us all to be kind and recognize those who contribute their efforts to make the SFVBA work for everyone.

Yi Sun Kim. You brought progress to our Bar Association. You brought us dignity, thoughtfulness and concern for others. You broadened us. You set an example and paved a way for others, for all of us. We cannot fathom that you have left us. Because you have not. You will be with us, always.

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CALENDAR

NOVEMBER 2022

SUN	MON	TUE	WED	THU	FRI	SAT
		**1** **ZOOM MEETING** **Editorial Committee** 12:00 NOON	**2**	**3** **ZOOM MEETING** **Membership and Marketing Committee** 6:00 PM	**4**	**5**
6 **Board Retreat** NOON – 3:00 PM	**7** VBN **Returning Live and in Person Soon!**	**8** **WEBINAR** **Probate and Estate Planning Section** ***Ethical Issues Arising in the Representation of Fiduciaries and Beneficiaries*** 12:00 NOON Presenter Meg Lodise will review the legal ethics issues that come into play. 1 MCLE Hour (Legal Ethics)	**9**		**11** 	**12**
13	**14**	**15** **WEBINAR** **Taxation Law Section** ***Tax Advice for Clients Who Day-Trade Stocks*** 12:00 NOON Professor Stephanie Wendling will discuss the income tax ramifications to day-traders in stock. She will also provide tax planning ideas and strategies for more effective and efficient tax reporting. (1 MCLE Hour)	 See ad on page 8		
20	**21** **ZOOM MEETING** **Mock Trial Committee** 6:30 PM	**22**	**23**	 **24**	**25**	**26**
27	**28** **WEBINAR** **Family Law Section** ***Hot Tips!*** 5:30 PM Once again this don't miss seminar will be presented. Attendees will get the latest updates from our esteemed Family Law Bench Officers. (1 MCLE Hour)	**29**	**30** **WEBINAR** **Business Law and Real Property Section** ***International Comparative Law–Case Study*** 12:00 NOON David Chudnow will specifically review Timna Park Israel–Home of King Solomon's Mines. It should be a fascinating one hour webinar. (1 MCLE Hour)			

The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. Visit www.sfvba.org for seminar pricing and to register online, or contact Linda Temkin at (818) 227-0495 or events@sfvba.org. Pricing discounted for active SFVBA members and early registration.

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

By Aaron T. Borrowman

Intellectual Property:
THE CRITICAL BASICS FOR ARTISTS AND ATTORNEYS

What is intellectual property? Under which category of intellectual property does my creation belong? Can I do anything to prevent others from copying or using my creation? These are common questions and issues covered by the law that addresses the rights of the property owner.

WHAT IS INTELLECTUAL property? Under which category of intellectual property does my creation belong? Can I do anything to prevent others from copying or using my creation?

These are common questions and issues encountered by intellectual property attorneys when advising new clients, and often their attorneys, as well.

What is Intellectual Property?

Intellectual property generally refers to creations of the mind or the intellect, such as inventions and designs; literary and other artistic works; and the symbols or logos, names and phrases used in commerce.

From a legal perspective, intellectual property is any qualified product of the human intellect that the law protects from unauthorized use by others.

The law of intellectual property can be seen as analogous to the law of tangible property in that both consist of rights conferred upon the property owner.

However, where the right of exclusive possession is at the core of the rights protecting real and personal property, the same cannot be said of intellectual property.

The law of intellectual property is commonly understood as providing an incentive to creators, such as authors and inventors, to produce works for the benefit of the public by regulating the public's use of such works in order to ensure that creators are compensated for their efforts.

Intellectual property generally falls into four categories, namely, patent, trademark, copyright and trade secrets with Congress deriving its power to regulate patents and copyrights from the Constitution.[1]

It's power to regulate trademarks is constitutionally grounded in what is referred to as the Commerce Clause.[2]

The U.S. Patent and Trademark Office (USPTO) is responsible for issuing and monitoring federally registered patents and trademarks, and although patents are exclusively governed by federal law, trademarks may also be regulated by State law.[3] [4]

Copyrights are exclusively regulated by federal law and the federal agency charged with administering the Copyright Act is the Copyright Office of the Library of Congress.

Trade secrets, though, are regulated primarily at the state level, and may be subject to the laws of unfair competition.

Copyrights

Copyright has been a part of U.S. law since the nation's founding. Congress passed the first federal copyright law in 1790, which covered books, maps, and charts.[5]

Music was not covered expressly by the original Copyright Act, but music compositions were often registered under "*books*".[6]

At that time, the Act applied exclusively to citizens of the United States, thus, works created outside the country or by people who were not U.S. citizens were not copyrightable in the U.S.[7]

Consequently, a number of foreign authors—Charles Dickens, for example—complained about not receiving royalty payments for copies of their work sold in the U.S.[8]

Copyright laws have been updated by Congress throughout the years to keep up with the times and advancements in technology.

The current U.S. Copyright Act covers not only books, maps and charts, but also paintings, photographs, drawings, musical compositions, sound recordings, architectural designs, graphic arts, motion pictures and other audiovisual works, sculptures, software, and more.[9]

Moreover, originally due to the Chace Act of 1891, and other changes since then leading up to the current Copyright Act, foreigners are now able to register copyrights in the United States.[10] [11]

Copyright protection exists in original works of authorship "*fixed in any tangible medium of expression from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device*."[12]

These would include, for example, words, illustrations, paintings, photographs, and video and audio recordings, whether saved on a physical medium such as paper, canvas, or magnetic tape, or digitally.

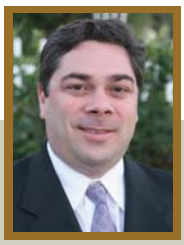
Eligible works that are independently created have copyright protection the moment they are created and fixed in a tangible form.

Copyright covers both published and unpublished works, and it is important to understand that copyright protection does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery.[13]

Thus, for a paper or book written describing a new discovery or procedure, copyright protection only extends to the author's description of the discovery or procedure; it does not protect the discovery or procedure itself.[14]

Copyright typically also does not extend to words, short phrases or titles.

Moreover, in addition to being independently created by the author, to qualify for copyright protection a



Aaron T. Borrowman, a partner at Kelly & Kelley, LLP in Woodland Hills, represents clients in patent, trademark, copyright and other intellectual property matters. He can be reached at aaron@kelly-kelleylaw.com.

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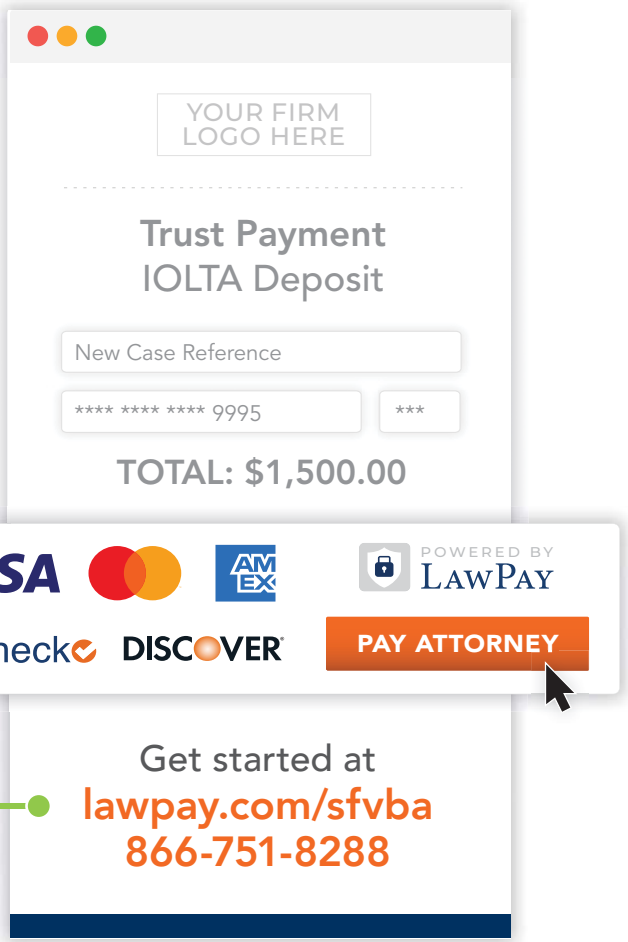

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work must also exhibit a minimum of originality with the United States Supreme Court holding that a work must have "*some minimal degree of creativity*."[15]

For example, a mere alphabetical list of data, such as listings in a phone book, is not protectable, but other original aspects of the work, such as page layout, design, and format might be.

Thus, information itself is not copyrightable, but the specific arrangements or presentations of it possibly could be.

Before March 1, 1989, the use of a copyright notice was required on all published works.

The copyright notice generally consists of three elements: the symbol ©, the word *Copyright* or the abbreviation *Copr.*; the year of first publication of the work; and; the name of the owner of copyright in the work.[16]

Omitting the notice on any work first published from January 1, 1978, to February 28, 1989, could have resulted in the loss of copyright protection if corrective steps were not taken within a certain amount of time.

For works published before January 1, 1978, if a work was published under the copyright owner's authority without a proper notice of copyright, all copyright protection for that work was permanently lost in the United States.[17]

For works first published on or after March 1, 1989, use of the copyright notice is optional.[18]

However, there are still benefits of including the copyright notice. A copyright notice may be used as a deterrent against infringement, or as a notice that the owner intends on holding their claim to copyright.

Inclusion of a proper copyright notice may be used to defeat a defense of "innocent infringement," to avoid statutory damages.[19]

The use of a copyright notice is the responsibility of the copyright owner and does not require permission from, or registration with, the Copyright Office. In general, registration is voluntary and may take place at any time during the term of protection.

However, works of U.S. origin must be registered with the U.S. Copyright Office as a prerequisite to certain remedies for infringement, including initiating a lawsuit.[20]

The owner of a copyright has the exclusive right to reproduce, distribute, perform, display, license, and to prepare derivative works based on the copyrighted work.[21]

The exclusive rights of the copyright owner may be subject to limitation, including by the doctrine of fair use.[22]

Fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not copyright infringement.

To determine whether a particular use qualifies as fair use, courts apply a multi-factor balancing test.[23]

The potential penalties for copyright infringement are steep, and copyright owners may obtain a temporary or permanent injunction against an infringer.[24]

Owners may also obtain an order of impoundment and disposition of infringing articles.[25]

The copyright owner is also entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.[26]

For eligible copyright owners who have registered their works prior to infringement, the copyright owner may elect to recover—at any time before final judgment is rendered—instead of actual damages and profits for all infringements involved in the action, with respect to any one work, an award of statutory damages in a sum of not less than $750 or more than $30,000, as the court considers just.

If the court finds that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000.[27]

The court, at its discretion, may additionally allow the recovery of full costs by or against any party and also award a reasonable attorney's fee to the prevailing party as part of the costs.[28]

The length of protection for a copyright can be complicated and depends on when the work was created, published, and registered.

Currently, for works created after January 1, 1978, copyright protection generally lasts for 70 years after the death of the author. If the work was an "*anonymous or pseudonymous work*," or a "*work for hire*," then copyright persists for 120 years after creation or 95 years after publication, whichever is shorter.[29]

There are differing terms of copyright prior to 1978. However, all copyrightable works first published or released in the United States before 1927 are in the public domain, and are free for anyone to copy and use.

Trademarks

A trademark can be "*any word, phrase, symbol, design, or a combination thereof, that identifies the source of goods or services*."

It is how the consuming public recognizes a company in the marketplace and distinguishes it, and its goods and services, from their competitors.

The trademark owner can be an individual, business organization, or any legal entity. Terms such as *mark, brand* and *logo* are sometimes used interchangeably with *trademark*.

Moreover, the word "*trademark*" can refer to both trademarks for goods and service marks for services.

Two basic requirements must be met for a mark to be eligible for trademark protection—it must be in use in commerce, and it must be distinctive.

Trademarks fall into a continuum of four categories of increasing strength—

generic, descriptive, suggestive, and arbitrary or fanciful.[30]

Generic terms or phrases, such as "*red apple*" or "*red apples*" are not capable of being used as trademarks as this would potentially allow its holder to unfairly monopolize common language.

A descriptive term or phrase that describes the nature of the goods or services will be afforded trademark protection only if the owner proves an additional meaning or recognition over time resulting from the public's connection of the mark with the owner's goods or services.

A suggestive term that makes an implication about the good or service without describing anything in particular can be afforded trademark protection even without a secondary meaning.

This type of trademark requires the consumer to use their imagination to figure out the exact nature of the product or services.

The greatest trademark protection is afforded to fanciful or arbitrary marks which the owner has made-up or created for the sole purpose of marketing their product or service under a trademark.

Examples are *Apple* for computer and electronic devices or *Nike* for clothing.

The Lanham Act was enacted by Congress in 1946 and provides for a national system of trademark registration and protects the owner's federally registered marks, as well as those marks used in commerce, against the use of similar marks if such use is likely to result in consumer confusion, or if the dilution of a famous mark is likely to occur.[31]

Trademarks may also be registered and governed at the state level, and also acquired by common law rights.

Registration at the state or federal level is not a requirement to obtain trademark rights.

Instead, merely adopting and commercially using a distinctive term, phrase, logo or design that serves as a trademark will grant rights to its owner. These are referred to as common law trademark rights, indicating that the rights are developed through use under a judicially created scheme of rights governed by state law.

However, common law trademark rights have limitations, including being limited to the specific geographic area in which the mark is actually used.

A state registration, on the other hand, provides protection for a mark within the entirety of the borders of the state in which it's registered. Each state can vary in the requirements for registration and the exact protections offered.

Such a registration can be a desirable option if the owner is planning to do business only in that state and has no desire to expand beyond its borders.

Nationwide protection of a trademark is obtained by registering the trademark with the USPTO. A use-based application may be filed if the applicant is using the mark in U.S. commerce at the time the application is filed.[32]

An intent-to-use application may be filed if the applicant has a genuine intent to use the mark in the United States in the future; however, the mark will not be registered until the applicant proves use.[33]

The filing date of a federal intent-to-use application is construed as constructive use of the trademark.

After filing, an examining attorney at the USPTO will examine the application and may refuse registration for various reasons, including that the mark is generic or descriptive or so resembles an already applied for or registered mark that it is likely a consumer would be confused as to the source of the goods or services.[34]

Determining the likelihood of confusion is made by applying varying factors, including the similarity of the marks, the similarity of the goods or services, the similarity of established trade channels, the strength of the

registered mark, the sophistication of purchasers, and the number and nature of similar marks in use on similar goods and services.[35]

Once allowed, an application is published for 30 days for opposition by any member of the public who thinks they'll be harmed by the registration of the trademark. They may file a Notice of Opposition, which starts a legal proceeding with the Trademark Trial and Appeal Board (TTAB).

If no opposition is filed, and all other requirements are met, a federal registration is issued by the USPTO, which grants the owner nationwide protection of the trademark.

Benefits of Trademark Registration

There are many benefits of obtaining a federal trademark registration.

Aside from nationwide protection, a federal registration provides legal presumption of ownership of and the right to use the trademark, and gives the owner the right to bring a lawsuit concerning the trademark in federal court.

The owner may use the federal trademark registration symbol, ®, with the trademark to show that it is registered with the USPTO. This may help deter others from using an identical or confusingly similar trademark.

An owner can also record its registration with the U.S. Customs and Border Protection, to stop the importation of goods with an infringing trademark. The federal registration can also be used as a basis for filing for trademark protection in foreign countries.

Trademark infringement occurs when a confusingly similar trademark is subsequently used by a third party.

The trademark owner can enforce its trademark rights against infringers and obtain injunctive relief, the infringer's profits, damages, costs of the action.

In some cases, these damages may be trebled, while attorneys' fees may be granted in some exceptional cases.[36] [37]

Trademark protection can last forever as long as the owner continues to use the trademark in commerce, enforces their rights, and, as applicable, renews the registration in a timely fashion.

Patents

A patent is a right granted to an inventor by the federal government that permits the inventor to exclude others from making, selling or using the invention for a period of time.

The patent system is designed and intended to encourage inventions that are unique and useful to society.

The invention can be any new process, method, machine, manufacture, composition of matter, or material, or any improvement thereof, or even a newly discovered plant.[38]

Unlike copyrights and trademarks, a patent does not automatically arise upon creation or use of the invention. Instead, the inventor must apply for a patent by filing an application with the USPTO and meet the requirements to have the patent issued.

In the United States, a patent application must be filed within one year of the public disclosure of the invention although not filing a patent application before the public disclosure is risky and can cause the inventor to lose the opportunity to obtain patent rights in some foreign countries.[39]

There are three different kinds of patents:

- Utility patents, the most common type of patent, are granted to new machines, compositions of matter, and processes.[40]
- Design patents, which are granted to protect the unique ornamentation—the appearance

or design, for example—of manufactured objects.[41]

- Plant patents, which are granted for the discovery and asexual reproduction—meaning the plant is reproduced by means other than from seeds, such as by grafting or rooting of cuttings—of new and distinct plant varieties found in cultivated areas.[42]

In order to be patentable, the invention must be useful, novel—that is, new—and not obvious.[43]

Although the scope of patentable subject matter is quite broad, naturally occurring substances and laws of nature, even if they are newly discovered, cannot be patented.

More recently, for example, abstract principles, calculation methods, and mathematical formulas have also been deemed not patentable.[44] [45]

A working prototype of the invention is not necessary to obtain a patent. Instead, patents require the inventor to file an application with a detailed and enabling description of the invention.

The application must include a written specification that provides a detailed disclosure about the invention, drawings or in some cases photographs, when necessary to understand the invention, and one or more claims defining the subject matter that is sought to be protected.[46]

This detailed disclosure of the best mode of the invention is required in exchange for the government-given right to exclude others from practicing the invention for a limited period of time.

Patent applications undergo a rigorous examination to ensure that they meet the requirements for filing and allowance, including a determination that the application is sufficiently descriptive and enabling, and the claimed invention is useful, novel and not obvious.

It is not uncommon for utility patent applications to be rejected initially, with opportunities given to the inventor to overcome the rejections.

If the inventor and the patent examiner cannot come to an agreement of the patentability of the invention, the inventor may appeal to the Patent Trial and Appeal Board of the USPTO to resolve the dispute.

Once the patent examiner agrees that the claimed invention is in condition for allowance, the inventor pays an issue a fee for the patent application to become issued.

Design patents are given a term of 14 or 15 years, depending on the grant date, while plant patents have a 20 year term after the date of filing.[47] [48]

Generally speaking, utility patents are also given a 20-year term from the date of filing, so long as the appropriate maintenance fees are paid in a timely manner.[49]

Issued United States patents grant to the patentee, or heirs or assigns, the right "*to exclude others from making, using, offering for sale, or selling the invention throughout the U.S. or importing the invention into the country; and, if the invention is a process, the right to exclude others from using, offering for sale or selling throughout the U.S., or importing into the United States, products made by that process*."[50]

Patent owners may obtain various remedies from courts against infringers, including, an injunction, monetary damages, and in exceptional cases attorneys' fees.[51] [52] [53]

The Patent Act also allows for damages to be trebled for cases of willful infringement.[54]

Trade Secrets

There is no central agency that enforces trade secrets.

In most states, trade secrets are enforced through a misappropriation lawsuit brought within the statute of limitations.

The Uniform Trade Secrets Act (UTSA) is a piece of legislation created by the Uniform Law Commission, a non-profit organization.

The Act defines trade secrets and describes claims related to trade secrets, and to date, nearly all states and the District of Columbia—with the exception of New York and North Carolina—have adopted the UTSA.

The UTSA defines a "*trade secret*" as "*information, including a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy*."

There are typically three essential elements to a trade secret claim under the UTSA:

- The subject matter involved must qualify for trade secret protection;
- The holder of the subject matter must establish that reasonable precautions were taken to prevent disclosure of the subject matter; and,
- The trade secret holder must prove that the information was misappropriated or wrongfully taken.

U.S. courts can protect a trade secret by ordering that the misappropriation stop and that the secret be protected from public exposure, and, in extraordinary circumstances, ordering the seizure of the misappropriated trade secret.

Use of a trade secret belonging to another does not always constitute misappropriation.

There are two basic situations in which obtaining the use of a trade secret is illegal; where it is acquired through improper means, or where it involves a breach of confidence.

Trade secrets may be obtained by lawful means such as independent discovery, reverse engineering, and inadvertent disclosure resulting from the trade secret holder's failure to take reasonable protective measures.

In some circumstances, misappropriation of trade secrets is not only a tort; it is a federal crime.

In 1996, Congress enacted the Economic Espionage Act (EEA), which criminalizes trade theft under two sets of circumstances.

The first refers to the theft of a trade secret "*intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent*."[55]

The second offense addresses theft "*that is related to a product or service used in or intended for use in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret.*"

These crimes are prosecuted by the Department of Justice and are punishable by imprisonment and/or fines.

Trade secret protection may be, in limited situations, a substitute or complement to patent protection.

Unlike trade secrets, patents expire, and when that happens the information contained within the patent is no longer protected.

However, patents may protect against reverse engineering, independent discovery or inadvertent disclosure, which would otherwise nullify a trade secret. Thus, relying on trade secret protection has inherent risks.

Conclusion

Intellectual property, creations of the mind or intellect, can fall under one or more of several categories and be protected by a variety of mechanisms. As a result, it is critical to propoerly identify and classify the intellectual property in question.

It may also be vitally important to know if and when what steps must be taken to create and protect the intellectual property. Otherwise, potential rights or remedies relating to future infringement might not be available to the owner of the intellectual property.

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[1] U.S. Constitution, Article I, Section 8.
[2] Article 1, Section 8, Clause 3 of the U.S. Constitution.
[3] U.S. Patent Act, 35 U.S.C. §§ 1 et seq.
[4] Lanham Act, 15 U.S.C. §§ 1051, et seq.
[5] Copyright Act of 1790.
[6] Patry, William F. (1994). "*Introduction: The First Copyright Act*". Copyright Law and Practice. BNA.
[7] *Id.*
[8] Hoern, Thomas (January 2016). "*Charles Dickens and the international copyright law*". Journal of the Copyright Society of the U.S.A. 63 (2): 341–352.
[9] 17 U.S.C. §§ 101 – 810.
[10] The International Copyright Act of 1891 (26 Stat. 1106, March 3, 1891).
[11] 17 U.S.C. § 104.
[12] *Id.* § 102.
[13] *Id.*
[14] *Baker v. Selden*, 101 U.S. 99 (1879).
[15] *In Feist Publications v. Rural Telephone Service*, 499 U.S. 340 (1991).
[16] 17 U.S.C. § 401.
[17] The 1909 Copyright Act.
[18] U.S. Berne Convention Implementation Act of 1988. [19] 17 U.S.C. §§ 401, 402, 504.
[20] *Id.* §§ 411, 412.
[21] *Id.* § 106.
[22] *Id.* § 107.
[23] *Id.*
[24] 17 U.S.C. § 502.
[25] *Id.* § 503.
[26] *Id.* § 504(b).
[27] *Id.* § 504(c).
[28] *Id.* § 505.
[29] *Id.* § 302.
[30] See, *Zatarain's, Inc. v. Oak Grove Smoke House, Inc.*, 698 F.2d 786 (5th Cir. 1983).
[31] 15 U.S.C. §§ 1051 et seq.
[32] *Id.* § 1051(a).
[33] *Id.* § 1051(b).
[34] *Id.* § 1052(d).
[35] *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973).
[36] 15 U.S.C. §§ 1116, 1117.
[37] *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014).
[38] 35 U.S.C. § 100.
[39] *Id.* § 102(b)(1).
[40] *Id.* §§ 101-105.
[41] *Id.* §§ 171-173.
[42] *Id.* §§ 161-164.
[43] *Id.* §§ 101-103.
[44] *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).
[45] *Alice Corp. v. CLS Bank International*, 573 U.S. 208 (2014).
[46] 35 U.S.C. §§ 111-113.
[47] *Id.* § 173.
[48] *Id.* § 163.
[49] *Id.* § 154.
[50] *Id.*
[51] *Id.* § 283.
[52] *Id.* § 284.
[53] *Id.* § 285.
[54] *Id.* § 284.
[55] 18 U.S.C. §§ 1831-1839.

Intellectual Property: The Critical Basics for Artists and Attorneys

Test No. 169

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. Intellectual property laws are intended to provide an incentive to authors and inventors to produce works for the benefit of the public and to ensure that they are compensated for their efforts.
❑ True ❑ False

2. Copyrights are primarily regulated at the state level in accordance with state laws.
❑ True ❑ False

3. Copyright protection exists in original works of authorship automatically so long as they are fixed in any tangible medium from which they can be perceived, reproduced, or otherwise communicated.
❑ True ❑ False

4. Copyright protection is extremely broad and extends to single words, short phrases or titles, ideas, procedures, processes, systems, methods of operation, concepts, principles, and discovery.
❑ True ❑ False

5. To qualify for copyright protection, a work must be independently created by the author and exhibit a minimum of originality or creativity.
❑ True ❑ False

6. Currently, a copyright notice is required on all published works, including the symbol © –the letter *C* in a circle–or the word *Copyright* or the abbreviation *Copr.*; the year of first publication of the work; and the name of the owner of copyright in the work.
❑ True ❑ False

7. Registration of a copyright is required to bring a lawsuit to enforce copyright rights.
❑ True ❑ False

8. A copyright registration obtained at any time during the term of protection avails the owner the right to statutory damages.
❑ True ❑ False

9. For a trademark to be eligible for protection it must be in use in commerce and it must be distinctive.
❑ True ❑ False

10. Federal registration is a requirement to obtain trademark rights.
❑ True ❑ False

11. To file a federal trademark application, the trademark must be in use commercially before filing the application.
❑ True ❑ False

12. A federal trademark registration owner can record its registration with the U.S. Customs and Border Protection, to stop the importation of goods with an infringing trademark.
❑ True ❑ False

13. The trademark owner can enforce its trademark rights against infringers and obtain injunctive relief, the infringer's profits, damages, costs of the action, and in some cases, these damages may be trebled.
❑ True ❑ False

14. A federal trademark registration has a term of the life of its owner, plus 70 years.
❑ True ❑ False

15. A patent may be obtained for any new and nonobvious process, method, machine, manufacture, composition of matter, or material, or any improvement thereof, or even a newly discovered plant.
❑ True ❑ False

16. Patent rights automatically arise upon the creation and use of the invention.
❑ True ❑ False

17. Patent rights automatically arise upon the creation and use of the invention.
❑ True ❑ False

18. An inventor should not disclose the most important and useful aspects of his invention to keep competitors from becoming aware of them.
❑ True ❑ False

19. U.S. patents grant to the patentee, or heirs or assigns, the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States.
❑ True ❑ False

20. The holder of a trade secret will always continue to have exclusive rights in the subject matter of the trade secret if the holder takes reasonable precautions to prevent disclosure of the subject matter.
❑ True ❑ False

Intellectual Property: The Critical Basics for Artists and Attorneys

MCLE Answer Sheet No. 169

INSTRUCTIONS:

1. **Accurately complete this form.**
2. **Study the MCLE article in this issue.**
3. **Answer the test questions by marking the appropriate boxes below.**
4. **Mail this form and the $20 testing fee for SFVBA members (or $30 for non-SFVBA members) to:**

San Fernando Valley Bar Association
20750 Ventura Blvd., Suite 104
Woodland Hills, CA 91364

METHOD OF PAYMENT:

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

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Credit Card Number

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CVV code **Exp. Date**

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Authorized Signature

5. **Make a copy of this completed form for your records.**
6. **Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0495.**

Name _____
Law Firm/Organization _____
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Address _____
City _____
State/Zip _____
Email _____
Phone _____
State Bar No. _____

ANSWERS:

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

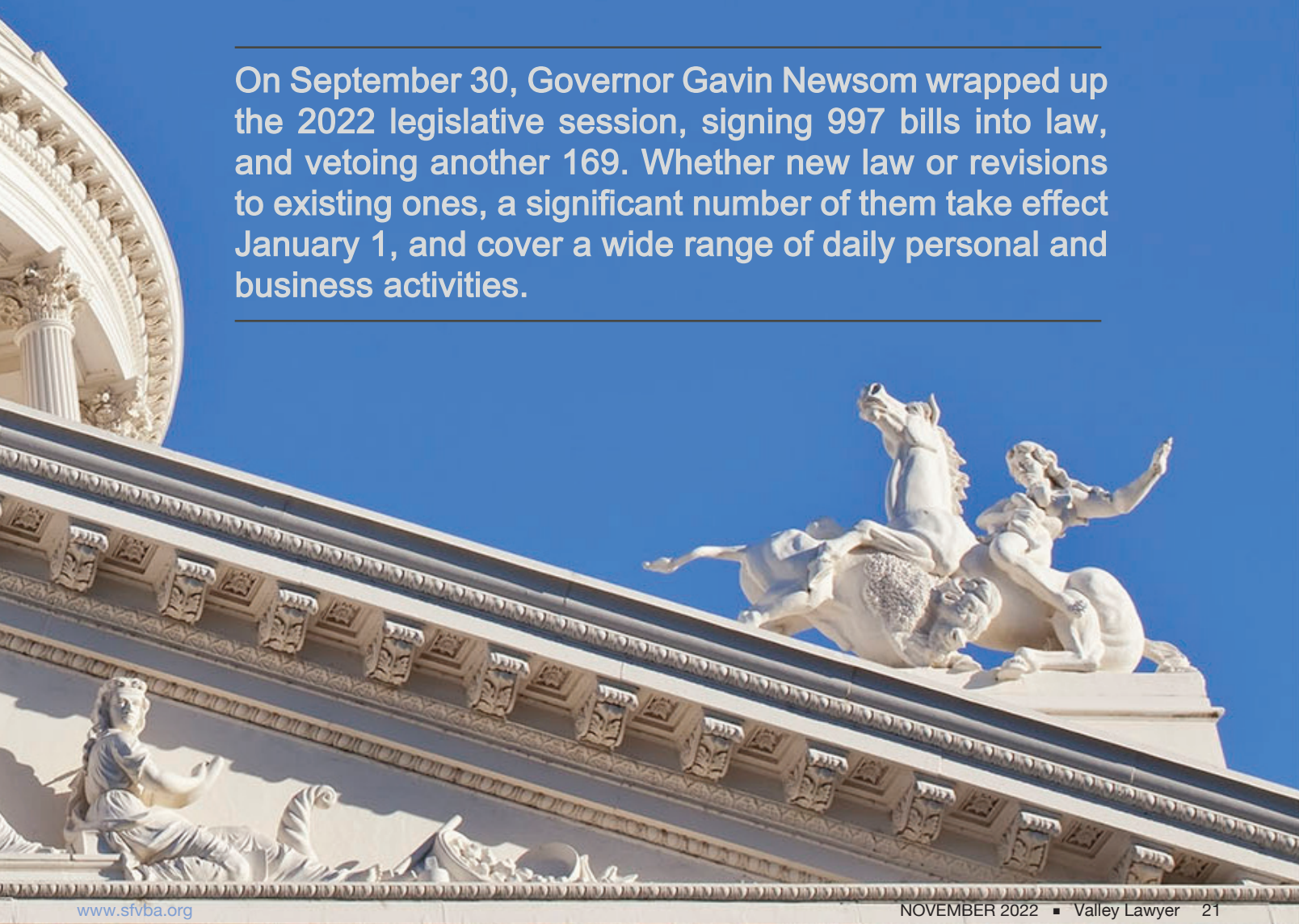
1.	❑ **True**	❑ **False**
2.	❑ **True**	❑ **False**
3.	❑ **True**	❑ **False**
4.	❑ **True**	❑ **False**
5.	❑ **True**	❑ **False**
6.	❑ **True**	❑ **False**
7.	❑ **True**	❑ **False**
8.	❑ **True**	❑ **False**
9.	❑ **True**	❑ **False**
10.	❑ **True**	❑ **False**
11.	❑ **True**	❑ **False**
12.	❑ **True**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

By Michael D. White

Here They Come!

New California Laws Effective January 1, 2023

On September 30, Governor Gavin Newsom wrapped up the 2022 legislative session, signing 997 bills into law, and vetoing another 169. Whether new law or revisions to existing ones, a significant number of them take effect January 1, and cover a wide range of daily personal and business activities.



ON SEPTEMBER 30, GOVERNOR GAVIN NEWSOM wrapped up the 2022 legislative session, signing 997 bills into law, and vetoing another 169 bills.

Whether new law or revisions to existing ones, a significant number of them take effect January 1, and directly impact the mandates covering a wide range of diverse areas from employment and bartending to pharmacy operations and social media.

What follows are generalized descriptions of a number of those bills that in a few weeks will be the law of the land.

For more detailed information on these or other Senate or Assembly legislation, visit the California Legislative website at http://leginfo.legislature.ca.gov.

BUSINESS & EMPLOYMENT LAW

NOTE: *It is important to know that some of the following laws, as well as existing laws, may apply to out of state employers with only one (1) employee in California.*

• California's **minimum wage** will increase to $15.50 for all employees, effective January 1, 2023.

Previously, California had different minimum wages for employers with 26 or more employees and for smaller employers. Effective January 1, however, the new minimum wage will be the same for all employers, regardless of size.

The minimum wage requirement may not be met just by compliance with state law, however. Employers should keep in mind that some 30 California cities and counties have their own separate minimum wages with different effective dates.

• **SB 1162** amends California's Pay Transparency Law to provide that employers must provide the pay scale for any job applicant upon receipt of such a request.

In addition, the employer must provide a current employee with the pay scale for the employee's position upon request.

And, employers with 15 or more employees will be required to include the pay scale for a position in any job posting, including those jobs posted on third party sites.

Moreover, employers will be required to maintain records reflecting the job title and wage rate history for each employee for the duration of their employment. Failure to follow these new rules may subject the employer to civil penalties ranging from $100 to $1,000 per violation, as well as to PAGA actions.

Employers with 100 or more employees also must submit a pay data report to the California Civil Rights Department annually, beginning in May, 2023. The report must include information on the number of employees by race, ethnicity, and sex, by job position, as well as the mean and median pay rates by grouping. Failure to submit the required report could result in penalties up to $200 per employee.

• **AB 2188** protects employees' off-duty cannabis use under the Fair Employment and Housing Act. The new law will prevent discrimination against applicants or current employees based on off-duty/off-premises use of cannabis.

Pre-employment drug testing still will be permitted, however, provided that the test does not screen for CBD or other non-psychoactive cannabis metabolites.

Employees still cannot be impaired or use cannabis on the job–the bill does not affect an employer's duty to maintain a drug and alcohol free work place.

• **SB 1044** protects employees who refuse to report to, or who leave, a workplace or work site because the employee has a reasonable belief that the workplace or work site is unsafe for reasons other than a health pandemic.

• Effective January 1, 2023, the provision of the **California Consumer Privacy Act** (CCPA) that exempts personal information collected in the employment context from most of the statute's requirements expires. The CPRA does not have the same exemption.

• **AB 257** creates new obligations for the fast food industry and creates a Fast Food Council with the California Department of Industrial Relations.

The Council will have responsibility for setting industry-wide wage standards, working hours and other working conditions for employees working for a fast food restaurant that is part of a fast food chain of 100 or more nationwide establishments.

• **AB 152**, effective immediately, expands the right to use 2022 COVID-19 supplemental paid sick leave, originally set to expire on September 30, 2022, through December 31, 2022, while **AB 2693** modifies the COVID-19 notification requirements by giving employers the option of posting a notice of potential COVID-19 exposure at the worksite and

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on existing employee portals, instead of providing a written notice.

CRIME/CRIMINAL JUSTICE

• Last May, rappers Young Thug, Gunna, and others were indicted in a federal racketeering case in which prosecutors used their rap lyrics as evidence of gang activity. That won't happen anymore in California, at least in state courts.

The new law, **AB 2799**, makes California the first state in the country to limit criminal liability stemming from "*creative expression*"—including rap lyrics. To be allowed as evidence, lyrics would have to be directly part of the alleged crime.

• **AB 1076** automatically withholds the disclosure of low-level offenses from statewide criminal justice databases.

• **AB 1963** expands the list of individuals who are mandated to report suspected child abuse or neglect. It now includes human resources employees in a business that has at least five employees, as well as workers who directly supervise children in a business with five or more employees.

• **AB 2147**–The Freedom to Walk Act–permits jaywalking on California's streets.

The new law says police officers can only ticket someone for jaywalking when there is "*an immediate danger of a collision*" and "*as long as it's safe to do so*."

• Current law allows people to permanently seal records of old misdemeanor convictions and arrests, as well as arrests for non-violent felonies that did not result in convictions. **SB 731** expands the existing law to include felony convictions, except for sex offenses.

To be eligible, a person who has completed a prison sentence for a felony must go four years without getting arrested. The new law also allows for the sealing of records of arrests for violent felonies that did not result in a conviction.

Some 225,000 Californians who completed their sentences for non-violent felonies and have stayed out of legal trouble for at least four years will automatically have old conviction records sealed when the law takes effect next year.

• **SB 301** and **AB 1700** both aim to crack down on the sale of stolen merchandise online, requiring online marketplaces to collect more information from sellers with high volumes of product, and sets up a section on the state Attorney General's office website to report stolen items, and **AB 2294** gives law enforcement the ability to keep those in custody accused of organized retail theft, while **AB 1740** and **SB 1087** aim to crack down on catalytic converter thefts.

FAMILY LAW

• **AB 1949** provides that employers with five employees or more must allow up to five days of unpaid bereavement leave for the death of a family member, including a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law.

• **AB 1041** expands the reasons for using paid sick leave or leave under the CFRA to include time off to care for a designated person—any individual related by blood or whose association with the employee is equivalent to a family relationship, for example.

An employee can designate this person at the time they request leave. Employers may limit an employee to one designated person in a 12-month period.

• On January 1, children in California will have a chance to get more sleep, as a new law limiting how early school can start takes effect.

According to **SB 238**, which was passed in 2019, middle schools, classes can start no earlier than 8 a.m. For high schools, the limit is 8:30 am. Rural school districts have an exemption from the law. The goal is to reduce adolescent sleep deprivation.

HOUSING

• The centerpiece of a significant 2022 legislative session is **AB 2011**, which provides a ministerial, California Environmental Quality Act (CEQA)-exempt approval pathway for qualifying multifamily projects on commercial zoned land that pay prevailing wages and meet specified affordable housing targets.

• A relatively under-reported, but significant, new law is **AB 2234**, which creates a major change to local agency norms by establishing strict timelines—and potential Housing Accountability Act liability—for localities when issuing post-entitlement ministerial permits such as grading and building permits.

• **AB 2097** generally prohibits public agencies from imposing minimum parking requirements within a half-mile of public transit; **AB 2334**, which makes important changes to the Density Bonus Law to define development capacity; and **AB 1551**, which reinstates the ability to seek State Density Bonus Law benefits for commercial projects.

MEDICAL/PHARMACY

• Effective January 1, **AB 1278**, will require a licensed physician and surgeon or a licensed osteopathic physician and surgeon, but not a physician or surgeon working in a hospital emergency room, to provide a written or electronic

notice of the Open Payments database to a patient at the initial office visit.

• **SB 362** was approved by the Governor on September 27, 2021. Effective January 1, 2022, community pharmacies will be prohibited from establishing performance quotas.

For purposes of the new law, a "*quota*" is a fixed number or formula related to the duties for which a pharmacist or pharmacy technician license is required, against which the chain community pharmacy or its agent measures or evaluates the number of times either an individual pharmacist or pharmacy technician performs tasks or provides services while on duty.

A "*quota*" includes a fixed number or formula related to any of the following: prescriptions filled; services rendered to patients; programs offered to patients; and revenue obtained.

• **AB 1064** was signed by Governor Newsom on October 8, 2021 and authorizes a pharmacist to independently initiate and administer any vaccine that has been approved or authorized by the FDA and received a federal Advisory Committee on Immunization Practices individual vaccine recommendation published by the CDC for persons 3 years of age and older.

• **SB 434** prohibits an operator of a licensed alcoholism or drug abuse recovery or treatment facility, a certified alcohol or other drug program, and a licensed mental health rehabilitation center, psychiatric health facility, or social rehabilitation facility, from "*engaging in various acts, including making false or misleading statements about the entity's products, goods, services, or geographical locations*."

The bill also prohibits a "*picture, description, staff information, or the location of an entity from being included on an internet website along with false contact information that surreptitiously directs the reader to a business that does not have a contract with the entity*."

• Signed by the Governor on October 6, 2021, **SB 409** authorizes pharmacists and pharmacies to perform, in accordance with specified requirements and conditions, any aspect of an FDA-approved or authorized test that is classified as waived under CLIA if the test is used to detect or screen for certain illnesses, conditions, or diseases "*as specified by regulation*."

• **SB 1280** prohibits hospice providers—and their employees and agents—from paying referral sources "*for the referral of patients. It will also prohibit hospice salespeople, recruiters, agents, and employees who receive compensation or other remuneration for hospice referrals or admissions from consulting with a patient/patient's representative or a patient's family regarding hospice services, hospice election, or informed consent to a patient, patient's family, or patient's representative.*"

• **AB 1020** imposes new limitations on hospital debt collections and raise the income level for hospital charity care eligibility as further discussed below. According to the bill's author, this law is necessary to avoid further economic fallout from the COVID-19 pandemic.

Under the new law, the definition of "*high medical costs*" is revised to include a patient who has a family income that does not exceed 400 percent of the federal poverty level.

This is an increase from the current law's definition, which is 350 percent of the federal poverty level. Patients with high medical costs are by law eligible to apply for participation under a hospital's charity care or discount payment policy.

The new law also requires that hospitals display charity care and discount payment notices regarding the hospital's policy for financially qualified and self-pay patients on the hospital's internet website.

• Effective December 31, 2023, **SB 650** mandates that organizations that operate, conduct, own, manage, or maintain a skilled nursing facility or facilities will be required to prepare and file an annual consolidated financial report with the Office of Statewide Planning.

The report must be reviewed by a certified public accountant in accordance with GAAP principles on an accrual basis. The report, among other things, must include a combined financial statement that includes all entities reported in the consolidated financial report, "*unless the organization is prohibited from including a combined financial statement in a consolidated financial report pursuant to a state or federal law or regulation or a national accounting standard*."

In such cases, the organization must disclose to the Office of Statewide Planning the applicable state or federal law or regulation or national accounting standard that prohibits the inclusion of a combined financial statement.

PRIVACY RIGHTS

• On January 1, California will unveil its updated **California Privacy Rights Act** (CPRA).

The revised Act contains provisions that apply to for-profit businesses that do business in California and meet any of the following—have a gross annual revenue of over $25 million; buy, receive, or sell the personal data of 100,000 or more California residents or households;

or derive 50 percent or more of their annual revenue from selling or sharing California residents' personal data.

PUBLIC SAFETY

• **AB 2285** expands the state's *Slow Down, Move Over* law to city streets and freeways. California drivers must slow down or move over for all emergency response vehicles with flashing lights.

Under the previous *Slow Down, Move Over* law, vehicles only had to do so on state and interstate freeways and highways.

Emergency vehicles include tow trucks, fire trucks, police vehicles, and ambulances. Citations for violating the law are about $238 and add a point to a person's driving record.

REAL ESTATE

• **SB 1348** removes offenses involving controlled substances from the list of crimes requiring automatic license denial under escrow laws administered by the Department of Financial Protection and Innovation.

These changes balance consumer protection with California's goal to allow former offenders to achieve meaningful employment.

• **AB 2011** enacts the Affordable Housing and High Road Jobs Act of 2022 to create a ministerial, streamlined approval process for 100 percent deed restricted affordable housing projects in commercial zones and for mixed-income housing projects along commercial corridors, as specified.

This law also imposes specified labor standards on those projects, including requirements that contractors pay prevailing wages, participate in apprenticeship programs, and make specified healthcare expenditures.

• Currently, when applying for a broker's license, an applicant must demonstrate two years of general real estate experience while holding a license as a sales agent, or a college degree with a major or minor in real estate.

AB 2745 requires the 2 years' general real estate experience to be within the 5-year period immediately prior to the date of the application for a broker's license.

In considering a petition for a broker's license, the commissioner may treat a degree from a four-year college or university, which course of study included a major or minor in real estate, as the equivalent of two years' general real estate experience.

SOCIAL MEDIA

• **SB 2273** establishes the California Age-Appropriate Design Code Act, requiring online platforms to consider the best interest of child users and to default to privacy and safety settings that protect children's mental and physical health and wellbeing.

• **AB 587** requires social media companies to publicly post their policies regarding hate speech, disinformation, harassment and extremism on their platforms, and report data on their enforcement of the policies.

It also requires companies to provide reports to the California Attorney General's office on terms of service violation data and enforcement action.

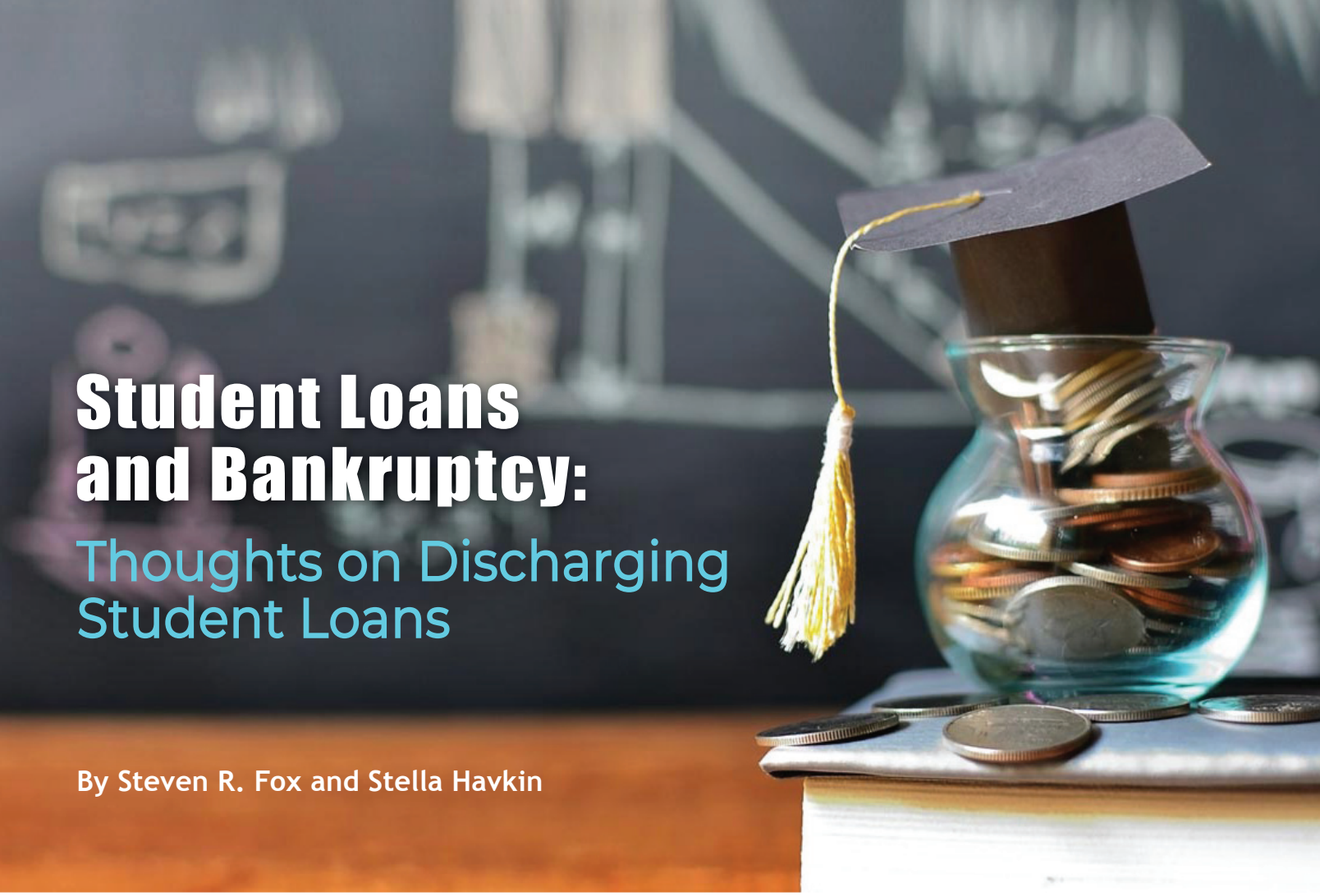
MISCELLANEOUS

• **AB 1766** allows undocumented immigrants to obtain state identification cards through the Department of Motor Vehicles.

• **SB 988** establishes suicide hotline call centers in California and dedicates a source to fund a '988' system in the state.

• **AB 1249** exempts PG&E wildfire victims from paying taxes on settlement payments from the state's Wildfire Trust.

• **AB 1817** bans the use of chemicals commonly known as PFAS from being used in fabrics and makeup by 2025.



Student Loans and Bankruptcy:

Thoughts on Discharging Student Loans

By Steven R. Fox and Stella Havkin

TO BE CLEAR, THIS ARTICLE DOES NOT distinguish different types of student loans nor will it cover non-bankruptcy options for paying or eliminating student loans. Those topics are not the focus of this article.

The writers assume the loan in question is a student loan within the meaning of applicable law.

This article examines some history and then considers some relevant case law on discharging student loans.

It will also briefly consider government offers Income Based Repayment plans (IBR) and the Revised Pay As You Earn Repayment Plan (REPAYE) for borrowers who cannot afford to repay the loans.

First, some history. Prior to 1976, student loans made by governmental entities were dischargeable in bankruptcy similar to other contract type debts. In other words, student loans were routinely discharged unless a general exception to discharge, such as fraud, applied and could be proven.

In 1976, there was a change in the way student loans were treated via regulation.

Student loans were not discharged—in the parlance, they are *excepted from discharge*—in bankruptcy unless one of two conditions were met:

- Either the loans had been in repayment for a period of at least 5 years; or,
- The loans were an "*undue hardship*" for the borrower or the borrower's dependents.

To establish that either condition was met, the debtor had to file a complaint in the bankruptcy court—an adversary proceeding—and establish that both elements were met. Now

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student loans made by governmental units are no longer automatically discharged in bankruptcy.

Changes Over the Years

Two years later, as part of the Bankruptcy Reform Act of 1978, student loans were dischargeable only under an undue hardship standard or if the loans had been due for at least five years when the bankruptcy petition was filed.

Over the years, discharging student loans has become more difficult. In 1979, the five-year waiting period was redefined to include all times the borrower had a deferment or a forbearance in effect. Also that year, this exception to discharge was expanded to include loans that governmental units did not make but that were insured, guaranteed, funded in whole or funded in part by a governmental unit.

One of the earliest circuit level opinions on the undue hardship test, issued by the Eighth Circuit, set out a totality of the circumstances test for the hardship exception.[1]

The Andrews opinion was only one of a thundering herd of opinions on student loans and dischargeability.

Thereafter, in 1984, the exception was expanded to include another area of student loans, the private student loans, provided that the private student loans were made under "*any program funding in whole or in part by a… nonprofit institution*."[2]

In 1987 the Second Circuit opinion was released containing what became the seminal, and almost impossible to meet, three part standard to discharge student loans under the undue hardship standard.[3]

Brunner determined that student loans could be discharged under the undue hardship exception only if a three part standard was met and the *Brunner* opinion was clear that the standard was an exacting one.

First the borrower must be unable to maintain a "*minimal standard*" of living for the borrower and the borrower's dependents while repaying the debt.

Second, the borrower's state of affairs must be likely to persist for most of the repayment period.

Third, the borrower has to have made a good faith effort to try to repay the debt. The Brunner Test applies in the 9th Circuit.

In *Brunner*, the bankruptcy court determined that the debtor's student loans were dischargeable. The district court reversed the bankruptcy court applying the three part test adopted by the Second Circuit. The opinion by the Second Circuit was short and thin on details, and the debtor represented herself on the appeal.

The Second Circuit relied on what it called "*the clear congressional intent exhibits in section 523(a)(8) to make the discharge of student loans more difficult than that of other nonexcepted debt*."[4]

In its few comments about the three part test, the Second Circuit stated that debtor did not show that her present state of affairs was likely to extend for a "*significant portion of the loan repayment period*."[5]

The Second Circuit also noted that Brunner had recently completed her Masters degree program, that she did not show that she would be unlikely to find work in the future and that she had not sought to defer her loan payments.[6]

At the District Court level, and not part of the Second Circuit's opinion were additional facts—e.g., the debtor had testified that she was capable of holding a job and that she was consulting a therapist.

The district court reversed the bankruptcy court's finding that the debtor in *Brunner* was disabled as clearly erroneous.

Given the undue hardship standard that the Second Circuit adopted, and which many or most circuits later adopted, discharging student loan debt on the basis of an undue hardship was a difficult prospect.

So now with the undue hardship exception becoming a difficult standard to meet, borrowers considering bankruptcy to discharge the student loans could still wait out the five year period and then automatically discharge their student loans.

But in 1990, the five year waiting period became a seven year period.[7]

In 1991, the noose was tightened a bit more as the six year statute of limitations to bring suit on student loans was removed.[8]

At least then, borrowers had the seven year waiting period to wait through and then they can discharge their debts.

In fact, no, they don't. In 1998, the seven year waiting period was excised.[9]

The Brunner Standard Unpacked

The only way to discharge student loans was through the undue hardship prong. From the perspective of debtors, *Brunner* ushered in a difficult period of time.

Student loan debt was increasing, many borrowers had student loans they could not afford to pay back, and the loans could not be discharged given the utter helplessness that the *Brunner* standard required for a court to find an undue hardship.

When one wondered whether it could only get better for student borrowers, that did not happen. In 2005, additional student loans known as '*qualified education loans*' were excepted from the bankruptcy discharge.[10]

The Ninth Circuit adopted the *Brunner* standard in *United Student Air Funds, Inc. V. Ernest and Julie Pena*.[11]

Despite the difficult standard, the debtors in that case established that they met the three prongs.

The debtors in *Pena* developed a narrative rich in facts and emotionally uplifting, a narrative that was hard for the lender to overcome. They were married, and owed $9,399.60 in consolidated federally guaranteed student loans, which bore interest at 10 percent.

Mr. Pena used the loans to obtain a credential at ITT Technical Institute as an Associate of Specialized

Technology—a credential that proved not to be useful for employment, nor did colleges accept the credential for course work credit.

The debtors made payments on the loans when Mr. Pena did find a job and they sought a 90 deferment when he was unemployed. When the deferment period ended, they were unable to make any loan payments.

Mrs. Pena had a mental disability including stabbing pains and hearing voices. Diagnosed psychotic, she was hospitalized, unable to hold a job, and was on disability.

The state delayed disability payments to her for a period of years, and when the past-due payments were sent to her in 1995, the Penas used the monies—$8,000—to replace their 1972 car with a 1976 model.

Most likely, the lender questioned why the $8,000 disability payments were not given to the lender to pay down the student loan. Replacing a then 23-year-old vehicle with a 19-year-old vehicle is a good response.

Their income at the the time the bankruptcy case began, based on Mr. Pena's income and Mrs. Pena's disability payment of $378 per month, was low amounting to a net monthly income of $1,179 with monthly expenses of $2,605.

During the litigation, their combined income increased by about $600 and their expenses declined by $1,100. So at the time of trial, net monthly income was slightly in excess of monthly expenses.

Three Prongs Analyzed

In analyzing the three part *Brunner* test, the Ninth Circuit described the first prong, saying that a debtor could not maintain based on current income and expenses a minimal standard of living if the debtor was also forced to pay the student loans.

This first prong is one that bankruptcy courts are adept at addressing and have considerable experience determining income and expenses. In the Pena's case, the Bankruptcy Court found that although at the time of trial the debtor's expenses were slightly below their monthly net income, their income and expenses fluctuated.

The bankruptcy court averaged the Penas' expenses from different sources and found that their expenses averaged $1,789 per month leaving them with a small monthly deficit of $41. As a result, if the Penas had to pay the loans, then they could not maintain a minimal standard of living.

In *Pena*, the Ninth Circuit did not find the Bankruptcy Court's concerning net income and monthly expenses were clearly erroneous.

In subsequent case law analyzing the first prong, the courts have held that a debtor must show something more than "*tight finances,*" but something less than "*utter hopelessness*."[12]

Another court held that a minimal standard does not require income that falls below poverty guidelines, but a minimal standard of living is not a middle class standard.[13]

The Ninth Circuit described the second prong as some "*additional circumstances*"…indicating that this state of affairs—the inability to maintain the minimal standard of living—would continue for a significant portion of the loan's repayment period.

The second prong is where a debtor has to have a rich narrative and the Penas had that narrative.

Mrs. Pena's mental issues began when she was 13 years old, she had been hospitalized, could not hold a job, and a court had found her to be permanently mentally disabled. The student loan lender objected to this finding,

The Ninth Circuit held that the third prong mandates that the debtor show that he/she has made good faith efforts to repay the student loans. In *Pena*, again the debtors had a good narrative–the debtors had made payments, and Mr. Pena was laid off and requested a deferment, but, thereafter, the couple could not meet their financial obligations.

In contrast, the *Brunner* debtor graduated and then filed her bankruptcy petition one month after the first student loan payment came due. The lender argued that the Penas' failure to pay the lump sum disability payment to the lender meant that the Penas could not meet the good faith prong.

The Ninth Circuit rejected this argument noting that the Penas had other considerable unsecured debt. That they replaced an older vehicle with one almost as old did not hurt.

Consider the third prong, but in the context of a different case. Assume that the debtor could improve their income and ability to pay the student loans if the debtor underwent a medical procedure to hopefully alleviate a serious illness.

In one case, the lender argued that the debtor could not meet the good faith efforts prong because they had refused to undergo a medical procedure that could improve their medical condition and permit him to work and to make more money.

The Bankruptcy Court here concluded that had the medical condition been a lifestyle choice perhaps the prong might not be satisfied, but a medical condition is typically not a lifestyle choice.

The Court, thus, rejected the argument that the debtor had to undergo a medical procedure to meet the third prong.[14]

Undue Hardship

One issue that arose fairly soon after Pena concerned the legal standard for the second prong as repayment of the loans would impose an undue hardship on the debtor and their dependents both now and for a substantial portion of the loan's repayment period.[15]

In *Nye*, the Bankruptcy Court held that to satisfy the second prong, a debtor needed to demonstrate not only that they would be unable to make the payments presently and for a substantial portion of the repayment period but that there were also exceptional circumstances.

Without the additional exceptional circumstances, the second prong would not be satisfied.

In *Nye*, the debtor had multiple student loans totaling approximately $85,000 at the time of the bankruptcy case. She had made some payments, but not many; her income potential was maxed out; she was in her early 50s; owned a home that needed considerable repair work; and her vehicle was old.

The Court determined that she had satisfied the second prong with respect to her income and expenses, but ruled that she had to demonstrate some additional exceptional circumstance to meet the second prong.

The student loan lender had apparently argued that some additional exceptional circumstance was part of the second prong. The Ninth Circuit rejected that argument, noting that courts would have difficulty predicting a debtor's future income.

While requiring some exceptional circumstance had some attraction, the Ninth Circuit concluded that in order to meet the second prong, the debtor must demonstrate that the present inability to pay the loans is likely to persist for a significant portion of the repayment period by considering "*additional circumstances*."[16]

The Ninth Circuit's opinion includes a non-exclusive listing of additional factors that the lower courts could consider. These additional circumstances are largely based on facts more in a debtor's control than that of a lender.

The factors include a debtor's or dependents' medical or mental condition; educational status and quality of one's education; lack of job skills; whether the debtor's income is maximized for the industry the debtor is in; age and years left to work; if older, difficulty retraining or relocating; likely future expenses; and whether there are better financial options elsewhere.[17]

Nye represented one small crack in the difficult undue hardship test, and recall that the five year—then seven year—standard had been written out of the Bankruptcy Code.

Limits on the Second Prong

The next case discussed here from the Ninth Circuit limited the *Brunner* test's second prong.

Recall that this prong looks to a present inability and whether it will extend for a substantial portion of the payment period.

In *Saxman v. E.C.M.C.*, the appellate court held that the bankruptcy courts, acting under their general equitable powers, could partially discharge student loans.[18] [19]

In other words, discharging loans under the undue hardship standard was not an '*all or nothing*' proposition.

Some debtors sought discharges of student loan debt in which their inability to pay the student loans was due to their own decisions. A common scenario is the debtor who makes the loan payments, but is convicted of a crime and sentenced to a prison term.

The courts are fairly consistent that these student loans are not dischargable because the circumstance that gave rise to a debtor's inability to pay the student loans—to maintain the minimal living standard, for example—was due to the debtor's acts.[20]

Another scenario is not criminal, but leads to the same result that cannot meet the standard. In one case, the debtor was 36 years old, and earned a chiropractic degree, but was working as a real estate broker.

He owed $240,000 in student loans, a net disposable income of $785 per month and, per the Bankruptcy Court, could afford to pay-off only $100,000 of his student loans.

However, the court concluded that the debtor did not show that, once he had established his brokerage business, his ability to pay the loans would not improve.

In other words, the debtor did not demonstrate that his present financial circumstances would persist through a substantial portion of the loan payment period.

The debtor had an additional problem. He had consulted with a credit counselor who had advised him to pay down his credit card debt.

To the Court, the decision to pay the credit card debt, and to not pay toward the student loan debt, was a sign that the debtor lacked good faith.[21]

Federal Repayment Programs

The issue with lack of repayment of student loans is vast and the federal government has created repayment programs to assist borrowers—Income Based Repayment plans (IBR) and the Revised Pay As You Earn Repayment Plan (REPAYE) for borrowers who cannot afford to repay their loans.

These programs, however, make it more difficult for borrowers to discharge their student loans in bankruptcy if debtors fail to participate in them before filing for bankruptcy.

Essentially, under the IBR program, the borrower would be required to make payments up to a maximum of 15 percent of their income in excess of 150 percent of the federal poverty level. No payments would be required if the borrower's income was less than 150 percent of the poverty level.

Under REPAYE, the borrower would be required to make payments equal to 10 percent of their discretionary income.

For purposes of REPAYE, "*discretionary income*" is defined as the difference between the debtor's income and

150 percent of the federal poverty guideline. If income falls below 150 percent of the poverty level, no payments are required. The REPAYE payment is recalculated annually based on the borrower's financial information reported on their federal tax return.

All income-driven plans share some similarities—each caps payments at between 10 percent and 20 percent of the borrower's discretionary income, and forgives the remaining loan balance after 20 or 25 years of payments.

However, what happens when bankruptcy judges try to apply the debtors' participation or lack of participation in such programs runs the gamut.

Partial Discharge Granted

For example, in 2020, the Hon. Margaret Mann of the United States Bankruptcy Court for the Southern District of California, ruled in *Koeuth v. United States Dept of Educ*. that a debtor who had applied for repayment through the IBR program, but then abandoned it, was still entitled to a partial discharge of $432,174 in student loans.[22]

The Court found that the debtor had good reasons to file for bankruptcy instead of delaying the forgiveness of the student loan balance over 25 years through the IBR program because existing IBR participation negatively impacts the debtor's credit score, and could create future problems with indebtedness tax problems.

The Court further agreed that the debtor was justifiably concerned that his more than $400,000 in student loans would deprive him of job opportunities because of his reduced credit score. The Court also stated that employers may use a credit report in considering the hiring of an employee.

In fact, the debtor testified that he believed that he was rejected for a job because of his sizable student loans.

The Court found the debtor to be a hard working individual who went through medical school, and incurred astronomical amount of student loan debt. He appeared to have been a good witness, who just experienced a "*string of bad luck*."

The Court, in analyzing his income, found that because of his good faith attempts to get work, as well as reasonable expenses including living in his parents' kitchen to save on rent, virtually all of the debtor's student loan except for $8,000 would be discharged.

Different Case, Different Finding

However, in 2021, a vastly different result was reached in another case.

In the Central District of the California Bankruptcy Court decision by Hon. Ernest M. Robles—*Mathis v. United States Dept of Educ*.—the Court applied the debtor's income in the context of both of the IBR and REPAYE programs.[23]

The 32-year old debtor, who had a degree from Smith College and a teaching credential, had a string of different jobs that averaged between $48,000 and $72,000 in compensation.

Her expenses as presented to the Court revealed that she spent between $600-800 on clothing per month, lived in an apartment for which the rent alone was $1,985, and leased a car for $590.

The Court applying the debtor's average income found that the debtor could easily repay the loans under provisions of either the REPAYE or IBR programs if she were to modestly reduce her income across the board or even in just one category.

Further, the debtor while aware of the programs, did not participate in either of them, and she had failed to make even one payment. The Court found those to be important factors in ruling against the debtor in her attempt to discharge the debt.

A Life Examined

The discharge of student loans in bankruptcy court requires a complicated analysis of a debtor's entire life including education, job history, medical history, and prospects of future employment and income.

The filing of an adversary case for dischargeability of student loans pursuant to the U.S. Code should not be undertaken lightly as is evident from the cases discussed above because bankruptcy judges are practical and solution-based in their decisions.[24]

They are also extremely adept at analyzing income and expenses, as well as relevant parts of debtors' life stories, and know how to determine if a debtor should be able to discharge their student loans based on the hardship standards.

But the law is tricky as it does not give bankruptcy judges a lot to work with.

Thus, it is up to the debtors and their lawyers to make the judges' jobs easier by presenting sufficient evidence and credible testimony. Otherwise, there is no point in filing a bankruptcy to seek the discharge of a student loan.

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[1] *Andrews v. South Dakota Student Loan Assistance Corp*. (In re Andrews), 661 F.2d 702, (8th Cir. 1981).
[2] Bankruptcy Amendments and Federal Judgeship Act of 1984.
[3] *Brunner v. New York Higher Education Services Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987).
[4] *Id.* at 396.
[5] *Id.*
[6] *Id.* at 396-397.
[7] Crime Control Act of 1990.
[8] Higher Education Technical Amendments of 1991 (P.L. 102-26).
[9] Higher Education Amendments of 1998.
[10] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.
[11] *United Student Air Funds, Inc. v. Ernest and Julie Pena* (In re Pena), 155 F.3d 1108 (9th Circuit 1998).
[12] *United Student Air Funds v. Nascimento* (In re Nascimento), 241 B.R. 440, 445 (9th Circuit BAP 1999).
[13] *E.C.M.C. v. Howe* (In re Howe), 319 B.R. 886, 889 (9th Cir. BAP 2005).
[14] *Smith v. Department of of Education* (In re Smith), 608 B.R. 236 (Bankr. Ore. 2019).
[15] *Nys v. E.C.M.C.* (In re Nys), 446 F.3d 938 (Ninth Cir. 2006).
[16] *Id.* at 946.
[17] *Id.* at 947.
[18] *Saxman v. E.C.M.C.* (In re Saxman), 325 F.3d 1168 (Ninth Cir. 2003).
[19] 11 U.S.C. § 105.
[20] *Hurley v. United States of America* (In re Hurley), 601 B.R. 529 (Ninth Cir. BAP 2019).
[21] Fuller v. U.S. Dept. Of Education (In re Fuller), 296 B.R. 813 (Bankr. N.D. Cal. 2003).
[22] *Koeuth v. United States Dept of Educ*. (In re Koeuth), 622 B.R. 72 (S.D. CA 2002).
[23] *Mathis v. United States Dept of Educ*. (In re Mathis), 2021 Bankr. Leis 3540, 2021 WL 6137895 (CD CA 2021.
[24] 11 U.S.C. § 523(a)(8).

Valley Lawyer

BAR NOTES

DISCIPLINE CASE PROCESSING: The State Bar of California has submitted a report to the Legislative Analyst's Office and legislative leaders proposing new processing standards for discipline cases.

The report, required by Senate Bill 211 proposes shorter timelines than current averages, while differentiating timelines by case complexity and types of cases, prioritizing those that pose a greater risk to the public.

The State Bar Board of Trustees approved the proposal at an October 24 special meeting.

In alignment with SB 211's requirements and the State Bar's strategic plan, the standards development process included a concerted effort to solicit views of the public, through surveys and a social media campaign to gather public comments, so that the resulting standards are "*responsive to public expectations for the resolution of complaints.*"

On average, the State Bar handles about 15,000 attorney misconduct cases each year. Under current law, the State Bar is expected to complete its investigation and either charge or close a case within 180 days of receiving a complaint for standard cases and 365 days for complicated cases.

Every year, the State Bar has "*a significant backlog*" of cases that have not been charged or closed within these time frames and has been criticized for taking too long to investigate and prosecute cases.

GOLDEN GATE UNIVERSITY: Almost a year after being found out of compliance with an ABA accreditation standard that requires a bar pass rate of at least 75 percent within two years, the Golden Gate University School of Law has significantly reduced its first-year class size and awarded full-tuition scholarships to all newly admitted full-time JD students.

The awards, announced in August, are unconditional and cover the duration of students' legal educational programs, Colin Crawford, Golden Gate University's law school dean, told the *ABA Journal*. He says plans for the offerings were in place before the school received public notice about Standard 316 in November 2021.

The pass rates for the law school, located in San Francisco, were 57.50 percent for 2018 graduates and 67 percent for 2019 graduates.

LEGALMATCH SETTLEMENT: *State Bar of California v. LegalMatch.com*, a case that dates back to 2019, has ended with the payment of a $225,000 settlement from online lawyer-matching service *LegalMatch* to the bar.

The Bar had sued *LegalMatch* for operating in California as an unlicensed lawyer referral service; the California Court of Appeal agreed, but the bar's subsequent claim for injunctive relief was effectively mooted when *LegalMatch* obtained California LRS certification in September 2020.

BY ANY OTHER NAME: Judge Jon Tigar of the U.S. District Court for the Northern District of California recently ruled that Subway can be sued for allegedly deceiving customers about its tuna products.

This includes a claim that Subway uses other fish, chicken, pork, and beef instead of "*100 percent tuna*" as advertised.

Subway had argued that any presence of non-tuna DNA may result from eggs in mayonnaise or cross-contact with other ingredients at its stores. However, Judge Tigar said it was premature to accept this argument.

"*Although it is possible that Subway's explanations are the correct ones, it is also possible that these allegations refer to ingredients that a reasonable consumer would not reasonably expect to find in a tuna product*," Judge Tigar said.

Judge Tigar said the plaintiff, who claims to have ordered Subway tuna products on over 100 occasions between 2013 to 2019, could attempt to prove that Subway's salads, sandwiches, and wraps "*wholly lack*" tuna.

In a statement, Subway said it was disappointed that the lawsuit, which it calls "*reckless and improper*," would continue.

NEW TRUST ACCOUNT PROGRAM: The California Supreme Court has approved a State Bar of California proposal to establish the Client Trust Account Protection Program, effective Jan. 1, 2023.

The court went beyond the State Bar's original proposal by requiring that several obligations be met. The original proposal only authorized the State Bar to impose such requirements.

Under this program—adding new California Rule of Court, rule 9.8.5—every licensed California attorney will be required to report whether they are responsible for managing a client trust account; if so, attest they are knowledgeable about and compliant with the applicable rules; and, provide the State Bar with the account numbers and the financial institutions for all such accounts.

The new rule also authorizes the State Bar to require licensed attorneys to complete an annual self-assessment and to select attorneys each year to submit to a compliance audit by a certified public accountant.

The State Bar "*will also develop and distribute new continuing legal education materials focused on promoting ethical management and distribution practices and launch a public education campaign to raise awareness of clients' rights with respect to client trust accounts opened on their behalf*," according to a statement from the Bar.

Virtual Legal Practices:

How to Build and Maintain One

By Lindsey Corbin

VIRTUAL LEGAL PRACTICES are on the rise. Though this trend started before the pandemic, as lawyers learned to leverage technology to their advantage, the pandemic, which forced many professionals to work from home, certainly accelerated the trend.

After having a taste of flexibility and work life balance, lawyers are eager to learn more about managing virtual practices, how to maintain them, and whether they are sustainable over the long term.

What is a Virtual Legal Practice?

A law office with no physical workplace might have a physical address, but only for mail and online search purposes.

These firms can operate from anywhere in the world, from shared offices, satellite offices, and home offices in cities and towns to mountain retreats or even RVs.

In fact, there is a whole community on Facebook called '*Lawyers on the Beach*' and, with the help of today's technology, lawyers can maintain an air of professionalism without their clients ever knowing from where they are operating and without sacrificing the timely quality of their work.

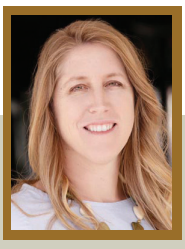
ABA Formal Opinion 495

Virtual legal practices are supported under the ABA Formal Opinion 495, which was issued in December of 2020, the first year of the pandemic.

The Opinion states that lawyers may practice in the jurisdiction(s) in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not found that the conduct constitutes the unauthorized practice of law.

It also acknowledges and addresses the fact that lawyers are increasingly working remotely–often from jurisdictions in which they are not licensed.

In fact, the Opinion opens by maintaining that , "*Lawyers like others, have more frequently been working remotely: practicing law mainly through electronic means …A lawyer's residence may not be in the same jurisdiction where the law is licensed. Thus, some lawyers have either chosen or been forced to remotely carry on their practice of the law of the jurisdiction or jurisdictions in which they are licensed while being physically present in a*



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jurisdiction in which they are not licensed to practice."

The Opinion, in effect, ushered in a new era of legal practice and gave lawyers the chance to reevaluate their practices and locations.

Benefits of Virtual Law Firms

There are many benefits to working at a virtual law firm, including the ability for working lawyers to enjoy flexibility both in location and time.

They can schedule meetings while traveling or opt to work during '*non-traditional hours*,' if that better suits them, and live wherever they want.

Along with more flexible hours and locations, they also can enjoy the reduced cost of not having to shoulder the expenses of a lease and the other costs of maintaining an office.

Virtual law firms are here to stay; they are part of the new normal in the wake of the pandemic and afford an attorney the opportunity to avoid work-related stress, and sustain a healthier and more well-rounded lifestyle.

Delegation is Key

How exactly can lawyers optimize virtual legal practices and set them up for success?

First and foremost, learn to delegate.

Delegating work can be especially difficult for lawyers, many of whom would rather handle every task and project themselves. This is chronic condition that often starts with the first internship or clerkship in law school and continues well into private practice.

Support staff is crucial to the success and livelihood of a law firm, but it is absolutely vital that lawyers learn how to both effectively and efficiently work with support staff.

When a lawyer can successfully delegate virtually, they can focus on the law and on building and expanding their practice.

As an initial matter, what can lawyers delegate? Many things, for instance, including calendar management tasks, such as monitoring and entering deadlines for filings; drafting documents and correspondence to opposing counsel, the court, and clients; pleadings; trademark applications; and estate planning documents;

Legal services firms can help virtual legal practices with document filing as well, accessing Case Management/ Electronic Case Files systems, local courthouses, and the U.S. Patent and Trademark Office filing systems, and many projects, such as researching court rules, the use of a client's brand online, and information about competitors, to name but a few.

Outsourcing

Outsourcing tasks to virtual paralegals and qualified assistants, rather than hiring someone in-house, will minimize their overhead costs and free up time.

As with professionals in any industry, all virtual assistants and paralegals are not created equal.

Lawyers need to find the right ones for their firms and consider whether the firm needs virtual legal service professionals with expertise in a specific area of the law.

To find virtual legal services firms, lawyers can ask for referrals from other virtual law firms or from local paralegal associations, or research for them online.

There are also agencies that only place virtual assistants. Those agencies are either domestic or based abroad and can provide virtual assistants who speak a variety of languages and offer a variety of services.

For instance, virtual assistants can help with project management, deadline monitoring, answering phones, scheduling appointments, and email management.

If lawyers choose to work with an agency that places virtual assistants, the agency will vet the candidate and likely provide additional backup coverage if the first assistant that is chosen proves to be is unavailable.

These vendors will also have contracts that cover hours, rate, taxes, and job descriptions. In addition, they can also replace a team member if they are not quite a fit for the firm.

Lawyers who do not want to contract with an agency can post their job postings on *Indeed*, *LinkedIn*, and other job search platforms, to find a remote team member, even one from elsewhere in the state or the country with a specific skill set that enhances the overall efficiency of the practice.

Building the Right Tech Stack

One of the most important considerations for virtual law firms is technology.

To operate from anywhere, it is crucial that a practice is centered around strong practice management software that can be easily integrated with other software components to streamline a practice and enhance its capabilities in a non-physical office setting.

An effective tech stack typically includes a practice management software—*Clio(R), MyCase(R*), and *Practice Panther*, for example—as well as Microsoft Office or Apple products; and an accounting system, such as *Quickbooks(R)*.

Also highly recommended is a Voice over Internet Protocol (VoIP) calling system that allows professionals to make voice calls using a broadband Internet connection instead of a traditional phone line.

In addition, a well-structured might also include practice area specific software for docketing or drafting, lead generation tools, and legal research platforms like *LexisNexis* or *WestLaw*.

Additionally, lawyers can 'onboard' clients by having them digitally sign engagement letters and other documents with services like *Docusign*.

To develop the best stack, lawyers practicing virtually must assess their processes—for example, how lawyers find and cultivate leads, handle billing, and track cases—and then research their options.

Despite its breadth, practice management software packages are not one size fits all as some are geared toward transactional practices, while others are ideal for litigators.

In addition, some legal service agencies can help lawyers build a successful tech stack.

Mindfully Communicate With Clients

Lawyers, practicing virtually or not, constantly need to strategize how they can best find, interact with, and serve their clients.

While attorneys can continue to find clients through traditional marketing methods, they can also likely expand their reach, especially if they have a transactional practice and/or one that incorporates practice before federal courts.

Traditional marketing can include finding clients through lawyers' networks, as well as from other lawyers; online marketing and advertising; publishing 'thought leadership' articles to showcase their expertise in an specific area of the law; and speaking at conferences or on panels—some of which might be virtual—among other marketing strategies. If operating in a virtual setup, a social media advertising campaign should be strongly considered to cast a wider net.

After securing a client, lawyers working at virtual firms need to weigh options about how to interact with the client on an ongoing basis.

Lawyers also should make booking consultations easy for themselves and prospective clients by using services such as *Calendly* to schedule consultations—without causing calendar conflicts—via video conference platforms like *Zoom, Google Meet*, or *Microsoft Office*.

If a virtual law practice is operating smoothly, new clients should not be affected by the fact that the firm is virtual and not located in a brick-and-mortar office.

Lawyers should also employ or contract with an experienced and attentive reception team, and keep support staff connected to clients over text, email, and other technological resources.

Consider Privacy

Lawyers need to be aware of where they are taking video calls and be protective of client information.

Dropbox or *Sync* are excellent cloud-based storage systems. Lawyers should ensure their WIFI connections are secure, use strong passwords for their accounts, install antivirus and encryption software, and consider setting-up a virtual private network (VPN) on a remote desktop to provide further privacy for virtual assistants or other remote staff.

Keep Learning

Lawyers working at remote law firms need not feel as though they are living on some far-off island.

They can alleviate any feeling of isolation and stay connected to the wider legal community by being active in local and/or national bar associations; taking relevant continuing education courses; subscribing to relevant practice area publications; and networking with other lawyers.

This will keep lawyers connected and abreast of any new developments in the law, and may lead to business referrals and partnerships.

Building an innovative virtual law practice is possible and is becoming a more widely accepted way of working.

Practicing law remotely is not a temporary fix because of the COVID pandemic–it is here to stay because, unlike in the past, lawyers can operate with more autonomy and flexibility, and see increased revenues, wherever they are–all while maintaining a sense of wellbeing and personal/professional balance in their lives.

By Carol L. Gonzales

Hanging a Shingle?
Avoid Just Running the Clock

ONE OF THE EASIEST WAYS TO '*HANG A shingle,'* or become employed as a lawyer, is to take on a personal injury case, make sure the details including the client's injuries add up, write a few letters, and '*run the clock*,' waiting for the fat '*dream*' offer to come in.

However, the perils of taking on a case in personal injury and running the clock can be ominous as it could expose the injured client to liability—not to mention the hazard of malpractice that could result in a State Bar investigation or settling the case with the '*money on the table*,' or failing to obtain a more desirable settlement.

That exposure not only begins with botching the management of a client, but failing to manage the client's case from claim inception through litigation, understanding that discovery is the crux of the case, ignoring the hazards of an Offer to Compromise, and proceeding to trial along with the potential hazards that lie in wait between Proposition 213 and the protections granted uninsured or underinsured motorists (UIM).

A failure to understand these key aspects—including client management along with a failure to plan—will not only leave one with the feeling of being overwhelmed, in a reactive cycle, but one's personal injury practice may not yield the expected profitability.

From a former in-house defense perspective, it was often telling which plaintiff lawyers were on their game, and which were simply '*running the clock*' for a marginally acceptable settlement offer.

Ultimately, it is how to be positioned as managing a case rather than being managed by it that will make for a much better litigator. Or, at the very least, help a keep a client out of the treacherous waters of plaintiff liability.

In short, here the imperatives to be explored—managing or evaluating the client; developing an awareness, if not a mastery of pertinent California statutes; handling discovery with some deliberation; and, becoming deliberate, if not managerial, as the case proceeds to trial.

Carol L. Gonzales has significant expertise in bankruptcy, real estate and twenty-plus years in litigation. Currently, she works in coaching, researching and writing for licensed attorneys while she proceeds toward her license to practice. She can be reached at gcarol99@yahoo.com.

Overview of Lititgation

A firm understanding of litigation helps to grasp it and gain a sense of how to better direct any litigated case.

A brief overview is to understand that there are five phases in litigation—inception, discovery, pre-trial, trial, and post-trial.

- Inception entails the filing itself, any preliminary motions, demurrers or default. Incidentally, demurrers are not motions to dismiss; rather, a demurrer is an objection to the complaint which a defendant must assert, or be deemed to have waived any rights arising from those defects in the event of an appeal.

- Discovery is the actual engagement between the parties where evidence and information is exchanged and is comprised of either special or form interrogatories, requests for admission, requests for production, depositions, subpoenas, and expert designation.

- Pre-trial is the truncated, harried phase prior to trial where witness and exhibit lists are exchanged, motions *in limine* are brought, and jury instructions and verdict forms are proposed and admitted by the court.

- Trial is the presentation of evidence before the trier which can be the judge or a jury.

- Post-trial includes the entry of judgment, collection and, if necessary, appeal. What does not occur as a matter of course in litigation is requested by motion. That is, a motion is some request that the court make some ruling and the most arduous, tedious motion is a motion for summary judgment or adjudication.

Incidentally, a routine defense motion against plaintiff lawyers who fail to adequately respond to discovery is a motion for summary judgment or adjudication that is brought to simplify issues or to have the case dismissed.

It is premised upon the movant's stance that the non-moving party cannot establish all elements as to each cause of action alleged in the complaint.[1]

Often, the defense will bring a motion for summary judgment when the plaintiff's discovery responses are so deficient that there can be no triable issue of material fact, or the responses to discovery fail to sufficiently set forth the plaintiff's damages.

Case Evaluation and Management

The ability to evaluate cases and prospective clients will help in navigating the claims process and litigation in a managing position rather than taxing time with chasing down a client or spending unanticipated time researching an issue.

The best way to manage is to establish standards including setting potential monetary return standards, key timelines, managing the client, and knowing the issues.

Your client management begins the minute a consult is held with the client—evaluate their credibility, and appeal to the jury the merits of the case including whether the monetary returns are worth the time or meet the set standards.

The most practical thing to incorporate into a retention agreement, even on a contingency basis agreement, is a cooperation clause which will ensure that the client remains responsive to calls, requests for documents or personal appearance, and, above all, their clear understanding of the need to tell the truth which will better allow counsel to lawyer their case.

It is truly a tragedy when a good, promising claim turns to a heap of debris because a lawyer fails to counsel their client, who attempts to lawyer their own case by lying under oath, and then faces a motion for summary judgment that results in wasted time, effort and the risk of an injured's liability for attorney's fees, or legal malpractice for the lawyer's failure to counsel their client regarding discovery responses.

Key timelines establish key points or goals that every case must be directed toward. It is this establishment of standards, rather than relying on litigation timelines, that enables counsel to be in a position of management, rather than one of reaction.

For example, rather than allowing a case to trail along in the claims process for an indefinite period of time following a client's treatment, and then doing a rush filing to preserve the statute of limitations, decide to evaluate the claims process every 45 days, and proactively file after an insurance adjuster has lagged more than 90 days following, if any, an admission of liability.

Examine and determine the monetary damages, beginning with the insurance carrier's stance on liability.

Has liability been admitted? Liability can either be admitted or comparative depending on the facts of the case. If so, the amount of property damage against the backdrop of the facts determines the size of the impact and the extent of the client's injuries.

Put simply, the size of the impact, based on the damage to the vehicles in auto personal injury, is what insurance carriers use to get some idea of the extent of potential injuries, including a range of what the reasonable cost of treatment should be.

While a client may need to be referred to a treatment provider on a lien basis, the best way to begin treatment is for the client's primary healthcare provider to make an initial evaluation and treat, if possible.

Treatment should be timely, ideally beginning on the day of the collision or within a few days, and treatment should be consistent with the damage to the vehicles.

If a lien treatment provider is sought, then care should be taken as to the degree or length of treatment, and the distance of the provider from the client's home or work.

The defense, or an insurance adjuster, will also review a police report, if any, for whether a car was towed at the scene or driven away and whether the party claiming injury continued with their planned activities immediately following the incident.

Also, in nearly all cases, a report as to a person claiming injuries, and their past insurance claim history, is also requested from the International Organization for Standardization (ISO) and, here is where the client's truthfulness will make the ISO report nearly irrelevant or of no consequence.

It is these details of personal injury that can evade a new practitioner.

Know Your Field

"*What most people don't know about us trial lawyers, the ones that are really successful, is that we are individuals who will learn and master topics we have no idea about.*"[2]

Knowing the field of specialty is also an important starting point.

For example, if a lawyer's specialty is medical malpractice, they should have some expertise in medical procedures or practices. If the specialty is auto collision personal injury, it is important to know the vehicle code so the potential of the prospective client's claim can be quickly determined .

Too often on the defense side, cases where the costs of medical treatment were astronomically high in comparison to cost of repairing the damage to the vehicles involved, it was common to find that it was, in fact, the claimant or plaintiff who was actually in violation of at least one vehicle code at the time of the collision.

Thus, the defense was unwilling to settle the case, proceeded to trial for a defense verdict, and pursued the plaintiff for costs to go to trial, where the costs averaged somewhere around $12,000.

California Laws

Some examples of California laws affecting even what appears to be a straightforward rear-end collision include the requirement of driving an insured vehicle; the necessity of putting the defendant on notice for damages claimed; recovering for injuries exceeding the at-fault driver's limits; and, ultimately, the peril of proceeding to trial following an Offer to Compromise.

California Proposition 213 limits a driver from recovering pain and suffering beyond medical bills, but enables a passenger of such an uninsured vehicle to recover for pain and suffering, while the ability to recover attorney's fees can be an added bonus that can be achieved in different aspects of personal injury.

Another aspect of personal injury is placing the defendant on notice of the damages the plaintiff is seeking. This is often accomplished with a Statement of Damages—Judicial Council form CIV-050 that includes claiming loss of income, and the failure to provide responses in the 8.0 series of Form Interrogatories.

In fact, the failure to fully respond to these interrogatories can be the basis for the defense seeking a summary judgment.[3]

Uninsured or Underinsured Motorist protection assures the injured party who is in the position of having injuries exceeding the insurance coverage of the at-fault driver—from their own insurance carrier.[4]

However, understanding that insurers write their insurance policies differently from one another is yet another aspect of personal injury to be understood.

In short, the California Code of Civil Procedure is rife with statutes which, if a lawyer fails to be fully informed about, can have the effect of either leaving money '*on the table*' or severely limiting the damages an injured party may recover.

> "The perils of taking on a case and running the clock can be ominous as it could expose the injured client to liability."

Be Deliberate about Discovery

The most ominous bane of every lawyer's existence is discovery.

This is a universal truth for the plaintiff as much as for the defense; but, it does offer the opportunity to further effectively elaborate or set forth the client's case.

It is the lawyer who is deliberate about discovery that not only serves the client's best interests, but is simply better lawyering and more likely to yield better results.

"*There should be a discovery plan in every case, even if the 'plan' is to conduct no discovery…Keep in mind that failure to conduct discovery may be a red flag for claims of legal malpractice*."[15]

One way to demonstrate deliberateness in discovery is to schedule it. For example, serving the client's responses, accompanied by propounded discovery, sends a message to the defense that the lawyer will not stand by idly.

From my defense days, it was astounding to note the number of plaintiff attorneys who propounded no discovery and then were forced to settle "*on the courthouse steps*" because the lawyer had done little in the way of working up their client's case with an eye toward trial.

The quality of that discovery solidifies the message. Thus, asking for relevant evidence *in auto*—rather than whether the defendant is current in child support, for example—that solidifies straightforward requests.

Straightforward requests for admissions tied to Form Interrogatory 17.1 along with Form Interrogatories and Requests for Production are a great starting point to eliciting relevant information.

Relevant discovery requests should include requests for the current policy; additional insurance if injuries appear to exceed coverage, such as homeowners and umbrella policies; photographs of the damaged vehicles; property damage estimates; copies of the registration and driver's license; driving history, including a history of other accidents; and licensure in other states along with the ISO report are straightforward in that such requests stick to the issues of liability and damages.

However, asking for the entire claim file is not relevant and can be privileged work-product as being produced in anticipation of litigation.

Truthfully, based on past experience, reviewing the claim file almost never revealed some conspiracy between the insured and any member of the insurance carrier, whether it be the adjuster, some investigator or the in-house attorney handling the case.

Another little-known fact about discovery is that propounding Requests for Admissions subjects the responding party to sanctions under the California Code of Civil Procedure § 2033.420(a).[6]

If successful, these sanctions could lead to payment of attorney's fees for establishing a fact available to the responding party, and for which the propounding party had to incur attorney's fees in establishing said fact.

Proceeding to Trial

In proceeding to trial, client management resurges along with an awareness of discovery, including expert designation and the California Code of Civil Procedure.[7]

Client management resurges just before trial. Again, advising the client as to the perils of surveillance, including impeachment, is imperative or a defense verdict will be easily had.

For some reason, injured parties nearly always believe they are the exception to the rule, and are nearly always caught on video doing the very things they claim an inability to do—running, skiing, or lifting heavy objects, for example.

Yet, it is the ten days prior to trial, when no further disclosures are necessary, that insurance carriers await and request surveillance or '*subrosa*'. If surveillance is solely for impeachment purposes, no disclosure of such surveillance prior to trial is necessary.[8]

Upon receipt of the defense's expert designation, it is advisable to do some homework and research if the expert is one who appears to be routinely designated by the defense.

If so, then a Motion to Compel the expert to provide, for example, tax filings of years prior will help to dispel the defense expert's credibility because it can then be said that the expert is motivated to give an opinion favoring the defense because their livelihood is dependent on such a finding.[9]

In proceeding to trial, it is the lawyer who propounds a request to supplement the prior discovery responses timed in a way so that responses are received within 20 days prior to the date set for trial that allows time to evaluate the defense's case, as well as the service of a California Code of Civil Procedure § 998 Offer to Compromise.

More specifically, if a plaintiff's lawyer serves an Offer to Compromise, the lawyer shows the defense their ability to establish the plaintiff's case for at least that amount or greater. If the defense serves the 998 Offer, the plaintiff must prevail with a jury award of at least the amount in the 998 Offer and one cent.

California Code of Civil Procedure § 998 has been vastly litigated as to what constitutes a "*prevailing party*" and whether that includes an award of attorney's fees, etc.

However, for purposes of simplicity, a 998 Offer sets the dollar amount at which either party must obtain a jury verdict to be deemed the '*prevailing party*.'

Being the '*prevailing party*' as per a 998 Offer allows the party to move forward with obtaining a further award of the costs of proceeding toward trial. These costs can include, for example the expert costs incurred, the costs of exhibits, jury fees, and court reporter fees.[10]

Failing to surpass or accept a 998 Offer and then not obtaining an award at the time of trial that exceeds the 998 Offer will subject a client to a judgment for these costs which, as referenced above, can exceed $10,000.

The alternative to that scenario could be a Motion to Tax Costs, but because these costs are based on reasonableness and are costs an individual defendant would likely incur in proceeding to trial, such a Motion to Tax may not likely succeed.

In closing, remember that personal injury is based on negligence, as well as its attendant negligent infliction of emotional distress cause of action; so a punitive damage award is not likely.

It is strongly advisable, then, to be thoroughly prepared and deliberate, and, above all, in a case where all the facts and diligence align, always ask for the moon and the stars because the results may surprise.

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[1] *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 establishing that California follows the federal standard in bringing summary judgment; Federal Rules of Civil Procedure Rule 56. See also, *Celotex Corp. v. Catrett* (1986) 106 S.Ct. 2548; Anderson v. Liberty Lobby, Inc. (1986) 106 S.Ct. 2505; and *Matsushita v. Zenith Radio Corp*. (1986) 106 S.Ct. 1348.

[2] *Arash Homampour*, The Verdict with Tom Feher, podcast Episode 6 at 18:33.

[3] *Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428, affirming California Code of Civil Procedure § 425.11.

[4] *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049 an insurer has a duty, beyond statutory 'requirements'.

[5] The Rutter Group Practice Guide: Civil Procedure Before Trial at 8:346—8.

[6] *See* "How to Put Some Bite In Your RFAs for Personal-Injury Automobile Cases", Plaintiff Magazine, Eric Gruber, May 2014: https://www.plaintiffmagazine.com/recent-issues/item/how-to-put-some-bite-in-your-rfas-for-personal-injury-automobile-cases.

[7] California Code of Civil Procedure § 998.

[8] California Rules of Court Rule 3.1548.

[9] *Stony Brook I Homeowners Ass'n v. Sup. Ct.* (Diehl) (2000) 84 Cal.App.4th 691.

[10] *See* Memorandum of Costs (Summary), California Judicial Council form MC-010.

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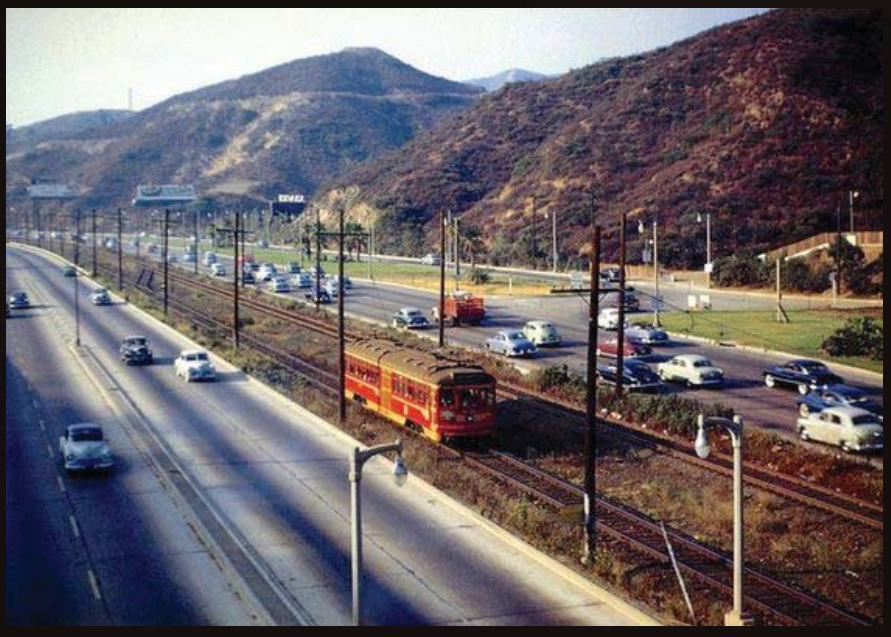

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