VALLEY LAWYER

JUNE 2015 • $4

A Publication of the San Fernando Valley Bar Association

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CONTENTS

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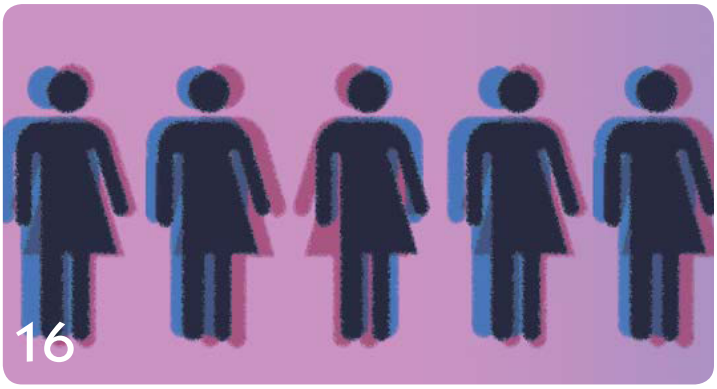

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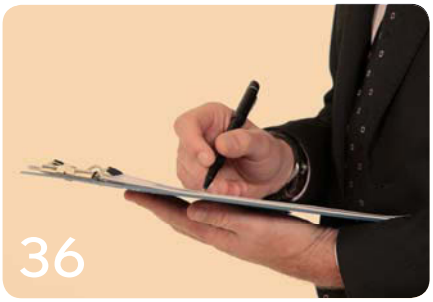

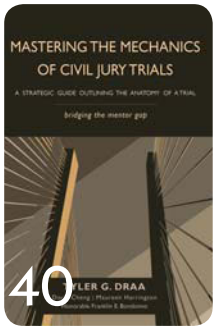

On the cover: *(L-R) Harold and Alan Wax, Marshall Glick and Heather Glick-Atalla, and Jonathan and Marshall Cole Photo by Paul Joyner*

FEATURES

COLUMNS

DEPARTMENTS

VALLEY LAWYER

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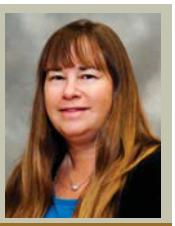
Printing Southwest Offset Printing

Summer's Here! Come Out and Play!

CARYN BROTTMAN SANDERS
SFVBA President



carynsanders@sbcglobal.net

CHANCES ARE, IF YOU ARE reading this article, the title of Alice Cooper's iconic rock anthem, *School's Out for Summer*, is no longer your June theme. But that doesn't mean you can't consider summer plans. Remember the days of meeting new friends at camp, the pool, or the park? This summer, consider coming out to play with a committee of the San Fernando Valley Bar Association. Being part of a committee gives you the opportunity to meet new people and to be an important part of our wonderful organization. Most committees meet once a month or less at a date convenient to its members. As a part of your summer plans, please consider joining us as a member of one of the following committees:

Attorney Referral Service Committee
The ARS Committee oversees and develops policy and procedures for the operation of the SFVBA's Attorney Referral Service, Modest Means Program, Senior Citizen Law Program, and Speaker Service.

Bench-Bar Committee
The Bench-Bar Committee meets regularly with leaders of the local courts to advance the smooth administration of justice and to ensure open communication between the Bench and Bar.

Blanket The Homeless Committee
This committee raises funds and organizes our annual Blanket the Homeless event during which we provide blankets to several homeless shelters and offer a free legal clinic to low-income and homeless members of our community.

Resolutions Committee
SFVBA members can participate in the legislative process by joining the Resolutions Committee. The committee drafts legislation and takes positions on resolutions to be debated by the Conference of California Bar Associations (CCBA). As one of the larger organizations at the Conference, the Resolutions Committee provides an opportunity for San Fernando Valley attorneys' viewpoints to be heard.

Inclusion and Diversity Committee
This important committee works to serve underrepresented segments of the Valley community through special presentations and outreach efforts (e.g. the recent Immigration Forum at San Fernando High School). It also works to educate Bar members about legal issues affecting minority communities and promotes diversity in the legal profession and the judiciary through various programs including Law Posts in local community colleges. The committee also liaises with minority bar associations through the Multicultural Bar Alliance.

Editorial Committee
Valley Lawyer, the official magazine

of the San Fernando Valley Bar Association, focuses on the law practice experience in the San Fernando Valley. The Editorial Committee recommends, writes, solicits and reviews the editorial content for *Valley Lawyer*.

Horace Mann Project Committee
The Horace Mann Project Committee works with schools in the San Fernando Valley to provide support and assistance with speakers, court tours, and other volunteer opportunities to introduce and educate students of diverse backgrounds to the field of law.

Mandatory Fee Arbitration Committee
The Mandatory Fee Arbitration Committee provides oversight of the SFVBA's Mandatory Fee Arbitration Program and the volunteer arbitrators who hear matters.

Membership & Marketing Committee
The committee's goal is to enhance SFVBA membership by providing services and programs that improve the quality of our members' practices (and decrease their bottom line).

Personnel Committee
This committee annually reviews the policies and procedures in the Employee Handbook, consults with the Executive Director on personnel matters, and makes recommendations to the Board of Trustees on employee benefits.

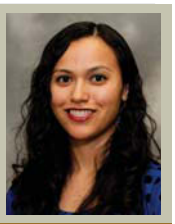
Programs Committee
The SFVBA provides opportunities for members to get together for social activities. The committee plans our Annual Judges' Night, the SFVBA Installation Dinner, and other special events throughout the year.

Sponsorship Committee
This committee works with our sponsors to create mutually beneficial relationships between our Bar and its members and the sponsors, including low cost or free educational programs and networking mixers.

Please join us at our Member Appreciation Event at The Stand in Encino on June 12! Find me there to discuss any of the committees or contact me at the email address above. Make the San Fernando Valley Bar Association a part of your summer plans!

Lifelong Learning and Teaching

IRMA MEJIA
Publications & Social Media Manager
editor@sfvba.org



THE FAMILY BUSINESS IS A TIMELESS TRADITION, YET ONE THAT seems increasingly rare these days—or so we thought. When considering our cover this month, I expected the search for father-son and -daughter attorney teams to be difficult. Surprisingly, there were many–more than we could fit on our cover. Along with father-son and -daughter legal teams, we encountered several firms made up of siblings and a few more made up of spouses. It seems the tradition of keeping it in the family remains strong in the San Fernando Valley.

The family teams we featured this month are quite impressive. Marshall Glick, Jonathan Cole and Harold Wax have decades of experience and are leaders in their areas of practice. Their professional and personal accomplishments make them excellent role models, not only for their children but to all rising attorneys. It's clear from their children's words that they have been incredible fathers. Their relationships are marked by mutual respect and an eagerness to share and gain knowledge. We can learn a lot from their example.

Our other features this month provide valuable lessons, too. The MCLE article by employment law attorney Hannah Sweiss discusses a topic that has been in the news recently. In an era of increasing civil rights victories for the LGBT community, there remain many issues affecting our transgender colleagues, friends and family members. Sweiss' article does an excellent job of presenting an overview of the laws affecting the rights of transgender employees and what employers should know.

Sole practitioner Richard Garber has written a very informative piece on liens in chapter 20. Impressively, his article was adapted from a 12-page winning brief he filed that caused the reversal of a previous bankruptcy court decision. He paints a very persuasive argument on the topic of lien avoidance.

In this month's *Finding an Expert* column, longtime associate member Martin Levy of Corporate Strategies, Inc. gives us insight into ERISA and what law firms can do to ensure compliance with federal requirements. It's a must-read for all employers, no matter the size of the firm. Mediator and attorney Jan Frankel Schau provides readers with worthwhile tips for getting the most value from mediation. Hint: it's a lot easier than we assume!

Finally, this month's book review written by Past President David Gurnick is a brief overview of a soon-to-be released technical guide for civil jury trials. According to Gurnick, the book is a must-read for all new trial lawyers and can serve as a refresher for the experienced litigator.

In the spirit of passing on practical lessons, I invite all SFVBA members to share their knowledge and experiences within the pages of this magazine. In addition to helping others improve their practice, you'll be increasing your visibility in print and online (we share our magazine on all our social networks). And if writing a scholarly article doesn't interest you, consider submitting a photograph, illustration, short story or poem to our art contest! The deadline to enter is June 22. Prizes will be awarded and select entries will be featured in the August issue. I look forward to all your submissions, both academic and creative!

SUN	MON	TUE	WED	THU	FRI	SAT
	1 *Valley Lawyer* Member Bulletin Deadline to submit announcements to editor@sfvba.org for July issue.	**2**	**3**	**4** Employment Law Section **The Effects of an Employer's Bankruptcy on an Employee's Lawsuit** 12:00 NOON SFVBA OFFICE Yi Sun Kim discusses how an employer's impending bankruptcy affects a lawsuit; pros and cons of potential bankruptcy as a settlement tool; and whether an employer in bankruptcy has authority to settle a case. (1 MCLE Hour) Membership & Marketing Committee 6:00 PM SFVBA OFFICE	**5**	**6**
7	**8** Tarzana Networking Meeting 5:00 PM SFVBA OFFICE	**9** Probate & Estate Planning Section **Savage Sunset: How 21380 Has Sharpened the Teeth of 21350** 12:00 NOON MONTEREY AT ENCINO RESTAURANT Lauriann Wright and Robert Eroen discuss the presumption that U/I is irrebuttable for drafters and anyone related to a drafter and the penalty of having to pay the other side's attorney's fees for trying to rebut. (1 MCLE Hour) Board of Trustees 6:00 PM SFVBA OFFICE	**10**	**11**	**12** Annual Member Appreciation Reception 5:30 PM THE STAND ENCINO Join us at The Stand for a casual dinner on the patio. Free to Current Members. See page 8	**13**
14	**15**	**16**	**17** Workers' Compensation Section **The Pros and Cons of Filing CT's** 12:00 NOON MONTEREY AT ENCINO RESTAURANT Karinneh Aslanian will discuss the advantages and disadvantages of filing CT's and post termination CT cases. (1 MCLE Hour)	**18** Bankruptcy Law Section **Settling with the Trustee Part 2** 12:00 NOON SFVBA OFFICE This is the conclusion of a prior program in which current and former chapter 7 trustees and counsel discuss do's and don'ts of making deals in bankruptcy with chapter 7 trustees. (1.25 MCLE Hour) New Lawyers Section 6:00 PM SFVBA OFFICE	**19**	**20**
21 Happy Father's Day	**22** Deadline to enter ART CONTEST See page 32	**23** Editorial Committee 12:00 NOON SFVBA OFFICE	**24**	**25**	**26**	**27**
28	**29**	**30**				

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) 227-0490, ext. 105 or events@sfvba.org. Pricing discounted for active SFVBA members and early registration.

CALENDAR

JULY 2015

SUN	MON	TUE	WED	THU	FRI	SAT
			1	2	3	4 
5	6 ***Valley Lawyer* Member Bulletin** Deadline to submit announcements to editor@sfvba.org for August issue.	7	8  Time to Renew Your Bar Membership! Renew online at www.sfvba.org	9 **Membership & Marketing Committee** 6:00 PM SFVBA OFFICE	10	11
12	13 **Tarzana Networking Meeting** 5:00 PM SFVBA OFFICE	14 **Board of Trustees** 6:00 PM SFVBA OFFICE	15	16 **Employment Law Section** **Reasonable Accommodations** 12:00 NOON SFVBA OFFICE Andrea Oxman, Counsel at Klinedinst, PC, and Paula D. Pearlman, Senior Staff Counsel of the California Department of Fair Employment and Housing, will discuss reasonable accommodations for employees with disabilities. (1 MCLE Hour)	17 **Bankruptcy Law Section** **Attorney's Fees** 12:00 NOON SFVBA OFFICE Attorney Lewis Landau addresses best practices for recovery of post-judgment prevailing attorney's fees in bankruptcy cases. (1 MCLE Hour)	18
19	20	21	22	23	24	25
26	27	28 **Editorial Committee** 12:00 NOON SFVBA OFFICE	29	30	31	

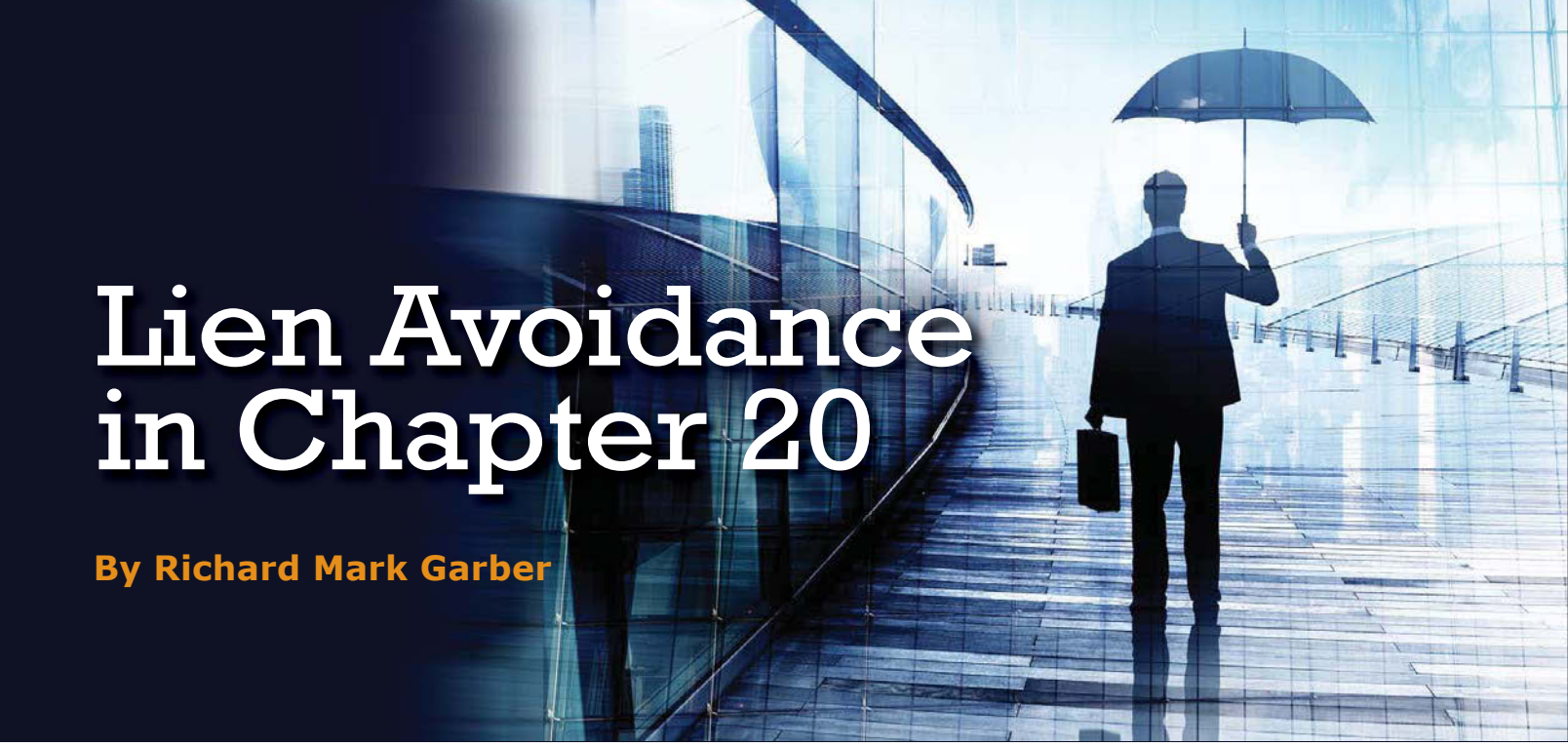
SAVE THE DATE

INSTALLATION GALA

September 24

5:30 PM

Braemar Country Club, Tarzana



Lien Avoidance in Chapter 20

By Richard Mark Garber

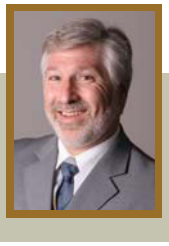
THERE IS A SPLIT OF AUTHORITY as to whether a debtor in a Chapter 20 case (i.e., a Chapter 7 case in which a debtor obtained a discharge followed by a Chapter 13 filed within four years) may avoid a lien under 11 U.S.C. 506(d). This split of authority reaches down to our own Central District, where not all judges agree that a Chapter 20 debtor may avoid a lien under §506(d). Since there are legitimate reasons why a debtor might obtain a Chapter 7 discharge before filing Chapter 13–such as when the debtor does not qualify for relief under Chapter 13 due to the debt limitations of §109(e)–it is important that this split of authority be resolved so legitimate Chapter 20 debtors are not denied the relief that Chapter 13 affords them. This article addresses that split of authority.

The Bankruptcy Court should not condition the avoidance of a lien under §506(d) upon the debtor's receipt of a discharge when the Bankruptcy Code does not do so.

Perhaps the most compelling argument in support of allowing Chapter 20 debtors to avoid liens under §506(d) is that the Bankruptcy Code does not prohibit it. Most bankruptcy courts agree that the avoidance of a lien under §506(d) is not contingent upon the debtor's receipt of a Chapter 13 discharge, and that lien stripping of a wholly unsecured lien on a debtor's principal residence is effective upon a debtor completing his plan payment obligations under his Chapter 13 plan.[1]

The analysis in *In re Tran*[2] is perhaps the most persuasive. The *Tran* court noted that the starting point for any statutory interpretation is the language of the statute.[3] In this respect, the *Tran* court found it significant that 11 U.S.C. §109(a),(e), and (g), which set forth the eligibility requirements for Chapter 13, do not condition eligibility for relief under Chapter 13 upon the ability of a debtor to obtain a discharge under §1328.[4] It also noted that §109(g) does not preclude relief under Chapter 13 to a debtor who previously received a discharge in Chapter 7 and that §1325(a),(b), which set forth numerous requirements for plan confirmation, does not condition or limit the right of a debtor to confirm a plan based on the availability of a discharge.

Moreover, it stated that neither §506, §1322(b), nor any other provision of the code, providing for a debtor's right to modify or strip off liens, conditions said right on the availability of a discharge[5] and that §349(b)(1)(C) (which provides that any lien avoided under §506(d) is reinstated in the event that a case is dismissed) is not applicable if a Chapter 13 debtor makes all of his payments and completes his Chapter 13 plan because a Chapter 13 case in which a debtor is not entitled to a discharge is closed upon the completion of the plan.[6] Finally, the court stated that §1325(a)(5)(b)(i)(II) conditions any permanent lien modification on the completion of a plan, not on receiving a discharge.



Richard Mark Garber is a bankruptcy attorney with 33 years of experience. His practice focuses mainly on Chapter 7 and 13 and emphasizes the avoidance of junior liens on real property, including second mortgage liens, tax liens, home owner association liens, and judicial liens, as well as the discharge of income taxes, sales taxes, and even some payroll taxes in bankruptcy. He can be reached at rickgarber@sbcglobal.net.

Based on the analysis of the foregoing code provisions, and in the absence of any other code provision expressly denying a debtor who is not entitled to a discharge in Chapter 13 the right to strip a lien under §506, the Tran court held that the Bankruptcy Code does not "...preclude a debtor that is not eligible for a discharge from filing a chapter 13 case, obtaining confirmation of a chapter 13 plan, and with the exception of the right to a discharge, from enjoying all the rights of a chapter 13 debtor, including the right to strip off liens."[7]

In re Waterman[8] found the *Tran* decision, and the cases it relied on, to be "'persuasive and compelling." Moreover, *Waterman* court further noted that:

> "Congress has been very particular, exacting and precise in delineating rights, obligations, opportunities and limitations of debtors in bankruptcy and particularly under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Congress could have easily denied a Chapter 13 debtor's right to "strip off'" a wholly unsecured lien on their principal residence, but it has not done so."[9]

In *In re Jennings*,[10] the court noted that, "[p]ursuant to BAPCA, Congress was deliberate in only prohibiting discharge in a Chapter 20 case[,]" and in *In re Fair*,[11] the court commented:

> "[w]hen Congress amends the bankruptcy laws, it does not write 'on a clean slate.' . . . The court must presume that Congress understood the distinction between discharging in *personam* liability and modifying the terms of an *in rem* lien when it enacted §1328(f)(1). In other words, denying certain chapter 13 debtors the right to a discharge did nothing to change the fact that lien stripping is generally allowed under chapter 13." [Italics in original]

Since there is no code provision which prohibits a debtor who is barred under §1328(f) from receiving a discharge in a Chapter 20 case from avoiding a wholly unsecured junior mortgage lien against his property under §506 and §1322, it must be presumed that Congress intended to permit debtors in Chapter 20 cases to avoid their wholly unsecured junior mortgage liens.[12]

The creditor holding the conditionally avoided unsecured lien retains said lien until the completion of the Chapter 13 case. It is the completion of the plan that determines when a debtor may permanently avoid a wholly unsecured lien.

Years ago, the judges of this District adopted a mandatory form of a Chapter 13 plan. It is F3015-1.1, which states, in relevant part:

> Property of the estate shall not revest in the Debtor until such time as a discharge is granted or the case is dismissed or closed without [a] discharge. Revestment shall be subject to all liens and encumbrances in existence when the case was filed, except those liens avoided by court order or extinguished by operation of law. In the event a case is converted...., the property of the estate shall vest in accordance with applicable law. [Emphasis added].

By delaying the revestment of property in the debtor until he completes his plan (and his case is closed with or without a discharge), debtor's plan confirmation does not operate to terminate any lien or claim interests of a junior lien creditor under §1327[c] upon the confirmation of the plan.

Thus, during the entire pendency of the debtor's case, the lien and claim interests of the junior lien holder are preserved. If a debtor fails to complete his plan payments, his case will be dismissed,[13] and the lien avoidance

is undone,[14] thereby restoring the creditor's rights and remedies under its lien instrument. It is the completion by the debtor of his plan obligation which is the operative fact that allows a debtor to permanently avoid a wholly unsecured lien.[15]

It also should be noted that the junior lien creditor is granted an unsecured claim equal to the amount of its conditionally avoided lien. The debtor's plan must provide for the treatment of the avoided lien creditor's unsecured claim; if the plan provides for a distribution to unsecured creditors, the junior lien creditor will receive a pro rata distribution along with any other unsecured creditors even though the debtor's in personam debt to the junior lien creditor was discharged in the prior Chapter 7 case.

By far the most compelling argument for allowing a Chapter 20 debtor to avoid a junior lien is that there is no code provision that conditions a debtor's right to avoid a lien on his ability to obtain a discharge; a court cannot forbid the conduct that the code has not expressly prohibited. Another strong argument is that Congress, in enacting BAPCA, could have enacted a provision barring a Chapter 20 debtor from avoiding a wholly unsecured lien, in the same way that it denied a Chapter 20 debtor the right to a discharge. However, Congress did not do so, and its failure to do so must be deemed as an expression of its intent to permit Chapter 20 debtors the right to avoid liens from their real property pursuant to §506(d).

Additionally, a third important argument in favor of allowing Chapter 20 debtors the right to avoid liens includes the fact that the lien creditor retains its lien during the pendency of the Chapter 13 case; any dismissal of the case, or even an attempt by the debtor to refinance his property or to sell during the pendency of the case without having completed his plan obligation revives the lien.

Lastly, a fourth important argument in favor of allowing Chapter 20 debtors to avoid liens is that the avoided lien creditor is given an unsecured claim equal to the amount of its avoided lien and its claim must be provided for in the plan. If there is a distribution to unsecured creditors, the avoided lien creditor must share pro rata in said distribution even though its claim has been discharged previously. Quite often, in Chapter 20 cases, the avoided lien creditor is the only unsecured creditor, in which case it is very likely that it will receive a distribution.

In summation, there is no good legal reason to deny a Chapter 20 debtor the right to avoid liens pursuant to §506(d), and courts of this district which continue to adhere to the position that the right to avoid a lien under §506(d) is dependent upon receiving a discharge must rethink their position on the matter, and must afford the Chapter 20 debtor the same right as any ordinary Chapter 13 debtor to avoid a wholly unsecured lien on real property upon completing his case.

[1] *In re Scantling*, 754 F.3d 1323, 1329 (11th Cir. 2014); *In re Davis*, 716 F.32d 331 (4th Cir. 2013); *In re Dang*, 467 B.R. 227 (Bkrtcy. M.D. Fla. 2012); *In re Okosisi*, 451 B.R. 90 (Bkrtcy. D. Nev. 2011), *In re Fissette*, 455 B.R. 177 (8th Cir. BAP 2011); *In re Tran*, 431 B.R. 230 (Bkrtcy. N.D. Cal 2010); *In re Hill*, 440 B.R. 176 (Bkrtcy. S.D. Cal. 2010); *In re Frazier*, 448 B.R. 803 (Bkrtcy. E.D. 2011); *In re Grounder*, 266 B.R. 879 (Bkrtcy. E.D. Cal. 2001); *In re Waterman*, 447 B.R. 324, 328-329 (Bkrtcy. D. Col. 2011); *In re Fair*, 450 B.R. 853 (Bkrtcy. E.D. Wis. 2011); and *In re Jennings*, 454 B.R. 252, 258 (Bkrtcy. N.D. Ga. 2011).

[2] *Tran,* supra.

[3] *Tran*, supra, 431 BR at 235.

[4] *Id.* at 235; see also, In re Jennings, 454 B.R. at 258.

[5] See also, *In re Hill*, 440 B.R. at 182; *In re Jennings*, 454 B.R. at 258 (wherein the court noted, "[l]ien stripping is one of the tools in the chapter 13 tool box. And use of the chapter 13 lien stripping tool is not conditioned on discharge eligibility.").

[6] It is not dismissed under Section §350; see also Bankruptcy Rule 5009.

[7] *Tran, supra*, 431 B.R. at 235. In accord, see *Fissette, supra*, 455 B.R. at 185; *Waterman, supra*, 447 B.R. at 328-329; *In re Fair*, 450 B.R. 853, 857 (E.D. Wis. 2011), and *Jennings, supra*, 454 B.R. at 258.

[8] *Waterman, supra*.

[9] *Id.* at 329.

[10] *Jennings, supra*, at 258.

[11] *Fair, supra*, at 857.

[12] *Fair, supra*, 450 B.R. at 857; *Waterman, supra*, 447 B.R. at 329; *Connecticut National Bank v. Germain*, 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992); *Jennings, supra*, 454 B.R. at 258.

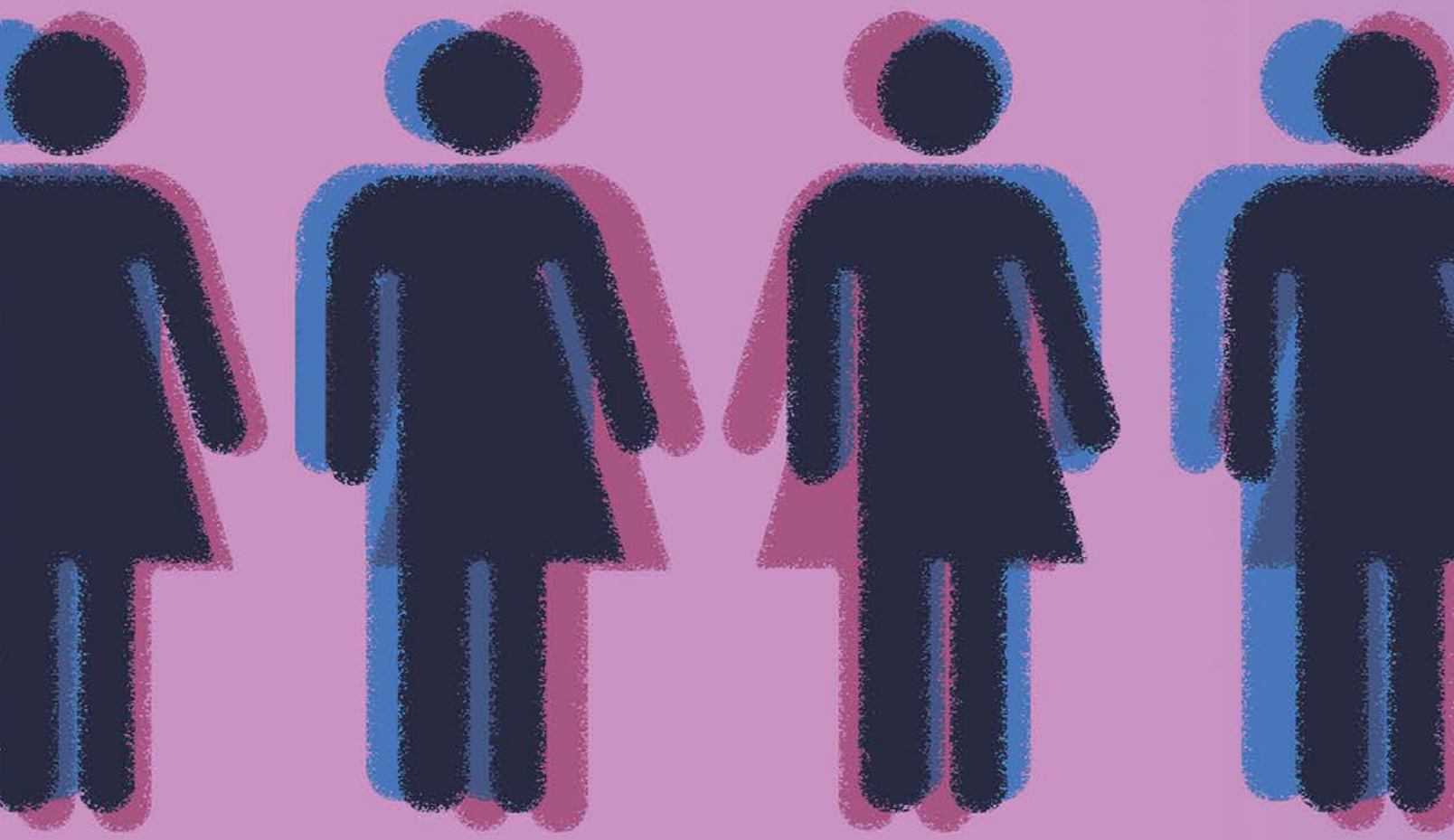
[13] *Okosisi, supra* at 95.

[14] 11 U.S.C. §349(b)(1)(C); *Dewsnup v. Timm*, 502 U.S.C. 410, 417-418, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992); *Okosisi, supra*, at 95; *Tran, supra,* at 236.

[15] *In re Frazier*, 448 B.R. 803 (Bkrtcy. E.D. Cal. 20111).

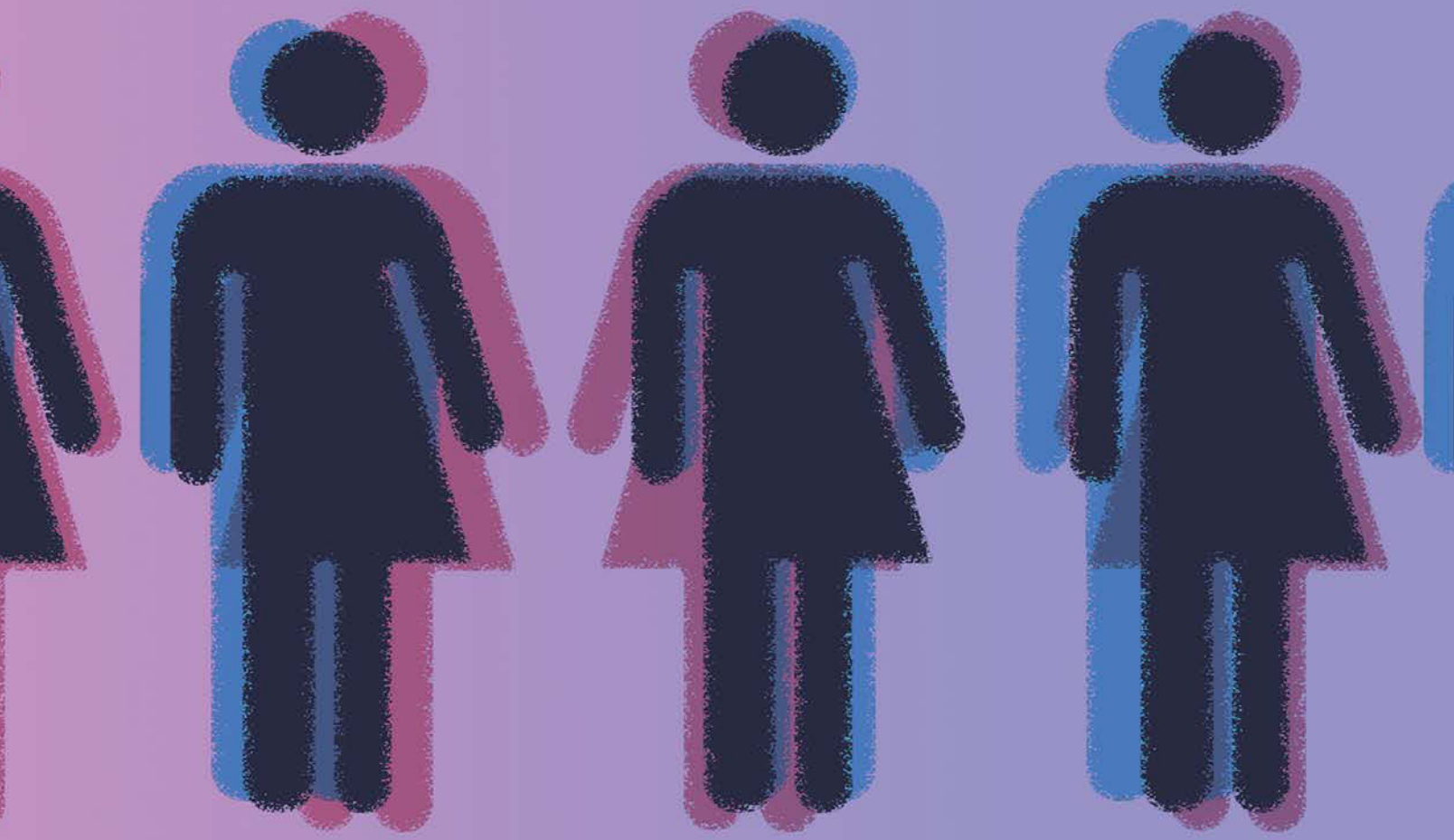
Transformation of Transgender Rights in the Workplace

By Hannah Sweiss



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 24.

Protections for transgender employees have expanded in recent years. Attorneys should familiarize themselves with the latest developments to better advise clients. Increased awareness and proper training can significantly reduce the risk of violations while improving the conditions for transgender employees.



GENDER TRANSITION AND TRANSGENDER identity has taken center stage in the media recently. However, out of the spotlight, the rights of transgender persons may be unclear to many. Transgender persons struggle with difficult issues, particularly in the workplace. In recent years, there have been increasing efforts to broaden federal and state protections for transgender persons in the workplace, but many employers may be unaware of these protections and rights. As transgender rights awareness continues to gain momentum and protections broaden, employers with even one employee need to be prepared to deal with pertinent issues such as gender identity, gender stereotyping, and gender transitioning.

Terminology: Getting it Right

In keeping with both political correctness as well as raising awareness in the workplace, mindfulness of terminology is important. To start, the term "transgender" is defined as "a person who identifies with or expresses a gender identity that differs from the one which corresponds to the person's sex at birth."[1] The term arose in the 1970's and has become an umbrella term for people whose gender identity and/or gender expression differs from what is stereotypically associated with their birth-assigned sex.[2]

The term "transsexual" is often confused with the term transgender.[3] Unlike transgender, transsexual is not an umbrella term.[4] Some people who have permanently changed or seek to change their bodies through medical interventions prefer the term transsexual, but many transgender people do not identify as transsexual and prefer to be referred to as transgender.[5]

There are multiple terms that are key when discussing transgender identity. Terms such as sex, gender identity, gender expression, and sexual orientation are particularly important in understanding transgender identity.

The term "sex" refers to the classification of male or female.[6] At birth, a sex is assigned to each person (girl or boy), based on the appearance of external anatomy.[7] However, a person's sex is not just external anatomy, but rather a multitude of bodily characteristics including chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics.[8]

Distinct from sex, "gender identity" is not a visible identity, but an individual's internal sense of being male or female.[9] For transgender people, internal gender identity does not match the sex assigned at birth (girl or boy). For some, their gender identity does not neatly conform within either sex.[10]

In contrast to gender identity, "gender expression" is a person's outward manifestation of gender.[11] Gender identity is expressed through a person's name, pronouns, clothing, haircut, behavior, voice, or body characteristics.[12] Transgender people typically seek to make their gender expression align with their gender identity, rather than the sex they were assigned at birth.[13]

"Sexual orientation" is a person's physical, romantic, and/or emotional attraction to another person.[14] Transgender people may be straight, lesbian, gay, or bisexual. As an example, a person who transitions from female to male and is attracted solely to women would identify as a straight male. "Transition" refers to the complex process of gender transition that may occur over a long period of time and is preferred over the term sex change.[15] Transition is more than surgery or hormone therapy. It includes telling family, friends, and co-workers; using a different name and new pronouns; dressing differently; and changing a person's name and/or sex on legal documents.[16] Transition is different and unique to each individual.

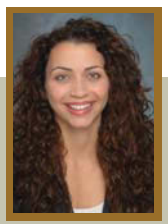
Those are just some of the basic terms that surround the transgender discussion; however, there are other terms that may lend to a better understanding of transgender status such as gender dysphoria, cisgender, gender-nonconforming, etc.

The Legal Landscape Impacting Transgender Persons in the Workplace

Though it may seem obvious to some that transgender persons would be protected from employment discrimination for being transgender or transitioning, federal and state courts have not always been sympathetic to transgender persons. In fact, until recently, there were essentially very few protections for transgender persons both under federal and state law. In addition to understanding the terminology surrounding the transgender discussion, it is important to understand the federal and state legal landscape protecting and impacting transgender persons in the workplace.

Federal Protections against Employment Discrimination

Title VII of the Civil Rights Act of 1964 (Title VII)[17] is the federal law that protects individuals against employment



Hannah Sweiss is an employer defense attorney at Lewitt Hackman in Encino. She may be reached at hsweiss@lewitthackman.com.

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discrimination on the basis of protected categories, including, but not limited to sex.[18] There is currently no express federal law protecting individuals from job discrimination based on actual or perceived sexual orientation or gender identity.[19] Sexual orientation and gender identity are not expressly protected categories under Title VII and until 1989, Title VII did not protect transgender people.

In 1989, the United States Supreme Court held in *Price Waterhouse v. Hopkins*[20] that sex discrimination under Title VII includes discrimination based on "sex stereotyping," or a person's perceived nonconformity with gender stereotype. Since the *Price Waterhouse* decision, there have been federal courts that have explicitly ruled that discrimination based on transgender status is a prohibited form of sex discrimination under Title VII and/or the Equal Protection Clause.[21]

In 2012, the Equal Employment Opportunity Commission (EEOC) issued a landmark decision in *Macy v. Holder,*[22], which held that discrimination based on transgender status constituted unlawful sex discrimination under Title VII. In extending protection to transgender persons, the EEOC noted:

> If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman or vice versa. But the statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.[23]

> Title VII 'extends to claims of discrimination based on an individual's gender identity, including transgender status.'"[i]

Though the protection afforded transgender persons under federal law has progressed, there are continuing efforts to broaden and implement consistent protections for the lesbian, gay, bisexual and transgender (LGBT) community as a whole since currently there is no federal law that consistently protects LGBT individuals from employment discrimination.[24]

Recent Federal Developments Broadening Transgender Protections in the Workplace

On December 15, 2014, Eric Holder issued a memorandum on behalf of the Department of Justice entitled "Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964," formally recognizing for the first time that Title VII "extends to claims of discrimination based on an individual's gender identity, including transgender status."[25]

A few months later, on March 16, 2015, the United States Commission on Civil Rights held its first ever hearing on workplace discrimination against those in the LGBT community.[26]

In another landmark ruling issued on April 1, 2015, the EEOC found that the Department of the Army had engaged in discrimination against a transgender employee who transitioned from male to female, by barring her from using the same restroom as other female employees, and by her supervisors' continued intentional use of male names and pronouns in referring to the employee after her transition.[27] The employee was not only refused access to a restroom consistent with her gender identity, her supervisors repeatedly used male pronouns and her old name in front of her co-workers and others, intentionally mocking her and "outing" her as transgender.[28] The EEOC held that "[w]hile inadvertent and isolated slips of the tongue would be a different story, it was clear the use of a male name and pronouns to refer to the employee was not accidental, but rather intended to humiliate and ridicule her."[29]

That same month, on April 8, 2015, the Obama administration announced it had opened a gender-neutral bathroom within the White House complex, which is a symbolic step for the President to protect the rights of members of the LGBT community in the workplace.[30]

In line with these recent developments, the EEOC recently adopted a strategic enforcement plan for Fiscal Years 2013-16, which specifically addresses "Emerging and Developing Issues," such as protections for LGBT individuals under Title VII.[31] The plan includes an LGBT work group to advise EEOC litigators, coordinate internal policies and comment on pending legislation.[32] Another initiative has EEOC litigators filing amicus curiae briefs in lawsuits around the country.[33]

California Protections for Transgender Individuals

California's employment discrimination protections are found primarily in the Fair Employment and Housing Act (FEHA).[34] FEHA prohibits harassment and discrimination in employment based on sex, gender, gender identity, gender expression, sexual orientation and perceived sexual orientation.[35] It also prohibits retaliation for protesting illegal discrimination related to one of these categories.[36]

Additionally, FEHA makes it unlawful for an employer to refuse to hire or employ a person; to discharge someone

from employment; or to discriminate in compensation, in terms, conditions, or privileges of employment, because of the person's gender identity.[37]

Despite these broad protections under FEHA, the law explicitly allows an employer to enforce reasonable workplace appearance, grooming, and dress standards, as long as employees are allowed to dress in a manner consistent with their gender identity or gender expression.[38] This means that if an employer enforces dress codes, the dress code should be enforced in a way that comports with standards appropriate to align with a person's gender identity or gender expression.

More progressive than federal law, FEHA broadly protects not only gender identity, but also gender expression (regardless of whether an employee self-identifies as a transgender individual).

In addition to FEHA, California Labor Code §§1101 and 1102 prohibit employers from preventing or punishing an employee's political activity, which includes "coming out."[39] So if an employee is discriminated against after disclosing his or her gender identity or openly transitioning from one gender to another, an employee may bring a lawsuit under these sections, arguing that such actions are protected political acts.

Other relevant California laws that may extend protection to transgender persons include California's Disabled Persons Act,[40] Unruh Civil Rights Act,[41] and Ralph Civil Rights Act.[42]

California employers and employment law attorneys must remain cognizant of the expanding gender-identity protections that safeguard employees' rights to dress like, act like and use the restroom of the gender they identify with, even if they never undergo surgery to alter their appearance.

Recent California Developments Expanding Transgender Protections in the Workplace

Last year, the California Department of Fair Employment and Housing (DFEH), which is the agency that enforces FEHA, brought a lawsuit against a California employer alleging it was sex, gender, gender identity and gender expression discrimination to require a transgender employee to use the female locker room and restroom facilities until the employee's gender transition to male was "complete" after sex reassignment surgery.[43] The DFEH further alleged the employer not only engaged in discrimination but the employer failed to prevent such discrimination.[44]

The employer demurred, arguing that DFEH failed to state a cause of action because FEHA does not prohibit employers from requiring restroom and changing room use based on gender at birth.[45] The employer expressed concern about the discomfort of other employees in regard to the prospective employee's use of the men's facilities.[46] In response, the court aptly noted:

> …hypothetical assertions of emotional discomfort about sharing facilities with transgender individuals are no different than similar claims of discomfort in the presence of a minority group, which formed the basis for decades of racial segregation.[47]

The Superior Court overruled the employer's demurrer on all grounds.[48] The court ruled it would be unlawful for an employer to require a transgender employee to use the bathroom and locker room of his or her birth-assigned sex.[49] As guidance to employers, the court clarified that "individuals who claim a different gender from day to day, or who do so simply to be disruptive or to sexually harass other employees, do not meet the definition of transgender."[50]

As noted earlier, cases invoking issues of gender identity and expression are increasing in frequency. The EEOC, interpreting the sex discrimination provisions of Title VII to forbid discrimination against transgender individuals, and DFEH's expanded role as an enforcer of FEHA, makes it more important than ever for employers and the attorneys that advise them to remain up to date on developments in regard to workplace issues pertaining to gender identity and expression.

Takeaway for Client Employers

Failing to properly deal with issues of gender identity and gender expression may lead to employee claims. Below are tips and suggested best practices to help ensure a workplace free from discrimination and harassment for all employees.

- *Establish Policies.* Make tolerance part of the workplace culture by having strong anti-discrimination provisions in personnel policies.
- *Establish Standards for All.* Implement reasonable workplace appearance, grooming, and dress standards that allow employees to appear or dress consistently with their gender identity and gender expression.
- *Communicate.* Ensure employees know harassment and discrimination based on sex, gender, sexual orientation, gender identity and/or gender expression will not be tolerated.
- *Establish Procedures.* Implement procedures for gender transitions that clearly delineate responsibilities and expectations of transitioning employees, their supervisors, colleagues and other staff.
- *Maintain Privacy.* Ensure the privacy of gender-transitioning employees.
- *Implement Changes.* Address employees by their preferred name and/or preferred title and pronoun by all persons in the workplace.
- *Update Personnel Records.* If state and federal legal requirements are met,[51] employee documents should reflect the employee's name, title and pronoun preference.
- *Restrooms.* Allow employees to use the restroom that corresponds with the employee's gender identity and consider assigning a gender-neutral restroom or locker room to accommodate all employees, whether male, female or transitioning.
- *Problem Solving.* If an employee requests help as he or she undergoes a gender transition, engage in a dialogue and ask the employee to share any concerns. Then, figure out what accommodations are best and/or possible. A change in wardrobe could occur overnight, but a transition involving hormones and surgery might take several years to complete.
- *Train Employees.* Larger employers that are required to provide sexual harassment training[52] and employers of all sizes should consider providing diversity training to employees.

Although employers and HR staff may be aware employees are afforded protection against discrimination based on gender identity and gender expression, transgender discrimination or harassment claims may arise from others employed in the workplace. To help prevent such claims, employers should educate their workforce not only through policies and procedures, but also through training. If this means having employees participate in diversity training, then employers should consider making that investment.

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[1] "Transgender," Merriam-Webster Online Dictionary, 2015, http://www.merriam-webster.com/dictionary/transgender (last visited May 11, 2015).
[2] Marvin Dunson III, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, Berkeley Journal of Employment and Labor Law Volume 22, Issue 2, Article 5 (April 2014).
[3] *GLAAD Media Reference Guide*–Transgender Issues, GLAAD, 2015, http://www.glaad.org/reference/transgender, (last visited May 10, 2015).
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, U.S. Office of Personnel Management, http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance (last visited May 11, 2015).
[10] See *GLAAD Media Reference Guide–Transgender Issues, supra.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] 42 U.S.C. §2000e-2(a).
[18] Title VII applies to employers with 15 or more employees. See 42 U.S.C. §2000e(b) ("the term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year…").

[19] *Employment Non-Discrimination Act,* The Leadership Conference, http://www.civilrights.org/lgbt/enda/ (last visited May 10, 2015).
[20] *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228.
[21] *Schroer v. Billington* (2008) 577 F.Supp.2d 293; *Glenn v. Brumby* (2011) 663 F.3d 1312.
[22] *Macy v. Holder* (EEOC April 20, 2012) Appeal No. 012010821, available at http://www.pcc.edu/programs/paralegal/documents/macy-v-holder.pdf.
[23] *Id*.
[24] Senate Bill 815-113th Congress (2013-2014), Employment Non-Discrimination Act of 2013, available at https://www.congress.gov/bill/113th-congress/senate-bill/815 (introduced in 2013, the Employment Non-Discrimination Act (ENDA) sought to prohibit covered employers (employment agencies, labor organizations, or joint labor-management committees) from engaging in employment discrimination on the basis of an individual's actual or perceived sexual orientation or gender identity).
[25] U.S. Department of Justice Memorandum, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (December 15, 2015, available at http://www.justice.gov/file/188671/download.
[26] Transgender Law Center, TLC Testifies at Hostoric Hearing on LGBT Workplace Discrimination, http://transgenderlawcenter.org/archives/11465 (last visited May 11, 2015); LGBT Employees and Workplace Discrimination, CSPAN (March 16, 2015), http://www.c-span.org/video/?324836-1/lgbt-employees-workplace-discrimination-forum (last visited May 11, 2015).
[27] *Lusardi v. Department of the Army* (EEOC April 1, 2015) Appeal No. 0120133395; *see also* Transgender Law Center, "Groundbreaking EEOC ruling finds the Army discriminated against transgender employee by denying bathroom access, pronouns," http://transgenderlawcenter.org/archives/11521 (last visited May 11, 2015).
[28] *Id.*
[29] *Id.*
[30] Kevin Liptack and Sunlen Surfaty, "The White House complex now has a gender-neutral bathroom," CNN (April 9, 2015 10:54 a.m.), http://www.cnn.com/2015/04/09/politics/white-house-all-gender-bathroom.
[31] See U.S. Equal Employment Opportunity Commission, *Strategic Enforcement Plan Fiscal Years 2012-2016*, http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm.
[32] *Id.*
[33] *Id.*
[34] California Government Code §§12900–12996.
[35] California Government Code §§12940,12945, 12945.2.
[36] *Id.*
[37] California Government Code §§12940(a) and 12926(p).
[38] California Government Code §12949.
[39] *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458 (1979) (the California Supreme Court interpreted "coming out" by lesbian, gay and bisexual employees to constitute protected political activity).
[40] *Cal.Civ.* Code §54 *et seq.*
[41] *Cal.Civ. Code* §51 *et seq.*
[42] *Cal.Civ.* Code §51.7, subd. (a) (prohibits violence, or intimidation by threat of violence, committed against their persons or property on account of any characteristic including gender identity and gender expression, or because another person perceives them to have one or more of those characteristics).
[43] *Department of Fair Employment and Housing vs. American Pacific Corporation* (March 13, 2014) Case No. 34-2013-00151153-CU-CR, available at http://www.dfeh.ca.gov/res/docs/Announcements/Lozano%20final%20order.pdf.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* The court made this clarification in response to the employer's argument that under the DFEH's interpretation of FEHA "a male employee need only claim a female gender identity and the employer must permit him to shower, disrobe, and perform bodily functions with female coworkers."
[51] Transgender Law Center, *A Practitioner's Guide to California Transgender Law: A Reference Guide for California Lawyers and Advocates* (March 2010), available at http://transgenderlawcenter.org/issues/a-practitioners-guide-to-california-transgender-law-a-reference-guide-for-california-lawyers-and-advocates.
[52] See California Government Code Section 12950.1 ("An employer having 50 or more employees shall provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees in California within six months of their assumption of a supervisory position. An employer covered by this section shall provide sexual harassment training and education to each supervisory employee in California once every two years.")

Test No. 80

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. Title VII of the Civil Rights Act of 1964 (Title VII) is the federal law that protects individuals against employment discrimination on the basis of protected categories.
❑ True ❑ False

2. The term "gender identity" refers to the classification of male or female.
❑ True ❑ False

3. Sexual orientation and gender identity are not expressly protected categories under Title VII.
❑ True ❑ False

4. The U.S. Department of Justice has never recognized that Title VII "extends to claims of discrimination based on an individual's gender identity, including transgender status."
❑ True ❑ False

5. California employers are not allowed to enforce reasonable workplace appearance, grooming, and dress standards under the Fair Employment and Housing Act (FEHA).
❑ True ❑ False

6. The Equal Employment Opportunity Commission (EEOC) interprets the sex discrimination provisions of Title VII to forbid discrimination against transgender individuals.
❑ True ❑ False

7. The Department of Fair Employment and Housing enforces the FEHA.
❑ True ❑ False

8. Sexual orientation is a person's physical, romantic, and/or emotional attraction to another person.
❑ True ❑ False

9. The term "transsexual" is an umbrella term to identify persons who identify with or expresses a gender identity that differs from the one that corresponds to the person's sex at birth.
❑ True ❑ False

10. Gender expression is a person's outward manifestation of gender that may be expressed through a person's name, pronouns, clothing, haircut, behavior, voice, or body characteristics.
❑ True ❑ False

11. In 1989, the United States Supreme Court held in *Price Waterhouse v. Hopkins* that sex discrimination under Title VII includes discrimination based on "sex stereotyping," or a person's perceived nonconformity with gender stereotype.
❑ True ❑ False

12. The term "transgender" arose in the 1970's and has become an umbrella term for people whose gender identity and/or gender expression differs from what is stereotypically associated with their birth-assigned sex.
❑ True ❑ False

13. The United States Commission on Civil Rights has never held a hearing on workplace discrimination against those in the lesbian, gay, bisexual and transgender (LGBT) community.
❑ True ❑ False

14. The FEHA prohibits harassment and discrimination in employment based on express categories including sex, gender, gender identity, gender expression, sexual orientation and perceived sexual orientation.
❑ True ❑ False

15. The FEHA does not prohibit retaliation for protesting illegal discrimination related to gender identity, gender expression, sexual orientation and perceived sexual orientation.
❑ True ❑ False

16. The White House does not have a gender-neutral bathroom.
❑ True ❑ False

17. Last year, a California court analogized claims of emotional discomfort about sharing facilities with transgender individuals to claims of discomfort in the presence of a minority group, which formed the basis for decades of racial segregation.
❑ True ❑ False

18. No California court has ever ruled that it would be unlawful for an employer to require a transgender employee to use the bathroom and locker room of his or her birth-assigned sex.
❑ True ❑ False

19. The FEHA is the only California law that protects transgender persons.
❑ True ❑ False

20. It is a suggested practice that if an employee requests help as he or she undergoes a gender transition, the employer should engage in a dialogue and ask the employee to share any concerns to figure out what accommodations are best and/or possible.
❑ True ❑ False

MCLE Answer Sheet No. 80

INSTRUCTIONS:
1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
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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

Working with Dad: Valley Attorneys Carry On the Family Business

By Irma Mejia

This Father's Day, *Valley Lawyer* highlights father-son and father-daughter legal teams. They share what it's like to work with family and the lessons that have been passed down.

Photos by Paul Joyner

FAMILY BUSINESSES HAVE LONG BEEN A staple of our economy. A lot of time and energy go into honing a craft, building a clientele and maintaining a reputation. It's not unusual for children to follow in their parents' career footsteps and carry on their work and professional legacy. In celebration of Father's Day, *Valley Lawyer* is shining the spotlight on fathers who practice law alongside their adult children. While their personal bonds extend beyond the water cooler, they remain all about business. Their successful practices have been built on mutual respect and continuous learning. Together they have formed leading legal teams in the San Fernando Valley.

Marshall A. Glick and Heather P. Glick-Atalla
Glick Atalla, APLC

Located in Sherman Oaks, Glick Atalla, A Professional Law Corporation, is a leading practice in estate planning and non-profit law. Founded by Marshall A. Glick in 1985 as Marshall A. Glick, APC, it expanded in 2010 with the addition of his daughter, Heather P. Glick-Atalla.

Having practiced law for 46 years, Marshall remains committed to a passion he picked up early in his career: non-profit law. He formed his first charitable organization, Committee to Bridge the Gap, in 1967 as a student at UCLA School of Law. (Impressively, that organization is still running.) After law school, he practiced in a few firms before going out on his own. As a sole practitioner, he focused his practice on estate planning, business law and real estate transactions before finding his niche in non-profit law. "I enjoy helping others achieve their charitable goals," Marshall explains. "In addition to helping others making positive changes in the world, I enjoy nonprofit law because it is completely non-adversarial and everybody wins." While he still does some business law and real estate transactions, the bulk of his practice is devoted to estate planning and non-profit law.

Marshall's devotion to charitable work extends beyond his practice. He has held leading positions in various charitable organizations such as the Greater Los Angeles-Orange County Chapter of the National Cystic Fibrosis Foundation. Additionally, Marshall helped to establish the UCLA Paralegal Program, one of the nation's first and most-widely recognized programs of its kind.

This leading practice has only been enhanced by the addition of Heather, a rising lawyer in her own right. Having graduated near the top of her class from University of San Diego School of Law, Heather got her start clerking for a San Diego litigation firm and USD Law School's Entrepreneurship Clinic where she helped low-income community members start or expand their businesses. She continued her community work by volunteering with Bet Tzedek in Los Angeles where she assisted Holocaust survivors seeking reparations.

Heather's dedication to community service mirrored her own father's devotion to giving back. "Deep down I always knew I wanted to become a lawyer and I am sure that my dad had something to do with it," she says. "I remember having conversations with him when I was younger about his job and seeing the sparkle in his eyes whenever he spoke about an exciting new matter."

Luckily for Marshall, she got bitten by the legal bug. As a leading practitioner in his niche practice areas, Marshall's work was getting to be too much and he called on Heather to help with the caseload. "My dad has given me an opportunity that I could not pass up. Not many lawyers are given the keys to a law practice with a built-in client base, which I hope to continue serving for many years to come," says Heather. When asked if she always envisioned herself working with her dad, she admits it was always a possibility. "I tried to keep my options open after law school, but when I finally landed at my dad's office, it just felt right being there."

> "Without a doubt, the high point of my career has been the privilege and great joy of practicing law with my daughter."

"Without a doubt, the high point of my career has been the privilege and great joy of practicing law with my daughter," explains Marshall. "I admit to pride of authorship but Heather is super smart, learns at light-speed, and can now run circles around me."

Their strengths complement each other and enhance their busy practice. Marshall brings decades of experience and what his daughter calls a "sixth-sense" about their clients' legal matters while Heather adds a fresh perspective, offering alternative ways of serving their clients. As she describes it, it's a terrific dynamic.

Though they always had a great relationship, working together required some adjustment. Initially, Heather found her father's computer software and networking system frustrating. "It took some time for me to bring the firm into the 21st century, but things are running much more smoothly since giving it a technological facelift," explains Heather.

Marshall also found he had to adapt in other ways, which could be difficult after practicing solo for 25 years. "We have a firm motto, taken from the classic movie Ben Hur: We keep you alive to serve this ship, so row well and live. I have never had to throw Heather overboard, although at times I have put my foot down regarding how an unusual provision in a document should be drafted," he says. "But

more often than not, Heather has been able to convince me that her approach was an improvement over what I had previously written."

Their adjustment period long over, Marshall declares that he can't imagine practicing law without her by his side. The feeling is mutual according to Heather. "I love working with my dad. Our bond has only strengthened during our five years of practicing together."

From the very beginning, Marshall took Heather under his wing, including her in all interactions with clients. "I am incredibly grateful for this unique opportunity," she says. "He has been a wonderful mentor to me." But the student quickly caught up to the teacher. "I have feasted on her fresh ideas and intellectual brilliance," explains Marshall. "Without my assistance she has developed new and advanced concepts in estate planning that I never dreamed of, which benefit clients in the lower to moderate estate value range. If anything, Heather now supervises me."

"My dad always jokes that he taught me everything he knows about the law in under 5 minutes. In reality, I learn something new from him every day," says Heather. "He is always offering me advice and tips about document drafting, client interaction, and most importantly, covering my behind! I welcome his advice and constructive criticism. I hope to continue learning from him for many years to come."

Outside the office, they enjoy family dinners and time with the newest addition to the family, Heather's son and Marshall's first grandchild. "He's a bit young to join the practice now but maybe someday it'll be Glick, Glick-Atalla, and Atalla," she says.

After so many years of practicing, Marshall is confident about passing on the reins to his more-than-capable daughter. "She now carries the brunt of the client workload in our office and has assumed the primary responsibility for generating and servicing new business." When asked what he hopes he achieved in teaching her, Marshall explains that he made it a point to instill in her an aversion to becoming a "stereotypical attorney." "I have taught Heather the importance of attending to all clients as though they were close relatives; to spend all the time needed to research and draft documents to the best of her ability (even though all of the time spent in doing so cannot be billed); to return phone calls immediately; to complete legal work promptly; and to always strive to be an ethical and hardworking 'lawyer's lawyer.'"

Jonathan and Marshall Cole
Nemecek & Cole

Nemecek & Cole is a distinguished professional liability and business litigation firm. Founded in 1984 by Frank Nemecek and Jonathan B. Cole, the Sherman Oaks firm has grown to a mid-size law office with far-reaching influence and recognition. Founding partner Jonathan B. Cole is a certified specialist in legal malpractice law, with 38 years of experience in complex litigation. Under his leadership, the firm has thrived and grown to include more than twenty attorneys with a reputation for winning litigation and appellate work.

Five years ago, Jon welcomed his son, Marshall, to the firm. Before joining Nemecek & Cole, Marshall had been an associate in a large firm where he handled complex business, real estate and environmental litigation. In his current position, he handles cases in both state and federal court in a variety of matters including professional liability and real estate.

Marshall's move was warmly welcomed. "I had never thought about him following in my footsteps," says Jon. "But once Marshall became an attorney, I always secretly hoped that he would find his way here because I think family-owned and -operated businesses are a great thing."

> "Once Marshall became an attorney, I always secretly hoped that he would find his way here."

While he didn't actively lobby for his son to follow his lead, he did have an impact on his son's decision. "It's really hard to pinpoint what inspired me to become a lawyer but watching my dad as I grew up definitely played a role," explains Marshall. When asked if he had always envisioned himself at his father's firm, he said it was difficult to say, partly because of the pressure such a move would create. "The thought of working at Nemecek & Cole was definitely intimidating at first, especially because of my father's reputation. I knew that he has some big shoes to fill and to the extent I would become a part of the business was both exciting and nerve-racking at the same time."

Marshall has adjusted well to the demands of the firm. "Since being here, I have enjoyed every minute of it," he says. "Each case brings an entirely new set of facts and new law which keeps things interesting and allows me to learn about areas of law that I never would have otherwise thought about."

In discussing the firm, he highlights its close-knit sense of community. "Nemecek & Cole is a true family environment. There are some staff members and attorneys who have been here for over 20 years and many of them have known me the majority of my life. It's an honor to work in such great company."

"At this point, Marshall pretty much handles his own caseload. Additionally, he has started to bring in his own business, which is very fun to watch," says Jon. "However, as managing partner in the office, I regularly meet with all associates to discuss their caseload and supervise with respect to strategy decisions and other case handling matters. Marshall is a hard worker and is treated like all other associates. He's not shy about asking for help or recognizing his weaknesses."

As a managing partner, Jon can be demanding but fair. "He's a pretty easygoing guy and I enjoy the cases that I have with him. As long as you get your work done with perfection, there is nothing to worry about," says Marshall. "If you don't, you're going to hear about it, which I think is pretty fair. He runs an extremely efficient operation and provides guidance whenever needed—oftentimes when I don't think it's needed, but it's ultimately helpful in the end.

"He is what I consider to be the preeminent attorney in professional liability defense, so I feel lucky to have such a great mentor. Any criticism I get is constructive and he allows me to make many strategy decisions throughout litigation which makes things more enjoyable."

As for Jon's evaluation of his son, he describes him as a great lawyer whose age has proven to be an asset. "He is a team player and brings camaraderie to the firm. He is also the youngest attorney at our firm to have jury trial experience, which is extremely helpful around the office," says Jon. "He is great on his feet and provides insightful ideas with respect to trial preparation and delivery, which I have found extremely helpful with cases I take to trial. Having a young pair of eyes looking at a case in preparation for trial makes a tremendous difference with respect to trial strategy."

As a mentor, Jon is imparting invaluable knowledge. "He has taught me and continues to teach me the specialty of professional liability defense work and is also teaching me the ins and outs of the law business and law firm management," says Marshall. "The amount I have taken away, and hope to continue to take away, is so immense that I cannot list all that I have learned."

With a so many associates on staff, this father-son team actually didn't work together much when Marshall first came onboard. But over the years, their collaboration has increased to the point that they now work together on about three-fourths of Marshall's case load. Still, due to their busy workloads, they spend surprisingly little time together in the office. "Not only do we work on opposite sides of the office, but our schedules generally differ quite dramatically on a daily basis," explains Marshall. "We probably only see each other in

the office once or twice a week." Jon adds, "We have a great relationship outside the office and having him in the office is an added bonus."

They enjoy spending time together outside of work. "For both of us, working in the same office is quite fun," explains Marshall. "Since we both get along very well it allows us to have more opportunities to socialize and be involved in each other's lives than we would otherwise be able to. We both have similar passions and have a very close family, so the time we spend with each other outside of work would probably be the same whether or not we worked together."

In addition to their shared interest in the law, they also are action-sport aficionados. "We enjoy the same activities, which include snow skiing, mountain biking, and water skiing," says Marshall. "We also have no problem just lounging around or spending time together. I truly enjoy all the time I get to spend with my father."

One might assume that all the time spent together might make Marshall stand out as his father's favorite among his two siblings. But Jon is quick to snuff out such suggestions. "They have all achieved their own successes in life, so I don't think there is even a need for jealousy. If anything, they are competitive, which I think is a good thing because competition breeds success," he explains.

Asked what he hopes to have been able to teach his son during their time working together, Jon replies, "To work hard, play hard and never give up. And to always remember that the 'champ closes the show.'" Looking back on past Father's Day celebrations, Jon remembers his favorite gift from Marshall being a poem. "It was a pretty amazing poem about my life, both hilarious and touching."

Harold W. and Alan J. Wax
Law Offices of Wax & Wax

The Law Offices of Wax & Wax is a long-established firm specializing in workers' compensation and Social Security disability matters. Partners Harold W. Wax and Alan J. Wax are both certified legal specialists in workers' compensation. This father-son team has been working together in the San Fernando Valley for 28 years.

Harold, who recently celebrated his 90th birthday, has been practicing law since 1952. He established his own firm in 1959 under the name of Wax & Sayble and later Wax & Appell. His son, Alan, joined him in 1987 when together they founded Wax & Wax. By this time, Harold had already made an impact in the field of workers' compensation. He had served as president of both the Lawyers Club of Los Angeles (1976) and the California Applicant Attorneys Association (CAAA, 1969), of which he was a founding member. He remains an active member of the CAAA's Board of Governors. In 1997, Harold was honored with the Eugene Marias Lifetime Achievement Award by the CAAA.

Alan joined his father's practice fresh out of law school. Along with his own knowledge and fresh perspective, he was able to benefit from his father's years of experience. The knowledge Harold had to impart on Alan helped establish the new firm as a trusted name in workers' compensation. Alan distinguished himself with his own exceptional work, establishing the Los Angeles Valley Applicant Attorneys Association and serving as its first president. He is a recipient of the Los Angeles Professional Excellence Award and is also an active member of the CAAA's Board of Governors.

Alan credits his father with inspiring his success, though the inspiration took a while to become clear. "At first I did not want to just follow in my dad's footsteps. I was a rebel without a clue but then I wised up," he says. "My dad was a highly respected leader in workers' compensation law and I was very proud to be in the same field of law."

For Harold, the inspiration to practice law came early on in the sixth grade. "I wanted to help people and I thought that was the best way for me," he explains. Though the right career path wasn't immediately clear to his son, Harold recognized certain personality traits in Alan that were to signal his success in law. "He was always very outgoing and a strong leader."

Alan's career trajectory required that he work his way up in the firm, from file clerk to paralegal, to associate before becoming partner. Remarkably, his path to partnership took only six months. It wasn't a complete breeze though, as he still had to meet his father's expectations. "I believe he did expect more of

me, but I did not think he treated me any harder than the other associates," says Alan. "He is not big on praise but I know he is proud of me." Alan, who has been in charge of managing the office for about 15 years now, remembers his father as always being fair.

Working together is something they have enjoyed a lot. "It's comforting knowing you are working with someone you can trust and has your best interest at heart," says Harold. Recently, Harold has been handling the Social Security disability cases while Alan manages the workers' compensation cases. The crossover in which a client has both types of matters is only about 25%, but they still speak to each other almost every day. "We have our own responsibilities and don't step on each other's toes," explains Alan. After so many years working together, they've become very close, even sharing rooms at CAAA conventions and board meetings.

Of course, they spend a considerable amount of time outside the office. "We share meals at different restaurants," says Alan. "We are both Dodger fans but he went to USC and I went to UCLA."

"Lately, I go over to his house to play paddle tennis in his backyard with my brother and sister and their kids and mine," says Alan. It's the grandchildren that Harold enjoys seeing most. When asked to identify the greatest gift Alan has given him, he replies that it's his two granddaughters.

After nearly three decades of working together, Alan credits his father with teaching him about respect, integrity, and being a good and fair leader. For his part, Harold hopes to have imparted the value of giving back to the profession and helping fellow attorneys. "I hope I have taught him to participate and help other lawyers in the practice of law, especially in worker's compensation."

Irma Mejia is Editor of *Valley Lawyer* and serves as Publications and Social Media Manager at the San Fernando Valley Bar Association. She also administers the Bar's Mandatory Fee Arbitration Program. She can be reached at editor@sfvba.org.

Maximizing the Mediation Experience

By Jan Frankel Schau

FOR YEARS, MEDIATION HAS increased in popularity as a less costly and time-effective method for resolving disputes. But are you getting the most out of your mediation? The following are tips to help you maximize the benefits of mediation for your clients.

Control the Flow of Information to Your Advantage

More and more frequently, mediation hearings are being conducted before substantial discovery has been completed and even before pleadings have been filed. There are often key documents and witness interviews that will sway the opposing party to reevaluate its position. Yet these documents are seldom exchanged before or sometimes even during the mediation due to concerns about confidentiality protection.

Unlike the theater of trial, which is conducted under the bright lights and scrutiny of the public eye, a mediation is done largely in the shadows or even in darkness. There is an air of secrecy and privacy associated with it that can be comforting but can also be a source of frustration. However, you and your clients can strategically let the light into mediation.

By controlling the flow of information, you can determine how much light to let in and when the appropriate moments are to raise or lower the curtains on the important evidence you have developed to get the best settlement possible. Be prepared with copies of key documents, separately paper clipped for each disputed issue. Or have the proposed statements on an iPad or laptop which you can send to the mediator to share with the other side as needed and confidentially.

As the critical issues are addressed, give your mediator permission to demonstrate the evidence upon which you will rely to substantiate your defenses or claims. This can be an extremely effective way to persuade your opponent that you are completely ready to litigate if necessary and that there is evidence of another side to the story than that which the attorney has heard from her client.

For example, in a recent pre-litigation pregnancy discrimination case, emails between the human resources manager and the supervisor concerning attempts to accommodate the plaintiff were unknown to the plaintiff or her lawyer. In the same case, the employer had taken statements from all of the other working mothers in the department, substantiating the policy and practice of accommodation afforded to other pregnant or post-partum employees.

Both sets of documents, though not permitted to be kept or used by the plaintiff or her counsel, went a long ways toward assisting them in re-evaluating their position on liability and achieving a settlement long before the expenses of litigation and discovery eclipsed the value of the case. Had the documents been provided in a big packet with a formal brief before the mediation, they would not have had the same impact as they did in slow, deliberative drips of information doled

out strategically in the confines of this highly confidential mediation.

Conduct Just the Right Amount of Formal Discovery

Albert Einstein famously said: "We can't solve problems by using the same kind of thinking we used to create them." And yet many litigators continue to believe that before a legal dispute can be resolved they need to thoroughly review every shred of evidence, including noticing and enduring a series of uncomfortable and expensive depositions from every identifiable potential witness.

You don't need to undertake such thorough discovery before mediation. In modern American litigation practice, it is assumed that every case will have opportunities for settlement, with some studies showing fewer than five percent going to trial. So why try to win by overburdening your adversary with discovery if you and your clients genuinely want to attempt to resolve the dispute?

Instead, from the moment you undertake a case, the discovery plan should consider the minimum necessary to convey your client's convictions and minimize their expense and discomfort before giving mediation a try. Oftentimes, it is only after preliminary discovery is conducted that counsel see the wisdom of engaging in settlement discussions. But after too much painful discovery, the moment may be lost in the anger, frustration and investment of time and capital that has occurred during the scorched earth phase of the litigation. In most instances, you will want to know the basis for your opposing parties' claims or defenses.

This means that if it is unclear in the pleadings, you will need some preliminary discovery, such as contention interrogatories, a basic document exchange and the deposition of the plaintiff. Unless the matter fails to settle at mediation, you don't need to take depositions of every potential trial witness, or have the plaintiff examined or experts weigh in with their opinions.

In a business dispute, for example, you probably don't need to review all of your adversaries' backup documentation before a mediation. Trust your client's side of the information and allow for some ambiguity so the process itself can work its magic. While discovery can be truly informative, it is, unfortunately, used frequently as a hammer to burden the other side with formalities. Too often, those kinds of formalities are what led your clients into conflict to begin with.

Prepare an Effective Pre-Mediation Memo

There is some controversy surrounding mediation briefs. Should they look like legal briefs? Should they provide the evidence as exhibits? Should they be exchanged or kept confidential? Should they reveal weaknesses as well as strengths? How long should they be?

You don't need to agonize about the fine points of your brief. First of all, let's stop thinking of the mediation brief as a legal pleading or motion. If we think of it as a memo to the mediator submitted in advance of the mediation, it will free the disputants and their lawyers to be a little more candid.

Second, do not share all of the memo with your adversary. If you choose to exchange briefs, then certainly communicate some of the finer points separately to the mediator in a less formal way via email or separate submission.

The memorandum should do what trial lawyers do best: tell the story of your case as you would to the judge or jury. Who is your client? What happened to him or her? What was the result? What does he or she want? As the defendant, you will want to highlight your defenses to this story by again answering the following questions: Who is bringing the lawsuit? What does your client stand for? What happened from your perspective? How do you evaluate the damages if liability is proven?

Briefly summarize the facts, the salient evidence, and the settlement efforts and negotiations thus far. If there are legal issues that have yet to be tested, include those, too. Feel free to ignore the rules of evidence if it means you can better highlight what your client really thinks, heard or saw. Focus on the issues where the evidence is nuanced and vulnerable to construction or inference for or against your client. That is where the real work of the mediator will kick in—helping each side to analyze and evaluate the likelihood of successful persuasion on the issues remaining in dispute.

Finally, if you can, give the mediator a heads up on your confidence and that of your client as to a particular result at trial. Although the mediator may discount it because of the typical overconfidence of litigants and their counsel, he or she will at least have a hint as to what extent you are open to compromise and concession.

And one more thing: busy mediators can't read or adequately prepare for a case if a box of documents are sent the night before a hearing. Many are mediating three to five cases per week. Make sure to get your memo in no later than the Friday before the week of your hearing, so the mediator can spend the weekend with it if necessary.

Jan Frankel Schau settles litigated cases arising out of employment, business and tort disputes. With over twenty years of experience as a litigator, half in insurance defense and half representing plaintiffs in employment and personal injury, Jan has an unique ability to understand and evaluate both sides of every claim. She is also a professional speaker and author. She can be reached at jfschau@schaumediation.com.

ERISA Compliance: What Every Law Firm Needs to Know About Plan Documents

By Martin Levy

ERISA IS A FEDERAL LAW THAT SETS MINIMUM standards for employee benefit plans maintained by private-sector employers, including law firms. ERISA includes requirements for both retirement plans (e.g., 401(k) plans) and welfare benefit plans (e.g., group health plans). It has been amended many times over the years, expanding the protections available to welfare benefit plan participants and beneficiaries.

The Department of Labor (DOL), through its Employee Benefits Security Administration (EBSA), enforces most of ERISA's provisions. Violating ERISA can have serious and costly consequences for employers that sponsor welfare benefit plans, either through DOL enforcement actions and penalty assessments or through participant lawsuits.

Traditionally, DOL audits of employee benefit plans have focused primarily on retirement plans, such as 401(k) plans. However, now that the DOL has started enforcing compliance with the Affordable Care Act (ACA), health plan audits are on the rise.

What Plans Require a Welfare Benefit Plan Document?

Plan documentation for health and welfare benefit plans is required by ERISA as the method for legal establishment, operational authority and meeting participant disclosure requirements.

All welfare plans subject to ERISA (e.g., medical, dental, vision, life, disability, certain employee assistance and wellness programs) are required to have a plan document that is memorialized in writing. ERISA further requires that the plan document contain specific, express provisions.

An insurance contract can function as the welfare benefit plan document, but it is often insufficient and not fully compliant because it lacks key ERISA provisions and specific employer information that provide operational discretion and limited liability advantages to the employer.

What Is a Summary Plan Description (SPD)?

The SPD is an informational, participant disclosure document required for each plan subject to ERISA. It is the primary, simplified piece for communicating plan rights and obligations to participants and beneficiaries. The SPD must contain certain information and should be understood by the average participant.

An insurance company booklet, certificate or summary can function as the SPD, but it is often insufficient and not

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fully compliant because it lacks key ERISA provisions and specific employer information.

How Does the DOL Enforce ERISA?

The DOL has broad authority to investigate or audit an employee benefit plan's compliance with ERISA. The DOL's Employee Benefits Security Administration (EBSA) division handles audits of employee benefit plans. To perform these audits, EBSA employs over 400 investigators working out of field offices, many of whom are lawyers or CPAs or have advanced degrees in business or finance.

DOL audits often focus on violations of ERISA's fiduciary obligations and reporting and disclosure requirements. The DOL may also investigate whether an employee benefit plan complies with ERISA's protections for plan participants. Recently, the DOL has been using its investigative authority to enforce compliance with the ACA.

What Are The Possible Consequences of a DOL Investigation?

Being selected for a DOL audit can have serious consequences for a law firm. The DOL has authority to assess civil penalties for many different types of ERISA violations. According to a DOL audit report for the 2014 fiscal year, approximately five out of eight investigations resulted in penalties or required other corrective action, such as paying amounts to restore losses, disgorging profits and ensuring claims were properly processed and paid. In addition, a DOL audit may negatively affect an employer's normal business operations because the audit process can be both stressful and time-consuming.

How Can a Law Firm Minimize Its Risk of Being Audited By the DOL?

As a practical matter, an employer has little control over whether it will be audited by the DOL. However, an employer can take the following steps to help minimize its exposure to a DOL audit:

- Respond to participants' benefit questions and requests for information on a timely basis
- File Form 5500 on time and make sure it is complete and accurate
- Distribute participant notices required by law (e.g., the summary of benefits and coverage) by the deadline
- Make timely updates to plan documents and summary plan descriptions to reflect legal and design changes

How Can Law Firms Be Prepared for a DOL Audit?

The best way to prepare for a DOL audit is to remain in compliance with the law and establish a recordkeeping system for maintaining all of the important documents relating to your employee benefit plans. Retaining complete and accurate records will help move along the audit process and provide an accurate picture of an employer's benefit package. As a general rule, these records should be retained for seven years.

Example: *If a firm's health plan is "grandfathered" under the ACA, confirm that the notice of grandfathered status has been included in materials that describe the plan's benefits, such as the plan's SPD, and document that the notice was provided at the required times. Maintain this documentation so that it is easily accessible in the future.*

Because the DOL has increased the frequency of health plan audits, law firms should consider reviewing their health plans for compliance now, before they are selected for audit. It is important for employers to get their health plans' paperwork in order as part of this process. Employers may want to designate one location for maintaining records relating to their health plans, such as plan documents and insurance contracts, SPDs and notices required under the ACA and other federal laws (e.g., the Women's Health and Cancer Rights Act).

Don't be fooled into thinking you are "too small" for ERISA. Employers of every size who provide any type of employer-sponsored benefit plan are subject to ERISA.

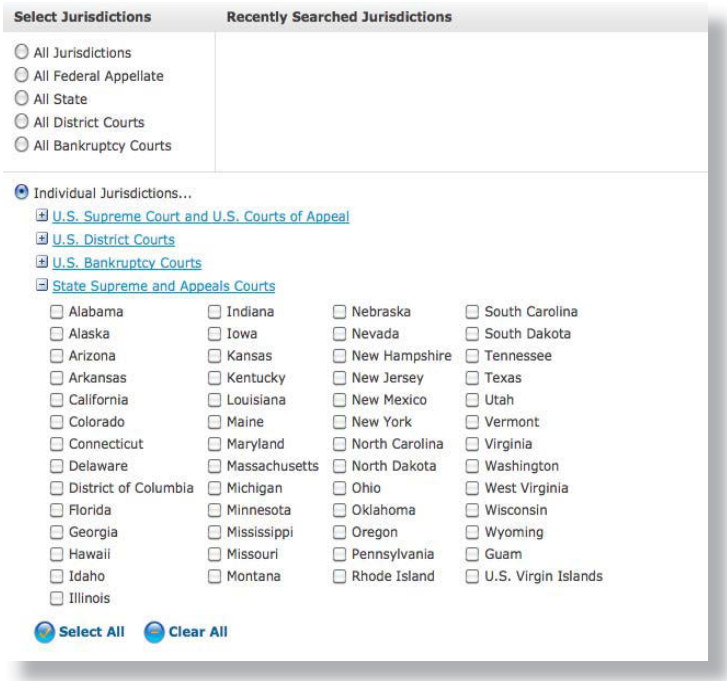
USING FASTCASE
Running Your Search, Using Your Results List

By Charles J. Lowry

IN PREVIOUS ARTICLES IN THIS SERIES, WE have examined getting access to Fastcase through your bar association website, using the Quick Caselaw Search box and framing a Boolean search. Now it is time to run a search and look at the results.

You may recall that in the previous article, we talked about the main caselaw search page, on which you must tell the database two things: what you want the database to look for, and where you want it to look. While we examined the "what you want it to look for" aspect in the last article, we should also consider the "where you want it to look" requirement.

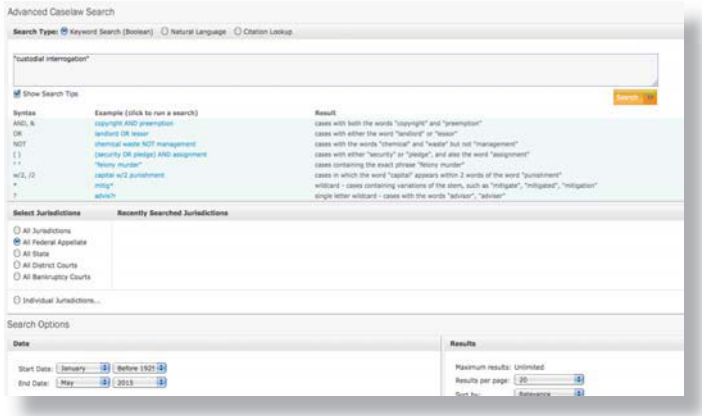
You may choose your jurisdictions one of two ways, either as general categories or as specific jurisdictions. To choose general jurisdictional categories, just check the radio button next to that category, e.g., All Jurisdictions or All Federal Appellate. To limit your results to cases from specific jurisdictions, use the Individual Jurisdictions radio button and check marks to choose as many or as few, jurisdictions as you wish from the categories. Feel free to mix and match. SFVBA members have access to all federal and state jurisdictions.

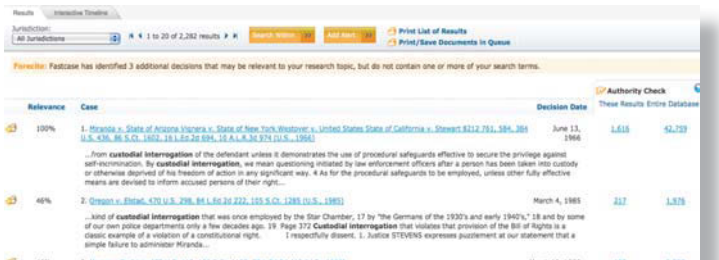


To keep this sample search as general as possible, assume that you are working for a criminal defendant whose trial prospects largely depend on a police

Charles J. Lowry is an enterprise sales representative for Fastcase, the research benefit offered to members of the San Fernando Valley Bar Association. He may be reached at clowry@fastcase.com.

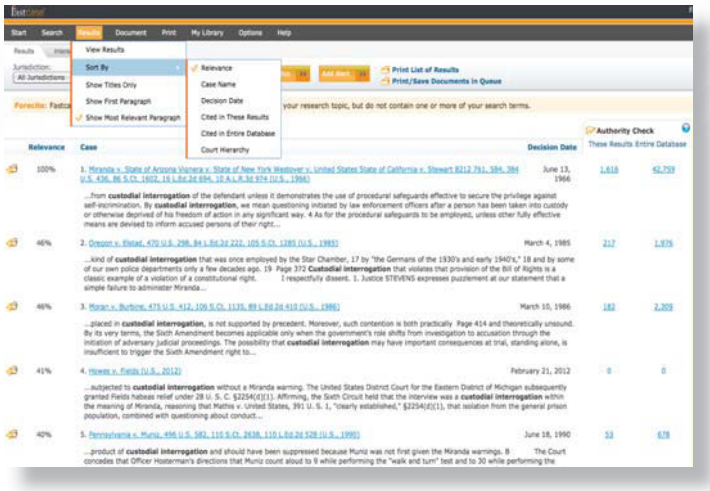
interrogation session, a session whose legitimacy you doubt. Your Boolean search term is simply "custodial interrogation." You recall that the quotation marks indicate to the database that you are looking for an entire phrase, not two discrete terms. In this case, for jurisdiction, you would probably choose All Federal Appellate, since it is in those courts that the parameters of allowable and unallowable state conduct are set. Here, then, is what our search screen would look like before and after we hit the Search button.

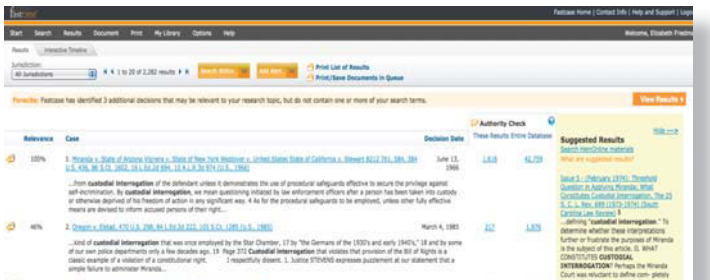




So now that we have our results, what do we know? We know that there are 2,280 federal appellate cases that contain the search term "custodial interrogation." The default sort mode is relevance. This algorithm takes into account standard measurements: how many times the search terms appear in the decision, how close the search terms are to one another, the search terms as a percentage of the entire decision, things like that. But relevance does not equal importance. New decisions tend to follow old decisions, or precedents. We therefore give you six ways to sort the results, including by citation history. The most useful of these is titled "These Results." Choosing "These Results" will bring to the top of your list the federal appellate case cited most often by other federal appellate cases that include your search terms.

Here is how we get there, and here is what our results look like. No one will be surprised to see Miranda at the top of our list.

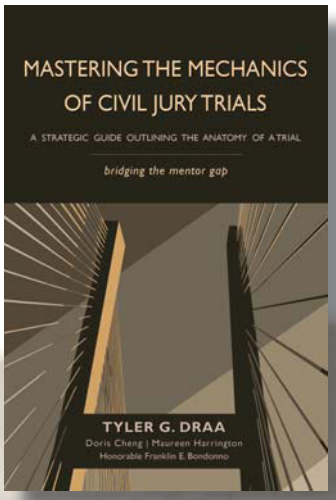




So what do we know that we did not know before? We know that Miranda has been cited 42,680 times across the entire database, and 1,614 of those were federal appellate cases that contain the search term "custodial interrogation." Therefore, we know that if 2,280 federal appellate cases used that search term, Miranda has been cited in more than two-thirds of them. As Arthur Miller wrote in *Death of a Salesman*, "Attention must be paid."

In our next article, we shall look at other things we can do with the result list, including print selection and judging the usefulness of more recent cases on our list.

A Mechanical Guide for a Smooth Running Trial



By David Gurnick

IN HIS 1875 BOOK, *HISTORY OF TRIAL BY JURY* (James Cockroft & Co.), Scottish lawyer William Forsyth explains that in Europe, a system of "procédure secrète" prevailed. This system of inquisitions, in which judges decided law and fact, was "an engine of grievous injustice."

Jury trials in civil cases are very important. Alexander Hamilton said the civil jury is a valuable safeguard to liberty (*Federalist* #83). James Madison said that in civil cases, jury trials are "essential to secure the liberty of the people." (*Madison Papers* 12:196—209).

But jury trials are also complicated. In a sense, they have a lot of moving parts, ranging from personalities of judges, to panel members who would rather be elsewhere, to the process of voir dire, presenting evidence, arguments, verdicts and numerous other procedures. So it is apt that the authors of *Mastering the Mechanics of Civil Jury Trials*, (Balcony 7, September 2015) continue the metaphor of a jury trial as a complex engine. This new book, by attorney Tyler Draa with co-authors Doris Cheng, Maureen Harrington and Judge Franklin Bondonno, reads like a user-friendly mechanics guide.

Mastering the Mechanics breaks the complexity of the jury trial into basic components. In plain English, with understandable summaries, straightforward instructions, occasional numbered step-by-step directions and real-life examples, the authors describe "how-to" and "what-to-do" from pre-trial, through every step of trial, and post-trial motions and appeals.

The book has chapters on inquiring about and making a peremptory challenge of the judge, and dealing with and relating to opposing counsel ("colleague first, adversary second"). Good guidance is provided for motions in limine and other pretrial filings, conducting voir dire, logistics of trial and evidence presentation, including course of action for direct and cross-examination, and making objections. Settlement, argument and guidance for jury deliberations, verdict and post trial proceedings are also addressed.

Throughout, the book is filled with practical tips that have value to new trial lawyers and are good reminders to the experienced professional: present your own personality and courtroom demeanor ("do not pretend to be someone else"); embrace harmful evidence, transform it into an advantage ("be the first source that reveals it to the jury").

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There are fundamental tips for presenting evidence, and even style before the jury ("never be more indignant than the least indignant juror, lest you appear unnecessarily harsh").

Many chapters include a "Judicial Comment," providing the judge's perspective on the subject. For example, "Trial attorneys often put far less effort into voir dire of alternate jurors . . . . And yet, in many cases, an alternate juror serves. You need to be as careful choosing alternate jurors as you are choosing the initial panel members." These are valuable tips that could be unknown to newer lawyers, and easily overlooked, even by those with deep experience.

Tyler Draa and his co-authors are very experienced trial and appellate lawyers. Draa, for example, tried over 70 cases and has more than a dozen published appellate decisions. Judge Bondonno was a trial lawyer for 32 years before being appointed to the Superior Court, where he has presided over trials for eight years. A how-to guide by practitioners of this caliber, with this much experience, would be valuable in any field. *Mastering the Mechanics* does not disappoint.

In 1875, Forsyth could not find the specific origin of the jury trial. But in Tyler Draa's manual, we know how to master the process now to achieve the best possible outcome. Through this mastery we can tell how the trial is conducted, how we can conduct the trial, and where it is going. *Mastering the Mechanics* will help any lawyer make the trial engine zoom, to our clients' advantage.

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Lawyers and LinkedIn

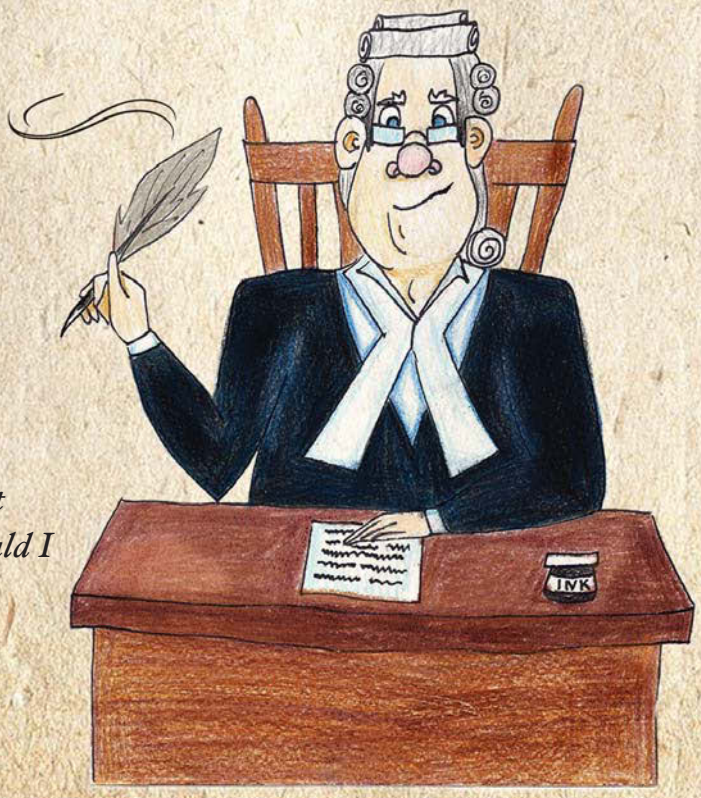

Illustration by Gabriella Senderov

Dear Phil,

I've heard of colleagues using LinkedIn but am not sure it will be helpful to my practice. What is it? And what should I know about the ethics of using it?

Best,
Low-Tech Lawyer in a High-Tech World

MANY SMALL FIRM practitioners suffer from a common business development challenge: they are either too busy serving current clients to prospect for new ones or they hit a dry spell and try to quickly reconnect with trusted referral sources (former clients, business contacts, networks). This cycle is ineffective and can drive a lawyer nuts.

What to do? LinkedIn is a valuable social media platform focused on networking for professionals. It's a tool that counsel can use to set up and maintain professional networks. It can effectively help lawyers maintain referral sources.

To maximize LinkedIn as a networking resource, counsel should create and frequently update his or her profile, invite colleagues to become connections, and keep in touch with those connections through messages and content sharing.

Another LinkedIn benefit is "distance networking." Distant potential clients can find (and hire) California lawyers for their in-California legal needs. Conversely, counsel can research these clients on LinkedIn.

As with all social media, attorneys ought to carefully make sure their actions comply with the California Rules of Professional Conduct. Since activity on LinkedIn is public, it can be considered marketing. The State Bar regulates lawyer advertising and requires solely truthful representations (Professional Conduct Rule 1-400). Rule 1-400(D) provides that communications shall not (inter alia) "contain any untrue statement; or contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public."

Rule 1-400 also contains 15 standards delineating communications that presumptively violate the rule (the presumption may be rebutted). The first two standards include any communications that guarantee or predict results; and

Dear Phil is an advice column appearing regularly in *Valley Lawyer* Magazine. Members are invited to submit questions seeking advice on ethics, career advancement, workplace relations, law firm management and more. Answers are drafted by *Valley Lawyer*'s Editorial Committee. Submit questions to editor@sfvba.org.

any communications that contain testimonials or endorsements of the attorney without an express disclaimer indicating that the testimonial does not constitute a guarantee or prediction for any current or future clients.

The threshold question is whether an online profile is considered a communication under Rule 1-400. Rule 1-400(A) defines a communication as " any message or offer made by or on behalf of a [State Bar] member concerning the availability for professional employment of a member or law firm directed to any former, present, or prospective client…"

The message must be "concerning the availability for professional employment," usually inviting contact regarding legal services (see, *State Bar Committee on Professional Responsibility and Conduct Formal Opinion* 2012-186, re: attorneys' postings on social media websites). Under Rule 1-400(A), "communications" include written materials describing a lawyer or law firm—including online profiles.

A popular feature of LinkedIn is the option for endorsements. The network encourages members to publicly acknowledge the special skills and expertise of their connections. New skills can be suggested as well, which can be accepted or rejected. LinkedIn connections can endorse users, even absent actual expertise.

HINTS FOR LINKEDIN LAWYERS

- Join select professional groups focused on practice-relevant topics
- Engage in group discussions related to your areas of expertise
- Post interesting comments on a regular basis (weekly is ideal)
- Keep your feed fresh with substantive updates based on insights gleaned from legal practice/educational activity

LinkedIn profiles and the endorsements on those profiles are messages, directed to everyone with an internet connection (including "any former, present, or prospective client"). Where Rule 1-400 likely applies (such as on LinkedIn), under the standards noted above, even a truthful endorsement is presumed to be false, deceptive, confusing, deceiving, or misleading to the public, unless the communication contains the express disclaimer. For this reason, counsel should add the disclaimer to their LinkedIn profiles. But if the endorsement is false or misleading, no disclaimer can be effective; counsel should remove such endorsements.

Best wishes,

Phil

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The following joined the SFVBA in April 2015:

Lara Akinlude
Larhdel Law
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Mary I. Carbajal
Valley Village

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San Francisco
Law Student

Sevag Demirjian
Demirjian Law Offices
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Merak Eskigian
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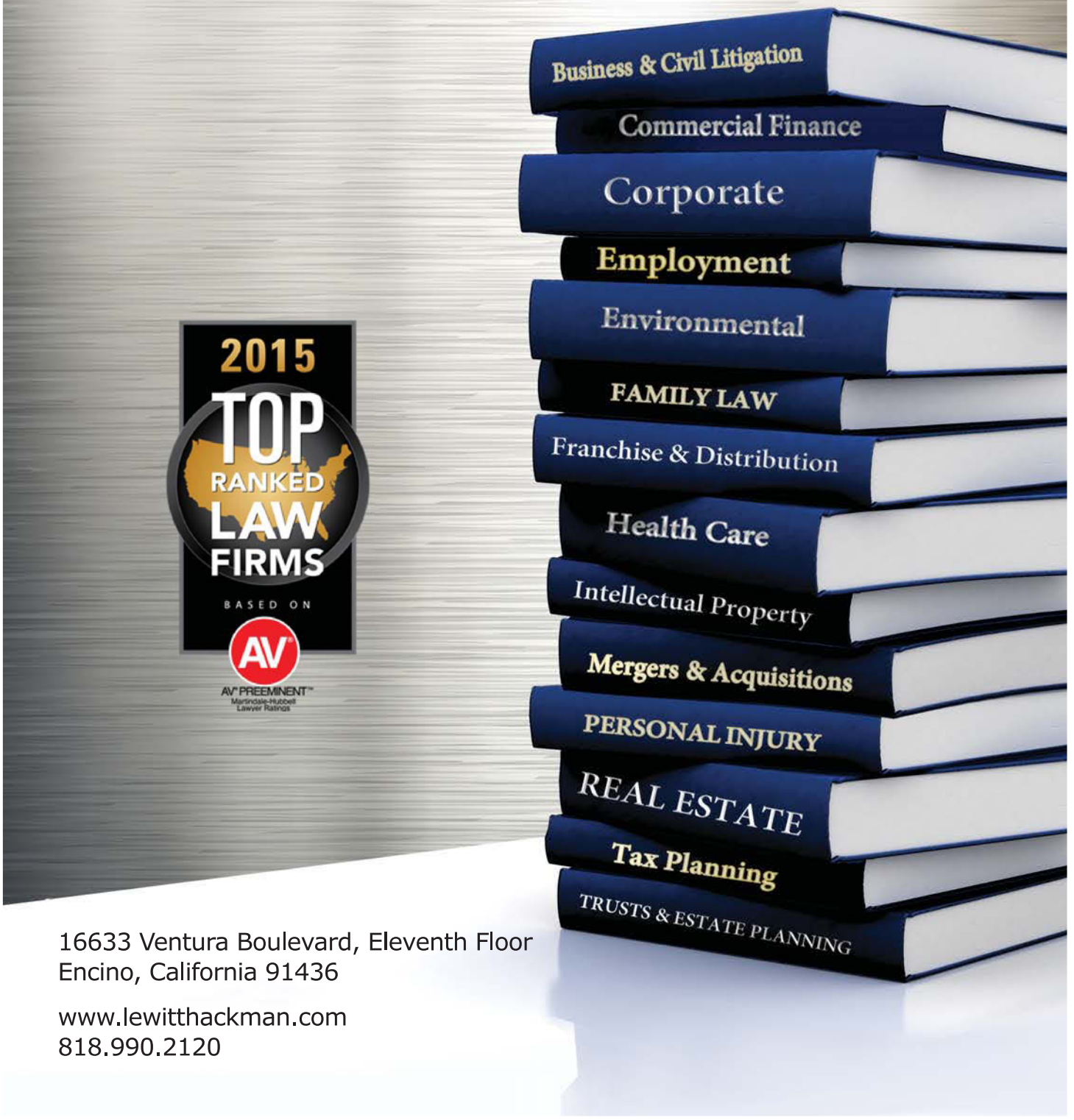

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