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OCTOBER 2020 • $5

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Filing an Appeal: The Basics

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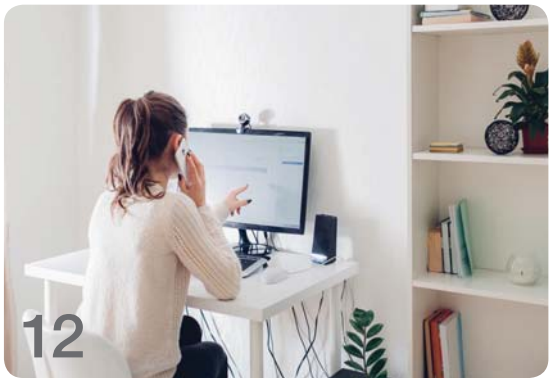

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Focus on the Positive

DAVID G. JONES
SFVBA President

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AS I SIT DOWN TO WRITE MY first message as President of the SFVBA, my reflections on the path to this moment are flooding my brain.

I expect that every past President who has penned a first column has reflected on the experiences which led them here, and their plans for the future.

So, in that way, I am no different than those leaders of the Bar who came before me.

There is a difference, though. And that difference lies in the context of our times. While those before me have both faced good times and bad, this term is different. Truly, my term as President will be defined on how this context is viewed and approached by our amazing Executive Committee, Board of Trustees, Executive Director, staff and myself.

There are so many clichés and repeated ways of analyzing this era of COVID-19 that we hear in daily conversations with colleagues, friends and family as we walk through these uncertain times.

I want my message to be clear. I view these challenging times from a lens that may be different from others. I am, by nature, a very optimistic and positive person, but these times are trying for all of us, including myself.

As I write this, I am reminded of the saying, often repeated to me in difficult times by my father. It's simple, funny and meaningful: "A'int no hill for a climber."

Nothing is more satisfying than confronting a difficult problem and solving it. We are lawyers, that is what we do. This year will present a unique opportunity for our Bar Association—the opportunity to confront a difficult challenge and emerge successfully on the other side.

Some may also see this message as a cliché, but it can also be viewed as a way of thinking or a positive "can do" approach to life and the work of our Bar Association.

Rather than focusing on the negative and problems, we can choose to focus on the opportunity to better our Bar by adapting and making the changes necessary to thrive in the future.

By committing to this type of positive, problem-solving team approach, I believe we can change the trajectory of the future of the SFVBA.

Now, of course, this type of approach is not enough by itself to solve the problems we face.

It must be combined with planning and execution, and I make this promise to our members: It will be.

As I begin this term, I will not be alone. I believe in respecting traditions and those that have preceded me, and, in that regard, I have a wealth of examples of leadership and experience to draw from as I navigate my term.

The Presidents that I have worked with have been amazing—Kira S. Masteller, Alan E. Kassan, Yi Sun Kim and Barry P. Goldberg—have taught me much in terms of how to successfully plot a course through this challenge.

Again, I would like to thank them for their leadership and intend to lean on them for advice as we work together through this term.

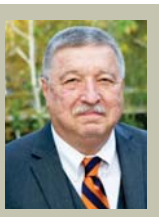
Additionally, I am a shareholder at Lewitt Hackman, a firm with more than fifty years of roots in the San Fernando Valley.

The firm has a long-standing tradition of support for our Bar and a legacy of several past presidents. With this collective wisdom, I have the support of great leaders of the past in my effort to help chart a new, successful future for our Bar.

In closing, I want to thank all those who have made this possible through their support and sacrifice—my parents, my wife Angela, and my daughters Alyssa and Samantha; all of those lawyers in my past that have supported my career; and all of those who currently support me as I start this new mission.

Tradition and Gratitude

MICHAEL D. WHITE
Communications Manager
michael@sfvba.org



WHILE INTERVIEWING incoming SFVBA President David G. Jones for the cover article for this issue, I was impressed by several personal and professional qualities.

The one that struck me the most was his appreciation for tradition and those SFVBA leaders who have gone before.

Soon after graduating law school, Jones was able to blend two loves—the law and his family's generations-old work in the horse racing field—to serve as an advocate, defending horse trainers and jockeys wrongly accused of violating California's strict racing regulations.

As the years past, his involvement in SFVBA led to his active participation in its Attorney Referral Service, a position on the Board of Trustees, and, this month, being named President of the 2,000-plus member Bar.

An interesting path that, he says, he owes, in large part, to the lessons he's learned from those Bar leaders who preceded him.

"I learned from [SFVBA Past President] Kira S. Masteller, who was one of the presidents I worked under and Barry [Immediate Past President Barry P. Goldberg]," Jones told me. "It's a positive energy that encourages people to extend themselves with the time and the passion needed to achieve a goal, rather than approaching a project as an obligation or a chore."

Through reputation and experience, "I've gotten to know many of the past presidents. I hold all of them in very high regard and have a tremendous amount of respect for them," he said. "What Alan [SFVBA Past President Alan E. Kassan] did in terms of networking, Yi Sun [SFVBA Past President Yi Sun Kim] did in the area of diversity, and what Barry [immediate Past President Barry P. Goldberg] did in terms of technology and social media by taking us to the next level created strong pillars for the Bar to rest on."

It's said that one can't look to the future without having an appreciation for what's been done in the past. If so—and I believe it is—the SFVBA will be in very good hands through the coming year.

As editor of *Valley Lawyer*, I take no small degree of pride in the quality of the work presented on the pages of this magazine.

Sometimes, though, errors occur and one such slip-up occurred in the September edition when we published the incorrect version of the article by attorney Barbara Bergstein on the topic of 'Estate Planning for Individuals with Special Needs.'

To make amends, we are running the correct version of the article in this issue.

No excuse. As editor, it's on me and I extend my most sincere apologies to Ms. Bergstein and our readers for the error.

Regards.

CALENDAR

OCTOBER 2020

SUN	MON	TUE	WED	THU	FRI	SAT

LATINO HERITAGE MONTH (SEPTEMBER 15 – OCTOBER 15)

4
VIRTUAL BOARD RETREAT
2:00 PM

5
ZOOM MEETING
VBN VALLEY BAR NETWORK
5:30 PM

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WEBINAR
Business Law and Real Property Section
How Business and Property Owners Can Avoid ADA Lawsuits
12:00 NOON
Sponsored by
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Anthony C. Guichard, speaker. Free to All Members! (1 MCLE Hour)

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WEBINAR
Bankruptcy Law Section
Tentative Opinions of the Woodlands Hills Bankruptcy Court
12:00 NOON
Robert Aronson, Nicholas Gebelt, Sloan Youkstetter headline this important annual seminar. Approved for Bankruptcy Law Legal Specialization. (1.25 MCLE Hours)

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

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WEBINAR
Taxation Law Section
Income, Estate and Gift Tax Ramifications of Charitable Giving
12:00 NOON
Attorneys Bill Strickland and Cari Jackson Lewis will discuss efficient income, estate and gift tax planning strategies for charitably inclined taxpayers. (1 MCLE Hour)

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By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 20.

By Janet Gusdorff

Filing an Appeal: The Basics

Trained to think in terms of worst-case scenarios, attorneys are committed to doing everything in their power to prevent them from actually occurring. Sometimes, though, a situation crops up resulting in an unjust result and the time comes when filing an appeal becomes a necessity.

Janet Gusdorff is a California Certified Appellate Specialist and founder of Gusdorff Law, P.C., which focuses primarily on plaintiff's employment and personal injury appeals. She can be reached at Janet@GusdorffLaw.com.

LAWYERS ARE TRAINED TO ANTICIPATE A WORST-case scenario for their clients and do everything in power to prevent it from actually occurring.

Sometimes, though, such a situation crops up resulting in an unjust result and the time comes when most attorneys first consider filing an appeal.

This article will offer some guidance to help navigate the process.

Identifying an Appealable Order

The first step in filing an appeal is to determine whether the ruling or order is appealable, and if so, what triggers the deadline to file a notice of appeal.

The Code of Civil Procedure (CCP) identifies broad categories of such appealable judgments and orders, but the Code is neither exclusive nor exhaustive.[1]

To the contrary, one of the enumerated categories broadly references an order made appealable by the Probate Code or the Family Code.[2]

Nevertheless, that section codifies the common law "one final judgment" rule, which states that, "An appeal lies only from a final judgment that terminates the trial court proceedings by completely disposing of the matter in controversy."[3]

That is the reason why, for instance, an appeal may properly arise from a judgment entered after the grant of summary *judgment*, but not summary *adjudication*.

There are exceptions, though, to the "one final judgment" rule—some collateral judgments are appealable, including, for instance, monetary sanctions exceeding $5,000, while others include an order on a motion to tax costs, attorneys' fees after voluntary dismissal, in a multi-party action, judgments that are final as to a specific party.

There are also judgments that, though seemingly final, are nevertheless not appealable.

Generally, interlocutory judgments are non-appealable—unless the type specified in Section 904.1 of the CCP, and although contempt orders are final, they are also not appealable.

Other final, but non-appealable, judgments include judgments on writ petitions in limited civil cases, judgments on superior court appeals of limited civil case decisions, and judgments entered solely on ministerial acts by the clerk.

When determining whether a judgment is final and appealable, there is no bright-line rule, but courts often consider whether issues remain for the lower court, and the nature of those issues, as well as the substance and effect of the judgment.

Generally speaking, bifurcated trials are not appealable until all trial phases are completed.

Filing a Timely Notice of Appeal

■ In State Court: In unlimited civil cases, after identifying the appealable judgment or order, the next step is to file the notice of appeal before the deadline.

Unlike most deadlines, the failure to file a timely notice of appeal is *fatal* to an appeal because it is a *jurisdictional* deadline. Parties cannot stipulate to additional time or request an extension. Filing the notice of appeal vests jurisdiction in the appellate court, terminating the trial court's jurisdiction, with a few exceptions.

For family law appeals, depending on the order, a party may need to obtain a certification from the superior court as well as the appellate court's grant of a motion to file an appeal.[4]

The substance of the notice of appeal, itself, is liberally construed. It is not necessary to identify the legal issues that will be raised. Rather, the notice must identify the name of the party appealing, the judgment or order from which the party is appealing, as well as the date it was entered.

For unlimited civil cases, Judicial Council Form APP-002 may be used for either the notice of appeal or cross-appeal. It is important to remember to serve opposing parties.

Counsel may sign and file the notice of appeal on behalf of the party it is representing.

The notice of appeal is filed in the superior court, not in the appellate court. When calendaring the due date, err on the earliest possible date as it is always better to file early than to inadvertently miss a deadline.

The California Rules of Court detail three methods of calculating the deadline, depending on whether a party or clerk serves notice of entry of judgment or appealable order. The earliest calculation governs.[5]

Most commonly, a notice of appeal must be filed within 60 days of notice of entry of judgment by the clerk or party or, if both, whichever was earliest.[6]

If for whatever reason, notice is not served, then the notice of appeal is due 180 days after the entry of judgment.[7]

Although those rules apply to most civil appellate matters, the California Rules of Court carves limited exceptions for a statute or rules that provide otherwise.[8] [9]

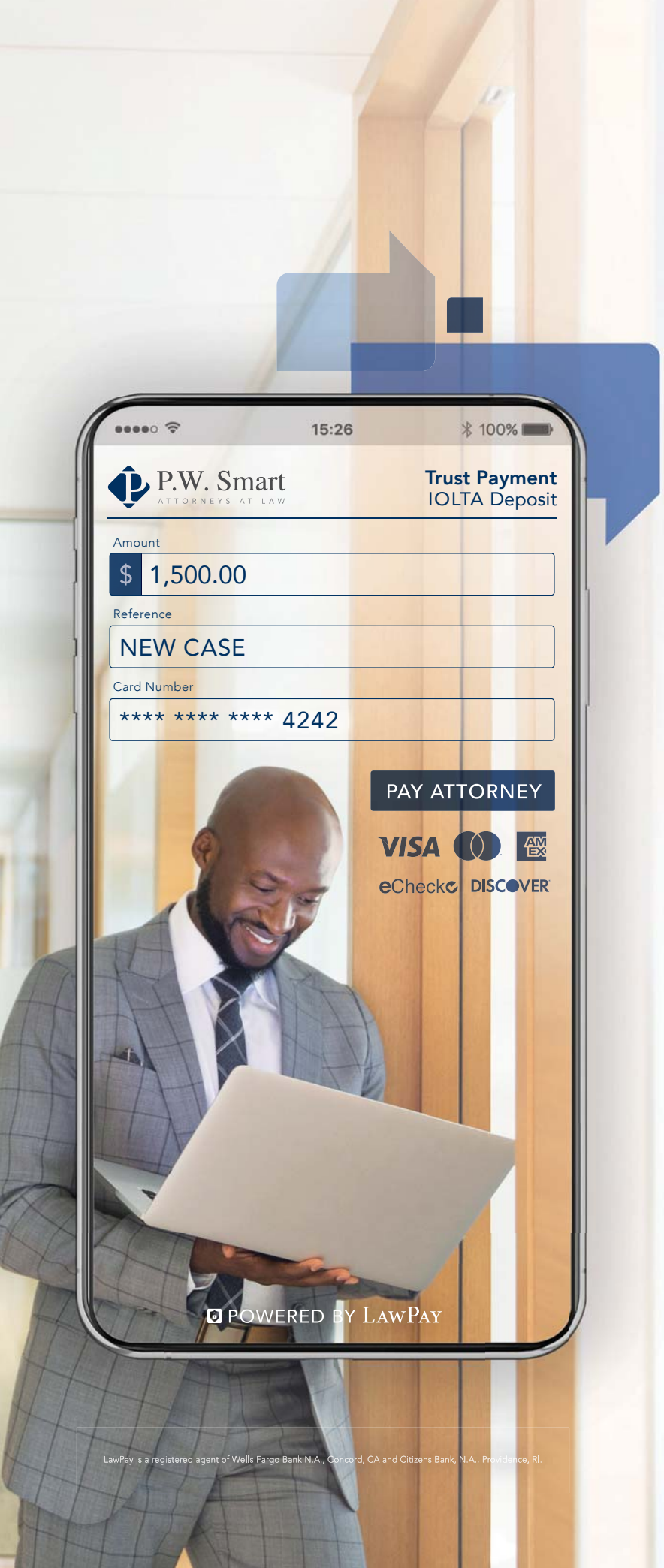
Additionally, the time to file a notice of appeal may be extended by certain events, such as bringing a valid motion for a new trial.

One of the most common questions trial attorneys ask is: Where an original judgment is subsequently modified with attorneys' fees, costs, and interest, does the time to file the notice of appeal run from the original or the modified judgment?

Where the amended judgment is not substantially changed, the time to appeal is not affected.[10]

Consider, however, an original judgment that left the determination of whether a party was entitled to fees for a future hearing. In such a case, the amended judgment containing a costs award would have substantially modified the judgment.

In practice, though, the line is often not as clear. First, research examples to see whether the issue has already been discussed by an appellate court. If, after researching the issue,



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doubts persist, it is better to file a notice of appeal from both and move to consolidate them into one case than to miss the opportunity to appeal. Note: the time to appeal is not extended by the "mailbox" rule.

■ In Federal Court: In civil cases to which the government is not a party, the deadline to file the notice of appeal is 30 days after the judgment or order is entered on the district court docket.[11]

Where the government is a party, more than nominally, the deadline is 60 days.[12]

Other shorter deadlines apply in specific circumstances, such as:

- Petitions for permission to appeal interlocutory orders: 10 days.[13]
- Petitions to appeal interlocutory class action certification orders: 14 days.[14]
- Criminal cases: Generally 14 days for defendants, 30 days for government appeals.[15]
- Tax court appeals: 90 days.[16]

Be advised that, as with State Court, the use of regular "snail" mail does not extend the time to file a notice of appeal.[17]

Designate the Appellate Record

■ State: Within ten days after notice of appeal has been filed, the appellant will need to file a designation of record in the superior court. Typically, attorneys use Judicial Form APP-003 rather than reinventing the wheel.

The catchall term "appellate record" describes the materials the appellate court will review. These materials include trial exhibits, as well as a transcript of oral proceedings and a collection of pertinent written materials that were put before the trial judge.

Most often, the written materials are assembled into a clerk's transcript or an appendix. If the party proceeds by utilizing a clerk's transcript, the designation of record form must specify which documents will be part of the written record on appeal. Parties are not given free-rein in this particular process.[18]

The California Rules of Court (CRC) contain a list of documents that must be designated for inclusion in a clerk's transcript, and also incorporates these requirements for appendices. In either case, the record should be complete and not one-sided.[19] [20]

For instance, it would be improper to designate only the moving papers to a pertinent motion and exclude the opposition.

If counsel elects to proceed by appendix in lieu of a clerk's transcript, that choice must be made in the designation of record.

However, unlike the clerk's transcript, the contents do not need to be designated at that point, and the appendix itself is due at the time the appellant's opening brief is filed.

The court prefers a single appendix rather than an appellant's appendix and a respondent's appendix. Nevertheless, the respondent has an opportunity to counter-designate any materials it deems necessary to the appeal.

What happens if there was an important hearing, but it was not transcribed? The California Rules of Court provide guidance here, permitting, in such a case, the parties to proceed by an agreed statement or the more formal process of a settled statement.[21] [22]

In some circumstances, it may be necessary to designate the record of an administrative hearing if it was admitted into evidence, refused, or lodged in the superior court.[23]

Similarly, where the parties agree and local rules permit, the parties may rely on the superior court's file in lieu of a clerk's transcript.[24]

It is important to be thoughtful when designating an appellate record. On appeal, there is a presumption that the lower court's ruling or the judgment below is correct. It is incumbent on the appellant, therefore, to *demonstrate* any reversible error.

If the appellate record is incomplete and thus prevents the appellate court from fully considering the issue, the appellant will lose.

Moreover, the CRC details various sanctions—including the dismissal of the appeal—for failure to procure the record.[25]

■ Federal: The Ninth Circuit's record designation is similar, but not identical to the state's procedure.

The appellate record includes the reporter's transcript, the docket sheet, the clerk's record of original pleadings, and other pertinent documents filed in the district court, as well as excerpts of the record, which function similarly to an appendix.

If the hearing was not transcribed, the parties may create a statement of evidence or proceedings to the best of their recollection, or less commonly, use an agreed statement.[26]

As in state court, the appellate record in the Ninth Circuit may not include any materials that were not before the District Court judge before the time the order or judgment was entered.

Also, as in state court, if the appellant fails to procure the record, the Ninth Circuit will likely dismiss the appeal, or at least, affirm the appealable order or judgment.

Timely File Ancillary Documents

In both state and federal court, it is the appellant's job to procure the record, and that duty includes confirming that the clerk's transcript, the reporter's transcript, or any other portion of the record, actually is complete and correct.

If it is not what the appellant designated, or what the respondent/appellee counter-designated, it rests on counsel to notify the clerk of the error or omission.

Depending on the court and local rules, the deadline to do so may be rather short after receiving the transcripts. As a result, upon receiving the transcripts, counsel should immediately review them to determine whether they are accurate and complete and, if not, immediately file a letter/notice to correct the record.

Occasionally, as attorneys prepare their appeal, they realize that an appellate issue requires documents that were not initially designated. In such cases, a motion must be filed in order to augment the record.

Additional ancillary documents may be required between the designation of the record and the filing of the opening brief.

For instance, in state court, a civil case information statement is required that helps the court clerk determine whether the court has proper jurisdiction over the case, whether there is an appealable order or the appellant must show cause, who are the parties and attorneys in the case, and basic information about the type of case.[27]

Failure to file the civil case information statement in a timely fashion may result in a notice of default, which, if not corrected, will likely result in dismissal of the appeal.

Often, counsel needs additional time to file its briefs. In state court, the parties may stipulate for up to a 60-day extension of time, and must request any additional time from the Court of Appeal.

In the Ninth Circuit, each party is entitled to one 30-day streamlined, or automatic, extension of time per brief, and additional time must be requested from the Court.

In California, the briefing deadline features a built-in default period for the appellant's opening brief and the respondent's brief. It does not, however, apply to the appellant's reply brief.

This default period maintains that when a party fails to file an appellant's opening brief or a respondent's brief in a timely manner, "the reviewing court clerk must promptly notify the party in writing that the brief must be filed within 15 days after the notice is sent and that if the party fails to comply, the court may impose one of the enumerated sanctions, including dismissal of the appeal or decision on the appellant's brief only."[28]

Prepare The Appendix/Excerpts of Record

If counsel has not designated a clerk's transcript, then, prior to filing the opening brief and often before even beginning to draft the opening brief, counsel will need to prepare an appendix in state court (or excerpts of record in the Ninth Circuit). There are numerous formatting requirements, especially since the adoption of electronic filing, as well as substantive requirements.

As previously discussed, in state court, the appendix must include the materials specified in the California Rules of Court in the appropriate format.[29] [30]

Parties must also pay attention to sealed documents which carry additional requirements. Similarly, the Ninth Circuit has particular requirements for the excerpts of record.

A Ninth Circuit Rule supersedes FRAP 30's appendix requirement.[31]

Circuit Rules set forth the required contents of the excerpts, and also detail formatting requirements, as well as what must be excluded from the excerpts.[32] [33] [34]

Both state and federal courts provide exceptions to the electronic formatting requirements for pro se litigants.

Brief Writing

Finally, the time has come to draft, edit, and file the opening brief.

Although this article will not attempt to offer step-by-step instructions for drafting an appellate brief, there are a few key points to consider, especially for those new to appellate litigation.

• One: Before drafting the brief, make sure to determine the applicable standard of review for each argument. The standard of review shapes the way the appellate court reviews the legal and factual arguments, including how much deference, if any, to give the lower court's findings. Be mindful of the standard when crafting an argument.

• Two: Are the arguments preserved for review? The fastest way to lose an appellate challenge is by forfeiting an issue. Was there a timely objection in the trial court? Was there an offer of proof? Was a new trial motion brought to challenge the amount of damages?

• Three: Make sure to leave ample time for editing. Try to complete the draft with sufficient time to ignore it for several days—ideally a week—before editing. Otherwise, it can be difficult to objectively review the brief.

There are multiple parts of an appellant's opening brief, generally including an introduction, a table of contents; a table of authorities; factual and procedural statements; a statement of appealability—for example, under what statute is the order or judgment appealable; the legal argument or arguments; a conclusion; a certificate of word count; proof of service; and, if necessary, a certificate of interested parties.[35] [36]

In the Ninth Circuit, additional sections are detailed in Circuit Rules that include a disclosure statement, if necessary; a jurisdictional statement; a statement of issues; a statement of primary authority or addendum; a summary of the argument; a certificate of compliance; and, if necessary, an immigration detention status statement and a statement of related cases.[37]

As with the appendix/excerpts of record, the briefing must satisfy various electronic formatting rules, including electronic bookmarking, OCR searchable text, consecutive page numbering, and electronic filing.

After the appellant has submitted an opening brief, the responding party has 30 days to respond, unless there has been an extension of time. The respondent/appellee's brief contains similar requirements as the opening brief.

Within ten days of the filing of respondent's brief in the Court of Appeal, or within ten days of the expiration of time to file that brief, the party who wants the reviewing court to consider any original exhibits that were not copied in the clerk's transcript or appendix must serve a notice in the Superior Court identifying what exhibits to transmit to the Court of Appeal.[38]

After the respondent/appellee's brief is filed, the appellant has the option to file a reply brief.

In state court, the reply is due within 20 days of respondent's brief, unless the time to file has been extended, while, in the Ninth Circuit, the brief is due within 21 days of appellee's brief.

When representing an appellant, make sure not to save any arguments for the reply brief, as an argument raised for the first time in a reply brief is usually deemed forfeited.

Oral Argument

After briefing is completed, the parties have an opportunity to argue the case before a panel of three judges of the California Court of Appeal. Typically parties may request a specific amount of time, usually 30 minutes or less, to argue their appeal.

These arguments are typically held in-person, although during the on-going COVID-19 pandemic, the courts have been using alternative methods, including videoconferencing and telephonic appearances.

The argument itself is usually brief while the order of argument usually mirrors the order of the briefing with the appellant arguing first, the respondent responding, and, if the appellant has saved time, the appellant replies. No jury or witnesses appear.

Oral argument in the Ninth Circuit is not guaranteed. However, if the court decides to hold a hearing, it proceeds in similar fashion to its state court counterpart.

Decision and Next Steps

Typically, by the time the court schedules an oral argument, the justices have familiarized themselves with the cases and the applicable law and have internally circulated a draft opinion.

Despite this, the opinion is usually finalized and filed from one week and three months after the hearing is held.

In state court, after the opinion is filed, a party has 15 days to petition the Court of Appeal for a rehearing before the same panel.[39]

The opposing party may not file an answer to the petition for rehearing unless the court requests it. Within ten days after the Court of Appeals decision has become final, a party may petition the California Supreme Court for review.[40]

Unlike a rehearing petition, the opposing counsel may file an answer and the petitioning party may file a reply. If the petition is granted, the Court will specify the grounds upon which review has been granted.

In the Ninth Circuit, the deadline for filing a rehearing petition is 14 days, unless the United States or another agency is a party, in which case the deadline is 45 days. As in state court, no answer should be filed in absence of a court request.

Sometimes, a party will petition for en banc review along with its petition for rehearing. In such a case, the original panel will decide whether to grant the petition and, only if it denies the petition, does the whole court determine whether to grant en banc review.

If an en banc review hearing is granted, the court will rely on the original briefing unless it requests supplemental briefing, while any party dissatisfied with the en banc decision may petition for a rehearing before the full court.

Final Thoughts

There are numerous resources available to demystify the mechanics of filing an appeal in both the California Courts of Appeal and Ninth Circuit Court of Appeals.

California's appellate court website contains step-by-step instructions, while the Ninth Circuit provides a comprehensive appellate practitioner's handbook, including checklists.[41] [42]

Remember to leave plenty of time for brief writing, and enjoy the opportunity to help shape the law.

[1] Code of Civil Procedure Section 904.1.
[2] *Id.* § 904.1(a)(10); see e.g., Fam. C. § 2025.
[3] *Griset v. Fair Political Practices Comm'n* (2001) 25 Cal.4th 688, 697.
[4] Fam.C. § 2025; CRC 5.392.
[5] California Rules of Court, rule 8.104(a).
[6] *Id.* 8.104(a)(1)(B).
[7] *Id.*
[8] 104(a)(1)(C). 8 California Rules of Court, Rule 8.104(a).
[9] *Id.* 8.108, 8.702, or 8.712.
[10] *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222.
[11] 28 USC § 2107(a); FRAP 4(a)(1)(A).
[12] *Id.* § 2107(b); FRAP 4(a)(1)(B).
[13] *Id.* § 1292(b).
[14] FRCP 23(f).
[15] *Id.* 4(b).
[16] *Id.* 13.
[17] *Haroutunian v. I.N.S.*, (9th Cir. 1996) 87 F.3d 374, 376-377.
[18] California Rules of Court 8.122(b).
[19] *Id.* 8.122(b).
[20] *Id.* 8.124(b).
[21] *Id.* 8.134.
[22] *Id.* 8.137.
[23] *Id.* 8.123.
[24] *Id.* 8.128.
[25] California Rules of Court 8.140.
[26] FRAP 10(c),(d).
[27] Judicial Form APP-004.
[28] California Rules of Court 8.220.
[29] *Id.* 8.124(b).
[30] *Id.* 8.74.
[31] Ninth Circuit Rule 30-1, 30-1.4(a).
[32] *Id.* 30-1.4.
[33] *Id.* 30-1.5.
[34] *Id.* 30-1.6.
[35] California Rules of Court 8.204(c).
[36] *Id.* 8.208.
[37] Circuit Rules 28-1, 28-2, and 32-1; FRAP 28, 28.1, and 32.
[38] California Rules of Court 8.224.
[39] *Id.* 8.268.
[40] *Id.* 8.500.
[41] *https://www.courts.ca.gov/selfhelp-appeals.htm* <last accessed 8-24-20>.
[42] *https://cdn.ca9.uscourts.gov/datastore/uploads/guides/AppellatePracticeGuide.pdf* <last accessed 8-24-20>.

Filing an Appeal: The Basics
Test No. 144

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. All judgments are appealable.
❑ True ❑ False

2. No monetary sanctions are appealable.
❑ True ❑ False

3. Parties can stipulate to an extension of up to 30 days for filing the notice of appeal.
❑ True ❑ False

4. A new trial motion may extend the time necessary to file the notice of appeal.
❑ True ❑ False

5. The time for filing a notice of appeal differs under state and federal rules.
❑ True ❑ False

6. An appeal may be properly taken from a judgment entered after a motion for summary judgment.
❑ True ❑ False

7. When designating the record, it is necessary to identify each document for inclusion in the appendix.
❑ True ❑ False

8. After the reporter's transcript and clerk's transcript are filed, it is necessary to determine whether additional documents should be added in a supplemental appendix.
❑ True ❑ False

9. Failure to procure the record will likely result in the appeal being dismissed.
❑ True ❑ False

10. The designation of record form is due within 30 days of filing the notice of appeal.
❑ True ❑ False

11. In state court, each party may receive an automatic 30-day extension of time to file its brief.
❑ True ❑ False

12. For each brief filed in California Courts of Appeal, there is a 15-day default period after the deadline.
❑ True ❑ False

13. Appellants have a right to oral argument.
❑ True ❑ False

14. Electronic filing is mandatory.
❑ True ❑ False

15. The standard of review shapes the way the appellate court reviews the legal and factual arguments, including how much deference, if any, it gives the lower court's findings.
❑ True ❑ False

16. When representing appellant, it is often a good strategy to save the best arguments for the reply brief so that appellant gets the last word.
❑ True ❑ False

17. For state criminal appeals, the defendant must be present for oral argument.
❑ True ❑ False

18. A panel of three judges or justices will determine each appeal.
❑ True ❑ False

19. Within two weeks of oral argument, court will issue its opinion.
❑ True ❑ False

20. A petition for rehearing en banc is determined in the first instance by the original panel that heard the case.
❑ True ❑ False

Filing an Appeal: The Basics
MCLE Answer Sheet No. 144

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

San Fernando Valley Bar Association
20750 Ventura Blvd., Suite 140
Woodland Hills, CA 91364

METHOD OF PAYMENT:
❑ Check or money order payable to "SFVBA"
❑ Please charge my credit card for
$ _____.

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Credit Card Number

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Authorized Signature

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

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

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

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
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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

Photos by Ron Murray

First Out the Gate:
Meet SFVBA President David G. Jones

By Michael D. White

At the beginning of his career in the law, SFVBA President David G. Jones was able to blend a love of the law with a respect for his generations-old family tradition of work in the horse racing field that set the course for his success as an employment law attorney and the goals he sees for the Bar during what promises to be a challenging year at the helm of the organization.

SFVBA PRESIDENT DAVID G. JONES 'EARNED his spurs' as an attorney in a rather unusual way. Born and raised in the San Gabriel Valley community of Arcadia, Jones grew up in a "very 1950s, Norman Rockwell-type" community with a long tradition in thoroughbred horse racing.

Eldest son of a professional thoroughbred horse trainer named to the California Horse Racing Hall of Fame, Jones' grandfather has the leading trainer award at Del Mar Racetrack named for him and served for a time as an exercise rider for the legendary Seabiscuit, while his younger brother found success as a trainer on the national racing circuit.

Jones, whose wife is also an attorney in the San Fernando Valley United States Bankruptcy Court, had "a great experience growing up" before majoring in political science at Loyola Marymount University, and enrolling at Whittier Law School, where, he says, he was able to feel like a "bigger fish" in a smaller pond.

"At Whittier, I was able to really thrive in an environment where I felt I could come out of my shell. I can honestly say I loved law school and I still love being a lawyer."

After graduating *cum laude* from Whittier, Jones found a unique way to honor his family tradition and, at the same time, created a 'daily double' of activities that he still has a deep affection for—horse racing and the law.

"I started representing both jockeys and trainers as an advocate on a couple of fronts," he says. "The California Horse Racing Board is charged with regulating race activity throughout the state and has the authority to issue suspensions for trainers and jockeys who violate the rules. With trainers, it's been a strict 'no tolerance' set of rules with strict liability for medication violations. They don't want any horses to be given performance-enhancing drugs or other illegal medications, so horses are tested extensively."

Jones Family

Like in professional baseball, says Jones, "In many of the situations, it was determined that the player took a supplement that contained some compound that was banned. The same thing happens a lot in horse racing, so I would represent trainers brought before the Board of Stewards and argue that the trainers either didn't violate the rules as it relates to medication or that the rules didn't cover the way in which the violation may have occurred."

A jockey, he says, might be suspended for a variety of causes such as perilous riding or excessive use of the whip.

"A typical suspension could be for a week or ten days and the jockey involved might be scheduled to ride in a high stakes race with a purse of $100,000 or much more, so I would present evidence and ask for a stay of the ruling from both the Stewards and Superior Court to create the time needed to file an appeal of the suspension. That would give the jockey the time to ride in the race."

It was, he says, "work that I loved doing. It was a great way to meld the two worlds together, but it wasn't a very viable way to build up a long-term business model for me to set up a full-time practice."

Jones ultimately made the decision to change his professional course and pursue a career in employment law.

"I'm glad I did what I did, but I really miss doing the work around the horses and the track. It was a fantastic experience and was about as close as I came in the early days to be a white-collar advocate trying to vindicate people who haven't violated the rules." To that end, his work has again come full circle, as he now has a thriving practice representing trainers in employment law matters of all types. "Trainers appreciate my understanding of their business at a whole different level, there is no need to explain how they or the racetrack operate, it is in my blood."

Q: Why did you choose a career in the law in the first place?

A: "My uncle was a judge for a long time in Orange County Superior Court. That was a big influence, but I think the genesis was the fact that I've always been a good writer.

In grade school, we had a project to make arguments as lawyers in a mock trial/appeal project as they related to the internment of Japanese-Americans during World War II. A lot of my friends just looked it up in the encyclopedia and went with that, but I went to the library and did a deep-dive and really got into it. I read up on the Korematsu case and did really well with it, arguing against the government's decision to improperly detain Japanese-American citizens.

I found out I had a real affinity for that sort of thing and still do. I've always had a rather analytical mind and that, mixed with being a good writer, have served as a good foundation for being an attorney.

Q: Why your particular area of practice?

A: "When I started out, it was with a mid-sized general practice firm. We had one partner who was at the forefront of focusing on the area of employment law and that was his sole area of practice. We did work on both the employer and the employee side. As a young associate, I was assigned cases on both sides, and I really did well."

"Employment law is a good fit for me because it is almost always engaging in terms of the emotional stakes for the parties; if I were stuck doing something a little more esoteric, like intellectual property work, for example, that just wouldn't fit my personality in terms of being able to isolate the strengths and weaknesses of a case factually and legally as it relates to a story.

"Employment cases, particularly individual plaintiff matters, are highly fact-driven more specifically when it comes to cases involving sexual harassment, retaliation, or discrimination. I think I have an affinity to be able to identify and focus on the facts that can help win a case, or achieve exceptional results for my clients."

Q: How would you describe your management style?

A: "There are two sides to the way I'll approach leading the Bar. During these difficult times, dealing with the financial side calls for fiscal conservatism and making sure that we're not extending ourselves in ways that put the organization either at risk or damage our prospects in coming out of this dip that we're going through. I'm a really positive person and I always tell the people I supervise, manage or work with that I don't focus on negatives as problems, but as situations that require solutions. With a positive attitude, you can encourage those around you.

"For example, we have many projects going on in the organization. When people get to pursue the things that they really want to, they should be able to move forward without constraints or having to face the 'that won't work' attitude where some look for opportunities to see others fail rather than helping pursue goals that are consistent with helping the organization grow.

"I learned from [SFVBA Past President] Kira S. Masteller, who was one of the presidents I worked under and Barry [Immediate Past President Barry P. Goldberg]. It's a positive energy that encourages people to extend themselves with the time and the passion needed to achieve a goal, rather than approaching a project as an obligation or a chore.

"There's a big difference between telling someone 'Don't do A, B, C, D, and E,' rather than focusing on the ultimate goal and saying 'Just get it done….just stay within the lines while you're doing it.' My management style is to support someone who has a good idea and a passion for it so they'll know that they're supported, even over the bumps along the road. If there are others who raise questions, they'll know I'll always be there to back them up."

Q: You joined the SFVBA nearly 20 years ago. How has the organization changed since then?

A: "In the years since I became actively involved, it's modernized in a lot of ways, particularly in the area of technology and how it can be used effectively.

Having a long-term Executive Director [Liz Post] gave us stability and that did a lot to help build the Bar through some difficult times, but I think with our new Executive Director, Rosie Soto Cohen, we've started to look at the organization with a fresh set of eyes and try to make it more professional and more modern. It's an ongoing process, but I think we've made great progress over the course of the last seven or eight years."

Q: Did you have any idea when you passed the bar that you'd be assuming the leadership of an organization like the SFVBA?

A: "No, not at all. I will say, though, that over the years, I have held a few leadership positions. I was president of my student bar association in law school and several others along the way. While I didn't ever think I'd be heading the SFVBA, when I joined the group and was able to get more active in it, I was simply very excited to sit on the Board and never thought I would ascend to the presidency.

"Through reputation and experience, I've gotten to know many of the past presidents. I hold all of them in very high regard and have a tremendous amount of respect for them. I was appointed for a one-year term to the Board of Trustees by Kira and spent only that year on the Board before I found myself on the officer track."

Q: These are challenging times for the Association. What goals are you setting for the organization during your term as president?

A: "At this time, the goal has to be organizational stability in terms of finances and the foundational structure of the Bar from top to bottom, not just staff. That is important because we are going to come out of this and, as we emerge, if the organization is sound and stable on all fronts and we're ready to hit the ground running when we do, we will have the stability to ensure that we can move forward.

"When the time comes, I want the Bar to emerge stronger than it was so that the president that follows me has a stronger foundation to build on with even greater momentum. While I certainly aspire to take the Bar to the next level, I have been more immediately tasked to build that stability and help get us through this difficult time."

Q: At the end of your term, where would you like to see the Bar?

A: "I'd like to see the Bar operating stronger and at a better level than when the COVID-19 pandemic hit. Once we've established financial stability, then at that point, it's going to involve in-person staffing and in-person operations, continuing and expanding even further the programs we started in past administrations. I've seen a trend not just in our organization, but out in the legal community, of a lot more support for community activities. I do think that, for example, we can work more closely with the Valley Community Legal Foundation to serve the wider community. I think we do a pretty good job of serving the lawyers, but what our membership wants is the opportunity for involvement in activities that have a broader reach to the Valley community that they can be involved in.

"What Alan [SFVBA Past President Alan E. Kassan] did in terms of networking, Yi Sun [SFVBA Past President Yi Sun Kim] did in the area of diversity, and what Barry [Immediate Past President Barry P. Goldberg] did in terms of technology and social media by taking us to the next level

"While I certainly aspire to take the Bar to the next level, I have been more immediately tasked to build that stability and help get us through this difficult time." —**David G. Jones**

created strong pillars for the Bar to rest on. As lawyers, we can get together socially, but to make the SFVBA whole to me, if we're out in the community working on projects and supporting each other as attorneys, that's really what brings it all together.

"We have the 25th anniversary of our very successful Blanket the Homeless program coming up and I think that's a great launching pad for us to exhibit our support of the Valley community, particularly at this time. The Bar has helped start a new program at Haven Hills [a shelter for victims of domestic violence]. These are the sorts of things I will be working on developing, not just with one or two organizations, but deeper into the community. That will make us a more involved part of our community, and I think that's what many of our members want. I'd also like to see our Association more visible in the community, which will see the Bar becoming a little more politically active locally, particularly in causes consistent with the mission of the Bar."

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By Bradley W. Hertz

Democracy in the Time of COVID-19

The following article on election law is particularly timely in view of the upcoming November elections. It contains content that is both informational and, in some respects, could be seen as reflecting the opinions of the writer. Any views or opinions, either expressed or implied, in the article do not necessarily reflect the opinions of the San Fernando Valley Bar Association or Valley Lawyer magazine.

SINCE THE MARCH 3, 2020 primary election, the world has changed in innumerable ways as not a day goes by without news of the COVID-19 pandemic and its ravaging effects on both the human body and the body politic.

In addition to COVID-19's dramatic impact on the primary election season this past winter and spring, COVID-19 continues to wreak havoc on the democratic process as the November 3, 2020 Presidential election—and all the state and local elections that are consolidated with it—draws near.

While the full effects of the current pandemic remain to be seen, COVID-19 has already changed our democracy in unimaginable ways.

Politics, they say, is a contact sport; wearing masks and staying six feet apart is a far cry from glad-handing and kissing babies.

Not being allowed to personally interact at close range has a ripple effect throughout the entire democratic process as we know it—on the candidates themselves, ballot measures, political parties, and the way we choose to govern ourselves.

As Abraham Lincoln said, "Elections belong to the people. It's their decision. If they decide to turn their back on the fire and burn their behinds, then they will just have to sit on their blisters."

With COVID-19's distancing requirements, people should be protected from the blisters to which Lincoln referred, and, although they may not have to sit on their scorched behinds, hopefully they also won't be sitting on their hands.

This article discusses various ways in which COVID-19 has thrown a wrench into the democratic process, especially the California political *zeitgeist* in which initiatives, referenda, recalls and litigation play such an important role.

While some of COVID-19's effects, such as the increased role that the vote by mail process will have, the wearing of masks for nearly all public interactions, and the rise of the Zoom call in lieu of in-person events, are obvious, some impacts are less obvious and not visible to the naked eye.

From the perspective of an election law practitioner, it is hoped that this article provides a lens through which democracy in the time of COVID-19 can be better understood and addressed.

I, R, R, Where Art Thou?: Initiatives, Referenda, and Recalls

Who among us has not been approached in front of a supermarket and asked to sign a petition?

According to one writer, "By making the government a combination of elected officials and citizen-backed initiatives and referenda, there can truly be a government of the people, by the people, and for the people."[1]

Despite the Lincolnesque appeal for robust public participation in the political process, the in-person circulation of petitions to qualify measures for the ballot, a staple of California politics for generations, has come to a virtual standstill—a reality that has not only dashed the hopes of many who were pushing various issues for the November ballot, but has also raised some unique and thorny issues for the courts.

Legalizing Sports Betting

When a proposed ballot measure to legalize sports betting at tribal casinos and horse racetracks was unable to gather enough signatures to qualify for the November 2020 ballot, the proponents filed a suit to ask for more time.[2]

Sacramento County Superior Court Judge James P. Arguelles extended the usual 180-day deadline and thus gave the proponents more time to gather signatures. As a result, the measure now has the opportunity to appear on the November 2022 ballot, without signature gathering having to start anew.[3]

Although in-person signature gathering is certainly the most common and successful way to qualify measures for the ballot, it is not the only way. Efforts have been made to find outside-the-box methods—from direct mail and email, to online approaches—to collect signatures, with limited success.

One such measure is the California Plastic Waste Reduction Regulations Initiative.

"One Word—Plastics"[4]

Although the proponents of the Plastic Waste Reduction measure submitted their ballot measure language to the state in November 2019—a year before the November 2020 election, as is suggested by the experts—and were permitted to collect signatures beginning in January 2020, by March the onset of COVID-19 had dashed their plans.

The proponents creatively organized an energized email signature gathering effort in which voters were asked to download the petition, sign it, and mail it in.[5]

The strategy was made more viable by the recently enacted Elections Code Section 108, which expressly allows petition pages to be bound together "by any reasonable method, including the use of staples," and, because of the brevity of the measure, its lack of color maps or legal-sized paper, and other aspects of the physical document that reduced the problems that often arise with electronically transmitted petitions.

By June 2020, though, it had become clear to the proponents of the Plastic Waste Reduction measure that they would not be able to meet the July signature submission deadline.[6]

So, off to court they went and, as with the sports betting measure, Judge Arguelles extended the signature gathering deadline to account for the introduction of COVID-19-related shelter-in-place orders.[7]

Even though several measures did not qualify for this November's ballot and will have to wait for the 2022 election, California voters will still see a dozen statewide measures asking them to weigh-in on issues ranging from stem cell research, property taxes, and rent control to labor law, consumer privacy, and the bail system.[8]

Making It Under the Wire

On November 20, 2019, the City of Oceanside's Council majority approved a much-debated residential real estate development project, but opponents gathered approximately 12,500 signatures on a referendum petition by the December 20 deadline, thus forcing the matter onto the November 2020 ballot.[9]

Had the Council approved the project in March 2020 instead of a few months earlier, COVID-19 might have interfered with the ability to qualify the referendum for the ballot. In this way, and in many ways we will never know about, COVID-19 is a political game-changer.

Whether the courts would have extended the 30-day referendum signature gathering period codified in Elections Code Section 9237—as they did with regard to the 180-day initiative signature gathering period as discussed above—or whether the courts would have taken a laissez faire approach, as they did with regard to the Common Sense Party as discussed below, remains to be seen.

Missed Opportunities

Dueling recall efforts directed toward rival members of the Oceanside City Council were well underway when the COVID-19 crisis hit, causing both

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factions to abandon their recall plans due to the difficulty of obtaining signatures for their respective petitions.[10]

According to NBC News, as of April of this year, at least 21 groups had suspended signature gathering efforts on issues ranging from minimum wage increases and gun control to criminal justice reform and cannabis.[11]

In the same way that so many of our nation's students are missing out on traditional in-person learning, our nation's policy wonks and everyday people are missing out on their rights of passage relative to making important decisions on public policy issues.

A COVID-19 Cannabis Compromise

A cannabis-related initiative in the City of West Hollywood was abandoned due to COVID-19 because the initiative's proponents were unable to gather the necessary signatures.

However, the story did not end there. Because a separate cannabis measure had already qualified for the ballot the old-fashioned way—that is, by gathering signatures—proponents of the second measure asked the City Council to place their measure on the ballot even without the requisite number of signatures.[12]

Proponents claimed that because of social distancing guidelines implemented by the Governor and other governmental actors, they had to abandon their in-person petition circulation efforts.

Although the City Council seriously considered putting the competing measure on the ballot, an 11th-hour compromise was reached among stakeholders, and, as a result, neither of the measures will appear on the November ballot.

As one City Councilmember put it, with so much else going on with COVID-19, including the city's economic challenges—even the world-famous WeHo Halloween Carnival has been cancelled—the city did not want to face an expensive and divisive campaign with two competing cannabis measures on the ballot.[13]

The ability of the proponents of the circulated measure to withdraw it from the ballot no later than 89 days before the election is the result of recently enacted Elections Code Section 9215.5.

In the past, once a measure qualified and the legislative body placed it on the ballot, everyone was past the point of no return, and an election was, barring judicial intervention, inevitable.

Section 9215.5, however, was designed to encourage legislative compromise at the local level, so that the proponents are able to withdraw the measure from the ballot if their legislative goals have already been met, usually via a compromise with the city.

Political Party Qualification

California election law provides procedures for the formation of new political parties.

These protocols, codified in Elections Code Section 5151, et seq., enable a political body to become an official political party if .33 percent of the voters—or approximately 68,000 voters for this election cycle—declare their preference for that party by a certain deadline.[14]

A group seeking to become the Common Sense Party of California, whose leaders include former Congressman and Chapman Law School Dean Tom Campbell, was in the process of registering new voters and was approximately one-third of the way toward achieving its goal when the pandemic took hold.[15] [16]

The courts were less forgiving than they had been toward the sports betting and plastic bag initiative measures when the group appealed to both federal and state courts asserting that COVID-19—and the government's response thereto—made the applicable statute unconstitutional as applied because

of the inability to continue gathering in-person signatures.[17]

The United State Supreme Court has been especially reluctant to expand voting rights in the era of COVID-19.

In cases arising out of election-related lawsuits in Wisconsin, Texas, Alabama and Florida, the High Court has refused to ratify the concept that accommodations need to be made to enhance vote by mail options, increase participation of those who were formerly incarcerated, or otherwise revise the status quo.[18]

Due to the ongoing COVID-19 pandemic, November 3, 2020 is sure to be an election day like no other.

Not only were the Democratic and Republican National Conventions in August bizarre affairs in that they were virtual instead of in-person, but the debates, the campaigns, and nearly all other aspects of this election cycle are unusual and unlike the democratic process we have grown accustomed to.

Vote by Mail Ballots

No discussion of COVID-19's impact on the democratic process would be complete without mentioning the vote by mail process as not a day goes by without a major announcement about, or attack on, vote-by-mail (VBM) ballots.

What many fail to realize, however, is that the VBM process has been in use in California since 1962.

At that time, a mere 2.63 percent of voters cast their ballots by mail. Over the next half-century, however, that number steadily increased, and by the March 2020 primary election, 72.08 percent of California voters voted by mail.[19]

With the onset of COVID-19, this percentage is certain to increase to nearly 100 percent, especially in California, where the election will be conducted as an all-mail ballot election.

Instead of voters having to request a VBM ballot—as has been the case for as long as many of us can remember—all voters will be sent one so they will not have to visit their local polling place and risk exposure to the virus.

Even so, those who express a need to vote in-person, including people with disabilities, those who do not speak English, and people experiencing homelessness, will still be able to do so.

Gone, however, are traditional and familiar local polling places.

Instead, we will be seeing regional vote centers and ballot drop-off locations, including at large stadiums and sports arenas, as well as extremely busy U.S. Postal Service workers.

The all-mail ballot election rule for the November 2020 election first came into being in May 2020, via Executive Order N-64-20 issued by California Governor Gavin Newsom.[20]

The State Legislature followed suit by adopting Assembly Bill 860, which Newsom signed in mid-June.

The law, which took immediate effect as urgency legislation, amended the California Voter's Choice Act to add Section 3000.5 to the Elections Code, and requires that on or about October 5, 2020—29 days before the election—all voters will be sent a VBM ballot. Those who register after that date must be sent a ballot within five days after they register to vote.[21]

Remote Accessible Vote By Mail

What's more, Section 3016.7 has been added to the Elections Code, and permits any voter—not just the disabled, military or overseas voters—to use the remote accessible vote by mail (RAVBM) system.

This allows any voter to mark an electronic vote by mail ballot on a personal computer, print out a paper cast vote record, and submit it to the elections official.[22]

After a contentious April 2020 recall election in the Orange County community of Westminster, rumors circulated that the all-mail election and the RAVBM system had been rife with fraud.

However, after a five-week recount in which each of 17,205 ballot and vote by mail envelopes were meticulously examined, the recount concluded with no change to the vote totals.[23]

Even so, the increasing liberalization and expansion of the VBM process has some election watchers concerned about possible voter fraud.

Notwithstanding partisan attacks on the process, however, polls conclude that a substantial majority of Californians have confidence in the integrity of the VBM process.

Familiarity, thus, breeds comfort rather than contempt, in that those who have consistently voted by mail in the past are more trusting of the process than those who have not.[24]

Also, more and more counties are employing sophisticated ballot tracking systems so that voters can monitor their ballots as they make their way through the system, much as one would do with a FedEx or UPS package.

Los Angeles County's BallotTrax system enables voters to track their ballot to see when it is received by the Registrar and counted.[25]

Finally in this regard, systems have long been in place that reject duplicate ballots, forged ballots, and ballots cast by those who are not eligible voters.[26]

Although the VBM system is by no means perfect, there is very little evidence of fraud or other large-scale gaming of the system in a way that undermines the integrity of the election process.[27]

Hopefully, by the time the 2022 mid-term elections roll around, things will back to politics as usual, at least in the sense of not having the COVID-19 albatross around our collective neck.

But more likely than not, things will never be the same. And when we look back, many election cycles from now, at these crazy times, we'll be able to say "I remember when . . . ."

Additional Reading

For those interested in further reading about the legal and political wrangling wrought by COVID-19, the University of Chicago Law Review Online featured a series of Pandemic Elections

articles, including one by UC Irvine Law Professor Richard L. Hasen entitled *Direct Democracy Denied: The Right to Initiative During a Pandemic*. [28] [29]

Additionally, the Congressional Research Service has a series of publications about COVID-19 and elections, one of which pertains to election emergencies and recent policy developments.[30]

And, for a fascinating read in Time Magazine about The Plague Election, see "*How COVID-19 Changed Everything About the 2020 Election*."[31]

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[1] Victoria Stoklasa, *Sign It Into Law: How to Put Your Petition on the Ballot* (Amazon Books), 2013.
[2] California Elections Code section 13314 and Code of Civil Procedure section 1085 contemplate pre-election litigation and allow for courts to issue equitable remedies, usually in the form of writs of mandate, where specified criteria are satisfied and where the relief will not substantially interfere with the conduct of the election.
[3] *Marc Macarro, et al. v. Alex Padilla*, Sacramento County Superior Court Case No. 34-2020-80003404 (July 3, 2020).
[4] *The Graduate* (1967).
[5] Per Elections Code Section 9020, electronic petition signatures are not permitted.
[6] Elections Code Section 9014(b) provides for a 180-day statewide initiative petition circulation period.
[7] *Michael Sangiacomo v. Alex Padilla*, Sacramento County Superior Court Case No. 34-2020-80003413 (July 2, 2020).
[8] *https://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures/*.
[9] "County Verifies North River Farms Referendum" (*San Diego Union Tribune*) March 19, 2020) *https://www.sandiegouniontribune.com/communities/north-county/oceanside/story/2020-03-19/county-verifies-north-river-farms-referendum.*
[10] "*Oceanside Recall Efforts Go Low-Key During Pandemic Crisis*," San Diego Union Tribune (April 26, 2020) (*https://www.sandiegouniontribune.com/communities/north-county/oceanside/story/2020-04-26/recall-efforts-go-low-key-during-pandemic-crisis); "Second Oceanside Council Recall Effort Halted, Says It Was 'COVID-Bit'," San Diego Union Tribune (June 2, 2020) (https://www.sandiegouniontribune.com/communities/north-county/oceanside/story/2020-06-02/second-oceanside-council-recall-effort-halted-says-it-was-covid-bit*).
[11] "*Ballot Initiatives Navigate Uncharted Paths to 2020 Election*" (April 27, 2020) (*https://www.nbcnews.com/politics/2020-election/ballot-initiatives-navigate-uncharted-paths-2020-election-n1192211*).
[12] California Elections Code Section 9222.
[13] "Unless a Compromise Is Reached by August, There Will Be Two Cannabis Initiatives on the Ballot" (WeHoVille) June 16, 2020) (*https://www.wehoville.com/2020/06/16/unless-a-compromise-is-reached-by-august-there-will-be-two-cannabis-initiative-on-the-ballot/*).
[14] Elections Code Section 5151(c)(1).
[15] *www.cacommonsense.org*.
[16] Tom Campbell, "California Needs a Party That Stands for Common Sense" (*Orange County Register*) August 22, 2020 (*https://www.ocregister.com/2020/08/22/california-needs-a-party-that-stands-for-common-sense-tom-campbell/*).
[17] *The Common Sense Party v. Alex Padilla, et al*., U.S. District Court Case No. 2:20-cv-01091 and Sacramento County Superior Court Case No. 34-2020-90003427.
[18] "*As Concerns About Voting Build, The Supreme Court Refuses to Step In*" NPR (July 25, 2020) *https://www.npr.org/2020/07/25/895185355/as-concerns-about-voting-build-the-supreme-court-refuses-to-step-in*.
[19] "*Historical Vote-By-Mail (Absentee) Ballot Use in California" (https://www.sos.ca.gov/elections/historical-absentee/*).
[20] "*Governor Newsom Issues Executive Order to Protect Public Health by Mailing Every Registered Voter a Ballot Ahead of the November General Election" (May 8, 2020) (https://www.gov.ca.gov/2020/05/08/governor-newsom-issues-executive-order-to-protect-public-health-by-mailing-every-registered-voter-a-ballot-ahead-of-the-november-general-election/*).
[21] Assembly Bill 860 (h*ttps://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB860*).
[22] Elections Code Section 303.3.
[23] *https://www.ocvote.com/press-releases/city-of-westminster-special-recall-election-recount-ends-with-no-changes.*
[24] Berkeley Institute of Governmental Studies Poll Release #2020-16: "*Californians Confident in Mail-In Voting Despite Partisan Attacks*" (August 24, 2020) (*https://escholarship.org/uc/item/1mm8c6v6*).
[25] *https://california.ballottrax.net/voter/*.
[26] Elections Code Sections 18000, et seq. contain dozens of criminal provisions to guard against election fraud and to enable district attorneys and "private attorneys general" to enforce these laws.
[27] "*The False Narrative of Vote-by-Mail Fraud*" (April 10, 2020) *https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud.*
[28] *https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-election/* (June 2020).
[29] *https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-initiative-hasen/ (June 2020).*
[30] *https://crsreports.congress.gov/product/pdf/R/R46455 (July 16, 2020).*
[31] *https://time.com/5876599/election-2020-coronavirus/ (August 6, 2020).*

Goodbye and Hello...Again

DAVID G. JONES
SFVBA President

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PEN THIS, MY FINAL ATTORNEY Referral Service column, with mixed emotions.

Over my time on the ARS Committee, we have experienced just about all the highs and lows that could possibly come with overseeing the complicated operation of such a much-needed service.

While we have, by any measure, collected significant referral fees and created a reserve to continue the work of the ARS, with the onset of COVID-19, we have also experienced a downturn in the number of referrals we receive.

While the Bar continues to receive and process a steady volume of referrals that land in the hand of great attorneys, the actual numbers have taken a sharp dip during this difficult stretch.

Every member of the ARS panel, as well as every member of SFVBA, needs to know how important it is to forward referrals to the Attorney Referral Service.

Doing that is the heart of the win-win we always talk about. Referrals link a client in need with a qualified pre-screened attorney, making you look good, and supporting the Bar with the much-needed referral fees that allow the ARS to function in top form.

This is a uniquely challenging time and we need those referrals now more than ever!

That said, the ARS has reached new heights over the past five years and it is with great pride that I hand the reins over to the new Chair of the ARS Committee, Matthew A. Breddan.

Matt, I know, will keep the Service's operations in top shape and keep it functioning through and beyond the current challenges it's currently facing.

He has served as Treasurer and, now, as Secretary of SFVBA, and, along with Christopher P. Warne and Heather Glick-Atalla, form the next team of officers leading the Bar through the following year.

The ARS Committee, currently in the hands of its able, creative and energetic Associate Director of Public Services, Miguel Villatoro, and its new chair are ready to work with you and turn the corner to better times.

Finally, I will say, without reservation, that the ARS Committee is one of the most respected groups in our Association.

Exercising judgment and professionalism, the ARS operates with a dedication that is consistent and unmatched.

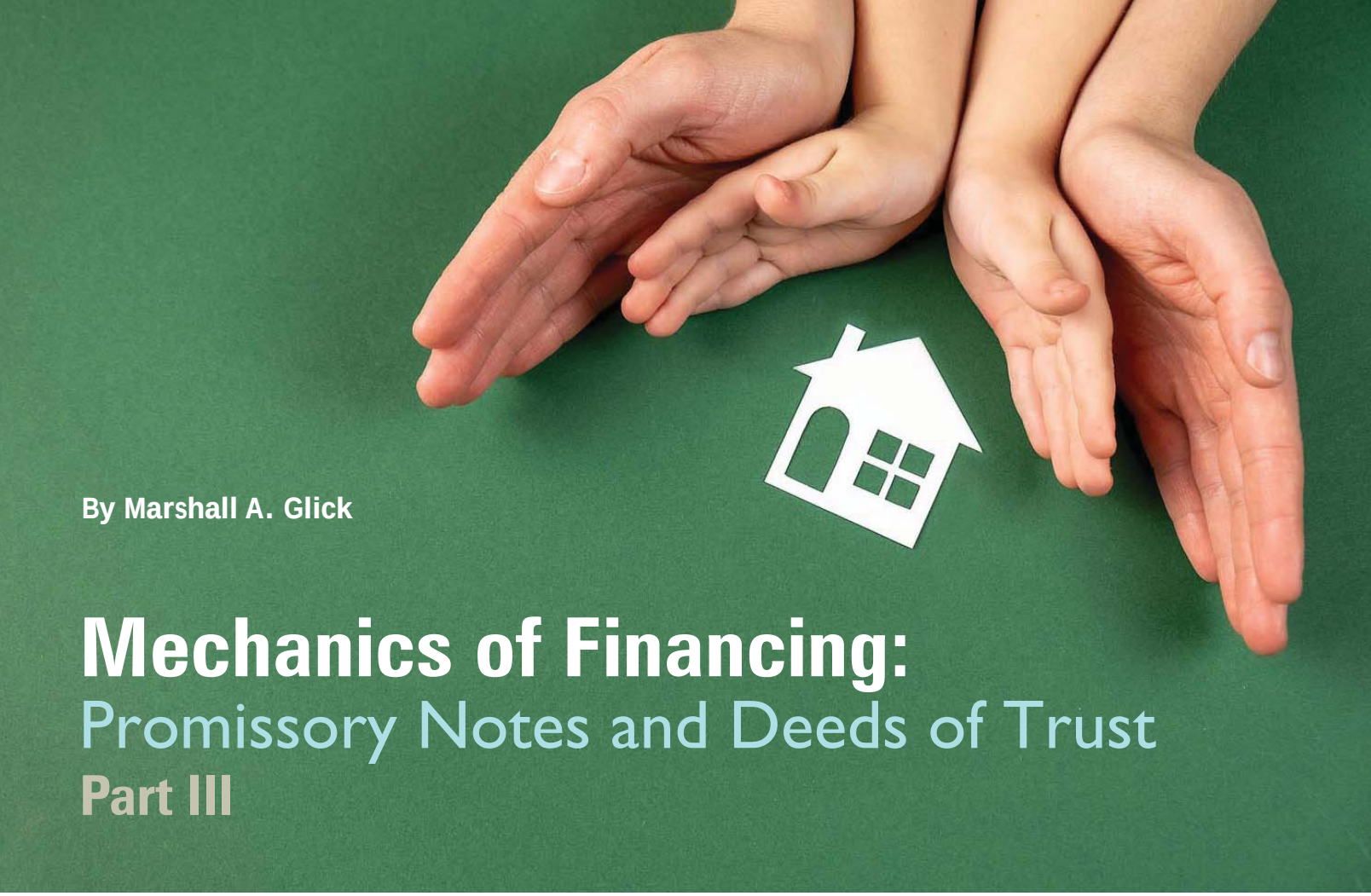
I want to personally thank the members of the Attorney Referral Service Committee for their commitment and enthusiasm.

My sincere thanks to Matthew Breddan, Angela Berry, Caryn Sanders, Steven Sepassi, Terri Asanovich, Marlene Seltzer, Matthew Erickson, Minyong Lee, George Seide, Darren LeMontree, and all the Committee members who served during my time as Chair.

Their support and positive attitude through bumpy times have meant the world to me.

My last days as Chair of the ARS Committee are bittersweet. While I won't be leaving the Committee, duty calls as I transition to the post of SFVBA President for the coming year.

But, I know I leave the work of the ARS to great leadership and great people. And so, I move on.



By Marshall A. Glick

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

IN PARTS I AND II OF THIS ARTICLE IN, RESPECTIVELY, the August and September editions of *Valley Lawyer*, we looked at the types of promissory notes and deeds of trust currently in use and enumerated some of the recommended provisions that may be included in promissory notes and deeds of trust from a seller's or lender's perspective, and outlined in detail the recommended provisions that should be considered from a buyer's or borrower's perspective.

This final article, Part III, looks at some recommended provisions that provide additional sample provisions that may be included in an addendum to a deed of trust.

All sample provisions should, of course, be tailored or expanded upon by counsel to fit the particulars of each transaction as the following provisions favor borrowers and may be included in such an addendum.

Refinancing and Subordination

There are some situations when the Borrower may need to refinance the lien of a senior loan on the property.

For example, in the case of an all-inclusive or wrap around deed of trust, a loan secured by a senior deed of trust may have become due. In the absence of refinancing and subordination provisions, or the lender's willingness to cooperate in the manner desired by the Borrower, the Borrower may be required to refinance or pay off not only the senior encumbrance that has become due, but, in addition, all junior encumbrances in order to avoid foreclosure by the senior lien holder.

When refinancing and subordination provisions are included in an addendum to a deed of trust, both the Trustor—the Borrower—and the Beneficiary—the Lender—should sign the notarized deed of trust as the the Beneficiary is undertaking an obligation to abide by the stated provisions.

The actual subordination of a junior lien to a refinanced senior lien occurs by recordation of a subordination agreement signed by the junior lienholder.

Most title insurance companies will provide, upon request, printed forms of subordination agreements, which, when recorded, are sufficient to achieve proper subordination.

A sample refinancing and subordination provision that favors the borrower that could be included in an addendum to the deed of trust could read as follows:

"Beneficiary hereby expressly and irrevocably agrees that in the event that Trustor desires to refinance the first priority Deed of Trust (the "Senior Deed of Trust) or should the holder of the Senior Deed of Trust elect at any time to accelerate (or by any means attempts to accelerate) the due date for the unpaid balance of principal and then accrued interest under the promissory note secured thereby (the

Senior Note), including any acceleration that may be made at the request of Trustor, or otherwise attempts to change the terms or conditions of payment thereof, then Trustor shall have the right (without obligation to do so) to arrange for and institute substitute financing on the most favorable terms and conditions then available from private or institutional lenders, to the end that the Senior Note and the Senior Deed of Trust will be refinanced and replaced by a new loan to go on record in like principal amount as the then unpaid principal balance and accrued but non-delinquent interest remaining unpaid under the Senior Note.

Such new loan will be obtained by Trustor forthwith (i.e., within not more than twenty (20) calendar days) and at Trustor's sole expense (i.e., should the interest rate under such new loan be greater than required to be paid under the Senior Note and/or should any other terms and conditions be less favorable to Beneficiary or to Trustor than are presently provided for under the Senior Note.

Senior Deed of Trust, then all such excess costs, charges, interest, points, loan fees, escrow and title policy fees, charges and the like will be paid solely by Trustor, and Beneficiary shall be held at all times fully safe and harmless therefrom).

In order to accomplish the foregoing, Trustor shall have the right to refinance the Senior Note by prepaying the Senior Note in accordance with the terms of the Senior Note and the Note secured hereby, and by making a new note (the New Note) in an original principal amount not to exceed the unpaid principal balance of the Senior Note at the time of such refinancing.

Beneficiary shall forthwith (i.e., within not more than ten (10) calendar days) subordinate the lien and charge of this Deed of Trust to a new deed of trust (the New Deed of Trust) securing such New Note provided that:

• The holder of the Note secured by this Deed of Trust approves of all documents used in connection with such refinancing, except that such approval shall not be unreasonably or arbitrarily withheld; and,

• Trustor pays all costs and prepayment penalties, if any, incurred in connection with such refinancing, or if such refinancing results in any prepayment penalty or charge to the holder of the Note secured hereby, Trustor shall immediately and directly pay the full amount of any such prepayment penalty or charge; and,

• The terms and conditions of the New Note and New Deed of trust are no more onerous than the terms and conditions of the Senior Note and the Senior Deed of Trust.

The terms and conditions of the New Note and New Deed of trust shall not be deemed to be more onerous than the terms and conditions of the Senior Note and the Senior Deed of Trust if:

1.) The original principal amount of the New Note does not exceed the then unpaid principal amount of the Senior Note at the time of such refinancing; and,

2.) The principal of and interest on the New Note is payable in monthly installments that do not exceed the aggregate monthly installments payable under the Senior Note; and,

3.) The period over which the indebtedness evidenced by the New Note is amortized is not less than the period over which the indebtedness evidenced by the Senior Note was originally amortized; and,

4.) All other terms and conditions of the New Note and the New Deed of Trust are substantially similar to the terms and conditions of the Senior Note and the Senior Deed of Trust, except that the New Note and the New Deed of trust may contain more stringent prepayment provisions. If such more stringent prepayment provisions shall result in payment by Beneficiary of any prepayment penalty or charge, Trustor shall immediately reimburse Beneficiary for such prepayment penalty or charge.

"In the event that Beneficiary wrongfully fails or refuses to execute the instruments necessary to effect the subordination contemplated hereby, then the parties acknowledge that Trustor is entitled to apply to a court of competent jurisdiction for and receive an order of court compelling specific performance of the obligations of Beneficiary hereunder. It is further acknowledged that the time necessary to obtain such a decree of specific performance would be so long as to render the benefits of the New Note to Trustor meaningless.

"The parties therefore agree that in the event Trustor is required to bring an action for specific performance of this agreement, Trustor shall be entitled to a preliminary injunction compelling Beneficiary (or the clerk of the court acting on behalf of Beneficiary, should Beneficiary refuse so to act) to execute and acknowledge before a Notary Public the instruments necessary to effect such subordination in accordance herewith.

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"In the event that any action becomes necessary to enforce the rights of Trustor or Beneficiary hereunder, the prevailing party in such action shall be entitled to recover from the other party therein such reasonable attorneys' fees in addition to costs as may be incurred."

Substitution of Security

Another provision that Borrowers may want to include in the addendum to the deed of trust is a right to substitute the security for other like-kind security, such as real property, of equal or greater value.

For example, if the real property described in the deed of trust is sold, the Borrower may want to continue making payments under the promissory note and substitute other security of equal value.

When substitution of security provisions are included in an addendum to a deed of trust, both the Trustor and the Beneficiary, such as when refinancing and subordination provisions should have the document notarized.

A sample short provision that allows for substitution of security is as follows:

"So long as Trustor does not become in uncured breach of the promissory note (the "Note") secured by this Deed of Trust or any other provisions of this Deed of Trust, Trustor reserves the right to substitute the security for the payment of the Note with any other improved real property having the same or similar use and located in the same county as the property described herein, is of equal or greater fair market value to the property described herein, and is free of any and all liens and encumbrances other than non-delinquent real estate taxes and assessments.

"Beneficiary shall have the right to approve of any such substituted improved real property, which approval shall not be unreasonably or arbitrarily withheld. Without limiting the generality of Beneficiary's approval right, Beneficiary may condition approval upon the substituted improved real property being appraised by a professional real estate appraiser selected by Beneficiary, the cost of which appraisal shall be paid by Trustor. Under no circumstances shall Beneficiary incur any cost or expense in connection with such substitution of security by Trustor.

"Accordingly, as a condition precedent to providing approval of such substituted security, Beneficiary may require Trustor to pay or reimburse Beneficiary for Beneficiary's reasonable attorneys' fees in representing Beneficiary in connection with the substitution of security. Trustor shall also pay or reimburse Beneficiary for the cost of obtaining a new policy of title insurance that insures the priority of the lien of the deed of trust of the substituted security as a first lien and charge against the substituted real property. In the event Beneficiary wrongfully fails or refuses to execute, or unreasonably delays—any delay exceeding ten (10) business

days—in executing the instruments necessary to effect such substitution of security as contemplated herein, then the parties acknowledge that Trustor is entitled to apply to a court of competent jurisdiction for and receive an order of court compelling specific performance of the obligations of Beneficiary hereunder.

"It is further acknowledged that the time necessary to obtain such a decree of specific performance would be so long as to render meaningless the benefits to Trustor of substitution of security. The parties therefore agree that in the event Trustor is required to bring an action for specific performance of this agreement, Trustor shall be entitled to a preliminary injunction compelling Beneficiary (or the clerk of the court acting on behalf of Beneficiary, should Beneficiary refuse so to act) to execute and acknowledge before a Notary Public the instruments necessary to effect such substitution of security in accordance herewith."

Contamination

Lenders are rightfully concerned that borrowers may cause contamination with hazardous waste materials on the property or allow the property to become contaminated by others.

Depending upon how the property has been used in the past, or how the borrower proposes to use the property during the term of the loan, it may be advisable when the circumstances warrant to include in a contamination provision as an addendum to the deed of trust.

This is usually lengthy and may be considered overkill if the circumstances of the loan do not warrant its use. However, in appropriate situations, Lenders want and should be able to have a contamination clause included in the loan documentation. The Lender may end up owing the property following foreclosure on the loan and, as the owner of the property, the lender may be held accountable for removing the contamination from the property that was caused by the borrower or others.

A sample contamination provision, which does not purport to include every recommended or conceivable provision, could read:

"Beneficiary and Trustor hereby acknowledge and agree that it is of primary importance and concern to Beneficiary that Trustor shall do nothing whatsoever while there is an outstanding unpaid balance of principle or interest owing under the Promissory Note to cause, or to suffer anyone else to cause, the contamination of the property described herein by any Hazardous Materials, as defined below.

"In addition, in the event that such contamination should occur at any time during the term of the loan, then Trustor shall at its sole cost and expense forthwith cause the complete removal and abatement from the property of all such Hazardous Materials, all in accordance with the following provisions upon which Beneficiary is materially relying, in the absence of which agreement Beneficiary would have declined to extend a loan to Trust."

Definitions

■ CERCLA: The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and any other subsequent federal or state legislation that regulates the remediation or abatement of contamination.[1]

■ Environmental Laws: Any federal, state or local laws, ordinances, regulations, or policies relating to the environment, health and safety, any hazardous materials activities and hazardous materials, including, without limitation, the use, handling, transportation, production, disposal, discharge or storage thereof, including without limitation soil or grand water conditions.

■ Hazardous Materials: Any petroleum or petroleum products, flammable substances, explosives, radioactive materials, hazardous wastes or substances, toxic wastes or substances or any other materials or pollutants that pose a hazard to the property described herein or to persons on or about the property, or cause the property to be in violation of any hazardous materials law.

Also asbestos in any form which is or could become friable, urea formaldehyde foam insulation, transformers or other equipment which contain dielectric fluid containing levels of polychlorinated biphenyls in excess of fifty (50) parts per million; and any chemical, material or substance defined as or included in the definition of hazardous substances, hazardous wastes of any kind or type, hazardous materials, or toxic substances or words of similar import under any applicable local, state or federal law or under the regulations adopted or publications promulgated pursuant thereto, including, but not limited to:

- The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended.[2]
- The Hazardous Materials Transportation Act, as amended.[3]
- The Resource Conservation and Recovery Act, as amended.[4]
- The Federal Water Pollution Contract Act, as amended.[5]
- The California Health and Safety Code.[6]
- The California Administrative Code.[7]

Also, any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any

governmental authority or may or could pose a hazard to the health and safety of the occupants of the described property or the owners and/or occupants of property adjacent to or surrounding the property in question.

■ Hazardous Materials Activity: The use, generation, transportation, treatment, storage or disposal by the Trustor or by any person or entity acting on behalf of the Trustor or suffered by the Trustor or any hazardous materials at any time heretofore or hereafter located on or present on, in, under or about the described or surrounding property.

■ Interest Rate: A rate per annum equal to the sum of four (4) percent plus the annual rate of interest announced publicly by the Bank Of America, National Trust and Savings Association, of Los Angeles, from time to time as its base rate, but limited to the maximum amount that the Beneficiary may lawfully charge based upon a written instrument executed and intended to be performed within the State of California.

■ Losses: Any and all loses, liabilities, damages, consequential or otherwise, demands, claims, actions, judgments, causes of action, assessments, penalties, costs and expenses, including, but not limited to, remedial, removal, responses—including any costs required to take necessary precautions to protect against the release of hazardous materials—abatement, cleanup, legal, investigative and monitoring costs and other related costs, fines, obligations, defenses, judgments, suits, proceedings and disbursements including, without limitation, any and all reasonable attorneys' and experts' fees and disbursements.

■ Environmental Losses: Any and all losses suffered or incurred by any Beneficiary, arising out of or as a result of the occurrence, at any time during the term of this loan, of any activities involving hazardous materials; any violation by the Trustor, or by any person or entity acting on behalf of the Trustor or suffered by the Trustor, at any time during the term of the loan, of any applicable environmental laws relating to the property described herein or to the ownership, use, occupancy or operation thereof; or any investigation, inquiry, order, hearing, action, or other proceedings by or before any governmental agency in connection with any hazardous materials activity occurring, or allegedly occurring, at any time during or after the term of the loan.

Also, any claims, demand or cause of action, or any action or other proceeding, whether meritorious or not, brought or asserted against the Beneficiary that directly or indirectly relates to, arises from, or is based on any of the matters described above or any allegation of any such matters, or the Beneficiary's legal expenses and costs incurred in connection with the loan.

Indemnification

Thus, the Trustor thereby agrees to indemnify, defend, protect and hold harmless the Beneficiary from and against any and all losses related to environmental issues.

■ Separate Obligation: The obligations of the Trustor under this loan are independent of, and shall not be measured or affected by any amounts at any time owing as principal or interest under this loan; the sufficiency or insufficiency of any collateral which may at any time be given to secure the Trustor's full performance; the modification, expiration or termination of this loan or any other document or instrument relating hereto; or the discharge or payment by the Trustor of all amounts due and owing under the promissory note secured hereby or otherwise payable hereunder by the Trustor.

■ Survival: Trustor's obligations hereunder shall survive the sale or other transfer of title to the property described herein by the Trustor or by the Beneficiary (should Beneficiary acquire title to the property as a consequence of

foreclosure or by any other means during or after the term of this loan).

The rights of the Beneficiary under the indemnity provisions of this loan shall be in addition to any other rights and remedies of the Beneficiary against the Trustor under this loan, whether such rights and remedies are derived at law or in equity including, without limitation, any reimbursement or contribution right under any environmental laws, and shall not in any way be deemed a waiver of any of such rights.

■ Limitation on Indemnification: Notwithstanding anything to the contrary set forth in this deed of trust or in any other loan documentation, the Trustor shall not be liable under the above indemnity provisions of the loan to the extent of that portion of any losses that the Trustor establishes is attributable solely and directly to an affirmative act of the Beneficiary that causes the introduction and initial release of a hazardous material on the property described herein; or the material aggravation of a then existing hazardous material condition or occurrence on the property; provided that in either such case referred to above, such act was in violation of any environmental law.

■ Procedures Relating to Indemnification: The Trustor shall at its own cost, expense, and risk defend all suits, actions, or other legal or administrative proceedings that may be brought or instituted against Beneficiary on account of any matter or matters arising under the preceding indemnification provisions; and pay in full or otherwise satisfy any final judgment or decree that may be rendered against the Beneficiary in any such suit, action or other legal or administrative proceedings.

In addition, the Trustor shall reimburse the Beneficiary for the costs of, or for any payment made by the Beneficiary, for any reasonable expenses incurred by the Beneficiary in connection with hazardous materials undertaken as a result of any demands, causes of actions, lawsuits, proceedings, or any other claims threatened, made, or brought against the Beneficiary, as the case may be, arising out of the obligations of Trustor under the preceding indemnification provisions;

Also, the Trustor shall not reimburse the Beneficiary for any and all costs and expenses, including but not limited to all reasonable legal expenses arising out of or attributable to the above acts or in connection with enforcing the rights of the Beneficiary under this loan or in monitoring and participating in any such action, proceeding or litigation.

■ Legal counsel selected by the Trustor pursuant to the above indemnification provisions shall be subject to the written approval of the Beneficiary, which approval shall not be unreasonably withheld or delayed; provided, however, that the Beneficiary may elect to defend any such claims, lawsuit, action, legal or administrative proceeding at the cost and expense of the Trustor if, in the judgment of the Beneficiary, the defense is not proceeding or being conducted in a satisfactory manner, or there is a conflict of interest between any of the parties other than the Trustor and the Beneficiary to such lawsuit, action, legal or administrative proceeding.

■ Notwithstanding anything set forth to the contrary, the Trustor shall not, without the Beneficiary's prior written consent settle or compromise any action, suit, proceedings, or claim or consent to the entry of any judgment that does not include as an unconditional term thereof the delivery by the claimant or plaintiff to the Beneficiary of a written release by the claimant or plaintiff—in form, scope and substance satisfactory to the Beneficiary in its sole discretion—from all liability with respect of such action, suit, or proceeding.

Neither shall the trustor without the Beneficiary's prior written consent settle or compromise any action, suit, proceeding, or claim in any manner that may materially and adversely affect the Beneficiary, as determined in the Beneficiary's sole discretion. In any circumstances under which the preceding indemnity provisions apply, the Beneficiary may employ its own legal counsel and consultants to prosecute, negotiate or defend against any such claim, action or cause of action, and the Beneficiary shall have the right to compromise or settle the same in good faith without the necessity of showing actual liability therefor, and without the consent of the Trustor.

The Trustor shall reimburse Beneficiary upon demand for all costs and expenses incurred by Beneficiary, including all costs of settlement entered into in good faith, and the reasonable fees in addition to all other out-of-pocket costs and expenses of such attorneys and consultants.

■ Liability of the Trustor: The liability of the Trustor under the preceding indemnity provisions shall in no way be limited or impaired by any amendment or modification of the Promissory Note, this deed of trust, or this loan.

In addition, the liability of the Trustor under the preceding indemnity provisions shall not in any way be limited or impaired by any extensions of time for performance required under the promissory note or the Deed of Trust; any sale or transfer of all or part of the property described herein; the accuracy or inaccuracy of the representations and warranties made by the Beneficiary or Trustor under any written instruments; the release of the Trustor or any other person or entity from performance or observance of any of the terms or conditions contained in the loan documents or by operation of law, the Beneficiary's voluntary act, or otherwise, except only to the extent that the release of the Trustor from the specific indemnity provisions is provided for.

Nor shall they be limited or impaired by the release or substitution in whole or in part of any security for the Trustor's

performance of its obligations and undertakings under the Promissory Note, the Deed of Trust, or any other loan instruments, or the Beneficiary's failure to perfect, protect, secure, or insure any security interest or lien on or hereafter given as security for the Trustor's performance under the Promissory Note or this Deed of Trust, whether such security is provided with or without notice to the Beneficiary and with or without consideration.

■ Waiver: The Trustor hereby expressly waives and relinquishes all rights and remedies accorded by applicable law to the Trustor, except any rights of subrogation that Trustor may have, provided that the indemnity provided for shall neither be contingent upon the existence of any such rights of subrogation nor subject to any claims or defenses whatsoever that may be asserted in connection with the enforcement or attempted enforcement of such subrogation rights, including, without limitation, any claim that such subrogation rights were abrogated by any acts of the Beneficiary.

■ Payment of Obligations: All obligations of the Trustor under the preceding indemnity provisions shall be payable on demand of the Beneficiary, and any amount due and payable under said indemnity provisions that is not paid within 30 calendar days after written demand therefor from the Beneficiary with an explanation of the amounts demanded shall bear interest from the date of such demand at the appropriate interest rate.

■ Successors, Assigns and Gender: The preceding indemnity provisions shall be binding upon the Trustor, its successors in interest and assigns, and shall inure to the benefit of any shall be enforceable by the Beneficiary, its successors in interest and assigns. As used in this indemnity, the singular includes and plural and the masculine includes the feminine and neuter and vice versa, if the context so requires."

In summary, there is much more to think about than initially meets the eye in drafting promissory notes and deeds of trust as is often the case that using a printed form of promissory note and deed of trust without substantial modification is inadequate to protect the interests of both lenders and borrowers.

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[1] 42 U.S.C. Section 9601 et seq.
[2] *Id.*
[3] 49 U.S.C. Section 18901, et seq.
[4] 42 U.S.C., Section 6901, et seq.
[5] 33 U.S.C. Section 1251, et seq.
[6] California Health and Safety Code Sections 25115, 25117, 25122.7, 25140; 25281, 25316, and 2550.
[7] California Administrative Code Title 22, Article 9 or Article 11, Division 4, Chapter 20.

Focusing on Goals in Hard Times

JOY KRAFT MILES
VCLF Co-President

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IT GOES WITHOUT SAYING THAT THIS IS A DIFFICULT time with the Valley Community Legal Foundation Board concerned about how our organization can continue to fundraise and, at the same time, continue our work of helping the Valley community.

So many people are suffering and even little misfortunes feel so much bigger at times like this.

Even though many of our Board Members feel this strain, we have decided to tread forward and keep alive two important philanthropic programs—our award of financial scholarships to deserving Valley high school students who are interested in pursuing careers in the law and our highly-regarded Constitution & Me project, that introduces students to the U.S. Constitution and its application in day-to-day legal situations.

By working toward achieving both goals, we will be able to both help students bear the financial costs of continuing their education and, at the same time, engage students across the Valley with our civics-based curriculum through the creative use of Zoom technology.

In addition, we are working with the Van Nuys Family Court to help with Settle O' Rama and offer support to confront homelessness and the various COVID-19-related situations affecting our community. We are also considering organizing a Drive-In Movie Family Fun Night as a safe fundraiser sometime by the end of the year.

As we move on, the VCLF would like to work closer with the SFVBA Board of Trustees and Bar members to both align our philanthropic goals and expand our manpower and resource base.

While it may be a challenge to keep the candle burning during this pandemic, we ultimately have faith that business and life, in general, will return to normal soon and that we will be glad to have made it through these turbulent times.

Regarding leadership of the VCLF, the officers going forward for 2021 will be the same as 2020 with the exception of Kira S. Masteller, who is stepping down from the position of Co-President because of family-related obligations.

As a result, I will be serving as President, while Terri Peckinpaugh will be Secretary and assist as a Co-President, and David Nadel will fill the post of Treasurer.

The annual dues for Board members will remain at $250 per year, except for Judicial Board members who are exempted. At its most recent meeting, the Board voted that, should a Board member be experiencing financial hardship, dues are not mandatory this year.

By Barbara Bergstein

Estate Planning for Individuals with Special Needs

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

ESTATE PLANNING ATTORNEYS are called upon to deal with more than just preparing wills and trusts. They often become counselors to their clients, advising on interfamily relationships, handling the gradual decline in mental function of a client, dealing with the death of that client, and often serving in the role of mediator for family conflicts.

One area that can be especially challenging for estate and trust attorneys is representing a family that has a special needs child, regardless of whether that child is a minor or an adult. Parents of a special needs child may be struggling with numerous, challenging issues, including the ongoing health needs of that child, finding care providers who can offer much-needed respite relief, advocating for their child, and finding supplemental programs to enhance that child's quality of life.

In addition to those challenges, parents are especially concerned about the future of their child, often wondering what will happen to her when they are no longer here.

Government Benefits

Many individuals with special needs receive government assistance. For those individuals who have never worked or been employed due to a disabling condition, Supplemental Security Income (SSI) and Medi-Cal[1] are their lifeline.

To qualify for SSI and Medi-Cal, the individual must have a qualifying disability and have no more than $2,000 in resources such as savings or checking accounts.[2]

Usually, when a child turns age 18, she can apply for these means-tested government benefits. The SSI program provides a monthly stipend to cover the costs of food and shelter. California adds a supplemental amount to the federal benefit rate.[3]

In addition, a disabled adult may qualify for Social Security Disability Insurance (SSDI) if she is the adult child of a worker who is receiving retirement benefits. She can also qualify through a deceased parent's earnings record. After a 24 month qualifying period, that child is also eligible for Medicare. The applicant must prove that she was disabled before the age of 22.

These benefit programs are called entitlement programs because they are based on the earnings record of a worker. Because these benefits are

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not means-tested, one's assets and resources do not count in determining eligibility. It is possible for a child with a disability to receive both means-tested benefits and entitlement benefits. Even if a disabled child loses SSI due to a cost of living increase in the SSDI amount, that child cannot lose Medi-Cal.[4]

Estate Planning to Preserve Government Benefits

The Special Needs Trust or Supplemental Needs Trust ("SNT") provides a unique opportunity to maximize the quality of life for a child with a disability. The trust is an opportunity for parents to plan for their child's future by ensuring that there will always be funds to hire advocates and care providers to take over when parents are gone.

The SNT is designed to protect a disabled child's government benefits, SSI and Medi-Cal, while providing a supplemental fund to pay for services and special programs.[5] Many children with special needs require extraordinary medical care and specialized services. Medi-Cal is often the only health insurance that children with disabilities are able to obtain. The SNT can pay for medical care not otherwise covered by Medi-Cal.

The Special Needs Trust may be drafted as part of the Family Living Trust or it may be created as a stand-alone Irrevocable Gifting Trust. In a typical Living Trust scenario, on the death of the parents (or any other family member who has created an SNT under their estate plan) the family trust assets are distributed to the trustee of the SNT to be used for the disabled child's special needs. The SNT directs the trustee to distribute funds for the benefit of the disabled child but not directly to that child. Distributions of trust funds directly to that child may cause her to lose her monthly SSI amount.

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

The SNT also allows parents to continue the care and support they were providing for their child while they were alive. For example, many parents supplement their adult child's basic necessities, food and shelter, without jeopardizing continued eligibility for means-tested government benefits. The SSI amount of $940.72[6] (federal benefit rate plus California supplement) severely limits the beneficiary's access to adequate housing,[7] since the beneficiary also has to use this amount to pay for the basic necessities of food and utilities.

The SNT provides an on-going opportunity for families to continue to supplement food and shelter while maintaining a child's government benefits. Under the current law, paying for food and/or shelter may only reduce the beneficiary's SSI Federal Benefit Rate by one-third (depending upon if the child lives in her own home or in the home of another) rather than dollar for dollar for the cost of the food or shelter provided.[8]

Another way to provide quality housing is to have the SNT hold title to the family residence, a place that's safe and familiar. The trustee of the SNT should be authorized to hire care providers on a live-in or visitation basis enabling the beneficiary to live in the least restrictive environment.

Because title to the residence is held in the name of the SNT, the trustee may allow the beneficiary to live there as long as she is willing or able. On the death of the trust beneficiary, the California Department of Health Services may not file an estate claim against the trust for reimbursement for medical costs and services paid on behalf of the trust beneficiary.[9]

The decision as to who should be the trustee of the SNT can be perplexing. Siblings may not want the responsibility of managing a brother or sister's trust during his or her lifetime.

That sibling may be more willing or better suited to oversee care providers and specialized services. An institutional trustee or a private professional fiduciary is a good alternative to a family member.

However, because that institutional trustee or private fiduciary usually has not had the benefit of having known the disabled child throughout her lifetime and because they are unfamiliar with the disabled beneficiary's special needs, the use of a Trust Advisory Committee is a practical consideration. Parents should choose trusted friends and/or family members who know and understand the beneficiary's particular circumstances to serve as members of the Committee.

The role of the members is to procure services, programs, care providers, advocates, and therapies or treatments that they agree will enhance the beneficiary's quality of life and then direct the trustee to purchase those services.

An alternative to creating an SNT at the death of a parent, is to create an Irrevocable Special Needs Trust during one's lifetime. The purpose of this trust is to receive gifts of money or property so that there is an available fund now (or in the future) to pay for therapies, schools, camps and care providers that otherwise might not be available to that child and that parents may not be able to afford. This is a good opportunity for grandparents and aunts and uncles to make gifts into a trust for the benefit of a disabled family member.

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

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

The Irrevocable Trust is drafted to receive gifts of a present interest in order to take advantage of the current annual gift tax exclusion amount of $15,000 per person each year.[11] This provision allows numerous people to fund the trust annually. The Trust must be carefully drafted to avoid jeopardizing the disabled beneficiary's benefits.

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

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

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

While most children are able to move out into the world as independent adults, a child with special needs may need lifetime care, dependent on their parents for their basic activities of daily living.

Planning an estate for families who have a child with a disability is an opportunity for estate and trust attorneys to make a difference in the lives of parents who struggle with the future of their special child.

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

Dealing With Rejection

Illustration by Gabriella Senderov

Dear Phil,

A client engaged me pre-litigation. He seemed satisfied with my handling of the matter, but I was not able to get it settled. The other side sued, and the client retained new trial counsel. Should I try to find out why? Can I try to convince him to retain me? Or should I just let it go?

Sincerely,
Confused

DEAR CONFUSED, THANK YOU for your question. From one attorney to another, my response is especially clichéd in our profession: it depends. Specifically, the answer rests on whether you are capable of handling the matter, or whether you were merely trying to resolve a dispute you were otherwise not equipped to deal with.

Before you reach out to your former client regarding this matter, you must ask yourself whether you are equipped to handle a case that may never settle, but may, in fact, have to be litigated through trial.

If you are serious about taking on a case in litigation, there are a few questions you might consider: Have you litigated in this area of law before? Do you have requisite experience as a litigator, in all stages of litigation, and, in particular, the jurisdiction in which this case could be tried? Do you feel comfortable handling the matter should it actually reach trial? Do you have the monetary resources available to you to pay for the costs of litigation, should there be a need to front these costs for your client before you are compensated?

If the answer to any of these questions is no, you will want to carefully think through your decision to convince the client to retain you. In fact, if you are not equipped to handle the matter, you are prohibited from doing so per the California Rules of Professional Conduct, as a lawyer's duty comes with it the obligation of providing competent representation.

Rule 1.1(a) is explicit: "A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence."

Competence is defined by Rule 1.1(b) as meaning "to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service." Whether you have the requisite knowledge and skill to litigate the case is something that you should definitely take into account.

If, however, you do believe that you are experienced enough to handle the matter, and that you are able to represent the client zealously, then there is no reason why you cannot reach out to them.

You don't necessarily have to ask why they retained another firm, but you will want to make an effective case as to why you are confident that you can competently represent them moving forward. One phone call won't hurt, and it can turn into a very rewarding experience.

Hope that helps, and best of luck.

Sincerely,

Phil

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