The Marin Lawyer

An Official Publication of the Marin County Bar Association

March 2009 Volume 40, Issue 3

Lisa Goldfien

Perry Taubman

GENERAL MEMBERSHIP MEETING
PRO BONO APPRECIATION LUNCHEON

Legal Aid of Marin was incorporated on April 19, 1958 and has been serving the community for over 50 years. What started as a group of Marin County Bar Association volunteers now has a staff of 13 (including 6 attorneys) serving over 2000 households each year. This month's MCBA General Membership Meeting will coincide with the annual Pro Bono Appreciation Luncheon. MCBA will host Legal Aid of Marin's Pro Bono Appreciation Luncheon, and the presentation of the 2009 Pro Bono awards, on **Wednesday, March 25, 2009**, at **12 noon** at **Rickey's Restaurant** in Ignacio.

We will celebrate 160 attorneys including nineteen recipients of the Wiley W. Manuel Award – issued by the State Bar of California for 50 or more hours of pro bono services. Presiding Marin County Superior Court Judge Verna Adams will present their certificates. In addition, MCBA members **Lisa Goldfien** and **Perry Taubman** will address our group on their experiences with Legal Aid of Marin and the pro bono services they have provided.

The attorney **Wiley W. Manuel Award Recipients** are: Jean Bordon, Matthew Brenner, Diana Campbell-Miller, Antonio Cortes, Kevin Dwight,

(Continued on page 13.)

Calendar of Events

March 25, 2009
Legal Aid Pro Bono Luncheon
12-1:30 pm

March 18, 2009
ADR Section Meeting
12 – 1:30 pm

March 18, 2009
Probate & Estate Planning Section Meeting
12 – 1:30 pm

March 19, 2009
Real Property Section Meeting
12 – 1:30 pm

March 20, 2009
Intellectual Property Section Meeting
12 – 1:30 pm

March 23, 2009
Probate & Trusts Mentor Group
12 – 1:30 pm

March 27, 2009
Spring Diversity Section Meeting
4:00 pm

Look for details each month in *The Marin Lawyer*

In This Issue

Andrew C. McCullough was Guest Editor of this issue of *The Marin Lawyer.* Philip R. Diamond is Series Editor for 2009.

TEN SIMPLE REQUESTS FROM YOUR BUSINESS CLIENT

*By Andrew C. McCullough**
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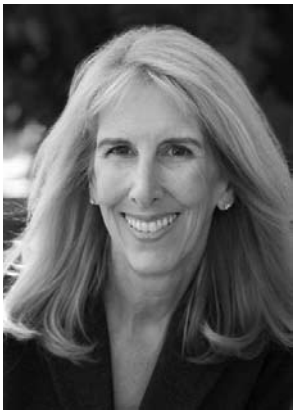
In these challenging economic times, few outside lawyers can afford missteps with their clients. For that reason, I thought that I would dust off some advice I was asked to give when I served as General Counsel for a retail company that retained local counsel throughout the western United States. Without further preamble, here is what I ask of my outside counsel.

Don't Surprise Me. This is the cardinal rule. Every client invokes it. It's also the rule most

(Continued on page 13.)



PRESIDENT'S MESSAGE

VOLUNTEERING IS WHERE IT'S AT

By Marlene P. Getchell

"I can no other answer make, but, thanks, and thanks."
William Shakespeare.

There are thousands of great quotes on the internet about the value of being a volunteer. My favorite quotes don't have as much to do with the impact volunteering has on the community, as with the internal satisfaction one receives from volunteering. Personally, the satisfaction I get from volunteering is in the pleasure I experience by serving as a volunteer. That's why I especially like the quote attributed to Dick Gregory: "One of the things I keep learning is that the secret of being happy is doing things for other people." Of course, being a volunteer in your own community has a significant impact on the organization and the community itself.

The Marin County Bar Association would like to thank our members who served on MCBA Standing Committees and as Section Chairs last year, as well as those who have volunteered to serve on Standing Committees and as Section Chairs this year. Those outstanding MCBA members who have been appointed to MCBA's 2009 Standing Committees and Sections are listed in this Newsletter. Your willingness to volunteer is what makes MCBA what it is. The Section Chairs do a great job in organizing monthly meetings for their sections and in providing monthly speakers who share with other attorneys their knowledge about their specific areas of practice. These meetings not only give section members the opportunity to keep up with recent developments in their areas of practice in their own community, but also give members the chance to network with other attorneys in their own field. I have met many attorneys who practice in my area of law at section meetings. Contacts made at my section meetings have enabled me to develop a list of attorneys to whom I can refer business.

Some Standing Committees are more active than others. Having served as a member and as co-chair of the Lawyer Referral Service Committee for a number of years, I have a particular fondness for the LRS Committee. The LRS Committee meets monthly to review applications for attorneys who want to serve on the LRS panel, as well as other issues involving the continued success of LRS. In my opinion, LRS is one of the most valuable services that MCBA provides to the community. I recently attended a luncheon where I sat at a table with 8 business people. I mentioned LRS, and 3 out of the 8 people present told me that they had used LRS at one time or another and found the service invaluable. Without the LRS Committee, there would be no LRS.

I have no doubt that many of you who have served on MCBA Standing Committees and as Section Chairs have similar stories of how meaningful an experience it has been. If you didn't have an opportunity to sign up this year for a Standing Committee or as a Section Chair, please consider volunteering next year.

If volunteering on an MCBA Standing Committee or as a Section Chair doesn't excite you, there are many other organizations that welcome volunteers. I recently had the pleasure of volunteering as a judge at the California Mock Trial Program. Many attorneys and judges dedicate many hours to this program as coaches and judges. The results of these efforts are amazing. The high school students who volunteer for this program are phenomenal in their abilities to serve as trial attorneys and witnesses in mock trials. My experience of volunteering for this program and watching these students made me want to become a better lawyer.

If you want to volunteer, but volunteering for an organization related to the law is not what you are looking for, there are many other opportunities available to you. Local schools are always looking for help in the classroom and for coaches. Also, your local Chamber of Commerce can refer you to a nonprofit organization that needs volunteers.

RESERVATION FORM General Membership Meeting **Pro Bono Appreciation Luncheon**

Please make ____ reservations for me at Rickey's Restaurant in Novato (See page 6 for directions).

on **Wednesday March 25, 2009**, from 12-1:30 pm.

Please choose one:____Chicken Breast Marsala ____Grilled Top Sirloin ____Grilled Vegetable Napoleon

Name(s) or Firm Name:_____ Phone:_____

❑ Enclosed check for _____($40 members and non members)

❑ Visa ❑ Mastercard _____ Exp _____

Please, we must have RSVP's by March 18, 2009.

Make checks payable to MCBA and mail to: MCBA, 30 North San Pedro Road, Ste. 140, San Rafael 94903.

Reservations are non-refundable unless the individual provides at least 24 hours cancellation notice to MCBA.

GOING GREEN

By Kate Rockas, MCBA Director

Americans buy more water in plastic bottles than any other nation in the world. It is estimated that we buy 29 *billion* water bottles every year. In order to make all of these bottles, manufacturers use 17 million barrels of crude oil. How much oil is that? It is enough to fuel approximately 100,000 cars for one year. Or, if you want to visualize it, picture a water bottle filled a quarter of the way up with oil – that is how much oil is needed to produce just one bottle.

In addition to requiring significant amounts of energy to manufacture plastic water bottles, plastic water bottles have other harmful effects on our environment. The manufacturing process for creating bottled water creates more than 2.5 million tons of carbon dioxide each year. It also takes more than three liters of water to create one liter of bottled water.

Clearly, there are many reasons to recycle plastic water bottles. Unfortunately, for every six water bottles we use, only one is recycled. The ones that are not recycled end up in our landfills, or worse, in our rivers, lakes and oceans. Plastic bottles take hundreds of years to disintegrate.

Another reason to avoid using plastic water bottles is that they are bad for your health. Plastic is a porous material, which means that some of the chemicals that were used to make the plastic leaches into the liquid it contains. You should pay attention to the recycling number on the bottom of plastic bottles. Numbers 1, 2, 4 and 5 are considered usable for human consumption (but you should not reuse them). Numbers 3, 6 and 7 should be avoided at all costs. These plastics are made from products which may leach out a human endocrine disrupter. Using plastics with any of these numbers over a prolonged period of time can actually change or interfere with the chemical balance of the human body.

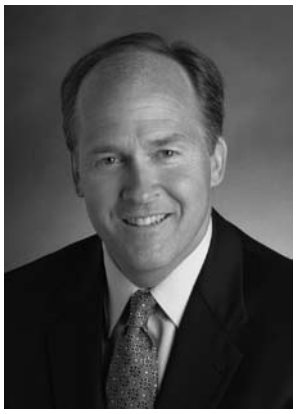
The bottom line is that instead of buying plastic water bottles, consider a greener solution. At your office, consider signing up for a water delivery service, or get a Brita water filter. For those of you on the go, buy a stainless water bottle and reuse it over and over.

Katharine E. Allen, Esq

WHEN GOOD LEASES GO BAD:
WORKOUT STRATEGIES FOR LANDLORDS AND TENANTS

*By Douglas Van Gessel, Esq., and Katharine E. Allen, Esq **

With consumer confidence plunging and companies significantly reducing their workforces, the remainder of 2009 will likely bring a rise in troubled commercial leases. Office and retail tenants alike will find themselves burdened with either too much space or rent that exceeds current market rates. Either way, more and more tenants will begin contemplating lease restructuring in the upcoming year.



Douglas Van Gessel, Esq.

The simplest solution for a tenant seeking to reduce its occupancy costs is to find a subtenant. However, in the current market, subleasing may not be feasible for most tenants due to an increase in supply and a decrease in demand for commercial space. Accordingly, tenants may seek more creative alternatives to alleviate their lease burden. Prior to taking action, the initial question a tenant must ask is whether the tenant and its business are sustainable in the long run. The answer to this question not only dictates the tenant's strategy in approaching its landlord, but also the options available to it.

Strategies for a Non-Sustainable Tenant

If, after careful consideration, a tenant determines that its business is not sustainable, reorganization or even dissolution is likely inevitable. This tenant will probably first attempt to reorganize or dissolve its affairs on its own, which, among other things, will require negotiating the early termination of its commercial leases. If all else fails, this tenant will file for bankruptcy.

If the tenant knows its business is going to fail, its first course of action will likely be to approach its landlord about voluntarily terminating its lease. With the threat of bankruptcy looming, a landlord may be more inclined to discuss this option in order to avoid receiving little or no lease damages in a bankruptcy liquidation. A lease termination agreement generally provides for the early termination of a lease in exchange for a lump sum payment to the landlord equal to a few months' rent due under the lease

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SUBLEASING CONCERNS

*By Douglas Van Gessel, Esq., and Katharine E. Allen, Esq **

The sudden and dramatic softening of the local commercial real estate market has led to a flood of sublease space on the commercial real estate market. Although this flood represents a potential windfall for those seeking to occupy commercial space, there are a number of legal pitfalls and practical problems commonly overlooked by potential sublessors and sublessees, who often rely on boilerplate sublease forms when entering into subleases.

The most basic pitfall involves the legal status of the parties to a sublease. It's often a surprise to sublessors to realize that they are not somehow released from their obligations under the master lease, which continue in full force and effect, notwithstanding the sublease. And a sublessee's rights pursuant to a sublease are entirely dependent upon the existence of the master lease for the space. If the master lease terminates, so does the sublessee's rights to the sublet space. Therefore, the sublessee must protect itself against the potential loss of its sublet space and the associated costs invested in the sublet space.

While the parties often assume that a sublease will be easier to draft than a master lease, that is frequently not the case. This article offers practical solutions designed to allow all of the parties to a sublease to successfully complete the transaction.

Sublessor Concerns

First, it is important for the parties to determine whether or not the master lease allows the sublease to occur. The landlord's consent is almost always required for an assignment or a sublease. In California, most leases state that the landlord's consent to a sublease is not to be unreasonably withheld. For a lease in California entered into after September 1983 which does not state the standard for a landlord's consent to a sublease (i.e., whether the landlord may withhold its consent to a sublease in its sole discretion, or the landlord cannot unreasonably withhold its consent to a sublease), California law implies that the landlord's consent may not be unreasonably withheld. Factors generally recognized by the courts as reasonable concerns of the landlord include the net worth and business reputation of the sublessee, and the proposed use of the sublease premises by the sublessee.

It is important to review the master lease, however, because less obvious requirements may give rise to a need for landlord's consent. For instance, many leases specify that a tenant may not sublease space to an existing tenant in the building or project, or to any entity with which the landlord has negotiated a potential lease within the last six months. Some leases also specify that the tenant may not enter into a sublease at less than the fair market value rent for the space or the rent otherwise being offered by the landlord in the building at the time of the request for consent to the sublease. Given that sublease rents are often less than those of direct lease transactions, such a requirement may be difficult to surmount. The parties should also review the master lease in order to determine the restrictions on use of the premises in order to ensure that the sublessee's proposed use of the sublet space is not in conflict with the master lease. Leases typically provide that any rights of the tenant to extend the lease term or expand the premises do not apply to sublessees, which may be a deal-breaker for the potential sublessee.

Many leases also provide a so-called recapture right of the landlord, allowing the landlord to respond to a request for a sublease by instead terminating the lease with respect to the space proposed to be subleased. If such a recapture right exists, it is important to determine the time period in which the landlord may exercise the right, and to refrain from spending any significant amounts with respect to the sublease until it is certain that the recapture right will not be exercised.

Sublessee Concerns

Terms of Master Lease

Given the dramatic swing in the commercial real estate leasing market in the past months, it may make sense for a sublessee to try to renegotiate some terms of a master lease rather than living with the terms that its sublessor was forced to accept in the pro-landlord market of the past few years. Although these subjects will be discussed in greater detail below, areas of particular concern to a sublessee often concern late fees, default rates of interest, the ability to make alterations to the sublease premises, the allocation of responsibility for capital expenditures and holdover rent provisions of the master lease passed through to the sublessee.

Terms of the Sublease

Once the sublessee has determined that the terms of the master lease will allow the sublease to occur, and that incorporation of the terms of the master lease will be acceptable to the sublessee, the terms of the sublease itself must be negotiated. The following is a list of some of the issues requiring the attention of the sublessee:

1. Definition of the Sublet Space. Although the portion of the premises subject to the master lease which is to be subleased as sublet space is often shown on a floor plan attached to the sublease, it is not uncommon for the parties to fail to understand fully whether the sublet space includes, or whether the sublessee at least has non-exclusive use rights to, lobbies, common areas, plazas, patios and lunchrooms servicing both the premises retained by the

(Continued on page 16.)

Assemblymember Jared Huffman and MCBA President Marlene Getchell

LEGISLATING SAUSAGES AND STIMULATING PORK!

JARED HUFFMAN SHARES HIS FRUSTRATIONS IN SACRAMENTO

By Andrew McCullough

At its General Membership luncheon meeting on February 20, 2009, the Marin County Bar Association was pleased to host Jared Huffman as its keynote speaker. A former member and director of the MCBA, Huffman represents Marin County in the California Assembly.

Barely 24 hours after the conclusion of a marathon legislative session, which culminated in a state budget and stimulus package, Assemblymember Huffman's prepared remarks to a full house acknowledged everyone's frustration with a legislative process that is all but broken. In the course of sharing anecdotes about the horse-trading that led to an agreement in the early hours of February 19, Huffman explained that the end result was a compromise no one liked but everyone agreed was necessary.

In addition to his remarks, Assemblymember Huffman reserved time to answer questions from the lawyers present. Regarding the supermajority vote required for tax increases, Huffman noted his support for a more modest voting margin of 55% but conceded that such a change faced stiff opposition from Republicans. He explained further that despite a growing consensus that revenue enhancement is badly needed, too many otherwise reasonable Republicans have been forced by conservative constituencies (and conservative talk radio hosts!) to oppose taxes regardless of the consequences to the state. Huffman is hopeful that a series of modest reform measures will promote more bipartisanship, but is skeptical that a constitutional convention, if convened, could avoid opening a Pandora's Box of other issues.

Despite his concerns over the legislative process, Huffman was optimistic in other areas. He noted that the EPA, under the Obama Administration, is poised to approve California's longstanding request for a waiver from preemption under the Clean Air Act, which will enable California (and other states) to impose strict standards for greenhouse gas emissions from motor vehicles. Huffman also intends to continue his opposition to the expansion of Death Row at San Quentin until his environmental concerns are appropriately addressed. And, finally, as the new Chair of the Water, Parks, and Wildlife Committee, Huffman says he is determined to address long-term water and other resource solutions for the state.

We wish Assemblyman Huffman well during the upcoming Assembly term, and we look forward to his future updates from Sacramento.

NEW FUNDING AUTHORIZES INCREASED FUNDING OF COUNTY LAW LIBRARIES

With Senate Bill No. 1407 taking effect in January 2009, the California Legislature and the Administrative Office of the Courts (AOC) have lifted a moratorium on County Law Libraries that previously prevented the Libraries from seeking the money needed to cope with inflationary and other economic pressures. The moratorium, which has been in effect since January 2006, was one component of the AOC's larger plan to stabilize filing fees statewide while reviewing the long-term needs of the court system.

SB 1407 restores the authority of Boards of Supervisors to increase by $3.00 a year a County Law Library's share of the court's 1st civil filing fees. This share of filing fees accounts for about 90 percent of County Law Library revenues. Marin's Board of Supervisors last approved a filing fee share increase in November 2004, raising the amount received by the Law Library to its current level of $32.00 per filing. Since that time, the price of an essential resource such as West's *Federal Reporter 3d* has risen from $82.85 to $126.11, a jump of slightly more than 50 percent, with all products from West and most other legal publishers showing comparable price increases.

According to Law Library Director Hal Aigner, the price jumps are indicative of the perennial problem of staying even with inflation. "In fiscal 1984-85," he comments, "the Law Library received $124,527 in filing fee revenues. That figure translates into $250,095 in 2008 dollars, using the American Institute for Economic Research on-line calculator. Yet, in fiscal 2007/08, filing fee revenue here was only $225,860, meaning that the Law Library now operates roughly $24,000 annually under budget in terms of adjusted real dollars when compared to 23 years ago."

"The lifting of the moratorium will not make filing and defending lawsuits any more costly," Aigner adds, "because civil filing fees are scheduled to remain at their current level until at least 2012. This means the AOC will be accommodating any fee share increase approved by a County Board of Supervisors, without the increase being passed along to consumers."

The Law Library looks forward to working with the Board of Supervisors, Marin's Superior Court and the legal community to avail itself of this opportunity.

DIRECTIONS TO RICKEY'S RESTAURANT

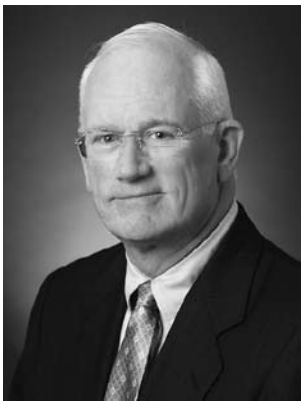
250 Entrada Dr., Novato, CA 94949
415-883-5952

DRIVING 101 SOUTHBOUND

- Take 101 South, towards San Francisco, and take the Ignacio Blvd/Entrada Drive exit.
- Turn right at yield sign just before the Shell station (Enfrente Dr.)
- At the stop sign turn right onto Entrada Drive.
- Entrada Drive dead ends to the left onto the Inn's property.

DRIVING 101 NORTHBOUND

- Take 101 North, towards Eureka, and exit off the Ignacio Blvd /Bel Marín Keys exit.
- Make a left at the stoplight at the end of the off ramp onto Nave Drive.
- Make a left at light onto Ignacio Blvd., which will take you over the freeway.
- At the light turn right at Enfrente Dr.
- Follow Enfrente Dr. through one stop sign.
- Enfrente dead ends at Entrada Drive turn right.
- Entrada Drive dead ends to the left onto the Inn's property.



LITIGATING IN LEAN TIMES

*By Bob Camors**

Are you getting a big litigation retainer up front these days? Tough times are here and that's no longer as easy as it used to be (if it ever was). Everywhere you look there is bad economic news and your corporate clients are wondering just how bad 2009 might be. That important case that was filed in 2007 or Q1 2008 to vindicate the company's rights may not look like smart business anymore to the board or the shareholders.

What should a savvy litigator do? Well, one size does not fit all and there is no magic bullet. So, let's start by trying to see the same picture the CFO sees: declining revenues, an extended A/R payment cycle, bankers looking over his shoulder, creditors becoming more strident every week, and layoffs in the works despite the added costs they entail. Given these pressures, small and predictable legal invoices are even more important to a CFO desperate to reduce overhead.

Here are five essential tips for the farsighted litigator:

Tip #1: ***A small team is the best way to keep attorneys' fees under control.*** Unless the matter absolutely demands a multidisciplinary approach, your client will be thankful that you've staffed the case modestly, with the lowest rate timekeepers you can justify. Once you've done that, don't forget to supervise the team!

Tip #2: ***A predictably moderate invoice is more likely to be paid promptly than an unpredictably large one.*** To accomplish this goal, propose an arrangement allowing the client to make set payments every month. When the monthly fee invoice is low, the excess payment goes into the trust account; when the fee is large, the overage in the trust helps retire the balance. The company and the lawyer both get predictability.

Tip #3: ***The lawyer must adequately forecast (and re-forecast) the incremental expense of pursuing litigation.*** This is critical for the business client, as the future cost of the litigation heavily influences the client's decision to continue with it. To avoid guesstimating, provide as much granular detail as possible. For example, keep a spreadsheet of common litigation tasks and their associated expenses (e.g., the true costs of a half-day deposition or an all-day document review), and share that data periodically with your client. As the litigation evolves, it will be that much easier to update the client with a revised forecast.

Tip #4: ***The client who wants to "keep it lean" must lift some of the load to reduce the fee.*** For example, if the client is staffed to provide draft discovery responses, encourage that practice. It's horribly inefficient for outside counsel to write out the first draft of answers to interrogatories if the client is better positioned to provide those responses. (On the other hand, never assume the client is able to frame the most appropriate discovery objections.) The lawyer should (of course) review and edit all of the client's "work".

Tip #5: ***Dust off your retention agreement and make sure it is both enforceable and that it adequately addresses the "slow pay or no pay" situation.*** See the helpful tips on the Marin County Bar Association web site under Fee Arbitration and the link to the State Bar Mandatory Fee Arbitration web site.

Good luck in 2009!

**Bob Camors is a litigator with Foley & Lardner in their Silicon Valley office. Formerly a partner at Thelen, Bob's practice emphasizes intellectual property disputes. He can be reached at: bobcamors@foley.com.*

THE IMPACT OF SIMPLE WORDS

*By Charlie D. Dresow, Esq.**

Never use 13,607 words when 272 will do. Legal language tends to turn simple thoughts into complex sentences filled with long and obscure words. A brief comparison of two speeches given on the same day commemorating the same event demonstrates how using simple, direct language is more effective. The first speech was 13,607 words and lasted for approximately two hours. The second speech was 272 words and took only two to three minutes to give. Following the event the first speaker wrote to the second speaker and stated, "I should be glad, if I could flatter myself that I came as near to the central idea of the occasion, in two hours, as you did in two minutes. My son who parted from me at Baltimore and my daughter, concur in this sentiment."

During his career Edward Everett was president of Harvard College, a United States Senator, a United States Congressman, and Governor of Massachusetts, and was appointed Secretary of State by President Millard Fillmore. His career was one of distinction. On the afternoon of 19 November 1863 Mr. Everett gave a two hour long oration to commemorate a turning point in United States history. Mr. Everett was chosen to give this speech because he was regarded as one of the finest orators in the United States at that time. His 13,607 word speech began:

"Standing beneath this serene sky, overlooking these broad fields now reposing from the labors of the waning year, the mighty Alleghenies dimly towering before us, the graves of our brethren beneath our feet, it is with hesitation that I raise my poor voice to break the eloquent silence of God and Nature. But the duty to which you have called me must be performed; - grant me, I pray you, your indulgence and your sympathy."

The next speaker began his speech by stating, "Four score and seven years ago our fathers brought forth on this continent a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal." President Lincoln's language was crisp and clear. President Lincoln's speech is carved into marble and continues to inspire new generations while Mr. Everett's speech lies quietly in the seldom disturbed archives of history.

The effectiveness of simple, direct words is illustrated by the final sentence of President Lincoln's address which continues to inspire so many: "It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth." In one sentence President Lincoln provided a clear purpose for the war and justified the sacrifices needed to reach that goal.

The contrast between the forgotten 13,607 word speech and the immortal 272 word speech is not just an interesting historical footnote. The simplicity of the Lincoln speech and its historical impact illustrates the power of simple, direct words. Mr. Everrett's speech was a work of art. It contained a vivid and detailed description of the battle and the events which led to the Union victory. He spoke of the glory of Athens and its reverence to those of its citizens that fell at the Battle of Marathon. He referenced world historical events such as The War of The Roses in England and the breakup of the Roman Empire. Yet after the speech Mr. Everett conceded that President Lincoln captured the moment better in two minutes than he had in two hours.

President Lincoln's speech did not provide a detailed summary of the events of the battle. He did not use long complex words. His language is as easily understandable today as it was when given over 145 years ago. He justified the necessity of the sacrifices of the battle and restated the reason for the struggle in a clear and concise fashion. If his speech is viewed as a closing argument he successfully persuaded the Union to continue the struggle.

President Lincoln did not use beautifully crafted sentences to convey his point. He described the purpose of the event as, "We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this." Compare this to Mr. Everett's explanation of why the commemoration was occurring: "We have assembled, friends, fellow citizens, at the invitation of the Executive of the great central State of Pennsylvania, seconded by the Governors of seventeen other loyal States of the Union, to pay the last tribute of respect to the brave men, who, in the hard fought battles of the first, second and third days of July last, laid down their lives for the country on these hill sides and the plains before us, and whose remains have been gathered into the Cemetery which we consecrate this day." President Lincoln's 38 words are far more concise than Mr. Everret's 88. They convey the same thought in a more direct manner.

Lawyers can learn an important lesson by studying the two speeches. Complexity does not equal clarity. Describing every fact does not lead to precision. And two hours can be forgotten in two minutes while two minutes can be remembered for an eternity.

**Charlie D. Dresow, Esq., recently founded his law office which focuses on criminal defense and motion practice. Mr. Dresow is a proud member of the Richard M. Sangster Inn of Court. In his spare time Mr. Dresow enjoys coaching youth football and reading history. He can be contacted at cdresow@gmail.com or (415) 300-7753.*

MARIN COUNTY BAR STANDING COMMITTEES AND SECTIONS 2009

BYLAWS COMMITTEE

	NAME	TELEPHONE	E-MAIL	Term
Chair	Eric Sternberger	(415) 453-9433	eric@rflawllp.com	2011
Board Liaison	Jessica Karner	(415) 456-4000	jkarner@marinlaw.com	2011
	Chris Sheron	(415) 898-3200	chris@sheronlaw.com	2011
	Terrel Mason	(415) 454-9880	tmason@rmm-law.com	2011

ETHICS/UNAUTHORIZED PRACTICE OF LAW & ADMINISTRATION OF JUSTICE

	NAME	TELEPHONE	E-MAIL	Term
Chair	Edward Berberian	(415) 499-6450	eberberian@co.marin.ca.us	2011
	Matt White	(415) 453-1010	matt@mattwhitelaw.com	2011
	Antonio Cortes	(415) 256-1911	corteslaw@comcast.net	2011
	Sean Kensinger	(415) 845-3265	SKensinger@co.marin.ca.us	2011
	Don Lesser	(415) 453-7600	dlesser@dal-attorneys.com	2011

CLE COMMITTEE

	NAME	TELEPHONE	E-MAIL	Term
Chair	David Zeff	(415) 923-1380	ZeffLaw1@aol.com	2011
	Robert Diskint	(415) 925-1000	robertdiskint@yahoo.com	2011
	Charles Dresow	(415) 300-7753	cdresow@gmail.com	2011
	Sean Kensinger	(415) 845-3265	SKensinger@co.marin.ca.us	2011

CLIENT RELATIONS COMMITTEE

	NAME	TELEPHONE	E-MAIL	Term
Chair	Judy Cohen	(415) 479-1400	jhbcohen@pacbell.net	2011
Vice Chair	Michael Fish	(415) 382-0100	mfish@fishandsnell.com	2011
	Bruce Blakely	(415) 381-6650	bruce@brucewblakely.com	2011
	Barri Kaplan Bonapart	(415) 332-3313	bonapart@treelaw.com	2011
	Judith Austin Brown	(415) 507-1400	judith@sharpbrown.com	2011
	Bernard Burk	(415) 434-1600	bburk@howardrice.com	2011
	Renee Chernus	(415) 455-8081	rchernus@aol.com	2011
	James Cohen	(415) 479-8400	james_cohen@sbcglobal.net	2011
	Colleen Doherty	(415) 482-7799	colldoherty@comcast.net	2011
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(General Membership, continued from page 1.)

William Gorenfeld, Roshan Jain, Rob Jaret, Christopher Jensen, George John, Heather Littlejohn, Jay Luther, Kevin Rodriguez, Nathan Sabri, Hussein Saffouri, Alex Sears, Perry Taubman, Natalie Thingelstad, and Randy Warren.

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Honorable Mention is for the following attorneys who provided valuable assistance to Legal Aid of Marin and/or contributed 20-45 hours in 2008: Sally Berger, Cory Birnberg, Pieter Bogaards, Matthew Brown, Karen Carrera, Fred Caspersen, Timothy Chambers, Judith Cohen, Jennifer Cowan, Karen Crockett, Natasha Cupp, Elizabeth Curtis, Craig Daniel, Jahmal Davis, Jennifer Ellis, Henry Froneberger, Lisa Goldfien, Myron Greenberg, Clay Greene, Joel Gumbiner, Robert Harrison, Shawn Hansen, Alice Hofer, Earl Hokenson, Charlotte Huggins, Glenn Kabanuck, Martin Konopken, Courtney Landis, Kathryn Mantoan, Christopher Miller, James Napoli, Jeb Pickett, Macolm Ruthven, David Scopp, Eric Seals, Margaret Sell, Todd Smith, Linda Swanson.

We would also like to extend **Special Recognition** to Carla Roy at Hanson Bridgett for her many extra efforts on behalf of Legal Aid of Marin.

Please make your reservations and join us on Wednesday, March 25, 2009.

(Ten Simple Requests, continued from page 1.)

frequently violated. Whether it's the size of the bill, the result of the case, the length of the transaction, the fact is that lawyers hate to predict outcomes. And so their clients are often surprised by what happens. Lawyers (especially litigators) also tend to be deadline-driven, going from fire to fire. When it's my matter on fire, I don't want to be the last to know. If a deadline is looming, or bad news has arrived from the court, or a new set of documents will need to be prepared, tell me NOW. If you surprise me later, I'm going to remember it

Tell me what it's REALLY going to cost. This repeats the cardinal rule, but with a bit more precision. If you've been practicing in your area for a while, you likely know what my matter is going to cost. So tell me the price and the variables that affect the price. If you lowball the figure, it will taint the matter later (no matter how good the outcome).

Be honest. I'm talking about your bill. If you push hard on the pencil, I will know. If you engage in the common duplicity of recording your assistant's time as your own, I will know. If you pad meetings, court hearings, travel time, I will know. I used to be in private practice, and I know all the tricks. I also know how long things should take, because I read a lot of bills from a lot of lawyers. The short-term gain of an "enhanced" bill is never, ever worth your integrity. Nor is it worth being fired later when the client finally wakes up.

Show me how much I'm saving. When you write off time because you don't know how you can bill for it with a straight face, let me know that. My two favorite words are "No Charge."

Letters should communicate, not inundate. If your client receives a heavy volume of mail (who doesn't these days?), be sparing with the written word. Letters and emails should be concise and formatted for quick understanding. If a reply is needed by a deadline, boldface your request. Do not send long explanations of the law or lengthy document/deposition summaries unless the client asks. Note: I rarely do.

Remind me what's going on. While your communications should be concise, they should also be frequent. (Again, no surprises.) When I was a new litigation associate, I was instructed by the senior partner to draft a monthly status report to each client for all pending litigation. I cynically viewed this as a billing opportunity. I now see the wisdom of regular letters. Just keep them short. And, with litigation matters, remember to recap the key facts and events. With multiple cases pending, and many other transactional matters competing for my attention, I sometimes need help remembering which case is which.

Tell me what to do. Each year I get at least one letter, from outside counsel, as follows: "Opposing counsel has

(Continued on page 14.)

(Ten Simple Requests, continued from page 13.)

served a demand of $_____. Please advise as to your response." I do not have a response. I am paid to analyze the options and select those that are in the best interests of my company. So, help me out. Tell me what the options are and what you recommend. And, by the way, if I routinely accept your recommendation, that is a good sign.

Tell me what the law is. Most in-house lawyers are forced to be generalists, facile in some areas and ignorant in others. In smaller companies, which do not have inside counsel, the legal sophistication can be quite modest. So, inevitably, a matter will arise where the client is clueless. If so, outside counsel must educate the client early on. And the education process must continue throughout the life of the matter. This prevents big misunderstandings. If I feel uninformed at the end of a matter, and its result or cost is a surprise to me, I will blame you. Bottom line: your excellent legal work is worthless if I do not understand it.

Get to know me and my business. Every client is different. Each has his or her own preferences, and you won't know what they are if you've never met your client contact. This can be an issue when a company is referred to and retains counsel out of state. It also happens with local and regional referrals. If you are the new counsel, find an excuse to visit your in-house contact. The personal touch is important, but you will also have the chance to learn about the organization, its hierarchy, and your contact's authority within that hierarchy. You might even meet other people in the organization who will retain your services if your contact person leaves. Fundamentally, though, you will improve your client's trust if he or she has met you. In those few instances where I use counsel I have never met, I wonder whether they are as competent and presentable as my referring source claims.

Pretend I'm your only client. This needs no explanation. I'm pretending it's true, and so should you.

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(When Good Leases Go Bad, continued from page 3.)

plus any unamortized portion of tenant improvement and brokerage costs incurred in connection with the lease. Additionally, the parties may wish to address other issues in the lease termination agreement, such as what happens to any rent already past due, the security deposit, the condition of the premises upon surrender, and the removal of tenant improvements or furniture. A savvy tenant will also bargain for a general release of all claims and obligations under its lease (including California Civil Code Section 1542 language) as part of any lease termination agreement.

A key obstacle a tenant may encounter in negotiating a lease termination agreement is its ability to make a termination payment. The termination payment is generally made upon termination in a lump sum cash payment. In many instances, the security deposit held by the landlord can be used to offset the amount of the termination payment. However, if the tenant cannot make a lump sum cash payment even with the application of the security deposit, the parties may consider an installment payment arrangement. Nonetheless, a landlord will likely have concerns about such an arrangement given the uncertainty over the continued existence of the tenant and its ability to make those payments when they come due. The landlord might suggest that any such payment obligation be secured by a letter of credit or promissory note secured by additional collateral.

While the threat of bankruptcy may give the landlord an incentive to reach an agreement for the early termination of a lease, this threat is somewhat of a double-edged sword. Landlords should be aware that if the tenant ends up filing for bankruptcy even after its initial restructuring or dissolution attempts, any termination agreement entered into within ninety days prior to the tenant filing for bankruptcy risks being treated as a preferential transaction under the U.S. Bankruptcy Code. As a result, a landlord could end up being bound by the termination agreement but having to return any payments made under the agreement within such ninety day period to the bankruptcy estate. Therefore, any lease termination agreement should state that it unwinds and the parties retain their existing remedies if the agreement is deemed a preference in bankruptcy court.

If a failing tenant is not successful in negotiating a lease termination agreement with its landlord, its only other option to rid itself of its lease may be through bankruptcy. If the tenant files for bankruptcy, the bankruptcy trustee, upon request by the tenant within 120 days after the bankruptcy petition (subject to extension for an additional 120 days) has the power to reject the lease, thus effectively forcing the landlord to accept termination. If the lease is rejected, Section 502(b)(6) of the U.S. Bankruptcy Code caps the amount of damages recoverable by the landlord to the

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greater of (a) twelve months rent or (b) fifteen percent of the rent for the remainder of the lease term, not to exceed three years. The amount of any security deposit or draws made on any letter of credit held by the landlord will be applied to offset these capped damages. However, the stark reality for a landlord is that it will likely not receive its statutory damages unless there are sufficient funds in the bankruptcy estate to pay all of the tenant's unsecured creditors.

Strategies for a Sustainable Tenant

If a tenant's business is sustainable in the long run and it simply suffers from a temporary decrease in profitability, the goal of both the landlord and the tenant should be to arrive at some compromise to ensure that the lease also remains sustainable. In this instance, bankruptcy is not an effective option and, in any event, the tenant will most likely want to keep the leased space with a few adjustments. Thus, the tenant's primary objective will be to reduce the financial burden of the lease by negotiating a temporary reduction in the rent in exchange for other concessions.

One approach is to reduce the amount of space leased and/or relocate the premises to a less desirable or less improved location in the building. This is especially appealing to the landlord if it frees up a full floor of space, for example, to lease to a new tenant.

Another approach is to alter the amount of rent due under the lease, either by unconditionally reducing the rent per square foot, declaring a lease "holiday" for a discrete period of time, or deferring a portion of the rent until later during the term of the lease. It is not uncommon for the parties to agree to extend the lease term in exchange for the rent reduction under the theory that by granting the rent reduction the landlord is creating a more viable tenant the landlord will want to lease to for a longer period of time. However, a landlord will want to condition any such rent modification on the tenant not defaulting in the future. Upon any future default, the tenant's previous higher rental obligations return.

A landlord's rental accommodations typically come at a price to the tenant, however. Landlords will typically look to strip the lease of: (i) existing economic advantages, such as undisbursed tenant improvement allowances or impending free rent or moving allowances; (ii) tenant options, such as early termination rights, expansion and/or extension options; and/or (iii) generally favorable provisions, such as representations and indemnities given to the tenant in a more generous leasing market. In addition (or in the alternative) to such provisions, landlords might ask for additional lease guaranties or increased security deposits (or a security deposit in the form of a letter of credit instead of cash), or introduce net worth, income flow or other financial tests to be met in order for the tenant to expand the premises or extend the lease, or possibly as a covenant allowing the landlord to terminate the lease if such financial test is not met by the tenant. More aggressive landlords might also ask for a stipulated judgment for possession of the premises, avoiding the eviction process in the event of a subsequent tenant default. Finally, sometimes a landlord will ask for – or a tenant will offer – warrants in the tenant's company at an attractive "strike price" under the theory that a landlord who grants a tenant rental concessions is much like an economic partner in the company who deserves a piece of the "up side" created by those concessions.

The foregoing overview is not an exhaustive list of all possible options available for dealing with troubled leases. It is merely meant to outline several ways to address leases involving too much space or that are above market rents. The best available option will vary based on individual circumstances, and landlords and tenants will want to discuss all of these options with experienced counsel.

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(Subleasing Concerns, continued from page 4.)

sublessor and the sublet space. Also, it is currently a common practice for sublessors to either lease or sell their furniture and/or other equipment to their sublessees. In any particular sublease, the parties should determine whether the sublessor desires to sell or lease such furniture and/or other equipment at the time of the sublease. If the sublessor sells such furniture and/or other equipment to the sublessee, the sublessor should deliver a bill of sale stating that the sublessor is the owner of such items, and that the items are not currently encumbered by any liens. The sublessee should have the free right to remove such furniture and/or other equipment from the sublet space at any time.

2. Condition of the Sublet Space. Is the sublet space to be delivered on an "as-is" basis, or is it to be built-out by the sublessor or the landlord? There are special issues associated with the landlord's control of the build-out and/or use of tenant improvement allowance for the sublet space. If the sublessee is subleasing space which has not been substantially completed by the landlord, or is given a portion of the tenant improvement allowance that is provided to the sublessor by the landlord under the master lease for completion of the sublessee's improvements, it is important for the sublessee to obtain estoppel certificates or other statements affirming the current status of construction and describing the conditions that will be imposed on the sublessee's use of the tenant improvement allowance for completion of the sublessee's tenant improvements.

3. Sharing Functions of the Leased Premises. It is important for the sublessor and the sublessee to allocate responsibility with respect to services and utilities that are provided jointly to both the sublessor's premises and the sublet space. Are the utilities that are provided to the sublet space separately metered? If not, the parties should determine whether a sub-meter should be installed and, if so, at whose expense. In the alternative, the parties may determine a manner for the equitable allocation of the cost of the utilities. To the extent that the sublessor has the right as the tenant under the master lease to choose certain utility providers, the sublessee might consider requiring a say in that choice. The sublessor and the sublessee should also consider how to approach issues related to the cost of after-hours HVAC or electrical systems.

4. Landlord's Obligation to Provide Services for a Sublet Space. Typically, a master lease specifies that the landlord is to provide building services and utilities to the tenant. These services include plumbing, electricity, water, janitorial service and maintenance, and repair of common areas. However, because a sublessee does not have a direct contractual relationship with the landlord, it has no redress against the landlord for the landlord's failure to provide such services or utilities to the sublessee or other occupants of the building.

Attorneys will often negotiate over whether the sublessor must use "diligent," "reasonable" or "best" efforts. In any event, it is important for the sublessee to attempt to provide in the sublease that the sublessee has the right to sue the landlord in the name of the sublessor in order to ensure that such services and utilities are provided to the sublet space.

5. Protecting Sublessee from a Sublessor's Default. A sublessee should obtain a good understanding of the financial strength of any proposed sublessor. Does the sublessor have sufficient financial strength to perform its obligations under the master lease? Will the sublessor be paying more rent under the master lease than the sublessee will pay under the sublease? If so, what, if anything, should be done to assure the sublessee that the sublessor is in a financial position to pay the difference in rent?

The following are strategies commonly used by sublessees to protect themselves against defaults by sublessors under master leases:

First, the sublessee might request a recognition agreement from the landlord pursuant to which the landlord agrees to recognize the sublease as a direct lease between the landlord and the sublessee in the event that the tenant defaults under the terms of the master lease. Landlords are historically reluctant to provide recognition agreements, because recognition agreements interfere with landlords' ability to play the market in the hope of an increase in fair market rental values.

If the sublessee is unsuccessful in obtaining a recognition agreement, it should at least attempt to obtain an agreement from the landlord that the landlord will simultaneously deliver to the sublessee a copy of any default notices that the landlord provides to the tenant under the master lease and that the sublessee will have the right to cure such defaults.

In addition or in lieu of a recognition agreement, a sublessee might also bargain for the ability to pay the sublease rent directly to the landlord in order to defeat the potential diversion of the sublessee's rent. The sublessee should obtain an indemnity from the sublessor for damages resulting from the sublessor's defaults under the master lease.

Also, the sublessor should covenant to promptly provide the sublessee with any notices of defaults and other matters received by the sublessor. The sublessor should also agree not to amend the master lease in any manner that would adversely affect the sublessee.

6. Protecting Sublessee Against a Landlord's Default. Because the sublessee's rights to the sublet space are dependent upon the existence of the master lease, the sublessee also has an interest in making sure that the master lease is not terminated due to a failure of the landlord (i.e., the owner of the building) to pay when due any debt encumbering the sublet space. If the landlord fails to pay such debt, and the lender forecloses as a result, any lease of the property which was executed after the loan was made may be terminated by law, unless the tenant in question has received a non-disturbance agreement from that lender promising that the lease will survive the foreclosure so long as the tenant is not in default under the lease.

Subsequent to a foreclosure, a sublessee's interest in its sublease will rise or fall with the status of the master lease. Therefore, a sublessee should make sure that such a non-disturbance agreement has been granted to the sublessor. This protection is especially important as the commercial real estate market continues to soften.

7. Protection from Termination of the Master Lease.

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(Subleasing Concerns, continued from page 16.)

Again, because the existence of the sublease is dependent upon the existence of the master lease, the sublessee will want to prevent the master lease from terminating for any reason. The sublease should contain a covenant of the sublessor not to terminate the master lease pursuant to a separate agreement between the sublessor and the landlord. The master lease may also provide that the sublessor, as the tenant under the master lease, has the right to terminate the master lease under certain circumstances if the premises are affected by casualty or condemnation, or if there is an interruption of services to the premises. The sublessee should try to control that decision to terminate, if at all possible.

8. Surrender Obligations. If the sublessee will perform an initial build-out of the sublet space, the sublessee should consider incorporating an agreement into the sublease regarding whether or not such build-out must be removed at the end of the term of the sublease. The sublease should also include a provision stating that the sublessee is not required at the end of the term of the sublease (and the lease) to remove any alterations made by the sublessor, or which were already in the sublet space at the time the sublease term began.

9. Alterations. If the sublessee already has plans for the alterations and intends to build out the sublet space, the sublessee should obtain approval of those plans from the landlord and the sublessor at the time the sublessee enters into the sublease in order to eliminate the risk of later disapproval by the landlord and/or the sublessor. If the master lease provides that the landlord is entitled to construction management fees in connection with any alterations to the premises, such fees should not be incorporated by reference into the sublease (and construction management fees should not be paid by the sublessee to the sublessor).

10. Parking. The sublease should discuss the sublessee's rights to use the parking spaces that are provided by the master lease (or by a separate parking agreement). The sublessor and the sublessee should consider how they will police the parking areas to ensure that neither party is exceeding its share of parking rights.

11. Signage. The sublease should discuss what rights, if any, the sublessee has to the sublessor's signage on the building directory, on the door to the sublet space, and, if applicable, to the premises. The sublessee might also consider having both landlord and the sublessor pre-approve any signage actually contemplated by the sublessee.

Current market conditions provide users of space a rare opportunity to sublease space at reduced rental rates. However, the same market conditions have created an unprecedented number of legal and practical pitfalls for the unwary. The suggestions offered above, in combination with the advice of seasoned real estate counsel, should help avoid most of the concerns of the parties to a sublease.

**Doug Van Gessel is a partner with Sheppard Mullin Richter & Hampton in San Francisco. His practice focuses on real estate and business transactions. He can be reached at dvangessel@sheppardmullin.com. Katey Allen is an associate at Sheppard Mullin Richter & Hampton in San Francisco. Her practice emphasizes real estate and land use. She can be reached at kallen@sheppardmullin.com.*

DETAILS FOR CALENDAR

March 18, 2009
ADR Section Meeting, 12 – 1:30 pm
Speaker: To be announced.
Location: Seafood Peddler
The luncheon provides attendees with an interesting presentation involving alternative dispute resolution topics, as well as one (1) hour of MCLE credit. If you have questions or would like your email address added to the ADR Section Announcements list, please contact The Law Office of Robert B. Ingram at (415) 499-0800 or hannahleigh@ingramlawoffices.com.

March 18, 2009
Probate & Estate Planning Section Meeting, 12 – 1:30 pm
Speaker: Philip Hayes, Bessemer Trust
Topic: State Fiduciary Income Tax
Location: The Rafael Corporate Center,
750 Lindaro, San Rafael

March 19, 2009
Real Property Section Meeting, 12 – 1:30 pm
Location: Seafood Peddler
Topic: Mechanics Liens, Stop Notices, and Payment Bond Claims During The Real Estate and Credit Erosion
Speaker: Mark J. Rice
For more information and to sign up, please contact section co-chair Derek Weller at derek@derekwellerlaw.com or call (415) 453-1375.

March 20, 2009
Intellectual Property Sec. Meeting, 12 -1:30 Brown Bag Lunch
1.5 hours of substance abuse CLE credit
Protect your intellectual capacity or "wetware"
New brain scanning technology shows the physical results from the consumption of caffeine, nicotine, alcohol and other lawyer staples. Free to IP Section Members, $35 dollars to all others.
Allman & Nielsen, P.C. 100 Larkspur Landing Circle, Second Floor Conference Room, Larkspur
Questions - contact Steve Nielsen, Steve@Nielsen-Patents.com or www.NielsenPatents.com

March 23, 2009
Probate & Trusts Mentor Group, 12-1:30 pm
An informal forum to further discuss issues addressed at the monthly estate planning section meetings or any other issues. Bring your lunch and interesting estate planning/trust administration/probate issues to discuss, and snacks will be provided.
Location: 802 B Street, San Rafael
Parking is available in the City of San Rafael parking lot on B Street south of 4th Street.

March 27, 2009
Diversity Section Meeting, 4:00 p.m.
Public Defender Office, Room 139, Marin Civic Center
Contact: Jose Varela 499-6333

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THE MARKETPLACE

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LEGAL SECRETARY – LEGAL ASSISTANT Flexible. Justin Soderberg Tel: 892-8920 Email: bfhwater@yahoo.com

LEGAL SECRETARY - Need help with motions, complaints, discovery? I am conscientious, responsible and reliable with 20 years experience. Barbara Plaut - 515-2400, email: browneyedbarbara@gmail.com. Available for temporary - sick leave - or long-term assignment.

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Deadline for submission of articles, ads, inserts, and announcements is the 15th of each month. Thank you.

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