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The Marin Lawyer

An Official Publication of the Marin County Bar Association

Hon. Lynn Duryee

Hon. Faye D'Opal

HEAR FROM THE MARIN COUNTY BENCH AND GET 5 HOURS OF CLE CREDITS AT THE SECOND ANNUAL CLE FAIR

Matt White

If your last name ends with the letter A through G, you will need your 25 CLE hours by February 1, 2010. If you are short, not to worry. Your Marin County Bar Association, in conjunction with the Marin County Women Lawyers, will present the Second Annual CLE Fair on Saturday, November 14, 2009 at the Four Points Sheraton in San Rafael, from 8:00 am to 3:00 pm. This is an opportunity to get 5 hours of CLE credits at once, including the much sought-after Ethics, Substance Abuse, and Elimination of Bias credits. And you can get your credits in one morning, at a convenient San Rafael location, with your friends and colleagues from Marin County, all while enjoying the included breakfast and catered lunch.

You will be able to hear Judge Duryee and Matt White give a presentation during the 11:30-12:30 pm time slot titled "Dumb Mistakes Smart Lawyers

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Calendar of Events

November 14th
Second Annual CLE Fair
Four Points Sheraton
(See insert)

November 16th
Intellectual Property Section Meeting
12 – 1:30 pm

November 18th
ADR Section Meeting
12:00 – 1:30 pm

December 11th
Holiday Party
5:30 - 7:30 pm
1120 Nye St., San Rafael
Save the Date!

Look for details each month in *The Marin Lawyer*

In This Issue

Houman Chitsaz was Guest Editor of this issue of *The Marin Lawyer.* Philip R. Diamond is Series Editor for 2009.

SOCIAL NETWORKING SITES AND BLOGS:
THE GOOD, THE BAD & THE UGLY FOR EMPLOYERS

*By Seth L. Neulight**

In today's electronic age, social networking websites are transforming how we communicate and even the way we do business. From students to job seekers to corporate CEOs, an increasing number of us are using sites like Facebook, LinkedIn, and Twitter to stay connected and to exchange information with friends, co-workers, and the general public. Users display personal profiles, post information and photos, and invite others to join their networks. The Internet also includes countless blogs, or personal webpages, where individuals or organizations host content focused on a particular subject matter.

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PRESIDENT'S MESSAGE

PRACTICING LAW IN A CIVIL MANNER

By Marlene P. Getchell

Recently, I was involved in a hotly contested hearing in San Francisco Superior Court. As I left the courtroom following the proceeding, the opposing counsel (who shall remain nameless) followed me out of the courtroom, continuing to vigorously argue about the motion we had just argued before the Court. He wouldn't let me walk away, and literally "got in my face" and continued arguing in a loud and abusive manner until the bailiff, who had seen what was going on and followed us out of the courtroom, interrupted to ask me if there was a problem.

This incident was extreme in my 30+ years of law practice, but hardly isolated. I frequently see other examples of lack of civility in the legal community. Bloggers are charging our judges with "undisputed lawbreaking activity" and calling them names. Other bloggers who appear to be attorneys continue to insult each other while both criticizing and defending our Courts.

Maybe this simply reflects a problem that's not confined to attorneys, but is also rampant in our society at large. Kanye West recently stormed onto the stage during the MTV Video Music Awards to complain that Beyonce's Single Ladies video should have won Best Female Video. Congressman Joe Wilson from South Carolina shouted out "you lie" during President Obama's health care address to Congress. The list goes on and on.

In a recent article published by The New York Times, author John Schwartz writes about attorneys reprimanded and fined for posting "intemperate" blogs about the court and judicial process. In one instance, a Florida attorney questioned the motives and competency of a judge who regularly gave defense attorneys only one week to prepare for trials, when most judges gave a month or more. The Florida attorney blogged about the judge, saying she was an "Evil, Unfair Witch." After reviewing briefs on First Amendment issues, the Florida State Supreme Court upheld a disciplinary agreement and the attorney paid a $1200 fine. In another case described in The New York Times article, a lawyer from Illinois lost her 19 year job in the Public Defenders' Office when she wrote posts to her blog in 2007 and 2008 that referred to one jurist as "Judge Clueless" and went on in other blogs to describe cases she had worked on. In Southern California, an attorney received a 45-day suspension and was ordered to pay $14,000 in legal fees because he failed to disclose he was an attorney during jury selection and he posted details of the case on his blog during the trial.

While rude and uncivilized behavior may be rampant in society as a whole, we attorneys, as counselors and sworn officers of the court, are properly held to a higher standard. It is not just a matter of professional etiquette or even common courtesy, although those are motivating factors for most attorneys. Our duties and obligations of civility are written into the law itself.

There are many legal and ethical rules that set the standards for proper interaction between lawyers and judges. Rules governing professional courtesy and civility among attorneys are really just common sense rules that should apply to individuals attempting to live in a civilized community. This article is not a legal dissertation about how far an attorney can go in vigorously representing a client before getting disciplined. It is about providing information to assist the practitioner in reining in the kind of conduct referred to above while engaged in zealously representing and advocating the clients' interests.

In 1997, the MCBA's Board of Directors adopted is own Code of Civility which is available on MCBA's website www.mcba.com.. MCBA's Code of Civility is a common sense approach to the practice of law and attempts to get rid of some of the childlike gamesmanship that sometimes

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THE BREAKING WAVE:

THE ABC'S OF FORE-CLOSURE LAW

*By J. Timothy Nardell**

In recent months, we have received an increasing number of calls from both borrowers and lenders seeking advice on defaulting loans. This trend, unfortunately, appears likely to continue. While the news of late has been full of talk of an economic recovery, the foreclosure crisis is still cresting. In mid-2006, approximately 55% of foreclosures were on "bottom tier" homes, and "top tier" homes accounted for barely 18%. But by the middle of 2009, bottom tier homes accounted for only about 35% of foreclosures, with top tier homes accounting for approximately 30%. (*Foreclosures Grow in Housing Market's Top Tiers*, Wall Street Journal Online, October 13, 2009.) This trend suggests that the foreclosure crisis has passed through the subprime market and is catching up with more "mainstream" borrowers — like Marin county homeowners. We may not be able to help our neighbors in distress, but in times like these, we should all know at least the ABC's of foreclosure law.

In California, a lender with a secured interest in real property has the right to pursue a loan in default through processes of judicial or non-judicial foreclosure. Judicial foreclosure involves a court action, where the lender seeks a decree of foreclosure and order for sale. (Cal. Code Civ. Proc. §725a.) Following the foreclosure sale, the lender may (subject to the anti-deficiency rules) obtain a judgment for any remaining debt. Non-judicial foreclosure is an accelerated remedy which allows the lender to obtain ownership of its security without being subject to the costs and delay of the court process. Non-judicial foreclosures are by far the favored remedy for lenders. However, they are available only if a power of sale clause is contained in the security instrument (which is almost universally the case) and are subject to strict statutory rules. (*See* Cal. Civ. Code § 2924 *et seq*.) For lenders, non-judicial foreclosures provide a speedier process that avoids court action, and cuts off any remaining right of redemption to the defaulting borrower after the foreclosure sale. Generally, three months after a Notice of Default is filed, the foreclosing creditor can record and disseminate a Notice of Sale with 20 days notice. This allows for a public auction of the property within four months of filing the initial Notice of Default. The trade-off for this expediency is that no deficiency judgment is allowed after a non-judicial foreclosure, and any variance from the statutory requirements can nullify the process.

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BROKERAGE COMMISSION – EARNED AT EXECUTION OF CONTRACT OR UPON CLOSING?

PROPER DRAFTING IS IMPERATIVE

By Scott D. Rogers © 2009*

Another recent California Court of Appeal decision underscores the need for careful drafting of real estate contract documents. In *RC Royal Development and Realty Corporation v. Standard Pacific Corporation*, 2009 Cal. App. LEXIS 1606 (September 29, 2009), the buyer ("Standard Pacific") was held liable for payment of a commission to its broker ("RC Royal") based upon its agency agreement with RC Royal notwithstanding that Standard had justifiably terminated the purchase agreement. The court determined that the contract, as drafted, did not condition payment of the brokerage commission upon closing but instead was deemed earned upon execution of the purchase agreement.

Background

RC Royal contacted Standard Pacific regarding availability of properties in downtown Los Angeles which RC Royal thought might be appropriate for development by Standard Pacific. Standard Pacific entered into an agency agreement with RC Royal pursuant to which RC Royal would be paid a 1.5 percent brokerage commission should Standard Pacific purchase the property. The agency agreement provided for payment of the commission through escrow at closing.

After its preliminary investigation of the property, Standard Pacific executed a purchase agreement to acquire the property. The purchase contained many of the usual conditions including satisfaction of Standard Pacific's due diligence review, issuance of certain entitlements and receipt of temporary certificates of occupancy. After waiving its due diligence contingency and entering into sale contracts with prospective condominium purchasers but prior to receipt of temporary certificates of occupancy, Standard Pacific terminated its purchase agreement for the property based upon substantial delays in the seller's completion of the project and deterioration of the market for condominiums in Los Angeles. In conjunction with its termination of the purchase agreement, Standard Pacific forfeited $4,000,000 in earnest money and transaction costs. Standard Pacific refused to pay any commission to RC Royal.

RC Royal filed an action for payment of its brokerage commission alleging breach of contract and breach of the implied covenant of good faith and fair dealing. The substance of RC Royal's complaint was that Standard Pacific's failure and refusal to consummate its purchase breached both the agency agreement and the implied covenant. The trial court granted Standard Pacific's motion for summary judgment finding that under the agency agreement RC Royal's brokerage commission would be payable only when all contingencies had been removed and escrow actually closed. The trial court also held that Standard Pacific's decision to terminate the purchase agreement was justified and did not constitute a breach of the implied covenant of good faith and fair dealing.

Analysis

The appellate court viewed the contract and circumstances very differently and read the agency agreement more literally. In reversing the trial court's determination that no commission was due, the appellate court focused on two specific provisions of the agency agreement. The first specified that the commission would be payable "in the event the Property is purchased...." The second defined "Purchase" as including any and all acquisitions of "any direct or indirect beneficial interest in the Property, including, without limitation, any lease, option, finance, exchange, stock purchase, joint venture or other transaction...."

The appellate court found that once Standard Pacific had entered into the purchase agreement it acquired "equitable title" to the property and consequently obtained a "beneficial interest" in the property sufficient to trigger Standard Pacific's obligation to pay the agreed upon brokerage commission to RC Royal. The court rejected the contention that close of escrow was a condition precedent to payment of the brokerage commission holding that reference to escrow was merely a description of the timing of the payment. Its reasoning was that the contract definition of "Purchase" included several scenarios in which no escrow would exist at all (e.g., lease or stock purchase). The court specifically noted the absence of language indicating that escrow must close before the commission is earned.

The appellate court also reversed the trial court's finding that Standard Pacific had not breached the implied duty of good faith and fair dealing. The court noted that although

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THE GOOD, THE BAD, AND THE SCARY:
JUDGES EXPLAIN STATE OF THE MARIN COURTS

Before a capacity crowd of local lawyers and nearly each Marin County judicial officer, Judge Verna Adams identified some growing challenges for the Marin County Courts. The presentation took place at the November general membership meeting of the Marin County Bar Association, held at the Embassy Suites in San Rafael on October 28.

Judge Adams, who will continue to serve as the Presiding Judge through 2010, noted the imminent retirement of Judge Michael B. Dufficy, who has served since 1990. Judge Dufficy's replacement will be determined by an election, but his position will probably not be filled in the interim. Due to state budget cuts, it is also unlikely that the Judicial Council will assign a temporary judge to serve during the vacancy. This leaves the courts one judge short. The civil department, which until recently had four judges, will be down to two.

Other budget issues will further burden the dockets. The state government ordered the courts closed one Wednesday each month, which has already caused calendar disruption. Clerks, bailiffs, and reporters can no longer stay past 5 p.m.; the days of all-evening settlement conferences are no more. Judge Adams reported that she is reusing every scrap of paper, and not just for environmental reasons.

Judge John Sutro, the presiding judge of the civil department, also addressed the membership. He thanked lawyers for their frequent volunteer service as judges *pro tem* and bench-bar settlement panelists.

Judge Faye D'Opal, presiding judge of the family law department since the beginning of this year, emphasized the importance of access to justice for everyone. She expressed great disappointment that the state government was limiting that access by underfunding the courts.

There was at least one bright note. Judge Lynn Duryee, presiding judge of the criminal courts, described a settlement program that has reduced the number of backlogged misdemeanor cases by 75%. She attributed much of this success to the hard work and cooperation of Deputy District Attorney Leon Kousharian and Deputy Public Defender George Shea; she presented each with an "Exemplary Service in the Administration of Justice" award.

Judge Adams noted that judges cannot defend themselves against criticisms involving pending cases. She thanked the local bar for speaking up for the judges and in support of an independent judiciary.

Finally, the general membership approved the slate of MCBA officers and incoming directors to serve with 2010 President Beth Jordan: Otis Bruce, Jr., President-elect; Jessica Karner, Treasurer; Tim Chambers, Secretary; and Larry Baskin, five-year Past President. New Director slots will be filled by Elizabeth Brekhus, Joel Gumbiner, Riley Hurd, Lisa Maslow, and Randy Wallace.

GOING GREEN

By Kate Rockas, MCBA Director

Incoming MCBA Director Lisa Maslow was recognized at the October 28, 2009, Judge's Luncheon for obtaining Four Stars in the MCBA's Green Star Program.

Lisa has been practicing labor and employment law since 1983. After 15 years of defense litigation in San Francisco, she went solo with a home office in Mill Valley in 1998. Lisa's primary practice consists of advice and counseling to employers, helping them stay out of court and effectively managing their employees. She also conducts independent workplace investigations of discrimination, harassment, and whistleblower complaints. Lisa occasionally assists individuals in the review of severance agreements and employment agreements.

Lisa is married to Jonathan Rolnick, another labor and employment law attorney who works in the San Francisco City Attorney's office. Lisa and Jonathan have three children, ages 18, 12 and 10. Lisa enjoys attending the theater and loves all kinds of music. She can be seen hiking the hills of Marin County, swimming laps at the Strawberry Rec Center pool, and at numerous school fundraising events.

Lisa has incorporated *green* practices in her home and office for many years. In her office, she uses recycled paper products and refilled cartridge toners. Her primary method of communication is by email. She has been archiving client emails for the past ten years. Lisa has very minimal paper files for her clients and recycles most of that paper when it is time to discard the file. Lisa prints on both sides of paper and uses JFAX to receive electronic versions of incoming faxes. All client invoices are sent by email and most online research is never printed on paper. Lisa doesn't heat her office – she wears extra sweaters and drinks hot tea to stay warm.

In her home, Lisa and her family use stainless steel water bottles and recycle paper, glass and plastic. They use Energy Star appliances, an electric lawn mower, and recently installed carpet floor tiles made of recycled material. Her husband and younger daughter have a vegetable garden and just started composting.

Congratulations on the Four Stars, Lisa! Many thanks to you and your family for your *green* contributions to our county.

MEET YOUR DIRECTORS

SPOTLIGHT ON STEVE NIELSEN

The Marin Lawyer decided that it would be a good idea to let the MCBA membership get to know a little more about the MCBA Directors whom they elected, and who give so much to make the MCBA a great, vibrant, organization. To that end, *The Marin Lawyer* ran a series of articles, each focusing on a different MCBA Director or Officer. Having now "spotlighted" all current Directors and Officers, this month, our spotlight is on MCBA Intellectual Property Section Chair Steve Nielsen.

The Marin Lawyer: What is your practice area?

Steve Nielsen: I focus on the procurement of patents before the United States Patent & Trademark office and patent litigation in federal court.

TML: Do you have any particular emphasis?

SN: I work on obtaining all types of patents, with the exception of stem cell projects and complex biology cases. But, I have litigated all types of patents, including cervical cancer detection methods, and cancer cell staining and medical devices. I try to stay out of biology labs as the smell and filth turn my stomach. On the other hand, optical, electrical and mechanical environments are usually clean and orderly.

TML: Why did you decide to become a lawyer?

SN: I grew up in Placerville where the only culture was agriculture and commercial logging was the main industry. In high school I worked for a logging company setting chokers (large steel cables) around fallen trees. I would hook the cables to a bull dozer, which would plow over small trees while dragging the logs miles away to a loading area. The logs would kick up all kinds of debris and some plowed trees would snap back and propel pine cones and branches in unpredictable directions. Many of my co-workers lived in tents on the job sites and might have been able to field one full set of teeth as a group. While I enjoyed the smell of the outdoors and fresh cut trees, this was not an appealing career choice.

At age 10, I observed my father, who at age 40 started attending night classes at McGeorge Law School in Sacramento. He and three friends drove to Sacramento (60 miles each way) 2 to 3 nights a week for four years. All four passed the bar and enjoyed successful law practices. While growing up, I enjoyed hearing about law school and the various cases that my father would take on. The first clients would come to our home to meet with my father. I recall my mother vigorously cleaning the bathroom after each client visit. My father eventually secured a law office on Main Street next to the court house. I enjoyed watching several of his trials and later enjoyed his political exploits as a two term county supervisor of El Dorado County. Just prior to retirement, my father worked for two years as the Chief Executive Officer for the El Dorado County court system. Seeing my father start out with nothing and develop a successful law practice and political career was very inspiring.

TML: How did you decide to become a patent lawyer?

SN: I have always enjoyed math and science. I might have become an electrical engineer if I had known of such a profession while growing up. I don't recall any "career days" in Placerville and there was no real exposure to careers outside of our community. Our public schools had their hands full just trying to teach us to read and write. Thus, I went to college and law school, and took a local job near Berkeley where I could try cases. I enjoyed 10 years of trying all types of cases in state courts and gravitated toward defending older civil and structural engineers in construction cases and young dentists who were working at various

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Joel Gumbiner and Larry Baskin prepare to tee off for $1 million.

THIRD ANNUAL MCBA GOLF TOURNAMENT A SUCCESS

The Third Annual MCBA Golf Tournament built on the momentum of the first two years and was a great success. Held on October 2, 2009, at the beautiful San Geronimo Golf Course, the event was once again coordinated by MCBA Ad Hoc Golf Committee Co-chairs (and Board Members) Lou Franecke and Phil Diamond. As past participants will recall, the first year's event had to be postponed one week at the last minute due to rain. Although the weather cooperated for this year's event (warm and sunny, and almost no wind), in the immortal words of Gilda Radner's Rosanne Rosannadanna, "If it's not one thing, it's the other thing." This time the event was originally scheduled to be played at the renovated Peacock Gap golf course because the greens at San Geronimo were scheduled to be aerated (and therefore virtually unplayable) during the time period we wanted, whereas that was not going to be a problem at Peacock. However, as luck would have it, about two weeks before our tournament, Peacock's groundskeeper changed his aeration schedule such that the greens were going to be aerated one day before our event! Fortunately, San Geronimo's greens had sufficiently recovered by that time and the course was able to take our tournament back at the last minute, at the same date and time originally scheduled for Peacock. Peacock returned our deposit, all golfers were notified of the change of location, and the tournament went off as planned. Our golfers are nothing if not flexible!!

The tournament was developed to promote camaraderie among MCBA members and to raise funds for a chosen charity, which was again Guide Dogs for the Blind (which is headquartered in San Rafael). Six foursomes participated this year (down slightly from last year, but given the economy and in comparison with how other fund-raising tournaments have fared, not a bad showing at all), and over $1,300 was raised for Guide Dogs from entry fees, sales of tickets for "mulligans" (which are "do-overs" for you non-golfers) and entry into the post-round raffle, and sponsorships.

As before, the tournament was held in a "scramble" format with a simultaneous "shotgun" start by all golfers on different holes, with each foursome competing as a team for the low score. In this format, all golfers, regardless of ability, had an opportunity not only to participate but also to be a "hero" to his or her foursome.

After the rounds were completed, participants gathered in the San Geronimo Clubhouse for drinks and the presentation of awards for First, Second, and Third Place team score, Long Drive, and Closest to the Hole. First place went to Joel Gumbiner, Lou Franecke, Steve Ruben, and Mohinder Mann; second place went to Greg Dyer, Joe Legallet, Ira Hillyer, and Richard Nelson; third place went to Ray Cherry, Larry Levin, T.J. Raseal, and Steve Blackman.

The Longest Drive award went to Derek Weller, and the Closest to the Hole award (given to the golfer whose tee shot on a designated par-three hole landed closest to the hole) went to Larry Baskin.

Like last year, the tournament also included a post-round "1,000,000 Hole In One Challenge," which was sponsored this year by Tamalpais Bank. The Challenge consisted of the golfers with the two closest-to-the-hole tee shots attempting to win one million dollars by hitting a hole in one from a distance of 165 yards. The participants were Joel Gumbiner and Larry Baskin. Although Joel and Larry both gave a great effort, regretfully neither actually got the ball into the hole.

New to this year's event was an additional hole-in-one prize – a 2010 Toyota Prius parked next to the tee box, graciously provided by Toyota Marin, which would be awarded to the first player to hit a hole-in-one on the designated Par 3 hole. Unfortunately, no one actually "holed out" in one shot, and the Prius went unclaimed.

MCBA would like to thank all of the participants who gave up an afternoon in the office for the event. MCBA would also like to thank Tamalpais Bank (which not only sponsored the "$1,000,000 Hole In One Challenge" but also donated a substantial sum to the event), West Coast Reporters, and Izzy's Restaurant for their generous sponsorship support.

The MCBA Golf Tournament once again achieved its dual objectives of community-building and fund-raising, and there is no question that the word "Annual" will remain in its name. Join us next year, at MCBA's *Fourth* Annual Golf Tournament!

NEGOTIATING LEASE WORKOUTS ON THE EDGE OF BANKRUPTCY

*By Helen Sedwick**

First the rent comes in a day late and a dollar short. Then come the frantic calls from the tenant asking to talk. Then rent payments stop altogether.

Undoubtedly a wave, if not a tsunami, of tenant defaults and bankruptcies is heading our way. Since both the Federal bankruptcy code and case law have evolved since the tenant defaults of 2001-2003, this article will lay out a brief bankruptcy law refresher for landlords and tenants. In addition, this article will suggest strategies for negotiating a lease workout or termination without a bankruptcy filing. A negotiated settlement is often a simpler and more efficient course.

How a tenant bankruptcy affects a commercial lease

Automatic stay. When a tenant files for bankruptcy protection, whether voluntarily or involuntarily, an automatic stay blocks any action to recover the tenant's property without the approval of the Bankruptcy Court. Since this stay may stop pending eviction actions and may even prohibit the delivery of default notices and the application of security deposits, do not take any action or deliver any default notices to the tenant in bankruptcy without consulting bankruptcy counsel. The Bankruptcy Court may impose painful sanctions for violations of the automatic stay.

Executory Contracts. A debtor/tenant in bankruptcy has the right to assume, to assume and assign, or to reject any executory contract in the exercise of its business judgment. This includes its unexpired commercial leases.

Assumption/ Assumption and Assignment. If the tenant assumes, or assumes and assigns/sells the lease, it must cure all pre- and post-filing defaults and/or provide "adequate assurance" of its (or its assignee's) ability to cure such defaults and to perform future obligations.

The tenant must assume or reject the lease AS IS. Neither the tenant nor the Bankruptcy Court has the power to force the landlord to rewrite the lease. However, many landlord-favorable assignment provisions may be ignored in a bankruptcy assignment. For instance, the landlord loses its right to share in excess rent and to recapture the space. The landlord has limited rights to withhold its consent to the assignment or assignee. (Note, shopping center landlords have some additional rights to object to an assignment if the proposed assignee may affect tenant mix or percentage rent.)

Rejection. If the lease is above-market, the tenant is likely to reject it. Rejection is a "breach" of the lease, but does not necessarily terminate the lease. If a tenant rejects the lease, the landlord may want to take the necessary steps to terminate the lease as well.

Limits on Landlord Damages. Following a rejection, the landlord is entitled to damages, including future rent, but its damages resulting from the lease rejection are capped at the greater of one year's rent or 15% of the remaining lease obligation not to exceed three year's rent. A landlord may also have the right recover tort claims, such as environmental clean up costs, above the cap.

Any security deposit is applied to the capped damages and reduces the remaining capped claim. As to draws on a letter of credit, the trend in the courts has been toward including such draws within the capped damages. Even though payments under a letter of credit are made by the issuing bank and not the tenant, courts have generally treated the draws as though they were paid by the tenant.

A landlord should not presume it will receive the entire capped claim since there may not be sufficient cash in the bankruptcy estate. A landlord has a secured claim to the amount covered by the security deposit or letter of credit, so it will receive that entire amount so long as it does not exceed the cap. Any remaining claim is unsecured. So if unsecured creditors receive ten cents on the dollar, the landlord will receive ten cents on the dollar on its unsecured

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MCBA STANDING COMMITTEES: A GREAT WAY TO GET INVOLVED AND TO MAKE A DIFFERENCE!

To: Members, Marin County Bar Association

From: President-Elect Beth Jordan

Re: 2010 Standing Committees

MCBA is seeking members interested in serving on its 2010 Standing Committees, which are listed below**.** Committee membership provides a wonderful opportunity to get involved, to get to know other members, and to assist MCBA in carrying out its mission to involve, encourage and support Bar Association members, to serve as a liaison to the Marin County courts, and to educate the community and enhance access to legal services.

Please mark below three committees, in order of preference. If you have no preference, but simply want to serve, please so indicate. Appointments will be made by the end of December so that all of the committees can be begin their work with the new year. ***Please return this form by December 15, 2009*** (a) by mail to MCBA, 30 North San Pedro Road, Suite 140, San Rafael, CA 94903; (b) by fax to (415) 499-1614; or (c) scan and email it to rgaspar@30nsp.org.

If you need more information regarding the individual committees, don't hesitate to contact Robynn Gaspar, MCBA'S Executive Director, for a full description. I look forward to working with you all!

_____ Membership
_____ Programs/Entertainment
_____ Lawyer Referral Service
_____ Legislation
_____ Library
_____ Bylaws
_____ Marin Justice Center
_____ Ethics/Unauthorized Practice
____ Administration of Justice
____ Insurance
_____ Continuing Legal Education
_____ Public Information
_____ Client Relations
_____ Law Day/Public Education
_____ Judicial Liaison
(must be an MCBA Past President)

Name_____

Contact Information _____
_____
_____

Comments: _____
_____
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ANNOUNCEMENT OF PILOT PROJECT FOR CIVIL SETTLEMENT CONFERENCES IN DEPARTMENT J

To the Members of the Marin County Bar Association:

Some months ago I formed an *ad hoc* committee to explore the possibility of including qualified mental health professionals and non-attorney mediators as panelists in civil judicially supervised settlement conferences. The committee is comprised of attorneys David Feingold, Carolyn Rosenblatt, and Larry Strick; mental health professionals Mikol Davis and Bob Kaufman; and Debbie Bellings-Kee and Steve Sulmeyer, who are both attorneys and mental health professionals.

Since 2008 we have been using the services of non-attorney mental health professionals and mediators in selected Family Law settlement conferences, with excellent results.

In Department J, we are expanding our pool of qualified civil settlement conference panelists to include licensed mental health professionals/mediators in certain selected cases. If you have a case scheduled for a settlement conference in Department J and think it is an appropriate one for this pilot program, please contact the Court's ADR Coordinator, Norma Johnson, at 473-6072.

Thank you in advance for your cooperation. I will report to you on the progress of this project.

Verna A. Adams, Presiding Judge

MCLE COMPLIANCE DEADLINE COMING UP GROUP 2 (A – G)

Deadline: 2/1/10 MCLE "Regular Requirement"

Total hours required every three years: **25 hours**

Maximum "self-study" hours: **12.5 hours**

Members must fulfill at least one-half of their MCLE requirement with activities approved for "participatory" MCLE credit. (For additional information contact The State Bar of California at 538-2130, or visit the website at http://www.calbar.ca.gov.)

Special Requirements within the total hours required (may be taken as participatory or self-study)

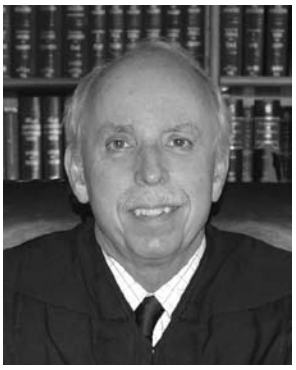
Legal Ethics: **4 hours** (required)

Detection/Prevention of Substance Abuse: **1 hour** (required)

Elimination of Bias in the Legal Profession: **1 hour** (required)

(CLE Fair, continued from page 1.)

Make in Settlement Conferences." You will also hear from Hon. Faye D'Opal, Hon. Terrence Boren and Commissioner Wood during the lunch presentation, when Matt White will moderate a discussion panel entitled "Everything You've Always Wanted to Know About the Marin Bench, but Were Afraid to Ask." Other topics include elder abuse, custody issues in family law, commercial lease workouts, bankruptcy, alter ego liability, and more effective use of technology in your practice. This event is organized into three one-hour morning sessions (choice of four seminars each hour), followed by the panel of members of the bench, which takes place during the catered luncheon. More information about each speaker and topic and online registration is available at www.marinbar.org, or you can call the MCBA office at (415) 499-1314. The price is $150.00 for MCBA members and $175.00 for non-members – a real bargain for breakfast, 5 CLE credits, and lunch!



Hon. Terrence Boren

Commissioner Beverly Wood

(Social Networking, continued from page 1.)

These blogs are accessible to anyone in cyberspace, and viewers can post comments to create or further a discussion. The rapid growth of social networking sites and blogs, like many digital technologies, is a double-edged sword for employers. While these tools offer various benefits, they also create a myriad of problems and legal risks. Employers should develop thoughtful, proactive policies to leverage the advantages of social networking tools while mitigating the risks of potential liability.

To start with the benefits, online social networks and blogs may provide companies an effective platform to manage and develop their brands. Some companies sponsor Facebook groups, and encourage the public and/or their employees to join in order to build brand awareness and loyalty. Other companies post corporate videos on YouTube to promote their products. Many companies, particularly in professional services, maintain their own blogs, in addition to corporate websites, as a means to highlight new information about their company or industry, or to obtain valuable feedback from existing or potential customers. Executives can use network sites to generate business leads, and to market their own personal brands through online profiles. We lawyers, for example, are discovering the benefits of online networking, for ourselves and our firms, as a useful business development adjunct to the industry seminar or cocktail party.

Social network sites also offer employers a fertile source of unvarnished information about job candidates which can be relevant in the recruiting process. In a recent survey by CareerBuilder.com of over 2600 hiring managers and human resource professionals, 45 percent of them reporting using networking sites for this purpose. Thirty-five percent of those surveyed said they found content which led them not to hire a candidate, such as sexually provocative or inappropriate photographs, content about drugs or alcohol, or disparaging comments about a prior employer or co-worker. Eighteen percent of those surveyed said they found content which positively influenced a hiring decision. These employers reported that online profiles provided a good feel for the candidate's personality, showed creativity, or supported the candidate's qualifications, *e.g.*, through posted recommendations.

Finally, research suggests that social networking sites may hold intangible benefits with respect to employee morale. In a 2009 ethics and workplace survey by Deloitte LLP, over half the executives polled said that using these sites helped their employees achieve better "work-life balance." To the extent employees' use of social network sites leads to closer and more frequent communication between them, one could argue this activity has the potential to improve job performance by enhancing cooperation, trust and teamwork.

Weighed against these benefits, online networking sites and blogs also present a number of significant problems and legal risks for employers. First, the use of online content as a basis for making employment decisions may lead to discrimination claims under state or federal civil rights laws. Suppose a hiring manager visits a candidate's Facebook page and learns he has cancer, is a recovering alcoholic, or is a devout Muslim. The company later rejects the candidate, and he sues for failure to hire based on his medical condition, disability, and/or national origin in violation of Title VII of the Civil Rights Act, or the Fair Employment and Housing Act. If discovery reveals the hiring manager visited the site containing information about the candidate's protected status, an inference may be drawn that the hiring decision was motivated by that information, whether or not it actually played a role. It will be difficult, if not impossible, to unring that bell in front of a jury. The risk of this type of discrimination claim is compounded when online searches are done sporadically, or when they are used more often (purposely or not) to screen certain types of candidates, *e.g.*, those with Arabic-sounding names.

Employers also run the risk of violating other statutes when they use content obtained from employees' social network sites and blogs to make personnel decisions. For instance, California Labor Code 96(k) prohibits employers from suspending, demoting, or discharging an employee "for lawful conduct occurring during nonworking hours away from the employer's premises." Thus if a company discharges a high-level executive after discovering photos on his Facebook page showing him engaged in lewd, sexually explicit (but legal) acts, the company could face liability under this statute. Similarly, what if an employee posted content on a blog identifying her employer by name, and at the same time expressing her strong support of a Neo-Nazi group? While this blog post may be offensive and highly damaging to the employer's reputation, a decision to fire the employee for this activity could result in liability under Section 96(k).

Employer online search activities also may result in

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(Social Networking, continued from page 11.)

liability under the National Labor Relations Act (NLRA). Section 7 of the NLRA protects employees against discrimination or retaliation based upon lawful "concerted activity." Thus employers cannot take adverse personnel actions against employees because they organize unions, or engage in other group activities relating to their wages and other terms and conditions. Employee blogs about their wages, or about working conditions they find unsatisfactory, may constitute "concerted activity" protected by Section 7. To the extent an employer monitors these posts and then disciplines the bloggers, it may face liability exposure under the NLRA.

Employer searches of employee social network profiles and blogs also creates potential privacy concerns. Users are increasingly deploying privacy filters offered by the sites which limit access to people meeting criteria specified by the user (e.g., people accepted as "friends"). Yet absent the use of such filters, most content on social networking sites and blogs is openly available to the public with no more than a mouse click. Thus an employee should not have any reasonable expectation of privacy in that information, however personal it may be. What if, however, a manager gains unauthorized access to an employee's personal profile, or a "confidential" online group, and then disciplines or fires the employee based on the content?

A similar scenario occurred in a case filed in federal district court in New Jersey, entitled *Pietrylo v. Hillstone Restaurant Group dba Houston's* (D. N.J. 2006). There a Houston's restaurant employee started a group on MySpace called "The Spec-Tator," the purpose of which was to provide a forum for employees to air their grievances about work. (The language on the site was far less polite.) This MySpace group was announced as "entirely private," and participants could join only "by invitation." Under the assumed cloak of secrecy, Pietrylo and his restaurant co-workers posted jokes online about Houston's customer service standards, sexual comments about its management and customers and, and references to violence and illegal drug use. One group member showed "The Spec-Tator" to a manager while visiting the manager's home. Later, another manager asked the employee for her password to the site; she provided it, though later testified equivocally that she felt some pressure to do so and had concerns about getting in trouble if she refused. Houston's management accessed the site, then fired Pietrylo for conduct detrimental to its core values. Pietrylo sued Houston's for violations of the federal Stored Communications Act (SCA) and invasion of privacy under New Jersey law. The SCA prohibits unauthorized access to electronic communications stored at an electronic communications provider, such as postings on a host website like MySpace. In July 2009, the jury returned a verdict against the restaurant chain on both claims, and awarded statutory and punitive damages as well as attorneys' fees.

Social networking sites also may create employer liability for claims including defamation, fraud, and unlawful harassment. For example, if a manager posts racially derogatory or threatening comments about a minority employee on a website or blog, such statements may be attributed to the employer as creating a "hostile work environment" for the target employee in violation of state or federal civil rights laws. Likewise, if a manager blogs or posts comments which include factual misrepresentations about a competitor, such activity could result in a claim against the employer for trade libel. If a company is publicly traded, any blogs or posts by employees which make material misrepresentations about the company may expose the company to violations of federal securities laws prohibiting fraud.

Finally, use of social networking sites and blogs by employees also creates a forum for the unauthorized disclosure of confidential and proprietary information. In the unrestricted world of cyberspace, some employees feel as if they can act more impulsively. They are not always as careful about the information they convey online versus in person or by telephone. Under the guise of an anonymous post, some employees may not hesitate to chat online about their company's exciting new products and services, financial results, or new customers. Yet the disclosure of such information in a blog post can destroy its "confidential"

(Continued on page 13.)

(Social Networking, continued from page 12.)

character, and the company may lose the ability to protect and defend such information as trade secrets in the event of later misappropriation by a competitor. If the employee blogs about a third party's confidential information, that activity may lead to a claim against the employer for infringement of intellectual property.

The courts and legislatures are still playing catch-up when it comes to regulating employee behavior in cyberspace. The law in this area continues to develop as judges and legislators struggle to apply traditional statutes and common law principles to new world technologies. What is fairly clear, however, is that social networking websites and blogs are not going away anytime soon. For better or worse, whether companies like it or not, their employees are likely using these online tools. They are doing so during work, outside of work, for personal and business purposes, for good and for bad (and sometimes ugly). Given the potential benefits and risks of these activities, what can or should employers do to manage them?

The answers depend, at least in part, on the size and nature of the company's business and culture, and an assessment of the scope of potential harms (or benefits) that online tools may have on its day-to-day operations. Some employers may choose to ban employees' use of all social networking sites on company time and equipment. Others may limit employee access to certain sites which benefit their business. Still other employers may decide to sponsor an employee group on a social networking site, or encourage employees to develop their own personal profiles on networking sites to enhance individual sales and marketing opportunities. Regardless of their approach, all employers should consider taking a number of preventive measures to mitigate the risks involved.

Employers should consider implementing specific procedures governing when and how, if at all, human resources staff and/or hiring managers may access social networking sites in the recruiting process, or in the context of any investigation of alleged employee misconduct. Employers should carefully review their personnel policies, procedures and forms, and modify them to address the use of social networking sites and blogs. The types of policies that should be reviewed and revised include, among others, those relating to discipline and termination, unlawful discrimination and harassment, conflicts of interest, and confidentiality of information. Form employment contracts, as well as nondisclosure and confidentiality agreements, should be revised to address online social networking. Employers should consider having a single policy addressing all types of electronic communications, including e-mail, instant messaging, voicemail, personal digital assistant (PDA) devices, and the Internet. This policy should include clear statements, with specific examples, indicating the uses of social networking sites which are acceptable, the limits on such use, when prior company approvals are required for specific activities, and the consequences of violations. The policy should prohibit disclosure of confidential company information or trade secrets, or the posting of any statements that violate company policies prohibiting unlawful harassment or discrimination. The policy should include appropriate disclaimers stating that opinions or views expressed by employees on non-company sponsored websites or blogs are not endorsed by the company and do not represent its views or those of anyone except the author.

Finally, employers should train their managers and human resource staff on policies and procedures governing the use of social media tools, and how to enforce them. By investing the time to educate employees about the standards of conduct that apply to blogging and online networking, and emphasizing the consequences of improper conduct in cyberspace, employers can position themselves to minimize the risks discussed here.

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(President's Message, continued from page 2.)

goes on between attorneys. The Code of Civility states that "A lawyer should, at all times, be civil, courteous and as accurate as possible in communication with adversaries and the court, whether in writing or orally." The Code of Civility defines a civil and courteous attorney as one who specifically "does not orally or in writing degrade or disparage" any judicial officer or counsel.

California Business and Professions Code Section 6068(b) lists "maintaining respect to the court" as one of the duties of an attorney. As officers of the court, attorneys are required to maintain an attitude of respect to the court. Under California Business and Professions Code Section 6103, an attorney may be suspended or disbarred for willfully violating a lawyer's duties as an attorney.

While not binding in California, Rule 8.2 of the ABA Model Rules states that lawyers are encouraged to continue traditional efforts to defend judges unjustly criticized, in order to maintain the fair and independent administration of justice. Showing "due respect" to the court may also require attorneys to be courteous to opposing parties and witnesses and to refrain from undignified conduct or dress in the courtroom that may disrupt the hearing or trial. (See ABA Model Rule 3.5(c).)

A false and insulting petition for rehearing may even result in sanctions for criminal contempt against the attorney. (*In re Koven* (2005) 134 Cal.App.4th 262, 264-265.) In *In re Koven*, attorney Koven accused counsel of having perpetrated "a fraud on the public trust" by hiring "two conflicted experts" and of having "destroyed the public trust in the integrity of the bar." Koven also accused counsel of committing "fraud on the court regarding its willful suppression of evidence" and of engaging in "purposeful misconduct" to manipulate the outcome of the case. As a result of her pleadings, Koven was found guilty of two counts of direct criminal contempt of Court and ordered to pay a total fine of $2,000. Pursuant to Business and Professions Code section 6086.7, the clerk of the court was directed to forward to the State Bar a copy of the judgment of contempt.

When MCBA approved its Code of Civility, it described the standards of professional courtesy as guidelines for the conduct preferred and expected by a majority of attorneys practicing in Marin County. I am pleased to report that the standards in MCBA's Code of Civility continue to represent accepted norms of professional behavior among Marin County attorneys. Personally, I agree with San Francisco 49ers' wide receiver Isaac Bruce who, when asked about his secret to a long, successful, and respected career as a professional athlete, said: "I watch what I allow to come out of my mouth and what I allow to go into my mouth."

(Foreclosure, continued from page 3.)

However, in a down real estate market, the value of the security to be foreclosed on becomes an increasingly important factor, especially when no deficiency judgments are available. When the equity in a property has declined to the point where a property is "underwater" (i.e., the debt against the property exceeds it fair market value), the property owner and the lender are both in an unenviable position. The property owner has lost equity, and the lender has lost security. In California, this scenario is further complicated by the one action and anti-deficiency rules. These rules were enacted to protect debtors individually, and additionally to avoid worsening economic downturns by limiting the personal liability of already struggling debtors. However, currently in California, those borrowers who made the most risky, zero percent down loans are likely to get deficiency protection, while those who refinanced for home improvements or more favorable terms are likely to be left liable for deficiencies.

The one action rule provides: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property.…" (Cal. Code Civ. Proc. §726(a).) Although this language suggests an election of remedies is available to a lender, the California Supreme Court has interpreted the rule to require secured lenders to pursue foreclosure of the property providing the security for the loan before any other actions are taken. Courts have construed Section 726 to provide an affirmative defense for a defaulting debtor against any action brought by the lender which does not first seek to exhaust the security in the real property. Further, even if the debtor fails to invoke Section 726 as an affirmative defense and a personal judgment is found in favor of the lending plaintiff, Section 726 still sanctions a plaintiff for failing to initially seek redress against the security by automatically terminating any lien that the lender originally held on the property. (*Walker v. Community Bank* (1974) 10 Cal.3d 729, 733-41.)

The general purpose of the anti-deficiency statues, codified at Code of Civil Procedure section 580a-580d, is to protect debtors by limiting a secured lender's right to recovery in foreclosure proceedings to the security interest in real property. For residential loans, the key provision is Section 580b, which generally prohibits lenders from obtaining a deficiency judgment on any "purchase money" loan for residential property consisting of one to four units that is the primary residence of the borrower. The policy purpose for this rule is to protect homeowners in times of general economic distress. As the California Supreme Court explained: "If inadequacy of the security results, not from overvaluing, but from a decline in property values during a general or local depression, section 580b prevents the aggravation of the downturn that would result if the defaulting purchasers were burdened with large personal

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(Foreclosure, continued from page 14.)

liability." (*Roseleaf v. Chierighino* (1963) 59 Cal.2d 35, at 42.) The Section 580b rule restricts lenders regardless of whether they seek to recover via judicial or a non-judicial foreclosure. Furthermore, even if the property in question is commercial, consists of five or more units, or is non-owner occupied, 580b prohibits deficiency judgments if the lender is also the seller of the property. From the lender's perspective, of course, this is harsh medicine, and in an era of zero down loans, these anti-deficiency rules have arguably given borrowers an incentive to "hand over the keys" and walk away from debts that they voluntarily incurred.

However, Section 580b is, on its face, inapplicable, to "non-purchase money" loans, thus restricting the protections of the anti-deficiency rules for many of today's borrowers who refinanced their loans to take additional equity out of their homes or obtained popular home equity loans after purchasing their property. Such borrowers are still afforded some protection under Section 580d, which prevents lenders from seeking a deficiency judgment after a non-judicial trustee's sale. But such borrowers likely have no protection from a deficiency judgment awarded after a judicial foreclosure, up to the fair market value of the property at the time of the foreclosure sale. While the California Supreme Court has yet to speak on the subject, it appears that borrowers who refinanced their property have lost the protection of the anti-deficiency laws. (*See Union Bank v. Wedland* (1976) 54 Cal.App.3d 393, 399 (holding that refinancing loans used to pay off the original purchase money loan and provide funds for the debtor's business were not considered standard purchase money loans).) Such borrowers can lose their homes after judicial foreclosure and still be subject to a personal money judgment for a portion of their debts that remain outstanding after sale of their property. Whether a loan is a first, second, or equity line of credit in third position, if it isn't a purchase money loan, and judicial action is employed to acquire the deficiency judgment, the borrower is likely liable for a deficiency. For such borrowers, simply "handing over the keys" to the lenders may not be an option, even when they believe that their homes are irremediably underwater.

Other instances where a borrower might incur personal liability, notwithstanding the anti-deficiency rules, include "bad faith" waste, fraud and environmental contamination of the property. In order to recover on a theory of waste the lender must show that the borrower permitted waste to occur because of reckless, intentional or malicious injury to the property. (*Cornelison v. Kornbluth* (1975) 13 Cal.3d 590, 604.) Certain actions in fraud are explicitly outside the scope of the anti-deficiency rules (Cal. Code Civ. Pro. §726(f)), and further, the courts have held that the anti-deficiency statutes were not intended to immunize borrowers for tortious activities. (S*ee Glendale Fed. Savings & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 139-40 (holding that the anti-deficiency statutes prohibit only deficiency judgments and that an action for damages for fraud or other tortious activities is not a deficiency judgment).) As for the environmental exception, if the borrower or his agent allowed an environmental impairment to occur and the lender had no knowledge of the impairment at the time the loan was made or renewed, the lender may waive the lien on the property and proceed as an unsecured creditor. (Cal. Code Civ. Pro. §726.5.)

The real property lending and foreclosure laws are complex and nuanced, and this article touches on only a few of the basics. For decades, courts and legislatures have attempted to keep stride with the creative use of security instruments by borrowers and lenders. In these challenging times, we will see whether they have struck the right balance between the interests of lenders and borrowers, and the broader social good.

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(Broker Commission, continued from page 4.)

Standard Pacific may have acted in a commercially reasonable manner in declining to close under its purchase agreement, doing so may not necessarily constitute good faith toward its broker. The court acknowledged the existence of an implied promise by a buyer to its broker to complete the purchase so that the broker can earn its commission. The case was returned to the trial court to determine whether Standard Pacific breached its duty to RC Royal.

Take-Away Message

In the case at issue, more careful drafting of the agency agreement clauses relating to (i) the definition of "Purchase," (ii) the relevance of close of escrow, and (iii) disclaimer of duty to the broker, could have avoided the entire disagreement. Had the parties anticipated, and specifically addressed, in the contract the major potential outcomes, there would have been little or no doubt about whether the brokerage commission was payable under the circumstances.

Careful drafting of real estate contracts is essential to realization of the parties' expectations. Implicit assumptions based upon common practices may be trumped by literal interpretation of contract terms. Similarly, implied legal obligations may not be avoided unless specifically disclaimed. There is no substitute for thorough thinking, thoughtful discussion and clear drafting. The alternative is surprise, litigation and expense.

**Scott Rogers is a senior partner in the Real Estate, Development, Land Use and Finance Group of Holme Roberts & Owen LLP. Resident in the firm's San Francisco office, his practice focuses on the representation of institutional and private real estate investors in all aspects of real estate equity and finance transactions. Mr. Rogers obtained his BA in Economics from U.C. Irvine and his J.D. and M.B.A. from UCLA. He is the immediate past chair of the Executive Committee of the Real Property Section of the State Bar of California.*

(Spotlight, continued from page 6.)

dental mills right out of dental school. I enjoyed all aspects of the work. But, much of the work was funded by insurance companies who were continually using third parties or computer programs to cut bills, cut rates, delay payments and otherwise interfere with the effective defense of their policy holders who faithfully paid their premiums.

In my first 10 years of practice, I would spend many hours sitting in settlement conferences before special masters such as the late John Griffiths. During these conferences older attorneys would boast about the old days where cases were settled over drinks and insurance companies paid their bills without question. Year after year I would hear the same complaints from the same bitter lawyers. The gripes would get worse over the years, but no one took any action to improve their experience as a lawyer. Everyone blamed the insurance companies for their woes, but no one was willing to develop another practice or clientele. It was just easier to complain. At age 37 or so, I continued to complain, but I also started to take classes in physics, electrical engineering, math, optics and computer science. Before long I became a registered patent attorney and developed a thriving practice.

Steve Nielsen practices law with Allman & Nielsen, P.C. www.NielsenPatents.com in Marin County. He is registered patent attorney, and thus specially licensed to procure patents before the United States Patent & Trademark Office. He obtained his law degree from Boalt Hall and now serves as patent counsel for major corporate clients. He may be reached at Steve@NielsenPatents.com or (415) 461-2700, ext. 203.

NOTICE RE: MARIN COUNTY SUPERIOR COURT UNIFORM LOCAL RULE 6.4.D.1. & 2:

DEADLINE TO SUBMIT FAMILY LAW JUDGMENT PACKET

Due to court personnel changes, it is necessary to adjust the deadline for submission of a Family Law Judgment Packet to ensure that for those who need it their dissolution will be finalized by the end of this calendar year.

For a dissolution to be finalized by the end of this 2009 calendar year, the Family Law Judgment packet must be submitted to the Clerk's Office no later than Friday, December 4, 2009.

Notice of the new deadline will be posted in the Clerk's Office and Legal Self Help Services, and will be published in the Marin County Bar Newsletters of November and December.

(Lease Workout, continued from page 8.)

claim. A landlord, however, generally retains its claims against any guarantors of the tenant's lease.

If the landlord had received any payments from the tenant outside the ordinary course of business (such as catch up payments for past due rent) within 90 days prior to the tenant's bankruptcy filing, the landlord may have to pay those amounts into the bankruptcy estate since they may be deemed "preference payments".

A tenant is suppose to keep rent current after the bankruptcy filing, but if it does not, and it rejects the lease, the landlord has a preferred administrative claim to those rental payments. That may be of small comfort if the tenant's estate falls short.

Timing. One major change in the 2005 amendments to the Bankruptcy Act is that tenants must elect to assume or reject their leases within 120 days after filing, although the Bankruptcy Court may extend that to 210 days upon a showing of cause. Any extension beyond that requires the landlord's consent. Prior to the 2005 amendments, the Bankruptcy Court could grant endless extensions, and landlords' hands were tied for years.

This is a BRIEF SUMMARY, and almost every statement could be qualified and explained further. Experienced counsel should be engaged to give advice specific to the situation.

Negotiation strategies for the landlord

Delay. When a tenant calls to discuss a workout, the first tactic used by most landlords is delay, provided rent is being paid. After all, every month of rent paid is one less month of rent in default. A landlord will ask the tenant for financials, for proposals, for comps, then delay, delay, delay. Since delay is not a solution to the problem, a landlord should use the delay period to engage experienced counsel and other advisors to evaluate its position and options.

Delay is not without risks. If the tenant is in a position to make a sizeable payment to terminate its lease, a delay may erode its ability to make that payment. Further, if the tenant files bankruptcy, the landlord will be entangled in the bankruptcy process.

Non-disclosure Agreements. Prior to any discussion, the parties should enter into a mutual non-disclosure agreement. The landlord agrees to maintain the confidence of the tenant's financial information (although be sure to permit disclosures to the landlord's lenders, investors, attorneys and financial consultants), and the tenant agrees to maintain the confidence of its discussions with the landlord. After all the landlord does not want other tenants to know that it is open to renegotiation of leases. A tenant's breach of this non-disclosure agreement should be a default under the lease.

Pre-conditions to negotiation. Most landlords require

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the tenant to be current and to sign an estoppel certificate stating that no landlord default exists. Some landlords require tenants to waive certain rights, such as the automatic stay, notice and cure rights, and extension options. (Not all these waivers may be enforceable). If a tenant is in default, the landlord may require the tenant to cure the default or to acknowledge the default, execute a stipulated judgment, deliver a promissory note for past due amounts, or enhance the security for the lease by adding a guaranty or increasing the security deposit. And all this is prior to sitting down at the table to talk.

Engage lender(s) in discussion from the start. Most likely, any lease modification or termination is subject to the approval of the landlord's lender. If the landlord's loan or lender has changed hands, it may take a while to locate someone with the authority and willingness to make decisions on the matter.

Evaluate alternatives and consequences. A landlord should evaluate the difficulty of re-leasing the space and ask itself whether receiving some rent from the tenant is better than no rent and a dark space. I suggest that the landlord evaluate the tenant's prospects as if it were an investor. Is the additional risk worth the potential reward?

Terminate the Lease. If survival of the tenant is doubtful and the likelihood of a significant recovery through the bankruptcy process is small, the parties may want to negotiate an orderly termination of the lease, which may include converting the lease to a month to month lease. The tenant typically delivers some termination payment, which may be as simple as relinquishing the security deposit and unencumbered furniture, trade fixtures and equipment. The termination agreement should provide that if the tenant files bankruptcy within the preference period, the landlord has the right to void the termination agreement and to seek to recover its entire claim. While a lease termination compromises the landlord's monetary recovery, it should allow the landlord to recover possession of the space sooner and with less legal process. That may be worth the tradeoff.

Negotiation strategies for the tenant

Face the facts. Many companies wait too long to deal with financial deterioration. Executives hold on to the belief that the "big deal" is around the corner. By the time the executives give up on miracles, the staff, assets and morale of the company are so depleted there is nothing much to sell. As soon as a tenant realizes that it is likely to run out of cash, then it should commence the work-out or wind-down process.

If turnaround is possible, court the landlord as an investor. A tenant will have to convince the landlord that working with it to reduce its burn rate will be financially more beneficial to the landlord than losing the tenant. A tenant should be willing to reduce its space, extend its term, backload rent, issue warrants or equity, increase the security deposit and provide additional guaranties. A tenant should not expect the landlord to make the first move or proposal. Offering a reasonable solution to the problem is the tenant's responsibility.

Calculate landlord's recovery under bankruptcy. The tenant should perform a "liquidation analysis." It should be prepared to show the landlord what it would recover after a bankruptcy filing. As discussed above, the landlord's recovery is capped by statute. And in reality, the landlord is unlikely to recover even that capped claim if the lease obligations are unsecured and the tenant does not have sufficient assets to pay unsecured creditors 100 cents on the dollar.

Know your limits. Determining the restructuring or termination payment is the most difficult part of the workout. Many tenants feel they should not pay more than the landlord would receive under the bankruptcy liquidation analysis. Most landlords expect a premium above that amount. The negotiation becomes a game of chicken, which hurts the tenant because it wastes time.

My analytical principle when a bankruptcy filing is imminent is the following: what is the tenant willing to pay NOT to file bankruptcy? What is it worth to the tenant to maintain control over its future, to pay employees back wages and a reasonable severance, to hold onto its intellectual and other property for a potential sale and to pay creditors something so that its executives retain a reasonable reputation in the business community?

Since this principle involves non-economic and non-quantitative factors, it is not a formula for setting an exact dollar amount. But by considering these issues, a tenant should be able to determine if the premium it is willing to pay is one dollar, $100,000 or $1,000,000. It will have a sense of the relative value of its options.

In my view, a tenant should be willing to pay that premium on top of what the landlord would recover in bankruptcy and nothing more. If the landlord insists on a premium which compromises the tenant's other goals, then the tenant might as well take its chance with the bankruptcy process. If a tenant is clear as to its limits and the reasons why, the parties are more likely to reach a compromise solution.

**After more than 20 years of practicing law with major firms in San Francisco, Helen Sedwick founded her own firm, Bennett Valley Law, in 2007. She continues to specialize in commercial real estate transactions, primarily sales and acquisitions, leasing, entity formation, financing and management. Clients include developers, investors, start-up companies, bio-tech companies, solar technology companies, wineries, restaurant franchisees and owners, and high net worth individuals. Helen is a*

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1984 graduate of University of Chicago Law School. She is a member of the State Bar of California, the American Bar Association, the Bar Association of San Francisco and The Sonoma County Bar Association, and she participates in the Business Law and Real Estate Law sections of each organization. For more information, please visit www.bennettvalleylaw.com.

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

THE MARKETPLACE

Anyone wishing to advertise in the Marketplace should send their text ad to MCBA, 30 N. San Pedro Rd, Ste. 140, San Rafael, CA 94903 with payment of $35 per month, or you may email to: rgaspar@30nsp.org. ***The ad should be no longer than 25 words and paid in advance. For each additional word add $1.***

NO MARKETPACE THIS MONTH

DETAILS FOR CALENDAR

November 16th Intellectual Property Section Meeting
Location: Allman & Nielsen, P.C.
100 Larkspur Landing Circle, Ste. 212, Larkspur
MCLE 1 hour

"Lions & Tigers & Friends: Legal and ethical issues of playing in the social media sandbox"

Social media is the hottest discovery since email. It's fun, fast paced, interesting, and allows you to connect with friends, colleagues, clients and potential clients. For solo practitioners and small firms, social networking tools can level the playing field, allowing you to develop a network and marketing program at a fraction of the cost. But, with all the good social media tools can accomplish, there are both hidden and obvious landmines to consider. In this session you'll identify legal & ethical pitfalls, and learn ways to avoid them. This informative session will be presented by Francine D. Ward who may be found at http://www.fwardattorney.com

For questions - RSVP contact Steven A. Nielsen Steve@NielsenPatents.com

Bring your own lunch.

November 18th
ADR Section
12 - 1:30 pm
Seafood Peddler

December 11th
Holiday Party
5:30 - 7:30 pm
at Rowland & Chambers
1120 Nye St., (3rd floor)
San Rafael

MISSION STATEMENT OF THE MARIN COUNTY BAR ASSOCIATION

To involve, encourage, and support
bar association members,
to serve as a liaison to the Marin County courts,
and to educate the community and
enhance access to legal services.

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MCBA encourages submission of articles that may interest the legal community. Letters to the Editor are also welcome and may be published if space permits. Submissions will not be returned. The Editor reserves the right to publish, decline to publish, edit or otherwise modify any submission. Editorial material should be sent to the Marin County Bar Association at the above address.

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