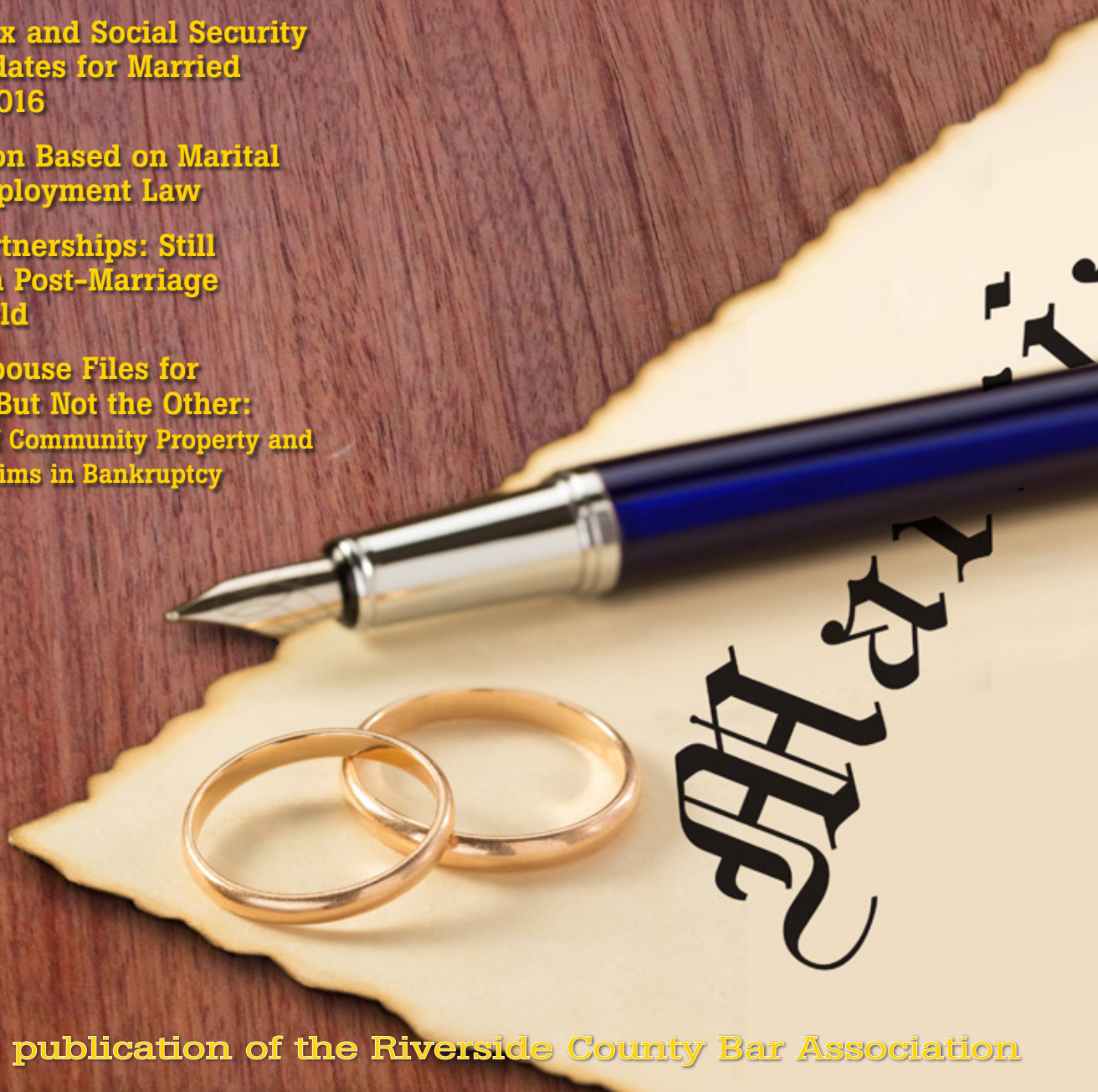
RIVERSIDE LAWYER

February 2016 • Volume 66 Number 2 MAGAZINE

In This Issue



The official publication of the Riverside County Bar Association

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RIVERSIDE LAWYER
MAGAZINE

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Mission Statement

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Mission Statement

The mission of the Riverside County Bar Association is:

To serve our members, our communities, and our legal system.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Inland Empire Chapter of the Federal Bar Association, Mock Trial, State Bar Conference of Delegates, and Bridging the Gap.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of *Riverside Lawyer* published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Annual Joint Barristers and Riverside Legal Secretaries dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

MBNA Platinum Plus MasterCard, and optional insurance programs.

Discounted personal disability income and business overhead protection for the attorney and long-term care coverage for the attorney and his or her family.

The Riverside Lawyer *is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are $25.00 and single copies are $3.50.*

Submission of articles and photographs to Riverside Lawyer *will be deemed to be authorization and license by the author to publish the material in the* Riverside Lawyer.

The material printed in the Riverside Lawyer *does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.*

Calendar

February

5 **Fee Arbitrator Training**
1:00 p.m. to 4:00 p.m.
RCBA – Gabbert Gallery
MCLE

9 **CLE Committee Presents the First in the Motion Practice Series – Winning Strategies and Pitfalls**
Noon – 1:15 p.m.
Speaker: Ben Eilenberg
Topic: "Demurrers, Motions to Strike and Motions for Judgment on the Pleadings"
RCBA - Gabbert Gallery
MCLE

10 **Criminal Law Section**
Noon – 1:15 p.m.
Speaker: Steve Harmon
Topic: "Closing Argument"
RCBA Gabbert Gallery
MCLE
Lunch sponsored by Trey Roberts of Breathe Easy Insurance Solutions

Mock Trial – Round 1
5:30 p.m. – 8:00 p.m.
Regional Competition
Riverside, Indio & Murrieta Courthouses

16 **Family Law Section**
Noon – 1:15 p.m.
Speaker: The Honorable Dale Wells Supervising Judge for Family Law, Riverside Superior Court
Topic: "State of Family Law Court"
RCBA Gabbert Gallery
MCLE
RSVP by Feb. 11 to rcba@riversidecountybar.com
Lunch sponsored by David Miller of Waddell & Reed and provided to those who respond by the deadline.

17 **Estate Planning, Probate & Elder Law Section**
Noon – 1:15 p.m.
Speaker: Wendy Wen Yun Chang
Topic: Ethics and Risk Management for Estate Planning Lawyers"
Noon – 1:15 p.m.
RCBA Gabbert Gallery
MCLE

Landlord/Tenant Law Section
6:00 p.m. to 8:00 p.m.
Cask 'n Cleaver – Riverside
Speaker: Tori L. Praul
Topic: "New Laws for 2016 and Masking of Unlawful Detainer Judgments"

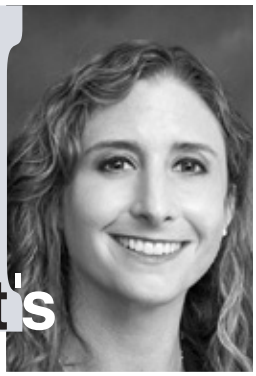
Mock Trial – Round 2
5:30 p.m. – 8:00 p.m.
HOJ - Riverside

19 **General Membership Meeting**
Joint with Richard T. Fields Bar Association
Speaker: Carl E. Douglas, Esq.
Noon - RCBA Gabbert Gallery
MCLE
Members – $20 - Non-Members - $40
Sponsored by Teer One Properties, Inc.

24 **Mock Trial – Round 3**
5:30 p.m. – 8:00 p.m.
Riverside HOJ

27 **Mock Trial – Round 4**
8:30 a.m. to 11:00 a.m.
Riverside HOJ

President's Message



by Kira L. Klatchko

Since we are ushering in a new year, I wanted to introduce all of you to the RCBA's newest endeavor, the Riverside County Bar Foundation (the Foundation). The Foundation is a nonprofit 501(c)(3) designed to facilitate charitable giving to programs like the Elves, Project Graduate, and Adopt-a-High-School. Unlike in years past, you will now be able to make tax-deductible contributions to these programs. While I certainly encourage all of you to continue supporting your favorite programs, and hope the creation of the Foundation will enable you to contribute even more, the Board has a broader vision for the Foundation.

In time, we hope the Foundation becomes a resource capable of supporting new and important programs that will benefit our entire legal community, and the community at-large. The Foundation, for example, could provide scholarships or fellowships to law students intending to practice in the Inland Empire. It could also support new pro bono programs or help expand existing ones. The Foundation could support new attorney mentoring programs or provide additional funding for existing programs like the New Attorney Academy. The Foundation could also support additional community outreach efforts and new educational opportunities for members of the public.

Similar programs throughout the state have met with great success. For example, the California Bar Foundation is a nonprofit organization affiliated with the State Bar of California, dedicated to building a better justice system for all Californians. The California Bar Foundation raises money from lawyers and corporate sponsors to distribute grants to nonprofits, courts, and bar associations. It also awards public service scholarships, and supports other legal educational outreach programs. Other local bar associations have established similar foundations. In fact, Public Counsel, which bills itself as the largest pro bono law firm in the world, is affiliated with both the Los Angeles County and Beverly Hills Bar Associations as well as the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law.

Although the Foundation is in its infancy, in time the Foundation will be an invaluable tool that will allow us to expand existing programs and create new ones that will benefit our community. I look forward to seeing the Foundation blossom in the coming years, and want to thank the RCBA Board, Brian Unitt, Peggy Hosking, Joyce Zimmerman, Jack Clarke, Greg Rizio, Jacqueline Carey-Wilson, Marlene Allen-Hammerlund, and Cathy Holmes for helping to get this effort off the ground. I also want to invite all of you to contact Foundation Steering Committee Chair Jean-Simon Serrano (jserrano@heitingandirwin.com) to learn more about how you can get involved.

Kira Klatchko is a certified appellate law specialist, and co-contributing editor of Matthew Bender Practice Guide: California Civil Appeals and Writs, *she is also a vice chair of the appellate practice at Lewis Brisbois Bisgaard & Smith, where she is a partner.*

Barristers President's Message

by Christopher Marin

"My whole approach in broadcasting has always been 'You are an important person just the way you are. You can make healthy decisions."

-Fred Rogers

Since last month's message focused on Mister Rogers, I thought you might enjoy a bit of legal trivia about him and how he has influenced love and marriage (this month's theme for *Riverside Lawyer*).

The quotation at the start of this message comes from testimony Mister Rogers gave in a federal lawsuit involving the advent of the VCR and the concerns of the entertainment industry that such a device would lead to rampant violations of their copyrights.

Mister Rogers was of the opinion that recording his program for non-commercial use was a perfectly acceptable practice, especially since it would give families the opportunity to watch his program together if they were not originally able to because of the network's schedule. It is this theory of "time-shifting" as part of fair use doctrine that ultimately won the day and now Mister Rogers is forever etched into our legal precedent in *Sony Corp. of Amer. V. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

The VCR ultimately gave way to the Digital Video Recorder and now many a marriage has been made more harmonious by allowing everyone to get a chance to watch whatever television shows they individually prefer – or even to watch shows together. So next time you "Netflix (or DVR) and chill" with your loved ones, remember that you have Fred Rogers to thank.

Our February Barristers event will be held in conjunction with the Eastvale Chamber of Commerce, and will allow us to come together as a community to remember and honor the victims of the San Bernardino shooting. For specific details about the event visit our website (there's a link on the RCBA's webpage at riversidecountybar.com) or follow us on Facebook (Riverside County Barristers Association) for all of the latest news and happenings. And since you no longer have to miss any of your favorite TV shows to join us (thanks to Fred Rogers), I expect to see most of you there.

Christopher Marin, a member of the Bar Publications Committee, is a sole practitioner based in Riverside. He can be reached at christopher@riversidecafamilylaw.com.

Probate Litigation: Current Spouse v. Children from a Prior Relationship

by Stefanie G. Field

Life seems good. While you may have had either a failed relationship or a deceased significant other, you have children from that relationship whom you love and who feel the same about you. And now, you have found a romantic love interest who you are marrying. If you are fortunate, while you are alive, everyone seems to get along well.

The problem comes when you do not have a prenuptial agreement and you die before your current spouse, without having adequately or timely completed or updated your estate planning documents. Why is this a problem? When there is money or property at stake, it is not uncommon for at least one of the heirs to get bitten with the greed or irrationality bug. This happens even where the spouse and children have seemingly good relationships. The problem is only magnified when the relationships are rocky or acrimonious.

The arguments made by the party seeking a larger or different share of the estate are varied and creative, but they often seem to have their foundation in three areas: (1) the timing of the decedent's estate plan; (2) an estate plan that is inadequate (e.g. not updated after the marriage); or (3) an estate plan that is not well or properly drafted (e.g. holographic will or created without the help of an experienced estate planning attorney).[1]

Technically, a mentally competent person (the testator) can prepare a will at any time prior to death. To be valid, it need only be in writing, signed by the testator or at the testator's direction and in the testator's presence, and witnessed by two people who understand that a will is being executed. (Prob. Code § 6110.)[2] If the will fails to comply with these requirements, it still may be a valid will, if the person seeking to enforce it can establish by clear and convincing evidence that the decedent intended the will to be his or her will, or, alternatively, the will qualifies as a holographic will (i.e. the material provisions and signature are in the handwriting of the testator). (Prob. Code §§ 6110(c) & 6111.)

So, why is timing important? Because the closer the date the will[3] is created to the date of the decedent's passing, particularly where the decedent was ill or elderly, the more likely there will be a claim that the will was procured by undue influence or the decedent lacked capacity. (See, Prob. Code §§ 810, et seq., 2104, 6100.5.)[4] This is particularly so where the will disproportionately favors particular beneficiaries. To make matters more stressful for the person defending the will, a claim of undue influence or lack of capacity is commonly coupled with a claim of elder abuse. While the decedent may have had good reasons to devise more funds or property to a child or a spouse, the person receiving less than what he or she deems his or her rightful share will inevitably be convinced (or at least argue) that the decedent was unduly influenced or did not intend the result. While these types of claims are difficult to prove, defending against them can be time consuming, costly, and emotionally draining for the will's proponent.

The second ground for potential challenge, the inadequacy of the estate plan, typically comes into play when the decedent created an estate plan prior to the current marriage and does not update it after the marriage. The Probate Code has a provision that permits the omitted spouse to receive shares in the testator's community property, quasi community-property, and separate property, regardless of what is provided for in the estate planning documents and regardless of the decedent's testamentary intent. (Prob. Code § 21610.) To avoid this provision, the will's proponent will have to show that the decedent's failure to provide for the spouse was deliberate, such as through transfers outside the estate that were intended to take the place of providing for the spouse in a testamentary document, or an agreement by the spouse waiving the right to participate in the decedent's estate. (Prob. Code § 21611.) Given decedent's passing, this will typically have to be proven through circumstantial evidence, a

1 To be fair, these circumstances can also create problems among siblings, particularly where the estate is not evenly divided or there are personal property items of significant emotional or financial value.

2 Please note, this article is intended to be only a summary or cursory overview. There are other circumstances ad code provisions regarding estate planning documents.

3 For convenience, the article will refer to a will, but estate planning can also include other instruments, such as a trust.

4 This article assumes the situation where a child or spouse is attempting to undo estate planning that was the deliberate and intended result of the decedent, without any undue influence or capacity issues.

difficult proposition because the documents that often could be used as evidence either never existed, or have gone missing[5] and the witnesses are often those who have competing interests in the estate. Again, this leaves the will's proponent in a time consuming, costly, and emotionally draining situation.

Challenges premised on the ground that an estate plan is not well or properly drafted can be varied. For example, where a will is not properly witnessed or is holographic, the challenger may claim the signatures are forgeries. Alternatively, the will may not dispose of all assets, may not properly describe assets, or may not fulfill the terms of a promise (e.g. the decedent convinced a child to work in the family business by promising that the child would inherit the business, but the will does not fulfill the promise or perhaps fails to mention the business). Again, more grounds for challenge, and more time, cost and emotional distress for those seeking to uphold the will.

While it would be nice to believe that after a person dies, his or her surviving spouse and children will have amicable relations, the reality is that conflicts can and do arise and, without proper planning, there is no way to ensure that a person's testamentary intent will be followed. To try to avoid the types of problems identified above, someone with separate property assets, who is embarking on a new marriage, should have an experienced family law and trust and estates attorneys help him or her draft a prenuptial agreement and a thorough estate plan. He or she should also periodically follow up with the trust and estates attorney to ensure that no changes to the estate plan should be made.

Stefanie G. Field, a member of the Bar Publications Committee is a Senior Counsel with the law firm of Gresham Savage Nolan & Tilden.

5 The unfortunate reality is that key or critical documents are often in the sole possession of the omitted spouse. Given the spouse's interests, the prudent practitioner cannot rely on the continued existence of those documents after the decedent's passing.

Civility in Love and Marriage

by Boyd Jensen

"Marriage is the highest form of consideration," Professor Noel Keyes (Pepperdine School of Law) explained as the reason for my second place finish in contracts. He did not say "love" qualified for that status, nor would he. I believe, at least at that time. "Alienation of affection" and "breach of promise to marry" were eliminated in California as "actionable wrongs" in 1939 (Civil Code §43.5.) Until the supposed American cultural season of "free love," *damnum absque injuria* – actionable love seemed to be one of those "losses without injury."[1] True, the ceremony of marriage has statistically diminished, yet the economics of relationships and the long overdue recognition of the rights of women, fostering "no fault divorce" to prenuptial and postnuptial agreements and now "domestic partnerships" or "cohabitation agreements," clearly any unentitled "benefit conferred" or "prejudice suffered," particularly when reduced to a written agreement, qualifies for a presumption of acceptable and legal consideration (Civil Code §§ 1605 – 1615.) Thus, one must clearly acknowledge that today the benefits conveyed by love or even mutual friendship enjoy the protection of the law; and relationships labeled as "same sex" or transgender find relatively easy legal protection, with standard civil remedies.

In terms of "general civil practice," as distinguished from Probate, Estate Planning and Family Law,[2] where the complexities of love and marriage are self-evident and conspicuous; the general practitioner seeking to abide ethical standards while serving his clients well, can be challenged and find his routine practice very awkward. The United States Department of Justice, for statistical purposes, categorizes the civil practice into three areas: *tort cases* – accidents, malpractice, premises liability, product liability, in intentional torts, libel and slander, false imprisonment and animal attacks; *contract cases* – commercial contracts, rental/lease agreement, partnership disputes, subrogation, foreclosures and other "unknown contracts;" and *real property cases* – boundary disputes, eminent domain and other real property matters.[3]

Each of these areas of the civil practice have economic losses as remedies. Treating that loss when parties are married or in other relationships, can become complicated. As a simple example, if a husband[4] is involved in an automobile accident, what rights does his wife enjoy, and to what extent should she be involved in the handling the case? May one even agree to accept representation of the husband, without advising the wife about her rights, including loss of consortium? The husband's claim of loss of earnings is inclusive of economic damages of which she has a clear legal interest. If this element of damages is to be litigated, is her approval necessary? May confidential information about her husband's employment be communicated in her absence? When a demand is made upon the defendant and decisions are made how to treat a verdict or settlement, doesn't she clearly have an interest in whether something is taxable as her husband's loss of earnings or not taxable as pain and suffering or general damages?

The 1959 California Legislature's seemingly very clear Civil Code § 163.5 that general damages for personal injury were the separate property of a spouse was repealed in 1964. (See Family Code §§ 780-783.) Today, other damages, such as *In re Marriage of Ruiz* (2011) 194 Cal.App.4th 348-lump sum worker's compensation benefits; *In re Marriage of Powell* 2003 (Not Reported in Cal.Rptr.2d, see Westlaw)-wrongful termination proceeds; and *Meighan v. Shore* (1995) 34 Cal.App.4th 1025-even loss of consortium damages, may be considered community property among many, many others.

Personal injury actions, like our auto example above, always involve debts or expenses. These debts and their repayment are undoubtedly community obligations. In some instances, such as debts incurred by a *former* or *separated* spouse and obtained for necessities of life – such as food, clothing or medical care – since the other spouse can be forced to pay, should not even spouses/partners, now separated, but living together during the incurring of the debt, be informed of the pending action to recover money to repay that debt? Generally except for minors – persons under age of 18 – agreements to purchase the medical necessities of life are binding. Even parents of minors now

1 There is seemingly no significant California tradition of "love" as a legal element of law, as California statutes cite but three references to "love:" Education Code § 52730 "expression of… love of country;" Government Code § 421.7 referencing the song "I Love You California;" and Insurance Code § 10110.1 "love" as a element of "substantial interest" regarding life and disability insurance. However other related terms mentioned "hate" 50 times, "marriage" 725 times and "dissolution" approximately 950 times.

2 Generally these areas are covered in the Family Law Code, Probate Code, Labor Code, Welfare & Institutions Code, and in the Revenue and Taxation Code.

3 U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics *Special Report, Civil Bench and Jury Trials in State Courts*, 2005 (revised April 9th 2009.)

4 Obviously "domestic partners" (Civil Code § 1714.01) are treated the same as husband and wife.

having reached the age of majority might have claim to reimbursement for the repayment of certain expenses such as medical bills. These rules would also apply to same-sex marriages, domestic partnerships and civil unions.

As a civil practitioner, I rarely take a case without first meeting with the spouse or other family members. It is cumbersome and often far more time consuming. However, I enjoy the warmth which proximity to the **Rules of Professional Conduct** provide. *Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice* states that, "(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability…" which I believe one may appear to violate by not recognizing and offering both advice and representation as appropriate to domestic relations of clients. *Rule 3-100 Confidential Information of a Client* states, (A) "A member shall not reveal information protected from disclosure… without the informed consent of the client,…" which while in our example above the client may be the injured husband, as the damages sought to be recovered are partially the property of the spouse, why not extend the same confidentiality advice and concomitant waivers for primarily seeking and providing information from the husband. *Rule 3-300 Avoiding Interests Adverse to a Client* recognizes conflicts of interest abound in current civil practice scenarios such as our auto accident above. It is impossible to anticipate and provide for all of them. Thus, transparency and copious disclosures to domestic relations of all varieties are the surest protection. Seek permission from clients to communicate by email or letter to such relations and formally ask them to keep all appropriate persons informed, which is best formalized in writing or email. *Rule 3-500 Communication* states, "A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed."

To unmarried domestic relations, as a matter of course, regardless of the legal representative capacity requested by a client, (i.e. personal injury, contract or real property) recommendations should include: Durable Power of Attorney for Healthcare (or Healthcare Proxy); Domestic Partnership Agreement; Will/Trust and a Durable Power of Attorney for Financial Management. Help and advice on these matters may be found at CalBar.org and the success and enjoyment to both counsel and client of the professional relationship are thereby fostered.

Boyd Jensen has been a civil practitioner in Riverside County since 1979.

Love, Marriage, Hill, Bill & the 22nd Amendment

by Abram S. Feuerstein

Groucho Marx once said that politics does not make strange bedfellows – marriage does.[1] But what about the combination of marriage and politics?

The relationship between Bill and Hillary Rodham Clinton has featured prominently in newspaper and television coverage of the 2016 presidential election. Commentators and candidates speculate about the effect that Bill Clinton will have if he joins his wife on the campaign trail.[2] Talking heads talk about the former president's scandals and whether they are relevant to Hillary's presidential ambitions.

Clearly the Clinton relationship has been part of the national political landscape for almost 25 years. And one day historians – or *People* magazine – may be able to tell us whether the Clinton marriage was a love-filled one riddled with Cupid's arrows, or a hollow one of a convenient and successful working political partnership.[3]

Regardless of the true nature of the relationship, certainly the Clintons have portrayed themselves to the American public as a unit. In Bill Clinton's initial 1992 presidential run, voters were told that they would get "two for the price of one."[4] When scandal threatened to overtake Bill Clinton's campaign in New Hampshire, Hillary Clinton was there at Bill's side providing dutiful testimony as to Bill's character. In a famous interview aired on CBS News's "60 Minutes," Hillary Clinton said: "You know, I'm not sitting here, some little woman standing by my man like Tammy Wynette. I'm sitting here because I love him and I respect him and I honor what he's been through and what we've been through together."[5]

In 1992, the couple appeared to be selling the public on a co-presidency. As Bill Clinton told author Gail Sheehy: "If I get elected president, it will be an unprecedented partnership, far more than Franklin Roosevelt and Eleanor. They were two great people, but on different tracks. If I get elected, we'll do things together like we always have."[6] True to his word, after the election, Hillary Clinton was assigned the heavy-duty task of trying to pass comprehensive health care reform legislation.

The co-presidency theme was replayed, again, in 2008, in Hillary Clinton's first presidential run. As one New York Times commentator observed: "She has cast herself . . . as a first lady like no other: a full partner to her husband in his administration, and, she says, all the stronger and more experienced for her 'eight years with a front row seat on history.'"[7]

More recently, in touting her current candidacy, Hillary Clinton advised voters that she is not a stranger at the White House and that were she to win, she would not "need a tour" but "know(s) right where the Oval Office is (located)."[8] As for Bill Clinton's role in a potential Hillary

1 *http://thinkexist.com/quotation/politics_doesn-t_make_strange_bedfellows-marriage/173499.html*. The original quotation, "politics makes strange bedfellows" is attributed to Charles Dudley Warner who, most famously, was the co-author with Mark Twain of *The Gilded Age: A Tale of Today*.

2 Campaigning recently in New Hampshire a short distance from where Bill Clinton was promoting his wife's candidacy, New Jersey Gov. Chris Christie said: "Who's running? Her or him?" Karen Tumulty and Abby Phillip, "Bill Clinton: Asset or liability for his candidate-wife?", *The Washington Post*, January 4, 2016, *at https://www.washingtonpost.com/politics/bill-clinton-asset-or-liability-for-his-candidate-wife/2016/01/04/9ad8c310-b2fb-11e5-a842-0feb51d1d124_story.html*.

3 Characteristic of the attention that the relationship has received are the comments of Carly Fiorina, a GOP presidential candidate and former Hewlett-Packard chief executive. During a presidential debate conducted on January 14, 2016, Ms. Fiorina said: "Unlike another woman in this race, I actually love spending time with my husband." The next day she noted, "(i)f my husband had done some of the things Bill Clinton had done, I would've left him long ago." R. Ballhaus, "Fiorina Digs in With New Shot at Clinton," *Wall Street Journal*, January 16-17, 2016, p. A5.

4 Lisa Lerer, "Hillary Clinton campaign deploys husband Bill very carefully," *The Washington Post*, January 16, 2016, at *https://news.yahoo.com/hillary-clinton-campaign-deploys-husband-bill-very-carefully-075607907--election.html*.

5 See Dan Balz, "Clinton Concedes Marital 'Wrongdoing,'" *The Washington Post*, January 27, 1992, available at *http://www.washingtonpost.com/wp-srv/politics/special/pjones/stories/pj012792.htm*.

6 Gail Sheehy, "What Hillary Wants," *Vanity Fair*, May 1, 1992, available at *http://www.vanityfair.com/news/1992/05/hillary-clinton-first-lady-presidency*.

7 Patrick Healy, "The Resume Factor: Those 2 Terms as First Lady," *New York Times*, December 26, 2007, available at *http://www.nytimes.com/2007/12/26/us/politics/26clinton.html?pagewanted=all&_r=0*.

8 Laura Meckler, "Hillary Clinton: 'I know Right Where the Oval Office Is,'" *Wall Street Journal*: Washington Wire, January 5, 2016, available at *http://blogs.wsj.com/washwire/2016/01/05/hillary-clinton-i-know-right-where-the-oval-office-is/*.

Clinton administration, Hillary noted during the January 17, 2016, Democrat presidential debate, "It'll start at the kitchen table – we'll see where it goes from there," and, further, as to economic issues, "You bet I'm going to ask for his ideas. I'm going to ask for his advice."[9]

Assuming that the Clintons have been truthful about their "full partnership," the oddball question arises as to whether Hillary Clinton's candidacy raises eligibility questions sounding in the 22nd Amendment?

The 22nd Amendment

The 22nd Amendment to the Constitution imposes a two-term limit on presidents. It provides:

> "No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once."

Nothing in the original Constitution barred a president from running for a third term. However, until Franklin D. Roosevelt ran in 1940 and 1944, presidents had followed the lead of George Washington and limited themselves to two terms. In 1947, Republicans in the majority in both houses of Congress, joined by Southern Democrats opposed to much of the New Deal, swiftly approved the 22nd Amendment.[10] Ratification by the requisite three-fourths of the state legislatures took place in 1951.

The 22nd Amendment may have been a reaction to FDR's lengthy tenure, but "the notion of presidential term limits has long-standing roots in American politics."[11] According to Bruce Peabody, Professor of Political Science at Fairleigh Dickinson University, term limits were debated (albeit rejected) by the Framers at the Constitutional Convention of 1787, and prior to the 22nd Amendment Congress had introduced 270 separate bills restricting presidential terms.[12] By preventing a third term, the Amendment served as a check on the accumulation of power by any single person.[13]

Few people would argue that the express terms of the 22nd Amendment extend beyond a "person" to cover the person's spouse. After all, the starting point for any issue of statutory interpretation "is the language of the statute itself." (*In re Rowe* (4th Cir. 2014) 750 F.3d 392, 396, citations omitted.) The Supreme Court frequently has advised that the plain language of a statute is the most appropriate interpretation. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon (of statutory interpretation) is also the last: 'judicial inquiry is complete.'" (*Id.*, quoting *Conn. Nat'l Bank v. Germain* (1992) 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed. 2d 391; see also, *United States v. Ron Pair Enterprises, Inc.* (1989) 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290.)

Of note, in 1966 Alabama's governor, George Wallace, found himself "termed out" by a state constitution that prevented Wallace from seeking a second term. He recruited his wife, Lurleen Burns Wallace, as a "surrogate candidate" who easily won election.[14] It appears to have been widely understood that George Wallace would continue to have an active

9 Erin Hill, "Hillary Clinton Outlines What Bill's Role Would Be as First Gentleman," *People*, January 17, 2016, available at *http://www.people.com/article/hillary-clinton-bill-clinton-role-first-gentleman*.

10 James MacGregor Burns and Susan Dunn, "No More Second-Term Blues," *New York Times*, January 5, 2006 ("Burns & Dunn"). According to Burns & Dunn, the House passed the amendment after only two hours of debate; the Senate after five days of debate. They opine that the amendment "seemed an effective way to invalidate Roosevelt's legacy, to discredit this most progressive of presidents."

11 Bruce Peabody, "Presidential Term Limit," The Heritage Guide to The Constitution, available at *http://www.heritage.org/constitution/#!/amendments/22/essays/184/presidential-term-limit*.

12 *Id.*

13 *Id.*

14 *See generally, https://en.wikipedia.org/wiki/George_Wallace.*

role in governing the state and that his wife's candidacy simply was an effort to get around term limits.[15] There do not appear to have been any legal challenges to the candidacy.

Under the law, married individuals are treated as a single unit for many purposes. Community property law recognizes the income and expenses of, well, a community. The rules of evidence broadly recognize privileges for communications between spouses, ensuring that spouses can confide in one another without the fear that their private conversations may later be disclosed in court. (See *generally*, Cal. Evidence Code §§ 980-987.) Married couples may opt to file a joint tax return. The bankruptcy laws permit spouses to file a joint bankruptcy petition. In these situations, however, the subject laws define the special treatment afforded to married individuals. By contrast, the 22nd Amendment says nothing about married partners.

The Spirit of the Law

If the *literal* language, or the "letter" of the 22nd Amendment is not offended by Hillary Clinton's presidential ambitions, a remaining question is whether her candidacy violates "the spirit" of the Amendment.

The spirit of a law is its perceived intention.[16] By complying with the spirit of a law, one is engaged in an effort to abide by the intentions of those who drafted and passed the law.[17] For a jurist like Supreme Court Justice Antonin Scalia, the concept that the spirit of a law is paramount, and not its letter, is "nonsense."[18] Scalia has observed that we must be governed by the letter of the law and not some judicial determination of spirit, "which could be anything."[19] According to Scalia, democratic self-government requires that people have representatives who can write a statute, and the statute should be applied as written.[20]

A contrasting view holds that Congress is charged by the Constitution with enacting laws, and its intentions as expressed in legislative history and other materials should not be discarded in efforts by Courts to interpret statutes.[21]

As a societal norm, there is an expectation that in marriage "two people become one."[22] Indeed, people spend lavishly and invite family and friends to witness and celebrate their marriage ceremonies, the forging of bonds that result ideally in a new, stronger relationship and a "merging" of families. Individual identities – and certainly egos – are sacrificed as the parties interact with each, and the world, as a married unit.

Most people have a certain expectation that a president's spouse, whether in the past a Jackie Kennedy or a Nancy Reagan, or in the future, a John Smith, will influence the decisions made by the president. A sharing of confidences between spouses in their private moments and in the private quarters of the White House is even viewed as healthy. Arguably, having shared the campaign trail together, a president's spouse has earned a role as an unelected, unofficial adviser. Nevertheless, that role is qualitatively different from the "two for one" or "co-presidency" role described in the past by the Clintons.

Ultimately, no court will decide whether the 22nd Amendment precludes Hillary Clinton from running for President, and certainly no court will issue an injunction to Bill Clinton to stay away from the White House in the event Hillary is successful. Instead, the political process will control, with voters deciding for themselves whether – and possibly with a small nod to the 22nd Amendment-- they believe that the Clinton partnership should return to power or whether two Clinton terms is sufficient.

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15 David Boaz, "Lurleen Wallance, 'Ma" Ferguson and Hillary: Will the Clintons be the new Southern political dynasty," *Orlando Sentinel*, January 14, 2008, available at *http://articles.orlandosentinel.com/2008-01-14/news/lurleen14_1_lurleen-wallace-george-wallace-jim-ferguson*.

16 S.M. Garcia et al., "The letter versus the spirit of the law: A lay perspective on culpability," *Judgment and Decision Making*, Vol. 9, No. 5, September 2014, pp. 479-90, available at *http://www.sas.upenn.edu/~baron/journal/14/14605/jdm14605.pdf*.

17 *See https://en.wikipedia.org/wiki/Letter_and_spirit_of_the_law*.

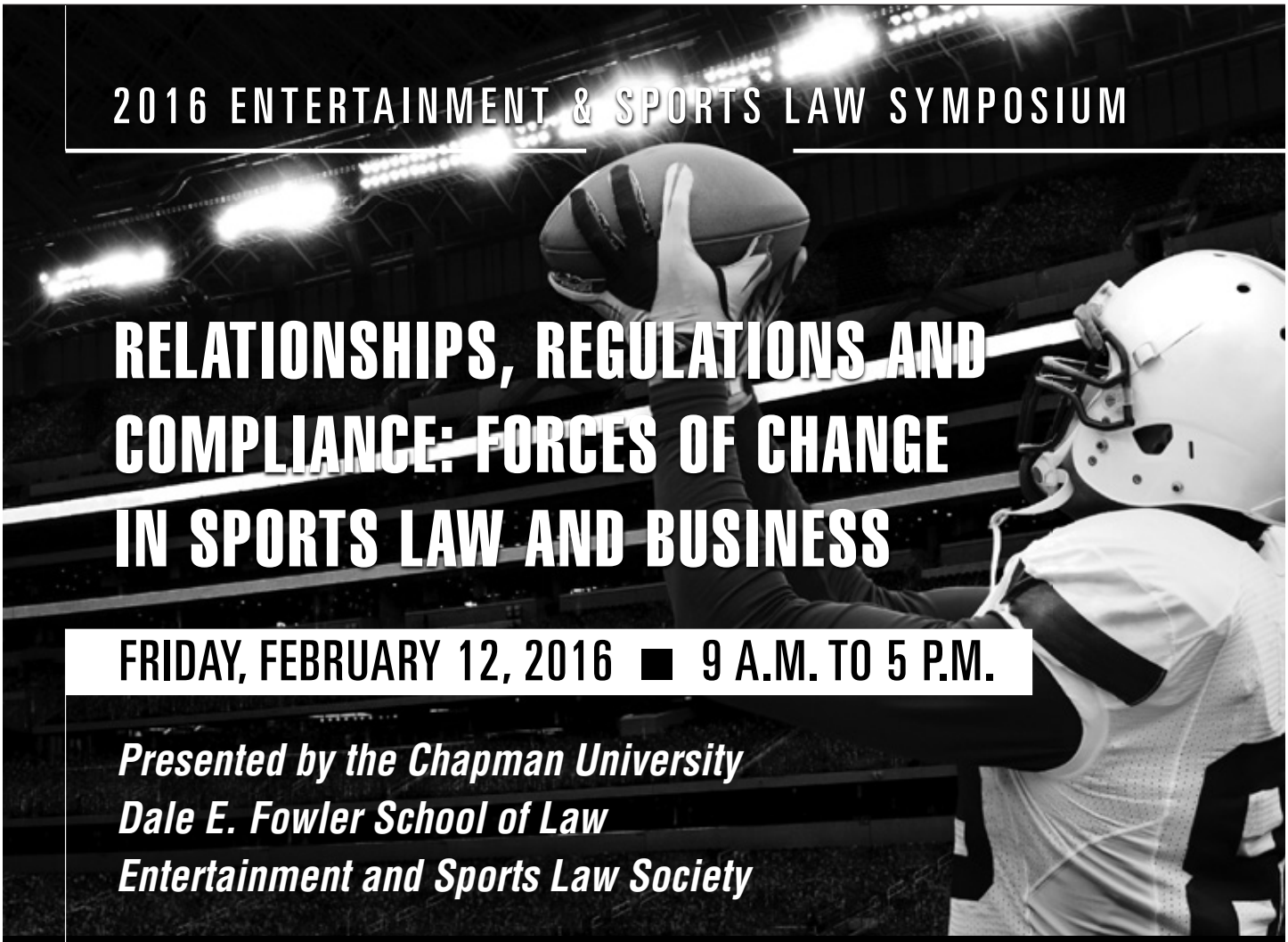
18 *See* Interview with Supreme Court Justice Antonin Scalia, at Bell Ringer: Spirit of the Law and Judicial Interpretation of Statutes, available at *http://www.c-spanclassroom.org/Lesson/1619/Bell+Ringer+Spirit+of+the+Law+and+Judicial+Interpretation+of+Statutes.aspx*

19 *Id.*

20 *Id.*

21 *See* Interview with U.S. Second Court of Appeals Chief Judge Robert Katzman at *Id.*

22 In the poem "I do, I will, I have," poet and humorist Ogden Nash characterized the relationship as an "alliance" of two people, "a man who can't sleep with the window shut and a woman who can't sleep with the window open," or "two people one of whom never remembers birthdays and the other never forgets them." *See http://www.ogdennash.org/poems/i_do_i_will_i_have.htm*.



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Important Tax and Social Security Planning Updates for Married Couples in 2016

by Rudy E. Brandes

Introduction

Imagine you were told to cross the street. What you were not told is that a ferocious tiger might lie on the other side of the fence across that street. Planning for clients can sometimes feel this way – it's difficult to plan with certainty when the federal government so frequently amends the rules. Thankfully, some practical tax planning for certain taxpayers including married couples can be performed with more confidence in 2016 (compared to prior years). Why? The Protecting Americans from Tax Hikes Act of 2015 (PATH) made permanent several tax items that kept getting "kicked down the road" in past years, and extended some rules for the 2016 tax year that were set to expire in 2015. On the other hand, planning for a married couple's Social Security benefits has become more challenging – specifically, the Bipartisan Budget Act of 2015 eliminated some popular Social Security claiming strategies for married couples that do not meet certain age and filing requirements by the end of April 2016.

Qualified Charitable Distribution Rule Made Permanent

The PATH Act, passed only weeks before the end of 2015, made Qualified Charitable Distributions (QCD) to help satisfy Required Minimum Distribution (RMD) obligations permanent beginning in the 2015 tax year.[1] The PATH Act permanently extended the eligibility of 70½ year olds to direct their Individual Retirement Account (IRA) provider to pay up to a $100,000 distribution from their IRA per tax year directly to a charity.[2]

Note that a QCD distribution is essentially an "above-the-line" type of deduction because the taxpayer does not have to include the QCD in their Adjusted Gross Income (AGI) calculation.[3] At the same time, this sort of distribution can help satisfy part or all of the respective taxpayer's RMD obligation for a particular tax year.[4] This is important to know because married couples that both have RMD obligations from their respective IRAs can be vaulted into higher tax brackets as they enter advanced years. Thus, performing a QCD to help satisfy RMD obligations can come in handy. For example, married couples with traditional IRA balances may be looking to donate to certain charities.[5] Imagine if this married couple wanted to keep their taxable income below the 25% bracket so all of their qualified dividends and long-term capital gains would get taxed at a 0% rate[6] (by keeping taxable income at or below $75,300 for a married couple filing a joint return in 2016[7]). Alternatively, imagine the couple was trying to avoid triggering the 3.8% Net Investment Income Tax which kicks in when a married couple files a joint return that exceeds a modified AGI of $250,000.[8] When appropriate, QCDs can be helpful to manage certain tax situations.

Discharge of Qualified Principal Indebtedness Rules Extended

Some taxpayers, including married couples, may also be in a tax situation caused by their home being underwater (i.e., the fair market value of their primary residence is less than the mortgage balance owed), and looking at the tax consequences associated with cancellation of debt income. The PATH Act of 2015 extended and modified legislation that excludes from gross income the discharge of qualified principal residence indebtedness.[9] Keep in mind that this rule only applies to certain discharges taking place prior to January 1, 2017, and for discharges after December 31, 2016 as long as the respective discharge is pursuant to a written agreement entered into on or before December 31, 2016.[10]

Key Social Security Planning Strategy Set To Expire in April 2016

Prior to the passage of the Bipartisan Budget Act of 2015 (BBA), optimization of Social Security claiming strategies became quite popular (especially for married couples). One of the most popular strategies for married couples became commonly known as the "switching strategy".

1 26 U.S.C. § 408(d)(8).
2 26 U.S.C. § 408(d)(8)(A).
3 *Id.*
4 26 U.S.C. § 408(d)(8).
5 For additional information on the types of charitable organizations that satisfy QCD requirements, see 26 U.S.C. § 408(d)(8)(B) & (C).
6 26 U.S.C. § 1(h)(1)(B).
7 *See* Revenue Procedure 2015-53, Section 3, Table 1.
8 26 U.S.C. § 1411(b)(1).
9 26 U.S.C. § 108(a)(1)(E) & (h)(2).
10 26 U.S.C. § 108(a)(1)(E)(i) & (ii).

The switching strategy generally involved situations where both spouses had relatively similar levels of Social Security benefits (that were not yet claimed), had each achieved full retirement age, and both wanted to delay their Social Security *retirement* benefits until age 70 to maximize delayed retirement credits (DRCs).[11] The DRC could add up to an 8% per year increase to an individual's primary insurance amount for every year that a spouse waits to claim Social Security benefits beyond full retirement age through age 70.[12]

Here is how the strategy typically worked. One spouse would file and suspend Social Security benefits upon reaching full retirement age.[13] At the same time, the other spouse (i.e., the non-suspending spouse) would file a "restricted application" solely for spousal benefits at full retirement age. Both the spouse that filed and suspended benefits, and the spouse that filed for restrictive spousal benefits would continue to receive DRCs through ages 70 on their own Social Security retirement benefits – increasing their respective primary insurance amounts by up to 32% from full retirement age. In other words, one spouse could technically receive spousal benefits beginning at full retirement age, while both spouses' benefits continued to earn DRCs. As each respective spouse attained age 70, that spouse would turn on their own increased Social Security retirement benefits.

The BBA ended this strategy for married couples not meeting strict age and filing requirements – essentially creating two regimes. One regime grandfathers in the old rule as long as three items are satisfied: (1) one spouse must file and suspend on or before April 29, 2016; (2) the spouse that files and suspends must have been born on or before April 30, 1950; and (3) the opposite spouse filing (or planning to file) solely a restricted application for spousal benefits was born on or before January 1st, 1954.[14]

11 *See https://www.ssa.gov/planners/retire/suspend.html.*

12 *See https://www.ssa.gov/planners/retire/delayret.html.*

13 42 U.S.C. § 402(w)(2)(B)(ii).

14 Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 831; GN 00302.400.

The new regime eliminates the switching strategy altogether for married couples that do not meet the aforementioned requirements.[15] Practically speaking, the new regime disallows a situation where one spouse files and suspends their own retirement benefit at full retirement age (while still earning DRCs) to solely trigger a spousal benefit.[16] Confirming which regime your married clients fall under will be critical for Social Security planning in 2016.

Conclusion

Tax planning is important for married couples in 2016 – especially for clients trying to manage their AGI with the Qualified Charitable Distribution rules that are now permanent, or by obtaining some relief from the discharge of Qualified Principal Indebtedness rule that expires in 2016. However, perhaps most important in early 2016 is Social Security Planning for married couples that potentially fall under the old regime of switching strategy rules – these couples should determine whether and how they are impacted by these rule changes before the end of April 2016

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15 42 U.S.C. § 402 (z)(3)(B) & (r)(2).

16 *Id.*

On the Record with Saenz

by Dawn Saenz

Attorney Robert Deller is the founder and sole practitioner of the Law Offices of Robert Deller and Associates. He was admitted to the California Bar in 1988. Mr. Deller is a valued member of numerous associations, such as the Leo A. Deegan Inn of Court and the Riverside County Bar Association.

I sat down with Robert Deller in his office. We spoke for about an hour...On the Record.

Q: When did you first know you wanted to be an attorney?

A: In my pre-teens, around ten years old. I always had a propensity to debate. I tended to not accept things at face value. My parents encouraged me. I was usually the peacekeeper, using humor and anecdotal stories to diffuse situations.

Q: Out of all of the cars you have ever owned, what is your favorite?

A: A convertible Austin Healey 3000. I had it in college. It was sleek. It was fast. It was sporty! It had a right-hand drive and was shipped from Brighton Sussex, England.

Q: Name something you love about the practice of law.

A: I love winning. Nothing is more rewarding than doing something that you know benefits the children. In a court of law, parents either heal or hurt themselves, speaking metaphorically. The children are the ones that need protection. They are the vulnerable ones.

Q: Coke or Pepsi?

A: Dr. Pepper.

Q: What type of music do you listen to?

A: Rhythm and blues; jazz; hard rock. Queen and John Legend.

Q: What is your favorite thing in your office, and why?

A: It's a painting of the female Samurai. They didn't have female samurai, which is why I love it. I am very into Asian art.

Q: Dogs or cats?

A: Dogs

Q: What is the most common "Dellerism" that you use?

A: "The star that burns the brightest burns the shortest." I also often say, "Those that pay the least demand the most."

Q: Something that annoys you when you are driving?

A: Wearing my seatbelt. Also, people in the No. 1 lane going 20 miles per hour under the speed limit because they're texting or on the phone.

Q: What is the strangest thing you have seen in court?

A: I was in civil court, early in my career. Someone was in front of the court . . . suing God. They genuinely believed they had a cause of action and were presenting oral argument to the court. The plaintiff had tried to take a default. . . against God. God hadn't answered the complaint. The court ended up dismissing the action because God had not been served and no proof of service was filed with the court. The court determined it didn't have jurisdiction over God.

Q: What is the last app you loaded onto your phone and what does it do?

A: Wallapop. It lists everything in your community that people are trying to sell on various sites.

Q: What were you thinking the first day you ever walked into a courtroom?

A: "What am I doing here?" I was in Judge Miceli's courtroom. I didn't even know where to stand when the case was called.

Q: What do you do to relax?

A: Meditation, I'm a voracious reader. I spend time with Julius, my horse, or simply sit by my koi pond.

Q: Who is your favorite sports team?

A: Angels for baseball. Dolphins for football.

Q: Any final thoughts?

A: I love my job and everything it entails...court, judges, court staff...they all work together. I enjoy my colleagues. Together, we all work as one integral wheel. I practice in many courts throughout many counties. In Riverside, we're like a family. Everyone is dedicated to doing their job in the Riverside courts...and it shows.

Dawn Saenz is a solo practitioner in the Riverside area, practicing in the areas of family law and personal injury. She is also a member of the Bar Publications Committee and involved in various RCBA activities.

Discrimination Based on Marital Status in Employment Law

by Sarah Mohammadi

There are a number of special legal and social advantages offered to people who choose to enter into the institution of marriage.[1] Similarly, a whole host of benefits are offered to domestic partners in California. These benefits are conferred upon spouses by both the federal and state governments and private entities alike and include, but are not limited to, preferential tax treatment, social security benefits, protections offered by intestate succession, and employee family health care. Despite the fact that marital status and domestic partnership status[2] (herein referred to as "marital status") confers benefits upon spouses in countless legal contexts, it cannot be considered for better or for worse in the scope of employment matters.

In California, the Fair Employment and Housing Act ("FEHA") prohibits an employer (or a prospective employer) from discriminating against an individual based upon his or her marital status.[3] Based thereon, an individual's state of marriage, non-marriage, divorce, separation, widowhood, annulment, or other marital state cannot be considered by an employer when making decisions regarding the individual's employment, including, but not limited to, hiring, firing, advancement, and discipline. In order for an employee[4] to properly state a claim for discrimination under California Government Code section 12940(a), the employee will need to prove that he/she was denied some sort of employment benefit because of his/her single or married status, or because his/her spouse is employed, or not employed.[5]

1 Federal law confers 1,138 benefits, rights and protections provided on the basis of marital status. (*See*, Human Rights Campaign, *http://www.hrc.org/resources/an-overview-of-federal-rights-and-protections-granted-to-married-couples*.)

2 California's domestic partnership law provides that registered domestic partners have "the same rights regarding nondiscrimination as those provided to spouses." (California Family Code § 297.5(f).) Based thereon, employers or prospective employers may not discriminate against any individual based on their domestic partnership status.

3 California Government Code § 12940(a). California Government Code § 12940(j) also protects employees from harassment based on their marital status.

4 Notably, California Government Code § 12940(a) and (c) also protect prospective employees and apprentices from unlawful discrimination.

5 2 California Code of Regulations § 11504.

Based thereon, employers should never consider an employee or applicant's marital status when making hiring decisions, firing decisions or other decisions involving the terms and conditions of employment. The best practice would be for employers not to ask questions regarding an employee or applicant's marital status. However, there are some narrow exceptions to these rules, where an employer may ask questions about an individual's marital status and/or may make employment related decisions based on marital status without running the risk that they are engaging in discrimination based on marital status.

The Exceptions

Generally, employers should refrain from considering an employee (or potential employee's) marital status or asking a job applicant to disclose his or her marital status.[6] However, there are specific circumstances where asking questions about an individual's marital status, either directly or indirectly, and considering marital status will be deemed acceptable. Some examples of these exceptions are as follows:

- An employer may ask whether an applicant has ever used another name in order to check the applicant's work history, despite the fact that the question may reveal the employee's marital status.[7]

- FEHA carves out a specific exception allowing an employer to ask an applicant whether their spouse is currently employed by the employer.[8] However, there are strict limitations on the use of this information. Employers are not allowed to use the applicant's response as a basis for an employment decision absent two specific circumstances.[9] First, an employer may regulate the working of spouses in the same department, division or facility for the business reasons of supervision, security or morale if the work involves potential conflicts of interest or other hazards greater for married couples than for other persons.[10] Second,

6 2 California Code of Regulations § 11056(a).

7 2 California Code of Regulations § 11056(b).

8 California Government Code § 12940(a)(3); 2 California Code of Regulations § 11056(c).

9 2 California Code of Regulations § 11056(c).

10 California Government Code § 12940(a)(3)(A); 2 California Code of Regulations § 11057(a)(2).

and similarly, employers may refuse to place one spouse under the direct supervision of the other spouse for business reasons of supervision, safety, security, or morale.[11] If neither conflicts of interests, hazards, or supervision issues exist, the employer may not consider the employee's marital status in any employment related decision. Notably, if two employees get married during their tenure with their employer, the employer must make reasonable efforts to assign job duties, so as to minimize problems of supervision, safety, security or morale.[12]

- Employers are free to utilize health plans that provide additional or greater benefits for employees with dependents than those without or with fewer dependents.[13] Notably, employers are not permitted to condition medical benefits or other fringe benefits on whether an employee is the principal or secondary wage earner for his/her family.[14]

11 California Government Code § 12940(a)(3)(A); 2 California Code of Regulations § 11057(a)(1).
12 2 California Code of Regulations § 11057(b).
13 California Government Code § 12940(a)(3)(B).
14 2 California Code of Regulations § 11058(a)(2).

Navigating the perilous waters of marital status discrimination can be challenging for employers, especially with the increasing popularity of social media websites like Facebook and Twitter. Employers should exercise extreme caution when looking at an applicants' or employees' social media accounts, because it may reveal their marital status, and employers cannot make any employment decisions on that basis, except for the narrow anti-nepotism exceptions carved out above. Employers should contact their legal counsel if an employee or applicant's marital status ever becomes germane to an employment decision.

Sarah Mohammadi is an attorney in the Labor and Employment Practice Group at Best Best & Krieger, LLP. Sarah's litigation practice encompasses, but is not limited to, wage and hour, discrimination, harassment, wrongful termination and contract disputes. Sarah also spends a substantial amount of her practice advising employers on how to comply with California laws.

Domestic Partnerships: Still Relevant in a Post-Marriage Equality World

by Christopher Marin

Last time I wrote on Domestic Partnerships,[1] it was looking at their status after marriage equality came to California following the Supreme Court's ruling in *Hollingsworth v. Perry,* 570 U.S. ___ (2013), Docket No. 12-144, which upheld a lower court's ruling striking down the California Constitution's prohibition of same-sex marriage as a violation of the 14th Amendment (albeit on Article III standing grounds). Now after *Obergefell v. Hodges*, 576 U.S. ___ (2015), Docket No. 14-556, that same 14th Amendment protection is extended to all same-sex couples across America and marriage equality is now the law of the land.

Even though these rulings obviate the need for Domestic Partnerships for same-sex couples who can now marry, California's Domestic Partnership statutes still remain on the books.[2] That is probably because of the second class of people Domestic Partnerships were designed to benefit: couples where one or both parties are over 62 years of age regardless of their sexual orientation. In the meantime, same-sex couples still have Domestic Partnerships available to them (at least statutorily) that many opposite-sex couples do not, granting them "special rights" – to use the language that opponents of marriage equality used to label the concept of marriage extended to same-sex couples.

The unique nature of the status of Domestic Partnership, however, will probably mean that the statutes will not be relegated to a historical footnote. Arguably, with some modifications these laws may serve as a preferred route for all couples wanting to enter a *Marvin*-type relationship without the hassle of drawing up a written *Marvin* agreement. (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 557 P.2d 106.) It is important, then, that Family Law practitioners understand the benefits of Domestic Partnerships to best advise their clients, regardless of the client's sexual orientation.

The key benefit offered to all couples in a Domestic Partnership is the protection of California's community property laws to extend to all property acquired by the couple after the formation of the partnership, as well as other state benefits attached to marriage. However, the designation of "Domestic Partner" is separate from the designation of "Married."

For state purposes, this designation makes little to no difference whatsoever. Because of the discrimination same-sex couples faced at the ballot box – first with the passage of the anti-marriage equality Proposition 22 in 2000, and then the anti-marriage constitutional amendment Proposition 8 passed in 2008 after the California Supreme Court struck down Prop 22 as violating California's guarantee of equal protection to individuals regardless of their sexual orientation – the legislature responded with one of the most robust domestic partnership protections in the country. In fact, this "separate, but equal" schema was one of the reasons the court upheld Proposition 8, although it did not invalidate any same-sex marriages performed between the In *re Marriage Cases* striking down Prop 22 in May 2008 and the passage of Prop 8 in November 2008.

For federal purposes, California's separate but equal schema does not apply. As we learned in the federal court case challenging Prop 8, there are over 1,100 federal benefits granted to married couples and married couples alone. The Internal Revenue Service does, however, recognize community property, and so it requires that individuals in domestic partnerships file taxes as single or head of household, but each partner must report their income as half of the combined income of the domestic partnership. Other than that, there is no federal benefit available to non-married couples, even in domestic partnerships.

Not being "married," however, carries the benefit of not having any disruption to federal benefits an individual might receive as a widow or ex-spouse entitled to receive a derivative federal benefit from their former spouse's contributions (usually in the form of Social Security retirement). This is what makes it such an attractive option to individuals already receiving those benefits, and why the legislature included that second category of couples eligible for Domestic Partnership.

There are other benefits of being in a "non-marriage marriage." This would probably be an attractive option for people who want legal protections for their romantic relationship, but object to having the word "married" attached to their relationship (presumably for religious

1 Christopher Marin, "Relationship Status? It's Complicated" *Riverside Lawyer*, June 2014 at 8.

2 Family Code §§ 297-299.6

purposes). It is also easier to enter and exit a domestic partnership. When France offered a status substantially similar to domestic partnership to all couples, it quickly gained popularity even among heterosexual couples who opted for it instead of marriage, much to the consternation of conservatives.[3]

Apparently, there is demand for domestic partnerships (or some functional equivalent). And if California does decide to extend these available protections beyond the two classes already classified, then citizens of all stripes can enjoy them – be they gay, old, ultra-Orthodox or just plain commitment-phobic.

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3 Edward Cody, "Straight Couples in France Are Choosing Civil Unions Meant for Gays", *Washington Post*, February 14, 2009.

When One Spouse Files for Bankruptcy, But Not the Other: An Overview of Community Property and Community Claims in Bankruptcy

by Cathy Ta

When a Chapter 7, 11, or 13 case is filed, a new entity is created called the bankruptcy estate. A bankruptcy estate is comprised of all of the debtor's non-exempt legal or equitable interests in property as of the time of the filing, wherever located and by whomever held, plus certain property that the debtor acquires (or becomes entitled to acquire) within 180 days after the case is filed. The idea is that "property of the estate" is broadly defined so as to maximize payment to creditors of the debtor; in exchange, at the end of the case, the "honest but unfortunate debtor" will receive a discharge that relieves the debtor from personal liability.

Notably, property of the estate also includes all interests of the debtor and the debtor's spouse in community property[1] as of the time of the filing – even when the debtor's spouse does not file for bankruptcy. Specifically, under bankruptcy law, the estate includes: (1) community property that is under the sole, equal or joint management and control of the debtor; (2) community property that is liable for a claim against the debtor; and (3) community property that is liable for a claim against the debtor and the debtor's spouse. This means that property of the estate includes all community property except community property that is under the sole management of the debtor's spouse. The purpose for including community property in the bankruptcy estate is so that creditors of the debtor as well as creditors with claims against community property (that may or may not be creditors of the debtor) may share ratably in the distribution of community property as they would have been able to under state law. In other words, a debtor who files bankruptcy without his or her spouse would not disadvantage creditors that hold claims against community property based on whether they are creditors of the debtor or the debtor's spouse – these creditors will be paid alike. In exchange, the discharge will apply to bar these creditors from reaching the same type of community property that is acquired after the filing of the case. Therefore, a debtor's bankruptcy filing not only discharges the debtor from personal liability, but also the non-filing spouse's debts against community property that is property of the estate.

A community property debt is defined under state law. In California, a community property debt is any debt incurred by either spouse before or during marriage,[2] regardless of which spouse has the management and control of the property and regardless of whether each spouse is a party to the debt. In contrast, separate property of a person is liable for all of that person's debts, whether incurred before or during marriage; the only debt for which separate property is not liable is a debt incurred by that person's spouse before or during marriage. In a bankruptcy case, this means all of the filing spouse's separate property as well as community property (except for those under the sole management of the spouse) is included in property of the bankruptcy estate for payment to creditors.

1 In California, community property is any property acquired by a spouse during the marriage (that is not a gift or inheritance) while domiciled in the state.

2 "During marriage" is the period that does not include when the spouses are living separate and apart before a divorce or legal separation. In California, spouses may hold property as joint tenants, tenants in common, community property, or community property with a right of survivorship; regardless, the property would be treated as community property.

So, what happens when a debtor files a bankruptcy case without the spouse? In a Chapter 7 liquidation case, a Chapter 7 Trustee takes control of community property that passes to the bankruptcy estate, including whether or not to exercise the power to sell community property. In a Chapter 11 or 13 reorganization case, the debtor controls community property that passes to the bankruptcy estate. This means that the non-filing spouse loses control over community property, whether or not the non-filing spouse authorized (or even knew in advance of) the debtor's filing, given that spousal authorization is not a filing requirement under bankruptcy law. At minimum, a non-filing spouse participates in the bankruptcy case by being entitled to notice and hearing before any disposition of community property. The non-filing spouse also could participate by joining the bankruptcy case as appropriate or in the case of a bad faith filing, defeating the bankruptcy case through a motion to dismiss.

Once a bankruptcy case is filed, the bankruptcy court exercises exclusive jurisdiction over property of the estate so as to orderly administer assets and liabilities of the bankruptcy estate. Typically, a bankruptcy court will not overturn a property division agreement approved by a state court, but, it may do so if the division was not at arms-length and fraudulent as to creditors. The practical effect is that the spouse that first files bankruptcy will determine not only the fate of community property, but also who and which court will exercise control over it during the bankruptcy case.

In short, bankruptcy law is crafted to include community property as part of the bankruptcy estate so that in general, all community debt may be paid from community property (before separate property is used to do so). This is the case even when only one spouse files for bankruptcy.

Cathy Ta is an attorney at Best Best & Krieger LLP. As a member of the Business Services Group, Cathy practices in the areas of bankruptcy and litigation. Cathy's extensive work in the representation of debtors, creditors and trustees in contested matters, adversary proceedings and general litigation includes pre-filing planning and counseling, prosecution and defense of complex cases and motion practice, and multifaceted mediated and unmediated settlement negotiations and agreements. Cathy also advises clients on transactional matters and performs collections work. Prior to joining the firm, Cathy served as a law clerk to the Honorable Marvin Isgur, United States Bankruptcy Judge for the Southern District of Texas.

Opposing Counsel: Gregory G. Rizio

by Dawn Saenz

"The other side might be my enemies, but they're also great people."

– Greg Rizio

That simple statement sums up not only how Greg Rizio views the practice of law, but also how he views the legal community. As one of the top personal injury attorneys in California, if not the country, what is immediately striking about this man is his humble attitude and his desire to make the Inland Empire a better legal community.

Gregory G. Rizio

Receiving a soccer scholarship, Rizio started attending Point Loma Nazarene University in 1984. The small campus was attractive to him because it was a Christian environment and it was located in the San Diego area, where he could envision living his life. He ended up loving the campus community and was well-known by staff, students, and administration. But while attending classes, he started to question if he had what it would take in a more challenging environment. "I started to wonder if I was just a big fish in a small pond, or if I could really swim with other big fish."

In 1987, Rizio decided to do a reality check on himself and applied to Georgetown University for a specialized internship that lasted three months. "It was the equivalent of an entire semester. We took three classes in the morning and then interned in the afternoons, it was very intense." Rizio's questions about his ability to "run with the big dogs" were quickly answered when he discovered his roommate from Harvard. He completed the internship in 1987 and graduated from Point Loma Nazarene University in 1988.

Still wanting to remain in the San Diego area, Rizio applied and was accepted to California Western School of Law in 1988. "I was wait-listed for University of San Diego, but by the time they accepted my application I was already in classes at Cal Western." Rizio graduated in 1991, took the California Bar Exam, and passed on his first attempt.

In 1991, while he was still in law school, Rizio had an externship with the San Diego District Attorney's Office. Rizio was a certified law clerk, handling preliminary hearings, trials, and trained to become a prosecutor. "I really saw myself as a deputy district attorney. I had minimal supervision and was able to do pretty much everything the district attorneys did." Rizio chuckled as he said, "Everything I do, I plan out. I knew if I had the externship in my last year of law school, and not in my second year, that I would be more memorable in my interview for a permanent position."

Although Rizio was assigned to the major narcotics unit, a coveted position, he was paid for his work until state funds ran out because he was on an externship. Rizio had been told that his chances of becoming a Deputy District Attorney upon bar passage was a virtual shoo-in. Shortly thereafter, the job market dropped and the budget crisis hit. Eventually, almost everyone left the externship program. That's when Rizio started working part-time with Daniel Krisnsky.

"Dan was a well-known personal injury attorney. He gave me projects and we quickly became friends. He said he would give me good cases, ones he was turning away, but I felt too green to take the cases on my own." Rizio decided to enter the job market so that he could gain the experience he needed to handle personal injury cases.

In 1992, he interviewed for an associate attorney position with Bruggeman, Smith, and Peckham. "It was a tough market, so I looked up the firm and the employees on Martindale Hubbell. I wanted to be ready for any questions they might throw at me and be able to engage the interviewers." Steven Beckett interviewed Rizio. "I had discovered that he had gone to Purdue as well as Indiana University. At the end of the interview he asked me if I had any questions. I asked, 'Who do you root for when the Boilermakers go up against the Hoosiers?'" Rizio was soon contacted for a second interview.

Rizio will tell you that during his time with Bruggeman, Smith, and Peckham he had met many people that he still calls friends. . . including his wife. However, the market was not doing well, and he still desired to live in San Diego.

Rizio met Steve Klarich while handling a personal injury/criminal cross-over matter. "You know, I'm in court at 8:00 for an 8:30 appearance, and so was Steve. We would sit and talk each time we ran into each other." Eventually, Rizio would interview with Paul Wallin. During the interview, Wallin stated, "I can't hire you, you look like my kid. You look so young. How is someone going to trust you enough to write you a check?" Rizio

replied, "You'd pull out your wallet and write me a check!" As he tells this story, he reminded me, "I've always had a strong belief in myself" with a laugh.

While with Wallin and Klarich, Rizio was taught how to market himself. "Cases had always been given to me, but Paul showed me how to run a business." Things quickly began to take off for Rizio and in 1994 he started Stevens, McGuire, & Rizio where Rizio decided he wanted his primary location to remain in the legal market he had come to love and respect. In 2001, the firm name changed to Rizio and Nelson.

Rizio currently serves on the Inland Empire's ABOTA (American Board of Trial Advocates) executive counsel, is the past president of the Consumer Attorneys of the Inland Empire (CAOIE), and now serves on the Consumer Attorneys of California (CAOC) Executive Board where he is involved in fighting the unfair MICRA law. Rizio is also member of the National Trial Lawyer's Association as a Top 100 Trial Lawyer. Rizio continues to be recognized as a Southern California Super-Lawyer, is a life member of the Multi-Million Dollar Advocates Forum and maintains a perfect 10 AVVO rating. Other awards and honors include:

2015 Awarded OCTLA Top Gun Personal Injury Attorney Of The Year

2015 Awarded CAOC Consumer Attorney Of The Year

2015 Awarded CAOIE/CAOC William Shernoff Trial Attorney Of The Year

2014 Named 2014 Litigators Award Winner, Top 1% Lawyers in the nation for Traumatic Brain Injuries, Catastrophic Injuries, Wrongful Death and Personal Injury

2014 Awarded the No. 1 Personal Injury Verdict in the State of California

2014 Awarded the 10th Largest Verdict Nationally for Herman v. Cardiel

2014 National Trial Lawyers Association, Top 100 Trial Lawyer

2014 Western San Bernardino County Bar Association, Trial Lawyer of the Year.

"It took me a while to learn the importance of being involved in the legal community. I was distrusted. Nobody really spoke to me or knew me. People said, 'Who is this guy? He says he's I.E., but we've never seen him or met him.'" Rizio described himself as a lonely lawyer that was greatly disconnected from the local legal arena. Now, after 10 years, he has become a leader in many local and state organizations and is very involved in the Inland Empire region. "I'm uncomfortable with what I did. I did it the wrong way without meaning to."

When asked about where he is now, Rizio replied, "I love the Mayberry feel of the Inland Empire. We all get along. We're a team. We're in this together to find the truth. Our jobs are to come to the truth of the value of the case. Injured people should get what they are entitled to, nothing more . . .nothing less." Rizio strives to give back to the community with every opportunity that comes his way.

On his success, he humbly stated, "I've won awards, but they're for everyone. We're all part of the same team. I'm the guy up front, but it's not about me. I'm just the quarterback. . . I don't win without a good offense, a good defense, and a good coach. It's the whole team. We all help each other. Let's be professional. It's not just a business, it's not about getting more cases and making more money. We're all in this for the same reason. Justice. Finding the truth.

"If all I talk about is the amount of the awards and I only highlight the negatives of the case then I end up poisoning the jury pool and tainting future cases and future jurors. I don't want to be that guy."

Rizio works with Robyn Lewis to host the New Attorney Academy, a program offered by the Riverside County Bar Association and the Riverside Superior Court. "All things Riverside run through Robyn Lewis!" When asked what he tells the new attorneys that go through the academy, he said, "If you want to be a good lawyer, don't think it's not going to affect your family. I tell them that I have ZERO hobbies. I am almost never in my office, but when I am, the line is always out the door. I am often in depos, mediation, visiting accident scenes, or preparing for trial. I have no extra time. My hobbies are my family. They get all of my spare time. Every minute of it."

When asked if he had any final thoughts. . . he left me with this, "I'm one of the most boring people you'll meet. I just want to have fun. I want to give back. I want to treat everyone the way I want to be treated. I am honored that I win awards. I'm surprised that I win awards, but I also recognize that I win awards based upon the result of tragic human suffering. And that is why I am always humbled."

Humble words from a humble man is what makes Greg Rizio one of the best attorneys in the nation.

Dawn Saenz is a solo practitioner in the Riverside area, practicing in the areas of family law and personal injury. She is also a member of the Bar Publications Committee and involved in various RCBA activities.

Best "Jurnalism" Movies of 2015

by Hirbod Rashidi

There is nothing I love more than the intersection of reporting and the law, politics, or power that is a genre on to itself and quite popular (I like to call it "jurnalism"). The popularity of this genre can be seen by Hollywood's interest, as of late, in producing these types of films, which are almost always based on a true story.

Spotlight, starring Liev Schreiber, Rachel McAdams, Mark Ruffallo, Michael Keaton, and John Slattery (of *Mad Men* fame playing Ben Bradley, Jr.), tells the story of how the *Boston Globe* exposed the priest sex-abuse scandal of 2001-02.

Think of *Spotlight* as the dream team, or the delta force, of the *Boston Globe*. This small group, including Ruffallo and McAdams, and led by Keaton, does investigative journalism. Their work is done in secret from the rest of the reporters and they don't have any deadlines per se; the story is done when the story is done.

In comes the new Editor-in-Chief, played masterfully by Schreiber. It is 2001 and all newspapers' circulation is down. He is not entirely thrilled that there is a unit that operates with no deadlines and with limited supervision. Nevertheless, they get information regarding priests that have abused children in the Boston area and he wants that investigated. With every turn they discover that this is not just a problem with a couple of bad apples, but one with dozens of priests just in the Boston area. Not only did the head of the Catholic Church in that area, Cardinal Bernard Francis Law, know about these priests but he did nothing to protect future victims. The implicated priests were simply sent to "therapy" and moved to other parishes with a fresh batch of unsuspecting victims.

There were many victims yet zero lawsuits. Why? How could that happen? As to most of the victims, who only came forward once they were adults, the three-year statute of limitations had passed. As to the victims that came forward and complained to the Church in a timely fashion, their silence was bought with out-of-court settlement which contained confidentiality provisions. It appears the same attorneys handled all of the settlements for the Church.

Therefore, this was not just the story of the Church turning a blind eye to this plague, but complicit were the attorneys that helped cover-up the story. Did they break the law or rules of professional conduct? I don't think so. But in its simplest form, when we take on a client we become their agent. During the course of that agency, we are by definition stepping into the shoes of the principal. The client, in this case the Church, has a right to good representation. And during the scope of that representation, the attorney must protect the client. At no point am I suggesting the attorney become a whistleblower; to the contrary, if you do I want you disbarred. However, once the number of victims hits double digits, I think we have a moral obligation to talk to the client about a change in policy or having to resign, although it is no doubt difficult to lose a cash-cow client, such as the Catholic Church.

Spotlight also turns the spotlight on the newspaper itself. They had received tips about the abuse years earlier and did nothing to investigate; they simply wrote a couple of stories about it and then they dropped the ball.

The news story would have been even bigger and garnered more attention but-for the events of September 11, 2001. Nevertheless, the story led to Law's resignation in 2002 (only to be promoted to a post in Rome later in 2004) and a global focus on this problem.

Another movie I watched during the holiday break was *True Story*, starring Jonah Hill and James Franco. Rising star reporter at the *New York Times*, Michael Finkel (played by Hill), is fired in a public way when the Times has to formally apologize for falsehoods in one of Finkle's stories. Around the same time, a man (Franco), purporting to be Finkle, is arrested for killing his entire family. Black-listed by his profession, and enticed by the exclusive access that the alleged murderer is offering him, he abandons all caution for the story. Throughout the movie we don't know if Finkle is being used, if Franco's character is guilty, and how far is Finkle willing to go for the story (and redemption?).

It is not your classic whodunnit story, but nevertheless keeps you wondering what is going on until the very end.

I would be remiss if I did not mention another political/legal thriller with a tangential journalism connection. Starring Tom Hanks in another Oscar-worthy performance, *Bridge of Spies* tells the true story of a cold war-era exchange of spies between the United States and the Soviet Union. Since neither side was willing to admit they had spies, let alone that their spy was captured, the exchange had to occur in secrecy. And it was for this reason that Hanks' character, a respected lawyer in private practice, was asked to handle the exchange. During these high stakes negotiations, East Germany detains an American journalism student claiming he is spy. Hanks' character refuses to abandon the student and demands his return as well. This story, unlike the one in *Spotlight*, shows how much lawyers can do if they stick to principles while serving their clients.

Both professions, journalism and law, can do much good when they use their skills and resources. Other than being quite entertaining, all three of these movies have lessons for both professions.

Hirbod Rashidi is an attorney, writer, and instructor (through extension) at UC Riverside. The views expressed are his alone.

Membership

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective February 29, 2016.

Juliet Michele Afusia – Law Student, Corona

Gabriel Arellano – Esperanza Immigrant Rights Project, Los Angeles

James E. Ashworth – Retired, Crestline

Judy I. Beck – Office of the District Attorney, Riverside

Suzanne M. Bryant – Varner & Brandt LLP, Riverside

Matthew Irwin Collins – Best Best & Krieger LLP, Riverside

Sheronda L. Edwards – Office of the District Attorney, Riverside

Chad E. Elwell – Office of the Public Defender, Banning

Nathan D. Finfrock – Law Office of Nathan Finfrock, Riverside

Peter Nelson King – The King Legal Group, Redlands

Diana Lopez – Inland Empire Latino Lawyers Assn, Riverside

Michael J. Luther – Schwartzberg & Luther APC, Rancho Cucamonga

Aaron P. McAllister – Law Office of Aaron P. McAllister, Riverside

Samantha K. McBride – Holstrom Block & Parke APLC, Corona

Cecilia Murillo-Quintana – Manduley & Camisassa PC, Los Angeles

Joe L. Phillips (A) – Advanced Investigations, Victorville

Angela L. Rayfield – Law Student, Moreno Valley

Nicole Rozakis (A) – Law Office of Stacy Albelais, Riverside

Jessica Sanchez – West Coast Mediation Inc, Chino

Meagan A. Silva – Law Office of Patrick J. Silva, San Bernardino

Jeffrey W. Smetana – Gresham Savage Nolan & Tilden PC, San Bernardino

Mohammad V. Tehrani – Office of the U.S. Trustee, Riverside

Gordon W. Trask – Retired, Glendora

(A) – Designates Affiliate Member

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Riverside Legal & Professional Center. Downtown Riverside walking distance to Courthouse. Private Executive Suite offices, virtual offices and conference rooms rental available. We offer a state of the art phone system, professional receptionist and free parking for tenants and clients. Accessible from the 91, 60 and 215 freeways. (951) 782-8089.

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Marathon-records.com is a complete resource center for the solo and small firm lawyer. IOLTA One is an online bookkeeping application designed specifically for IOLTA accounts that reduces the task of keeping compliant records to a simple data entry function. IOLTA One prevents the most common IOLTA account errors and automatically produces a chronological account register, individual client ledgers, and a three-way reconciliation report in compliance with the rules of professional conduct and ALTA best practices. Visit online at www.marathon-records.com and sign up for a free trial.

Wanted: Attorney for Job Position
Sole Practitioner looking for an attorney to handle workers' compensation and personal injury litigation. Requires experience in drafting and responding to discovery, law and motion matters, taking and defending depositions and trying cases. In our Rancho Mirage office. Potential to purchase practice. Send resume via email to lisa.mcintosh@roadrunner.com.

Now Hiring Executive Director – Riverside Legal Aid
Must be an active member of the State Bar and have public interest legal experience and a demonstrated commitment to equal access to justice. Prior experience with LSC and IOLTA grant programs and fluency in Spanish desirable. For more information, contact Diane Roth, Executive Director, at (951) 682-7968 or droth@riversidelegalaid.org.

Conference Rooms Available
Conference rooms, small offices and the third floor meeting room at the RCBA building are available for rent on a half-day or full-day basis. Please call for pricing information, and reserve rooms in advance, by contacting Charlene or Lisa at the RCBA office, (951) 682-1015 or rcba@riversidecountybar.com.

Riverside Superior Court Accepting Civil Grand Juror Applications
The Riverside Superior Court is now accepting applications from qualified citizens interested in being nominated to serve as civil grand jurors for the time period July 1, 2016 through June 30, 2017. Duties include, but are not limited to, investigating the operations of county government, researching matters of civic concern, and inquiring into public offenses. More information and a fillable application can be located on the court's website at www.riverside.courts.ca.gov by selecting Grand Jury under the Divisions tab. Applications must be received by March 25, 2016 and should be submitted to: Superior Court of California, County of Riverside; Jury Services Division; PO Box 400, Riverside, CA 92502.

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