# Contra Costa LAWYER

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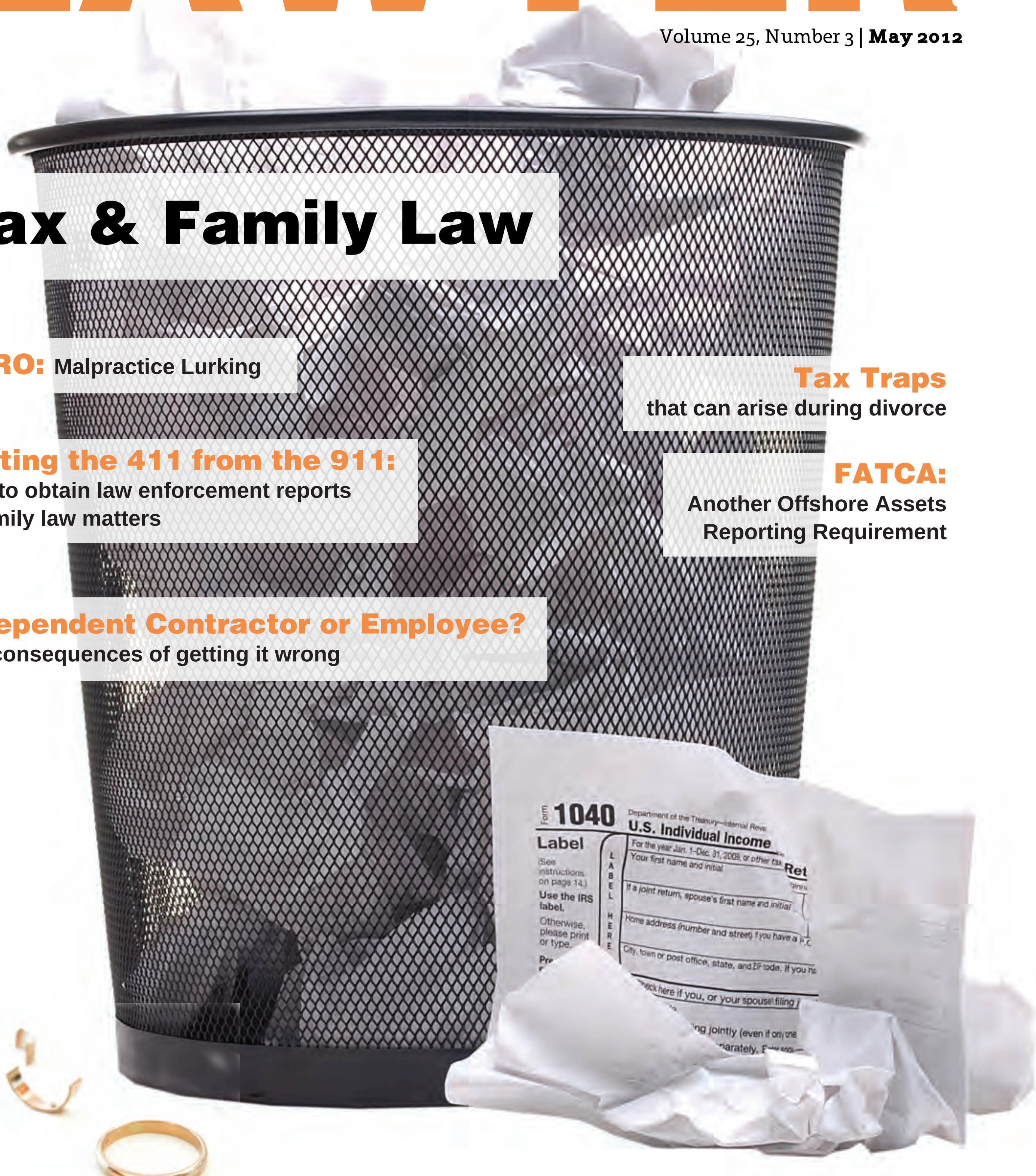


## Tax & Family Law

**QDRO:** Malpractice Lurking

**Tax Traps**
that can arise during divorce

**Getting the 411 from the 911:**
How to obtain law enforcement reports in family law matters

**FATCA:**
Another Offshore Assets Reporting Requirement

**Independent Contractor or Employee?**
The consequences of getting it wrong

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# CONTRA COSTA LAWYER

Volume 25 Number 3 | **May 2012** The official publication of the Contra Costa County BAR ASSOCIATION

## FEATURES



## DEPARTMENTS

May Guest Editors, from left:
Mark Ericsson, Pam Marraccini, Heidi Taylor

This issue represents a "marriage" of the family law and tax sections. These are the two oldest sections of the bar. There has been a lot of bantering as to who was first. We may need arbitration by the bar. It's clear that if we are going to settle the dispute by tug of war, the tax section will need a tractor.

Inside, this edition of the Contra Costa Lawyer addresses family law issues that tax practitioners will find interesting and tax issues that family law practitioners will find enlightening.

One article, for instance, addresses tax questions most asked by the family law bar (See *Tax Traps...*, page 18). This issue also addresses the two most pressing initiatives by the Internal Revenue Service. The IRS, and particularly the EDD, does not believe that there is such a thing as an independent contractor and the penalties are huge if you are wrong (See *Independent Contractor or Employee?*, page 15). Secondly, the IRS believes that there are billions of dollars to be collected overseas and has made collecting this a priority (see *Another Offshore Assets Reporting Requirement*, page 23). In this regard, last year provided us with a look into IRS philosophy, which seems to be shifting from ensuring that everyone pays his or her fair tax to raising revenue.

When the IRS introduced the 2009 overseas voluntary disclosure initiative, it issued an FAQ. Number 23 said that if your penalties would be lower than the offer, you would be given the lower rate. The rate was then 20% of your overseas assets while the penalties for non-willful failure to file might be $500 or $10,000. Many taxpayers enrolled in the initiative based on this representation. On March 1, 2011, about the time that most of these applications were being processed, the IRS sent out a memorandum to its examiners which either said (depending on who you talk to) do not calculate the alternative or calculate the alternative based upon willful failure to file the treasury report required which carries humongous penalties and shifts the burden of proof to the IRS. The IRS did not change the FAQ and has not to this day. This is bait and switch, pure and simple. We leave you to think about the implications.

From the Family law perspective, this issue also discusses Qualified Domestic Relations Orders and the potential for malpractice law suits hidden within the seemingly innocuous issue of employee benefits in dissolutions (see *QDRO: Malpractice Lurking*, page 8). Finally, we also offer you a step-by step guide on how to obtain information and reports from law enforcement agencies in family law matters (see *Getting the 411 from the 911*, page 12).

We hope you enjoy this joint family law and tax edition!

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# QDRO:
## Malpractice Lurking

by Harry L. Styron

It has been said that employee benefits are among the least understood property types by family law attorneys.  When the subject comes up in a dissolution, it is commonly proposed that benefits issues be referred to one or another of the actuarial firms which purport to specialize in drafting disposition orders.  It is less common, now, to put the subject off with a reservation of jurisdiction to permit disposition when the benefits eventually become payable, but there are certainly plenty of cases lurking about where that is what was done.  Both of these approaches are fraught with hazard for the non-participant spouse's attorney.

Civil Code §340.6 provides the statute of limitations for an action against an attorney for errors and omissions.  While it is not uncommon for us to be sanguine because of the one year limitations period provided there, one should not overlook the fact that the tolling provisions provide that the period does not begin to run until there is actual injury (subdivision (a)(1)).  This likely puts the attorney whose client has an interest in any deferred compensation plan in the same category as the estate planning draftsperson, whose errors and omissions may rise up to bite only upon the event of retirement many years after the work was thought to have been completed.

Of the two situations cited in the first paragraph, the latter is much easier to analyze. Deferring division of deferred compensation benefits past the termination of the status of marriage is very likely to be error *per se*.  This is so because of the frequent provisions of deferred compensation plans to provide residual benefits for a surviving *spouse*.  Such benefits can take the form of joint and survivors' annuities, but also pre-retirement survivor's death benefits (see Family Code §2610(a)(1) & (2)).  Deferred compensation plans ordinarily couch these provisions in language limiting their benefit to a surviving spouse, and if the person is not a spouse at the time of election, plans will refuse to honor the attempted election. The better course is to join the plan and provide for the "election" in the court order dividing the benefit before marital status is terminated. That way, if the plan were to disallow the employee's retirement time election of the benefit to the then non-spouse, the eventuality of the latter looking to the assets of the employee and his or her former attorney to make up the then present value of the annuity will be avoided.

The former situation is not so concrete. We lawyers are required to represent our clients "competently." (Rules of Professional Responsibility, Rule 3-110). Among the duties of a family law attorney is the duty to counsel the client to bring him or her to a sufficient level of understanding of the issues so that he or she can make an informed judgment about the disposition of the case. The rule does provide that we may act competently, where we do not have the requisite knowledge ourselves, by associating a *lawyer* who we reasonably believe to have that knowledge. There is, however, no such safe harbor for reference to any "expert" who is not a lawyer. Even where such an association is made, the associating attorney's name is still going to be at the top of the order disposing of the deferred benefit, and hence identifying one of the defendants in the malpractice suit.

All of this arguably supports the proposition that the better option for the competent family lawyer is to include the knowledge of how to explain to the client and dispose of deferred compensation plans right alongside the knowledge of how to explain, value, characterize and divide real and personal property, explain and demonstrate "best interests of the children", and explain the elements of marital standard of living. If, as is often stated, students only retain about twenty-five percent of the information they are given in lectures, something beyond sitting through MCLE courses is probably required.

Employee benefit plans may be classified as those covered by the Employee Retirement Income Security Act of 1974 (ERISA; 29 USC 1001-1461) and those that are not. Most "private" (non-governmental) plans will be covered by ERISA because of tax favored treatment.

> "The risks of loss of benefits by delay in analyzing and dividing employee benefits are both substantial and, for the most part, avoidable.

One of the motivations for enacting ERISA in the first place was the existence of discriminatory employee benefit plans that favored owners and executives over non-management employees. However, where closely held businesses are involved it is still possible to find non-qualified plans which discriminate against non-owning employees. Other non-ERISA plans are primarily found covering state and local government employees.

It cannot be emphasized too much that the risks of loss of benefits by delay in analyzing and dividing employee benefits are both substantial and, for the most part, avoidable. The event which, in California, fixes the right of the non-participant spouse to a share of the benefit is the date of separation. It is an exceptional case where this date is not established by the filing of the petition for dissolution. After this date, the following events can result in the loss of some or all of the non-participant spouse's rights if the order dividing benefits has not already been entered: death of the employee spouse, death of the non-participant spouse, bifurcated status termination, liquidation, merger or bankruptcy of the employer, retirement of the employee spouse, modification of employee benefit plans by the employer, and others. It is therefore very important for issues affecting employee benefits to be taken up early on, if not first thing, in the process of property analysis.

The first line of defense is notice to the administrator of any benefit plan of the claim of the non-participant spouse. Because of this, a prudent attorney will consider service of the family law form interrogatories with interrogatory number 14 checked, as soon as possible after the action is commenced (see CCP §2030.020). The advisability of using a formal procedure for this purpose is commensurate with the financial risk the attorney will face in a malpractice action if something goes awry. The advantage of using formal discovery over the procedure provided in Family Code §2062(c) is that the discovery statutes provide for sanctions, including staying the action until the discovery is provided, thus protecting the non-participant spouse from the consequences of a bifurcated status termination. In contrast, while Family Code §2337(c)(5) appears to be protective of such consequences, that protection only exists until the entry of final judgment on all other issues, and may have no efficacy at all if the effect of the bifurcation is to adversely effect the claims of the non-participant to be classed as surviving spouse under the terms of a deferred compensation plan. Also, what protection there is from that statute depends on the financial resources of the non-participant spouse, which may or may not exist.

Notice may take the form of a letter "Notice of Adverse Interest" or

**QDRO,**
cont. from page 9

joinder of the plan. In the case of governmental plans, joinder is the only effective option. This is true of CalPERS, CalSTRS, the UC Retirement System, municipal retirement plans, for example the Contra Costa County Employees' Retirement Association, and others. Interestingly, it is true of ERISA qualified plans of churches as well, and of non-qualified plans. A notice of adverse interest letter is all that is required for ERISA covered plans.

One should not then rest on his or her laurels after giving notice. One should proceed to orders dividing the plan interests, even while collecting other property information and dealing with temporary orders. With ERISA covered plans, the instrument provided by the Retirement Equity Act of 1984 is the Qualified Domestic Relations Order (QDRO; 29 USC 1056). Non-ERISA plans often refer to allocation orders as "Domestic Relations Orders", or "DROs".

Often, upon request, form QDROs and DROs will be available from a plan administrator. These should not be relied upon to cover everything that needs to be covered. One should obtain the summary description of each plan (Summary Plan Document, or SPD) and also should pay attention to the provisions of Family Code §2610.

There are two general types of plans, and two situations to be considered for each type. The types are "defined benefit" and "defined contribution" (the latter often call 401k plans after the Internal Revenue Code provision which defines their tax treatment, but may also be plans covered by other IRC sections). The situation which complicates the drafting of orders dividing plans is whether or not there was any premarital credited service or contribution to a plan.

Defined benefit plans specify a formula for determining what the employee will receive upon retirement, but do not specify the amount nor do they maintain segregated accounts for each employee. Defined contribution plans maintain separate accounts for each employee, and at any moment in time the amount of the employee's benefit is whatever is on deposit in the account. The contribution may be from the employee's income, or the employer's profits or some combination of the two. Neither party ever owes anything other than that year's contribution to the plan (unless the plan permits loans to the participant) and the employer and participant can control the extent of their respective contributions for any period.

Defined contribution plans where there is no premarital contribution are relatively easy to divide. The amount on deposit in the employee's account at the date of separation can simply be divided equally between the parties. However, note that the employer's contributions for services can be made up to 8-1/2 months after the credited services are concluded, so orders should be drafted with provision to include all contributions based on services which occurred prior to the specified date of separation. Also, such plans generally have provision to roll out the non-participant's contribution into another retirement vehicle such as an IRA, or in some cases the defined contribution plan of the non-participant spouse who is employed elsewhere. Drafting a QDRO or DRO for such plans should not be much of a challenge to the attorney, since there are no long term or survivor benefits to be considered.

However, if there are premarital contributions, those contributions and investment gains and losses on them are the separate property of the employee spouse. In such cases computation of the separate and community portions of the benefit may best be left to an accountant to trace through the life of the plan. The attorney should, however, take the trouble to fully understand and document the accountant's methodology in arriving at the characterization, so that it may be explained to the client and available in the event of later dispute.

Defined contribution plans are, at once, simpler and more complex. They may be divided according to the "time rule" (see *Marriage of Poppe* (1979) 97 Cal.App.3d 1, 8). In general this may be accomplished by specifying in the order the date of marriage, date of separation, the date of beginning of credited service, and the fraction which defines the community portion of the benefit, in days or months. However, model plans of this type sometimes omit to provide for the required selection of joint and survivor annuity benefits and survivors death benefits, and also for apportionment of enhancements to the benefit (see *Marriage of Lehman* (1998) 18 Cal.4th 169). The attorney should be cautioned against ever totally waiving division of a plan which provides for future benefits in exchange for some other property without fully understanding what those benefits are. In one instance, the non-participant spouse lost very valuable health insurance benefits that accompanied participation in a retirement plan which she would have had if she had retained a $1 interest in the plan (see *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1093).

In short, the attorney representing a spouse with an interest in the other spouse's employee benefits must be mindful of his or her responsibility to fully understand the ramifications of those benefit plans which are part of a marital estate. He or she also must be mindful of the notion that once the status of the marriage is terminated the non-participant party may no longer be a "spouse" under the terms of a plan, and hence may not be eligible for election of very valuable surviving spouse annuity and death benefits.

> " In one instance, the non-participant spouse lost very valuable health insurance benefits that accompanied participation in a retirement plan which she would have had if she had retained a $1 interest in the plan.

One simply cannot rely on a statute of limitations to immunize oneself against mistakes which may cause actual damage far into the future, nor can one rely on Family Code 2337 to indemnify the party who suffers that damage. An attorney cannot simply turn employee benefits over to a QDRO drafter, particularly a non-attorney, and sleep well on the belief of having made a safe harbor. The attorney who represents a non-participant in a case where employee benefit plans are part of the marital estate must expend the time and effort to know what are the provisions of the plan, and to get orders allocating rights under such plans done promptly and correctly, before other events can crop up to interfere with the non-participant's rights.♦

# Getting the 411 from the 911

## *Obtaining Information and Reports from Law Enforcement Agencies in Family Law Matters*

by Richard Grossman

As family law attorneys we frequently hear from our clients that the police are involved in their cases. There may be a domestic violence report, one of the parties may have been arrested for driving while under the influence, or one of the children may have been involved in a police matter.

This article is meant to help and guide family law attorneys through the trauma of trying to get reports and other information from local law enforcement agencies. I spent twenty-eight years with Walnut Creek Police Department, first as an officer, then as a detective, and finally as a sergeant. I attended John F. Kennedy University School of Law while I was assigned as a detective. I graduated and passed the bar but continued to work for the police department until I retired in April 2002.

### *COMMUNICATING WITH THE LAW ENFORCEMENT AGENCY*

Attitude, Attitude, Attitude!! Police personnel are happy to help you. Please communicate with their offices as you would with court staff, with respect and dignity. Do not approach with the attitude you are an ATTORNEY and they are there to do your bidding. Most police officers are college educated, many have graduate degrees, and they know what they are doing. They are professionals and know their assigned jobs.

Do not tell them that you, or your client, has the "right to know!" There is nothing that sets the tone more negatively than the term "right to know." I must admit that they mostly hear that phrase from reporters and not from attorneys but you might as well start off on the right foot.

### *WHAT DOES THE AGENCY HAVE THAT YOU WANT?*

Before making a request for information, carefully look at everything you already know and determine what information you need. The law enforcement agency has reports, evidence, statement of Officers/Deputies, Dispatch radio recordings, Dispatch telephone recordings and the State has Criminal History Reports (RAP Sheets). You may also want to speak directly to the officers who wrote the reports or were on the scene during the incident. It really does not work to walk into the station and say "give me everything you have for the Jones family living on Pine Street".

Every time the police respond to a call for service or individual officers initiate a contact with a citizen there is something written. It may be a computer entry with the basic information on the contact or it may be an actual written report. The written reports are done differently by each agency but basically there is a report reflecting all the names and identifying information of the parties, the witnesses, the officers present, the evidence, and, of course, what everyone said and what the officers concluded about the incident. If someone was arrested or injured that is also included in the report.

Along with the reports, there are evidence lists, photographs, and statements that are written by the victims, witnesses and officers. These may be on separate reports or forms. The officers may also have written supplemental reports that reflect the information they gathered in their investigations after the initial investigation. Some of these records are available to you through the request process or subpoena and some are not.

One very good place to look for information that may help your family law case, specifically a domestic violence case, is the Dispatch recordings. All the telephone calls into the dispatch center are recorded, including 911 calls and non-emergency calls. All radio traffic between dispatch and officers is recorded. The law requires law enforcement agencies to retain these recordings for 200 days. You can subpoena a copy of the telephone and subsequent radio dispatches to the officers and their radio responses. The bottom line is to outline what you want and ask for it. It is important to ask for a particular item rather than just "give me everything".

### *GUIDELINES FOR RELEASE OF REPORTS*

Not every report is available for release. It depends on the subject matter of the report and how the requesting party is involved. There are two primary requirements for the release of a report to a civilian:

- There must have been a crime committed. In all cases a crime must have been committed and reported in the report or the report will not be released; and
- Your client must be the victim or one of the victims.

Every person identified in a police report is classified as a victim, suspect, witness, reporting person or law enforcement personnel. Only victims and their representative(s) will be eligible to receive a copy of the report. Government Code 6254. Basically you can expect to get the following:

- Names and addresses of persons involved;
- Property involved (stolen, vandalized, lost, found, in dispute);
- Date, time location of the incident;
- All diagrams, statements of the parties and statements of witnesses;

You will not get the investigating Officer's conclusions or analysis or supplemental reports made during a continuing investigation. Referring to Government Code 6254(f) "However, nothing in this division shall require the disclosure of that portion of those investigative files that reflects the analysis or conclusions of the investigating officer."

It depends on how strict the department you are requesting the report from is in monitoring report releases but they are supposed to remove the analysis and conclusions from the report.

Another consideration in determining the release of a report is if juveniles are named in the report. If there are named juveniles (they may be the suspect, victim, witness or just present) you will have to request release of juvenile reports.

## *APPLICATION FOR RELEASE OF INFORMATION*

Here are the steps in requesting the standard release of information:

- Determine the report number or the date/time/location so the report can be identified. You can get the report number from your client (Officers usually leave a business card with the number on it), the daily bulletin or log, or by calling the Department and asking;
- Determine that the report you are requesting is a crime report;
- Make sure you have something that shows you are representing the victim in the crime. If you do not, have your client get the report;
- Complete the Application for Release of Information;
- Submit the request to the law enforcement agency's records bureau.

## *WHAT WILL NOT BE RELEASED BY REQUEST ONLY*

Even if your request meets all the requirements for release there are some things that you will not be able to get using the standard release request. The following generally are not released:

- Investigative supplements;
- Crime scene photographs;
- Photographs of the victims, suspects or witnesses;
- Reports where the case has already been sent to the District Attorney's Office for a complaint;
- Outside agency assistance cases (this means that the law enforcement agency you are requesting the report or information from actually did an investigation or responded to an incident upon the request of another agency or was outside the jurisdiction of the agency. You will have to request the report or information from the other agency);
- Reports that are not yet completed. This includes reports that are still waiting to be reviewed by the supervisor of the investigating Officer(s).

The solution to the problem of not being able to get the above is to request the report or information using the more formal method of Civil Subpoena. Using the subpoena method takes longer and requires notice to all persons in the report but you will get more.

A subpoena should get you the entire report including the supplementals. You must serve the Notice to Consumer when you serve the subpoena. Make sure you serve a Notice to Consumer on every party, witness, Officer, victim and suspect. If you do not, you may find that the name and identifying information of the person you did not serve has been redacted from the report.

## *RELEASE OF JUVENILE CASE INFORMATION*

Requesting the release of reports and information containing juveniles is more complicated and each case must be reviewed by the Presiding Juvenile Judge. "Juvenile Case Information" is any case that includes the name of a juvenile whether named as a victim, suspect or witness. If the children are not named, there is no need for a Juvenile Case Information request and the report can be released through a Request for Information.

To have your request considered you must have the following:

- There must be a crime involved;
- Interest in the case must be as:
  - Victim;
  - Parent/Guardian of Victim;
  - Insurance Company representing Victim;
  - Attorney representing Victim.

You should also be aware that all law enforcement agencies, including the Court, Probation and Parole can receive copies of any law

**GETTING THE 411,**
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enforcement reports. This includes Federal, State and Local law enforcement agencies. The provisions for release of juvenile information are contained in CRC Rule 5.552 and Welfare and Institutions Code 827 and 828. Only the Presiding Juvenile Judge has the authority to release juvenile reports and records. The Judge must review every request for release and make a decision of what to release in each case.

If your request for juvenile information is denied using the form then you will have to use the formal method of petitioning the Court for release of the information. With the exception of those permitted to receive copies without a court order everyone else must petition the court using Petition for Disclosure of Juvenile Court Records (form JV-570). Ten day notice must be given to the juvenile using the Notice of Request for Disclosure of Juvenile Case File (form JV-571). It is very important to note that CRC Rule 5.552(2)(A)(4) specifically states: Juvenile case files may not be obtained or inspected by civil or criminal subpoena.

## *WHAT YOU WILL GET*

You may get the following information:

- Names of all parties involved (victim(s), witness(es), suspect(s) and Officers);
- Statements of all the parties (victim(s), witnesses, suspect(s) and Officers).

If the Judge does not release the documents you will receive a letter advising you the request was denied. Alternatively you may receive a redacted report containing only the information the Judge feels is appropriate for release.

## *CONCLUSION*

It may seem that the law enforcement agency is trying to avoid releasing the information you are requesting but in actuality they are trying to remain within the guidelines they have been given based in the government codes. If you know what you are asking for, that your request is for information to which you are legally entitled, and know how to make the request you should be able to get information that you can use in your family law case. ♦

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# Independent Contractor or Employee?

## *The Consequences of Getting it Wrong*

by Janet L. Everson and Matthew A. Cebrian

### *The Far Reaching Trust Fund Recovery Penalty*

The Trust Fund Recovery Penalty, Internal Revenue Code ("IRC") Section 6672, requires employers to withhold from the pay of employees properly calculated FICA, (i.e. Social Security) taxes, Medicare taxes, and income taxes. An employer must withhold taxes on behalf of its employees for payment to the government; the taxes are considered to be held in trust on behalf of the government. Employees are allowed a credit against their tax liability for the amount of taxes withheld from their wages, regardless of whether the employer actually pays the funds to the Feds.

Failing to withhold from the pay of employees, or failing to pay the proper withholdings, may subject a business to tax penalties and interest. Incorrectly characterizing service providers as independent contractors and thus failing to withhold the properly calculated payroll taxes likewise may result in significant tax penalties and interest being assessed.

These payroll tax penalties are not only assessed and collected from a business, they may also be assessed and collected against individuals associated with the business - CPAs, bookkeepers, office managers, officers, directors, etc.

IRC Section 6672 provides the Service with the authority to collect 100% of the amount unpaid from "responsible person(s)". The statute is far reaching in terms of who may be considered a "responsible person" for the payment of the trust fund taxes, and the courts have interpreted the definition of a responsible person quite broadly. See, e.g., *Denbo v. United States*, 988 F.2d 1029, 1032 (10th Cir.1993); ["The responsible person generally is, but need not be, a managing officer or employee, and there may be more than one responsible person. Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees. Among other things, therefore, a corporate officer or employee is responsible if he or she has significant, though not necessarily exclusive, authority in the general management and fiscal decision making of the corporation."]

Nonparticipating officers or directors have found themselves liable for the employer's entire trust fund tax liability for taxes they didn't even know were owed. *George v. U.S.*, 819 F.2d 1008 (11th Cir. 1987). Accountants have been found responsible for the entire trust fund payroll owed by their clients. *Bax v. U.S.*, 92-2 USTC pp. 50,354 (N.D. Ill. 1992). Most significantly, one or more persons may be deemed by the Service liable for the penalty, and each may be held responsible for 100% of the penalty.

The IRS is not required to collect from the employer first. If a company is without sufficient liquid assets to meet its 6672 obligations, the IRS may seek to collect the entire penalty from a responsible person rather than the company.

**WORKER CLASSIFICATION,**
cont. from page 15

## California's Penalty For Worker Misclassifications

Further complicating the issue, California Senate Bill 459 ("SB 459"), which became effective on January 1, 2012 creates significant and daunting new civil penalties for employers who "willfully" misclassify as independent contractors individuals who, in the opinion of either, the California Labor and Workforce Development Agency or the State Labor Commissioner, should be treated as employees.

The draconian law imposes penalties between $5,000 and $15,000 for each violation. Where the employer is found to have engaged "in a pattern or practice of [those] violations," the civil penalty is increased to $10,000 to $25,000 per violation. What the law fails to specify is the effect of a single classification decision affecting a group of similarly situated individuals. Given the grave tenor of the statute it should be assumed that multiple violations stemming from a single categorical misclassification, will result in multiple independent fines and potentially, the heightened penalty.

The bill also includes what has been termed the "Scarlet Letter" rule which requires employers who are found to have engaged in misclassification "to display prominently" for one year on their websites a notice to employees and the general public announcing that the employer "has committed a serious violation of law by engaging in willful misclassification of employees."

Accountants, insurance brokers and outside human resource professionals should be mindful of the provision which holds non-attorney advisors jointly and severally liable with the employer if they knowingly advise the employer to treat an individual as an independent contractor and the individual is not found to be an independent contractor. The penalty structure lacks for a definition of what constitutes "willful" misclassification of an employee. While it is reasonable to presume the term 'willful' suggests some scienter on the part of the employer, this presumption may be misguided. To the extent this statute mirrors the federal statute, it is prudent to assume that any violation will be deemed "willful" absent evidence to the contrary reviewed on a case by case basis.

California's statute lacks any safe harbor provision similar to that afforded by the Feds, and employers may be less willing to voluntarily reclassify workers. In some cases, California's rule may prevent employers from participating in the otherwise generous Federal settlement program discussed below.

## The IRS's Voluntary Worker Classification Settlement Program

In contrast to California, the IRS launched a program on September 21, 2011, that enables employers to resolve past worker classification issues and achieve certainty under the tax law at a low cost by voluntarily reclassifying their workers. The Program provides taxpayers not under examination with an opportunity to voluntarily reclassify their workers as employees for future tax periods, with limited federal employment tax liability for the past non-employee treatment.

Essentially, participants will pay one percent of the employment tax liability that may have been due on compensation paid to the workers for the most recent tax year, will not be liable for any interest and penalties on the liability, and will not be subject to an employment tax audit with respect to these reclassified workers for prior years. Participating employers will, for the first three years under the program, be subject to a special six year statute of limitations, rather than the usual three years that generally applies to payroll taxes. Those desiring to participate must file at least 60 days before the date they want to begin treating the workers as employees.

## Federal Penalty Abatement

For those who did not participate in the Settlement Program, and who are assessed penalties at the Federal level, these penalties may be abated upon a showing that the responsible person did not act willfully, i.e. intentionally. If an employer has a reasonable basis for believing that workers are independent contractors for whom withholding is not required, they may be able to avoid liability. See *Crowd Mgmt. Services, Inc. v. U.S.* 889 F. Supp. 1313 (D. Or. 1995) [court concluded that the responsible person took significant steps to determine whether withholding was required, and has a reasonable basis for concluding that no withholding taxes were due, such that his actions were not willful].

Although the Service may collect the penalty from the employer and/or the responsible persons, the stated IRS policy is to collect the income and employment taxes only once – whether it be from the employer or a responsible person or some combination thereof. IRS Policy Statement P-5-60 (2-2-93). Courts also have recognized that the government is entitled to only one satisfaction. *U.S. v. Hukabee Auto Co.*, 783 783 F.2d 1546 (11th Cir. 1986); *Brown v. U.S.*, 591 F.2d 1136 (5th Circ. 1972). As a result, a penalty assessed a responsible person is abated to the extent that the underlying tax obligation is paid. *McCray v. U.S.*, 910 F.2d 1289 (5th Cir. 1990); *Gens v. U.S.*, 615 F.2d 1335 (Ct. Cl. 1980).

While the IRS has provided employers some safe harbor with regard to the classification of its employees, California offers no such protection. To this end it would behoove employers questioning the classification of their work force to consult with qualified counsel to see if they may be able to benefit from the get out of jail free card offered by the IRS's new policy without exposing themselves to hefty fines levied at the State level. For those rendering advice to employers on worker classification, proceed with caution. ♦

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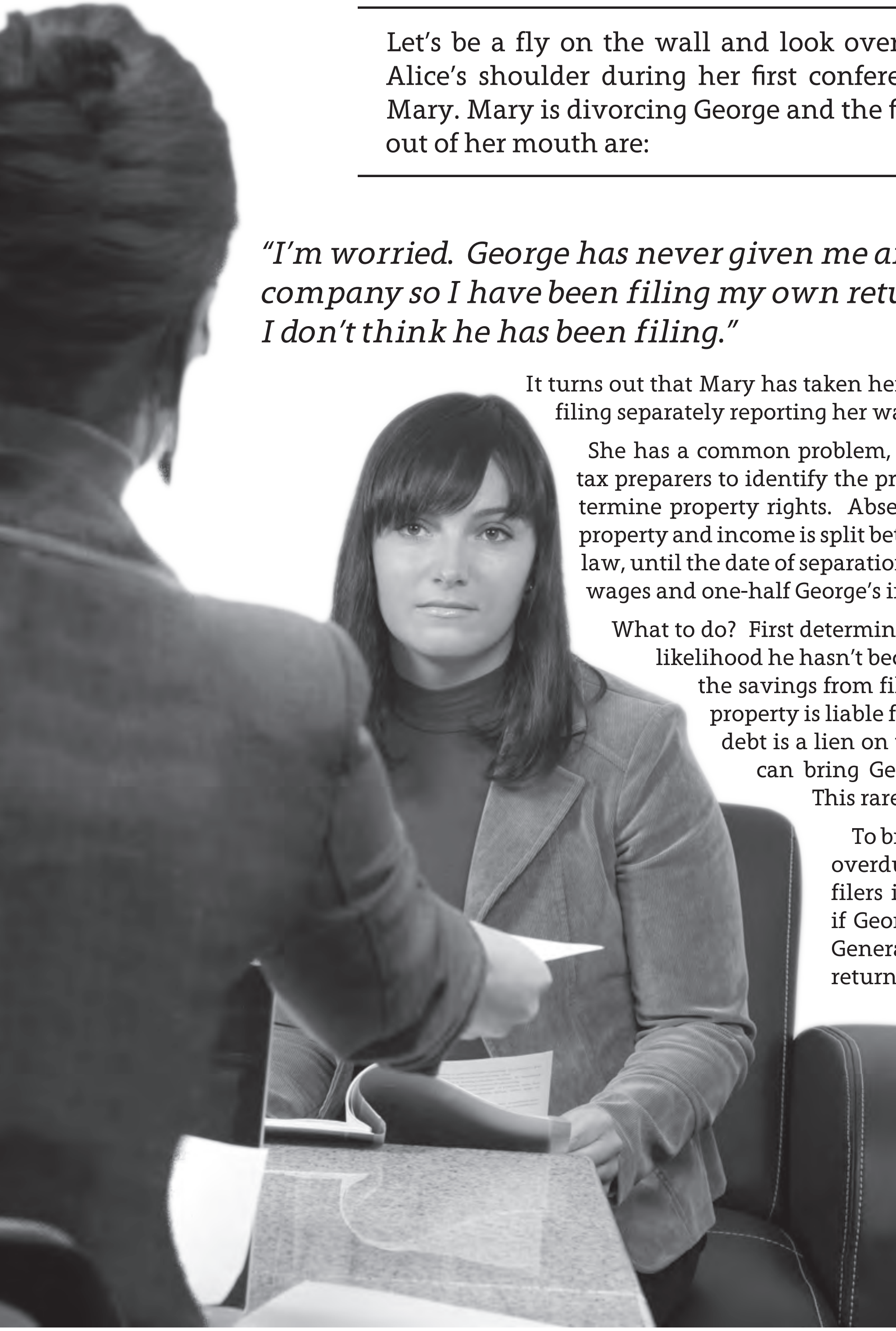
**Matthew A. Cebrian** is a Director of Murphy Pearson Bradley & Feeney. Mr. Cebrian represents management clients in connection with all types of matters under federal and state law. Mr. Cebrian specializes in claims involving wrongful termination, harassment, wage and hour, discrimination and whistle-blowing/retaliation claims. Mr. Cebrian also advises clients with regard to employment related risk management and crisis management.

# TAX TRAPS
## that can arise during divorce

by Mark Ericsson

Let's be a fly on the wall and look over attorney Alice's shoulder during her first conference with Mary. Mary is divorcing George and the first words out of her mouth are:



*"I'm worried. George has never given me any information about his company so I have been filing my own returns. I don't think he has been filing."*

It turns out that Mary has taken her W-2 to a tax preparer and filed married filing separately reporting her wages.

She has a common problem, which is compounded by the failure of tax preparers to identify the problem. Tax law looks to state law to determine property rights. Absent a premarital agreement, community property and income is split between the two spouses. Under California law, until the date of separation, Mary should be reporting one-half her wages and one-half George's income.

What to do? First determine whether George has been filing. In all likelihood he hasn't because he would have taken advantage of the savings from filing jointly if he had. Since community property is liable for the debts of either spouse, George's tax debt is a lien on their community property. Ideally, you can bring George into compliance and pay the tax. This rarely happens.

To bring George into compliance, he must file overdue returns. The criminal statute for non-filers is six years. The IRS is usually satisfied if George files his last six years of tax returns. Generally, the statute of limitations to amend a return is three years. There is no statute that requires Mary to amend a return filed in good faith. However, if the IRS turns up the problem from a matching program, the penalties will be higher than if she amends voluntarily. Mary will want to amend as a joint filing if George's income is less than Mary's income.

If Mary cannot get George's tax information, there are ameliorative provisions allowing Mary to estimate George's income. George can get a transcript of his account at IRS customer service at 185 Lennon Lane in Walnut Creek if he is unsure as to liabilities or how much he earned. Mary cannot get George's records, but I should think a judge could help in this regard.

### *"I've got George over a barrel. He's been forging my name to our returns."*

This does not bode well for Mary because if she claims she did not sign the return, she is admitting to not filing a return. The IRS does not show compassion for someone who has not been signing returns and the courts generally find that there is implied authority for George to file the joint return. She will have to keep quiet or plan to file returns reporting one-half the community income.

It is also generally a good idea to avoid involving the IRS in domestic disputes because of the likelihood that the strategy will backfire and Mary will end up in trouble with the IRS or George will have no money to pay alimony. The IRS checks the accuser as well as the accused.

### *"George and I owe a lot of tax because he never paid his share. I'm an innocent spouse."*

If there are balances owing, the IRS will seek to recover from the spouse who is the easiest collection target.

The innocent spouse protection is rather limited. If George and Mary are audited, George is found to have omitted income or taken a deduction erroneously and Mary was not aware of the erroneous item at time of signing the return, Mary can assert the defense against the adjustment as long as she did not benefit from the underreporting of income. It only applies where there has been an audit and George and Mary owe tax. Another provision allows Mary to elect to be responsible for only that amount of an audit adjustment that is due to her income and deductions. There is also relief if Mary signs the return with a balance owing upon the assurance that George will pay the balance and then George fails to pay. Alice will have to make sure that the indemnity provisions in the marital settlement agreement don't nullify the effects of these provisions.

### *"George is supporting me hoping we will get back together."*

Good for Mary, bad for George. If George files a separate return, he will not be able to deduct these payments unless there is a Court Order or separation agreement specifying that this is alimony.

### *"George has offered to give me the house."*

Mary will want to weigh the tax consequences. Mary's basis in the house will be the amount that she and George paid for it plus any improvements. When she sells the house, she will report all the gain. If the house is foreclosed upon or disposed of in a short sale, Mary will report any gain or loss. If George and Mary both signed the mortgage, the indebtedness is usually a personal liability and each spouse will report one-half the cancellation of indebtedness income. If Mary is insolvent and George is not, she will be able to exclude the income and he will not.

### *"George has offered to let me live in the house until the children are out of school."*

George will want to make sure that he can use his $250,000 exclusion from gain at time of sale. This requires a court order that the out spouse cannot inhabit the house.

### *"George is buying me out of the business (and other business transactions)."*

George owns a business. Buying out Mary's interest is fraught with tax issues and tax counsel should be retained at the start of the negotiations. The same can be said for dividing stock options.

### *"I am thinking about giving the dependency exemption for our son to George in return for more alimony, but I want to file as a head of household."*

Mary can file head of household if she and George are separated for the entire year, the son is living with her for more than half the year and she is paying over half his support, even if George is taking the dependency exemption.

### *"George and I are expecting a refund this year."*

This is a huge administrative problem. The best solution is often to file separately claiming each spouse's respective rights in withholding and estimated payments. Otherwise, address the refund in the marital separation agreement as part of the community property for purposes of division.

Oh, the tangled webs we weave. ♦

# Twelfth Annual
# Northern California Judicial Reception
# 2012 Rose Bird Memorial Award Presentation to
# The Honorable Diana Becton

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Mary Grace Guzman, Hon. Christopher Bowen, Audrey Gee


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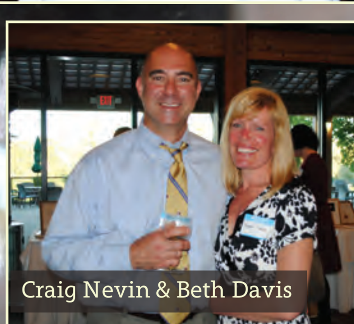
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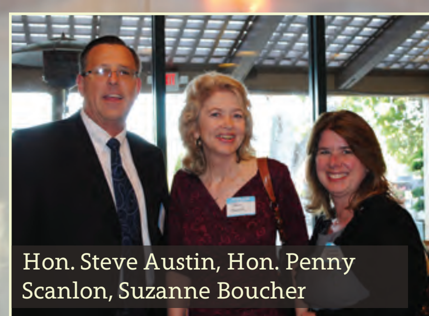
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# ***Another*** Offshore Assets Reporting Requirement

## Congress enacts additional reporting requirement in effort to combat offshore abuses

by Jenny C. Lin

In recent years, as governments all over the world face their own budget crises, their attention has increasingly shifted to ensuring that taxpayers properly report and pay taxes related to their offshore assets to fill the revenue gap. As the carrot to encourage taxpayers to come forward and disclose any past noncompliance, many governments, such as United Kingdom, Italy, and Spain, initiated tax amnesty programs promising no criminal prosecution and/or reduced penalties. The United States itself launched three tax amnesty programs in 2009, 2011 and now 2012 for U.S. taxpayers who have not properly reported or paid taxes related to their offshore assets and/or activities.

By all accounts, the tax amnesty programs seem to have been very successful in bringing in much needed revenue for their respective governments. The Internal Revenue Service ("IRS"), for example, announced that the first two tax amnesty programs in 2009 and 2011 generated more than $4.4 billion in collections as of January 9, 2012. IR-2012-5.

Lawmakers and tax enforcement agencies see the success of the tax amnesty programs as confirmation that many taxpayers are using offshore jurisdictions to avoid compliance with its tax laws. Whether such perception is justified or not, lawmakers seem to agree among themselves that more transparency is needed to combat offshore abuses. As a result, Congress enacted the Foreign Account Tax Compliance Act ("FATCA") in 2010.

In part, FATCA increases transparency by imposing an additional disclosure requirement on individuals and certain domestic entities.

Under FATCA, an individual who is a: (i) U.S. citizen; (ii) resident alien for any part of the taxable year; (iii) nonresident alien married to a U.S. citizen or resident with an election in effect to be treated as a U.S. resident for income tax and wage withholding purposes; and (iv) nonresident aliens of certain U.S. possessions are required to file Form 8938 with their annual tax return for the taxable year if the aggregate value of the individual's interest in specified foreign financial assets reach the required threshold. Treas. Reg. §1.6038D-2T(a)(1). Those who are not required to file an annual return for the taxable year are excepted from filing a Form 8938 with the IRS. Treas. Reg. §1.6038D-2T(a)(7).

In general, Form 8938 is required to be filed if the thresholds to the right are met:

| Status | Aggregate Value of Specified Foreign Financial Asset Interest |
|---|---|
| **Single or married filing separately** | ◆ Exceeds $50,000 on last day of taxable year; or<br>◆ Exceeds $75,000 at any time during taxable year |
| **Married filing jointly** | ◆ Exceeds $100,000 on last day of taxable year; or<br>◆ Exceeds $150,000 at any time during taxable year |
| **Single or married filing separately & living abroad[2]** | ◆ Exceeds $200,000 on last day of taxable year; or<br>◆ Exceeds $300,000 at any time during taxable year |
| **Married filing jointly & living abroad[3]** | ◆ Exceeds $400,000 on last day of taxable year; or<br>◆ Exceeds $600,000 at any time during taxable year |

**OFFSHORE ASSETS,**
cont. from page 23

Treas. Reg. §1.6038D-2T(a)(1)-(4).

There are various specified foreign financial assets subject to reporting under FATCA. These include:

- any financial account maintained by a foreign financial institution; and
- the following which are held for investment and not held in an account maintained by a foreign financial institution –
  - stock or securities issued by a non-U.S. person;
  - a financial instrument or contract that has an issuer or counterparty which is a non-U.S. person; and
  - an interest in a foreign entity, such as foreign corporations, foreign partnerships, foreign trusts and foreign estates.

IRC §6038D(b); Treas. Reg. §1.6038D-3T(a), -3T(b).

Many of the foreign assets subject to reporting under FATCA are actually already subject to reporting under existing laws, albeit some have slightly different criterions for triggering a reporting requirement. Some of the existing reporting requirements which overlap with FATCA include:

- Form 3520 used for reporting transactions with foreign trusts and receipt of large gifts or bequests from foreign persons or foreign estates;
- Form 5471 for reporting with respect to certain foreign corporations;
- Form 8865 for reporting with respect to certain foreign partnerships; and
- T.D. Form 90-22.1 (also known as the "Report of Foreign Bank and Financial Accounts" or "FBAR") for reporting with respect to foreign financial accounts.

The regulations acknowledge the redundancy of FATCA's reporting requirement by providing that assets reported on certain forms need not be included on Form 8938 again if the filing of the form on which the asset is reported is indicated on Form 8938. Treas. Reg. §1.6038D-7T(a)(1). However, the regulations do not specifically exempt financial accounts reported on the FBAR from reporting under FATCA. As such, U.S. taxpayers must file both Form 8938 and FBAR if the threshold requirements for each are met.

There are also other lingering ambiguities that are either not addressed in the regulations or created in the instructions of Form 8938. For example, the instructions for Form 8938 provide that a person filing Form 3520 need not include the asset reported on Form 3520 on Form 8938 again. Form 3520 is used to report the receipt of large gifts or bequests from foreign persons or foreign estates and transactions with foreign trusts. However, the regulations only exempt such asset from reporting on Form 8938 if Form 3520 was filed as a result of being a beneficiary of the foreign trust. Treas. Reg. §1.6038-7T(a)(1)(A). Thus, the regulation does not appear to exempt all assets reported on Form 3520 from reporting on Form 8938.

An individual who relies on the instructions of Form 8938 may be taking the risk that a penalty may be imposed for failing to properly include an asset on Form 8938 despite following the instructions on Form 8938. Cases litigated before the courts have held that instructions on a form are not dispositive, especially if such instructions are contradictory to other authorities given greater weight. See e.g., *Wilkes v. U.S.*, 50 F.Supp. 2d, 1281, 1287 (M.D. Fla. 1999), aff'd 210 F.3d 394 (11th Cir. 2000).

Civil penalties for failing to file Form 8938 in the time and manner required can be substantial. In general, the penalty for failing to file Form 8938 is $10,000. IRC §6038D(d)(1); Treas. Reg. §1.6038D-8T(a). If the failure to comply continues for more than 90 days after the IRS mails a notice of the failure to comply to the individual required to file Form 8938, an additional penalty of $10,000 is imposed for each 30-day period (or a fraction thereof) that the failure continues, up to a maximum of $50,000 for each failure. IRC §6038D(d)(2); Treas. Reg. §1.6038D-8T(c). Therefore, the maximum penalty for each failure is potentially $60,000.

> "Although the reporting under FATCA may be duplicative of existing reporting requirements and overbroad, taxpayers should not take the matter lightly if they have offshore assets and/or activities.

There are other related consequences that may result from the failure to file Form 8938 in the time and manner required. First, underpayments attributable to any transactions involving an undisclosed foreign financial asset, including assets required to be disclosed pursuant to FATCA, is subject to an increased 40% penalty rather than the 20% penalty that generally applies. IRC §6662(j); Treas. Reg. §1.6038D-8T(f)(1). Second, the statute of limitations for assessment and collection may be extended to three years after the information required to be reported pursuant to FATCA is furnished to the IRS. §6501(c)(8).

The civil penalties are in addition to any criminal penalties that may apply for failing to file Form 8938 or failing to supply the information accurately and completely.

Although the reporting under

FATCA may be duplicative of existing reporting requirements and overbroad, taxpayers should not take the matter lightly if they have offshore assets and/or activities. This is especially imperative given that the IRS has greatly increased enforcement with respect to a U.S. taxpayer's reporting of worldwide income and offshore assets and activities. This effort includes the issuance of a John Doe Summons to Swiss banking giant UBS AG in 2008 seeking the turnover of banking information relating to U.S. taxpayers and adding hundreds of agents to work on these international issues. The IRS, working with the U.S. Department of Justice, is also diligently pursuing the prosecution of recalcitrant taxpayers who did not enter the voluntary compliance programs and foreign banks and foreign bankers who assist and/or counsel U.S. taxpayers to violate U.S. tax law.

Taxpayers should not think that their small foreign account and/or foreign asset will not attract IRS interest or that criminal charges will not be brought if the taxpayer quietly amends or files the necessary returns. On May 19, 2011, the U.S. Department of Justice charged Michael F. Schiavo with willfully failing to disclose his foreign bank account for the 2006 year even though he quietly (without going through the tax amnesty program) mailed in FBARs for the 2003 to 2008 years and amended his income tax returns in 2009 after the tax amnesty program began. The balance in the foreign bank account from 2003 to 2008 was between $65,000 to $150,000 at all times. In all, Mr. Schiavo was alleged to have deprived the government of $40,624 in taxes.

Nor should taxpayers take comfort in thinking that they will not be discovered. As the issuance of a John Doe Summons to UBS shows, the IRS has a number of tools at its disposal. There are also tax treaties with many countries that require foreign governments to cooperate with the U.S. government in its tax investigation. Foreign governments are also recognizing that they have a common interest in ensuring offshore compliance. For instance, Germany, France, Britain, Italy and Spain have all agreed to share data with the United States in assisting the United States to implement FATCA.

The IRS's position is clear that offshore compliance and enforcement is a high priority. Taxpayers should likewise treat offshore compliance with the same priority and not take the matter lightly. ♦

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# CYPRESS

## contemporary californian with a french twist

by Gary Lepper

When you enter this restaurant, you will find a little bit of everything. A grand piano, spacious seating, a comfortable bar area with *Casablanca* playing in uninterrupted silence to set a mood. After all, as Rick Blaine had his *Café Americain*, so Rick Delamain has his *Cypress*.

In a very real sense, Rick has come home. Beginning in high school, he spent nearly twenty years at *Le Virage* (remember that marvelous spot, oldsters?), with two one-year breaks (1995-1997).

After *Le Virage* closed in 2003, Rick became general manager at *Bing Crosby's* and senior general manager for *Dudum Sports Entertainment*. Later, he opened *DiMaggio's*, another *Bing Crosby's* (Rancho Mirage), *Centercourt* (Sacramento) and *DiMaggio's* (Austin), while overseeing four restaurants. He returned to the corporate office as beverage director and manager of the newly-acquired *Maria Maria* restaurant group.

So what remains after you've served dishes and washed them, bought beverages and poured them, cooked in a kitchen and managed multiple restaurants? Open one of your own, just as you've always wanted. And so Rick did, on September 6, 2011.

If "formal brasserie" is not an inherent contradiction, then *Cypress* is it. It is somewhat schizophrenic in style: casual in attitude and manner - perhaps a concession to the presently odious dress practices of (especially) males, including the gauche wearing of hats at the table - but nonetheless formal in setting and service, often enhanced by piano music. Yet Rick wants it to be regarded as "just a local joint," where one can go specially or spontaneously. And then one is handed the rather patrician menu…

Determined to avoid any culinary niche, Rick dubs his concept "contemporary Californian." It is a merger of California-based components with a French influence (he unabashedly wants to restore at least some of the traditional cuisine that was lost when *Le Virage* closed, though without replicating the formality). Sauces thus are less features by themselves than accents for the centerpiece (for example, the sauce provencal is considered an accompaniment to the sea bass, rather than poured on top of it).

Variety is prized, so that all tastes can discover some unique treat. The menu changes two or three times during the year, though it is supplemented by extemporaneous specials. As in any benign monarchy, he decides what delights fall from the cypress tree, as it were, onto the diners' tables but he actively encourages suggestions and refinements from his chef de cuisine Dindo Burjo and his line cooks. He is proud of the menu's collaborative quality.

Dishes are deliberately mid-priced. Appetizers ("Beginnings," on the menu) are universally outstanding; try the unusual charcuterie ($13), crab cakes ($12) with hearts of palm and avocados or the escargot ($11). Have the beet carpaccio ($8), with greens, radish and vinaigrette or join me with either the Caesar ($16) or warm spinach ($18) salad, both prepared tableside for two (no pre-mixed concoction, but a delectable flashback to bygone elegance). On the other hand (so far, you've been eating with only one), try any soup du jour; I've had four and all were distinctly excellent.

Okay, warm-up is over. Choose among six meat dishes and five fish. Consider the braised rabbit ragout ($24) over tarragon pappardelle pasta in a butternut squash sauce (it's ineffable and my favorite). The duck breast ($25) with farro risotto, complemented by a red wine demi-glaze…or the bone-in pork loin ($24) with white bean/Brussels sprouts ragout…or the Icelandic cod ($23) in brown ale batter with a trio of sauces…or the sautéed prawns, mussels and clams ($23) in a citrus caper beurre blanc sauce over angel hair pasta. Also available as "Sides" ($6) are bistro-type pommes frites, spinach and leeks creamed with nutmeg and rosemary, sautéed beets with thyme and rosemary, etc.

Hoping that you're not one of those "just water, please" crypto-diners, ask for the cocktail-wine list that comes on its own Kindle-like reader, complete with wine pairing suggestions. The wines are moderately priced and geographically diverse; whatever your red or white preference among recent vintages will be satisfied easily.

Desserts have their own menu. Within it are, for example, chocolate ganache tart with fresh berries and berry sauce or strawberries flambee (see "traditional," supra) at tableside, with brandy and orange liqueur beside vanilla ice cream.

Whenever you're ready, so is *Cypress*: seven nights from five to midnight, Tuesday-Friday lunch and Saturday-Sunday brunch. Evening reservations (925-891-4197) are recommended; semi-private rooms for parties of 12 and 40 and catering are available. It is located at the corner of Cypress and Locust Streets in central Walnut Creek (even if it were a vegetarian restaurant, he wouldn't have named it "Locust"), incongruously across the street from *Crogan's*.

According to Ovid's *Metamorphoses*, a beautiful deer came daily to be fed by the god Apollo and his devoted attendant, Cyparissus. One day, the deer was mistakenly killed when Apollo was practicing throwing the javelin. Distraught and inconsolable, Cyparissus lay crying on the ground. "Drained by a torrent of continual tears," his dessicated body gradually turned into "a tapering bush, with spiry branches." Thus cometh the cypress tree.

Rick doesn't want you crying on the ground outside his restaurant. Come inside and try what he describes as "simple" (wrong), "straightforward" (wrong again) and delicious (correct, at last) food.

In *Casablanca*, Rick Blaine's "problems…don't amount to a hill of beans in this crazy world"; in *Cypress*, Rick Delamain's cuisine amounts to far more than any hill of beans. ♦

*There is a big elephant in the room, and if law firms don't deal with it, they will be put out of business.*

by Carol Langford

Legal process outsourcing companies (LPOs) are offshore entities that essentially engage in the practice of law and charge far less than an American law firm. We have all heard about them, but the new LPO does not just review documents or perform simple research; they want to counsel, advocate and produce legal documents. Most law firms are unaware of how openly and unabashedly they are seeking to grab business away from firms. I don't need to paint a picture of how doctors lost control of their profession by ceding it to health insurance companies, and I see this as similar.

Here is the real problem with LPOs: GCs of major corporations are having law firms they once would have paid to do things like memos, document review and other tasks supervise the LPO's work. The LPO thus takes income from the firm, but keeps the firm on the hook for professional liability (Rule 3-310 imposes a duty to supervise). We all know that the definition of what is and is not the practice of law can get murky, which gives the LPOs more freedom to take on projects that might cross the line. It also gives legal malpractice insurers greater ability to deny coverage in the event of a problem; if it is not the practice of law, they will say a suit is not covered.

Moreover, the industry standard E&O policy coverage for LPOs is 5 million dollars. Yes, that's right; the amount many solo practitioners have for coverage. The LPO's argument: We are not providing legal work and thus don't need a lot of coverage. But…if the work done by the LPO is poor, who suffers the financial loss? The law firm, of course. If a law firm suffers a significant loss that is uninsured it will go out of business.

Take note of the lawsuit against the McDermott law firm currently under way. J-M Manufacturing Co, the world's largest supplier of plastic pipe, hired McDermott to help respond to prosecutor's requests for documents after a former employee filed a whistleblower lawsuit. J-M alleged that the contract attorneys the firm used "negligently performed their duties." This suit is seen as an important case concerning the quality of work performed by the growing cadre of contract lawyers who earn as little as $25 an hour to review documents related to litigation; far less than what a first year associate at a big law firm would charge.

Having worked on several challenging and exacting document review projects I can say that sometimes the determination of what is responsive is quite substantive and complex. The issue is whether the document is responsive and/or privileged, but that can require insight into the law and internal corporate processes of the client. When a mistake is made by an LPO, it is "game over" for the client; the bell cannot be unrung.

How should firms deal with this? Demand to be paid to really supervise, and hope the GC doesn't go to another firm that will be more sanguine about their potential liability. Develop a niche that would be hard to fill by someone offshore. Cut your costs so you can refuse work that will bring supervisory problems. But most of all, be able to tell a GC to take a hike if she is putting you in a position of shouldering a responsibility with no pay that can take down your firm. I'll bet the McDermott firm wishes it had done that. ♦

**Carol M. Langford** is an attorney in Walnut Creek specializing in providing advice and counsel on ethics matters. She practices before the State Bar of California. She is also an adjunct professor of law at U.C. Berkeley Boalt Hall School of Law.

# MCLE Auditing Compliance

from the desk of Jon B. Streeter
President, The State Bar of California

The State Bar is taking a more aggressive approach to auditing MCLE compliance than it has historically. All California lawyers need to be aware of this change in the Bar's MCLE auditing process.

The result of the State Bar's recent 2011 MCLE audit of one percent or 635 lawyers has confirmed the need for increased auditing. Of the 635 audited attorneys, 539 provided the necessary documentation showing full compliance. Of the remaining 96 attorneys, five have been suspended due to their inability to show any compliance. Most of the remaining 91 attorneys had minor reporting deficiencies and received a cautionary letter from our MCLE compliance group about future compliance. Approximately 25 of the 91 are being referred to the Office to Chief Trial Counsel for disciplinary action. Using simple math, we see that 15% of this reporting group were not in compliance.

This result is troubling and reaffirms the action being taken by the State Bar. In 2012, California attorneys can expect that five percent or roughly 3,000-4,000 lawyers to be audited. In 2013, the goal is to audit 10% which translates to 7,000-8,000 lawyers. Letters requesting proof of compliance for 2012 will be mailed in June.

"California lawyers must fulfill and accurately document and report their MCLE requirements. No California attorney should be surprised if their compliance certificate is audited.

The message is clear. California lawyers must fulfill and accurately document and report their MCLE requirements. No California attorney should be surprised if their compliance certificate is audited. For more information regarding MCLE requirements and reporting, visit the State Bar's MCLE web page.

If you have any questions, please send an email to Carol Madeja, Managing Director of Bar Relations Outreach at carol.madeja@calbar.ca.gov. ♦

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# Lawyers Behaving Badly

## *The Importance of Ethics in Litigation and the Courtroom*

by Matthew Talbot

Nothing interests a group of attorneys and judges more than anecdotes of lawyers and judges behaving badly. At the Robert G. McGrath Inns of Court meeting on March 8, 2012 at the Lafayette Park Hotel, Judge Weil's group (consisting of Sean McTigue, Nicholas Jay, Samantha Sepehr, Robin Pearson, Kenneth Strongman, Laureen Bethards, Jay Chafetz, David W. Ginn, and David Pastor) presented an hour-long program entitled "Lawyers Behaving Badly". They identified unethical and inappropriate activities by attorneys and judges. Judge Weil's group took the Inns membership down the yellow brick road of litigation to the Emerald City of just plain bad lawyering.

Using a variety of vignettes, they illustrated instances when lawyers (and even judges) didn't exactly meet the standards of our fine profession. Their first vignette dealt with an attorney navigating the choppy waters of a joint representation. Even under the best circumstances, a joint representation can create potential conflicts of interest. In the example shared by the group, an actual conflict did arise, but the attorney tried to stay on to represent one of the clients, which is generally disallowed. If an actual conflict does arise in the dual representation, the attorney generally must withdraw from representing both of the clients. The Inns group discussed what the attorney could have done to protect his clients and his representation.

In another vignette, Judge Weil's group told the story of the "Stinky Bentleys." Here, the Bentley car company had sold cars with obnoxious odors, and despite receiving complaints, did not take appropriate steps to remedy this problem. Instead of following the tried and true method advocated on Seinfeld of dealing with smelly cars (i.e. abandoning them on the streets of NYC), the owners sued Bentley. Bentley, in return, followed poor legal advice and abandoned any responsibility to perform discovery. They failed to turn over documents, lied under oath, destroyed evidence despite court order, and generally stymied attempts at discovery. The Court considered this "lawyers behaving badly." The Inns meeting had a lively discussion regarding whether terminating sanctions for Bentley's defense were appropriate.

There was another vignette that related to Seinfeld as it had an element near and dear to George Constanza's heart: manure. "It's like Ma and Newer!" (George, 3. episode: The Cadillac – Part 2). In this case, the defendant was avoiding following any discovery rules at all. He was a rebel who played by nobody's rules! When it came time for a document request at a deposition, he showed up to the deposition with those documents ... covered in manure. Unfortunately for the people at the deposition, the 'manure' episode of Seinfeld wouldn't air for another 13 years and so there was little mirth to be had in this production of documents. The Inns meeting again discussed whether terminating sanctions were appropriate.

> "The next Inns of Court meeting is May 10, 2012 at the Lafayette Park Hotel. To learn more about the Inns Of Court and get involved, contact President David Pearson at (925) 287-0051 or attorney@mac.com.

But it was not just the lawyers who had their naughty moments. Judge Weil's group discussed judges behaving badly, too. Yes, as it turns out, not every Judge is a perfect luminescent being of light. Just all the ones in Contra Costa County!

In one discussion, the judge in question conducted the trial like a game show! In another, the judge waited until the trial was in full swing before disclosing that his wife worked for the defendant. Then, he refused to withdraw from the case. The Inns membership discussed what attorneys could do to protect themselves and their clients from situations in which it appeared judicial officers were not complying with their duties.

Finally, Judge Weil's group looked at contempt proceedings. The group discussed what constituted a weapon in court. Further, the membership discussed what might constitute sufficiently boisterous court room behavior rising to the level of contempt.

All in all, it was an interesting discussion regarding the unethical steps a few amongst us are willing to take. This small group of unethical lawyers, by their obstreperous and unprofessional acts, gives the large majority of professional, skilled and ethical attorneys a bad name, and sometimes sleepless nights. While most attorneys are just trying to do their best to zealously represent their clients, there are some attorneys out there sadly making the published decisions or even the news; they shirk all responsibility to their clients, other attorneys, and society as a whole. May none of us ever find ourselves the subject of a similar Inns discussion! ♦

# letter to the editor

*From:* *Kim Stone,*
*President, Civil Justice Association of California*

*Re:* ***The Trouble with Tort Reform***
*by Scott Sumner, Contra Costa Lawyer, March 2012*

Scott Sumner's column "The Trouble with 'Tort Reform'" is not helpful to the debate over California's civil justice system. Rather than dismissing examples of frivolous lawsuits as "fabricated from whole cloth" and arguing over how tort reform may or may not fit with unrelated principles of conservatism, we need to get to the heart of the issue.

Sumner fails to recognize and address how California law has been set up to favor plaintiffs over defendants in many different respects.

Our class action law allows plaintiffs to appeal a judge's decision on class certification, but not defendants.

California, unlike many other states, puts no limit on punitive damages and only requires 9 of 12 jurors to agree that punitive damages are appropriate.

In certain cases, such as disabled access lawsuits and suits brought under the Consumer Legal Remedies Act, even if the defendant wins they still have to pay their own attorneys' fees. So even if the defendant did nothing wrong the lawsuit will still cost them thousands of dollars. However, if the plaintiff wins, the defendant has to pay the plaintiff's attorneys' fees.

California's vexatious litigant statute, which allows judges to restrict individuals who repeatedly file meritless claims, only applies to plaintiffs representing themselves, not plaintiffs represented by attorneys.

Sumner may have arguments as to why the law should be this way, but let's hear them and see how the public feels.

*The Civil Justice Association of California* (CJAC) believes this kind of imbalance encourages abusive lawsuits to the detriment of small business owners, taxpayers, and our economy.

The fact is there are lawsuits that we can only wish were "fabricated from whole cloth."

Californians need to know about the lawyer who sued to stop a July 4th fireworks show in San Diego and then, as the San Diego Union-Tribune reported, submitted a bill to the court asking the city to pay him $756,000 in attorney fees. Democratic Senator Juan Vargas is carrying legislation this year, SB 973, to prevent this type of lawsuit.

Californians need to know about the lawsuits filed by a couple against hot-air balloon businesses in Coachella Valley, claiming without any evidence that the balloons were flying too low over their property. When the FAA found no violations, the couple even sued the FAA. The lawsuits were finally dropped last August but not until, as *The Desert Sun* put it, "a dozen balloonists or balloon companies went out of business, left the area or simply stopped flying locally." One balloonist ran up $177,000 in legal fees.

These and many other examples of lawsuit abuse are not myths, and the devastating impact that a lawsuit can have on a person's life should not be casually dismissed. There is a reason that survey after survey shows business leaders around the nation believe California has one of the worst legal environments in the country. Let's focus on why California law has been crafted in a way that makes it easier to abuse our legal system. ♦

*Scan this QRcode with your smart phone to read Scott Sumner's column, "The Trouble with Tort Reform" at cclawyer.cccba.org/?p=3660*

# New Workplace Poster Requirement about Employee Rights

by Harvey Sohnen

As of April 30, 2012, most employers in the private sector will come under a new requirement of the National Labor Relations Board ("NLRB") to post in a prominent place in the workplace an 11" by 17" poster informing employees of employees' rights under the National Labor Relations Act.

The rights listed in the poster include the right to organize a union, to join a union, to discuss wages and benefits with co-workers, to take action with co-workers to improve working conditions, to strike or picket, depending on the purpose, or not to do any of these things. It also lists illegal activities with respect to employers and unions, and explains how to contact the NLRB.

The poster is available for free on this website: www.nlrb.gov/poster. The Notice should be posted in English. Also if at least 20% of employees are not proficient in English and speak another language, a translation of the Notice should be posted in another language. The NLRB has translated the notice into 26 other languages, and made the translations available through its website.

**Employee Rights**

**Under the National Labor Relations Act**

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

**Under the NLRA, you have the right to:**

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

**Under the NLRA, it is illegal for your employer to:**

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.

**Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:**

- Threaten or coerce you in order to gain your support for the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or **(TTY) 1-866-315-NLRB (1-866-315-6572)** for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

**This is an official Government Notice and must not be defaced by anyone.**

SEPTEMBER 2011

*The Employee Rights poster is available for free at* ***www.nlrb.gov/poster***

This posting requirement applies to private sector employers whose activity in interstate commerce exceeds a minimum threshold. Of interest to law firm employers are the NLRB's directions that law firms with over $250,000 gross annual volume are covered.

In today's highly partisan climate, this notice, which tells employees that they have a right to unionize, has attracted more attention than many other notice requirements. Employers, however, are already subject to a number of other workplace posting requirements. The great majority of these posters are available for free from the agencies issuing them, although some commercial services have found a market in selling them to businesses for a charge, and some vendors have even tried to create a poster combining a large number of posters into one. A list of many of the required posters can be found at www.dir.ca.gov/wpnodb.html. Some of the other areas covered by posting rules are anti-discrimination laws, family leave laws, wage and hour requirements under federal law and the California Wage Orders, health and safety laws and workers compensation insurance. If auditing your clients' or your law firm's compliance with employment law requirements, these are things to consider, and there is now one more! ♦

**Harvey Sohnen**, a past editor of Contra Costa Lawyer, practices employment law with Law Offices of Sohnen & Kelly in Orinda. Their website is www.sohnenandkelly.com

COFFEETALK!

# Facebook & Family Law. Discuss...

After my client separated from her husband, she received a friend request from a person named David. She initially declined, but he persisted. Upon reading David's profile, she agreed to be friends because they appeared to have much in common.

David stated that he was an architect with a wife and kids. He posted pictures of his family. His favorite book was "The Sum of our Days" by Isabel Allende. His heroes were Lance Armstrong, JFK and Albert Einstein.

He said: "I have a great career, and lot's of loving family and friends.

I would be best described as a man who is solid in character, funny, passionate, speaks the truth; but has a gentle way of delivering it. I am someone who is expressive and not uptight. I love kid's, and I help old ladies cross the street. I still believe in chivalry and allowing others to pursue their own passions. I don't make mountains out of mole-hills, and am confident with myself. I have strong beliefs and lot's of passion in all that I do...but at the same time I'm not so stubborn that I can't see when I'm wrong and admit it. I respect other's and support them with their goals, I am not argumentative and believe that those in my life have much to teach me."

My client struck up an intense cyberspace friendship with David by writing long emails about her feelings and the difficulty of going through a divorce. David later told her that he had he had pancreatic cancer with a 5% survival rate, which she was devastated to learn.

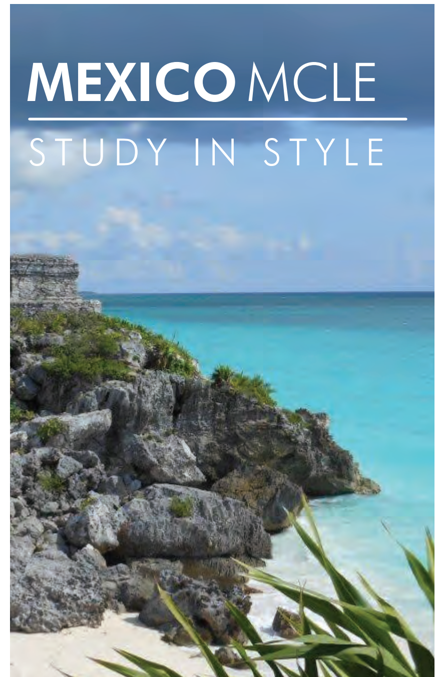
Eventually she discovered that David was her husband, who was a chronically unemployed salesman against whom she had a restraining order because he had stalked her by hiding in the trunk of her car while she was driving. He also had a history of sexual assault and domestic violence against her.

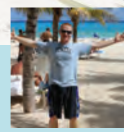
Her husband admitted to having committed the fraud. He said that his plan was that David would convince her to reconcile with her husband, then after the reconciliation, David would die.

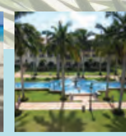
*Anonymous*

Facebook is a gold mine for family law attorneys in terms of impeachment but litigants can still spin things as they see fit. One individual, when faced with photographs of him attending a concert of a band that he stated in a deposition that he had not seen and would never see, simply stated "I left before that band came on. So I never saw them, like I said."

*Wallace Francis, Esq.*
*Director of the Paralegal and Criminal Justice Programs, Heald College, Concord*





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OCTOBER 6-13, 2012

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For information, please contact **Dana Santos** at **danasantos@comcast.net**.

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