

# Contra Costa Lawyer Online

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Three easy ways to renew your membership: Online, over the phone or by mail. Thank you for your continued membership!

The Contra Costa Lawyer is the official publication of the Contra Costa County Bar Association (CCCBA), published 12 times a year - in six print and 12 online issues.



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# How I Survived the MCLE Audit - You Could Be Next!

Monday, December 01, 2014



The State Bar's goal is to increase MCLE audits tenfold compared to three years ago, so if they keep that up, there is an even greater chance you will be audited within the next five years. I don't have to wonder about my number being called because I was one of the lucky ones, part of the 5,500 lawyers already audited in 2014 for the compliance group N-Z.

Of the 5,500 attorneys audited, approximately 75 percent were random and 25 percent were those the State Bar considered a higher risk for doing poorly on the audit. Higher risk tendencies include a history of administrative actions or late filing of MCLE compliance, making this their "risk-based" audit.

The State Bar's goal was to audit 10 percent of its members and the audit rate for next year has not yet been determined. In 2014, 8.5 percent of the attorney pool were audited, as compared to 1 percent in 2011, 5 percent in 2012 and 7.5 percent in 2013. In 2011, 27 attorneys had referrals to the Office of the Chief Trial Counsel for further investigation or discipline, 77 in 2012, 106 in 2013 and the number for 2014 is not yet available.

The audit is time consuming, and you are required to fill out the State Bar of California MCLE Audit Summary Log through the State Bar website. This requires the listing of the provider name and number, course title, date taken, type of course, participatory or self-study, total number of hours and the category for those hours. You are required to submit the Certificate of Compliance for all of the courses by email or by mail.

This year, the audit notice came out on July 7, 2014, and the compliance was due by August 21, 2014. When you successfully complete the audit, you'll receive a letter stating you passed the audit.

At the completion of this audit, I contacted the State Bar recommending they make the Summary Log available under the Member Profile, so attorneys could log all information after each class is taken and then, if audited, that log could be submitted, which would save its members a huge amount of time. The State Bar said that process was not available.

Right now, what the State Bar makes available along these lines is just a partial log; currently courses taken from the State Bar are tracked through a tool on the State Bar Member Profile. A self-study log is also available that members can use to self-track: [http://mcle.calbar.ca.gov/Portals/7/documents/MCLE-Personal-Log\\_ADA.pdf](http://mcle.calbar.ca.gov/Portals/7/documents/MCLE-Personal-Log_ADA.pdf)

The State Bar reports the following to be the most common problems in its audits:

- Not responding to the audit.

- Missing the subfield requirements in Ethics, Competence (formerly Substance Abuse) and Elimination of Bias.
- Not understanding that only specific items qualify as self-study—simply reading case law or researching **does not** qualify and self-assessment tests must be completed and graded to count.
- All CLE must be approved. Non-CLE courses or CE from other professions (CPA, Real Estate) do not count unless specifically approved.
- Submitting hours from an earlier compliance period.

Make sure you don't forget to sign in for the classes you attend. The State Bar is doing random checking with providers to verify that the audited attorney signed in for the class.

The next compliance group is Group 2, (H-M) for the period February 1, 2012 – January 31, 2015. Next year's audit will be for that compliance group, and your chances of being audited could be 1 in 10 or higher. Assume you will be audited, and make the job easier by keeping good records, update as you go and keep hard copies of all of your attendance certificates.



If you are a CCCBA member, the CCCBA helps track your MCLE credits for CCCBA sponsored programs. Log into your member profile and you will be able to access most of your bar-sponsored attendance certificates with the exception of the MCLE Spectacular events.

To further assist you in meeting your MCLE requirements, this edition of the Contra Costa Lawyer offers a new self-study article: "Priority" of Interests in Real Property with Tenant Occupied Foreclosure Properties.

Other resources include: "California's MCLE requirements: Complying with the rules and your ethical obligations" (California Bar Journal, September 2014) and "When the State Bar Audits Your MCLE Compliance" (Contra Costa Lawyer, February 2014).

**Candice Stoddard** is an attorney in Walnut Creek with the Law Offices of Candice E. Stoddard. Her practice focuses on real estate litigation, personal injury, estate litigation and mediation. She has served on the Board of Directors for the CCCBA for the past 10 years.

# What Have We Accomplished?

Monday, December 01, 2014



At the CCCBA's Annual Officer Installation back in January, I promised that this year, the CCCBA would focus on two primary areas—engaging young lawyers and improving our communications, particularly related to the increased use of mobile devices. I am pleased to report that we have accomplished some great things in both of these areas over the past eleven months.

To better engage our younger lawyers, we held three events, two of which were brand new. First, in May we brought back the Barristers/Law Students & CCCBA Leadership Mixer at the Pyramid Alehouse in Walnut Creek, which drew almost 50 people. I saw numerous connections made between our barrister and law student members and our section leaders and board members, which led to increased collaboration between the barristers and our other sections.

Then in June, we held a new kind of event to help pair up young lawyers with more experienced attorneys as potential mentors, using a speed-dating format. Through a series of discussion prompts to help get conversations started, nearly every one of the 24 participants found someone they connected with and was able to form the beginning of a potential mentorship relationship. And from what I've heard, most of these relationships have continued to blossom in the ensuing months.

Lastly, in October, we held a program called "Positioning Yourself for Job Search Success," designed to provide barristers and law students with job hunting strategies and advice, which drew about 50 people as well.

In terms of communications, last month we launched our responsive website at [www.cccbba.org](http://www.cccbba.org), which means that our website now optimizes its appearance based on the size of your screen—whether it's on a desktop or laptop computer, tablet, smartphone or phablet (smaller than a tablet but bigger than a smartphone).

I am probably most excited about the launch of our new CCCBA mobile app, available at both Apple iTunes and Google Play. The app offers all of the CCCBA's most popular

services. You can view our event calendar and sign up for an event with just a few touches. You can search our member directory to get in touch with your colleagues from around the Bar Association. You can watch videos of our best MCLE events. You can read our outstanding monthly publication—the Contra Costa Lawyer—as well as judicial profiles for most of our local judges. Please go download the app today at one of the links above, if you haven't already.

I hope all of our members will find these tools to be useful additions to the host of services and benefits provided by the CCCBA.

I want to thank the CCCBA staff, board members and others who generously contributed their time and energy to make these things happen. And I want to thank the CCCBA board and its members for allowing me to lead this great organization for the past year. It has truly been an honor and a pleasure to work with all of you.

# Social Impact Bonds: A Revolution in Richmond

Monday, December 01, 2014

*"Every dollar we spent [on disaster preparedness] saved five dollars in future losses."*[1]

*"Chicago's preschool program generates '\$11 of economic benefits over a child's lifetime for every dollar spent initially on the program,' according to one study."*[2]

*"\$10 a person per year invested in prevention [of disease] could save billions."*[3]



So, if we know that investing in disaster preparedness, early childhood education and preventive health actually save money, why don't we do it? One reason is that we don't have the money to invest. With governments struggling to maintain basic services while meeting their obligations to retirees, there isn't enough money, even to make profitable investments. So, how are we to pay for social programs?

One answer is what are called "Social Impact Bonds," or, by the Obama administration, "Pay for Success" programs. The premise is that if we can capture, or monetize, those savings that we anticipate from the program, we can use some of those savings to repay investors. In other words, we

can create privately financed social programs, and attract private investors by promising them repayment from the success of the program.

The Richmond Community Foundation (RCF) is working on a Social Impact Bond targeting blighted housing. The city of Richmond suffered disproportionately from the Great Recession, and still has an oversupply of deteriorating houses awaiting tax sale, foreclosure or in the inventory of banks. RCF is working with the city of Richmond, which will issue \$2 million in municipal bonds, then lend the money to RCF, which will purchase boarded-up houses, rehabilitate and sell them.

The bondholders will be repaid from the proceeds of the house sales. The program will be among the first Pay For Success programs in California, and the first Social Impact Bond program in the nation to be actually financed through the sale of bonds.[4]

The three primary challenges of establishing a Social Impact Bond are:

- 1. Finding proven programs that address a specific need. RCF's housing rehabilitation program will reduce blight, improve property values, reduce crime, increase property tax revenues and reduce the city's costs of code enforcement. The benefits of cleaning up blighted neighborhoods have been demonstrated in cities around the country. The city of Philadelphia, for example, commissioned a study in 2010 that determined "Vacant property reduces market values by 6.5 percent citywide and by as much as 20 percent in neighborhoods with the most empty lots and structures. The report estimates that 17,000 vacant properties are tax delinquent and rob the city of \$2 million in tax revenue each year. Vacant properties also

consume \$20 million in city services a year, \$8 million of which is spent on code enforcement and maintenance, such as boarding up buildings or demolishing them.”[5]

- 2. Designing an intervention that can produce a real return on investment. In Richmond, once homes are rehabilitated they will sell in the Bay Area’s tight housing market.
- 3. Attracting investors. The market for Social Impact Bonds is new and uncertain, because the programs inherently bear above-market risks.[6] There are, however, investors willing to invest, some out of philanthropic motives, others because they are incentivized to do so. The former include private and family foundations willing to make what are called “Program-Related Investments” (PRI), individuals, and socially responsible mutual funds. The latter include banks that need to meet their Community Reinvestment Act obligations, and corporations that consider community investments and corporate social responsibility part of their profit-maximizing strategy.

However, to “scale-up” Social Impact Bonds, the pool of possible investors will have to grow. Issuing bonds for sale to the public or noninstitutional investors may mean that the offerings become securities.[7] Securities are heavily regulated,[8] and their issuance can be expensive because of the costs of lawyers and underwriters. The technical requirements of issuing bonds are beyond this article, but they are formidable.

In 2011, a Google search for “Social Impact Bonds” yielded fewer than 1,000 listings. Today that same search yields 122,000 results, even though there are only a handful of them in existence within the United States. Social Impact Bonds are an innovative financial tool, but one that with boldness on the part of all participants, can yield impressive results.

**Joshua Genser** is the Chair of the Board of the Richmond Community Foundation. He has recently retired, after more than 30 years, from the private practice of business and real estate law to help funders, nonprofits, government agencies and community foundations establish pay-for-success social programs.

[1] Lee Witt, former head of FEMA, quoted in “The Plain Math of Disaster Preparedness: ‘Every Dollar We Spent Saved 5 Dollars in Future Losses,’” by Sarah Goodyear

[2] Travis Waldron, “The Case for Expanding Preschool Access to Every American Child”

[3] Robert Wood Johnson Foundation, “Return on Investments in Public Health: Saving Lives and Money”

[4] City of Richmond Council Agenda Report, September 23, 2014

[5] “The Cost of Blight: Vacant and Abandoned Properties,” Pittsburgh Quarterly, Fall 2011

[6] Paul Brest and Kelly Born, “When Can Impact Investing Create Real Impact?” Stanford Social Innovation Review, Fall 2013

[7] Kimberly Amadeo, “Securities,” About.com

[8] U.S. Securities and Exchange Commission, The Laws That Govern the Securities Industry

# Tips of the Trade: Transform the Readability of Your Legal Documents

Monday, December 01, 2014



The annoyed reader is difficult to persuade. In the Journal of the Association of Legal Writing Directors article “Painting with Print: Incorporating concepts of typographic layout design into legal writing documents,” Ruth Anne Robbins explains how simple stylistic choices can reduce the reader’s annoyance and enhance the persuasive force of a legal brief. [1]

## Tip 1: Abandon the use of ALL CAPS.

Using all caps is SCREAMING. It is the typesetting equivalent of the 5-year-old’s, “He hit me!” and like the exasperated parent, the annoyed reader stops listening. It also hurts the eyes. According to Robbins, research shows that using all caps drastically decreases eye movement and reading speed,

between 9.5 percent to 19 percent, or about 38 words per minute slower, which frustrates the reader. The reader might not even try to read the all caps text and may simply skip over it because the brain sees it as too much work.

Using all caps in legal writing should be abandoned, even in headings. Historically, headings were in all caps because of the typewriter’s limitations. Because “Initial Caps” also slows readability, in order to ensure the readability of headings, simply bold them.

## Tip 2: Sparsely use bold or italics.

When used *sparingly*, italics can effectively offset an important word or phrase. Robbins notes that the research on using *italics* and **boldface** showed that italics reduced reading speed between 4.5 percent and 10 percent. But as leadership consultant Patrick Lenicioni said, “If everything is important, then nothing is.” More often than not, legal writers use emphasis in the written text to mirror the verbal emphasis they would use if they were delivering the text aloud in court. Unfortunately in practice, this analogy does not translate.

Regarding credibility and professionalism, sparse use of italics can reflect the advocate’s thoughtful and considered choice, while abundant use may reflect insecure panic or worse. Heed Justice Scalia and Bryan Garner’s warning that constant italicizing results in a brief reminiscent of an “adolescent diary.”[2]

Boldface does not appear to significantly reduce reading speed, which makes it appropriate for headings, but not necessarily for in-text use. While Robbins notes that some psychologists recommend boldface because of its readability, legal writers should be wary with admonishments like Justice Scalia’s: “Some brief-writers ill-advisedly use boldface type within normal text. The result is visually repulsive.”

Extensive research on underlining has not been conducted but studies using mixed media suggest that use of underlining results in reduced reading speeds similar to all

caps because the underlining “skews the visual pattern of letters.” Here again, Justice Scalia: “As for underlining, it’s a crude throwback: that’s what writers used in typewriting—when italics weren’t possible. Nobody using a computer in the 21st [c]entury should be underlining text. To the extent that *The Bluebook* suggests otherwise, it should be revised.”

### Tip 3: Use an easy-to-read font.

Robbins’ crash course in typeface design highlights the two significant fonts for legal writers: (1) serif fonts (fonts with “wings” or “serifs” at the bottom of the letters); and (2) sans serif fonts (no “wings”). From a graphic design perspective, serif fonts, like Times or Garamond, enhance the readability of a large block.

The font’s width spacing can also enhance readability and conserve document space.

Proportionally spaced fonts, like Times and Garamond, take up less space on a page than a monospaced font, such as Courier. With Courier, each letter occupies the same space regardless of the natural letter’s width. So the “i,” “l” and “w” use the same space. But in Times, these letters have different widths. This results in more letters per line and more words per page, which also may be helpful when complying with a burdensome page limit.

A legal writer’s tone and content notwithstanding, these three quick tips will improve readability and hopefully will reduce or eliminate reader annoyance.

**Wendy McGuire Coats** of McGuire Coats LLP has a state and federal appellate practice in which she handles civil, criminal, juvenile, immigration, writs, and amicus matters. Wendy is a member of the CCCBA’s Appellate and Women’s Sections. She is a regular contributor to the ABA’s Council of Appellate Lawyer’s publication, *Appellate Issues*.

[1] Ruth Anne Robbins. “Painting With Print: Incorporating concepts of typographic and layout design into the text of legal writing documents,” *J. ALWD* 2 (2004): 108-150, on the website of the 7th Circuit Court of Appeals.

[1] Antonin Scalia & Bryan A. Garner, “Making Your Case: The Art of Persuading Judges,” p. 122 (Thomson/West 2009).

# Recent Developments in the Law of Lawyering

Monday, December 01, 2014

The past year has brought numerous developments in legal ethics and the law of lawyering. This article will help attorneys stay abreast of major developments and spot ethical and other practice issues.

## New Ethic Rules Return to Drawing Board

Revision of our California Rules of Professional Conduct began in 2000, with the goal of aligning them with the ABA Model Rules that most states follow. In October 2014, the California Supreme Court, which must approve any rule change, requested that the State Bar start over and appoint a new commission.

The California Supreme Court was concerned with how much to retain existing California Professional Rules versus how closely California's rules should follow the American Bar Association Model Rules. The court wanted the rules to remain a set of minimum disciplinary standards rather than a broad ethical guide as the ABA rules provide.

It is now expected that the new revision commission should finish its work in March 2017. Stay tuned!

## Settle and Sue

A pernicious type of legal malpractice claim is the "settle and sue" case, which typically involves a plaintiff settling an underlying action and then suing the attorney for failing to obtain a better result. The latest case on this issue comes from the converse of the "settle and sue" case where the plaintiff declines to follow the attorney's settlement recommendations and then loses the case.

In *Moua v. Pittullo, Howington, Barker, Abernathy LLP*, (July 2014) \_\_\_ Cal. App. 4th \_\_\_, the Court of Appeal affirmed summary judgment for the attorneys, holding there was no causal connection between the attorneys' alleged breach and plaintiff's damages because the plaintiff rejected the settlement offer and the consequences of that decision were hers alone.

## Confidentiality for Attorney-Plaintiffs

If you find yourself embroiled in a wrongful termination action against your former employer law firm, a new case, *Chubb v. Superior Court*, (August 2014) \_\_\_ Cal. App. 4th \_\_\_, is instructive. In *Chubb*, an attorney, Lemmon, sued her law firm employer and Chubb, whose insureds she represented while at the firm. In response to Lemmon's request for documents relating to her job performance (e.g., "feedback letters from clients about how she handled their case"), Chubb withheld documents based on attorney-client privilege and confidentiality of third parties.

The trial court ordered the documents to be disclosed to the parties' respective attorneys in order to evaluate the privilege claims. In a writ proceeding, the Court of Appeal denied the petition, holding there is no distinction between an allegation of privilege as to a party. In its opinion, the Court of Appeal relied on *General Dynamics v. Superior Court*, (1994) 7 Cal 4th 1164, and *Fox Searchlight v. Paladino*, (2001) 89 Cal. App. 4th 294.

The three grounds for the court's decision included: (1) a State Bar Advisory Opinion which analyzed a similar case and found that disclosure of the information did not violate an attorney's duty of confidentiality; (2) the non-party's interests were adequately protected by the trial court's order; and (3) attorney Lemmon needed the information to pursue her wrongful termination action. The case is important because it addressed an issue which was not before the *General Dynamics* or *Fox Searchlight* courts—whether an attorney-litigant may disclose to her own attorney the client confidences of a third party who are not named defendants in the wrongful termination action.

## Two-Year Statute of Limitations in CCP 335.1 Applies to Malicious Prosecution Claim

There is now a split of authority regarding which statute of limitations applies to a malicious prosecution claim. In *Vafi v. McCloskey* (2001) 193 Cal. App. 4th 874, the Fourth Division of the 2nd District Court of Appeal held the one-year statute in CCP 340.6 applied. This year, the Third Division of the same district court disagreed. In *Cleveland Golf Co. v. Krane & Smith* (2014) 214 Cal. App. 4th 660, the court concluded the two-year statute in CCP 335.1 applies. While we wait for the Supreme Court to resolve this split, the prudent attorney should calendar the shorter one-year statute to avoid a bar.

## Successor Attorney Cannot Sue for Attorneys' Fees Without First Bringing Action Against Client

It is not uncommon for a client to fire her first attorney, retain a second attorney and then settle her case. The settlement check is deposited into the successor attorney's trust account and the first attorney demands payment of his fees/lien and then sues the second attorney. The Court of Appeal addressed this scenario in *Mojtahedi v. Vargas*, (August 2014) \_\_\_ Cal. App. 4th \_\_\_. The court held that the former attorney must first sue the client in an independent action to determine the existence, amount and enforceability of his attorney lien.

While not an issue before the court, attorneys are reminded that before they may sue the client to establish the value of fees recoverable, they must first give the former client Notice of Right to Fee Arbitration under Business & Professions Code 6200, *et. seq.*

## Attorney, not Client, is Entitled to Post-judgment Interest on Fee Award

In *Hernandez v. Siegel*, (September 2014) \_\_\_ Cal. App. 4th \_\_\_, the 1st District Court of Appeal held that post-judgment interest on an attorney's fee award belongs to the attorney, rather than the client, unless the attorney-client fee agreement states otherwise.

**Lorraine M. Walsh** has been in practice for 32 years and is a State Bar Certified Specialist in legal malpractice law. She is also a member of the State Bar Committee on Mandatory Fee Arbitration. She continues to focus her practice on controversies involving attorneys and clients including legal malpractice and malicious prosecution actions, fee disputes and expert witness consultation and testimony on the standard of care and conduct.

# Five Things New/Junior Associates Should Know

Monday, December 01, 2014

## 1. Know Who Your Client Is

As a new or junior associate, your client is probably not who you think he/she is. But if you know nothing else, know this: Your client is the partner or other attorney supervising your work. Your role is to make your partner's life as easy as possible. You can do this in many ways, including:



- Do not wait for new assignments/projects; seek them out.
- Turn in your assignments/projects on time or early. There is nothing worse than getting an email from your partner asking where an assignment is. It makes you seem unreliable.
- Turn in your assignments/projects as if no one else will review them. While your partner may not expect you, as a new or junior associate, to have perfect legal analysis or evaluation, they do expect you to know how to spell and format your document. If you give a partner a document that appears unfinished or filled with spelling errors, the partner will not trust your work. Worse, it will make more work for the partner.

## 2. Know Your Staff and Recognize Their Value

Legal secretaries and paralegals are essential to your success—especially for new or junior associates who typically do not have a lot of experience with the actual practice of law. Your secretary or paralegal can make your life easier or harder. Behind every good lawyer is a patient and amazing secretary and/or paralegal. If you fail to recognize this, then you may find yourself at the office alone all weekend trying to finalize that summary judgment motion.

## 3. Know Your Firm's Billing Requirements and Policies—and Exceed Them

At the end of the day, the practice of law is a business. You could do amazing legal work—but if you are not following your firm's billing requirements and policies, your firm may not be getting paid for that amazing work. Strive to exceed your firm's minimum billable hours. Be sure to enter your billable time on the schedule your firm requires and pay attention to your time entries—this includes wording and spelling. Your time entries are just as important as your legal work. Your partner should not have to spend hours rewording or “fixing” your billable time entries.

## 4. Know You Need a Business Development Plan

As a new or junior associate, this means having a plan to improve and grow your practice expertise. This includes seeking out and attending continuing legal education opportunities, networking events and mentorship. Do not sit back and wait for business to find you—start planning early.

## 5. Know Your Limitations

As a new or junior associate, you know just enough about the practice of law to be dangerous. Never pretend to know something you do not know. And always take advantage of an opportunity to learn from your partner. Often such opportunities will not be billable—but they are worth their weight in gold to new and junior attorneys building their skill set.

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# Limited Conservatorship and Autism Spectrum Disorder

Monday, December 01, 2014



The U.S. Center for Disease Control estimates that one in 68 children who have reached the age of eight years has Autism Spectrum Disorder.[1] Over the last decade, the autism rate has increased fivefold in California.[2] Early intervention is important and our schools have attempted to respond. Slightly more than 1 percent of California public school children are receiving special education services for autism.[3]

As these children mature to adulthood, they and their families will have to decide what types of support and, in some cases, supervision are necessary for the young developmentally disabled adult to live as independently as possible.

In layman's terms, the limited conservatorship was designed so that developmentally disabled adults could retain maximum independence and families could continue to help their developmentally disabled adult child navigate a complex society. A "developmental disability" is a disability that originates before the individual reaches 18 years of age, is expected to continue and constitutes a "substantial handicap" for the individual.[4] Autism is included in the definition of "substantial handicap."

As an attorney, this author's role in helping parents during their developmentally disabled child's transition from childhood to adulthood is short. For the parents, however, the journey to deciding whether their child's condition requires them to retain any legal decision-making authority has lasted years and been marked by triumph, fear, sadness and joy.

One father described the grief he felt when he reviewed the petition for limited conservatorship. For years, he had been his son's champion, searching for opportunities for his son to learn new skills and develop his many abilities. The limited conservatorship process, by its nature, requires everyone involved to focus on the soon-to-be-adult's disabilities. This is no mean feat for families who have worked to focus on what their child can do versus what their child can't do.

When families come to discuss their options, other less restrictive and cumbersome alternatives to the limited conservatorship are also considered. These include a special or limited power of attorney, durable power of attorney for health care or estate management and a trust. In some cases, a combination of these documents may provide all the support the developmentally disabled adult needs.

In other cases, however, these documents, standing alone or in concert, do not address the global needs of the developmentally disabled adult. Moreover, the developmentally disabled adult may not have the requisite capacity to execute these types of documents.

If, after considering the alternatives, the parents determine that a limited conservatorship is the best option to support their child, they must decide what powers to request in their petition; these run the gamut from determining their child's residence to consenting or withholding consent for their adult child to marry. The limited conservatorship process includes a background check of the parent (petitioner), court appearances and paperwork.

If the parents' petition is granted and they become their child's limited conservators, the parents assume the responsibility of securing the educational, vocational and medical services their adult child requires in order to live as independently as possible. Many parents have already been doing this for their child's entire life.

Determining the best course of action and level of support a developmentally disabled child reaching adulthood requires is daunting for parents. With the incidence of autism rising, our community needs to provide the support and counsel these families in transition deserve.

***Kristen Southworth** is a partner at Southworth Chavez & Day-Seiter in Orinda. Her practice focuses on disability and elder law issues.*

[1] Centers for Disease Control and Prevention (CDC): <http://www.cdc.gov/media/releases/2014/p0327-autism-spectrum-disorder.html>

[2] UC Irvine Health: <http://www.ucirvinehealth.org/medical-services/autism-neurodevelopmental-services/autism-facts/>

[3] *Id.*

[4] Section 1420 of the Probate Code.

# "Priority" of Interests in Real Property with Tenant Occupied Forec...

Monday, December 01, 2014

Earn one hour of General MCLE credit by reading the article below and answering the questions on the Self-Study MCLE test. Send your answers, along with a check (\$20 per credit hour for CCCBA members / \$30 per credit hour for non-members), to the address on the test form.

"Foreclosure of a first deed of trust wipes out a second deed of trust." This statement derives from California's law regarding priority. This law settles disputes between multiple interests in property by granting preference to one over the other. "Senior," "junior," "prior" and "subsequent" are labels designating priority. Interests in property have priority from the dates of their creation.[1] For mortgages and deeds of trust this rule applies, subject to the effect of the recording laws.[2]

A senior lien interest has long had priority over a junior lease interest. A foreclosure of said lien extinguishes the lease.[3] Title conveyed by a trustee's deed relates back to the date when the deed of trust was executed[4] and is free and clear of all interests thereafter created.

Local rent control ordinances exist. On August 20, 1985, the 1st District Court of Appeal issued *Gross v. Superior Court*, (1985) 171 C.A.3d. 265. *Gross*, citing *Birkenfeld v. City of Berkeley*, (1976) 17 C.3d 129 (local rent ordinance which eliminates particular grounds for eviction is a limitation upon a landlord's property rights under the police power conferred by Cal. Const. Art. XI, Section 7), bars foreclosure purchasers of tenant occupied properties located in rent control jurisdictions from recovering possession through a CCP 1161a(b)(3) eviction.

*Gross* provides that CCP 1161a does not preempt San Francisco's Rent Ordinance, which is an exercise of police power that substantively places a limitation on the owner's property rights. The ordinance by its operation created a tenancy between the trustee's sale purchaser and the tenant under the junior lease despite the existence of contract and real property principles which would have otherwise precluded the tenancy. The foreclosure purchaser becomes a "landlord" by operation of law. *Gross* does not state that the terms of the junior lease are binding on the foreclosure purchaser and does not state what the terms of the "created" tenancy are.

Post market crash legislation has been enacted to protect tenants occupying foreclosure properties, including: (1) the 2009 Protecting Tenants at Foreclosure Act (PTFA), enacted as part of the "Helping Families Save Their Homes Act of 2009," Public Law 111-22, Division A, Title VII Sections 701-704 (amended in 2010); and (2) 2008's CCP 1161b, requiring that tenants occupying foreclosure properties be given 60 days notice (amended in 2012, changing 60 days to 90 days).

On January 23, 2014, the 6th District Court of Appeal issued *Nativi v. Deutsche Bank National Trust Co.*, (2014) 223 C.A. 4th 261. *Nativi* interpreted the above mentioned federal and state statutes in a manner that extends the principles born in *Gross* statewide. In doing so, *Nativi* has arguably abolished California's law regarding "priority" of interests between senior liens and junior leases.

Mr. Nativi was a tenant under a junior lease. After a 2009 trustee's sale to Deutsche Bank, Mr. Nativi was removed from the property. He sued. Deutsche Bank successfully moved for summary judgment. The trial court concluded that under California law, the 2009 trustee's sale extinguished Mr. Nativi's junior lease; that Deutsche Bank did not step into the shoes of the former landlord; and that its obligation under the PTFA was to give a 90-day notice. The Court of Appeal reversed.

*Nativi* interpreted the PTFA to provide that any "bona fide" junior lease created prior to a foreclosure sale under senior lien survives the foreclosure sale and is binding upon the purchaser for the remainder of the lease term (except where the foreclosure purchaser moves in). *Nativi* also discussed the California's enactment of CCP 1161b and the 2012 amendment of same to make it comparable to the PTFA. Under *Nativi*, a foreclosure purchaser is forced: (1) into the role of "landlord"; (2) to become a successor to the landlord under the junior lease with the tenant; and (3) to assume all of the legal obligations that a landlord has.

The PTFA expires on December 31, 2014. H.R. 3543 and S. 1761 have been introduced, which would make it permanent. If it does expire, CCP 1161b, *Gross* and *Nativi* remain.

*Gross* and *Nativi* exclude junior leases from extinguishment via foreclosure of senior liens. They alter the rule of priority. Junior leases are elevated above senior liens in importance. As these opinions become widely known, people will realize that they create a new avenue for resisting foreclosure. Relying on *Gross* and *Nativi*, people will implement a strategy to keep control of encumbered properties by creating customized, "bona fide" junior leases (i.e., low rent, renewable, assignable and a purchase option at a wholesale price) and arguing that said leases survive foreclosure sales. Whether such a lease is bona fide depends on the facts, however such a lease will likely be considered bona fide even if the effect is to substantially lower the value of the foreclosed property below where it would be if the general rule of priority applied.

*Gross* and *Nativi* interpret the law in a manner that protects the interests of tenants and uphold the exercise of police powers in ways that limit private property rights. Both opinions may result in future real property transactions having increased risk. Higher borrowing costs, fewer loans being made and lower prices being paid at foreclosure sales may also result. Whether the benefits of *Gross* and *Nativi* are worth their detriments depends on one's point of view. However, both opinions are here to stay and will have continuing impact on real property transactions.

**Earn one hour of General MCLE credit by reading the article below and answering the questions on the Self-Study MCLE test. Send your answers, along with a check (\$20 per credit hour for CCCBA members / \$30 per credit hour for non-members), to the address on the test form.**

*Since 1994, Kevin S. Eikenberry has been in solo practice in Walnut Creek. He is a civil litigation practice with an emphasis on real property, foreclosure, judgments and judgment liens.*

[1] CC 2897.

[2] CC 2898.

[3] *McDermott v. Burke*, (1860) 16 C. 580, 589; *Bank of America v. Hirsch Merc. Co.*,

(1944) 64 C.A.2d 175, 184; *Hahn v. Riverside County Flood Control, etc. Dist.*, (1964) 228 C.A.2d 605; *Dover Mobile Estates v. Fiber Form Products, Inc.*, (1990) 220 C.A.3d 1494.

[4] *Bank of America v. Hirsch Merc. Co.*, *supra*.

# Introducing the New CCCBA Mobile App

Monday, December 01, 2014

CCCBA members can download the free mobile app for quick access to the most popular areas of the website. Use the CCCBA Members-Only Mobile App to:



- View and register for events
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## Questions? Comments? Feedback?

Contact Dawnell Blaylock, Communications Coordinator, at (925) 370-2542 or [dblayment@cccba.org](mailto:dblayment@cccba.org).

# Can I Give You a Lyft? Uber, Lyft and the Regulation of Taxis

Monday, December 01, 2014



Uber and Lyft rideshare companies are shaking up the taxi industry by providing transportation services to consumers via a smartphone application through which the consumer may choose a privately operated vehicle or a licensed taxi.

Neither Uber nor Lyft are registered or regulated in the same way as traditional taxi services, and as a result, taxi dispatchers and drivers have filed suits complaining “Uber has gained an unfair competitive advantage over traditional taxicab dispatch services and license-holders because it avoids the costs and burdens of complying with extensive regulations designed to ensure that residents ... have access to fairly priced and safe transportation options throughout the city and yet reaps the benefits of

others’ compliance with those regulations.”[1]

Effective September 2014, Milwaukee, Wisconsin, passed an ordinance which removes the limit on taxicab medallions and allows any permittee to legally provide transportation if a fixed fee is agreed upon electronically in advance. The city was promptly sued by several taxicab companies alleging violation of their rights to substantive due process and equal protection under the 14th Amendment.[2] The plaintiffs’ request for a preliminary injunction was denied in September.

The court reasoned the city was “faced with new companies like Uber and Lyft that were redefining the way that taxicab services operated in Milwaukee and were entirely unregulated.”[3] It is in the public interest to regulate their services and “the apparent success of such companies indicates a substantial demand for their services.”[4]

In September 2014, news outlets reported the district attorneys of San Francisco and Los Angeles were investigating California law violations and threatening to levy civil penalties on the rideshare companies.[5] The practices under fire include misleading information regarding the background checks on drivers, allowing passengers going the same way to split a fare, not having licenses to drop off and pick up passengers at the airport and being out of compliance with the inspection of taxi meters.

Uber’s official statement insinuated a number of these assertions were inaccurate and under discussion.[6] In October 2014, both Uber and Lyft announced they had obtained agreements with the San Francisco airport to legally pick up and drop off passengers.[7]

In *O’Connor v. Uber Techs., Inc.*, two former Uber drivers filed a class action suit alleging violations of statutory employee reimbursement and other causes of action for unremitted gratuity including alleged violations of the Business and Profession Code Section 17200, *et seq.* A similar suit is pending in Massachusetts. In January 2014, some consumers filed a class action suit regarding the same issue.[8] Uber is taking the position that

consumers do not have the right to know how the money is spent.[9]

Perhaps due to the novel way of delivering a service—connecting people who need transportation with those willing to provide it via smartphones—existing laws are outdated. Are Uber and Lyft simply competing more effectively in the market or are they competing unfairly? These issues will be continuously developing as they move through the courts and across the desks of lawmakers.

***Janell Alberto*** is an Associate at Livingston Law Firm in Walnut Creek, practicing general civil litigation defense with an emphasis on products, general liability and commercial litigation matters. She has seven years experience in civil litigation defense, and also has experience working in-house at several corporations.

[1] *Boston Cab Dispatch, Inc. v. Uber Techs., Inc.* (2014), 2014 U.S. Dist. LEXIS 42068.

[2] *Joe Sanfelippo Cabs Inc. v. City of Milwaukee* (2014), 2014 U.S. Dist. LEXIS 128026.

[3] *Id.* at 7.

[4] *Id.* at 14.

[5] Knight & Evangelista, "S.F., L.A. Threaten Uber, Lyft, Sidecar With Legal Action" (September 26, 2014)

[6] Kosoff, "California DAs: Uber, Lyft, And Sidecar Are All Engaging In 'Unlawful Business Practices'" (September 26, 2014)

[7] Balise, "Lyft, Uber Can Operate At SFO" (October 20, 2014)

[8] *Ehret v. Uber Techs., Inc.*

[9] *Ehret v. Uber Techs., Inc.* (2014), 2014 U.S. Dist. LEXIS 132125, 19.

# Hakuna Matata: How to Achieve Financial Peace of Mind

Monday, December 01, 2014



Seeing the Broadway musical, “Lion King,” is a captivating experience. The story touches hearts and senses; hearing the music, feeling the beat, seeing the costumes and the beautifully choreographed movements. The actors help us to suspend belief and feel we have been transported to the African savanna.

One song, “Hakuna Matata,” on the surface is light hearted and whimsical, but it has deeper meaning. Timon and Pumbaa explain to a young Simba, “Hakuna Matata, what a wonderful phrase/Hakuna Matata, ain't no passing craze/It means no worries for the rest of your days/It's our problem free philosophy, Hakuna Matata.”

Now that you have that song in your head, let's talk about life insurance and how it can help you achieve financial peace of mind. Owning life insurance will not eliminate all worries, but it will help minimize them.

People purchase life insurance because they love someone and want to protect that loved one. The specific reasons to purchase life insurance are varied and options need to be discussed. Life insurance can be used to protect families and businesses.

There is great satisfaction in meeting with a couple, giving them each a piece of paper that lists six basic reasons why people purchase life insurance, explaining the list and asking them to prioritize those reasons. The couple is then left alone, as it is necessary for them to have a few private moments to discuss the list and assign a personal level of importance.

Having the privilege of joining a discussion and hearing about the couple's hopes and dreams leads to a practical, financial discussion addressing how much life insurance is needed to protect those hopes and dreams.

This is one method for conducting a needs analysis. It is essentially an estimation process, an attempt to fund known and unknown future needs of survivors. It is tough to pinpoint an exact number when talking about mortgage protection, income replacement and education costs. Throw in the need to protect a child with special needs, and the conversation becomes even more complex.

Another method is to discuss the current household income, select a multiple of salary to be replaced and purchase an amount of insurance based on that multiple. The discussion must address whether preservation of capital is important. Determining if the income stream is to be replaced with investment earnings only or a combination of investment earnings and liquidation of capital will ultimately lead to a firmer idea of the proper amount.

Selecting the type of insurance, term or permanent, requires an understanding of the purpose and the length of time the insurance is needed. Is the need temporary or permanent? If it is temporary does that mean 10, 15 or 20 years? Is there a need or desire for some amount of insurance that is guaranteed for life?

A business might need life insurance to fund a buy/sell agreement, to cover business debt or to protect against the risk of losing a key employee. The death benefit provided could help a business to continue into the next generation, offering security to employees, owners and family members.

In a divorce situation, the spouse that is receiving benefits or support might consider owning a policy on the former spouse. Having the policy guarantees the support payments can be replaced in the event of death.

Once the amount or face amount of the insurance has been established, it is time to see how much it will cost. The premiums are determined based on amount of insurance, the length of the guarantee, age, gender, personal health, family history, driving record and hobbies of the applicant. Accurate and complete information is crucial in the quoting process. No one, not the agent, the insured nor the owner wants to be surprised by a final offer that differs greatly from the original quote. Knowing in advance about a unique or dangerous hobby or a family history of cancer can help the agent recommend an insurance company that is more suitable.

Completing the application is more than providing personal, financial and health information about the proposed insured. Naming the owner and selecting the beneficiary needs careful consideration, as the owner controls the policy.

The application has a spot for a primary and contingent or secondary beneficiary. Unfortunately, too often parents will name children as contingent beneficiaries. This could potentially present a problem if the children are minors at the time the policy is to be paid. The insurance company will not pay a benefit to the minor because they are not able to complete a contract. This could delay a child or children from receiving the funds needed to support them. There are other more appropriate alternatives.

The insurance company underwriting or application review process can take several weeks. The applicant must submit to an exam, paid for by the insurance company. Sometimes medical records are requested and that can be the place where the process stalls. Doctors' offices may not be attentive to record requests.

Once all of the review material has been gathered and considered, the underwriter makes an offer. Policies are issued with a risk classification; the better the rating, the lower the premium.

Once the policy has been issued and the first premium has been paid, you can begin humming the tune to "Hakuna Matata." No worries, your family is protected.

Ongoing maintenance in the form of an annual review or check-up is important. Insurance needs change over time and it is important to conduct regular reviews to be certain that the coverage continues to be appropriate.

***Colleen Callahan, CLU, LUTCF, CASL, has 25 years of experience in the life and health insurance industry. She works with individuals and small to mid-size companies providing***

*insurance and employee benefits. She serves on the board for two industry associations, GGAHU and SFSP. She is available as an expert witness and has visited all 50 states. Colleen can be reached at [ccallahan@callahaninsurance.com](mailto:ccallahan@callahaninsurance.com) or (925) 363-5433.*

## MCLE Spectacular [photos]

Monday, December 01, 2014

CCCBA's 20th Annual MCLE Spectacular took place on Friday, November 21, 2014, at the Walnut Creek Marriott.

Our speakers this year included:

- Breakfast Kickoff Speaker: **Sergio C. Garcia**, Presenting "Road Towards the American Dream"
- Luncheon Speaker: **Jesse H. Choper**, Earl Warren Professor of Public Law, UC Berkeley School of Law
- Afternoon Plenary Speaker: **Dr. Jonathan Canick**, Dept. of Psychiatry & Neurology at CPMC, Assistant Clinical Professor at UCSF

Below are photos from the event. To see more event photos, please visit the CCCBA Facebook page.

[gallery ids="9323,9331,9324,9325,9326,9327,9330,9329,9328"]

# Renewing Your CCCBA Membership is Easy!

Monday, December 01, 2014

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## Renewal Resources

- Membership Dues and Sections Fees
- Detailed Instructions on How to Renew Online
- Restricted Access Court Security Cards
- 2015 January Directory Photo Shoot Schedule
- Communication Preferences
- Join/Rejoin the Lawyer Referral & Information Service (LRIS)

Thank you for your continued membership!





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Social Impact Bonds: A Revolution in Richmond

The Richmond Community Foundation (RCF) is working on a Social Impact Bond targeting blighted housing. The program will be among the first Pay For Success programs in California.

Spotlight

Introducing the New CCCBA Mobile App

Download the free CCCBA members-only mobile app for quick access to the most popular areas of the website.

Can I Give You a Lyft? Uber, Lyft and the Regulation of Taxis

Are Uber and Lyft rideshare companies simply competing more effectively in the market, or are they competing unfairly?

News & Updates

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Renewing Your CCCBA Membership is Easy!

Three easy ways to renew your membership: Online, over the phone or by mail. Thank you for your continued membership!

Not for Resale