Contra Costa Lawyer Online

February 2018 - Update On New Laws

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Beginning of the End: How the Loss of the Spousal Support Deduction...

Thursday, February 01, 2018

When I agreed to write an article on the various changes to the Family Code in 2018, the new tax law (IRC Section 11051) had not been passed, but there was, and continues to be, substantial speculation on how the proposed elimination of the deductibility of spousal support would affect all the agreements we had drafted over the years, as well as those we were trying to finalize before the end of 2017. I am not a tax expert; however, the tax implications of any spousal support order are an issue that family law attorneys must address on a regular basis. It is always good practice to consult with a tax professional when negotiating or litigating spousal support, but with this new tax law it will be more important than ever.

In the past, the parties had the several options to consider regarding how spousal support would be paid.

1) Spousal support could be deductible by the payor and taxable to the payee (so long as the agreement contained the language required by IRC Section 71(b)(2));

2) Not deductible by the payor and not taxable income to the payee; and

3) Family Support, in which the payor would pay what was usually a higher combined payment of spousal and child support, but the entire amount would be deductible by the payor and table income to the recipient [1].

There were pros and cons for each of the options depending on the financial situation and goals of the parties. The practical effect of allowing the payor to deduct his/her spousal support or family support payments was to create more net spendable income for the payor from which he/she could pay more spousal or family support to his/her former spouse. Depending on the amount of support being paid, the payee was generally in a lower tax bracket and would be taxed at a lower rate. The law has now been amended to eliminate the deductibility of the support as well as the obligation of the payee to claim the payments as income for tax purposes. The initial question in response to this change in the law was whether it would result in a flood of modification hearings to recalculate the support based on the shifting tax burden or if the modification hearings would suddenly dry up because the parties do not want to have to address these new tax issues. The true impact has yet to be seen, but IRC 11051 states that it applies to the following: 1) any divorce or separation agreement (as defined in section 71(b)(2) of the Internal Revenue Code of 1986 as in effect before the date of the enactment of this Act), executed after December 31, 2018; and 2) any divorce or separation instrument (as so defined) executed on or before such date and modified after such date *if the modification expressly provides that the amendments made by this section apply to such modification.* (emphasis added). Based on this language it appears that the changes apply to agreements after December 31, 2018. Does this mean that for agreements executed before December 31, 2018 and modified after December 31, 2018, it is up to the parties to decide whether future modifications will incorporate this change in deductibility? If so, this new law may not have much of an impact on the agreements executed before December 31, 2018 since it appears you may have the option of including language that the amendments made by S11051 do not apply. If that is in fact the case, then we will need to focus on agreements/instruments executed after December 31, 2018. Fortunately, the delay in the effective date for the instruments as set forth in Section 11051 gives us some time to figure this out. I trust there will be many opportunities to attend seminars discussing the full impact of these tax changes and how to best address these issues in our family law practice.

Other notable changes to the Family Code effective January 1, 2018 include:

Low Income Adjustment in Child Support:

Family Code Section 4055 has been modified to so that the net disposable income threshold that was supposed to be reduced from $1,500 to $1,000 on January 1, 2018, will be maintained at $1,500 and adjusted annually for costs of living increases until January 1, 2021. This means that an obligor with a net disposable income of $1,500 per month will continue to have a rebuttable presumption that he or she is entitled to low-income adjustment to his or her child support obligation.

Mediation for Child Custody and Visitation:

Family Code Section 3170 has been amended to authorize *a party, prior to filing the petition, application, or other pleading* to obtain or modify a temporary or permanent custody or visitation order, to request that the court set a custody or visitation issue for mediation and would authorize the court to do so. Previously, the court was only required to set the contested issues for mediation when it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested. This amendment will remain in effect until January 1, 2020. It is unclear how the mediation dates will be assigned, especially with the new tiered system that will be going into effect at Family Court Services on March 1, 2018.

Authorization to Keep Minor's Information Confidential:

Family Code Section 6301.5 is a new statute that establishes the right of a minor or legal guardian of a minor to request a protective order to keep minor's information confidential. The minor must show a substantial probability that the minor's interest will be prejudiced if the information is not kept confidential and there is no less restrictive means to protect the minor's privacy. In such cases, the information regarding the minor will be maintained in a confidential case file and shall not be part of the public file in the proceeding or any other civil proceeding. Disclosure or misuse of that information is punishable as civil contempt of court with a fine of up to $1,000. An order of civil contempt under this subdivision shall not include imprisonment. To the extent necessary for the enforcement of the order and to allow the respondent to comply with and respond to the order, confidential information shall be included in the notice sent to the respondent pursuant to this part. The notice shall identify the specific information that has been made confidential and shall include a statement that disclosure or misuse of that information is punishable as a contempt of court.

These are just a few of the changes that will affect the practice of family law in 2018. It looks like this will be a very interesting year.

[1] "Orders and stipulations otherwise in compliance with the statewide uniform guideline may designate as "family support" an unallocated total sum for support of the spouse and any children without specifically labeling all or any portion as "child support" as long as the amount is adjusted to reflect the effect of additional deductibility. The amount of the order shall be adjusted to maximize the tax benefits for both parents." (Fam. Code §4066.) A family support order, may be made by agreement of the parties or order of the court. (Fam. Code §92.) See also: C.I.R. v. Lester (1961) 366 U.S. 299, 6 L.Ed.2d 306, 81 S.Ct. 1343,

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Dramatic Changes Coming for Mediation Confidentiality

Thursday, February 01, 2018

The law of Alternative Dispute Resolution hasn't moved too much over the last few years, but that may change this year. Currently there is a bill working its way through the California Legislature that would dramatically alter the protections of confidentiality in mediation and would apply across the board – to all types of mediation, including mediation of civil litigation matters and family law matters. As such, it is important that all members of the bar keep abreast of this potential legislation.

The proposed legislation would amend and add sections to the Evidence Code to create a new exception to mediation confidentiality in cases where any participant in a mediation later alleges misconduct by an attorney or even disputes their attorney's bill.

This new exception would apply to evidence "relevant to prove or disprove an allegation that a lawyer breached a professional obligation when representing a client in the context of a mediation or a mediation consultation." (Proposed Evid. Code Section 1120.5(a)(1)) It would apply in a) disciplinary proceedings against the lawyer; b) a cause of action (in court or arbitration) against the lawyer for malpractice; c) a fee dispute between a lawyer and client (Proposed Evid. Code Section 1120.5 (a). It would allow the introduction of writings and communications previously protected by mediation confidentiality, even if those communications and writings belonged to or were made by parties other than the accused attorney and their client.

Although the legislation states that it does not apply to communications or writings of the mediator, and that the mediator shall not be competent to testify or produce evidence, closer examination of the wording of the language reveals that this is not entirely true. The proposed legislation creates an exception to mediation confidentiality not just for actions at law, but also for disciplinary actions and for fee disputes (Proposed Evid. Code 1120.5(a)(2)(A) and (C)), and that exception applies not only to the parties and their communications and writings, but to the mediator's communications and writings as well. Proposed Evid. Code Section 1120.5(e):

"No mediator shall be competent to provide evidence pursuant to this section, through oral or written testimony, production of documents, or otherwise, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with a mediation that the mediator conducted, **except as to a statement or conduct that could** (i) give rise to civil or criminal contempt, (ii) constitute a crime, **(iii) be the subject of investigation by the State Bar or Commission on Judicial Performance,** or (iv) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure." (emphasis added)

This means that under this legislation, mediators could be deemed competent to testify and forced to produce evidence at disciplinary hearings conducted by the State Bar.

In June, 2017, the California Law Revision Commission again asked for public comment on this bill. Pursuant to that request, numerous stakeholder organizations with direct experience in mediation wrote in opposition (or had already done so earlier in the process of the bill's creation) either opposing the specific wording of the proposed legislation or opposing the weakening of mediation confidentiality in general. Indeed, the staff noted that "reaction to the proposal was decidedly negative." Opposition included both the Consumer Attorneys of California and the California Defense Council that took the unusual step of submitting a ***joint letter of opposition***; the Judicial Council of California; and the Contra Costa County Bar Association, that wrote in opposition to weakening mediation confidentiality. http://www.clrc.ca.gov/pub/2017/MM17-52.pdf.

Reasons for opposition focused primarily on the chilling effect that the proposed legislation would create and the resulting effects on settlement agreements, mediators and the increased burden on the courts, among others. http://www.clrc.ca.gov/pub/2017/MM17-52.pdf (pages 16-27). The California Judges Association noted specifically that creating the exception would essentially require mediators to explain to participants that "whatever they or their lawyers say in the process of mediation is no longer confidential…" (California Judges Association Statement of Opposition, http://www.clrc.ca.gov/pub/2017/MM17-52.pdf (page 22-23).) Additionally, opposition pointed out that other parties could trigger disclosure of someone else's previously-confidential materials simply by alleging misconduct against their own attorney, causing risk of disclosure of the materials or creating great cost to these third parties who would then have to seek – and pay for – protective measures against disclosure. http://www.clrc.ca.gov/pub/2017/MM17-52.pdf (pages 16-17)

In contrast to the numerous organizations writing in opposition to the proposed legislation, support was offered by one organization – the Conference of California Bar Associations, the organization that supported the initial creation of the study that lead to the proposed legislation (http://www.clrc.ca.gov/pub/2017/MM17-52.pdf (footnote 19)); as well as 10 individuals who wrote in to support the proposed bill, focusing primarily on the need for parties alleging attorney malpractice – or attorneys being accused of malpractice – in mediation to be able to submit evidence in support of their claim or defense. http://www.clrc.ca.gov/pub/2017/MM17-52.pdf (pages 27- 33).

Despite the overwhelming opposition to the proposed legislation, on December 1, 2017, the Commission voted to submit the bill in the 2018 session. Because this would affect practitioners in almost every practice area, all attorneys should be watching this bill closely to determine whether mediation confidentiality will remain untouched.

In order to stay fully informed, a full copy of the statements written in support and opposition to the proposed legislation (including the two referenced above) can be found here: http://www.clrc.ca.gov/pub/2017/MM17-51.pdf. A copy of staff memorandum 2017-52 "Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (Analysis of Comments on Tentative Recommendation)" can be found here: http://www.clrc.ca.gov/pub/2017/MM17-52.pdf. Finally, a complete copy of the commission's report and the proposed legislation (which begins on page 145 of the document) may be found here: http://www.clrc.ca.gov/pub/Printed-Reports/RECpp-K402.pdf.

Additionally, the ADR Section Board provides updates on the issue of mediation confidentiality to those who sign up for the email updates. If you would like to be included on this list, please apply to Nancy Powers at PowersLaw@aol.com.

If, after reviewing the proposed legislation, you would like to voice your opinion, please write to the Chairs of the California Senate and Assembly Judiciary Committees (must be mailed or faxed) so that you may be heard before the bill is considered by the Legislature.

*This article could not have been written without the input and insights of Ron Kelly, Nancy Powers and Tracy Lindsey.

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New Year 2018 Real Estate Law Updates

Thursday, February 01, 2018

Commercial Real Estate: Cannabis

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Non-medical use marijuana is now "legal" under state law, and local jurisdictions are determining what land, if any, will be permitted for growing, distribution, and sale of cannabis. Notably, however, the newly effective state law is still preempted by federal law, which continues to outlaw marijuana as a Schedule I narcotic.

Most local jurisdictions in Contra Costa County appear to have imposed a ban on commercial non-medical marijuana activities pending further review of whether, what, and where to permit. Contra Costa County, Concord, and Walnut Creek have taken this approach. Richmond is allowing some commercial sales of adult-use recreational marijuana but only at its existing medical marijuana dispensaries.

Residential Landlord-Tenant: Immigrant Sanctuary Policy

The state has furthered its policies supporting sanctuary for immigrants by expanding protections for tenants and occupants of rental dwellings. Landlords are now prohibited from evicting because of the immigration or citizenship status of a tenant or occupant. (CCP § 1161.4.) Residential landlords are also prohibited from threatening to disclose, or disclosing, immigration or citizenship information about a tenant or occupant to any person or entity, including immigration authorities. (Civ. Code § 1940.2.) Attorneys for landlords are also prohibited from reporting or threatening to report such status information in connection with the tenant/occupant's real estate rights. There are exceptions to the new rules where eviction or disclosure is required by an applicable rent program of the federal government.

HOA Solar Policy

HOAs were already prohibited from outright prohibiting solar. A new law further limits HOAs' ability to restrict solar, outlawing any general policy that prohibits installation of solar on the user's roof or on the user's exclusive use garage or carport. The new law also prohibits any membership voting condition for such installations. (Civ. Code § 714.1.)

Entitlements

In a recent case arising out of Contra Costa County, the Court of Appeal clarified that a property owner has no vested right to proceed under a building permit when it is ultimately determined that the government should have never issued the permit—that the permit was invalid. (*Attard v. Board of Supervisors of Contra Costa County*, 14 Cal. App. 5th 1066, 2017 WL 3711765 (1st Dist. 2017).)

Residential Landlord-Tenant: Local Rent/Eviction Control

The Bay Area continues to see city-by-city developments in local rent and eviction controls. Contra Costa cities with new controls over the past year include Concord. Concord tenants in properties with three or more units now have the right to a non-binding mediation of rent increases of more than 10 percent in any 12-month period.

Construction Defect & Environmental Contamination

The Court of Appeal held that the 10-year statute of repose for construction defect claims does not protect a former owner-user alleged to have contaminated the site prior to the development. (*Estuary Owners Association v. Shell Oil Company* (2017) 13 Cal.App.5th 899, 903.) The case involved a condominium development built on a former Shell fuel distribution terminal in Alameda County.

Lenders: Anti-deficiency Rules

A split has arisen in the Court of Appeal on the question whether the anti-deficiency statute at Code of Civil Procedure section 580d prohibits a lender who holds both a senior and junior position trust deed on a piece of property from collecting on its sold-out junior-position loan after it non-judicially forecloses on its senior-position loan. In the recent case, *Black Sky Capital, LLC v. Cobb* (2017) 12 Cal.App.5th 887, the court sided with the lender, while in the long-standing case of *Simon v. Superior Court* (1992) 4 Cal.App.4th 63, the court had held that the anti-deficiency statute bars the lender from non-judicially foreclosing on the senior loan and then suing on the sold-out junior debt. The Supreme Court has granted the petition for review from the *Black Sky* decision.

The Latest from SCOTUS on Takings

The U.S. Supreme Court decided a regulatory takings case this past year, *Murr v. Wisconsin* (2017) 137 S.Ct. 1933. There, the property owners had two vacant, adjacent parcels which were too small to be sold and developed separately under local law. Although they owned both parcels together, the owners claimed the regulation prohibiting individual development and sale constituted a taking of each of the two parcels. The Supreme Court disagreed, holding that the two parcels should not be considered separately in evaluating whether a compensable taking had occurred. Instead, the combined value of the two parcels, treated as one, should serve as the “denominator” for determining whether the regulation’s impact on the property was enough to constitute a taking. Because the two parcels combined constituted the “property,” still intact, no taking had occurred.

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Civil and Criminal Tax Enforcement of Employment Taxes

Thursday, February 01, 2018

Editors Note: *Practitioners should be mindful of a renewed focus on employment tax enforcement. While not relying on new laws, the IRS and the Department of Justice have recently prioritized enforcement, and particularly criminal enforcement, of existing employment tax laws. The following will help show how these concerns can play out for you and your clients.*

You're sitting in your office with a fairly new client who is the vice president for finance of a medium-size corporation. He tells you that he signed the company's employment tax returns, but didn't really know what was in them. He claims that the controller was responsible for the numbers, as well as handling actual payment of the taxes to the IRS.

Unfortunately, the controller failed to remit $50,000 in payroll taxes, but she now assures the vice president that the company can "make it up" next quarter, when a new contract is going to come on line. Your guy's antsy, because he's heard that the IRS really doesn't like this practice, and wonders about his personal downside. What do you tell him?

Well, first, some preliminaries. You have to understand who your client is. Is he the individual sitting in front of you, the company, or both? If the latter, have you explored carefully whether there is a conflict of interest, or potential conflict? If you represent the company, and particularly if there are other officers who are potentially liable, you may need to suggest strongly that he find his own attorney.

Second, tell him that no matter what he's heard about a shrinking IRS workforce and hostility from a Republican Congress, enforcement still has real teeth. The company holds payroll taxes in trust for the U.S. Government, which imposes heavy fiduciary liability. Moreover, the individuals from whom tax has been withheld are entitled to claim it as a credit on their own individual returns, whether or not the company has remitted them. Unless the IRS collects them, either from the company or the individual "responsible" for them, it gets whipsawed: it's out the employment taxes and it's out the credit that the employees rightly can claim.

Third, you can alert him that the IRS' Criminal Investigation division recently announced the creation of a National Coordination Investigation Unit (NCIU) to ensure that every field office focuses on possible employment tax prosecutions. It is considered one of the NCIU's "core missions" and one of its top priorities.

Fourth, you can tell him that while there is some dispute within the government whether actual fraudulent intent is required to sustain a prosecution for failure to remit employment taxes, the Department of Justice (which litigates all criminal tax actions) takes the position that there is not. The "willful" failure to pay over taxes does not always require the intent to defraud the government, by purchasing vacation homes and motorboats while not remitting payroll taxes.

Fifth, tell him that "making it up next quarter" is the road to perdition, and that almost all failures to remit did not start out with the intent to steal from the government. It simply is easy—far too easy—to encounter difficulties next quarter, and then the quarter after that, until the problem becomes insurmountable.

You can add that the IRS can assess a portion of the payroll taxes (the withheld income taxes and half of the Social Security taxes) directly against the individuals who are "responsible" for this function. [1] This is usually referred to as the "trust fund penalty," although strictly speaking, it is not a penalty at all, but merely a means by which the IRS opens up a second source to tap for collection. This goes against them directly, personally, under their own Social Security number. That it dings their FICO score becomes the least of their problems. Tell him that signing the returns is a huge strike against him, even if he didn't really understand the numbers, one that can be overcome only by herculean effort, and that going forward, he should be very careful about what he signs.

What if both the vice president and the controller are both considered "responsible persons"? The IRS can assess the full $50,000 against both and, if it actually collects it from one, the other can sue for contribution in a separate federal court action, in addition to any contribution rights he has under state law. Unfortunately, this federal right of contribution is only 20 years old and certain aspects remain unclear. [2] For example, must the vice president pay the full $50,000 before seeking contribution, or only one dollar more than his "proportionate share?"

Must the IRS have made its own determination that the controller was "responsible," or is the vice president permitted to build his own case, in effect succeeding to the IRS' trust fund penalty determination function that the controller is also in the soup? Fortunately, here, the vice president is at least entitled to demand information from the IRS on what trust fund penalty determinations it has made, if any, against other people, information that would otherwise be protected by disclosure law.

In short, there are a huge number of potential civil pitfalls here for the vice president. If he's not the vice president at all, but the president of his own small company and enjoying a lavish lifestyle, criminal prosecution is a real possibility. But then again, you don't have to be Al Capone or the star of "The Wolf of Wall Street" to garner serious attention. Merely owning a small food preparation business but stating, according to the Revenue Agent in your employment tax audit, that your workers preferred to be paid in cash and you didn't think it necessary to file returns, can be enough. [3]

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[1] In a kinder world, being considered a "responsible person" would be a compliment. In the tax world, it is not.

[2] Prior to 1996, the absence of such a right was clear, and was widely considered a serious injustice. Sometimes Congress does do the right thing.

[3] True story.

New Probate Laws: You Will Want to Read This... Trust Me

Thursday, February 01, 2018

Another year has flown by and it appears our colleagues at the Executive Committee of the Trusts & Estates Section of the State Bar of California ("TEXCOM") were quite busy in 2016 and 2017. Here's your annual round up of five newly-chaptered laws that will go into effect in 2018 and will shape the legal practice of trust and estate litigation, planning and administration for years to come.

First up, a much-anticipated notice clarification for those litigators out there. Under current law, the notice provided under the notice of hearing for section 850 petitions fails to convey the seriousness of the proceeding. Although rights and claims of interested persons are being determined in the proceeding, the notice of hearing prescribed under current law fails to convey the import of the proceeding. For instance, the present notice of hearing states that the "notice does not require you to appear in court." This leaves interested persons with serious due process rights violations because they do not realize that property they currently hold may be taken from them in a proceeding where their presence is not required. To remedy these concerns, the amendments add a new section 851, subdivision (c) which requires that a notice of hearing contain the following information:

(1) A description of the subject property sufficient to provide adequate notice to any party who may have an interest in the property. For real property, the notice shall state the street address or, if none, a description of the property's location and assessor's parcel number.

(2) If the petition seeks relief pursuant to Section 859, a description of the relief sought sufficient to provide adequate notice to the party against whom that relief is requested.

(3) A statement advising any person interested in the property that he or she may file a response to the petition.

As of the date of writing, there is not a Judicial Council form that includes this information, therefore, practitioners are advised to create their own notices of hearing that include the above language unless or until the Judicial Council creates a new form.

This supplemental notice provision dovetails nicely with the second clarification regarding commencement of discovery and the lack of summonses in most trust and estate litigation proceedings. Civil summonses not only provide recipients with adequate notice of the gravity of the proceedings, they also trigger the commencement of discovery under the Code of Civil Procedure. These new clarifications are especially relevant for those who regularly commence litigation in Department 14 of the Contra Costa County Superior Court, where current practice dictates that a civil summons be issued and served in those matters brought under Probate Code section 850 containing civil causes of action such as conversion or elder abuse.

Under Probate Code section 1000, except to the extent that the Probate Code provides applicable rules, the rules of practice in civil actions, including discovery proceedings, apply to and constitute the rules of practice under the Probate Code. However, under the Code of Civil Procedure, discovery may only commence after service of summons or appearance by the defendant. (Code Civ. Proc., §§ 2025.210(b), 2030.020(b), 2031.020(b), and 2033.020(b).) The instance where a summons is issued under the Probate Code, is where a will contestant files an objection to the probate of a will. Otherwise, practitioners are left without guidance on how to proceed. To remedy this confusion under Probate Code sections 851, 1000, and 17201, these amendments provide create new sections 851.1, 1000(b) and 17201.1, which all reflect each other and essentially state that "for purposes of determining when a petitioner in a proceeding under this code may commence discovery as to nonparties, the time periods set forth in the Civil Discovery Act (Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure) shall apply, except that the time periods shall commence to run upon service of the petition and notice of hearing upon all parties entitled to notice." Nothing in these new divisions shall either alter when a respondent in such a proceeding may commence discovery or increase the extent to which nonparties may be subject to discovery.

Third, Probate Code section 6300, which authorizes pour-over wills, previously required that the written trust instrument be executed concurrently with or before the pour-over will. The amendments to section 6300 now allow the decedent's pour-over will to reference terms in a written trust instrument that is executed within 60 days after the will's execution. While this amendment may not change the practice of executing a whole estate plan, it does provide wiggle room in case a notary is not around the day the will is witnessed and executed. According to TEXCOM, prior to the change, technical difficulties in arranging for a notary would result in defeating testamentary intent. Now that is not the case. Moreover, the amendments bring California law in line with other states.

Fourth, changes to Probate Code sections 15403 and 15404 make it easier to modify or terminate a trust. Revised section 15403 creates a modest expansion in the ability of consenting beneficiaries to modify or terminate an irrevocable trust with court approval. Under the prior rule, even if all beneficiaries consented, the court was precluded from terminating a trust if the trust was subject to a valid spendthrift provision limiting what a beneficiary could receive and when. Now, such a trust may be terminated with the consent of all beneficiaries where the court, in its discretion, determines that there is good cause to do so. The section also adds subsection (c), which authorizes the court to limit the class of beneficiaries whose consent is necessary under the rule, thereby harmonizing the section with mirrored language in section 15404. Revised section 15404, in turn, creates a private process for modifying or terminating a trust where the settlor and all beneficiaries consent by eliminating the requirement of court approval for such changes. Lastly, both revised sections adopt clarifying language, such as eliminating the word “compel” to describe a request to the court.

Lastly, the all important Uniform Principal and Income Act (“UPAIA”) has been amended to give trustees more discretion in how they characterize certain receipts from entities held in trust. (Prob. Code, § 16329 et seq.) Under UPAIA, a trustee is required to allocate money received from an entity either to principal (property titled or held under the trust) or income (money generated from the trust’s principal). This characterization in turn determined whether the assets are used for the benefit of income or remainder beneficiaries. Initially this amendment sought to clarify the term “capital asset” and move away from how “capital asset” was defined by the Internal Revenue Code. However, after some debate, the amendment recasts how a trustee is to determine whether a distribution is a return on capital and therefore allocated to principal rather than income. Instead of setting forth rigid definitions to characterize the return on capital, the amendments hand discretion back to the trustee by providing a multi-factor test by which the trustee makes the determination. This change is believed to better effectuate settlor intent while also holding the trustee accountable for the decision. The amendments are substantial enough to be worthy of an article in their own right, so it behooves us to say that attorneys and fiduciaries who administer trusts with income and remainder beneficiaries should spend some time reviewing the changes as they require more analysis than this summary update can provide.

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Employment Law Legislative Updates

Thursday, February 01, 2018

A plethora of employment laws were effective January 1, 2018. A sampling of the likely most relevant are noted herewith in brief.

Minimum Wage Increase

SB 3 (Leno) - Pursuant to SB3 which was effective in 2016 a stepped increase to the state minimum wage, starting January 1, 2018 the state minimum wage increases to $10.50 per hour for employers with 25 or fewer employees and to $11 per hour for employers with 26 or more employees.

In accordance with the law, the minimum wage increase will continue through 2022 for employers with 26 or more employees with an increase by $1 until it reaches $15 per hour. For employers with 25 or fewer employees, the minimum wage will be $11 in 2019 and then increase by $1 each year until it reaches $15 per hour in 2023.

Cities within California including within Contra Costa County have their own minimum wage requirements which exceed the state law. For example, El Cerrito's hourly minimum wage will rise from $12.25 to $13.60, and Richmond's will go from $12.30 to $13.41 for employers of 26 or more.

New Parental Leave Act

SB 63 (Jackson) - aka New Parent Leave Act expands the parental leave rights to workers previously ineligible under the California Family Rights Act due to the employer's size. Specifically, the bill provides up to 12 weeks of job-protected parental leave for workers at companies with 20 to 49 employees. Under the new parental leave act, employers must maintain and pay for the continued healthcare coverage of the employee while on leave, and guarantee reinstatement to the same or comparable position upon the employee's return from leave.

Salary History Questions

AB 168 (Eggman) – Prohibits an employer from seeking salary history information or relying on a job applicant's salary history as a factor in determining whether to offer the applicant employment or what salary to offer the applicant. Employer cannot seek an applicant's history from the applicant in the hiring process or through an agent/third party. Further, this bill requires the employer, upon reasonable request, to provide the pay scale for a position to an applicant applying for employment.

“Ban-the-Box” Law

AB 1008 (McCarty) – Prohibits employers, with certain exceptions, from inquiring about or considering a job applicant’s conviction history prior to a conditional offer of employment and would set requirements regarding the consideration of conviction history in employment decisions.

Preventing Harassment Training, re: Gender Identity, Expression and Sexual Orientation

SB 396 (Lara) - Requires employers with 50 or more employees include in their bi-annual harassment training program preventing harassment based on gender identity, gender expression, and sexual orientation. Also requires a Department of Fair Employment and Housing poster on transgender rights be displayed in the workplace.

Immigrant Workplace Rights

AB 450 (Chiu) – Other than required by federal law or specific exceptions, this new law prohibits employers or other persons acting on behalf of the employer from providing voluntary consent to an immigration enforcement agent to enter nonpublic areas of a place of labor unless the agent provides a judicial warrant. Further, other than required by federal law or specific exceptions, the law prohibits an employer or other persons acting on behalf of the employer from providing voluntary consent to an immigration enforcement agent to access, review, or obtain the employer’s employee records without a subpoena or court order.

Beth W. Mora *owner of MORA EMPLOYMENT LAW, a law firm dedicated to representing victimized employees. She is a zealous and skilled advocate for those facing a range of employment law issues. In every case she handles, Ms. Mora is committed to aggressively pursuing her clients’ best interests while treating each person she serves with integrity and compassion.*

It's Not Called Marijuana Anymore

Thursday, February 01, 2018

SB 94 [Approved by Governor June 27, 2017. Filed with Secretary of State June 27, 2017] also known as the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), establishes a single set of guidelines for adult recreational and medical cannabis use.

The bill affects numerous sections of the Business and Professions, Fish and Game, Food and Agricultural, Health and Safety, Revenue and Taxation, and Water Codes. (New Laws for 2018, Garrick Byers Statute Decoder) [1]

Not to be forgotten is its impact on motor safety laws under the Vehicle Code. Among the many provisions of this bill, there is a $3 million funding appropriation for the California Highway Patrol to train state and local law enforcement officers in drug recognition and impairment. This will likely try to address the many obstacles law enforcement and prosecutors have faced with prosecuting marijuana DUIs. Unlike with alcohol, there is no measurable, definitive level at which a person is deemed to be “under the influence” of cannabis products for DUI arrests. Essentially, an officer can make a discretionary judgment call of how high you might be when determining whether or not to make an arrest. Without consistent and clearly defined standards, protocols, or practices, establishing that a person was driving “under the influence of marijuana” presents a whole host of evidentiary issues at trial.

Without a scientific basis for determining what specific level of cannabis consumption impairs a person for purposes of driving, and an explicit law dictating what that quantitative level is, how can one prove in a court of law that a person violated a DUI law? Law enforcement should be cautioned in making arrests for DUIs involving legal substances that do not yet have a specified quantitative limit. A good example of that is a 2016 case in Solano County where a man was arrested under suspicion of DUI. Arresting officers conducted a blood test of the suspect but the test came back negative for alcohol, marijuana and various narcotics. Despite no scientific evidence to bring the suspect’s case to trial, the Solano County DA’s office pushed forward with the case and charged the suspect with being under the influence of caffeine while operating a motor vehicle. It makes one ponder how many caramel frappuccinos are too many in the eyes of Solano County officials. After the case was pursued for 16 months, Krishna Abrams, the Solano County District Attorney, finally decided to drop the DUI charge. (http://abc7news.com/news/solano-county-da-drops-dui-for-caffeine-charge/1677999/). (http://www.cnn.com/2016/12/29/health/dui-charge-caffeine-california-trnd/index.html)

Hopefully SB 94’s CHP funding will train officers not to make a marijuana DUI arrest based on evidence that a person with frequently dry red eyes and slow speech is driving around in a tie-dye shirt listening to the Dave Matthews Band.

SB 94 also amends Vehicle Code section 23222 to create a new infraction when a person has any opened cannabis or cannabis products in a vehicle. The amendment generally replaces any reference from “marijuana” to “cannabis” in the language of the statute. There is an exemption for a qualified medicinal patient under specified circumstances. (New Laws for 2018, Garrick Byers Statute Decoder). The bill also requires cannabis and cannabis products legally purchased from a licensed retailer to be sealed in opaque packaging during motor vehicle transportation or placed in the trunk of the car.

SB 65 (Approved by the Governor on September 11, 2017 and filed with the Secretary of State on September 11, 2017) is a bill that also addresses cannabis and motor safety laws. This law specifically prohibits smoking or ingesting marijuana or marijuana products while driving or riding as a passenger in a vehicle. This bill generally changes the language of Vehicle Code section 23220 to include “marijuana” and “marijuana products” to alcoholic beverage consumption in a moving vehicle. The California DMV stated on its website it will assign negligent operator point counts on driving records for this violation. In addition to the California Driver Handbook, the DMV also will revise the Motorcycle Handbook and the DMV’s website to include information related to marijuana violations. (https://www.dmv.ca.gov/portal/dmv/detail/pubs/newsrel/2017/2017_94)

As a reminder, just like open alcoholic beverage containers can provide law enforcement with permissible reason to make a traffic stop and potentially search your vehicle, open containers of cannabis and cannabis products will also do the same. Moral of the story: even though they’re both legal, keep the booze and cannabis in sealed containers or in the trunk.

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[1] http://www.adi-sandiego.com/pdf_forms/New_Laws_for_2018_4.pdf

Will the Corporate Tax Cut Really Help the U.S. Economy?

Thursday, February 01, 2018

The United States Congress just passed an historic tax reform package which includes a significant reduction in the top corporate tax bracket. Proponents of the package have asserted that this reduction will lead to a surge in the U.S. economy. This surge, so the argument goes, will more than offset the estimated $1.5 trillion the Congressional Budget Office (CBO) says the new law will add to the national debt over the next ten years. If I may, I would like to take a few minutes of your time to apply some facts to this argument.

Will the Tax Cut Help Corporate America?

According to a 2016 study by the U.S. Government Accountability Office (GAO), during the years 2006-2012, at least two thirds of all active corporations had zero tax liability after taking tax credits into account. [1] While it is tempting to blame the 2008 recession for the low rate of tax liability, the year with the lowest tax payments was actually 2006.

A separate study by the Tax Policy Center reported that 90% of all corporations currently have a tax rate below 10%. [2] The fact is that the new law eliminates some corporate tax deductions, so it could actually cause corporate taxes go up, not down.

Will Companies Hire and Expand Under the New Law?

Republicans argue that tax savings from the lower corporate rate will cause businesses to increase capital expenditure, and hire more workers. This will cause the economy to grow, and tax revenue to rise, covering the estimated $1.5 trillion cost of the tax reform.

Various independent studies have argued that companies are not likely to save anything at all from the tax law, but the answer to the “hire and expand” question actually comes from the Federal Reserve Bank of Atlanta, and from the Wall Street Journal CEO Council.

The Atlanta Fed regularly conducts a Business Inflation Expectations Survey. In the most recent surveys, they included a new topic: Expected Impact of Tax Cuts and Jobs Act. They asked businesses how passage of the tax bill would affect their hiring plans, and their capital investment plans. Only 8% said they would increase hiring significantly, and just 11% said they would increase capital investment significantly. Fifty-nine percent said they would make no change in their hiring plans, and 46% said they would make no change in their capital investment plans. [3]

The Wall Street Journal CEO Council members said any savings from passage of the tax bill would likely go to increased dividends and stock buybacks, as it has in the past. They said that lowering taxes, and thereby increasing profit margins was nice for the companies, but if demand for products and services didn't increase, there was no reason to hire or invest above their current levels. [4]

What is the Impact on the National Debt?

The tax bill was designed to limit the increase in the national debt to $1.5 trillion over the next ten years. That figure was not arrived at as the answer to an economic question. It was arrived at because under Senate rules, the bill can be passed with just 51 votes as long as the debt increase is only $1.5 trillion. If the deficit increase goes above that level, the bill would require 67 votes to pass. Since there are only 52 Republicans in the Senate, the answer is to design the bill to require just 51 votes.

What I have not seen discussed anywhere in the media is what the overall national debt is forecast to be in ten years. It might be reasonable to assume that if the debt today is $20 trillion, and this bill adds $1.5 trillion over ten years, the total debt in 2027 would be $21.5 trillion. Federal budgeting is a unique process, though.

The budget process includes automatic spending increases each year so that no one has to go on record and vote for more spending. As a result, the CBO has calculated that the national debt is already going to increase by $10 trillion over the next ten years, even with no tax reform bill. That means that in 2027 the national debt is forecast to be $31.5 trillion under the new tax law, and $30 trillion without it. [5]

Keep in mind that for the fiscal year 2017, which ended on September 30 of last year, the federal government paid $269 billion in interest on the national debt, accounting for 7% of all federal expenditures. [6]

It's 1982 all over again! Or is it?

Some people who strongly support the new tax law have compared it to the tax cuts passed during the Reagan Administration. They try to draw parallels to the incredible economic growth that occurred at that time, but the economic environment in 1982 is a world away from where we are now.

In 1982 the Federal Funds Rate (the rate set by the Federal Open Market Committee) was 18% and falling. Today it is 1.50% and rising. The interest rate on a 10-year U.S. Treasury Bond was 15% versus 2.54% as of this writing on January 11, 2018.

Total U.S. debt compared to the total size of the U.S. economy was just 0.90 times in 1982, compared to 3.6 times today. Perhaps most importantly in terms of long-term growth potential, in 1982 the median age of the baby boom generation was 26. Today it is 60. [7] The world is a different place. We should not expect the same results.

Perry Novak *is Senior Vice President – Investment Officer with Wells Fargo Advisors in Walnut Creek. He has provided wealth management services to Bay Area families, business owners and professionals since 1983. He received his J.D. from the University of San Francisco (currently non-practicing). Perry is an active CCCBA member who serves on the board of the Business Law Section, and on the Editorial Board of Contra Costa Lawyer Magazine. He can be contacted at (925) 746-7278, or perry.novak@wellsfargoadvisors.com.*

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[1] Trump's Corporate Tax Slash Ignores How Little Companies Already Pay; Erik Sherman, Forbes Magazine, April 24, 2017;
[2] Bull Trap: The False Promise of Tax Cuts; ZeroHedge, October 5, 2017;
[3] Federal Reserve Bank of Atlanta, Business Inflation Expectations Survey, November 20, 2017;
[4] Wall Street Journal CEO Council Conference, as reported by Business Insider, November 30, 2017;
[5] Federal Debt Forecast; Congressional Budget Office; cbo.gov; November 2017;
[6] Ibid.
[7] All comparison figures courtesy of the Federal Reserve Bank of St. Louis, Bloomberg Financial Services, and the U.S. Bureau of Economic Analysis (BEA).

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D.I.N.E. With Us

Thursday, February 01, 2018

The theme of the magazine this month is "Update on New Laws." As usual, our hardworking Editorial Board has assembled excellent authors who have contributed very informative articles. Though not a "new law," I write about an exciting "new event" that started as a grassroots effort by two judges and is now sponsored by the Diversity Committee.

In 2017, the Diversity Committee was more active than ever. The Diversity Awards presented to ten firms in the County in January 2018 is a shining example of the rising awareness and dedication to diversity and inclusion. Significantly, and perhaps coincidentally, in 2017, Governor Jerry Brown appointed the first Filipino-American Judge in Contra Costa County, Hon. Benjamin T. Reyes II.

Last fall, not long after he was sworn in, Judge Reyes contacted our Executive Director Theresa Hurley and me to discuss an event he was interested in developing along with the CCCBA. Judge Reyes recruited Judge Joni Hiramoto, while Theresa and I looped in our Diversity Committee and the incoming Committee Chair, Mika Domingo. After several emails, a delicious lunch meeting in El Cerrito, and more planning, the "first annual" Lunar New Year Dinner for the CCCBA is on calendar for February 22, 2018 at 5:30 pm. Now, just days away from the event, we are at near-full capacity, and have wonderful law firms and individuals sponsoring the dinner. I am looking forward to this purely social event (tagged Diversity In the New Era) with CCCBA members and judges!

Lunar New Year (aka "Chinese New Year") is often considered the most important day of the year for Chinese and other Asian populations – celebrated by more than a quarter of Earth's population. The Lunar New Year is based primarily on the moon's orbit around Earth. Lunar New Year this year is February 16, 2018, and it is traditionally celebrated for seven to 15 days. According to the Chinese calendar, this new year is 4,716, and is considered a year of the "dog" under the Chinese "zodiac." Some popular traditions include hanging lanterns, married adults giving "Red Envelopes" with money to young children, dragon/lion dances, fireworks, and eating. Click the link for more information about Lunar/Chinese New Year history and traditions.

The way our Lunar New Year Dinner developed exemplifies how the CCCBA welcomes volunteers, ideas, and new energy. Please do not hesitate to contact Theresa Hurley, me, any Board Member or any Section Leader if you would like to join a Bar Committee, propose an event, or to volunteer in any capacity. Regardless of your availability to volunteer your time, please do join us at any of our numerous MCLE programs and/or our purely social events (like Lunar New Year and our Happy Hours). I look forward to "D.I.N.E."ing with you in 2018!

*For over 21 years, **James Wu** has practiced employment law. He is a defense litigator for employers, and he also provides advice and counsel to reduce the risks of employment-related claims and lawsuits. Contact James at james@jameswulaw.com or visit*

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New Laws in an Uncertain Year

Thursday, February 01, 2018

This is an issue you do not want to miss. The Editorial Board and a few other kind souls took on the onerous task of covering the new laws in several practice areas, including employment, trust and probate, family law, business, tax, criminal, professional responsibility and ADR. This issue provides one stop reading to find out important new laws that will affect not only your practice, but your life.

Melissa Ignacio answers our burning (pun intended!) questions on the legalization of cannabis (It's not called marijuana anymore), and its impact on motor safety laws under the Vehicle Code and reminds us of the pitfalls of having opened cannabis or cannabis products in a vehicle. Perry Novak discusses tax reform, potential (hopeful?) benefits of the new corporate tax rate and the national debt. Beth Mora gives us an overview on employment laws and Ed Perry alerts us to renewed focus on enforcement of existing employment tax laws. In Probate and Trust, there have been significant changes procedural notice requirements in the trust and probate laws. Carol Langford who served on the Commission for the Revision of the Rules of Professional Conduct gives us all the details on the overhaul of the Rules of Professional Conduct. Nicole Mills' article on the status of the pending legislative changes regarding confidentiality in mediation is important for anyone who engages in mediation. Finally, I took on the onerous task of addressing how the elimination of the spousal support deduction may impact the practice of family law.

Since these laws are fresh on the books it is difficult to predict the effects they will have. But knowledge is power and after reading this issue, you will be well versed on the changes you will need to be aware of for the coming year! I want to thank everyone who contributed to this issue. Our deadlines came in right after the holidays and you all stepped up and volunteered your time during this busy season. A special thanks to Carole Lucido who gave us a "grace period" so we could enjoy our holidays. This magazine would not happen without you!

Suzanne Boucher *is a certified family law specialist with more than 25 years experience. Suzanne has served on the Editorial Board of the Contra Costa Lawyer since 2014 and is co-editor for 2017 and 2018. You can contact Suzanne at SBLaw@msn.com.*

The Coming New Rules of Professional Conduct

Thursday, February 01, 2018

What is Different and What Does it Mean?

The Rules of Professional Conduct are changing and frankly, it is about time. California was one of the few states with its own set of rules and its own numbering system, making it difficult for an attorney from another state to comply with our Rules. As the practice of law becomes more national, and borders are broken down between states and countries for bar exam reciprocity and licensure, the Commission for the Revision of the Rules of Professional Conduct knew they had to have a set of uniform Rules. This means our rule numbering will change. For example, our old rule on competence - Rule 3-110, will now be 1.1, like the ABA Rules. Generally, however, the rules will follow the same logical glide path as before, from the beginning issue of competence to withdrawal and other issues.

What is new about the new rules? Here are some highlights. First, there will be some dramatic changes to the trust accounting Rule 4-100. Don't shoot the messenger readers, but all advance fees will now have to be put in the trust account. I fought that, because it is easier to not have to deal with trust accounting on advance fees. My belief that if a lawyer will steal, they will take from a trust account or a general office account.

I lost that battle. Flat fees too have to be put in the trust account unless the lawyer puts in the fee agreement some language as to its refundability. The language is spelled out in the proposed rule, and it is not onerous.

Sex with clients? Sorry folks. In the past you could have a sexual relationship with a client as long as it did not involve duress (what better way to meet people, as one lawyer friend said to me in jest), but it will now be something the lawyer will have to wait for until the end of the representation. In light of the recent sexual harassment scandals, I think we made a good call on this, because a clear rule actually protects lawyers from false allegations of duress.

We will also have a new rule on candor to the tribunal that reads a lot like ABA Rule 3.3. The proposed rule follows our case law on the revelation of client confidences to the court in criminal and civil cases but it shows that we value honesty and gives a clear path to lawyers on what they need to do if their client wants to perjure himself. This was true of the other proposed rules; they simply codify existing law. The Commission for the Revision of the Rules of Professional Conduct was not a body that could create law; the California Supreme Court has the ultimate authority to govern lawyers. This is clear from the new rule for prosecutors, Rule 3.8. We had hoped it would be stronger in making prosecutors comply with their ethical obligations but it seems to merely codify existing Brady disclosure law.

Last, there will be a new set of advertising rules. In the past, we had one long rule on advertising and solicitation that essentially encompassed the idea that advertising cannot be false and misleading. However, it also contained a set of standards that created a presumption of a violation of the rule if the lawyer advertised in a way set forth in a standard. We eliminated those standards, ultimately deciding that they chilled lawyer advertising in an age where AVVO and the like are trying to eat our lunch.

The set of rules will be longer, as we provided more comments so the lawyer has ease of interpretation.

I was on the Commission, and we worked for three years on this effort, weekly telephone conferences, and many meetings here and in Los Angeles; hours and days of research and writing. I sincerely hope the lawyers of Contra Costa County like what we have done, and if not "like," at least can live with the new rules. We don't know yet when they will be all approved, but we are hoping this March.

Carol M. Langford is a lawyer specializing in attorney conduct and discipline matters. She also represents students in admissions matters. She is an adjunct professor of professional responsibility and the past Chair of the Committee on Professional Responsibility and Conduct. She served on the Commission for the Revision of the Rules of Professional Conduct.

47th Annual Judges Night Gala

Thursday, February 01, 2018

The Alameda Contra Costa Trial Lawyers' Association presented its 47th Annual Judges Night Gala on Thursday January 18, 2018. Over 50 local judges and justices attended, including California Supreme Court Associate Justice Carol Corrigan and speaker Dean Erwin Chemerinsky. Honorees included:

- Honorable Brad Seligman, Alameda County, 2017 Trial Judge of the Year
- Honorable Christopher Bowen, Contra Costa County, 2017 Trial Judge of the Year
- Honorable Lois Haight, Contra Costa County, Outstanding Public Service

As he accepted his award, Judge Bowen spoke about his years as a trial attorney in the Contra Costa Public Defenders office as well as his most recent rotation in family law, closing his tenure there as family law presiding judge. Judge Bowen has been a public servant his entire career and is active in the West Contra Costa county community. Judge Bowen (Department 40) is now overseeing a criminal calendar in Martinez.

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Hon. Lois Haig with William Gagen

Nick Casper, Hon. Barry Baskin, and Suzi Lin

Laura Ramsey with Hon. Christopher Bowen

Susan Reyes, Hon. Benjamin Reyes, and unknown

Hon. Thomas Reardon, Hon. Carol Corrigan, and Matthew Halay

Dean Erwin Chemerinsky

Not for Resale