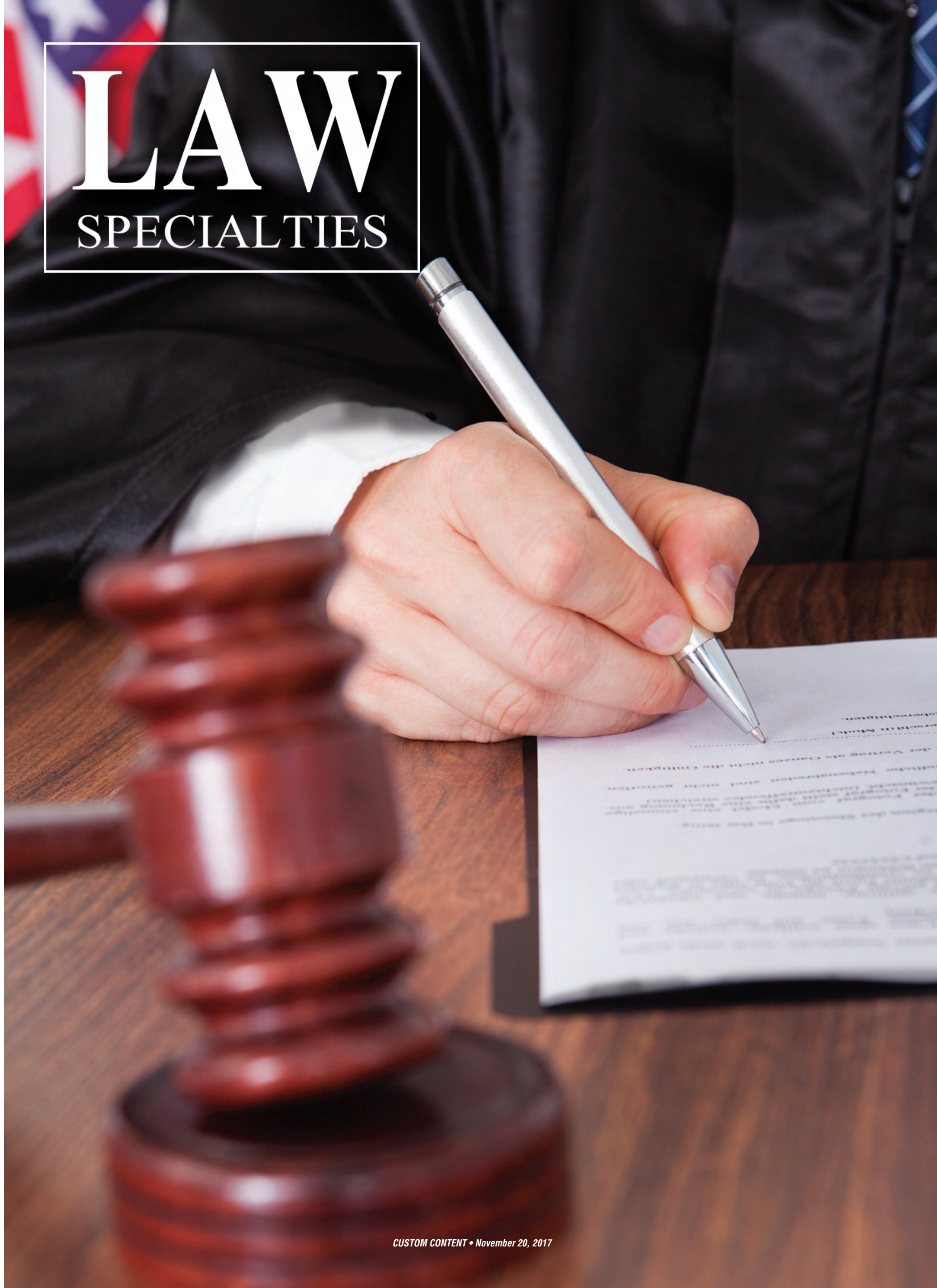


LAW

SPECIALTIES





Why You Should Hire a Trial Attorney for a Case That Will Never Go to Trial

by Jennifer Keller, Founding Partner, & Jesse Gessin, Senior Counsel, Keller/Anderle

Litigation can feel like a never-ending safari. And actually going to trial can seem as likely as encountering a white rhino. In 2015, there were 4,734 federal civil jury trials, down almost 40% from 7,933 in 2000. Federal trials have also gotten shorter. In 2015, only 14 lasted twenty days or more, compared to 85 in 2000. Local trends are the same. In California, there were 1,726 civil jury trials in 2015, down more than 50% from 3,868 in 2000. And here in Orange County, there were only 176 civil jury trials in 2014, down from 364 in 2000.

These statistics raise the question: if trials are becoming an endangered species, why hire a trial attorney? The answer: dispute resolution, like any other business decision, should be cost-effective. Seasoned trial attorneys are best equipped to save companies money because they know how to avoid distractions and focus on what is important in a case. And hiring a veteran trial attorney shows the other side you're serious, and prepared to go the distance.

Trial Lawyers Frame the Case for Trial from the Outset

The only way to become a trial lawyer is by trying cases. Due to the scarcity of civil jury trials, it takes many years, often in public practice as a prosecutor or criminal defense attorney, for an advocate to develop into an effective trial attorney. Trial advocacy is a skill mastered only in the courtroom, not in the classroom or from an office.

Unfortunately, many people who claim trial expertise have conducted few, if any, actual trials. Perhaps they've "been members of a trial team," which could mean being one of dozens who worked on a case in the office, but never examined a witness in court. The client needs to bluntly ask, how many jury trials have you personally "first chaired" to jury verdict? Not mediations, not arbitrations, not summary judgment motions or bench trials, but trials to jury verdict. Surprisingly often, the answer will be none.

Spending years in front of juries trains an attorney to appreciate from a case's outset what a jury will find to be significant. This vision separates trial lawyers from litigators. Even before the first discovery request is served, a trial lawyer conducts an extensive internal review and frames the case in a tight narrative supported by meritorious legal theories and intuitive storytelling themes. The narrative is grounded in the causes of action or defenses most likely to survive pretrial motions and end with a jury verdict.

Discovery is the process by which trial attorneys *refine*, not *discover*, the narrative. The story becomes the fulcrum upon which a trial attorney decides between what is important and what is meaningless. By framing the case for trial from the start, less becomes more. Every aspect of pretrial litigation is custom-fit to distill the narrative. Trial attorneys avoid litigation jousting over things that do not affect the story, and that waste the client's time and money. And trial attorneys understand that overindulgence in discovery will merely educate the opponent about their respective clients' trial strengths and weaknesses.

Trial Lawyers Conduct Discovery by Agreement

Trial attorneys start discovery with agreements, not disputes. From the very beginning of every case, plaintiff or defense, trial attorneys seek to agree on discovery covenants. These agreements naturally move cases towards trial and avoid litigation that seeks to stall and delay going to trial. Discovery disputes should rarely be taken to court, and only when the issue is critical to the narrative. By slimming down the discovery process, the client will benefit from increased efficiency. They will also be likely to see a courtroom far earlier than they normally would.

Trial Attorneys Use Depositions to Prepare for Trial

Whether taking or defending a deposition, a trial-focused approach creates austerity in depositions. The best trial attorneys take only necessary depositions, and those tend to be bespoke. Meandering questioning of witnesses fritters away time and money, while misuse of potent impeachment evidence may accomplish nothing more than to educate the opposition about its weaknesses. This is especially true of experts. Every question should be surgical, purposeful, and tied to the trial theory.

When defending depositions, trial attorneys lean on experience to thoroughly prepare their witnesses to give trial testimony during the deposition. Near the end

of the deposition, when the opponent and witness are exhausted, trial attorneys seize on opportunities to elicit testimony helpful to their own case. A transcendent deposition may cause the opponent to abandon calling the witness at trial, while preserving the trial attorney's ability to introduce choice parts of the deposition testimony at trial.

Trial Attorneys Emphasize Teamwork

Adept trial attorneys pair with accomplished pretrial litigators to prepare cases for trial. This teamwork has been the norm for hundreds of years in England, where barristers and solicitors develop cases together. Work is not leveraged through multiple layers of lawyers of different experience and billing rates. Instead, each task is handled by the one lawyer best suited for the task. "One task, one attorney" is the rule, not the exception. And the team uses streamlined communication and technology to assure unimpeded work flow and avoid duplication.

Trial Attorneys Use Their Experience to Leverage Better Settlements

Trial attorneys enjoy immeasurable leverage in settlement negotiations. In civil dispute resolution, the best negotiating tool is the looming threat of trial against a top-notch trial lawyer. An opponent with few, if any, jury trials under the belt, has an inherent incentive to settle. Fear of the unknown is a powerful motivator. Dread over being exposed to the client as a trial novice is another. Meanwhile, the experienced trial lawyer is comfortable sizing up the boundaries of what a real-life jury may actually do, and crafts a settlement offer accordingly. Judges, for their part, quickly determine which lawyer seems to be the more knowledgeable practitioner. The pressure mounts on the novice. (And the novice might be a 40-year litigator who has somehow always avoided a jury, and whose client has no idea that is the case.) Even while posturing for the client, the trial rookie becomes queasy hearing the jurors' footsteps coming up the courthouse stairs, and frequently settles immediately before the panel is sworn.

If Your Case Goes to Trial...

Finally, while jury trials are getting rarer, they are sometimes inescapable, especially in bet-the-company scenarios. If your case turns out to be the white rhino and your company's fate will be entrusted to "12 good people and true," you need a seasoned, fearless, winning trial lawyer at your side. A trial attorney with nerves of steel honed by years of experience is your best insurance policy against injustice in a legal system designed to reward the best advocate.

Jennifer L. Keller

Jennifer L. Keller, one of Keller/Anderle's founding partners, is among the nation's premier trial attorneys. Her practice focuses on high-stakes commercial, intellectual property, white collar criminal and securities litigation. She has received innumerable awards for excellence as a trial lawyer, including: *Benchmark Litigation's* "Top 100 Trial Lawyers in America;" *The Lawdragon* "500 Leading Lawyers in America;" and 10 times on the Los Angeles and San Francisco *Daily Journal's* list of "California's Top 100 Lawyers." Ms. Keller is a Fellow of the invitation-only American College of Trial Lawyers, widely considered the most significant honor a trial attorney in North America can receive. Contact her at 949.476.8700 or jkeller@kelleranderle.com.



Jesse Gessin

Jesse Gessin, senior counsel, is a highly accomplished trial lawyer. He has tried 25 federal jury trials to verdict as lead or co-lead counsel. His areas of practice include complex commercial litigation, appellate litigation and white collar criminal defense. As a deputy federal public defender, Jesse won fourteen jury trials through acquittal, dismissal, hung jury or reversal on appeal. Jesse's appellate experience has included drafting and arguing over 15 cases to the Court of Appeals, with impressive results. Jesse also teaches trial advocacy at the University of California, Irvine School of Law, and has lectured on trial strategy and techniques throughout the United States. Contact him at 949.476.8700 or jgessin@kelleranderle.com.



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Jesse Gessin

- Lead Counsel, 25 Federal jury trials
- Lecturer, Criminal Trial Advocacy, University of California, Irvine School of Law



Jay P. Barron

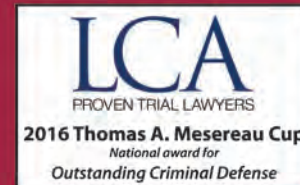
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This is the time of year when businesses take account of new laws enacted by the California legislature. One of the most problematic new laws this year is AB 1008, California's "ban the box" law.

"Ban the box" laws prohibit employers from asking job applicants about their criminal records until after a conditional offer of employment has been extended. The thinking behind such laws is that criminal convictions, especially those that are old, minor or not related to the job, should not bar a person from employment. This view, in itself, is not the problem. Smart employers do not reject otherwise qualified candidates because of mistakes made years earlier or for insignificant or irrelevant offenses.

The problem is with the way the legislature wrote California's "ban the box" law. The law fails to account for the challenges an employer faces in a competitive labor market. Specifically, the law states that once an offer of employment has been extended, an inquiry can be made about the candidate's criminal record. If the candidate or a background check reveals one or more convictions, the employer must then conduct an individualized assessment, considering (1) the nature and gravity of the offense, (2) the time that has passed since the offense and completion of the sentence, and (3) the nature of the job. If the employer decides to withdraw the job offer on account of the conviction it must notify the candidate in writing and give the candidate five business days to challenge the accuracy of the conviction record, offer evidence of rehabilitation or mitigating measures, or both. If the candidate challenges the accuracy of the conviction record, he or she must be given an *additional* five business days to respond. Thus, the process of rejecting a candidate for a criminal conviction will take at least a week and perhaps two weeks or longer. During that time the other leading candidates for the job are likely to have accepted other offers.

In addition, the new law requires that, if after considering the information submitted by the candidate regarding the conviction the employer's decision is still to withdraw the job offer, the employer must notify the candidate in writing *and inform the candidate of his or her right to file a complaint with the*

If You Have a Criminal Conviction, Please Sue Me

By: James J. McDonald, Jr., Fisher Phillips

Department of Fair Employment and Housing. This requirement is likely to produce a surge of new claims against employers.

It is apparent from this law that the legislature's design is to make it as difficult as possible for employers to reject candidates with criminal convictions such that many employers might simply give up and not inquire about applicants' criminal histories at all. That would be a mistake.

Nothing in this new law protects employers from lawsuits by customers or other third parties who are injured by employees with criminal records. Nor does the law provide for reimbursement of employers for losses suffered as a result of new criminal acts by an employee with a criminal record. Employers therefore need to continue to protect themselves and should do the following:

- Include an arbitration agreement on the employment application, so that any lawsuits for wrongful failure to hire will be heard by an arbitrator instead of in court.
- Inquire about criminal convictions in writing when extending a job offer.

Require the candidate to respond in writing and certify that all information provided is true, complete and correct.

- Run a background check. If it reveals a conviction the candidate failed to report, reject him or her for dishonesty.
- Conduct pre-employment drug testing. A candidate who fails the drug test may be rejected regardless of criminal background.
- Evaluate any criminal convictions according to the criteria listed above. If there is a legitimate concern that hiring a person with such a criminal background will put customers, patients, children, elders or members of the public in danger, do not be afraid to withdraw the job offer and continue the search.

James J. McDonald, Jr. is managing partner of the Irvine, California office of the labor and employment firm Fisher & Phillips LLP. He is author of *California Employment Law: An Employer's Guide*, published by the Society for Human Resource Management.



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McDermott Will & Emery

Influencer Marketing Disclosures

by Sarah Bro, Partner, McDermott Will & Emery

Influencer marketing. You've likely encountered it, and if you are a business utilizing online advertising strategies, there is a very good chance that you are already engaged in or considering the influencer approach.

Influencer marketing involves identifying individuals that have some degree of influence over potential buyers, and orients marketing activities or product promotions around these influencers. For example, a resort hotel may gift a free stay to a well-followed travel writer in hopes for a glowing review; or a wellness company might compensate an Instagram fitness model to post photos promoting its line of vitamins.

"Influencers" come in all shapes, sizes, and market reach – from mega-watt reality stars, to your favorite tech blogger, to your neighborhood yoga instructor. A 2015 survey examining the state of influencer engagement found that 84% of marketers planned on executing at least one influencer campaign during the forthcoming year, while 93% of marketing professionals consider influencer engagement to be an effective brand awareness strategy.

“ Influencer marketing involves identifying individuals that have some degree of influence over potential buyers, and orients marketing activities or product promotions around these influencers. ”

For those engaged in influencer marketing, however, it is critical to remember that like all advertising, the messaging is subject to applicable laws and oversight by the Federal Trade Commission (FTC). To the extent that influencers are paid, or given free products or other incentives to promote a particular product or brand, the resulting advertisements or sponsored posts fall under the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising.

In April 2017, the FTC sent more than 90 warning letters to influencers and

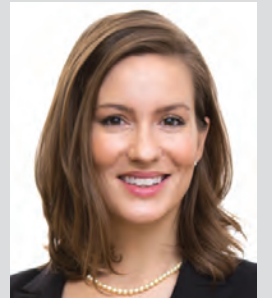
advertisers reminding them that if an influencer is endorsing a brand and has a "material connection" to the sponsoring advertiser, that relationship must be clearly and conspicuously disclosed. In the eyes of the FTC, disclosure of the relationship helps consumers decide how much weight to give the endorsement.

This fall, after finding that many advertisers and influencers were not practicing the mandatory disclosure requirements in connection with endorsements made on behalf of a sponsoring advertiser, the FTC issued its Endorsement Guides FAQs. The FAQs provide illustrative examples regarding the types of disclosures that likely are acceptable ("#ad [Company X]") and those that are not ("Thank you Company X," or disclosures placed in truncated captions). The FAQs also provide guidance as to what makes a disclosure "clear and conspicuous," and how to best represent the "accurate experience and opinion" of the endorser.

Since it looks like influencer marketing (and the FTC's rules) are here to stay, whether you are a veteran marketer or a newly minted influencer about to make that first #sponsored post, consult with an attorney to make sure that you understand and are complying with the FTC Endorsement Guides.

Sarah Bro

Sarah Bro is a partner in the Orange County office of McDermott Will & Emery. Her practice focuses on the protection, management, and enforcement of domestic and international trademarks and copyrights, and strategic guidance in the areas of unfair competition, right of publicity, social media, digital marketing, domain name management, corporate transactions, licensing, and intellectual property litigation support. Contact Sarah at 949.757.6001.



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Choosing the Right Lawyer: The Fallacy of Specialization

by Edward Susolik, Partner, Callahan & Blaine

Introduction

Frequently the most difficult decision that a company must make when dealing with litigation occurs within the first 30 days of a lawsuit being filed. Specifically, a company must quickly decide which lawyer or law firm it will retain to represent it in the litigation.

There is a great deal riding on making the right decision. As anyone knows who has been involved in a lawsuit as a party, attorney or juror, a stronger and more experienced trial attorney can make all the difference in the world in the success or failure of litigation. To quote the Grail Knight's message to Indiana Jones, "You must choose, but choose wisely."

As a fallback in choosing litigation counsel, many companies look to a "specialist" in the particular subject matter involved in the litigation. Superficially, such a choice would make sense, as these specialist lawyers have practiced for decades in this one narrow area and subject matter, and thus they know the rules, regulations and laws in that field. Perhaps they have written articles or even books on that area of law. To a layperson, such a specialist would appear to be the lawyer most qualified to handle litigation in that particular subject area.



Susolik

For example, at a recent meeting, the president of a major Orange County company commented that there are only approximately a dozen law firms in the United States who specialize in the narrow field her company does business in. However, the officer also commented that these lawyers had lost every case that they had ever litigated for companies in this business area. She was thus wondering whether her company should choose from that same group of law firms to handle a new case that had just been filed.

The answer is a resounding no. As explained below, choosing litigation counsel based on specialization in a subject matter area is a fallacy and red herring.

Choosing the Right Lawyer: The Specialty of Litigation, Trials and Winning

Rather than looking for lawyer with a narrow specialization, businesses should look for an attorney whose specialty is litigation and trial practice. The reality is that while there are hundreds of thousands of lawyers who do litigation, only a small percentage of such lawyers are true "litigators." An even smaller percentage are true "trial lawyers."

It is these true trial lawyers and litigators that businesses should turn to when confronted with lawsuits or the need to engage in litigation. For example, if a business has a multi-million dollar litigation arising out of a complex lease transaction, it is not going to win or lose that lawsuit because its attorney knows how to read leases, has drafted commercial leases himself or has handled prior lease lawsuits.

The bottom line is that using a wide variety of efficient and powerful techniques, a true litigator can learn virtually any specific sub-set of the law. At the end of the day, a case is won and lost because of a litigator's talents and abilities in the courtroom, discovery, the deposition room, law and motion and ultimately trial.

For example, a litigator who specializes in real estate law but cannot take a meaningful deposition is not a good advocate. Likewise, the "specialty

litigator" who lacks trial experience or is unable to connect with a judge or jury during trial is a weak advocate. Ultimately, every lawsuit that is litigated must have as its ultimate goal how the facts and legal issues will be decided before a jury and judge. If the "specialty litigator" is not a powerful trial attorney, the entire discovery, law and motion, deposition and pre-trial phase will be handled in a mediocre and unpersuasive manner.

Moreover, the opponent on the other side will feel no intimidation or pressure to settle with a weak legal adversary. Settlement is a powerful weapon in the arsenal of the "litigator/trial lawyer." It is one of the true ironies of litigation that the best settlements come from the lawyer who is an expert at trials and has prepared his case for trial. The trial lawyer who prepares his case for trial is the lawyer who gets the best settlements.

Choosing the Right Lawyer: A Checklist for Choosing the Lawyer Who Specializes in "Winning"

Ultimately, when a business owner is choosing a litigator, the ultimate "specialist" he or she should be looking for is the "specialty of winning." The following is a checklist of some of the critical factors to look for in selecting a "winning" litigator:

1. Does the lawyer or law firm have a track record of conducting actual trials in front of a jury? A litigator who has never conducted a trial cannot be an effective advocate in the pre-trial and discovery phases.
2. Does the litigator have a track record of winning cases and being successful? Look carefully at the lawyer's record in trial in handling complex cases. For example, Dan Callahan, the founding partner of my law firm Callahan & Blaine, has won a \$934 Million jury verdict (after a three month trial) in the area of complex business litigation, which is the largest jury verdict in Orange County history.
3. Does the attorney have experience and expertise in handling both plaintiff and defense cases. A true litigator is not relegated to one perspective or one point of view. A lawyer who is equally adept at both plaintiff and defense work is a very powerful asset, as that lawyer is able to understand the perspective and mindset of both sides of the litigation. Moreover, many cases have both a complaint and cross-complaint, so the attorney must be able to wear both plaintiff and defense hats.
4. Is the lawyer an expert in depositions and discovery? The testimony of a witness at deposition is what the witness must say at trial. Consequently, a litigator who is not able to conduct an aggressive and effective deposition is an ineffectual lawyer. Likewise, document production, third party subpoenas, interrogatories and other discovery devices frequently make or break a case. Again, a true litigator must be an expert in discovery, in order to win your case.

Conclusion

In conclusion, when a business becomes embroiled in a lawsuit, the legal specialty they should look for is the lawyer who is an expert in the art and science of litigation, and, more importantly, winning.

Edward Susolik

Edward Susolik is a senior partner at Callahan & Blaine, a boutique litigation firm with 28 attorneys. Callahan & Blaine specializes in complex litigation of all types, both plaintiff and defense. Mr. Susolik is in charge of Callahan Blaine's Insurance Department, and has successfully represented hundreds of corporations in disputes with insurance companies for over 25 years. Mr. Susolik can be reached at ed@callahan-law.com or 714.241.4444. Callahan & Blaine's website is found at www.callahan-law.com.

California's Statewide "Ban-The-Box" Law to Go Into Effect January 2018

by Ron Raether, Partner, Troutman Sanders

Employers beware what you ask about prior criminal history on employee applications. On October 14, 2017, California became the most recent state to adopt a "ban-the-box" law, which goes into effect on January 1, 2018. The bill prohibits employers from asking candidates about prior criminal convictions and regulates when employment is denied based on a candidate's criminal history. This bill is among the strongest and most expansive in the nation.

Prohibition Against Criminal History Inquiries

This bill prohibits employers in California with five or more employees from asking an employment candidate to disclose prior criminal convictions before the employer has determined whether the candidate is qualified for the position. Employers will be prohibited from:

- ▶ Including any question on an employment application requesting an applicant's conviction history;
- ▶ Inquiring into or considering the applicant's conviction history before the applicant receives a conditional offer of employment; or
- ▶ Considering, distributing, or disseminating certain information, such as arrests that did not result in conviction or previously expunged convictions.

Restrictions on Employment Decisions

This bill also includes restrictions on an employer's use of criminal convictions after an employment offer has been made and the criminal history has been obtained. Specifically, employers cannot deny an applicant employment based on a conviction until after the employer assesses the relationship between the conviction and the job duties of the employment position at issue.

If the employer preliminarily determines that a criminal record warrants denying employment, the employer must follow certain procedures, including (i) notifying the applicant of the decision in writing, (ii) waiting to make any final employment decision during a specified notice period, and (iii) allowing the applicant additional time to respond to the notice if the applicant is obtaining evidence to dispute the criminal record. If the employer ultimately decides to deny employment based on conviction history, the employer must follow additional specific procedures

regarding the notice of the adverse employment decision.

Considerations for Entities Affected by the Law

Employers that conduct criminal background screening should review their policies, procedures, and documents relating to the screening process to ensure compliance with the new state law as well as other local ordinances that similarly regulate criminal background screening.

The law provides an exemption for employers who are required to conduct criminal background checks by federal, state or local law. This exemption should be of benefit to depository institutions required by federal law to conduct background screenings on applicants and employees, and for the securities industry.

This law also affects Consumer Reporting Agencies ("CRAs") that conduct background screening reports involving criminal records. Employers should work with their background screeners to discuss excluding certain criminal records from background reports, which the employer may be prohibited from considering under the new law.



Ron Raether

Ron Raether leads the Cybersecurity, Information Governance and Privacy practice group at Troutman Sanders, and is a partner in the firm's Financial Services Litigation group. Ron is known as the interpreter between businesses and information technology, and has assisted companies in navigating federal and state privacy laws for over twenty years. Ron's understanding of technology led him to be involved in legal issues that cross normal law firm boundaries, including experience with data security, data privacy, patent, antitrust, and licensing and contracts. This experience allows Ron to bring a fresh and creative perspective to data compliance issues with the knowledge and historical perspective of an industry veteran. For more information, please contact Ron at ron.raether@troutman.com or 949.622.2722.



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Why the EB-5 Visa May Be a Better Option Than the E-2 Visa (With Some Other Considerations)

by David Hirson, Managing Partner, David Hirson & Partners LLP; assisted by Warren Oakes, Paralegal, David Hirson & Partners LLP

An ever-growing number of foreign investors are establishing their livelihood and their lives in the U.S. by choosing to invest their capital into the U.S. economy. Many investors are choosing to apply for the EB-5 immigrant visa, while some are going a more temporary route by obtaining the E-2 non-immigrant visa or other visas such as EB-1A, L-1, or EB-1C. Our Los Angeles- and Seattle-based EB-5 lawyers understand that the significant differences between these visas require taking a look at the pros and cons of each for every prospective applicant. However, while the E-2 visa has many attractive attributes, including a potentially lower capital investment amount, the EB-5 visa may be a better and broader alternative for those looking to permanently resettle in the U.S. The following are some important differences between the EB-5 and E-2 visas that showcase reasons why the EB-5 visa may be a better route for certain foreign investors.

The EB-5 Visa Is Open to a Broader Range of Countries

EB-5 visa holders come from a broader range of countries because this type of visa has less limitations on country of origin. E-2 visa holders must be a national of a treaty investor country, i.e., a country that maintains a Treaty of Commerce and Navigation with the U.S. For many prospective visa applicants, this restriction bars them from applying for an E-2 visa altogether, but does not bar them from applying for an EB-5 Visa. (For example, nationals of the People's Republic of China may not apply for an E-2 visa because China is not an E-2 treaty country.)

The EB-5 Visa Paves the Way for a Permanent Resident Card (Green Card)

The EB-5 visa is an immigrant visa, which can lead to a green card and permanent resident status for its holder. An E-2 visa is a non-immigrant visa, which can be renewed but cannot lead to obtaining permanent residency in the U.S. This immigration intent is one of the reasons for the higher investment requirement of an EB-5 visa, which in most instances is \$1,000,000 but in certain cases can be lowered to \$500,000.¹ While an E-2 visa generally requires a lower capital investment than the EB-5 minimum investment amount, the E-2 applicant must show "non-immigrant intent" when applying with the United States Citizenship and Immigration Services (USCIS). Therefore, for those applicants seeking a way to permanently establish themselves in the U.S., the EB-5 visa is the obvious choice.

Some Other Considerations

First, U.S. tax laws should be considered by investors and their experienced U.S. tax professionals in relation to the investors' personal and business financial situations.

Second, due to the current extended waiting times facing EB-5 visa applicants from mainland China (current estimates run approximately ten years), timing is a major concern. This automatically makes the EB-1A, L-1, and EB-1C visas a faster option for mainland Chinese applicants. Other applicants may face other timing considerations with each visa options that should be discussed with their experienced immigration attorney.

“ Many investors are choosing to apply for the EB-5 immigrant visa, while some are going a more temporary route by obtaining the E-2 non-immigrant visa or other visas such as EB-1A, L-1, or EB-1C. Our Los Angeles- and Seattle-based EB-5 lawyers understand that the significant differences between these visas require taking a look at the pros and cons of each for every prospective applicant. ”

Lastly, it is interesting to note that mainland born Chinese applicants are currently considering EB-1A along with L-1 and EB-1C visas as better alternatives for them (since the People's Republic of China is not a party to a Treaty of Commerce and Navigation with the U.S.). These visas have other requirements and considerations though that should be discussed with experienced counsel such as our team here at David Hirson & Partners, LLP.

If you are considering the EB-5, E-2, EB-1A, L-1, or EB-1C visas, or have further questions about the differences between these visas, contact the experienced team at David Hirson & Partners, LLP today.

¹ Increases to the EB-5 minimum investment amounts are currently being negotiated in Congress and many expect an increase within the next six months or so.

David Hirson

David Hirson is the managing partner of David Hirson & Partners LLP. He has been certified continuously as a Specialist in Immigration and Nationality Law by the State Bar of California, Board of Legal Specialization since 1990, and has worked on EB-5 cases since the program was established. In fact, Hirson filed many of the EB-5 cases that were approved throughout the first 10 years of the EB-5 visa program, and in 1991, personally prepared and filed one of the very first EB-5 cases with the INS (now USCIS). He is highly active in the immigration law community. His memberships include the immigration law sections of the Los Angeles County Bar Association and the Orange County Bar Association; the American Bar Association (ABA); the Law Association for Asia and the Pacific (LAWASIA); the American Immigration Lawyers Association (AILA); and he is on the policy committee of the regional center trade group Association to Invest in the USA (IIUSA).





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Surviving and then Succeeding: Using Chapter 11 to Restructure Your Business

Some of the best and brightest have been in bankruptcy court, including Henry Ford, Walt Disney and Henry Heinz and businesses from General Motors to Eddie Bauer. Filing for bankruptcy does not mean the end of a company, in fact, it could be an opportunity to start over by reorganizing through Chapter 11 or an out of court workout.

Some benefits of a Chapter 11 reorganization include:

- ▶ Upon filing a bankruptcy case, an automatic stay goes into effect and almost all creditors are prohibited from continuing unless permitted to do so by a judge.
- ▶ Leases that are not contributing positively can be terminated while other beneficial leases can be retained. This is important in retail reorganizations as stores that are profitable can remain open.
- ▶ A plan of reorganization can be approved by a court that reduces debt. The court can rewrite a secured loan that is secured by assets that is not the debtors personal residence as long as the rewrite is "fair and equitable."
- ▶ Unsecured obligations are typically paid a fraction of the face amount of the debt. To rewrite unsecured obligations, the debtor needs to obtain the vote of 66% of the dollar amount owed to unsecured creditors or get the court to find that the rewrite is "fair and equitable."

Chapter 11 only works if the company can demonstrate future profitability or that there will be a capital infusion that will fund a reorganization. Once feasibility is established, the Debtor can be creative in designing a plan of

reorganization as long as several requirements of the Bankruptcy Code are satisfied.

An alternative means of reorganizing is an out of court workout. This approach should be evaluated as it is considerably less expensive. The big difference between an out of court workout and Chapter 11 is that one dissent unpaid creditor can prevent an out of court workout where a court can force the terms of plan of reorganization on dissent creditors in a Chapter 11 proceeding.

This area is complex but with committed management and experienced counsel, survival and success is possible.

Contact Richard Marshack at 949.333.7777 for more information.

Richard Marshack

Richard Marshack is a founding partner of Marshack Hays LLP and has been a bankruptcy attorney for over 35 years. He is a frequent lecturer on bankruptcy and commercial law issues. He is also a Bankruptcy Trustee appointed by the U.S Department of Justice.



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Judge Peter M. Elliott served
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for the Central District of California
for almost 20 years.

Mr. Marshack is a founding member of Marshack Hays LLP,
and has been a bankruptcy attorney for over 35 years.

Richard Marshack | rmarshack@marshackhays.com | 949.333.7777

Trust Me!

Probate, trust and estate battles are a common occurrence in the legal system. Typical scenarios involve beneficiaries arguing over how much money should be disbursed, who should get it, and when.



Trust Litigation

Forensic accounting plays a critical role in trust litigation by providing attorneys with the independent financial analysis often necessary to resolve disputes. Some examples:

Misappropriation of Trust Assets – Sometimes beneficiaries think there is more money in an estate than there actually is, and an independent accountant is needed to trace funds to set the record straight. Other times assets are missing, or have been inappropriately transferred to the wrong beneficiary. The sooner a forensic accountant is hired, the more assets may remain available for recovery.

Misinterpretation of Trust Terms – Trust instruments can be difficult to interpret without the help of a professional. Inexperienced trustees may not read trust documents correctly. A forensic accountant can determine whether estate distributions are in accordance with trust terms. If there is a discrepancy, the accountant can provide guidance as to how the assets may be redistributed to effectively represent the decedent's wishes as evidenced by the written trust.

Petition to Replace Trustee – Beneficiaries may not be happy with the selection of the trustee. For example, a sibling may be designated as trustee but have minimal business acumen, so another sibling may challenge the first sibling for not upholding the duties of the trustee. Allegations in this area may also include a trustee not providing a timely and accurate accounting of the trust assets. A qualified CPA with experience in trust accounting can analyze the validity of such claims.

Worth the Cost

Without a CPA firm that is experienced in handling trust matters, it can be very difficult to resolve these types of disputes. Engaging a qualified forensic accountant to trace trust assets can result in significant funds being recovered and provide peace of mind for the family.

Gina Lara, MBA, CFP® is a Forensic Accounting Analyst at Smith Dickson, An Accountancy Corporation (www.smithdickson.com) based in Irvine. The firm's Litigation Support Services include forensic accounting, expert testimony, intellectual property, fraud and embezzlement, real estate, and trust and estate beneficiary disputes. Ph. 949.553.1020.



Lara



Workplace Sexual Harassment – We Owe It to Everyone to STOP IT NOW!

by John A. Cone Jr., Of Counsel, Hall Huguenin LLP

The media outrage of the moment, from Hollywood to Capitol Hill, is the apparent epidemic of sexual harassment in the workplace. While this uproar is undeniably appropriate, it also has the ring of the rather disingenuous line from *Casablanca*: “I’m shocked, shocked to find that gambling is going on here!” The media suggests that workplace sexual harassment was a dirty little secret, but those of us who are employment attorneys and HR professionals know this was no secret – never has been.

As employment professionals, our jobs require us to defend against harassment claims, particularly opportunistic money-grabs. But it is even more important to create an enlightened, proactive company culture that makes it unnecessary for aggrieved employees to resort to the courts. California employers can work toward achieving this result by simply doing what the law requires, including the following:

- ▶ If the employer has 50 or more employees, it must provide supervisors at least two hours of qualified classroom or similar interactive training every two years on the prevention and correction of sexual harassment. New supervisors must receive this training within six months after their start date.
- ▶ The employer must provide its employees with a written sexual harassment policy that is discussed regularly at meetings.
- ▶ In the event of an incident of sexual harassment, an employer must conduct a prompt and fair investigation, followed by a prompt and fair remedy.

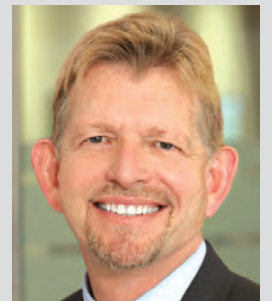
While California’s regulations are extensive (perhaps unduly so), employers should heed the key admonition from the agency charged with enforcement of these regulations: “Buy in from the top. This means that management is a role model of appropriate workplace behavior, understands the policies, walks the walk and talks the talk.” Ultimately, good management requires treating each other with

dignity and decorum – it’s good for our employees and it’s good for our bottom line.

This publication is for general informational purposes only. It is not meant to address specific factual and legal issues. Please consult your labor and employment counsel for any information related to a particular legal question or scenario.

John Cone

As Of Counsel to Hall Huguenin LLP, John Cone provides 35 years of labor and employment experience, including litigation, trial work and counseling. Mr. Cone has extensive litigation and counseling experience in employment-related issues, exclusively representing organizations and management in matters concerning wrongful termination, discrimination, sexual harassment, ADA violations, wage and hour claims, prevailing wage matters and Labor Code 132a and S&W claims. Mr. Cone’s trial experience includes a substantial number of bench and jury trials in State and Federal court. He has also represented management in administrative actions before the Equal Employment Opportunity Commission, Department of Fair Employment and Housing, the Division of Labor Standards Enforcement and the U.S. Department of Labor. For more information regarding this topic, or labor & employment questions generally, please contact John at 714.918.7000 or jcone@hhlawyers.com.



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Immigration Under the Trump Administration; What Employers Are Experiencing

by Mitch Wexler, Partner, Fragomen Worldwide

Now that we are a full year into the current administration, its impact to U.S. employers who lawfully employ critical foreign national talent, is clear. Although there have been no real legislative changes, such tools as Executive Orders (EO), Memoranda and other informal vehicles have been used to significantly change the way employers manage their immigration programs.

One key vehicle, known as the Buy American and Hire American Executive Order, orders relevant agencies to make recommendations to the H-1B and other work visa programs with a view to prioritizing advanced degree holders and high wage earners. It also orders tougher enforcement of bad actors in the H-1B program. It is felt by many involved in the immigration field that this EO was the catalyst for significant changes in adjudication of a variety of work visas such as the H-1B (for university educated professionals) and L-1 visa (for intra company transferees of international companies) programs. Occupations and job requirements, critical to establishing eligibility for these work visas have changed with no notice to employers resulting in the introduction of significant uncertainty when managing resources on projects and teams in the U.S. Examples include jobs that have for decades been considered eligible for H-1B visa classification are being challenged, frequently resulting in visa application denials.

Another recent change no longer requires USCIS, the adjudicatory agency, from honoring prior decisions on the same visa for the same foreign national beneficiary. This was both rational and served to conserve resources. This comes into play when for example, if a high level executive is transferred to a U.S. facility

from a related entity abroad on an L-1A visa and a few years later seeks an extension of that very same visa status, USCIS will now expend the resources in readjudicating what was decided years earlier. The irony is that after a few years, a foreign national would be even more qualified for the visa status than before as she would have obtained more valuable experience. There was always a requirement to readjudicate if there was a substantial change of circumstances. As indicated above, U.S. employers no longer have certainty that their critical visaed employees, often high level executives, will be permitted to remain in the U.S. for the duration of their need. Often times, children are in school and otherwise integrated into communities for a period of time anticipated by the worker and employer. This will result in extending the adjudication times already stretching many months to even longer periods of time.

Site visits are another tool significantly featuring in the current immigration climate. Historically, relevant Federal agencies would conduct site visits to “audit” visa sponsoring employers and associated foreign nationals to verify compliance. Now, the “site visit program” has been enhanced both in number and visa category. It has been reported that 20,000 site visits are the goal for this fiscal year. Also, the program has expanded to include L-1 visa employers and holders as well as other visa categories. Bad actors need to be ferreted out for sure. To date, very few bad actors were identified through site visits. We shall see if this new enhanced site visit program has any better yield.

“ Site visits are another tool significantly featuring in the current immigration climate. Historically, relevant Federal agencies would conduct site visits to “audit” visa sponsoring employers and associated foreign nationals to verify compliance. Now, the “site visit program” has been enhanced both in number and visa category. ”

Mitch Wexler

Mitch Wexler is a partner with Fragomen Worldwide, the leading global immigration law firm. He manages firm’s Irvine and Los Angeles offices and sits on the firm’s Executive Committee. Mitch is an immigration and nationality law California State Bar certified specialist. He can be contacted at mwexler@fragomen.com.



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Hold On ... to Evidence Potentially Relevant to a Lawsuit

by Mark B. Wilson, Partner, Klein & Wilson

If you have been involved in litigation, you may have received a “litigation hold letter,” demanding that you preserve evidence relevant to the dispute and the consequences of failing to comply.

“Failing to preserve evidence can have serious consequences. Depending on whether the failure to preserve was accidental, negligent, or intentional, a court may impose sanctions ranging from monetary or contempt sanctions, to adverse jury instructions and terminating sanctions (i.e., you lose the case because you destroyed key evidence).”

Litigation hold letters probably trigger a duty to preserve evidence, and sometimes, a duty to preserve evidence may arise even before you receive such a letter. While a party to a lawsuit is not required to preserve every shred of paper, every email, or electronic document ever created, it must preserve documents it knows could be relevant to the dispute. The sources of potentially relevant information are not limited to electronic data on computers (e.g., emails, calendar entries, and word processing files) and hard files. Relevant information might be located on cellular telephones, thumb drives, and even social networking sites. The complexity of sources and sheer amount of potentially relevant information may seem daunting, but there are consultants and vendors who can help collect the evidence.

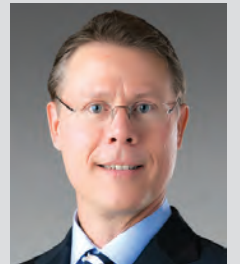
When a dispute arises, you should take steps to maintain and prevent

destruction of evidence. This includes identifying what is relevant, circulating the litigation hold notice to all people who might have related information, and instructing those people to not delete anything related to the dispute, whether it is electronic information or paper documents. You should suspend automatic document destruction and/or data deletion policies or practices. Ensure documents generated or received by former employees are properly stored and can be easily located. If you do not already have a litigation hold readiness plan in place, develop one so you can efficiently and effectively implement the litigation hold in the future.

Failing to preserve evidence can have serious consequences. Depending on whether the failure to preserve was accidental, negligent, or intentional, a court may impose sanctions ranging from monetary or contempt sanctions, to adverse jury instructions and terminating sanctions (i.e., you lose the case because you destroyed key evidence). When in doubt, err on the side of caution, hold on to the evidence, and call us at 949.631.3300.

Mark B. Wilson

Mr. Wilson, a trial attorney, has won nearly every case he has tried or arbitrated. He lost only one jury trial but then obtained a complete reversal on appeal. This year, Mr. Wilson was listed in the Super Lawyers® Top 50 Orange County list, and he is a past Chair of Orange County Bar Association’s Business Litigation section.



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Borrowing From or Lending to Your Business – Owners Beware!

It is commonplace for owners of closely held businesses to borrow money from their company. When doing so, it is of critical importance to always follow corporate formalities. For example, any loan should be authorized pursuant to appropriate corporate resolutions and minutes, and documented pursuant to a written and legally enforceable promissory note. Further, the loan should be reflected as such on the company's books and records and listed on any financial statements of the company and the owner/borrower. Finally, it is worth stating the obvious, which is that loan repayments should be made in accordance with the terms of the promissory note.

It is also common for owners of closely held businesses to lend money to their business, especially when the company is experiencing financial difficulties. These companies tend to receive more financing in the form of "owner loans." While owner loans are a perfectly acceptable method of corporate financing, whether such financing is classified as debt or equity can have a substantial impact on the company and its owners for the purposes of federal income tax and subsequent bankruptcy proceedings.

For example, classifying a shareholder contribution as debt could allow both the corporation and the shareholder to take income tax deductions or grant the shareholder priority over the other equity shareholders in the event that the corporation later files for bankruptcy. The simple act of classifying a contribution as debt on the company's books, however, does not end the discussion. Both bankruptcy and tax courts have the power to transform or "re-characterize" corporate debt into disguised wages, dividends or distributions that are taxable income, or equity. Such re-characterization could have disastrous consequences for both the company and its owners.

The factors and standards that courts use to determine whether or not to re-characterize debt vary between jurisdictions and are generally unclear. Factors courts consider typically include the: (1) names given to the instrument; (2) presence or absence of a fixed maturity date and schedule of payments; (3) presence or absence of a fixed rate of interest and interest payments; (4)

source of repayments; (5) adequacy or inadequacy of capitalization; (6) identity of interest between the creditor and the stockholder; (7) security, if any for the advances; (8) extent to which advances were subordinated to the claims of outside creditors; (9) corporation's ability to obtain loans from outside lending institutions; (10) presence or absence of a sinking fund to provide repayments; and (11) extent to which the advances were used to acquire capital assets.

None of the factors alone are determinative and each may be granted a different amount of weight depending on the facts and circumstances of the situation. Many closely held companies may satisfy some factors, but not others, therefore, making it exceptionally difficult to predict the outcome of any given re-characterization case.

Loan transactions between closely held businesses and their owners are always subject to heightened scrutiny. The potential for insolvency heightens the scrutiny. Many closely held businesses lend to or borrow from owners with a proper purpose in mind. Yet, given the tremendous amount of ambiguity and uncertainty surrounding debt re-characterization claims, it is highly recommended that the company and its owners retain experienced transactional counsel, insolvency counsel and tax professionals to properly structure and document loans and navigate clear of dangers that can and should be avoided.



Richard H. Golubow

Richard H. Golubow, a founder and managing partner of Winthrop Couchot Golubow Hollander, LLP, is an attorney who devotes his practice to representing primarily corporate debtors in out-of-court workouts and Chapter 11 reorganizations. Mr. Golubow has been honored as the recipient of bankruptcy or restructuring attorney of the year awards by several leading international financial publications. For more information, contact Mr. Golubow at 949.720.4135 or rgolubow@wcghlaw.com.



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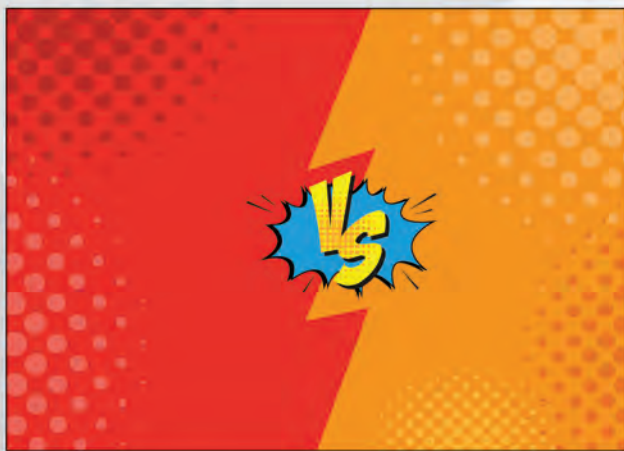
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“ If you know the enemy...you need not fear...a hundred battles.

- Sun Tzu, *The Art of War* ”

“ Victory requires overcoming the enemy’s ‘Center of Gravity’ – its ‘source of strength’ or vulnerability.

- Carl Von Clausewitz, *On War* ”

The Art of Litigation and War

Knowing your enemy and its “Center of Gravity” is as important in litigation as it is in war. Litigation between businesses typically focuses on dollars gained or lost; the bottom line is the *center of gravity*. With the government as your opponent – the public perception of the decision maker(s) is the center of gravity. Costs of the litigation itself – including the prospect of losing – are often not a consideration. If the government decision maker believes the public is supportive – the fight may be well worth fighting – irrespective of costs.

Recently an elected official decided to make a political statement about what he believed was the high cost of law enforcement pensions. At his urging – the government sued the deputy sheriffs to roll back their pensions. As predicted by most legal analysts – the litigation failed at every level. The government paid millions in costs and attorney’s fees. The government’s center of gravity was how the public perceived the office holder’s effort. As long as the elected official championing the cause gained favorable press and accolades in certain circles for leading the fight – the litigation continued.

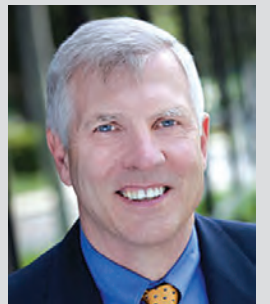
Conversely, where the government sued a publically held company for a breach of contract – the company immediately sensed the government’s center of gravity was the public’s perception of the elected official who was responsible for the contract. In order to scuttle the litigation, the corporation generated legislative hearings and press attention to embarrass the responsible agency and its elected leader. The center of gravity for the elected official was again the public’s

perception. The elected official withstood the potential embarrassment. Meantime it became apparent that if trial were to actually occur – embarrassing facts may emerge regarding the company itself. These facts raised the possibility of driving down the company’s share price – its center of gravity. The company settled on the eve of trial.

In short, “know your enemy” and its “Center of Gravity” and “you need not fear...a hundred battles.”

Thomas Umberg

Tom Umberg has a unique perspective as a seasoned trial lawyer who has successfully tried over 100 cases to verdict or judgment, combined with extensive experience in the public sector as a federal criminal prosecutor and California Legislator. Tom is also a retired Army Colonel, veteran of Afghanistan and Bronze Star recipient. He was recently selected to Chair the Justice for Vets – Veterans Treatment Court Committee. Contact Tom at 949.679.0052 or tumberg@umbergzipser.com.



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Walking the High-Wire

Defending Against Liability for an Unauthorized Wire Transfer in California

In less time than it will take you to read this article, a cybercriminal on the other side of the world could steal millions of dollars from your customer's bank account without your knowledge. Using sophisticated "man-in-the-middle" and "man-in-the-browser" attacks, cybercriminals have learned to infiltrate even the most sophisticated online banking systems to log in to valid online banking sessions and wire millions of dollars overseas. In the aftermath of these attacks, often courts are left to determine who bears the responsibility for the loss—the financial institution or its customer.

With adequate preparation and information, financial institutions can minimize the risk that they will be held accountable for these losses. The right counsel can help draft policies, procedures and agreements to minimize risks to financial institutions, while also putting financial institutions in a stronger position to defend against claims for reimbursement of unauthorized wire transfers.

The Law

The California legislature provided the framework for courts to answer the question of who bears the risk of loss for an unauthorized wire transfer when it enacted the Uniform Commercial Code—Funds Transfers. The risk of loss initially falls on the bank. However, if the bank can prove its good faith compliance with an agreed-upon, commercially reasonable security procedure, the risk shifts to the customer. The customer then must prove that the wire was not sent by one of its agents or by someone who obtained access to the account from a customer-controlled source to put liability back on to the bank, which is a very difficult hurdle for the customer to meet.

First, a bank must prove that it accepted the wire transfer order in compliance with a commercially reasonable security procedure. The court considers the following factors to determine whether the bank's security procedure is commercially reasonable.

1. The wishes of the customer expressed to the bank;
2. The circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank;
3. Alternative security procedures offered to the customer; and
4. Security procedures in general use by customers and receiving banks similarly situated.

Thus, the question of commercial reasonableness depends, in large part, upon the unique circumstances of the customer. Importantly, the question of commercial reasonableness does not require that the bank offer the best security procedures available on the market. Instead, the bank must offer procedures that are "reasonable" in light of the specific circumstances of the bank and customer. As a result, it is important for banks to understand the individual circumstances of each customer and the security procedures in use by similarly situated banks for similarly situated customers.

Even if the security procedure that was used to process the unauthorized wire was not commercially reasonable, the bank may avoid liability under a limited exception. A security procedure is "deemed to be commercially reasonable" if the following requirements are met:

1. The customer chose an alternate security procedure after the bank offered, and the customer refused, a security procedure that was commercially reasonable for the customer; and,
2. The customer expressly agreed in writing to be bound by any payment order issued in its name and accepted by the bank in compliance with the chosen security procedure—whether or not authorized.

In order to benefit from this exception, the bank must prove both elements. A bank may more easily establish the first element if the customer has signed a written acknowledgement that a particular security procedure was offered and that the customer voluntarily chose a different procedure.

On its own, a commercially reasonable security procedure is insufficient to insulate a bank from liability stemming from an unauthorized wire transfer. The bank must also accept the wire transfer order in good faith and in compliance with the security procedure.

The California Uniform Commercial Code defines good faith to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing." The first prong—honesty in fact—means that the bank employees involved in accepting the wire transfer order did not know that it was fraudulent at the time the order was accepted. The second prong—the observance of reasonable commercial standards of fair dealing—requires that the bank accept the wire transfer order in accordance with the reasonable expectations of the other party.

If the bank can prove that it accepted the wire transfer order in good faith and in compliance with a commercially reasonable security procedure, the bank still may be liable if the customer can prove that none of its employees sent the wire and the actual sender did not obtain access to the customer's account from a source controlled by the customer. However, it will be a rare circumstance where the customer can meet this burden.

Best Practices

To minimize the risk that a bank will be held liable for an unauthorized wire transfer, planning and diligence are required at every step of the process—from the selection and implementation of a core processor to the first contact with a potential new customer to the investigation into any unauthorized or fraudulent wire transfer. The following are best practices to help ensure that your bank is prepared to defend itself in the event of an unauthorized wire transfer:

- ▶ Commercially reasonable security procedures begin with the bank's selection and implementation of a core processor. In doing so, it is important for the bank to understand what security procedures other similarly-situated banks are offering their customers. The majority of banks in the United States obtain their core processors from one of three major vendors—FIS, Fiserv and Jack Henry. However, banks cannot assume that the mere implementation of a big-name core processor will end the court's commercial reasonableness inquiry, particularly since the bank exercises its discretion in choosing the core processor settings. The bank should be familiar with the Federal Financial Institutions Examination Council ("FFIEC") guidelines when making these choices.
- ▶ Customer agreements regarding online banking also play an important role in determining the commercial reasonableness of a security procedure. These online banking agreements should clearly delineate the security measures available to the customer at both the login and transaction levels. These security measures may include multifactor authentication, dual control, antivirus software requirements, daily limits on the total amount of wire transfers per day, per transaction limits and out-of-band authentication.
- ▶ If a customer declines to use security measures offered by the bank, the bank should require that the customer agree in writing that it is voluntarily choosing not to implement the bank's offered security procedure and will be bound by any payment order issued under the customer's chosen security procedure, whether or not authorized.
- ▶ Customer interactions, whether in person, on the phone, or electronically, should be carefully documented in order to later prove that the bank complied with its obligations to operate according to the reasonable expectations of the customer.
- ▶ When a customer provides notice to a bank of an allegedly unauthorized wire transfer, the bank should promptly perform a thorough investigation. The bank should involve experienced counsel in this investigation to provide legal advice throughout this process. Under the attorney-client privilege and the attorney work product doctrine, an attorney's involvement also will protect the investigation from discovery in any future litigation.

With careful planning and diligence, a bank can minimize the risk that it will be held liable for an unauthorized wire transfer. To our knowledge, Stradling is the only firm in California that successfully proved at trial that a bank's security procedures were commercially reasonable. As a result, Stradling is uniquely positioned to assist financial institutions by reviewing and auditing online banking policies, procedures and agreements, as well as to defend against



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The Changing Paradigm of the Estate Planning Fundamentals

The unification of the gift and estate tax systems occurred in 1976, and since that time estate planning strategies have changed for married couples. Originally, the common plan was to leave everything to the surviving spouse at death. However, with the potential that more estates could be subject to estate taxes and with an ever increasing fear about a survivor re-marrying and giving the deceased's share of the estate to a new spouse, a predator, or a creditor, new techniques arose.

Unless Congress acts to change the Applicable Exclusions Amount (commonly referred to as the estate tax exemption amount) it is set to increase to \$5.6 million per person in 2018. Currently, the House and Senate have competing proposals, which could either result in the doubling of the estate tax exemption or completely repeal it. The estate tax exemption amount is only one factor that affects the changing paradigm of estate plans. As discussed below, income tax liability should be a factor.

Traditionally, ABC trusts were created to allow for more of a married couples' estate to pass tax free. To illustrate the benefits of an ABC estate plan, assume a California couple has \$14.2 million of community property.

ALL TO SPOUSE PLANNING: An estate plan that requires the distribution of the trust estate to the surviving spouse would result in the estate being taxed only once. Depending upon the estate tax exemption amount at the death of the surviving spouse, it may result in increased tax liability to the estate. In our example, if both spouses pass away in 2018, the entire trust is taxed once. Without a portability election, the estate tax would be \$3.4 million at the death of the survivor.

ABC TRUST PLANNING: Under the same example, if the couple elects to have an ABC trust plan, the estate tax is \$1,200,000. Fundamentally, an ABC Trust requires the splitting of the trust estate into three separate sub-trusts with the following results:

A-Trust: Survivor's Trust

The A-Trust is a revocable trust that holds one-half of the community property assets and all of the surviving spouse's separate property. Under our example, A-Trust would be funded with \$7.1 million. The survivor gets all the income and principal without restrictions. The survivor can leave the remainder of the trust estate to whomever the survivor wants at death. At the survivor's death, the A-Trust assets are subject to the estate tax. If the survivor's gross estate remains at \$7.1 million, the A-Trust's share of the estate tax due at the survivor's death would be \$600,000.

B-Trust: Bypass Trust

The B-Trust is irrevocable, meaning the terms of the trust can't be changed. The B-Trust is sometimes called the bypass trust, residual trust, or the credit shelter trust. Under our example, the B-Trust would receive \$5.6 million – equal to the deceased's estate tax exemption amount. Typically, the trust would name the surviving spouse as the beneficiary for life with the right to receive the income and principal based on a HEMS standard (i.e. health, education, maintenance and support). The B-Trust is not subject to estate tax at the surviving spouse's death regardless of any appreciation.

C-Trust: QTIP Trust

The C-Trust is an irrevocable trust, similar to the B-Trust. The C-Trust is often referred to as the "QTIP" trust. The C-Trust would receive \$1.5 million of assets based on our example. The C-Trust must require the Trustee to distribute all the income to the surviving spouse annually. The remaining principal of this trust, at the survivor's death, is included in the gross estate of the surviving

spouse. Assuming that at the death of the survivor the C-Trust has assets totaling \$1.5 million the estate tax would be \$600,000, assuming death in 2018 under current law.

Estate Tax Savings: As illustrated above, by having the ABC Trust in place, it results in an estate tax savings of \$2.24 million.

INCOME TAX BASIS FACTORS TO CONSIDER WHEN SELECTING A PLAN

Currently, there is a paradigm shift in estate planning. As illustrated above, traditional planning focused on estate tax. Now, when considering an estate plan, income tax and capital gains implications are also factors to consider when making a decision. Under current law, when an individual dies the basis of the acquired asset is stepped-up to the date of death value, thus avoiding capital gains when the asset is later sold. Currently, there are differing proposals in the House and Senate which could repeal the step-up in basis rules. This could result in adverse tax consequences, essentially trading estate tax liability for capital gain tax on assets after death.

A couple with an ABC Trust may experience increased income tax liability as a result of this plan. Under our estate example above, at the surviving spouse's death, the A-Trust and the C-Trust (QTIP) each receive a step-up in basis; but there is no step-up in basis for the B-Trust.

To that end, if the survivor lives for 10 years more and assuming the B-Trust assets double in value, the \$5.6 million amount that was initially funded into the B-Trust would be worth \$11.2 million. Then, if sold after the death of the surviving spouse the \$5.6 million in gains would be subject to capital gains tax. The resulting tax could be as much as \$1.96 million at a 33% overall rate. The trade-off, however, is that those B-Trust assets are not subject to estate tax, which if taxed at the current rate of 40% would generate an estate tax of \$2.24 million. Thus, there is an overall tax savings of \$280,000 by utilizing the B-Trust.

CONCLUSION

Only 0.20% of US citizens or residents who died in 2016 paid estate taxes. That means 99.8% who died did not need a B-Trust to save estate taxes. However, that doesn't mean the risk of predators or creditors subsides. At Ferruzzo, we develop plans to reduce concerns arising from creditors, predators, and surviving spouse's remarriages. Depending upon your assets and beneficiaries, we draft plans that utilize only the A-Trust and C-Trust. This allows certainty regarding beneficiaries upon the first spouse's death, while still receiving the step-up in basis under current law.

Even though the estate tax future is uncertain, it is important that your estate plan is certain. Some believe that postponing planning until Congress acts is better because they will have certainty about the estate tax amount. There is one thing that Congress has taught us in estate planning historically: the exemption amount may be increased, decreased, or be repealed. However, it will not be stagnant. The changes to the estate tax exemption amount should not stop you from creating or updating any existing estate plan. It is important that you protect your estate and your beneficiaries by having a comprehensive estate plan.



James K. Leese, Esq. is a Partner and chairs the Firm's Estate Planning Practice Group. His practice group dedicates themselves to all aspects of Estate Planning including Advanced Estate Planning, and Business Succession planning.



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IT'S YOUR BUSINESS IT'S YOUR FAMILY

At FERRUZZO, we know how important your legal issues are because we take a personal interest in you. Strong, lifetime relationships form the cornerstone of our practice and it has been that way for over 35 years. As we continue to grow, let our experience, risk-awareness, and agile business savvy navigate you through the rapidly-shifting legal world.

BUSINESS TRANSACTIONS We work closely with you, your business, and your trusted advisors to set and achieve strategic plans. From start-ups to business operations, expansion to acquisition or sale, and devising an exit strategy, our transactional attorneys bring powerful expertise in the areas of tax planning, deal structure, real estate transactions, and asset protection.

NEW DEALERSHIP REPRESENTATION Beginning in 1984, Ferruzzo has represented new vehicle dealerships. In addition to advising new motor vehicle dealerships, we have negotiated with all of the vehicle manufacturers, set up and reorganized the dealership entities, provided advice on the daily operations and laws governing the sale, rental, lease, financing, and repair of motor vehicles.

BUSINESS LITIGATION Our trial lawyers vigorously prosecute or defend your case and have brought to successful conclusion trials in state and federal civil court, appellate court, arbitration and before federal, state and local administrative boards and commissions. Our caseload regularly includes corporate and partnership disputes, real property disputes, and construction defect defense. Whatever litigation issue you may be facing, we'll walk you through it every step of the way.

REAL ESTATE Working alongside both owners and users of commercial real estate, our goal is to add significant value

to the processes of property acquisition, due diligence, development, operations and disposition. Our depth of experience in real estate extends to construction, environmental conditions and sophisticated lease transactions and our approach is both efficient and practical. It's not about meeting your expectations, it's about exceeding them.

ESTATE PLANNING Our team of estate planning attorneys design and implement estate plans that accomplish your objectives, ever mindful of preserving family harmony and providing smooth asset transition with minimal opportunity for dispute or court interference. You want experience, knowledge, and specialization. That's why our attorneys include Certified Specialists in the areas of Estate Planning, Trust and Probate Law. Meticulous planning – it's what we do.

TRUST ADMINISTRATION & PROBATE AND TRUST LITIGATION Let our probate and trust administration group guide you through the complex legal, tax and financial issues that require expert analysis, discussion and decision. And when a contested matter may arise in connection with a probate or trust, our team of probate and trust litigation attorneys have the tenacity to litigate the dispute to efficiently protect your interests.

EMPLOYMENT PRACTICES We work hard to safeguard your business by providing preventative counseling and sound practical advice regarding the complicated employment laws that impact your business. And we are there to defend your business when a claim is brought alleging any of the myriad of state and federal laws that affect you and your employees. Our team of employment attorneys regularly defend wage and hour claims, allegations of harassment and discrimination, and wrongful termination. Your business deserves the proactive approach that our Firm offers and our litigation team is ready to defend your business when a disputed issue arises.



Postmarital Disagreements

by Stephen Jay Kaufman, Founding Partner, Kaufman Steinberg LLP

Premarital agreements help spouses resolve potential divorce issues, and save them a lot of time and money when things don't work out. Pre-divorce planning can have as big, or even bigger impact on what it will cost in time, money and pain to end a marriage.

If you're thinking about Paul Simon's idea – to "... just slip out the back, Jack, make a new plan, Stan, you don't need to be coy, Roy, just set yourself free..." - you should definitely think again. The issues raised in separating property and sharing children are legally complex. The spouses who plan carefully with good counsel's assistance regularly avoid the enormous drain of time and resources to litigate these issues. Relationships are better-preserved and fostered when necessary, or vital to the interests of children, if the process of divorce is well-managed. That takes planning.

You want to take your share of the community when you go, and that means your parental rights too, if you have kids. But the decision to separate is often made in haste, and that can be a costly mistake. Irreplaceable photographs, valuables and obscure financial records are often left behind, never to be seen again. Children and parents are uncertain how and when they'll see each other. While the conversations with your lawyer and your spouse may be painful, having them before you slip out the back can help you avoid having the screen door hit you on the way out.

Spouses have fiduciary duties to each other, and they owe each other complete candor regarding their financial affairs, during marriage and after separation. Seasoned family law attorneys navigate complex and demanding rules regarding discovery, and sharing that information is a whole lot cheaper than compelling a spouse to produce the same facts and figures by force of law. Gathering (and at some point) sharing sensitive personal documents, and taking inventory of personal property, are essential parts of planning for divorce. Consider getting some professional advice before you walk away from

it all or back up the moving van to the front door.

Family law attorneys see a wide variety of outcomes to divorce. We see some parties and children devastated by divorce, it's true. But we also see parties that divorce very well, remain friends, share and support their children and each other. And we see everything in between those two extremes. We also see extreme fluctuations in the transactional costs of divorce in time, money and emotional distress. The best outcomes are often achieved by people who understand the process going in, plan well, and participate in fashioning their individual outcomes themselves.

Attorneys inform their clients' choices; they do not make them. Judges decide issues spouses cannot decide between themselves. Good family law attorneys will help their clients understand the issues they face in divorce, and help them make plans to resolve those issues. Just thinking about splitting can be overwhelming, but *not* thinking about the issues or seeking professional advice about them can be disastrous.

Stephen Jay Kaufman, Esq., CFLS

Steve Kaufman is a founding partner of Kaufman Steinberg LLP. Certified as a family law specialist by the California State Bar, Steve has practiced family law for 25 years, and has been named as a Super Lawyer since 2015. Steve lives in Irvine. He is a volunteer counselor to victims of domestic violence at Human Options, and he is involved in community affairs throughout Orange County. Contact him at steve@kaufmansteinberg.com.



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KAUFMAN STEINBERG LLP

DIVORCE, CUSTODY, PROPERTY DIVISION, PREMARITAL AGREEMENTS, POST-JUDGMENT MODIFICATIONS

FAMILY LAW CLIENTS WITH ISSUES INVOLVING CHILD CUSTODY, CHILD SUPPORT, SPOUSAL SUPPORT, PROPERTY DIVISION AND DOMESTIC VIOLENCE NEED HIGHLY SKILLED, KNOWLEDGEABLE AND EXPERIENCED ATTORNEYS TO GUIDE THEM WITH DISCRETION AND DEDICATION, TO BE TREATED FAIRLY AND HONESTLY, AND TO PROTECT AND PRESERVE ASSETS AS WELL AS RELATIONSHIPS TO THE GREATEST POSSIBLE EXTENT. AT KAUFMAN STEINBERG, WE DO ALL THAT FOR OUR CLIENTS, AND MORE, EVERY DAY.

