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# the PRACTITIONER

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About Today's Rapidly Changing  
Immigration Laws

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The Magazine of the Solo & Small Firm Section of the California Lawyers Association

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# Letter From the Chair

By Ritzel Starleigh Ngo



**Ritzel Starleigh Ngo** is the Chair for the Solo & Small Firm Section of the California Lawyers Association, and she practices family law in Pasadena. Ms. Ngo is experienced in contentious

dissolutions; parentage matters; child custody and visitation, spousal and child support; property division; temporary and permanent restraining orders; including domestic violence, elder abuse, and civil harassment. She can be reached at [ritzel@gmail.com](mailto:ritzel@gmail.com).

Dear Section Members:

Our section has identified several subcommittees which I want you to be aware of, so that you can join and participate and share your ideas. Thank you to our members who have reached out to me and other members of our executive committee with ideas to provide our section with feedback in how we can support your needs as a small law firm and/or a solo practice.

The subcommittees of the Solo and Small Firm section, which includes a brief description and e-mail contact person are as follows:

- **Membership, Marketing and Social Media:** focus on improving member benefits, and marketing our section and practice, and social media efforts for our section. Steven Mayer, email: [smayer@mayerlawla.com](mailto:smayer@mayerlawla.com)
- **Publications committee:** focus on the PRACTITIONER magazine, reviewing and publishing substantive and procedural articles. Subcommittee Chair: Omar Anorga, e-mail: [omar@anorgalaw.com](mailto:omar@anorgalaw.com)
- **Outreach committee:** focus on serving the needs of the underserved attorney/legal population in our section, which includes lesser-populated areas. Subcommittee Chair: Nancy Goldstein, email: [nbg.esq@gmail.com](mailto:nbg.esq@gmail.com)

- **Appointments subcommittee:** focus on appointing new members to the section's executive committee. Subcommittee Chair: Susan Share: [sshare@susansharelaw.com](mailto:sshare@susansharelaw.com)
- **Attorney of the Year Award:** focus on identifying multiple attorney candidates for the attorney of the year award, which is recognized and celebrated that the Sections Convention annually in September. Subcommittee Chair: Robert Klein, e-mail: [Robert@rkleinlaw.com](mailto:Robert@rkleinlaw.com)
- **Programs subcommittee:** focus on identifying educational MCLE programs (live, webinars, webcasts, Section Convention). Education Chair: Sabrina Green: [sgreen@sglawcorp.com](mailto:sgreen@sglawcorp.com).

We look forward to your participation.

Please keep a look out for our live program e-blasts and upcoming e-newsletters for details which will include executive committee member visits to your local bar association, webinars, and committee updates.

All the best for your practice,

Ritzel Starleigh Ngo

# Letter From the Editor

By Omar Sebastian Anorga



**Mr. Anorga** represents businesses and individuals with various legal problems, and he strives to always resolve these problems in a smart, and cost-effective manner. Mr. Anorga has vast experience with litigating legal

disputes in both state and federal court. Lastly, The Anorga Law Firm, Inc., has a large stable of Spanish-speaking business owners, and Mr. Anorga is able to communicate with them in their native language.

**T**his issue of *the PRACTITIONER* is predominately focused in on providing you with articles examining certain new laws or updates and revisions to existing laws, each being enacted and/or implemented earlier this year. In addition to keeping you abreast of changes in the law, and how it could affect your practice, we are also providing you with an informative MCLE article on how judgment liens can be a powerful tool in your collection efforts, and a best practices article on how you can better manage your time in an effort to balance life/work activities.

We start off with author Louis J. Shapiro, who provides us an article on how the lawful recreational use of cannabis is having an effect on DUI prosecution. Next, author Princessherry Hechanova writes on important changes having an impact on immigration policies. We move onto attorney and

professor Neil J. Wertlieb who examines several proposed new amendments to the Rules of Professional Conduct, and how those amendments can change current standards, and add new obligations for licensed practitioners. Thereafter author David R. Ruiz discusses how a Federal Court upheld the legality of the California anti-fraud provisions and added some notice and hearing requirements to guarantee due process for medical providers. Finishing up the update articles, author Steven L. Krongold examines the issue of what property interest—and, therefore, profits—a dissolved law firm might have in cases that are in progress but not completed at the time of dissolution.

As you can see, this issue of *the PRACTITIONER* is jam-packed with great content—we hope you enjoy it and find it useful!

## the PRACTITIONER FOR SOLO & SMALL FIRMS

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The statements and opinions expressed in the PRACTITIONER for Solo & Small Firms are those of the authors and do not necessarily reflect the views or policies of the California Lawyers Association, the Solo and Small Firm Section, or any government entity.

the PRACTITIONER for Solo & Small Firms is designed to provide accurate information to professional advocates. However, we make this subject matter available to our members with the understanding that the publisher is not engaged in rendering legal or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

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# Cannabis Country

By Louis J. Shapiro Esq.



**Lou Shapiro**, a former LA County Public Defender, is a criminal defense attorney out of Century City and a certified criminal law specialist by the State Bar of California. He is also a TV/Radio Legal Analyst, NBC Trial & Error

Legal Consultant and advises on the board member of the California Innocence Project.

Even though it's only been a few months since cannabis became lawful to use recreationally, we are already seeing its immediate impact to the DUI sector.

Cannabis DUIs are becoming an increasing conundrum for everyone involved. Starting with law enforcement, police are making cannabis DUI arrests when they smell its odor and the driver admits to any recent usage. Because no current scientifically validated roadside testing exists for cannabis impairment—as for alcohol impairment—police are resorting to simply arresting the driver, and passing the issue onto the prosecutors.

Once the prosecutor is assigned the case, he or she is provided with a qualitative toxicology report by the local crime lab. This report only reveals whether cannabis was detected in the blood stream. It does not provide numerical information. It is up to the defense attorney to make a discovery request for the quantitative analysis of the sample.

The quantitative analysis of the sample provides three numbers. We will use the following example to illustrate:

1. 2.0 ng/mL THC
2. 13.1 ng/mL Carboxy THCA
3. 0/neg 11-Hydroxy THC

THC is the amount of psychoactive THC in the system. It affects the mind, mood, and other mental processes. In the double digits it may be comparative to having two alcoholic drinks. These results are on the very low end of the scale. This is obviously a good factor for the defense.

Carboxy THCA is the amount of non-psychoactive THC in the system. THCA does not affect the mind or mental processes. It also indicates a long-term time frame of THC usage. This property attaches to fat cells and remains in the system days-months after absorption. A frequent user will have a higher amount of THCA in their system. In this instance, the number is quite low according to most experts and does not fit the profile of a habitual user.

11-Hydroxy THC indicates a short-term time frame of THC absorption. The higher the number the more recent the absorption. In some cases, this particular THC will not appear in results due to absorption occurring several (i.e., between four and six) hours before the test. This appears to be the case in these test results. The fact that this is not present indicates that the driver did not have a recent usage prior to driving and is very good for the defense.

The performance on the standardized field sobriety tests also factor into the case evaluation. But assuming that the driver performed decent on them, the quantitative analysis numbers leaves the lawyers with more confusion than clarity. Here, application of the “proof beyond a reasonable doubt” standard clearly benefits the defense.

This leads to most of the cases settling for something below a DUI (example: reckless driving or exhibition of speed) or going to trial and resulting in hung juries and acquittals.

In conclusion, the good news is that the defense generally will have the better hand to argue in cannabis DUIs. The bad news is that it will cost the defendant a significant amount of resources and time to get there.

Just another day in the justice system.

# Five Things You Need to Know About Today's Rapidly Changing Immigration Laws

By Princessherry Hechanova



Although **Princessherry Hechanova** started her career as a litigator, defending healthcare professionals in personal injury cases, her passion for immigration drove her to continue to pursue her goal to manage her own immigration firm. Today, she has offices in both Los Angeles and Orange County, where modern technology allows her to assist clients located throughout the United States as well as those in foreign countries. She continues to believe that immigration has made, and continues to make, the United States the great country it is today.

**W**ith the change of administration in 2017 came widespread change in immigration law. Covering each and every change in detail will take more space than this publication can cover. Thus, we have limited this article to some of the most pressing changes:

## 1. DACA:

The Deferred Action for Childhood Arrivals (DACA) was a program established by the prior administration through an executive order. This allowed for individuals who entered as minors and remained in the United States illegally to receive a two-year period of deferred action from deportation. The program also allowed for DACA recipients to obtain a work permit.

On September 5, 2017, the current administration announced its plan to phase out the DACA program. As of February 13, 2018, a second federal judge has issued an injunction that orders the present administration to keep in place the DACA program. Prior to that, a California district court ruled to partially maintain DACA. Presently, here is a summation of the present DACA policy in effect: <https://www.uscis.gov/daca2017>

- USCIS will still not accept *new* DACA applications.
- DACA recipients, who are eligible to renew, may still file their renewal application.

- DACA recipients whose DACA expired on or after September 5, 2016, may still file for renewal.
- DACA recipients whose DACA expired before September 5, 2016, must file a new initial DACA request, but must list the date that their prior DACA expired.

## 2. TPS:

Temporary Protected Status (TPS) is a program that was established by Congress through the Immigration Act of 1990 as a humanitarian program that suspends deportation to countries that have been destabilized by war or catastrophe. Foreign nationals with TPS protection are generally able to obtain a work permit and a driver's license. Presently, the following countries are designated for TPS: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen. However, just like DACA, this program has also experienced sweeping changes during the present administration's short tenure:

- In January 2018, the administration announced that it is ending TPS for Salvadorans, effective September 9, 2019. Thus, following that date, their immigration status will revert to whatever it was before they were granted TPS protection.



- Also in January 2018, the administration announced that it was extending TPS for Syrians through September 30, 2019.
- TPS for Haitians will end on July 22, 2019.

### 3. H-1B:

The H-1B visa allows U.S. employers to employ foreign workers in specialty occupations.

- On March 31, 2017, USCIS released a policy memorandum, which concludes that most computer programmer positions would not qualify for the H-1B category in light of the updated Occupational Outlook Handbook (OOH) job duties and educational requirements. The memorandum indicates officers should scrutinize the Labor Condition Application (LCA) to make sure wage levels correspond to job duties and the specialized nature of the position. Finally, the memorandum indicates that merely requiring a degree for the position, without more evidence, does not, in and of itself, support the notion that the position is a specialty occupation.
- On April 18, 2017, the present administration issued an executive order titled, *Buy American and Hire American* (Exec. Order No. 13788). The Order directed the Secretaries of State, Labor, and Homeland Security, as well as the Attorney General, to propose new rules and issue new guidance to protect the interests of U.S. workers. Particularly, the administration highlighted the H-1B visa program, where it demanded reforms to help ensure that H-1B visas are awarded to the most skilled and highly paid beneficiaries.
- USCIS has updated its policy to ensure that petitioners meet the burden of proof for nonimmigrant employment based extension of petitions. The updated guidance instructs officers to apply the same level of scrutiny when reviewing nonimmigrant visa extension requests even though nothing has changed (same

employer, same duties, same everything). The updated policy guidance rescinds the previous policy, which instructed officers to give deference to the findings of a previously approved petition, as long as the key elements were unchanged and there was no evidence of a material error or fraud related to the prior determination.

### 4. PERM:

Program Electronic Review Management (PERM) is an immigration process wherein positions that need to be filled are tested against the United States labor market to determine whether there is a U.S. worker who is able and willing to fill the position. If a qualified U.S. worker is not found, then a foreign worker may obtain the position and obtain permanent residency through the program.

- Starting on October 2, 2017, all I-140-based adjustment of status applicants will be required to appear for an in-person interview at a USCIS Field Office.

### 5. TRAVEL BAN:

- The first ban, introduced a week after the current administration took office, blocked entry into the U.S. for individuals from seven Muslim-majority countries —Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—for ninety days. This ban applied to both new visa applicants and then visa holders from the identified countries. The present administration announced a second ninety-day ban on March 2017.
- After the courts halted the first ban, the present administration issued the second ban, which dropped Iraq and individuals who already held valid visas. That ban, too, was enjoined by federal courts.
- However, in June of 2017, the Supreme Court allowed an amended version of the second ban. The court carved out an exception for individuals with “a credible claim of a bona fide relationship with a person or entity in the United States.”



- Upon the expiration of the second ban, the September 2017 proclamation outlined new restrictions for nationals of eight countries: Chad, Libya, Iran, North Korea, Somalia, Syria, Venezuela, and Yemen (Proclamation No. 9645). The restrictions on travelers from the above-listed countries

vary by country. The restrictions range from a total ban on all immigrant and nonimmigrant travel for nationals of North Korea and Syria to a limited ban on short-term travel for business and tourism by certain Venezuelan government officials and their immediate family members.

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### ERRATA

In our initial issue of the PRACTITIONER this year, the response to question four in the MCLE article was incorrect. Instead, the correct response should have stated that you can expunge a conviction. However, whether you can reduce the conviction to a misdemeanor will depend on whether the conviction was a wobbler, and depending on whether you were sentenced to prison, jail or whether you received a sentence of probation that includes a period of jail time that does not exceed 364 days as a condition of probation. The latter two are reducible. The court cannot reduce a felony to a misdemeanor when a prison sentence was imposed, or suspended. We apologize for the incorrect information and thank our readership for bringing it to our attention.

# Proposed New Ethics Rules, and Their Impact on Solo Practitioners

By Neil J Wertlieb\*

**S**eventy proposed new and amended Rules of Professional Conduct were recently submitted by the State Bar to the California Supreme Court for approval.<sup>1</sup> If approved, these proposed Rules would replace the forty-six Rules of Professional Conduct that currently govern the conduct of attorneys in California.<sup>2</sup> Several of the proposed Rules would implement controversial or important changes to the current Rules or impose new obligations in California. As a result, all attorneys in the State should be aware of these proposed changes.

The California Rules of Professional Conduct apply to all attorneys in the state. Failure to comply with the Rules may result in discipline, including being disbarred from the practice of law.<sup>3</sup> Failure to comply in a litigation matter may also result in disqualification from that matter.

All states other than California have rules of professional conduct that are based on the Model Rules developed by the American Bar Association.<sup>4</sup> In fact, at this time California is the only state with its own unique set of rules of professional conduct. The last comprehensive revision of the Rules in California was submitted to the California Supreme Court in 1987 and became operative in 1989. Since then, numerous changes have influenced the practice of law, including technological advances, multijurisdictional practices, and a focus more on the practice of law as a business—all with potential ethical implications.



**Neil J Wertlieb** is an experienced transactional lawyer who provides expert witness services in litigation and arbitration matters. He has served as an expert witness in disputes involving business transactions and corporate governance, and

in cases involving attorney malpractice and attorney ethics. He is a former Chair of the California State Bar's Committee on Professional Responsibility and Conduct, a former Chair of the Business Law Section of the California State Bar, and a former Co-Chair of the Corporations Committee of the Business Law Section. He is also an Adjunct Professor at UCLA School of Law, the General Editor of *Ballantine & Sterling: California Corporation Laws*, and the Vice Chair of the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee. For additional information, please visit [www.WertliebLaw.com](http://www.WertliebLaw.com).

## HISTORY:

In 2001 and 2002, the Model Rules were revised, which prompted the Board of Governors of The State Bar to appoint a Commission for the Revision of the Rules of Professional Conduct (the "Predecessor Commission") to do a comprehensive review of the Rules. However, after more than a decade of work, in 2014 the California Supreme Court granted The State Bar's request to restart the effort. A second Commission for the Revision of the Rules of Professional Conduct (the "Commission") was appointed in January 2015. The Commission began an expedited process, with a goal of submitting proposed Rules by the end of March 2017. The Commission carefully reviewed the California Rules and related law, compared the Rules against the Model Rules, and examined how the Model Rules had been adopted and interpreted in other jurisdictions. After soliciting public comment, the Commission presented a set of proposed Rules to the Board of Trustees of the California State Bar. The Board of Trustees then submitted the proposed Rules to the California Supreme Court before the March 31, 2017 deadline.

## WHAT ARE THE CHANGES?

One of the most significant (although non-substantive) changes reflected in the proposed Rules is a change to the numbering scheme of the Rules. The Commission determined that the Rules should generally conform to the organization and rule numbering of the Model Rules. This change allows for easier comparison and review across various jurisdictions.

**This article highlights for solo practitioners a number of the proposed Rules that would implement material changes from the current regulatory scheme—material due to substantive changes in the law, potentially disruptive compliance issues, or public policy and enforceability considerations.** It is important to note, however, that this article is not a comprehensive review of all of the changes reflected in all of the proposed Rules. Also, the proposed Rules discussed herein are not effective, and will not become effective, unless and until approved by the California Supreme Court.

### Controversial or Potentially Disruptive Changes:

The following three rules are noteworthy in that the changes they propose are controversial or potentially disruptive.

**Sexual Relations with Current Client.** Our current rule, California Rule of Professional Conduct 3-120, effectively permits a lawyer to engage in “sexual relations” (as defined in the Rule) with a client, provided that the lawyer does not:

- “(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation;
- (2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or
- (3) Continue representation of a client with whom the [lawyer] has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110 [Failing to Act Competently].”

In contrast, most other jurisdictions have adopted a version of Model Rule 1.8(j), which imposes a bright-line standard that generally prohibits all sexual relations between a lawyer and client unless the sexual relationship was consensual and existed at the time the lawyer-client relationship commenced.

Proposed Rule 1.8.10 reflects a major shift from current Rule 3-120, and substantially adopts the bright-line prohibition approach of Model Rule 1.8(j):

“A lawyer shall not engage in sexual relations with a current client who is not the lawyer’s spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.”<sup>5</sup>

This proposed change has been very controversial, and has attracted much commentary during the public review process and in the press. The Commission itself recognized that the change represents a significant departure from California’s current Rule, and may implicate important privacy concerns. The members of the Commission, however, concluded that the current Rule has not worked as intended, as evidenced by the fact that, in the twenty-five years since the adoption of Rule 3-120, there have been virtually no successful disciplinary prosecutions under the Rule as currently formulated.

**Prohibited Discrimination, Harassment and Retaliation.** Proposed Rule 8.4.1, like current Rule 2-400 (which it would replace) would prohibit unlawful discrimination, harassment, and retaliation in connection with the representation of a client, the termination or refusal to accept the representation of any client, and law firm operations. However, Rule 8.4.1 reflects a fundamental change from Rule 2-400. Proposed Rule 8.4.1 would eliminate the current requirement that there be a final civil determination of such unlawful conduct before a disciplinary investigation can commence or discipline can be imposed.<sup>6</sup> The current Rule requires a prior adjudication by a tribunal of competent jurisdiction (i.e., not the State Bar Court):

“No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a

tribunal of competent jurisdiction . . . shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred.”<sup>7</sup>

A majority of the members of the Commission believed that the prior adjudication requirement renders the current Rule difficult to enforce. The Commission cited the fact that there does not appear to be any discipline ever imposed under the current Rule. Further, no other California Rule contains a similar limitation on the original jurisdiction of the State Bar Court.

Proposed Rule 8.4.1 was one of the more controversial rules being proposed by the Commission. In fact, the State Bar’s Board of Trustees, on its own initiative when considering the Commission’s proposal, mandated that an alternative version of this rule be sent out for public comment—the only rule as to which the Board of Trustees took such action. And in its final vote on the proposal, the Board of Trustees was evenly split 6 to 6, with the State Bar President breaking the tie in favor of the version of the rule proposed by the Commission.

**Some of the primary concerns raised by the elimination of the prior adjudication requirement include the following:**

- First, State Bar complaints may be filed by aggrieved clients and employees without concern for the negative consequences typically associated with filing complaints in litigation, such as being subject to claims for malicious prosecution or attorneys’ fees.
- Second, the State Bar Court is not properly experienced or staffed to become the forum of first resort for a victim of discriminatory, harassing or retaliatory conduct committed by a lawyer.
- Third, the disciplinary process before the State Bar Court does not provide for the same due process protections to lawyers accused of such conduct in a tribunal of competent jurisdiction. (For example, lawyers are afforded limited discovery in matters before the State Bar Court). On the other hand, the deficiencies identified above

in the current Rule (with respect to enforceability) led several Commission members, as well as members of the public (as reflected in public commentary), to view the current Rule as discriminatory in and of itself.

**In response to public concerns with respect to the elimination of the prior adjudication requirement, the Commission modified the proposed Rule to impose a self-reporting obligation on a lawyer who receives notice of disciplinary charges for violating the Rule.** This modification would require the lawyer to provide a copy of a notice of disciplinary charges pursuant to proposed Rule 8.4.1 to the California Department of Fair Employment and Housing, the United States Department of Justice, Coordination and Review Section, or to the United States Equal Employment Opportunity Commission, as applicable.<sup>8</sup> The purpose of this modification is to provide to the relevant governmental agencies an opportunity to become involved in the matter so that they may implement and advance the broad legislative policies with which they have been charged. Further, a comment to the proposed Rule clarifies that the Rule would not affect the State Bar Court’s discretion in abating a disciplinary investigation or proceeding in the event that a parallel administrative or judicial proceedings arises from the same lawyer misconduct allegations<sup>9</sup>—thus giving a tribunal of competent jurisdiction an opportunity to adjudicate the matter before the State Bar Court takes action.

**Safekeeping Funds and Property of Clients and Other Persons: Current Rule 4-100 requires that all funds received or held for the benefit of clients by a lawyer or law firm be deposited into a client trust account.** Such funds include settlement payments and other funds received from third parties as well as advances for costs and expenses. But, while best practices may dictate otherwise, the current Rule does not require the lawyer or law firm to deposit into a client trust account advance fee retainers or deposits. Such payments are not currently required to be segregated from the lawyer’s or law firm’s funds, and may be deposited into a firm operating account. By including the word “fees,”

Proposed Rule 1.15 would mandate that advances for legal fees be deposited into a client trust account.<sup>10</sup>

The permissive nature of current Rule 4-100 has led many lawyers and law firms to simply deposit all such fees into their operating accounts, some due to the operational needs of the type of practice at issue. **In fact, many solo practitioners have not even needed to maintain a trust account due to the nature of their practices. This will change under proposed Rule 1.15.**

Similar to current Rule 4-100, proposed Rule 1.15 would apply to funds “received or held” by a lawyer or law firm, and would require that the bank account into which funds are deposited be “maintained in the State of California” (subject to a limited exception).<sup>11</sup> As a result, the addition of a simple four-letter word to the Rule may cause material disruption to practitioners in the State.

- First, because the Rule is not just prospective (by applying to funds received following enactment of the proposed Rule), but applies to funds “held” by a lawyer or law firm for the benefit of a client, funds received prior to the enactment of the Rule and deposited into the firm’s operating account would have to be identified, traced and deposited into a trust account. Because of the formulation of the Rule, it would essentially be given retroactive effect.<sup>12</sup>
- Second, because the trust account must be maintained in California, firms that are based outside of the State or otherwise maintain their banking relationships outside of the State would be required to establish new banking relationships within the State.

It is important to note that the requirement to deposit advance fees into a trust account would not apply to a “true retainer,” which is defined in proposed Rule 1.5 as “a fee that a client pays to a lawyer to ensure the lawyer’s availability to the client during a specified period or on a specified matter.” Such a fee is earned upon receipt, not as compensation for legal services to be performed, and as such may be deposited directly into a firm’s operating account.

Similarly, proposed Rule 1.15 permits a flat fee paid in advance for legal services to be deposited into an operating account, but only if the lawyer discloses to the client in writing that (i) the client has a right to require the flat fee be deposited into a trust account until the fee is earned and (ii) the client is entitled to a refund of any unearned amount of the fee in the event the representation is terminated or the services for which the fee has been paid are not completed; and if the flat fee exceeds \$1,000, the client must consent in writing.<sup>13</sup>

### **Important Changes Attorneys Should Know:**

While not as controversial or potentially disruptive as the foregoing proposed Rules, attorneys in California should be aware of the following four Rules which propose important changes to our current Rules.

#### **Advising or Assisting the Violation of Law:**

Proposed Rule 1.2.1 provides that a “lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.” Rule 1.2.1 carries forward the substance of our current Rule 3-210, but proposed new Comment [6] clarifies that a lawyer may counsel a client in the client’s compliance with a state law that conflicts with federal law.<sup>14</sup>

The addition of Comment [6] apparently was intended to provide some clarity on the provision of legal services to medical marijuana dispensaries, which are not permitted under federal law, but generally are lawful in California. Arguably, due to the absence of language similar to Comment [6], the wording of current Rule 3-210 might be read to preclude advising clients with respect to such issues (although there are two ethics opinions that have concluded otherwise).<sup>15</sup>

**Communication with Clients.** Current Rule 3-500 articulates a broad requirement likely intuitive to most practitioners: Lawyers must keep their clients “reasonably informed about significant developments relating to the representation.” But this Rule provides little guidance as to precisely what and how much information lawyers must share.

Proposed Rule 1.4 is generally consistent with Rule 3-500, but it adds clarifying language from the corresponding Model Rule that has been adopted by most other states. This language is intended to enhance public protection by more clearly stating a lawyer's obligations to clients with regard to communication.

**Rule 1.4 would require that lawyers promptly inform their clients of any decision or circumstance with respect to which disclosure or the client's informed consent is required by the Rules, and advise the client of any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance that may not be permitted under the Rules.** As a result, lawyers must not only inform clients as to what they will do, they must also advise clients as to what they cannot do.

Rule 1.4 provides that a lawyer must explain matters to the extent reasonably necessary for clients to make informed decisions regarding the representation, and would also require that a lawyer reasonably consult with the client about the means employed to accomplish the client's objectives. Combined, these obligations help to ensure that the client understands the information conveyed and to empower the client to be an active participant in the matter.

**Conflicts of Interest:** Current Clients: Current Rule 3-310 governs conflicts of interest among current clients. The provisions of the Rule are viewed as taking a "checklist" approach to identifying conflicts because they describe discrete situations that might arise in representations that trigger a duty to provide written disclosure to a client or obtain a client's informed written consent in order to continue the representation. For example, these situations include a representation where a lawyer has a relationship with a party or witness in the case, or where a lawyer has a financial interest in the subject matter of the representation.<sup>16</sup>

Proposed Rule 1.7 would replace the current "checklist" approach with generalized standards that follow the Model Rule approach to current client conflicts. Under this new approach, the inquiry for assessing whether a conflict is present is to simply ask whether there is either direct adversity "to another

current client in the same or a separate matter" or "a significant risk that the lawyer's representation of a current client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client, or by the lawyer's own interests."

As is the case under Rule 3-310, Rule 1.7 provides that, if such a conflict of interest exists, the lawyer shall not proceed with the conflicted representation without informed written consent from each affected client.

**Organization as Client:** Both proposed Rule 1.13 and our current Rule 3-600 make clear that, in representing an organization, it is the organization itself—and not its directors, officers, employees, or other constituents—that is the client of the lawyer. As an entity, the organization can only act through its authorized officers, employees, and other individuals, and such individuals are not the client even though the lawyer may take direction from such persons. Proposed Rule 1.13, however, makes the following substantive changes to Rule 3-600:

- First, Rule 3-600 permits a lawyer to refer a matter to a higher authority within the organization under certain circumstances, including when the lawyer becomes aware that a constituent of the organization is acting, or intends to act, in a manner that either may be a violation of law imputable to the organization or is likely to result in substantial injury to the organization. (Such an action by the lawyer is often referred to as "reporting up the corporate ladder.") Proposed Rule 1.13 would mandate reporting up in certain circumstances. This mandate is consistent with the ABA Model Rule and the rules of many other states, but it diverges from current Rule 3-600 which permits, but does not require, a lawyer to take such action.<sup>17</sup>
- Second, while the circumstances that trigger reporting up the corporate ladder under Rule 3-600 are based on the lawyer's actual knowledge, a lawyer's duty to report under proposed Rule 1.13 would be triggered by two separate scienter standards: (1) a

subjective standard that would require actual knowledge by the lawyer that a constituent is acting, intends to act, or refuses to act; and (2) an objective standard that asks whether the lawyer knows or reasonably should know that the constituent's actions would be (a) a violation of either a legal duty to the organization or law reasonably imputable to the organization, and (b) likely to result in substantial injury to the organization.

- Third, unlike Rule 3-600 which permits a lawyer to take corrective action if there is either a violation of law or likely to be substantial injury to the organization, Rule 1.13 would require that both be present before a lawyer's duty to report up the corporate ladder is triggered.
- Fourth, under Rule 1.13, a lawyer would be required to notify the highest authority in the organization if the lawyer has been discharged or forced to withdraw as a result of his or her reporting up obligation. No such notification is required by current Rule 3-600.

### Entirely New Rules:

The following three Rules are new to California.

**Duties to Prospective Clients:** Proposed Rule 1.18 would impose duties upon lawyers relating to consultations with a prospective client—*i.e.*, a “person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal services or advice from the lawyer in the lawyer's professional capacity.”<sup>18</sup> In particular, lawyers would have the obligation to preserve the confidentiality of information acquired during a consultation prior to the establishment of an attorney-client relationship. Even if no attorney-client relationship is established, under this Rule a lawyer is prohibited from using or revealing confidential information learned as a result of the consultation.

Although concepts articulated in this Rule are already the law in California and do not establish new standards,<sup>19</sup> the Commission acknowledged the

importance of including these concepts in the Rules so as to alert lawyers to this important duty and provide lawyers with guidance through a clearly-articulated disciplinary standard on how to comport themselves during a consultation.

The Rule would further prohibit a lawyer from representing a client with interests adverse to those of the prospective client in the same or substantially related subject matter, absent informed written consent from the prospective client, if the lawyer has obtained confidential information material to the matter.

**Truthfulness in Statements to Others:** It has long been recognized in California that attorneys may be disciplined for intentionally deceiving a tribunal or opposing counsel, and that attorneys may be civilly liable to a third party for making false statements of material fact on behalf of a client. Further, our Business & Professions Code provides that attorneys may be disciplined for committing acts involving “moral turpitude, dishonesty or corruption.”<sup>20</sup> **Proposed Rule 4.1 would prohibit lawyers, in the course of representing a client, from “knowingly” making a “false statement of material fact or law to a third person,” or failing to disclose to a third person a material fact necessary to avoid assisting in a client's criminal or fraudulent conduct.**

This Rule reflects an important change by expressly including in the Rules a disciplinary standard for misrepresentations to third parties where no such disciplinary standard currently exists. Further, it differs from the legal standard applicable to civil liability for fraudulent representation, as a violation does not require proof of either reliance or damages.

**Duties Concerning Inadvertently Transmitted Writings:** There is no current Rule that addresses a lawyer's duties to third persons when presented with inadvertent disclosure of privileged materials. Proposed Rule 4.4 provides:

“Where it is reasonably apparent to a lawyer who receives a writing relating to a lawyer's representation of a client that the writing was inadvertently sent or produced, and the lawyer knows or reasonably should know that the writing is privileged or subject to the work product doctrine, the lawyer shall: (a) refrain



from examining the writing any more than is necessary to determine that it is privileged or subject to the work product doctrine, and (b) promptly notify the sender.”

While the proposed Rule is consistent with California case law,<sup>21</sup> the Commission concluded that adopting this Rule would help protect the public and the administration of justice, as well as inform attorneys of their ethical obligations. Consistent with such case law, Comment [1] to the Rule provides the lawyer with the following options when a lawyer determines the Rule applies to a transmitted writing: “the lawyer should return the writing to the sender, seek to reach agreement with the sender regarding the disposition of the writing, or seek guidance from a tribunal.”

## CONCLUSION:

The proposed changes and additions to the Rules of Professional Conduct, including those described above, have been submitted to the California Supreme Court for approval. All attorneys in the state will be subject to such Rules when and if approved by the court.

## ENDNOTES

\* A version of this article originally appeared in *Los Angeles Lawyer*.

- 1 The proposed Rules of Professional Conduct can be found at <http://www.calbar.ca.gov/Portals/0/documents/ethics/Proposed-Rules-of-Professional-Conduct.pdf>.
- 2 The current Rules of Professional Conduct can be found at <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules>.
- 3 See current Rule 1-100, paragraph (A); proposed Rule 8.5, paragraph (a) [Disciplinary Authority].
- 4 The Model Rules can be found at [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html).
- 5 Proposed Rule 1.8.10, paragraph (a). The proposed prohibition carries forward the exceptions in current Rule 3-120 for spousal and preexisting sexual relationships. Also, under this Rule (both current and proposed), when the client is an organization, the person overseeing the representation is considered

to be the client. Current Rule 3-120, Discussion; Proposed Rule 1.8.10, Comment [2].

- 6 In addition, Proposed Rule 8.4.1 would expand the scope of current Rule 2-400, which only applies to “the management or operation of a law practice,” and also does not expressly cover retaliation.
- 7 Current Rule 2-400, Paragraph (C).
- 8 Rule 8.4.1, paragraph (e).
- 9 Rule 8.4.1, Comment [7].
- 10 Rule 1.15, Comment [2], defines “advances for fees” as “a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client’s behalf.”
- 11 Rule 1.15, paragraph (a) [“or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client’s business and the other jurisdiction.”].
- 12 Although in its submission to the California Supreme Court the State Bar has requested that the Rules not become effective for at least 180 days after approval (so to allow the State Bar sufficient time to notify and educate lawyers, judges and the public about the changes implemented by the new Rules), as currently worded proposed Rule 1.15 would still apply to “held” funds.
- 13 Rule 1.15, paragraph (b).
- 14 Comment [6] provides as follows: “*Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to assist a client in conduct that the lawyer reasonably believes is permitted by California statutes, regulations, orders, and other state or local provisions implementing those laws. If California law conflicts with federal or tribal law, the lawyer should also advise the client regarding related federal or tribal law and policy.*” [italics added]
- 15 Rule 3-210 provides: “A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.” But see Los Angeles County Bar Association Opinion No. 527 (August 12, 2015) [“A member may advise and assist a client regarding compliance with California’s marijuana laws provided that the member does not advise the client to violate federal law or assist the client in violating federal law in a manner that would enable the client to evade arrest or prosecution for violation of the federal law.”]; San Francisco Bar Association Opinion No. 2015-1 (June 2015) [“A California attorney may ethically represent a

California client in respect to lawfully forming and operating a medical marijuana dispensary and related matters permissible under state law, even though the attorney may thereby aid and abet violations of federal law.”].

- 16 Rule 3-310(B) provides: “A member shall not accept or continue representation of a client without providing written disclosure to the client where: (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; [...] or (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.”
- 17 Proposed Rule 1.13 would carry forward the requirement in Rule 3-600 that a lawyer must maintain his or her duty of confidentiality when taking action pursuant to the Rule. In particular, it is important to note that, while lawyers may be permitted or obligated to report misconduct up the

corporate ladder, they are generally precluded by their duty of confidentiality from “reporting out” such misconduct (e.g., to a regulatory body or prosecutor).

- 18 Proposed Rule 1.18, Paragraph (a).
- 19 *See, e.g.*, California Evidence Code § 951 and Business and Professions Code § 6068(e).
- 20 California Business & Professions Code § 6106: “The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.”
- 21 *See, e.g., Rico v. Mitsubishi*, 42 Cal.4th 807, 817 (2007).

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# A Federal Court Upholds the Legality of California Workers' Compensation Anti-Fraud Legislation With Additional Procedural Due Process Warranties

By David R. Ruiz

Starting January 1, 2017, two Workers' Compensation anti-fraud provisions came into effect that affect the ability of medical providers charged or convicted of fraud-related offenses to collect on their liens. Shortly thereafter, the provisions were challenged by a medical provider alleging in federal court that the provisions failed to guarantee due process. In an effort to prevent an injunction curtailing the application of the anti-fraud provisions, the California Legislature soon thereafter enacted AB 1422 clarifying the anti-fraud provisions. The federal court upheld the legality of the California anti-fraud provisions and added some limited notice and hearing requirements to guarantee due process to medical providers.

Labor Code section 4615 as amended by Senate Bill 1160 and effective January 1, 2017, provided for an automatic stay of the adjudication of medical treatment and medical-legal liens of those providers charged with a fraud-related offense. The stay was to be in effect from the time the charges were filed until the disposition of the criminal proceedings.



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On May 17, 2017, a charged medical provider challenged this legislation in federal court claiming that a blanket automatic stay of all their liens would deprive medical providers charged yet not convicted of due process and hinder their ability to pay for counsel. (*Vanguard Medical Management Billing, Inc., et al. v. Christine Baker et al.*, CV17-00965 (C.D.Cal., filed May 17, 2017).) The medical provider requested injunctive relief to stop the application of the automatic stay until the case was adjudicated. The court issued a tentative decision in July 2017 upholding the legality of the anti-fraud provisions, but giving credence to the medical providers' argument that they were deprived of due process by their liens being automatically stayed without the possibility of a hearing.

On September 26, 2017, before the court was to rule on the medical providers' request for injunctive relief, California enacted AB 1422, which will become effective on January 1, 2018. As mentioned previously, AB 1422 clarified the prior anti-fraud bills and attempted to ensure procedural due process in the application of the lien automatic stay by providing that the automatic stay does not preclude the Workers' Compensation Appeals Board from inquiring into and determining within a workers' compensation proceeding whether a lien is stayed or whether a lien claimant is controlled by a suspended or charged physician, practitioner, or provider.

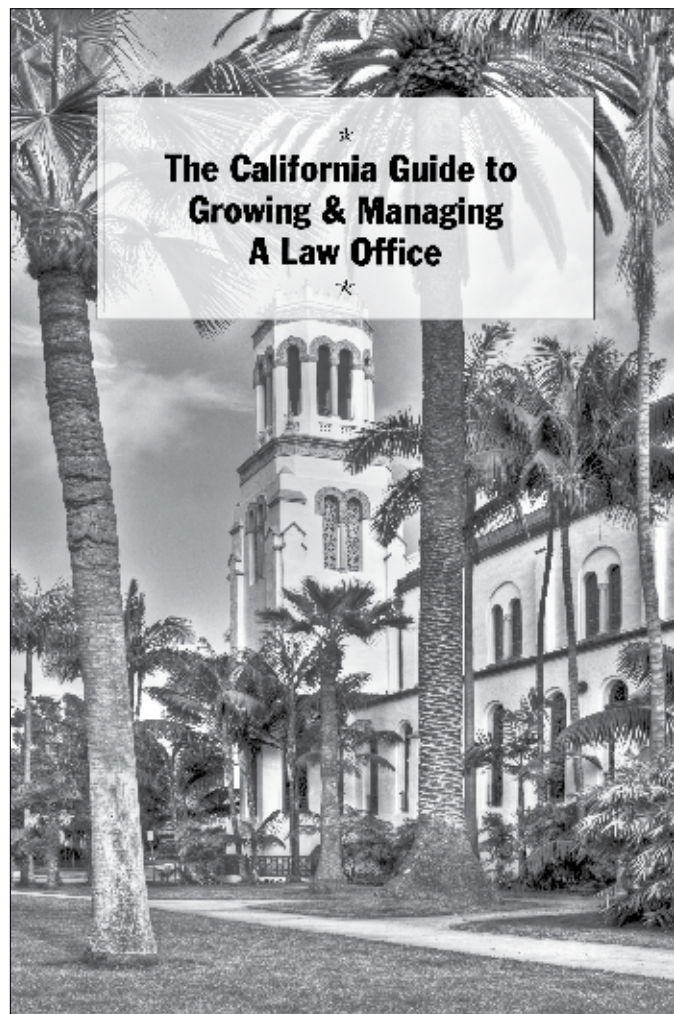
On October 30, 2017, the federal court issued its final ruling on the medical provider request for injunctive relief. The Court denied the injunction upholding the legality of the anti-fraud provisions,

but granted injunctive relief on procedural due process grounds on a very narrow issue: the stay needs to allow for basic notice and hearing requirements for procedural due process to exist. However, the court delayed ruling on the exact wording of the injunctive relief to give an opportunity to the parties to come up with its language.

On December 22, 2017, the court issued its final order. Regarding the notice requirement, the court ordered that medical providers' liens cannot be treated as stayed unless notice is provided via the lists posted on the Department of Industrial Relations website. As to the hearing requirement, the court ordered that

medical providers have to be given the opportunity to be heard within any case where a lien can be stayed for the sole purpose of preventing the erroneous application of the stay. This hearing cannot be used to challenge the propriety of any criminal charges giving rise to the stay or to dispute whether a lien arises from the alleged conduct-giving rise to the criminal charges.

The court's decision provides for due process protections that are narrow and targeted to prevent an erroneous application of an automatic stay. More importantly, the anti-fraud provisions remain intact, except for the newly added protections.



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# Who Owns the Client?

By Steven L. Krongold



## **Steven L. Krongold**

specializes in business litigation. For the past 30 years, Mr. Krongold has litigated disputes involving trademarks, copyrights, trade secrets, invasion of privacy, cybersquatting,

investment fraud, defamation, and other business-related torts. Mr. Krongold can be reached at the Krongold Law Corp., P.C., located in Orange County, CA.

Several years ago, reeling from the Great Recession, several prominent national law firms dissolved or filed for bankruptcy protection. A partial list of such firms includes Dewey & Leboeuf (2012), Howrey (2011), and Thelen (2008). Before then, other failed firms included Brobeck, Phleger & Harrison (2003), Arter & Hadden (2003), and Coudert Brothers (2005). When firms are on the brink of collapse, partners jump ship, taking clients with them. This happened with Heller Ehrman LLP (“Heller”), a firm founded in San Francisco in 1890 that suddenly collapsed in 2008.

Just a year before its demise, Heller employed more than 700 attorneys in offices across the globe. Sensing the end was near, most of these attorneys left to join other large firms, including Jones Day, Foley & Lardner, and Davis Wright Tremaine. The clients followed their chosen lawyer, signing new retainer agreements. When Heller filed for bankruptcy under Chapter 11, the court appointed a plan administrator who became responsible for recovering assets of the partnership in order to pay creditors. The administrator filed lawsuits against the new law firms seeking to recover profits earned on former Heller clients, specifically, on hourly fee matters pending when the firm dissolved. The Ninth Circuit certified a question, which the California Supreme Court agreed to resolve: what property interest, if any, does a dissolved law firm have in legal matters, and therefore profits, of cases that are in progress but not completed at the time of dissolution? (*Heller Ehrman LLP v. Davis Wright Tremaine LLP (In re Heller Ehrman LLP)*, 830 F.3d 964, 966 (9th Cir. 2016), req. granted *Heller Ehrman LLP v. Davis Wright Tremaine LLP*, 2016 Cal. LEXIS 7131 (Cal. 2016).)

In suing to recover profits, Heller relied on the Revised Uniform Partnership Act (RUPA), specifically, Corp. Code, § 16404, subd. (b)(1). This provision sets forth a partner’s duty to account and hold as trustee for the partnership “any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity.” Heller also cited *Jewel v. Boxer* (1984) 156 Cal.App.3d 171, which held that on contingency matters taken by partners of dissolved firms, the fees generated were to be shared according to the partner’s interest in the dissolved firm. In other words, former partners were not entitled “to extra compensation for services rendered in completing unfinished business.” (*Jewel*, supra, 156 Cal.App.3d at 176 & fn. 2.) *Jewel* thus established the “no compensation rule” in the context of the “unfinished business doctrine.”

The Supreme Court declined to follow *Jewel*, and cast serious doubt on its continued viability. *Heller Ehrman LLP v. Davis Wright Tremaine*, 2018 Cal. LEXIS 1122 (3/5/2018). When it comes to hourly fee cases, the dissolved firm—indeed, even a healthy, active firm—has a mere expectancy or hope of continued work because clients have the right to terminate the contract at any time and for any reason. (*Heller*, 2018 Cal. LEXIS 1122, \*17, citing *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1174-75.) As such, law firms do not have an enforceable property interest in ongoing hourly fee matters.

The Court’s holding may surprise many lawyers. After all, a lawyer who works on hourly matters and has a solid, long-standing relationship with the client should

have more than a speculative, unilateral expectation of continued fees. Nevertheless, that is not how the Court sees it. A property interest requires a “legitimate, objectively reasonable assurance rather than a mere unilaterally-held presumption.” (*Id.* at \*18.) In other words, it “must reflect more than a mere contingency or a certain probability that an outcome—such as further hourly fees remitted to the firm—may materialize.” (*Id.* at \*18, citing Civ. Code, § 700 [“A mere possibility . . . is not to be deemed an interest of any kind.”].) Other cases support this position. (See e.g., *In re Thelen LLP* (2014) 20 N.E.3d 264; *Heller Ehrman LLP v. Davis Wright Tremaine LLP* (N.D. Cal. 2014) 527 B.R. 24, 30-31 [“A law firm never owns its client matters. The client always owns the matter, and the most the law firm can be said to have is an *expectation* of future business.”].)

Based on this fundamental understanding of property rights, a law firm that performs hourly work lacks such a property interest because a client may discharge an attorney at any time and for any reason. As the court reasoned:

[N]o doubt [the Heller firm] hoped to continue working on the unfinished hourly fee matters and expected to receive compensation for its future work. However, such hopes were speculative, given the client’s right to terminate counsel at any time . . . Dissolution does not change that fact, as dissolving does not place a firm in the position to claim a property interest in work it has not performed—work that would not give rise to a property interest if the firm were still a going concern. (*Id.* at \*25.)

This holding, the Court noted, “fits comfortably with the RUPA’s provisions governing fiduciary duty.” (*Id.* at \*25.) Winding up is the process of completing pending or unfinished business, reducing assets to cash, and distributing the proceeds, if any, to the partners after paying creditors. A person winding up a partnership may preserve the business or property as a going concern for a limited time in order to collect receivables, discharge liabilities, settle disputes, and the like. For law firms, the necessary acts to “preserve the partnership business” during dissolution consist of filing motions for continuances, noticing parties and courts of its withdrawal, packing up and shipping files back to

the client or to new counsel, and getting new counsel up to speed on pending matters. The firm can bill and collect for this type of work, but not for substantive legal work performed that was formerly the business of the partnership.

Therefore, a contrary rule was not justified to prevent competition among partners. The RUPA “makes clear that the duty to refrain from competing with the partnership only pertains to the period *before* dissolution.” (Emphasis original, citing Corp. Code, § 16404, subd. (b)(3).) “When partners know they may freely compete after a firm dissolves, they have less reason to compete during the life of the partnership.” (*Id.* at \*25.)

Law firms are to be treated like any other business. Law firms should not be able to assert “a postdissolution interest in the business they normally conduct—the prosecution and defense of actions—while other partnerships would have no statutory hooks to receive compensation for what they do.” (*Id.* at \*29.) Once a law partnership votes to dissolve or dissolves by operation of law, it no longer has a property interest in matters handled on an hourly basis, or in the profits generated by former partners who continue to work on those matters after moving to new firms. Allowing the dissolved firm to share in those profits—or even to control the case in any manner—would intrude on the client’s choice of counsel, limit lawyer mobility postdissolution, and incentivize partner defections.

*Heller* will have repercussions far beyond law firm dissolutions. The Court’s interpretation of what constitutes a property interest and its rejection of the ‘unfinished business doctrine’ applies to all partnerships—and perhaps to limited liability companies. Under the Revised Uniform Limited Liability Company Act, an LLC that has elected to dissolve (or even cancel) continues only for the purpose of winding up its affairs, much like a partnership. (See, Corp. Code, § 17707.05 and § 17707.06.) The LLC can prosecute and defend actions to collect and discharge obligations, dispose of and convey its property, and collect or divide its assets. However, a limited liability company “shall not continue business except so far as necessary for its winding up.” It remains to be seen how *Heller* is applied to corporate or LLC dissolutions.

# MCLE Article: Judgment Liens: The First and Last Step

*Judgment liens are quick, inexpensive and innocuous and can be powerful, durable and devastating.*

By Joseph Chora

*(Check the end of this Article for information about how to access 1.0 self-study general credits.)*

Once you have obtained a favorable verdict for a client, whether in state or federal court,<sup>1</sup> and dealt with the post-trial motions, it is time to start thinking about getting your client paid on that money judgment. While each case will require a specific enforcement strategy, almost every plan will include the use of judgment liens.

While there are other liens,<sup>2</sup> this Article will focus on the three post-judgment liens that have the widest reach and greatest applicability: (1) The J-1 or JLPP Secretary of State lien on business personal property;<sup>3</sup> (2) The real property abstract of judgment, or the real property lien;<sup>4</sup> and (3) The secret ORAP (short for “order to appear”) lien on all personal property of the debtor.<sup>5</sup>

Utilizing these liens can assist you or your client to enforce your judgment. California is a race-notice state,<sup>6</sup> meaning usually (there are some exceptions) the first person to file a lien has priority over those who file liens later in time. As with most aspects of the law, there are exceptions, so each case must be dealt with individually.

Each of these post-judgment liens is only valid for a specified amount of time. The J-1 is valid for five



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years, the abstract of judgment is valid for ten years, and the ORAP lien is valid for one year. Further, these liens are only valid if the judgment is valid, not expired, and not fully satisfied. These liens must be removed if the judgment is deemed invalid, expires, or is fully satisfied. A creditor must also keep in mind that installment judgments affect the Creditor's ability to create liens as well, liens cannot be created under installment judgments until a particular installment has come due.<sup>7</sup>

All three of these liens can be renewed and overlapping liens from the same judgment on the same property relate back to the original date of priority.<sup>8</sup> It is important to track and extend or renew these liens as it may make the difference between your client getting paid in full or not at all.

## J1/JLPP LIEN

This easy and inexpensive lien can be filed with the California Secretary of State for ten dollars to put the world on notice of your judgment lien on a business debtor's personal property. Property subject to this lien are valuable business assets, including accounts receivable, equipment, inventory and negotiable documents of title.<sup>9</sup> This lien is created by completing and filing the JLI form found on the California Secretary of State website.<sup>10</sup>



This lien attaches assets in the State of California, and continues in the proceeds of the personal property if those funds are traceable.<sup>11</sup> There are exceptions and nuances beyond the scope of this Article, so a close reading of the statute and case law is recommended if this situation arises.

J1 liens are in effect for five years from the date of filing with the Secretary of State and can be renewed an unlimited amount of times.<sup>12</sup> A renewal of a J1, however, can only take place within six months before the expiration.<sup>13</sup> Indeed, if you are one day late, the lien expires and your client loses his place in line.<sup>14</sup> If you file one day too early, the continuation may be ineffective, and again, your client loses his place in line.

## **ABSTRACT OF JUDGMENT OR REAL ESTATE LIEN**

Obtaining a lien on real property is usually accomplished in a two-step process: First, you submit Judicial Council form EJ-001<sup>15</sup> to the Clerk of the Court that issued the judgment (include self-addressed stamped envelope if you are not using an attorney service). Second, once you receive the issued abstract of judgment, you record that abstract with every county recorder where the debtor has real property,<sup>16</sup> where he might have real property or where you think he may obtain real property in the next ten years.

An abstract attaches to any real property interest of the debtor in any county where an abstract is recorded, whether that interest is present, future, vested or contingent, legal or equitable, with certain exceptions.<sup>17</sup> If the creditor records an abstract in a county and the debtor subsequently acquires a real property interest in that county, the lien automatically attaches to that interest.<sup>18</sup>

Real property judgment liens are valid for ten years from the date of entry of the judgment.<sup>19</sup> To renew a real property judgment lien, a creditor must first renew the judgment, by filing Judicial Council form EJ-190, serving a notice of renewal on the debtor and any transferee,<sup>20</sup> and filing a proof of service with the court.<sup>21</sup> The creditor then must record a certified copy of the application (EJ-190) with each county recorder where the lien is to be extended.

Caution: if the certified copy of the application for renewal is recorded after the judgment lien expires, the lien is not extended; a new lien is created, but it will not relate back to the original lien priority date. This can make the difference between being first in line to receive funds from a liquidated property to last in line. Just like judgments, real property liens can be renewed an unlimited amount of times.

## **ORAP OR DEBTOR EXAM “SECRET” LIEN**

One of the best post-judgment tools for discovery of a debtor’s assets is a debtor’s examination pursuant to an ORAP.

A secondary benefit of obtaining and serving an ORAP on the debtor is the creation of a lien on all of the non-exempt personal property of the debtor.<sup>22</sup> Obtaining and serving an ORAP on a third party in possession of the debtor’s assets or owing the debtor creates a lien on those assets if they are sufficiently described in the ORAP (which may be difficult to do until you have examined the third party).<sup>23</sup>

An ORAP lien is referred to as a secret lien because unlike the J1 or the abstract of judgment, there is no notice, either constructive or actual, to the world generally. A J1 lien is recorded with the California Secretary of State, and the abstract of judgment is recorded with the County Recorder, but the ORAP is not recorded anywhere, and creates a lien upon service on the debtor.<sup>24</sup> The only way for other creditors to determine whether an ORAP lien has been created is to check court dockets—and even then, the creditor may not have filed a proof of service of the ORAP, so one could not be sure whether the ORAP lien was created.

Although the ORAP lien is “created” when the ORAP is served on the debtor, the lien expires one year after the court signed the ORAP, unless extended or shortened.<sup>25</sup>

## **THE USE OF THE LIEN IN ENFORCEMENT**

Liens attach to equity, a simple but often misunderstood concept. If a creditor records an abstract of judgment in County A and the debtor owns a million-dollar home with a million-dollar mortgage, the lien still attaches to the debtor’s interest in the property but because there is no equity

in the property, there is no value for the lien to attach. If the property appreciates over the next five years to \$1.2 million, the lien would attach to the \$200,000.00 in equity, the debtor's interest. If the property later decreases in value, the creditor is back to his original position—a valueless lien.

Liens typically become relevant when an interest in the asset is about to be transferred, such as the sale of the property, refinancing of a mortgage, the filing of a bankruptcy, or a foreclosure of the lien. The most common scenario is a real property lien placed on a residence (although this frequently happens to commercial property as well), and the lien is discovered during escrow for sale or a refinancing of a mortgage. The debtor is motivated to satisfy the lien obligation as he will receive a net payoff from the sale. Spirited negotiations may be required when the debtor will receive little or no money after the payment of the lien.

Bankruptcy can also bring liens to the forefront. Liens in place for ninety days or less can be avoided in bankruptcy as a preference, effectively extinguishing the lien, at least from the creditor's perspective.<sup>26</sup> If your lien has been in place for ninety-one days or more, your lien generally will not be subject to avoidance, and you generally are considered a secured creditor in the bankruptcy. The full range of bankruptcies (Chapter 7, 11, 12, or 13) and all the possible outcomes of a lien dispute is outside the scope of this Article; suffice it to say that in bankruptcy, creditors and their claims are classified: priority, super-priority, secured, unsecured, etc. As a secured creditor, your lien typically will be paid to the extent of your collateral before unsecured creditors are paid from the proceeds of that collateral.

Typically, if a bankruptcy trustee sells a residence encumbered by a lien with an earlier priority date than your lien, the proceeds will be used to pay to the lien with the earlier [higher] priority in full, then pay your lien in full, with the remaining funds will be paid to the unsecured creditors on a *pro rata* basis.<sup>27</sup> The debtor may also receive some of the proceeds—even in priority to your lien—if the subject property is exempt.<sup>28</sup>

A lienholder also may compel a sale of the property to satisfy the lien and costs of sale, with any excess

funds to junior lienholders and then the property owner.<sup>29</sup> As part of the process to force a sale, you must review of the state of title of the property to determine all interests in the property.

## SATISFACTION OF JUDGMENT

When a judgment is satisfied (paid in full), a satisfaction of judgment must be filed. A creditor's obligation to file an acknowledgement of satisfaction (EJ-100) arises only when the creditor actually receives the funds to satisfy the judgment. If the debtors pays with a check, the obligation does not arise until the funds clear.<sup>30</sup> A creditor is not obligated to file a satisfaction of judgment if the judgment is fully satisfied pursuant to a writ.<sup>31</sup> The court clerk will file a satisfaction of a money judgment when a writ is returned satisfied for the full amount.<sup>32</sup> Failure to file a satisfaction of judgment particularly after a demand by the debtor can bring liability to creditor, for the debtor's actual damages, attorney's fees, and a statutory \$100.00.<sup>33</sup>

## CONCLUSION

Using these three judgment liens will enable a creditor to take a security interest in the nonexempt property of a debtor. These liens can put other creditors on notice of a creditors security interest and will likely improve a creditors position should the debtor file for bankruptcy.

Ultimately these liens are inexpensive ways to passively enforce a judgment. While the creation of a lien on debtor's property is unlikely to result in a settlement, a secondary activity (transfer of the asset, bankruptcy, levy and creation of an execution lien) can leverage these liens into powerful collection/settlement tools.

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## ENDNOTES

- 1 Further, a party who obtains a judgment in a California federal court may obtain the same liens that a party who obtains a judgment in California state court may obtain. Code Civ. Proc., § 697.060; *see* Fed. R. Civ. Proc. 69.
- 2 Code Civ. Proc., §§ 697.010 *et seq.*
- 3 Code Civ. Proc., §§ 697.510-697.670.
- 4 Code Civ. Proc., §§ 697.310-697.410.
- 5 Code Civ. Proc., §§ 708.110-708.120.
- 6 Civ. Code, § 1214.
- 7 Code Civ. Proc., §§ 683.030, 685.020, 697.380
- 8 *See* CCP 697.020(b)
- 9 Code Civ. Proc., § 697.520.
- 10 Alex Padilla, *JL Filing Instructions*, CALIFORNIA SECRETARY OF STATE, [http://bpd.cdn.sos.ca.gov/ucc/ra\\_9\\_jl1\\_barcode.pdf](http://bpd.cdn.sos.ca.gov/ucc/ra_9_jl1_barcode.pdf)
- 11 Code Civ. Proc., §§ 697.530(a)(1)-697.530(a)(6); *see also* Code Civ. Proc., § 697.620.
- 12 Code Civ. Proc., 697.510(d)-697.510(e).
- 13 Code Civ. Proc., 697.510(d).
- 14 Code Civ. Proc., 697.510(e).
- 15 Judicial Council, *Request for Abstract of Criminal Judgment*, CALIFORNIA COURTS, <http://www.courts.ca.gov/documents/ej001.pdf>
- 16 For purposes of a real property lien, “real property” includes all interests in real property (present or future, vested or contingent, legal or equitable) in the county where the lien is created, with certain exceptions.
- 17 Code Civ. Proc., § 697.340(a).
- 18 Code Civ. Proc., § 697.340(b).
- 19 Code Civ. Proc., § 697.310(b).
- 20 Code Civ. Proc., § 683.180(b).
- 21 Code Civ. Proc., § 683.120; *see also* Code Civ. Proc., §§ 683.160, 693.180; *see also* Judicial Council, *Application for Renewal of Judgment* (<http://www.courts.ca.gov/documents/ej190.pdf>), *Notice for Renewal of Judgment* (<http://www.courts.ca.gov/documents/ej195.pdf>), CALIFORNIA COURTS.
- 22 Code Civ. Proc., § 708.120(c).
- 23 Code Civ. Proc., §§ 708.120-708.130.
- 24 Code Civ. Proc., § 708.110(d); *see In re Hilde* (9<sup>th</sup> Cir. 1997) 120 F.3d 950, 955-956 (ORAP lien is perfected effective on service of the ORAP on the debtor).
- 25 Code Civ. Proc., § 708.110(d).
- 26 11 U.S.C. §§ 547(b), 550.
- 27 This description of the process has been simplified for the sake of clarity. There are multiple classes of creditors paid in order of priority. 11 U.S.C. §§ 507, 726.
- 28 11 U.S.C. § 522.
- 29 The execution sale of a dwelling is complicated, time-consuming, and expensive—and under certain circumstances, may not be available as a remedy. This topic is beyond the scope of this Article, but Judge Ahart discusses it in his authoritative treatise; *see* Alan M Ahart, *Cal. Prac. Guide: Enforcing Judgment and Debts* (The Rutter Group, May 2017), ¶ 6:1013 *et seq.*
- 30 Code Civ. Proc., § 724.010; *see also* <http://www.courts.ca.gov/documents/ej100.pdf>; Code Civ. Proc., §§ 724.110 *et seq.* Another topic beyond the scope of this Article is how best to ensure that a judgment is not deemed “satisfied” before you have claimed all of the post-judgment fees and costs. *See Grayl CPB, LLC v. SCC Acquisitions, Inc.* (2015) 233 Cal.App.4th 882, 886-887 (right to more than \$3 million in post-judgment fees that judgment creditor had not yet claimed waived by acceptance of certified check from debtor for the existing balance of judgment).
- 31 Code Civ. Proc., § 724.030.
- 32 Code Civ. Proc., § 724.020.
- 33 Code Civ. Proc., § 724.050.



# Coach's Corner: Get Off the Hamster Wheel Now, Before it is Too Late!



**Eleanor Southers** is a Professional Legal Coach who helps attorneys at all stages of their careers to become more successful and contented. Working one on one, Ms. Southers guides attorneys to uncover and fulfill their goals. She can be reached at [esouthers@aol.com](mailto:esouthers@aol.com) or her website: [www.southerslaw.net](http://www.southerslaw.net).

By Eleanor Southers

**M**ost attorneys know what I am talking about. It is that feeling that all you are doing is working, going to court, commuting, eating, and sometimes sleeping. Even on the weekends, you may still work at least part time and rest of the time is spent trying to catch up on your sleep, doing chores, and errands that you have not been able to be done during the week. If you have a family, it is even worse because you feel guilty that you cannot spend significant time with them. You are a hamster making your wheel go round and round in your cage, hoping your foot does not get caught on the wheel and you take a tumble (*e.g.*, getting sick).

**Well, it is time to get off the wheel and become human again.** After observing clients as well as being on the wheel for some time myself, I think I may have identified some beliefs, which support the craziness of this syndrome. They are:

- I am an attorney and therefore I cannot make any mistakes;
- I am the sole person who can make sure my clients' problems are solved;
- I would be depressed if anyone criticized or doubted my legal abilities. Thus, I need to work harder;
- I always have to have more work than can actually be completed;
- I would be letting so many people down if I were not a success;

- There is simply not enough time to do anything else but work;
- . . . And more.

I do not have the solution to whatever craziness it takes to step onto the wheel, but I do have a few notions about what might help to ease the burden. First, identify as closely as possible *why* you are on the wheel. It may be for some of the reasons outlined above, or something else completely.

Then, challenge yourself to picture what it would look like if you were not driven by a compulsive need to work or do only activities, which support your working. How about a day at the beach or taking the kids to the zoo, or a date night with your spouse? *All of this without your phone. You cannot cheat yourself here!*

Now that I have you in the right frame of mind, let me suggest some solutions you might explore, which could make this a reality.

- **Time-Management Training.** Every attorney needs a weekly and master calendar where the time sensitive matters can be noted so that stress is reduced. Also time for preparation of those matters. That still leaves quite a number of unaccounted for hours. Next, try out some *new hours*. By this, I mean like giving Fridays over to a catch-up day in the morning and taking the afternoon off. You can even let yourself work Saturday morning if necessary but

giving yourself a break on Friday afternoon will work wonders with both your mind and energy. Alternatively, don't go in Monday mornings until noon. This one is harder because you might feel you have to work until midnight to "catch up." \*\*\*Please know, in the law, there is no such thing as "catching up."

- **Delegating.** Yes, Matilda, there are contract workers just hanging around asking to work. Yes, your staff can probably do at least 15% to 20% more tasks than they presently are assigned—all you have to do is ask. You have to let go of the "perfect" doctrine and jump in the supervisor/manager seat. Unfortunately, this is a huge step for most solos.
- **Procrastination.** When you ask yourself to do too much, it is easier to find ways of doing nothing at all. Then you can stress and beat yourself up. If you can look forward

to Friday afternoons off, you will find it is easier to get things done efficiently.

- **Support Groups.** Find other lawyers who also have this problem and meet on a regular basis to talk about ways they have found to solve this. You will be surprised how other people deal with their life balance, or non-life balance. This can be just a conference call for an hour with colleagues every two weeks, or beer and pizza once a month. The need to confront this predicament timely and have accountability to another person is the key to success. If you use a list serve, you may find others who like this idea and you can form your own group.
- **One-on-One Help:** There are therapists and even good friends and family who can help you with this. So try a couple of sessions and see if it helps. *No attorney deserves to lose his or her life to the practice of law!*

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