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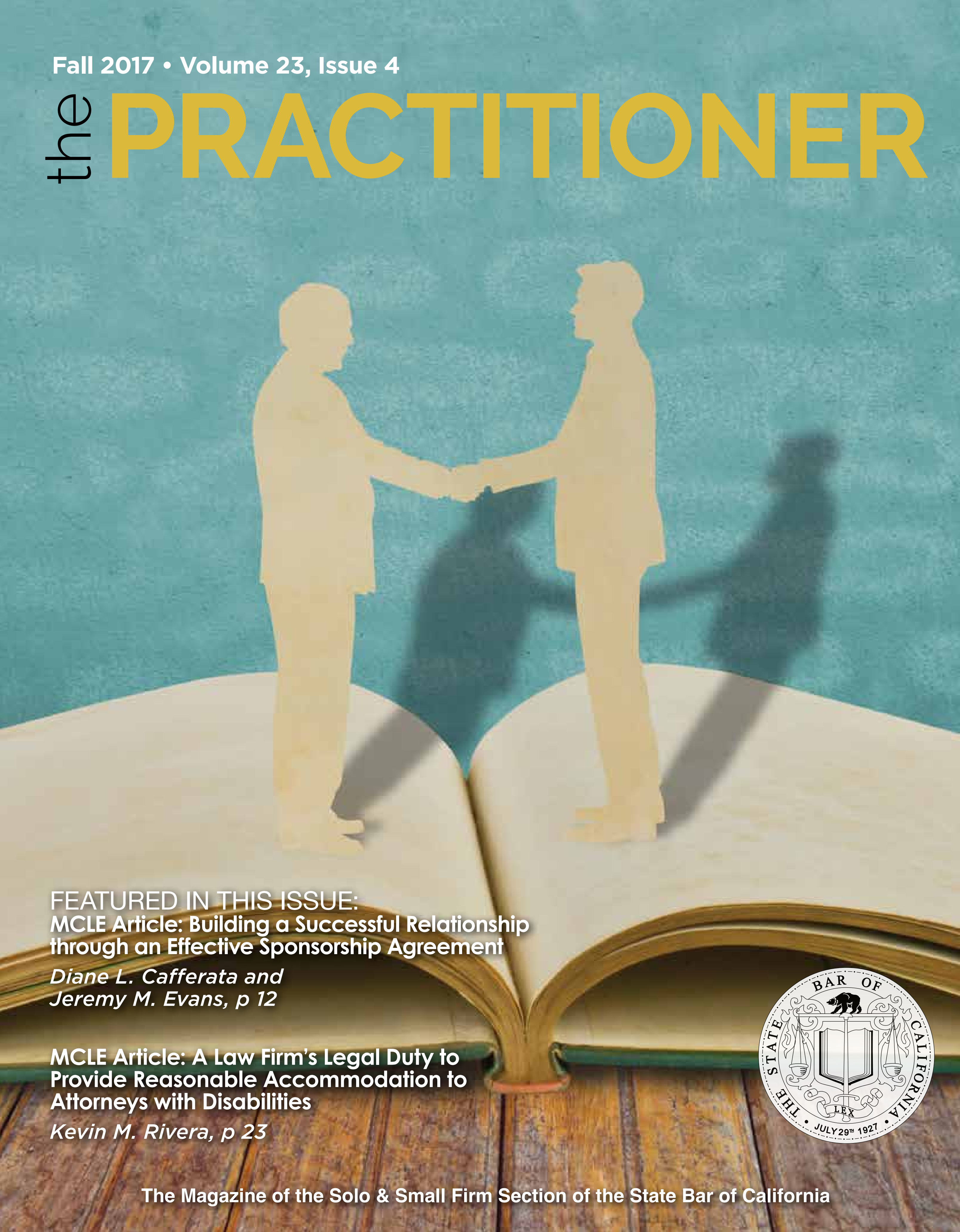
the PRACTITIONER



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The Magazine of the Solo & Small Firm Section of the State Bar of California

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Letter From the Outgoing Chair

By Megan Zavieh

Megan Zavieh focuses her practice on attorney ethics, representing attorneys facing state bar disciplinary action and providing guidance to practicing attorneys on questions of legal ethics. She has been representing attorneys facing disciplinary action before the California State Bar since 2009 and is admitted to practice in California, Georgia, New York and New Jersey, as well as in Federal District Court and the U.S. Supreme Court. She blogs at CaliforniaStateBarDefense.com and is a contributor at Lawyerist.com and AttorneyatWork.com.

We always say how quickly time passes, whether it is how long we have been practicing lawyers or how fast our children grow, and my time as Chair of the Solo and Small Firm Section has truly flown by.

It has been a particularly busy year given the impending separation of the Sections from the State Bar of California, so that uncertainty has made it more exciting than usual. In thinking about our Section's leadership, I want to specifically thank Cindy Elkins of our representative with the Council of Sections for her tireless efforts on our Section's behalf through the separation. I could not have been an effective leader in other areas of our Section's work had she not taken the laboring oar on our behalf with the Council of Sections. Thank you, Cindy.

I am honored to have been a part of the leadership of this great Section for the last four years, and I hand off the baton to our new Chair, Ritzel Ngo, knowing that our Section is in the best hands. Ritzel has served on the Executive Committee throughout my time here, and her contributions have been tremendous. I am thrilled to have her step into the Chair's role. We also have an incredible Executive Committee of dedicated volunteers, including four new members joining us this fall. I am excited to see what the committee can achieve with Ritzel at the helm.

Speaking of separation and new members, despite the changes at the Bar level, our Section continues to serve its members with high quality programming, MCLE opportunities, and publications. We remain active in our communities throughout the state, bringing outreach programs to under-served bar associations and engaging with our local communities. At the inaugural Sections Convention, we hosted a reception for the recipient of our annual Attorney of the Year Award, L. Tracee Lorens, and spent time with many of our members in beautiful San Diego.

Though the future of the Sections as a group continues to evolve, the Executive Committee of the Solo and Small Firm Section is dedicated to continuing to serve its members through all our programs and member benefits. We urge each of our members to engage with us. The Section is active on social media, posting about our events and opportunities to participate in seminars and publications. We have many opportunities throughout the year to publish, so please be in touch if you would like to write for one of the Section publications, *the* PRACTITIONER or *the* ePRACTITIONER. We also have speaking opportunities, so please let us know if you are interested in presenting a live MCLE or webinar.

One major goal of the Solo and Small Firm Section is to keep the solo community engaged with each other. Thank you for your membership and participation in our great Section.

Letter From the Editor

By Jeremy M. Evans

Jeremy M. Evans is the Managing Attorney at California Sports Lawyer®, representing sports, entertainment, and business professionals in their contract, negotiation, and intellectual property matters. Evans is an Outreach Captain for the Sports Lawyers Association and is an award-winning attorney and community leader based in Los Angeles. He can be reached at Jeremy@CSLlegal.com or via his website: www.CSLlegal.com.

This is my fourth and final issue as Editor-in-Chief. Newly appointed Executive Committee member Omar Anorga is the incoming Editor-in-Chief beginning with Issue 1 in 2018. For this issue (Fall 2017, Issue 4), it is likely that you are now enjoying or have just enjoyed Thanksgiving with loved ones.

Since being appointed in the summer of 2016 and taking on the first issue in the fall of 2016, we have changed the name of the publication from *Big News for Solo and Small Firms* to *the PRACTITIONER*. We have increased the number of issues per year from three to four. Moreover, the Solo and Small Firm Section experienced a terrific year providing more MCLEs than in years past, while guiding members through an uncertain period as the State Bar of California and the Sections work out the next chapter as two separate entities.

Over the past year, we have also had a wide array of authors and topics. In this issue, it is no different. We begin with the Letter From the (outgoing) Chair Megan Zavieh. Our next Chair will be Ritzel Ngo, while Renee Galente was elected as the Chair-Elect, and your former Editor-in-Chief was elected as the incoming Treasurer, a position being vacated by Ms. Galente. Ms. Zavieh will now be the Immediate Past Chair.

Next, we have an article announcing the 2017 Solo and Small Firm Section Attorney of the Year Recipient, L. Tracee Lorens. Two separate articles follow introducing the next Executive Committee and *the PRACTITIONER*'s new Editor-in-Chief. Jacob Stein has written an article on asset protection. Kevin Rivera has written a piece on accommodating attorneys with disabilities. Mainstays Marilyn Monahan, Steven Krongold, and Eleanor Southers close this issue with their articles.

Over the past year, it has been a pleasure to serve you. Thank you for the opportunity. It has been a wonderful time and experience. We are confident that *the PRACTITIONER* and the Section are in good hands.

the PRACTITIONER FOR SOLO & SMALL FIRMS

Editor
Jeremy M. Evans, jeremy@csllegal.com

Congratulations to the 2017 Attorney of the Year L. Tracee Lorens

L. Tracee Lorens

By Jeremy Evans

The State Bar Solo and Small Firm Section is pleased to announce that San Diego County attorney L. Tracee Lorens is the honored recipient of the 2017 Attorney of the Year Award. The Solo and Small Firm Section of the State Bar of California presents its Attorney of the Year Award to honor a solo or small firm attorney, who has shown exemplary leadership and dedication to the legal profession, contributed to the betterment of the practice of law, and has devoted significant service to the public and legal community. Mrs. Lorens fits the profile exceptionally. The award was presented at the Solo and Small Firm Reception at the Section's Convention held on Friday, August 18, 2017, in San Diego at the Sheraton San Diego Hotel & Marina.

Tracee Lorens is a very accomplished attorney (recently retired) who now divides her work time between a Mediation practice in California and Colorado, and her luxury vacation rental business. She was born and raised in the mountains of Colorado and many admiringly nicknamed her "The Colorado Mountain Woman", due to her tenacious litigation style and her never ending drive to win for her clients, every single time.

Ms. Lorens is the Founding Partner of Lorens & Associates, APLC, and has been recognized for showing dedication, leadership, and excellence in employment and labor law, evidenced by being named one of California's Lawyers of the Year in 2013 and 2014. She spent her twenty-four-year career fighting to uphold the rights of low-wage workers and consumers, and has led a multitude of class action lawsuits in California. She was recently inducted into Worldwide Registry and maintains affiliation with the Consumer Attorneys of California, the California Employment Lawyers Association, the Consumer Attorneys of San Diego, the San Diego County Bar Association, and The State Bar of California. She won the "CLAY" Award in 2013 for her ten (10) year battle in the *Brinker* Wage and Hour Class Action case.

Looking back, Ms. Lorens attributes her success to "good old-fashioned" hard work and dedication to always producing the best product humanly possible. She started her own firm so she could balance a family and career. She attributes much of her success to her husband, Wayne A. Hughes, who practiced law with her for twenty years, and the love and unending support of her daughter Alexandra Rose Lorens, who graduated from law school in May and took the July California Bar exam. When asked about her mother's career, Alexandra had this to say:

"Looking back on my childhood I can't remember many family vacations that weren't spent with a full load of white file boxes, fax machines, and printers. I am also pretty sure that most of my friends growing up were the children of my mom's clients or my mom's other lawyer friend's children. Some might find that kind of childhood experience to be odd. But those of us who grew up in the home of a lawyer know that it comes with the territory because you are always fighting for the little guy against big, well-funded, law firms.

"My mother eats, breathes, and lives every case she ever had. She's like the Energizer Bunny that her opponent never sees coming and really never has a chance of keeping up with—thus the vacations and holidays with files.

"She taught me you do not have to be the smartest person in the room, but you better be the hardest working if you plan on getting anywhere. As a little girl I remember telling my friends, 'My Mom is a lawyer and I can't wait to be like her some day'. Twenty-six plus years later, as I take the Bar exam, that is still what I say to all my friends. I only hope that one day I can instill in my children the same passion for the law and the ability to make people's lives better, as my mother has."

Tracee was President of the Consumer Attorneys of San Diego in 2003, following ten years serving on their Board of Directors. She served on the Alumni Association Board of Directors for Thomas Jefferson School of Law, and currently serves on the Board of Trustees for the same institution. She has been involved in numerous charities, is known as a great cook, mother, and wife, and has sponsored no fewer than seven children from low-income families (or orphans) in their quest to obtain a university education.

Memorable cases Ms. Lorens has litigated include *Albrecht v. Rite Aid*, *Hohnbaum v. Brinker*, and *Laguna v. Coverall*, among many others, both multi-party and individual. The most recognized case being *Hohnbaum v. Brinker*—that 100,000+-member class case was settled for $57.5 million in 2014. That is when Tracee retired and began her Mediation practice. She also develops and rents luxury cabins on the edge of Rocky Mountain National Park in Colorado, and on the Sea of Cortez in Baja California Sur.

In 1999, Ms. Lorens began focusing her practice on consumer class actions. She obtained in excess of $100,000,000 in settlements and/or verdicts over her 25-year career. One of her more memorable cases, *Albrecht v. Rite Aid*, involved violations of California's wage and hour laws. It settled for $25,000,000 and Lorens received an Outstanding Advocacy Award honoring her efforts. She prides herself on representing those who could not otherwise afford representation and ensuring access to the legal system for low-wage workers and consumers.

When speaking to Wayne Hughes, her partner in law and in life, he described Tracee's career by saying, " I have decades of watching Tracee's labor as an attorney. She does not give up. She sets ambitious and worthwhile goals. Without procrastinating she then sets out to accomplish those goals. When set backs occur, Tracee pauses, studies, and then attacks from a different route.

"I remember when her Class Certification Order was overturned by the Court of Appeals in *Brinker* and all her colleagues told her it was over. But she said, 'No. This Order is a death knell to all workers in California and I'm taking it all the way to the Supreme Court, if I have to.' She did. She won. And then she settled that case for $57.5 million.

"Her caseload was always complex, beyond what is normal for a Class Action firm, let alone a small firm. She produced a caliber of work and results that even large firms would envy. She is hard driving yet always extremely civil and professional, to a degree not always deserved by her opponents. She has always run her businesses with a woman's touch. She has an empathy about her that her clients and employees never missed; yet she was a pit bull underneath. I guess that's why she was called a Colorado Mountain Woman."

Ms. Lorens was a 2005 Nominee and Semi-Finalist for the *San Diego Daily Transcript's* Top 25 Lawyers of the Year. Senator Joe Dunn presented her with a Senate Resolution for her "involvement in the community, outstanding record of personal and civic leadership, spirit, integrity, and passion for excellence" in 2004. She has received several Outstanding Lawyer Awards from CASD, a CLAY Award in 2013, and *Super Lawyer* Awards on numerous occasions.

By the way, she loves to fish in Mexico during her "spare" time. Deep-sea fishing and travel are her favorite pastimes.

Tracee has recently retired from the practice of law and spent a year in training and credentialing to become a mediator. To date, she has a 100% settlement rate.

Tracee's years of litigation and trial work, combined with hundreds of settlement conferences and meditations, has given her the experience and knowledge to assist in resolving any type of dispute, litigated or otherwise. She has a reputation for being hard working, dogged in her determination, bright, highly experienced and knowledgeable, courteous yet adept at handling contentious personalities, and a "straight talker;" thus making the Mediation process efficient and very cost effective.

Tracee Lorens has found mediation to be a truly satisfying means of resolving disputes in a more cost-effective and satisfying way for the participants. Instead of spending thousands, if not hundreds of thousands or millions of dollars litigating, the parties, with her assistance, can construct a resolution that works for them, instead of having a judgment imposed on them via the court system. In some sense, Ms. Lorens has come full circle, from esteemed litigator to compassionate mediator. He experience definitely allows her to do both well.

All of us should celebrate a life and law practice lived well. The Solo and Small Firm Section of the State Bar of California is proud to present L. Tracee Lorens with its *2017 Attorney of the Year Award*.

Meet the New Executive Committee

By the PRACTITIONER Staff

RITZEL S. NGO

1. What is your current title and term on the Committee? And was your past experience on the Committee?

I am the Chair of the Executive Committee for the Solo & Small Firm Section for the 2017-2018 year. I was appointed to serve on the Executive Committee in the Fall of 2013. Last year, I was the Vice-Chair of the Committee, and before that, I was the Treasurer for the 2015-2016 year, and for two years, the Education Chair.

2. Give us a short bio.

I am a family law attorney, and I handle matters in Los Angeles and Ventura counties. I represent clients in all aspects of divorce, parentage, support, custody and visitation, property division, and post-modification issues. I also act as a judge *pro tem* with the Los Angeles Superior Court.

3. Tell us your favorite hobbies.

I enjoy visiting new places with my six-year-old and relaxing to the sound of ocean waves on a secluded beach.

4. What you most want to accomplish in your new role as Chair?

My goals are to increase this Section's visibility and build a larger financial reserve through webinars and live-education programs, which will us hold future programs and give small law firms and solo practitioners a stronger voice with the State Bar of California and the new entity in which all sections will converge. I also want us to continue to reach out to Section members in less populated regions in our State, such as (but not limited to) Humboldt and Butte counties, and to open communication between smaller counties and larger ones.

RENEE N. GALENTE

1. What is your current title and term on the Committee? And was your past experience on the Committee?

I have been on the Committee since 2014 to the present. This year (2017-2018), I am the Vice Chair (2017-2018). I have been the Treasurer (2016-2017), the "Trusted Social Media Poster" (2014-present), and an Editor/Contributor to the PRACTITIONER (2014–present).

2. Give us a short bio.

I am the Owner and Trial Lawyer at Galente Law, APC, where I focus on plaintiff's personal injury, military, and criminal defense trial work. I serve on the faculty for Gerry Spence's Trial Lawyers College. I also am an adjunct professor for the National Trial Competition Team for Thomas Jefferson School of Law and a mediator for the Probate Court Mediation Program. I currently serve as California Women Lawyers President-Elect, California La Raza Lawyers Association Southern California Vice President, and San Diego La Raza Lawyers Scholarship Fund Communications Chair, and sit on the Board of the San Diego County Bar Association.

3. Tell us your favorite hobbies.

I am a new mother to my son Gabriel, and am learning how to balance running my law office, being active in the community and raising a child with love and care. That takes up every spare second!

4. What you most want to accomplish in your new role?

I want to help ease the current transition as the Sections separate from The State Bar of California. I want to make sure that our members are well represented, that their interests remain protected, and that we continue to provide stellar education, programming, and outreach for our members.

JEREMY M. EVANS

1. What is your current title and term on the Committee? And was your past experience on the Committee?

My term as a member of the Committee is 2015-2018. I have been the editor/publisher of eNews (2015-2017), the Section's electronic newsletter; the Editor-in-Chief of the PRACTITIONER (2016-2017), the Section print magazine; and its current Treasurer (2017-2018).

2. Give us a short bio.

I am the Managing Attorney at California Sports Lawyer®, representing sports and entertainment professionals in contract drafting, negotiations, licensing, and career growth. I am also an Outreach Captain for the Sports Lawyers Association, have been fortunate enough to win several awards, and strive to be a very active community leader. I can be reached at Jeremy@CSLlegal.com or via my website: www.CSLlegal.com.

3. Tell us your favorite hobbies.

I attend baseball games, sporting events, watch movies and television, and meet new people, which also happens to be my job too!

4. What you most want to accomplish in your new role?

I look forward to continuing the great work of Renee Galente, our outgoing Treasurer, and working with John Buelter, our Solo and Small Firm Section Coordinator. This past year, we experienced, through hard work with our MCLEs, unprecedented financial success. We will look to continue that growth and open up new revenue streams while investing back into our members.

Welcome to the 2017-18 Solo and Small Firm Executive Committee members

J. Christopher Toews	San Luis Obispo, CA
Bennett W. Root Jr	Pasadena, CA
Robert Max Klein	Los Angeles, CA
Belle H. Hsu	Torrance, CA
James Irwin Ham	South Pasadena, CA
Omar S. Anorga	Pasadena, CA

Become a member of the Solo and Small Firm Executive Committee!

The application can be found here:

http://www.calbar.ca.gov/Portals/0/documents/cc/commApp/SBCAppForm.pdf.

The Solo and Small Firm Committee webpage can be found here:

http://www.calbar.ca.gov/Attorneys/Sections/Solo-Small-Firm.

The Solo and Small Firm Section Executive Committee webpage can be found here:

http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Section-Executive-Committees/Solo-Small-Firm.

You should peruse the brand new State Bar of California website while you are visiting your Section's webpage! We hope you will apply to join us soon on the Executive Committee.

Meet The New Editor: Omar Sebastian Anorga

By the PRACTITIONER Staff

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.

The PRACTITIONER staff and writers appreciate all of the support and assistance from the Solo and Small Firm Executive Committee and our members, the assistant editors, former editor Henry David, and outgoing editor Jeremy Evans. In welcoming our incoming editor Omar Anorga, we would like to take this opportunity to acquaint you with the outstanding qualifications he has for this very important job.

Omar Sebastian Anorga is the principal owner of The Anorga Law Firm, Inc., which is a boutique litigation law firm located in Pasadena, California. He represents businesses and individuals with all aspect of civil litigation in both state and federal court. The Anorga Law Firm has many Spanish-speaking business owners, and Omar can communicate with them in their native language.

When in law school, he was selected as the outstanding law review candidate of the year as well as having an article published entitled, *Music Contracts have Musicians Playing in the Key of Unconscionability*, 24 Whittier L. Rev., 739 (2003). After passing the California bar, Omar continued to write articles. One for the *Los Angeles Daily Journal* entitled *Lost in Translation: non-English Fee Agreement,* Oct., 24, 2011, VOL., 124 NO 206, and one published by the *State Bar of California E-Journal*, entitled *Introducing Foreign Language Evidence at Trial.* Furthermore, at the 88th California State Bar Annual Meeting, he presented the topic entitled "Blurred Lines Between Social Media and Attorney Advertising: Connecting Ethically." Mostly recently, Omar was selected to the 2017 Super Lawyers Southern California Rising Stars list, an honor reserved for those lawyers who exhibit excellence in practice. Omar attended Whittier College, where he obtained a Bachelor of Science degree in Political Science and in English. He then attended Whittier Law School and, after law school, worked for two years at a litigation firm before opening his own law firm.

Omar's community involvement includes contributing and actively participating in the betterment of teaching non-literate Spanish speaking adults on how to read and write. On a personal note, Omar is married with two children. He enjoys playing basketball, hiking, travelling with the family, and attending Los Angeles Clippers games, which he has been a committed fan for over twenty years. You can see from Omar's talent and experience that he will make an outstanding Editor in Chief. Please join us in welcoming him.

MCLE Article: Building a Successful Relationship through an Effective Sponsorship Agreement

By Diane L. Cafferata and Jeremy M. Evans

Diane L. Cafferata is a partner based in the Los Angeles office of Quinn Emanuel Urquhart & Sullivan, LLP, the largest all-business-litigation firm in the world. Diane specializes in complex commercial litigation, including intellectual property cases, class actions, financial matters and business breach and tort cases, for both plaintiffs and defendants. Diane has been repeatedly recognized as a Southern California Super Lawyer and was named one of the Benchmark Plaintiff Top 150 Women in Litigation in 2014. She can be reached at dianecafferata@quinnemanuel.com.

Jeremy M. Evans is the Managing Attorney at California Sports Lawyer®, representing sports, entertainment, and business professionals in their contract, negotiation, and intellectual property matters. Evans is an Outreach Captain for the Sports Lawyers Association and is an award-winning attorney and community leader based in Los Angeles. He can be reached at Jeremy@CSLlegal.com or via his website: www.CSLlegal.com.

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

In this article, Jeremy Evans with California Sports Lawyer® and Diane Cafferata with Quinn Emanuel Urquhart & Sullivan, LLP provide insights into the drafting and negotiation of sponsorship and endorsement agreements. Both attorneys are based in the heart of the entertainment and sports industries, Los Angeles, California.

The sports industry's rapid evolution and growth continues to generate increasing opportunities for sponsorship exposure. In North America, the world's largest sponsorship market, sponsorship spending is projected at $23.2 billion, up from $22.3 billion last year, with sports accounting for 70% of that market.[1] Per *Forbes*:

> "[W]hat separates the Dallas Cowboys ($2.3 billion value) and Oakland Raiders ($825 million) is their stadiums and the revenue derived from each venue. **Sponsorship revenue plays a huge part in this. The Cowboys earned $100 million from sponsorships and advertising signage last season, and this was before owner Jerry Jones inked his 25-year, $500 million naming rights deal with AT&T. Teams like the Raiders and Buffalo Bills generate less than $20 million in sponsor revenue."**[2]

Per *CNBC*:

> In [Major League Baseball], the league reached $695 million[3] and $778 million[4] in sponsorship revenue for 2014 and 2015, respectively. Since 2011, sponsorship revenue has gone up every year.[5]

Sponsorship agreements, the legal vehicle creating such relationships, are becoming increasingly common as a result. Whether you represent a sponsored party, a sports league, a charity, a company, or the government, it is wise to be familiar with these agreements and their key provisions before they cross your desk. The purpose of sponsorship agreements—to clearly describe the contours of the parties' successful relationship into the future—compels candid discussion and clear and unambiguous drafting of the parties' rights and obligations under the agreement.

There are many articles that explore the basics of sponsorship agreements, and the typical provisions that should be included,[6] but here we examined some provisions that have generated significant litigation over sports sponsorships in the last several years to illustrate and develop some conclusions about how these agreements may be drafted to avoid or at least minimize such disputes in the future.

PROPER REPRESENTATIONS OF PARTIES' CAPACITY AND AUTHORITY

In addition to ensuring that the agreement properly identifies the parties to the agreement, there should also be clarity around each party's authority to enter into the agreement and its ability to grant the rights it will provide under that agreement.

In *VICI Racing, LLC v. T-Mobile USA, Inc.,* 763 F.3d 273 (3rd Cir. 2014), for example, section 5.8 of the parties' agreement provided that "VICI grants to [T-Mobile] the right to be the exclusive wireless carrier supplying wireless connectivity for the Porsche, Audi and VW telematics programs beginning in model year 2011 with such exclusivity continuing throughout the term of this Agreement."[7] In that case, T-Mobile terminated the agreement and alleged that VICI, a former operator of a racing team that competed in the American Le Mans Series, had breached this provision of the agreement because "VICI does not have and has never had the authority to grant such rights."[8]

The district court found section 5.8 was "too convoluted to have any one clear meaning."[9] For example, it could mean the sponsor had bargained for the right to seek the telematics business from those companies, or it could mean the sponsored party was supposed to facilitate the sponsor's efforts to get that business, or it could have some other meaning entirely. Further, it included undefined key terms that were open to conflicting interpretations, and the balance of the contract contained no other provisions that would clarify section 5.8.[10] The court held section 5.8 severed from the contract and unenforceable based on the parties' clear intention in section 14.7 of the agreement that unenforceable provisions would be severable.[11] This result was upheld on appeal.[12]

A sponsored party's capacity came into play in a different way in *Oakley Inc. v. Nike, Inc. et al,* 988 F.Supp.2d 1130 (C.D. Cal. 2013). In that case, Oakley and professional golfer Rory McIlroy had signed a two-year endorsement contract for the period January 1, 2011 through December 31, 2012, which contained a provision requiring McIlroy to provide Oakley a right of first refusal for the next endorsement period after 2012.[13] In September 2012, an Oakley executive backed out of the running for that next endorsement deal with a late-night email: "Understood. We are out of the mix. No contract for 2013."[14]

Nevertheless, when McIlroy entered into a new agreement with Nike, Oakley sued him for breach of contract and Nike for intentional interference with contractual relations.[15] The Court entered summary judgment in favor of Nike, because McIlroy's representatives had repeatedly stated to Nike that they had the ability to contract with Nike and that Oakley was not submitting a competing proposal and in fact had chosen not to do so.[16] On these facts, the Court found that Nike was entitled to rely on the representations of the only party in the know, McIlroy.[17]

Practically speaking, when drafting a sponsorship contract, it is important to include representations in the agreement that each party has the legal authority to sign the agreement and the capacity to deliver the items negotiated in the contract. Each party should speak candidly during the negotiations about what it expects the other party to do, and about its own true capabilities and willingness to perform its obligations, in order to avoid problems later. In *VICI Racing,* neither party had a clear sense of what the "telematics" provision required, creating a great deal of misunderstanding that poisoned the relationship and sent it into litigation. In contrast, Nike benefited from its many statements to McIlroy's representatives during negotiations that it would not sign a contract with McIlroy until he was contractually able to do so, and from insisting on representations by McIlroy that he in fact was contractually able to do so. Take the time to ensure the person/entity has the authority and approvals necessary before agreeing to any contract and put that authority and approval in writing inside the agreement.

CLEAR PROVISIONS ON THE TERM FOR THE AGREEMENT, THE PARTIES' ABILITY TO TERMINATE, AND WHAT HAPPENS UPON TERMINATION

The parties to a sponsorship agreement will benefit from clarity as to when their rights under the agreement, for example, a license to use the other party's trademarks, have ended. In *All Star Championship Racing, Inc., v. O'Reilly Automotive Stores, Inc.*, 940 F.Supp.2d 850 (C.D. Ill. 2013), the plaintiff, an organizer and advertiser of automobile races, continued to use O'Reilly's marks after the parties had failed to renew their contract in 2010 and 2011. A factual dispute as to whether an implied license to use the marks continued to be in effect between the end of the 2009 contract and July 16, 2011 prevented summary judgment from being granted in favor of O'Reilly for that time period.[18]

In *United States ex rel. Landis v. Tailwind Sports Corporation,* 155 F.Supp.3d 12, 14 (D.D.C. 2016), a former member of Lance Armstrong's professional cycling team brought a *qui tam* action against Armstrong and several affiliated defendants for violations of the False Claims Act, and in particular, for reverse false claims.[19] Reverse false claims accrue where someone has improperly withheld money or property to which the United States is legally entitled.[20] Therefore, the question before the Court was whether the Sponsorship Agreement created a legal obligation to repay the United States Postal Service any sponsorship fees that were obtained and retained because of Armstrong's materially false statements that he was not using performance-enhancing drugs.[21] The clause at issue permitted the U.S. Postal Service, in the event of defendants' breach of the moral turpitude and drug clause, to immediately terminate the agreement and pursue whatever remedies it had available to it under law or equity.[22]

The court initially denied defendants' motion to dismiss this claim, finding that the agreement created a legal obligation "sufficiently certain to give rise to an action of debt at common law."[23] The Court reasoned that the doping activity alleged would constitute a "total breach" so serious that this conduct generated a sufficient obligation for purposes of reverse false claim liability.[24]

However, Judge Cooper, who presided over this case later in the proceeding, thoroughly reconsidered this reasoning, and granted defendants' motion for summary judgment on the same claim. Judge Cooper concluded that the clause in question only created a *contingent* obligation, because it did not require Tailwind, the manager of the cycling team, to return any funds during periods in which team members were in violation of the moral turpitude and drug clause.[25] An obligation to the U.S. Postal Service for purposes of reverse false claims liability would only arise after it sued to enforce the obligation and obtained a favorable judgment.[26]

When drafting these types of provisions, we suggest seeking clarity and balance. Clarity is helpful to avoiding misunderstanding later about what was agreed to. Balance is required because a sponsorship agreement is about creating an ongoing and positive relationship between the two parties and an environment where the parties seek to go beyond what is contractually required to provide value to the other and increase the value of the contract in the next negotiation period. In negotiating term ending dates, renewal provisions, and rights of first refusal, each side should carefully consider the terms and their true effect on the parties and try to negotiate fair terms that engender enthusiasm for the partnership. If the term is set up to lock up the talent for a very lengthy period of time, for example, the sponsor may find that it has a half-hearted partner looking for exit opportunities halfway through the term.

In thinking about creating a partnership feeling in drafting sponsorship agreements, morals clauses are some of the most difficult in negotiations because sponsors want to ensure they are not purchasing a public relations crisis, or liability, with their sponsorship money. In the last few years, we have seen many instances in which sponsors have pulled their sponsorships when the talent/athlete has engaged in problematic conduct (*see, e.g.,* Lance Armstrong, Tiger Woods, Ryan Lochte, the list goes on). Both parties should do thorough due diligence before entering an agreement and ask for consent to a background check where there is any doubt. Asking the right questions and being clear about one's expectations can go a long way to avoiding problems later. Of course, some misconduct cannot be foreseen, and so the best way to protect against damage during and after contract is to have termination, liquidated damages, and similar provisions that delineate the remedies available when the relationship ends or goes sour.

CLEAR DESCRIPTION OF SPONSOR RIGHTS AND ANY EXCEPTIONS

In every sponsorship agreement, the sponsor bargains for a unique bundle of rights it is to receive from its sponsored party as consideration for its sponsorship. Some examples of common sponsor rights include:

- ***Exclusivity*** (rights to be the exclusive sponsor or one among sponsors in a given business sector);
- ***Trademark and logo use*** (rights to use the sponsored party's marks or logos);
- ***Advertising and promotional rights*** (rights to promote or advertise oneself as the sponsor);
- ***Presentation rights*** (rights to present awards or play a certain role in presentational events);
- ***Merchandising rights*** (rights to develop and sell related merchandise);
- ***Filming/recording/broadcast rights*** (rights to go beyond the event and merchandise to record and broadcast coverage);
- ***Hospitality rights*** (rights to entertain clients, for example, box seats);
- ***Management rights*** (rights to control aspects of event planning and management);
- ***Naming rights*** (rights to name venues, facilities or events); and
- ***Exposure on social media*** (views and impressions from social media posting).

Being clear in describing the rights being granted and candidly discussing what the sponsored party expects to do to fulfill its obligations to the sponsor while negotiating those descriptions in the agreement, are good ideas because they set and match the parties' perceptions of what is expected throughout the relationship. As we saw with *VICI Racing, LLC v. T-Mobile USA, Inc.*, an ambiguously worded pseudo-representation like the "telematics" statement can generate a great deal of expensive litigation that could easily have been avoided.

Similarly, it is wise to be clear about the circumstances under which the sponsored party's performance is to be excused. In the *VICI Racing* case, T-Mobile also accused VICI of breaching the agreement by failing to run its racecar at Le Mans for the rest of the 2009 season after an accident at the Lime Rock race on July 18, 2009, that resulted in engine and body damage.[27] The court found, however, that this failure did not constitute a breach under the parties' force majeure clause, which required fulfillment of three conditions: that "(1) the prevented obligation is a nonmonetary obligation that is prevented by a condition beyond a party's control, (2) the affected party provides prompt notice of the interference, its nature and expected duration; and (3) performance of the prevented obligation resumes as soon as the interference is removed."[28] VICI properly adhered to these procedures and was excused from its failure to race the car for the remainder of the year.[29] T-Mobile unsuccessfully argued that the interference preventing VICI from racing was actually a monetary interference because it lacked the money to repair the damage in time to finish the 2009 season, but as the court put it, "[t]he fact that money can solve a problem does not mean that a lack of money caused the problem."[30]

On the transactional front, sponsor rights and sponsored party's obligations are really the core of the agreement. Each party should have a clear vision of what this sponsorship will look like going forward, for example, how and when their intellectual property is to be used or not used; how they can protect themselves from confusion with other brands and products; how they each can maintain sufficient control over joint activities to ensure their own interests are protected; and how they will protect each other from attacks by third parties. In the *VICI Racing* case, the owner of the racecar benefited from negotiating a sensible procedure to follow in the somewhat likely event that its racecar would sustain damage, making it unable to fulfill its obligations for some period of time, and then following that procedure when that event occurred.

In negotiating sponsor rights, special attention should be given to the protection of the intellectual property of the product or brand because inadvertent misuse or infringement can be destructive, harming the relationship and diminishing the value of the deal. Further, knowing what other products a talent or company has been, is currently, or will be in a sponsorship/endorsement relationship with may be helpful to developing a clear picture of what the sponsorship being negotiated will look like with that talent or company. Both parties will benefit from a clear vision of the relationship going forward, and from taking the time to express what each side wants and papering it appropriately.

***In closing*,** we have developed a few broader themes for the successful negotiation of a sponsorship agreement. First, it is important to recognize, and deal effectively with, the very different interests represented by each side of a sponsorship agreement, to better understand the likely nature of the future relationship. For example, a large retailer recently selected an attorney with experience representing talent to help it negotiate and draft a sponsorship agreement that it would use with its talent, because the attorney would be better able to explain proposed terms to talent likely unfamiliar with those terms. It was a smart move by the retailer and ended in a positive negotiation and fair contract.

Second, a sponsorship agreement should read less like legalese and more like a story that accurately portrays the relationship going forward. It should be easy to understand and both parties can benefit from taking the time to accurately describe what they expect out of their respective rights and obligations. Remember, sponsorship agreements are first and foremost based on relationships. If one party does not feel comfortable with the contract, its terms, or the relationship in general, its performance under the contract will be lackluster, diminishing the value of the contract and making renewal unlikely. Also, spelling out the terms and the conditions in an easy-to-understand way makes it easier for parties to work out difficulties by renegotiating specific aspects of the agreement based on a clear understanding of what the agreement would otherwise provide, rather than resorting to litigation because there is confusion over ambiguous terms.

Third, a mandatory arbitration clause should be considered. Most people and entities, specifically talent and large companies, would rather keep things private and out of the public eye. Arbitration is typically more streamlined than litigation, saving money and time. The parties can select the decision maker, who may bring relevant experience to the table and help the parties resolve their differences and move forward positively through a settlement.

Fourth, with regard to terms and conditions, it is wise to lay out the deliverables clearly and concisely, preferably in an addendum to the contract. For example, in most sponsorship contracts there are terms like "Amount of Social Media Posts" (regarding the product or brand), "Public Appearances or Promotions," "Product Placement or Signage," and the like. These terms are the lifeblood of the agreement between the parties because it is the underlying service or act in promoting the brand or product that creates the reason why the parties are contracting in the first place and it is helpful for the delivering party to know precisely what it is responsible for doing under these terms and fulfilling those responsibilities. Understanding the deliverables make for happy contractual relationships and minimize the likelihood of costly litigation.

Last, in any sponsorship agreement, it is unwise and unethical to guarantee the results of the sponsorship relationship. A contract directs the parties, and creates opportunities, but it does not control the markets or consumer decisions. A sponsorship agreement should on its surface only attempt to influence consumer spending based on what the parties promote, and the emphasis should be on good communications between the sponsor and sponsored party about how to maximize both the promotional opportunities coming out of the relationship and the value of the sponsorship deal.

This article is available as an online self-study test.
Visit:
www.calbar.org/self-study
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ENDNOTES

1 http://www.sponsorship.com/IEGSR/2017/01/04/Sponsorship-Spending-Forecast--Continued-Growth-Ar.aspx

2 http://www.forbes.com/sites/kurtbadenhausen/2013/08/14/nfl-stadiums-by-the-numbers/#4e1642cc6e19 (emphasis added)

3 http://www.sponsorship.com/iegsr/2014/10/20/MLB-Sponsorship-Revenue-Totals-$695-Million-In-201.aspx

4 http://www.sponsorship.com/iegsr/2015/11/09/Sponsorship-Spending-On-MLB-Totals-$778-Million-In.aspx

5 Id.

6 *See, e.g., David J. Ervin and James Hennigan, Sponsorship Arrangements in the U.S.,* Practical Law Practice Note 0-503-9158 (2017).

7 *VICI Racing, LLC v. T-Mobile USA, Inc.,* 763 F.3d 273, 279 (3rd Cir. 2014).

8 *Id.* at 280.

9 *VICI Racing, LLC v. T-Mobile USA, Inc.,* 921 F.Supp.2d 317, 328 (D. Del. 2013).

10 *Id.* at 328, 329.

11 *Id.* at 330.

12 763 F.3d at 286.

13 *Oakley Inc. v. Nike, Inc. et al,* 988 F.Supp.2d 1130, 1132 (C.D. Cal. 2013).

14 First Amended Complaint, 8:12-CV-02138 JVS-MLG at ¶ 45.

15 998 F.Supp.2d at 1133.

16 *Id.* at 1137, 1138.

17 *Id.* McIlroy was dismissed per stipulation of the parties.

18 *All Star Championship Racing, Inc., v. O'Reilly Automotive Stores, Inc.,* 940 F.Supp.2d 850, 864-865 (C.D. Ill. 2013)

19 *United States ex rel. Landis v. Tailwind Sports Corporation,* 155 F.Supp.3d 12, 14 (D.D.C. 2016).

20 *Id.*

21 *Id.* at 26.

22 *Id.* at 15.

23 *Id.* at 18.

24 *Id.* at 18-19.

25 *Id.* at 28.

26 *Id.*

27 921 F.Supp.2d, at 331.

28 *Id.* at 332.

29 *Id.*

30 *Id.*

Employee Benefits for Small Employers: Your Questions Answered

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By Marilyn Monahan

Solo and small firm practitioners often have questions about the types of health and welfare benefits they can offer to their employees (or to themselves). Guidance on these issues is not readily available, and unfortunately the answers are sometimes complicated. This article will answer some common questions solo practitioners and small employers have about benefit options and flag some regulatory issues they should know about.

WHERE AND WHEN CAN I PURCHASE HEALTH COVERAGE?

Both individual and small group health plans are available from Covered California,[1] the state marketplace (or exchange) created pursuant to the Affordable Care Act (ACA). Individual and small group plans are also available outside the marketplace. In either case, a licensed accident and health agent may help with the selection and purchase.

Individual and small group health plans fall into four metal tiers: platinum, gold, silver, and bronze. A platinum plan, for example, will offer more generous benefits (such as lower copayments and deductible limits) than a gold plan. The plans are underwritten by insurance companies and HMOs.

Individuals are only allowed to purchase an individual plan during Covered California's annual open enrollment period, which begins November 1 of each year.[2] This limit also applies to individual coverage purchased off the marketplace. If a person misses the annual open enrollment period, mid-year enrollments are only allowed if a person has a "special enrollment" event.

Small employers may purchase a small employer plan at any time during the calendar year, either from Covered California or outside of it. However, if an employee does not sign up at the beginning of the policy/plan year, the employee will only be able to enroll mid-year if he or she has a "special enrollment" event. Small group plans offered through Covered California are referred to as SHOP plans.

CAN AN INSURER/HMO TURN DOWN MY APPLICATION FOR SMALL GROUP OR INDIVIDUAL HEALTH COVERAGE?

No. Both individual and small group coverage are "guarantee issue," which means that an individual or small employer cannot be turned down, so long as the applicant satisfies the plan's eligibility requirements. The eligibility requirements for small plans are important limitations and are often the reason small employers who want to provide coverage are unable to.

WHAT ARE THE ELIGIBILITY REQUIREMENTS FOR SMALL GROUP HEALTH PLANS?

In California, employers with up to 100 "full-time equivalent" employees are eligible for small group health coverage.[3] Very small firms should know that to be eligible for a small group plan the employer must have at least one W-2 employee other than a business partner or spouse.

As part of the eligibility requirements, the insurer/HMO will require the small employer to offer coverage to all eligible employees. An eligible employee is someone who works thirty or more hours per week.

In addition, the insurer/HMO will impose minimum employer contribution and participation requirements on the small employer. If the employer cannot satisfy these requirements, the insurer/HMO will not issue coverage.

WHAT ARE THE MINIMUM EMPLOYER CONTRIBUTION AND PARTICIPATION REQUIREMENTS FOR SMALL EMPLOYER PLANS?

The insurer/HMO will require the employer to pay at least 50% of the cost of employee-only coverage (the employer is not required to contribute toward the cost of coverage for employees' dependents).[4] In addition, the insurer/HMO will mandate that at least 70% of eligible employees enroll, unless they are eligible for certain other coverage. This other coverage cannot be an individual policy, but it can be a spouse's employer's plan, Medicare, or Medi-Cal. However, if the employer pays 100% of the premium for all employees, or if the employer only employs 1 to 3 eligible employees, then all eligible employees must enroll.[5]

IS ANY RELIEF AVAILABLE IF A SMALL EMPLOYER CANNOT MEET THE MINIMUM PARTICIPATION AND CONTRIBUTION REQUIREMENTS FOR SMALL EMPLOYER PLANS?

Yes. Each year, small employers that cannot satisfy the minimum participation and contribution requirements may apply for coverage between November 15 and December 15.[6]

May employees pay the cost of their group health coverage pre-tax?

Yes. Employers may allow employees to pay their portion of the premium for their group health coverage pre-tax. This pre-tax arrangement is known as a "cafeteria plan." A cafeteria plan must be set up in compliance with 26 U.S.C. § 125 and governing regulations.[7] If the plan is not administered according to these requirements, the tax benefits of the pre-tax arrangement are forfeited.[8]

Among other requirements, the employer must have a written cafeteria plan document, require that employees elect how much they will pay pre-tax before the start of the plan/policy year, and only allow employees to change their elections mid-year under certain specified circumstances.

Cafeteria plan documents may be prepared by an employee benefits lawyer, or may be obtained for a minimal fee from a payroll company or third party administrator. Setting up a cafeteria plan usually involves minimal administration, and most employees appreciate the tax savings. Employers also benefit, because as employee taxable income goes down, the employer has less to pay in employment taxes.

To satisfy California law, employers should obtain a written authorization before deducting insurance premiums from an employee's paycheck.[9]

DOES THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA)[10] APPLY TO HEALTH AND WELFARE BENEFITS OFFERED BY SMALL EMPLOYERS?

Typically, and regardless of the size of the employer, if an employer offers group health and welfare benefits to its employees, those benefits are subject to ERISA.[11]

HOW DOES AN EMPLOYER DETERMINE IF THE BENEFITS IT OFFERS TO EMPLOYEES ARE SUBJECT TO ERISA?[12]

First, for a plan to be subject to ERISA it must be "established or maintained" by an employer[13]; in very general terms, group plans are subject to ERISA and individual plans are not. Employers often do not realize that if they pay the premiums on an individual policy, or take certain other steps such as "endorse" the individual policy, the employer may convert that individual policy into a group plan subject to ERISA.[14]

Second, the benefit must qualify as a "health or welfare" benefit. To fall into this category, the plan must provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services."[15] In practical terms, this means that the following group plans are subject to ERISA: medical, dental, vision, prescription drug, mental health coverage, life insurance, short- and long-term disability, health flexible spending accounts (health FSAs); and prepaid legal plans. Two examples of plans that are *not* subject to ERISA are dependent care spending accounts (which are subject to 26 U.S.C. § 129) and workers' compensation benefits.

IF ERISA DOES APPLY TO A SMALL EMPLOYER PLAN, WHAT DOES THAT MEAN?

In general, it means that an employer must satisfy all the reporting and disclosure requirements contained in ERISA. The Department of Labor's *Reporting and Disclosure Guide for Employee Benefit Plans* (Sept. 2014), available on the Department's website, outlines an employer's obligations. Many, but not all, of the disclosure requirements will be satisfied by the written materials provided by the insurer or HMO; any documents or mandatory terms missing must be provided by the employer.

In addition, employers are generally considered fiduciaries of the ERISA plan.[16] This means, for example, that employers must handle employee premium contributions consistent with ERISA's fiduciary requirements. An ERISA plan fiduciary also has a duty to act solely in the interest of the plan participants and beneficiaries and with the exclusive purpose of providing benefits to them. The Department has also posted a publication summarizing fiduciary obligations: *Meeting Your Fiduciary Responsibilities* (Feb. 2012).

IS A SMALL EMPLOYER GROUP HEALTH PLAN SUBJECT TO COBRA[17]?

Maybe.[18] COBRA applies to employers with twenty or more employees.[19] An employee enrolled in a group health plan maintained by an employer subject to COBRA is entitled to continue his or her coverage after a "qualifying event" (such as a reduction in hours or termination of employment that results in a loss of coverage). COBRA continuation coverage lasts for up to eighteen months[20] (thirty-six months for dependents in the case of certain qualifying events). The participant must pay for the coverage (102% of the *total* cost of coverage, not just the amount paid by active employees).[21] The employer, not the insurer/HMO, is obligated to provide required COBRA notices to participating employees.[22]

In California, group health plans covering employers with fewer than twenty employees are subject to Cal-COBRA.[23] Like COBRA, employees enrolled in their employer's health plan may continue coverage under that plan following a qualifying event, such as a termination of employment, for up to a total of thirty-six months. The participant must pay the cost of coverage (and the insurer/HMO may charge up to 110% of the actual premium cost). Unlike COBRA, Cal-COBRA is administered by the insurer/HMO, rather than by the employer.

MAY A SMALL EMPLOYER PAY FOR AN EMPLOYEE'S INDIVIDUAL HEALTH POLICY?

Until 2017, the answer to this was no. The Internal Revenue Service (IRS) and the Department of Labor (DOL) prohibited these arrangements—that the IRS refers to as "employer payment plans." However, the employer can increase an employee's compensation (but then cannot require that the employee use the increase to purchase health insurance).[24] This latter type of arrangement is much less attractive to both employees and employers because the compensation is taxable. It is also important to note that employees cannot pay the premiums on an individual policy pre-tax through the employer's cafeteria plan.

For some employers, the answer may now be yes. In late 2016, Congress passed the 21st Century Cures Act.[25] This Act allows certain small employers to set up a "qualified small employer health reimbursement arrangement" (QSEHRA), which can be used to pay the premiums on individual plans. Only certain employers are eligible to set up a QSEHRA, and the plans are subject to a number of rules. Expert guidance should be obtained.

MAY A SMALL EMPLOYER PAY AN EMPLOYEE'S OUT-OF-POCKET MEDICAL EXPENSES?

Yes, but the employer has to follow the rules. An employer can set up a QSEHRA for this purpose, but cannot then also offer group health coverage. An employer could set up a "health reimbursement arrangement" (HRA), but the IRS and DOL have placed significant limitations on the structure of these plans (and, if they are set up, are subject to various IRS and DOL rules).

A common practice is for an employer to establish a health flexible spending account (or health FSA) as part of the employer's cafeteria plan.[26] With a health FSA, both the employer and the employee may contribute a certain amount of money per year on a pre-tax basis. This money is used to reimburse qualifying medical expenses that are not covered by the employer's health plan (such as reimbursing co-pays and expenses subject to the plan's deductible). In general, amounts contributed must be used during the plan year or they are forfeited. In 2017, employees could, by IRS rule, contribute up to $2,600 per year to a health FSA. While health FSAs are sometimes administered by the employer, many third party administrators also provide this service, including the required plan documentation. A health FSA is considered a health plan subject to ERISA as well as certain non-discrimination rules in 26 U.S.C. § 105(h) and § 125.

If employees are enrolled in a high deductible health plan (HDHP), participating in a health FSA may make those employees ineligible to contribute to a health savings account (HSA), unless the health FSA is a "limited purpose" health FSA that is set up to avoid this outcome. Employers should consider this when structuring their benefits.

MAY A SMALL EMPLOYER CONTRIBUTE DIFFERENT PREMIUM AMOUNTS FOR DIFFERENT EMPLOYEES?

Maybe. In some circumstances, an employer may contribute different amounts toward health coverage premiums for different groups of similarly situated employees. The differentials should be based on bona fide employment-related classifications. Problems usually arise when the employer wants to contribute more for executives than other employees do. If employees pay their premiums pre-tax through a cafeteria plan (which most employers allow), such an arrangement could fail the non-discrimination testing rules for cafeteria plans, which prohibit eligibility and benefit structures that favor highly compensated individuals.[27] Employers should either contribute the same amount for all employees or seek guidance.

SOME TAX ISSUES SMALL EMPLOYERS MIGHT NOT KNOW ABOUT:

HSA contributions: An individual enrolled in a qualifying HDHP may be eligible to contribute to an HSA.[28] Those contributions are tax deductible for federal income tax purposes. However, HSA contributions are not tax deductible for California income tax purposes; the state legislature has not passed conforming legislation. Additionally, different (and complicated) nondiscrimination rules apply to HSA contributions depending on whether the employer allows employees to contribute pre-tax through payroll reduction.

Voluntary benefits: In addition to group health coverage, many employers offer employees the opportunity to enroll in "voluntary" benefit plans. Many employees appreciate this opportunity. However, employers should be aware that if an employee pays the premiums on voluntary benefits pre-tax through the employer's cafeteria plan, or if the employer pays the premium, the value of the benefit should be included in the employee's gross income. [29] In such an event, these benefits are much less attractive to employees. Therefore, employees should pay the full premium for voluntary plans, although employers can ease the administrative burden on employees by paying via a payroll deduction.

WITH ALL THESE FACTORS IN MIND, IS THERE AN ADVANTAGE TO OFFERING HEALTH AND WELFARE BENEFITS TO EMPLOYEES?

Yes! Employees value a strong employee benefits package. Offering a robust benefits package helps ensure that an employer can both attract and retain the most qualified employees. In addition, employees who have health coverage are less likely to come to work sick ("presenteeism"), and are more likely to get better faster. There is also some indication that employers that offer health coverage have fewer workers' compensation claims. Employers that establish cafeteria plans will also find that as employee gross income is adjusted downward, the employer's employment tax obligation eases.

ENDNOTES

1 www.coveredca.com

2 Open enrollment periods are subject to change by either CMS[? Define please] or Covered California.

3 Cal. Health & Safety Code § 1357.500(k)(3); Cal. Ins. Code § 10965.3(q)(3).

4 Cal. Code Regs. tit. 10, § 6522(a)(5).

5 Cal. Code Regs. tit. 10, § 6522(a)(4).

6 Cal. Code Regs. tit. 10, § 6526(b).

7 *See* Employee Benefits—Cafeteria Plans, 72 Fed. Reg. 43937 (proposed Aug. 6, 2007) (Proposed Regs.).

8 Proposed Regs. at § 1.125-1(c)(7).

9 Cal. Lab. Code § 224.

10 29 U.S.C. § 1001, et seq.

11 29 U.S.C. §§ 1002(a), 1003. Plans established or maintained by government employers or churches are not subject to ERISA.

12 ERISA also applies to retirement and pension benefits.

13 29 U.S.C. §§ 1002(a), 1003.

14 29 C.F.R. § 2510.3-1(j).

15 29 U.S.C. § 1002(a).

16 Under ERISA, the obligations technically fall on the "plan administrator" but, as that term is defined, the "plan administrator is usually the employer.

17 26 U.S.C. § 4980B.

18 26 U.S.C. § 4980B(d).

19 26 C.F.R. § 54.4980B-2, Q&A 5.

20 The 18 month period may be extended to 36 months pursuant to Cal-COBRA (*see* Cal. Ins. Code § 10128.59(a)).

21 COBRA and Cal-COBRA premium may be higher for disabled participants.

22 *See Reporting and Disclosure Guide for Employee Benefit Plans*, Dept. of Labor (Sept. 2014).

23 Cal. Ins. Code § 10128.50-.59; Cal. Health & Safety Code § 1366.20-29.

24 IRS Notice 2013-54; https://www.irs.gov/affordable-care-act/employer-health-care-arrangements.

25 Pub. L. No. 114-255 (2016).

26 29 U.S.C. § 125.

27 Proposed Regs. at § 1.125–7.

28 26 U.S.C. § 223.

29 IRS Chief Counsel Memorandum 201703013 (Dec. 12, 2016).

MCLE Article: A Law Firm's Legal Duty to Provide Reasonable Accommodation to Attorneys with Disabilities

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

Law firms in California with five or more employees have an affirmative legal duty to provide reasonable accommodation to their attorneys and other employees with physical or mental disabilities unless doing so would cause undue hardship. This affirmative duty arises from state and federal law and furthers the important public policy of lifting barriers to employment faced by attorneys with disabilities. According to data the Equal Employment Opportunity Commission (EEOC) has provided, 32.6% of all EEOC claims filed in California in 2016 were based on disability, surpassing the number of claims filed based on any other protected characteristic, such as race, sex, color, religion, national origin, or age.[1] Similarly, the California Department of Fair Employment and Housing (DFEH) reported that the majority of employment-based discrimination claims it received in 2016 were based on disability.[2] This is not surprising given how complex the law is on accommodating individuals with disabilities.

While attorneys with disabilities may require accommodations similar to those required by employees in other business environments, the law firm setting can pose unique challenges not faced in other settings, such as billable hours requirements, heavy caseloads, and the ability to work under extreme pressure. This article reviews the legal framework for a law firm's duty to provide reasonable accommodation, and discusses the ways in which firms can meet this obligation for their attorneys with disabilities.

OVERVIEW OF A LAW FIRM'S DUTY TO PROVIDE REASONABLE ACCOMMODATION

A California employer's duty to provide reasonable accommodation to individuals with disabilities is principally derived from two laws, the federal Americans with Disabilities Act (ADA)[3] and the California Fair Employment and Housing Act (FEHA).[4] The ADA prohibits private sector employers from discriminating against employees on the basis of disability, and requires employers to provide reasonable accommodation to qualified applicants and employees with disabilities, unless doing so would cause undue hardship.[5] The FEHA was modeled in part on the ADA, and prohibits employment discrimination on the basis of physical disability, mental disability, and medical condition.[6] Like the ADA, the FEHA requires employers to provide reasonable accommodation for the known physical or mental disability of an applicant or employee, unless doing so would impose an undue hardship.[7]

Importantly, "the duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA."[8] Although the ADA provides a floor of protection, the FEHA affords additional protections to California employees.[9] One of the major differences between the FEHA and ADA is that while the ADA applies to employers with fifteen or more employees, the FEHA applies to employers who regularly employ *five* or more employees.[10] Employees located outside of California are counted in determining whether the employer meets the "five or more" employee threshold under the FEHA.[11]

The FEHA's anti-discrimination and reasonable accommodation provisions apply only to employees and applicants, not independent contractors.[12] A law firm therefore has no legal duty to provide reasonable accommodation to a disabled freelance or "contract attorney" with whom it works, assuming that the attorney is a bona fide independent contractor and not a misclassified employee.[13]

Under the FEHA, an employer's duty to disabled individuals encompasses two distinct yet related obligations: (1) to make "reasonable accommodation" and (2) to engage in an "interactive process."[14] "Reasonable accommodation" refers to a modification or adjustment to the work environment that enables the employee to perform the essential functions of the job he or she holds (or for which he or she is applying).[15] An "interactive process" consists of a dialogue between the employer and the employee/applicant to assist the employer in selecting an appropriate accommodation.[16] Essentially, reasonable accommodations remove barriers to employment faced by disabled employees that enable them to apply for jobs, perform their jobs, and reap the benefits of employment, and the interactive process is the means by which a reasonable accommodation is selected. An employer must make reasonable accommodation(s) for the disability of an applicant or employee unless it can demonstrate, after engaging in an interactive process, that the accommodation would impose an undue hardship.[17]

UNDUE HARDSHIP

If providing a reasonable accommodation for an employee's disability would impose an undue hardship on the employer, the employer is not required to make the accommodation.[18] The FEHA defines "undue hardship" as "an action requiring significant difficulty or expense" when considered in light of several factors: the nature and cost of the accommodation; the employer's ability to pay for the accommodation; the type of operations conducted at the facility; the impact on the operations of the facility; the number of employees and the relationship of the employees' duties to one another; the number, type, and location of the employer's facilities; and the geographic, administrative and financial relationship of the facilities to one another.[19]

While the cost of an accommodation and the employer's ability to pay for it are factors used to assess undue hardship, the determination *cannot* be made by making a cost-benefit analysis.[20] Whether the cost of a particular accommodation imposes an undue hardship depends on the firm's resources and ability to pay, and not on the accommodation's benefit to the firm and attorney in relation to its cost. For example, suppose an attorney who has significant experience and expertise in a highly specialized area of the law requires two months off as a reasonable accommodation. Due to her level of expertise, her workload cannot be distributed among more junior attorneys in the firm, and the firm therefore engages a legal staffing agency that places highly specialized attorneys with firms. Granting the leave would not be an undue hardship if the firm has the financial ability to hire a qualified temporary attorney through the staffing agency, even if the cost of doing so will be more than what the firm would have paid to the disabled attorney for the same period of time.

Undue hardship, however, is not limited to the issue of financial difficulty, and also can arise from "reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business."[21] Take, for example, an attorney who will be second chairing a class action trial that is expected to last several weeks. On the eve of trial, the attorney requests intermittent leave for unforeseeable episodes of incapacity caused by migraines. Granting the request for intermittent leave may pose an undue hardship for the duration of the trial.

Law firms should exercise caution when denying an accommodation based on undue hardship, as "[t]he bar for undue hardship is 'high.'"[22] If the determination is later challenged in court, the firm will have to present "proof of actual imposition or disruption" that granting the accommodation would have worked.[23] "Hypothetical or merely conceivable hardships cannot support a claim of undue hardship."[24] Whether a reasonable accommodation will cause undue hardship should be based on careful analysis and be meticulously documented. If a firm determines that one particular reasonable accommodation will cause undue hardship, but a different accommodation will be effective and will not cause an undue hardship, the firm must provide the second accommodation.

THE INTERACTIVE PROCESS

Once an attorney requests an accommodation or the firm otherwise becomes aware of the need for one, the firm must take proper steps to engage in a timely, good-faith, interactive process. Specifically, the FEHA regulations provide that an employer must initiate the interactive process when any of the following occur:[25]

(1) *A disabled applicant or employee requests reasonable accommodations.* Importantly, an attorney need not mention the words "reasonable accommodation" or refer to disability rights laws when making a request. Any "plain English" request will suffice. For example, an attorney might tell a partner at her firm that she will need four weeks off to recover from a scheduled surgery, that walking ten city blocks from the office to the courthouse is difficult due to her leg injury, or that she cannot sit at her office desk for long stretches of time due to her back pain flaring up. Each of these would trigger the law firm's duty to initiate the interactive process.

(2) *The employer becomes aware of the need for an accommodation through a third party or by observation.* Even if an attorney does not say he or she is disabled or request an accommodation, the firm must nonetheless initiate the interactive process if it learns of the need for an accommodation. For example, if an attorney's spouse or other family member calls the firm to advise that the attorney is in the hospital due to a medical emergency, or an attorney is observed walking into the office with his arm in a cast, either of these scenarios would trigger the firm's duty to start the interactive process.

(3) *A disabled employee has exhausted leave under state or federal law or under the employer's leave policy, and the employee or employee's health care provider indicates that further accommodation is necessary.* Oftentimes, an employee's doctor will place the employee on medical leave for a duration that exceeds the amount of leave they are entitled to by law or under the employer's leave policy. Employers are required to take a request for such additional time off as a request for accommodation. For example, suppose an attorney is out on leave under the California Family Rights Act (CFRA) due to his own serious health condition, and his leave entitlement ends on June 1st.[26] On May 30th, the attorney submits medical documentation indicating that he must be off work until June 25th. The firm must interpret the doctor's note as a request by the attorney for accommodation for the period starting June 2nd.

FIRMS MAY REQUIRE REASONABLE MEDICAL DOCUMENTATION

If an attorney's disability or need for accommodation is not obvious, the firm may require the attorney to provide "reasonable medical documentation" from a health care provider that confirms the existence of the disability and the need for accommodation.[27] In such instance, the firm may require documentation that contains the name and credentials of the attorney's health care provider; a statement that the attorney has a physical or mental condition that limits a major life activity, or has a medical condition; and a description of why the attorney needs a reasonable accommodation.[28] The attorney must then cooperate "in good faith" and provide the documentation.[29] Most health care providers have their own form to supply this information. However, a firm may require an attorney to have his or her health care provider use the firm's form, as long as it does not request information disclosing the nature of the disability.[30]

If an attorney provides insufficient documentation in response to the firm's initial request, the firm must explain why the documentation is insufficient and give the attorney an opportunity to provide supplemental information in a timely manner from his or her health care provider.[31] Documentation is insufficient if it fails to specify the existence of a FEHA disability, explain the need for reasonable accommodation, or include a description of the attorney's functional limitations to perform the essential job functions.[32] If the medical documentation provided does not support any reasonable accommodation, the firm has no obligation to provide one.[33]

Importantly, all such medical information and records obtained during the interactive process must be maintained in a medical file separate from the attorney's personnel file, and must be kept confidential.[34] However, supervisors and managers may be informed of the attorney's restrictions and any necessary reasonable accommodations.[35]

COMMON REASONABLE ACCOMMODATIONS FOR ATTORNEYS

An employer is required to consider any and all reasonable accommodations of which it is aware or that are brought to its attention by an employee, except for those that create an undue hardship.[36] Thus, a firm should consider all potential accommodations and assess the effectiveness each would have in enabling an attorney to perform his or her essential job functions.[37] Although a firm is required to consider an attorney's preferred accommodation, it has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.[38] If an attorney refuses a firm's selected accommodation, the firm should inform the individual that refusing the accommodation may render him or her unable to perform the essential functions of the position.[39] If an attorney cannot perform the essential functions of the job either with or without accommodation, the firm need not retain the attorney.

The FEHA regulations provide a non-exhaustive list of examples of the different kinds of accommodations that employers may provide to employees in general, irrespective of industry or the type of work performed.[40] The following are common types of reasonable accommodations that attorneys with disabilities may require:

> *Making existing facilities readily accessible to and usable by disabled attorneys.* This may include providing accessible office space, break rooms and restrooms, acquiring or modifying furniture, equipment or devices, or making other similar adjustments in the work environment. For example, a firm may need to provide an attorney with a wheelchair-accessible desk, or a standing desk, depending on the nature of the disability.
>
> *Providing a paid or unpaid leave of absence.* If an attorney cannot perform the essential job functions, or otherwise needs time away from the job for treatment and recovery, holding the position open so the attorney may take a leave of absence, or extending a leave provided by law, may be a reasonable accommodation. If the attorney can work with a reasonable accommodation other than a leave of absence, the firm cannot require the attorney to go on leave.[41] A firm is not required to provide an indefinite leave of absence as a reasonable accommodation.[42] In determining the amount of time off to provide, if any, the firm may take into account factors such as the size of the firm, how busy the attorney's practice is, whether the attorney's workload can be distributed to other attorneys at the firm without burdening their workloads, etc. For example, a large firm with attorneys in multiple offices may be better able to provide a two month leave of absence as a reasonable accommodation than could a small firm with five attorneys. Employers are not required to provide paid leave, but they may elect to do so.

Providing an intermittent or reduced schedule. An attorney may need leave on an intermittent or reduced-schedule basis to obtain planned medical treatment.[43] In such instance, the firm may require reasonable medical documentation that establishes the medical necessity for such intermittent or reduced-schedule leave.[44]

Allowing attorneys to bring assistive animals to the office. Assistive animals include guide, signal and service dogs, or support dogs or animals that provide emotional, cognitive, or other support to the disabled person.[45] An employer may require reasonable medical documentation from the attorney's health care provider explaining why the attorney requires the presence of the assistive animal in the workplace.[46]

Transferring an attorney to a more accessible office building. If a law firm has more than one office location, temporarily transferring an attorney to a different office may be a reasonable accommodation. For example, if an attorney has weekly physical therapy appointments near her firm's second office, allowing the attorney to work at the closer office on the days she has physical therapy appointments may be a reasonable accommodation.

Providing assistive aids and services. For attorneys who are blind or have vision loss, the firm might provide a qualified reader or a computer screen-reading program. For those who are deaf or have hearing loss, the firm might provide a qualified note taker or sign language interpreter, or use real-time captioning technology (a service similar to court reporting in which a transcriber types what is being said at a meeting or event into a computer that projects the words onto a screen).

Job restructuring. Job restructuring may include reallocation or redistribution of an attorney's non-essential job functions. For example, a litigator's essential job functions might entail legal research, drafting briefs, and taking depositions, and non-essential job functions may include entertaining clients, updating the firm's legal blog, and serving on the firm's hiring committee. Temporarily reassigning these non-essential functions to another attorney may be a reasonable accommodation.

Providing a part-time or modified work schedule. Firms may adjust an attorney's arrival and departure times, or temporarily place the attorney on a part-time schedule.

Modifying supervisory methods. A firm may need to modify the ways in which it exercises supervisory oversight of an attorney's performance as a reasonable accommodation. For example, for an attorney with a learning disability, this might mean that instead of requiring a brief be completed by a certain date, the supervising attorney may set different deadlines for completing the fact, law and analysis sections, or using daily, weekly, and monthly task lists. "Modifying supervisory methods" *does not* require assigning an attorney to a new supervising attorney. An employee's inability to work for a particular supervisor due to anxiety or stress related to the supervisor's standard oversight of the employee's job performance does not constitute a disability under the FEHA.[47]

Permitting an attorney to work from home. For many attorneys, much of their work involves using a computer, and communicating via phone and email, which can usually be performed anywhere with an internet and phone connection. However, if an attorney's essential job functions include collaborating closely with other attorneys in the office and supervising filings, permitting a telecommuting arrangement may not be reasonable. The firm and attorney may need to work out how to handle tasks that cannot be performed remotely, such as attending client meetings, court appearances and depositions. The disabled attorney may agree to handle such tasks, or other attorneys may be available to cover them.

The FEHA regulations provide that employers may also be required to provide reasonable accommodation for the "residual effects of a disability."[48] For example, an attorney may need a schedule change to permit him or her to attend follow-up appointments with a health care provider.

IMPACT ON BILLABLE HOURS REQUIREMENTS

Like the ADA, the FEHA regulations provide that where a quality or quantity standard is an essential job function, an employer is not required to lower the standard as an accommodation, but may need to accommodate an employee with a disability to enable him or her to meet its quality or quantity standards.[49] The EEOC has taken the position, with respect to the ADA, that "a law firm may require attorneys with disabilities to produce the same number of billable hours as it requires all similarly-situated attorneys without disabilities to produce. Reasonable accommodation may be needed to assist an attorney to meet the billable hours requirement, but it would not be a form of reasonable accommodation to exempt an attorney from this requirement."[50] Thus, under the ADA and FEHA, a law firm's billable hours requirement may be an essential job function tied to a quantity standard, and a firm would have no obligation to reduce or waive its billable hours requirement as an accommodation.

However, a law firm may not penalize an attorney for failing to meet its billable hours requirement if the firm has granted the attorney leave as an accommodation and the attorney's failure to meet the hours requirement is due to taking the leave. The EEOC has advised that penalizing an attorney in such instance would amount to retaliation for the attorney's use of a reasonable accommodation, would violate the ADA, and would render the leave an ineffective accommodation.[51] A firm should also exercise caution if it plans to give an attorney an unsatisfactory performance review if the attorney was out on leave for a significant portion of the review period; otherwise, it may violate the ADA and FEHA, and amount to retaliation. Instead, the firm should delay the evaluation for several months after the attorney has resumed a normal workload, thus enabling the firm to conduct a more accurate review of the attorney's work.

CONCLUSION

Attorneys with disabilities may require a range of accommodations to perform the essential functions of their jobs. Law firms can take a number of steps to create a climate in which their attorneys feel comfortable requesting an accommodation, and to ensure that attorneys and firm managers are aware of their legal obligations. At a minimum, law firms should have clear written policies and procedures in place for handling accommodation requests and that confirm the firm's commitment to non-discrimination and providing reasonable accommodation. Firms can also ensure that their attorneys and other employees receive proper training on the interactive process and reasonable accommodation requirements. Not only does providing reasonable accommodation to attorneys with disabilities satisfy a law firm's legal obligations, it importantly lifts barriers to employment faced by disabled attorneys and serves the larger goal of enabling legal employers to diversify their workforce.

This article is available as an online self-study test. Visit: www.calbar.org/self-study for more information.

ENDNOTES

1 EEOC, EEOC Charge Receipts by State (includes U.S. Territories) and Basis for 2016, *available at* https://www1.eeoc.gov/eeoc/statistics/enforcement/state_16.cfm.

2 DFEH, 2016 Annual Report (2017).

3 42 U.S.C. § 12101 *et seq.*

4 Cal. Gov. Code § 12900 *et seq.*

5 42 U.S.C. § 12112(b)(5)(A).

6 Cal. Gov. Code § 12940(a).

7 Cal. Gov. Code § 12940(m).

8 *Bagatti v. Department of Rehabilitation* (2002) 97 Cal. App. 4th 344, 362.

9 *Id.*, citing Cal. Gov. Code § 12926(a).

10 42 U.S.C. § 12111(5)(A); Cal. Gov. Code § 12926(d).

11 While employees located outside of California are counted in determining whether California employers employ five or more individuals for coverage purposes, the employees located outside of California are not themselves covered by the FEHA if the wrongful conduct did not occur in California and it was not ratified by decision makers or participants located in California. 2 Cal. Code Regs. § 11008(d)(1).

12 2 Cal. Code Regs. § 11008(c)(1)) ("'Employee' does not include an independent contractor as defined in Labor Code section 3353.").

13 However, the FEHA does protect independent contractors from disability-based harassment as persons "providing services pursuant to contract." Cal. Gov. Code § 12940(j)(1), (4)(A); *Fitzsimons v. California Emergency Physicians Med. Group* (2012) 205 Cal. App. 4th 1423, 1430 (observing that the FEHA's anti-harassment provisions cover "contract workers").

14 2 Cal. Code Regs. §§ 11068(a), 11069(a).

15 *Nealy v. City of Santa Monica* (2015) 234 Cal. App. 4th 359, 373; 2 Cal. Code Regs. § 11065(p).

16 Cal. Gov. Code § 12940(n); 2 Cal. Code Regs. § 11069(a).

17 2 Cal. Code Regs. § 11068(a).

18 Cal. Gov. Code § 12940(m).

19 Cal. Gov. Code § 12926(u).

20 EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), #45.

21 *U.S. E.E.O.C. v. Placer ARC* 114 F.Supp.3d 1048, 1058 (E.D. Cal. 2015).

22 *Id.*

23 *U.S E.E.O.C. v. Abercrombie & Fitch Stores, Inc.* 966 F. Supp. 2d 949, 962 (N.D. Cal. 2013).

24 *Id.*

25 2 Cal. Code Regs. § 11069(b).

26 The CFRA and analogous federal Family and Medical Leave Act (FMLA) provide up to twelve weeks of unpaid leave per year to employees who meet certain eligibility requirements and who work for employers with fifty or more employees. An employer's obligation to provide reasonable accommodation exists independently of its duty to comply with the CFRA, FMLA and other leave laws.

27 2 Cal. Code Regs. § 11069(c)(2).

28 2 Cal. Code Regs. § 11069(d)(5)(A),(B).

29 2 Cal. Code Regs. § 11069(d).

30 2 Cal. Code Regs. § 11069(d)(1).

31 2 Cal. Code Regs. § 11069(d)(5)(C).

32 2 Cal. Code Regs. § 11069(d)(5)(C)(1).

33 2 Cal. Code Regs. § 11069(d)(6).

34 2 Cal. Code Regs. § 11069(g).

35 2 Cal. Code Regs. § 11069(g)(1).

36 2 Cal. Code Regs. § 11068(e).

37 2 Cal. Code Regs. § 11069(c)(7).

38 2 Cal. Code Regs. § 11069(c)(8); *Hanson v. Lucky Stores, Inc.* 74 Cal. App. 4th 215, 228 (1999).

39 2 Cal. Code Regs. § 11068(f).

40 2 Cal. Code Regs. § 11065(p).

41 2 Cal. Code Regs. § 11068(c).

42 2 Cal. Code Regs. § 11068(c).

43 2 Cal. Code Regs. § 11069(d)(9).

44 2 Cal. Code Regs. § 11069(d)(10).

45 2 Cal. Code Regs. § 11065(a)(1).

46 2 Cal. Code Regs. § 11069(e).

47 *Higgins-Williams v. Sutter Medical Found.* 237 Cal. App. 4th 78, 84-85 (2015).

48 2 Cal. Code Regs. § 11068(g).

49 2 Cal. Code Regs. § 11068(b).

50 EEOC, Reasonable Accommodations for Attorneys with Disabilities (2011), *available at* https://www.eeoc.gov/facts/accommodations-attorneys.html; *see also Dziamba v. Warner & Stackpole LLP* 56 Mass. App. Ct. 397, 405-406 (2002) (lawyer who could not meet law firm's minimum billable hours requirement would not be performing an essential function of position).

51 *Id.*

Coach's Corner: Reach for the Stars: Getting to the Next Level in Your Career and Life

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 or her website: www.southerslaw.net.

By Eleanor Southers

"Why bother? I'm making an OK living, I like my colleagues most of the time, my commute is hard but doable and I can handle my boss's temper most of the time."

Answer: Because you can do much much better and will have a truly great life and career if you step up to the next level in your development.

HOW DO I KNOW THIS?

Answer: Because I have seen many attorneys who decide that they can do better in their daily lives if they plan for the next level and manifest it. And, by the way, that means change, patience, and determination. They have reached for the stars!

If you decide you too want to take this journey, you must first identify exactly what that next level looks like for you. This is how you do that:

- As in the quote above, identify all the areas you are not totally satisfied with but are putting up with;
- Then identify all the areas you really like in your life; and
- Next first look at your law career and realistically determine what your next level looks like. Is it to become partner? Is it to work less? Is it to earn more? Is it to have more responsibility? Is it to get more satisfaction from your daily work? Is it to contribute more to your community? Is it to retire?

As an example, let's follow Lisa on her quest to grow in her career. Lisa is thirty-five years old and has been an attorney for the past ten years. Lisa had part time jobs as a barista and as a law clerk before becoming an attorney. She was hired as an associate in a Big Law firm straight out of law school. She had come out of law school with an $80,000.00 student loan as her parents had picked up the rest. That loan amount is now down to $20,000.00 as she had been able to pay it off in large amounts when she was working for Big Law.

After becoming a fifth-year associate at Big Law, Lisa could see that she was never going to make partner and the grueling hours were killing her. She really wanted to have a family with her husband but needed income.

So she decided that solo practice was for her. She hung out her shingle and worked 60-70 hour weeks to get her practice going. Lisa did everything on her own, refrained from hiring a staff and remained in a very tiny office in order to keep costs low. She still has not gotten pregnant, and Lisa is back to being exhausted.

WHAT IS HER NEXT LEVEL?

- Lisa determined that her wants are to: (1.) Start a family; (2.) Work less in order to care for her new family; and (3.) Keep a level of income at no less than 80% of what she is now making;
- Lisa is happy practicing the area of law she chose. She likes having one on one contact with her clients and helping them; and
- The number one thing she likes is being her own boss.

YOU CAN SEE THE OBVIOUS QUESTION IS HOW DOES LISA GET TO THE NEXT LEVEL IN HER DEVELOPMENT WHILE WORKING LESS BUT MAINTAINING A PRETTY HIGH INCOME?

One way of solving this problem is obvious. Hire help. This means first figuring out what 80% of present income amounts to, then calculating the cost of hiring a secretary and an associate, or at least a paralegal and a contract attorney to do appearances. The next step would be to figure out the necessary amount of funds needed to hire the aforementioned employee(s) as well as to rent a larger office to accommodate the new staff.

Loans can come from relatives, banks, credit unions, on home equity, and many other places. For an attorney who has been in business for five years, a $10,000 line of credit from her bank should be easily attainable.

Then the hard part is getting everyone on board with this new idea. Lisa's husband needs to understand what she is doing and support her. Her staff needs to understand that she wants them to afford her time to work from home so that she can care for her new family, and keep her client's happy as well.

Fortunately, in this digital age, this type of arrangement is more doable now than ever. But Lisa will have to know that her income will decrease for a time as her overhead increases and that she needs patience until the expansion is fully in place. In about one year, Lisa should reach her goal of having a child and working less.

I know that Lisa did this! Of course, there were other ways in which she could have gotten to her next level, but this route worked for her.

What is your next level of achievement? What will your star gazing produce?

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