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the PRACTITIONER

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**MCLE Article: Legal Entities and
Real Property: Limiting Reassessment**

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Letter From the Chair

By Renee N. G. Stackhouse

BEING SOLO OR SMALL FIRM DOESN'T HAVE TO MEAN YOU'RE ALONE.

I left mid-sized law-firm life in 2011 and haven't looked back. Well, ... occasionally I longingly remember the endless supply closet and what it was like to have two paralegals, but other than those moments, I have thrived with the majority of my time in practice proudly combined with the title "business owner."

In the beginning one of the hardest parts of the transition was withdrawals from the community that law-firm life gave me. I knew that I could always take a stroll through the office or to the kitchen and find someone off of whom I could bounce an idea or with whom to take a quick break. There were after-work evenings out and a variety of people with whom to talk about news and life. When there was a case win, there was usually someone who would send around an email to let everyone know about the accomplishment. As a solo.... Let's just say I've found there are usually less opportunities for that sort of engagement.

So, when I read an article in August about "lawyer loneliness,"¹ and how to overcome that loneliness, it resonated with me. And while I agree with the article that loneliness isn't just about physical isolation, it's definitely a contributing factor and one to keep in mind for SSF practitioners in addition to the general stressors



Renee Stackhouse is a San Diego trial attorney and founder of Stackhouse, APC (formerly Galente Law, APC) who focuses on plaintiff's personal injury, military, and criminal defense. She is Chair of the CLA Solo & Small Firm Section, Immediate Past President of California Women Lawyers, President of the CWL Foundation, and sits on the San Diego County Bar Association. She is faculty at the prestigious Gerry Spence Trial Lawyers College and the founder of MSheLE.com. She can be reached at Renee@StackhouseAPC.com.

of the profession. "What we do is hard," as one of my colleagues and mentors Lilys McCoy would say. We have the weight of our client's expectations on us, as well as our own (which is usually far heavier). And we want everyone to think we're perfect; a great lawyer, person, parent, significant other, etc. And that carries its own heavy weight, too.

Inadvertently, I fell into finding some of the cures that the article talked about for loneliness; the biggest of which for me was involvement in legal organizations where I could create and build relationships with like-minded folks and where I could channel my energy into work that helped me be a better lawyer and person.

And that is one of the reasons why I love being a part of CLA SSF Section so much. As solo and small firm practitioners, we make up 60-70% of the legal profession in California. We are the face of the profession in all of our beautiful diversity and differences. #SSF is here to celebrate and strengthen that.

Our mission is to foster a supportive community for solo and small firm practitioners across all areas of practice, to guide our members on their path to

the PRACTITIONER FOR SOLO & SMALL FIRMS

Editor
Omar Anorga, omar@anorgalaw.com

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becoming strong, competent and ethical solo and small firm business owners, and to recognize the accomplishments of solos and small firm professionals across the state.

So, join us. Not just as members (though you should do that too!) but get involved. Come out and meet us at our in-person CLE events. Work with us to teach civics education to K-12 grade across the state. Write for the Practitioner. Teach a webinar. Let us know when you achieve a success and let us spread the word. Find the perfect person across the state to whom to refer cases. Let others know who you are and what you practice so they can do the same. There is so much we can do to support each other.

I would like to end with gratitude to those SSF leaders whose terms ended at the Annual Meeting this past September; To outgoing Chair Ritzel Ngo, thank you for your leadership throughout your time on the SSF Executive Committee. To outgoing Immediate Past

Chair Megan Zavieh, thank you for your thought leadership on all things ethics. I have learned so much from you. To outgoing advisor Eleanor Southers, your guidance and advice is missed, as are your many contributions. To outgoing executive committee member Trina Chaterjee, thank you for all the time and effort you gave. Finally, thank you to outgoing Editor in Chief Oman Anorga for your leadership and quality work during this last year of the Practitioner. SSF is stronger and better because of each of you.

I look forward to working with leaders that comprise SSF Executive Committee this year... and with all of you! Here's to CLA SSF 2018-2019!

Sincerely,

Renee N.G. Stackhouse

ENDNOTES

- 1 Lawyers Loneliness: You're Not Alone in Feeling Alone by Shawn Healey (attorneyatwork.com, 2018).



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SOLO AND
SMALL FIRM
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Letter From the Editor

By Omar Sebastian Anorga



Omar 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.

This fourth issue of the PRACTITIONER is loaded with articles encompassing a vast range of subject matters from all over the legal landscape. It is by far our most diverse issue for the year.

Hitting leadoff for this issue, we have Joshua R. Driskell and Zacharias N. Tripodes, who co-authored *Legal Entities and Real Property: Limiting Reassessment*, which is an illuminating article on the transfer of property and its potential property tax implications. On deck is the article *Lost In Translation: Non-English Fee Agreements* written by yours truly. The article dives into the potential perils of verbally negotiating the terms of an attorney/client relationship in a foreign language but then memorializing and executing the relationship in an English written fee agreement.

Up next in the lineup, Cameron Rhudy provides us with *Helping Clients Raise Community Capital Using A Direct Public Offering*, an article that addresses alternative ways for enterprises to raise capital. Hitting clean-up, Julie Goren writes *Beware the Pitfalls in Calculating California State Court Deadlines*, which is an article about properly calendaring important dates for your litigated matters. Next, we're happy to have her back in the PRACTITIONER, Eleanor Southers, writes another one of her *Coach's Corner* articles. Rounding out the line-up we have two (2) excellent articles by seasoned attorneys Jan Frankel Schau and Richard Weissman. Ms. Schau writes about *Maximizing the Outcome and Experience in Mediation with Large Firm*. Mr. Weissman pens *FIGHTING FIFTH AMENDMENT*

CLAIMS: Can a Receiver Obtain Business Records When a Fifth Amendment Right Against Self-Incrimination Is Asserted.

This is my last issue as the Editor in Chief for the PRACTITIONER. It has been an absolutely wonderful experience, and I am thankful to the Executive Committee for entrusting me with this publication. My successor as Editor in Chief, Somita Basu, is going to do a great job in continuously making the PRACTITIONER a premier read for the legal community. Thank you to all of the associate editors who tirelessly edited each of the articles before publication. Special thanks to Jeremy Evans for setting such a high standard for the PRACTITIONER and always helping me out when I needed it.

Signing off.

Omar Sebastian Anorga
omar@anorgalaw.com

MCLE Article: Legal Entities and Real Property: Limiting Reassessment

By Joshua R. Driskell and Zacharias N. Tripodes

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

Legal practitioners have rightfully promoted the many advantages of holding real property in corporations, limited liability companies (LLCs), and other legal entities. By doing so a landowner can limit personal liability, exercise a degree of anonymity, and realize various tax efficiencies. However, when advising clients regarding the transfer of real property to a legal entity, due diligence requires careful consideration of any property tax consequences.

With the passage of Proposition 13 in 1978, voters drastically altered California's real property tax regime. Property taxes are now assessed on a property's 1975 value, as adjusted for inflation by no more than 2% per year.¹ A re-appraisal of real property occurs only where one of the following events takes place: (1) new construction on the property or (2) a change in ownership.

In the context of holding real property in a legal entity, the more common event leading to possible reassessment is a change in ownership. California law sets clear rules on when a transfer constitutes a change in ownership. This area of the law is based on several decades of practice and case law and is therefore well developed. Moreover, because the Proposition 13 regime has depressed the assessed value of property statewide, local tax authorities will



Joshua Driskell focuses his practice on business, tax, estate, bankruptcy and related matters. He is a member of the Pasadena Bar Association, the Los Angeles County Bar Association and the California Bar Association. Prior to the formation of Primuth & Driskell, LLP with Partner Jonathan Primuth in 2014, Mr. Driskell worked at a multi-state law firm, handling a wide variety of matters for individuals and small and medium sized businesses. In addition to his activities as an attorney, Mr. Driskell is a board member for the Pasadena Museum of History, Leadership Pasadena, and Pasadena Fire Foundation.



Zacharias Tripodes focuses his practice exclusively on transactional matters, including business, estate, trust and probate matters. Prior to joining Primuth & Driskell, LLP as Associate Counsel in 2016, Mr. Tripodes externed for the United States Custom and Border Protection. Mr. Tripodes earned his juris doctor from Loyola Law School, where he was a member of the International and Comparative Law Review. Mr. Tripodes is admitted to practice law in all California state courts and the United States District Court for the Central District of California.

not hesitate to characterize a real property transfer as a change in ownership in the event of an error. It is therefore very important to understand and follow these rules. The following are the most common change in ownership exclusions applicable to legal entities. Excluded are the less common situations of mergers, acquisitions, and transactions between affiliated entities, as well as specific rules applicable to partnerships and cooperative housing corporations.

A. CHANGE IN OWNERSHIP

The California Revenue and Taxation Code defines a "change in ownership" as "a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest."² This expansive

definition, clarified by other sections of the code and regulations, covers most common transfers, whether voluntary, involuntary, or by operation of law.³

B. TRANSFERS OF INTEREST IN REAL PROPERTY

The general rule is that “the transfer of any interest in real property between a corporation, partnership, or other legal entity and a shareholder, partner, or any other person” is a change in ownership.⁴ This general rule is applicable in arms-length transactions. If Person A and Corporation B have no relationship and Person A sells an interest in land to Corporation B, this is a change in ownership and the property will be reassessed. Likewise, if Corporation B later sells to Limited Liability Company C, there is another change in ownership.

The exception to this rule is what is known as the proportional interest transfer change in ownership exclusion. There is no change in ownership in a transfer between individuals or entities “that results solely in a change in the method of holding title to the real property and in which proportional ownership interests of the transferors and transferees . . . in each and every piece of real property transferred, remain the same after the transfer.”⁵ For example, if Person A owns land and is the sole shareholder of Corporation B, the transfer from A to B of the land will not be a change in ownership because the proportional ownership interests are identical and because the transfer simply changes the method by which Person A holds title: from himself as an individual to his corporation.

Now assume that Person A owns all of Parcel 1 and Person B owns all of Parcel 2. Both parcels are of equal value. Persons A and B each own 50% of the membership interest in Limited Liability Company X. Each person’s capital contribution to the LLC is their respective parcel. In this situation there is a change in ownership and each parcel is reassessed. This does not fall under the exclusion because it is determined on a parcel-to-parcel basis: before the transaction, Parcel 1 was owned by Person A; after the transaction Parcel 1’s beneficial owners are now Persons A and B (the same analysis applies to Parcel 2).

C. TRANSFERS OF INTEREST IN LEGAL ENTITIES

The general rule applicable to the transfer of interests in legal entities that own real property is that “the purchase or transfer of ownership interests in legal entities, such as corporate stock or partnership or limited liability company interests, shall not be deemed to constitute a transfer of the real property of the legal entity.”⁶ Under this general rule, stock in a corporation can be bought and sold without characterizing that transaction as a change in ownership of the real property held by the corporation. There are two major exceptions to this rule. The first is for transfers that result in a change in control of the legal entity. The second is when “original co-owners” have cumulatively transferred more than 50% of their interest in the legal entity.

C1. CHANGE IN CONTROL

Control of a legal entity exists when one person (or entity) directly or indirectly owns more than 50% of the legal entity.⁷ For corporations, ownership means the voting stock. For limited liability companies and partnerships, ownership means both capital and profit interests. When there is a change in control, there is a change in ownership and the real property held by the entity is reassessed.

An example of direct change in control would be as follows: Person A owns 55% of the voting stock of Corporation C, which owns real property. Person A sells all of his stock to Person B. There is a change in ownership in the underlying real property because of the change in control.

An example of indirect change in control would be as follows: Assume the same facts as the previous example, except that Corporation C does not directly own real property. Instead, Corporation C’s has a 60% capital and profit interest in a limited partnership that owns real property. When Person A sells all of his voting stock to Person B, Person B now indirectly has control of the limited partnership. This change in control means that there is a change in ownership of the underlying real property, and reassessment of the real property is proper.

C2. ORIGINAL CO-OWNER INTEREST TRANSFERS

An original co-owner is a person who gains an ownership interest in a legal entity following a proportional interest transfer. Regardless of whether there is a change in control, once the original co-owners cumulatively transfer more than 50% of the ownership interest in the legal entity, there is a change in control.⁸

For example, Persons A, B, and C own Parcel 1 as tenants in common. These persons transfer their ownership interest to Limited Liability Company X, of which each person owns a 1/3 interest. There is no change in ownership because this is a proportional interest transfer. Persons A, B, and C are now deemed “original co-owners.” Person A sells his LLC interest to Person D. There is no change in ownership. Sometime later Person B sells his LLC interest to Person E. At this point there is a change in ownership because the original co-owners have cumulatively transferred more than 50% of the total interests in the LLC. Note that there is no change in control because no person has directly or indirectly obtained more than 50% ownership interest in the LLC.

However, there are several transfers that do not count as an original co-owner interest transfer: (1) transfers between spouses or between registered domestic partners, (2) transfers to or from a trust established for the trustor’s benefit (or the benefit of the trustor’s spouse or registered domestic partner), (3) a proportional interest transfer, and (4) transfers which have already been counted.⁹

For example, Person A owns 60% and Person B owns 40% of Parcel 1 as tenants in common and they each transfer their interests to Limited Liability Company Y and maintain their respective ownership interests. Person A and B are now original co-owners. Person A transfers all of his interest to his spouse.

In another example, Persons A, B, C, and D become original co-owners after transferring their tenant-in-common interests in Parcel 1 to Corporation X, of which each person owns 25% of the voting stock. Person A sells all his stock to Persons B, C, and D, all of whom now own 1/3 of the shares. If Person B were to then transfer his shares to a third party, there would be no change in ownership. Because

original co-owner interests are not to be counted twice, only 50% of the original co-owner interests have been transferred: 25% from Person A and 25% from Person B. Note that the transfers between original co-owners are counted as transfers of original co-owner interests.

When considering transfers of interests in legal entities, it is also important to remember that common exclusions to the general change in ownership rule are not always applicable. Transfers of real property between parents and children, as well as grandparents and grandchildren, are not considered changes in ownership under some circumstances.¹⁰ However, both the parent-child and parent-grandchild exclusions specifically do not apply to transfers of interests in legal entities.¹¹

C3. REPORTING CHANGE IN OWNERSHIP OR CONTROL

Changes in Ownership and/or Control are monitored by the State Board of Equalization. Whenever there is a change in control pursuant to section 64(c) or a change in ownership pursuant to section 64(d), and the legal entity owned or leased an interest in California real property as of that date, the person or legal entity acquiring ownership control or the legal entity that has undergone a change in ownership must file the BOE-100-B, Statement of Change in Control and Ownership of Legal Entities (statement) with the Board of Equalization (BOE) at its office in Sacramento within 90 days of the change in control or ownership¹². In addition, any legal entity is required to file a statement with the BOE within 90 days of the date of the BOE’s request regardless of whether a change in control or ownership of the legal entity has occurred.

D. CONCLUSION

While almost any transaction involving real property will be considered a change in ownership, transfers to and between legal entities can be structured to fall within one of the many exclusions. Although real property transfers to and between legal entities are changes in ownership, the proportional interest transfer exclusion can be relied upon to change title and transfer property in and out of LLCs or

corporations. Likewise, although one must be mindful that a change in control or the transfer of a majority of the original co-owner interest will cause a change in ownership, there are many ways to structure transactions to rely on the general rule that transfers of interests in legal entities are not changes in ownership.

This article is available as an
ONLINE SELF-STUDY TEST.



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for more information.

ENDNOTES

- 1 CAL. CONST. art. XIII A, § 2.
- 2 CAL. REV. & TAX CODE § 60.
- 3 *See* CAL. REV. & TAX CODE § 61; CAL. CODE REGS. tit 18, §§ 460–462.500.
- 4 CAL. REV. & TAX CODE § 61(j).
- 5 CAL. REV. & TAX. CODE § 62(a)(2).
- 6 CAL. REV. & TAX. CODE § 64(a).
- 7 CAL. REV. & TAX. CODE § 64(c)(1).
- 8 CAL. REV. & TAX. CODE § 64(d).
- 9 CAL. CODE REGS. tit. 18, §§ 462.180(d)(2).
- 10 CAL. REV. & TAX. CODE § 63.1.
- 11 CAL. REV. & TAX. CODE § 63.1(c)(8).
- 12 CAL. REV. & TAX. CODE §§ 480.1 & 480.2.

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Lost In Translation: Non-English Fee Agreements

By Omar S. Anorga

A bilingual or multilingual attorney can be a valuable resource to your law firm. I have found that communicating with potential clients in their native Spanish language immediately promotes in them a sense of trust, comfort and confidence in my legal abilities.

Not only do language skills enhance the attorney-client relationship, but it also allows the attorney to increase his or her market-share by carving out a legal niche with a certain language-speaking community. Additionally, the globalizing economy is making it imperative for California attorneys to be able to communicate with individuals from all over the world, especially those in the Asian financial markets. More locally, Spanish is by far the most widely spoken language in California other than English. Without a doubt, California attorneys are leaving money on the table if they cannot communicate with potential clients in a language other than English.

Not surprisingly, state law requires certain fee agreements be translated from English into a different language. Acute knowledge of the requirements of Civil Code section 1632 *et seq.* is important before you sign up that next well-heeled foreign speaking client.

Civil Code section 1632 (b)(6) states that any attorney who negotiates legal services primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, shall deliver to his or her potential client a written translation of the fee agreement in the language in which it was negotiated. This translation must be provided before the client executes the agreement.



Omar 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.

Say an exclusively Spanish speaking potential client walks through your door seeking legal representation. During the client in-take, you and the potential client agree to the terms of the fee agreement. You present the potential client with your standard English written fee agreement, which the client signs. Now your firm has a valuable new matter. Under most circumstances, congratulations are in order; however, you have just violated Civil Code section 1632, and potentially exposed yourself to a malpractice lawsuit affording the client the right to rescind the fee agreement. Not good.

A natural inclination for most lawyers is to look for an exception to section 1632(b)(6). Translating your reliable English fee agreement sounds complex and risky. The primary exception is Civil Code section 1632(h), which applies when your client negotiates the terms of the fee agreement through his or her own interpreter. The interpreter must be a “person, not a minor, able to speak fluently and read with full understanding both the English language and any other languages in which the fee agreement was negotiated, and who is not employed” by you. So, if your client brings their child in with them to translate, no matter how competent and capable the minor may be, the exception does not apply. And, your assistant who is fluent in the client’s native language may assist in interpreting, but this will not allow you to circumvent the translation requirement.

In most situations, you simply need to comply with the translation requirement. So, after negotiating the terms in the client’s language, your next step is to

have your fee agreement translated into that language. Here are a couple of tips to keep in mind:

First, the most cost-effective way to translate a written fee agreement is by plugging into Google Translate or any of a number of other free online translation tools. I recently cut and pasted my eight-page fee agreement into Google Translate, and I was astonished at how remarkably accurate Google translated my English fee agreement into Spanish. There were minor issues with the translation, but I was able to rectify them without any problem.

There were some issues with Google Translate word choices. For example, my English fee agreement collectively refers to me as an attorney; presumably, the common translation of that word should have been *abogado*. Google Translate, for some reason, used the word *fiscal*, which means district attorney or prosecutor. This word choice problem is a likely specific to the Spanish language, which is the official language of 21 countries, each having their own nuanced dialect.

Since you should only be translating your fee agreement into a language that you speak well enough to have conducted the negotiation in it, you should be able to read the translated document and pick up on issues like these. If you do not speak the language well enough to find these errors, then you probably should not be negotiating in it. If you use a translator like one of your staff members to assist in negotiating, make sure they read the translated document to help fix these errors.

Google Translate is probably best for those attorneys with a decent grasp of one of the covered languages under Civil Code section 1632. With some moderate editing, the attorney should be able to easily present the potential client with a properly worded and translated fee agreement.

Second, there is a thriving market dedicated to translating professional documents. A simple online search for these types of services will bring up several different providers. Legal document translation generally costs in between 14 to 26 cents per word, depending on the language. Chinese and Spanish tend to be on the lower end of cost, while Korean and Vietnamese are middle of the road, and Tagalog

being the most expensive. Also, note that translating English into these languages can either expand or contract text. Generally, all romantic languages, like Spanish, expand the text from an English translation. This is also true for Vietnamese, but not necessarily so for Korean. It varies with Chinese and Tagalog.

When selecting a company to translate your fee agreement, determine whether it is an accepted member of the American Translators Association, which establishes a high standard of translating competency. Also, make sure to determine if someone other than the translator will review your document for accuracy. Two sets of eyes are better than one.

Since a translation service is not going to be instant, if you are conducting business in a community where a foreign language agreement is going to be a recurring need, consider having your standard fee agreement translated and keep it on hand for the times that you need it. If you ever negotiate with a new client a change to your standard language, you can always edit the foreign language template for that client.

So for all you talented linguistic attorneys seeking to build your practice with non-English speaking clients, or for those attorneys who already are, make sure to comply with the requirements of Civil Code section 1632, et seq., and have your fee agreement translated into the language in which it was negotiated. Because after you have obtained that favorable result for your client and its time for them to pay up, you do not want anything to suddenly get lost in translation.

Helping Clients Raise Community Capital Using A Direct Public Offering

By Cameron Rhudy

Access to capital is one of the largest barriers to new and emerging businesses. The capital needs of new and emerging businesses are often higher than what is feasible to raise from friends and family, but also lower than the minimum amount most large banks are willing to lend. New businesses have little to no track record of steady income and few assets or collateral for banks to lend against, often making them ineligible for a loan even if they are asking for amounts that would otherwise be worthwhile for the bank. According to a 2016 study funded in part by the Kauffman Foundation, only about 18% of businesses ever access a bank loan.¹

Rural businesses, women-owned businesses, and businesses owned by people of color are disproportionately affected by these barriers to capital. Conventional financial strategies rely on institutions that have a history of exploitive and discriminatory practices, including predatory lending and redlining. Despite California being one of the few states that receives a concentrated amount of venture capital (VC) funding compared to most U.S. states, the actual number of businesses that receive VC funding is very small, with rural businesses, women-owned businesses, and businesses owned by people of color grossly underrepresented.²

For these reasons, many types of enterprises need to consider alternative capital raising options. Raising



Cameron Rhudy is the Grassroots Finance Attorney at Sustainable Economies Law Center, which provides research, education, advice, and advocacy for just and resilient economies. Cameron is currently working on a project with the Grassroots

Finance team that is focused on increasing access to capital for farmland conservation. Cameron also supports the Resilient Communities Legal Cafe, the Law Center's national Fellowship program, and its Transformative Policymakers project.

capital directly from one's community is one such option.

WHAT IS COMMUNITY CAPITAL?

Community capital is simply money held by community members. What community capital looks like can differ depending on the type of enterprise seeking to raise money, the geographical location of the business and customer base of the business, and various other factors. Potential community capital investors include anyone who has money to invest. This doesn't mean, however, that someone has to have *a lot* of money to be a community investor; many community capital raises have a minimum investment amount of around \$1,000, and some are even lower. In the context of securities regulation, community investors include both accredited investors (investors that meet certain wealth and asset thresholds)³ and non-accredited investors (everyone else). Individually, the amount of money a community investor has may not seem like much, but harnessing the wealth of the collective can have a significant impact.

For purposes of this article, I will focus on raising community capital through investment crowdfunding (by way of a direct public offering), which usually involves the solicitation of loans, equity investments, or other similarly structured investments in exchange for some sort of financial return. Similar to donation or rewards-based

crowdfunding, investment crowdfunding involves raising smaller amounts of money from a large number of individuals and/or institutions. By conducting a direct public offering (DPO), clients can advertise their investment opportunity to the general public and make it available to both accredited and non-accredited investors.

WHY DOES COMMUNITY CAPITAL MATTER?

Community capital is about more than meeting the capital needs of a local business. Community capital raising increases transparency and gives community members an opportunity to decide which goods and services are most valuable to the community. Even when community-based banks or credit unions are doing their best to meet the needs of their community, they operate under a strict regulatory environment that can prevent them from lending to borrowers that are viewed as high-risk. By raising capital directly from the community, both financial and nonfinancial factors can be considered, such as the business's reputation in the community and the strength of the relationships the owners have cultivated over time.

As with any capital raising strategy, however, raising community capital is not without its own set of risks and challenges. For example, raising money from a large number of community members can be administratively challenging to manage and defaults have the potential to damage relationships. These are considerations you can help your client navigate when discussing options.

SECURITIES LAW BASICS

Whenever a client wants to raise money for their business it may implicate securities laws. The definition of a security under both federal and California law is very broad.⁴ Almost any kind of investment is a security. All types of stock, shares, promissory notes (i.e. loans), or other evidence of indebtedness are securities, as are revenue sharing agreements and other certificates representing an investment. It doesn't matter what you call it, if someone is contributing money to an enterprise, has little to no involvement in managing the enterprise, and expects a return on the investment, then the transaction is considered a sale of securities under

federal law.⁵ California's definition of a security requires the additional analysis of whether a person contributing funds is putting their money or other assets at risk. This is known as the risk-capital test.⁶

If the investment falls under the definition of a security, the issuer (in this case, the business owner) needs to comply with both federal and state securities law. In other words, the offering either needs to be registered with the federal Securities and Exchange Commission and the California Department of Business Oversight (if the securities offering will be made in California) or the offering needs to fall under an exemption from registration. It is important to note, however, that an exemption is from the registration requirements, and not an exemption from the other provisions governing securities offerings. Most importantly, the relevant anti-fraud provisions will still apply, which prohibit an issuer of securities from misleading prospective investors by making an untrue statement of a material fact or omitting to state a material fact.⁷

DIRECT PUBLIC OFFERINGS

Direct public offering (DPO) is not a legal term, but the term is generally used to describe a securities offering that is advertised to the general public and is available to both accredited and non-accredited investors. Unlike the more familiar initial public offering (IPO), securities offered via a direct public offering are not offered on a stock exchange, can be offered directly by the business owner rather than via a broker or underwriter, and do not necessarily mean the business is "going public," or selling parts of the business to shareholders. Recent DPOs conducted in California have raised money to fund efforts to increase access to fresh foods in West Oakland and to fund the growth of an independently-owned news site in Berkeley; a nonprofit loan fund serving California farmers recently obtained a permit to conduct a DPO that will be formally launching this fall.⁸

The distinction between a public and a private offering, however, is important because different rules apply and it affects how a business owner can advertise an investment opportunity to potential investors. Business owners that want to raise money only from close personal and business contacts would

likely be making a private offering. Some federal and state exemptions do exist for private offerings but those are beyond the scope of this article.⁹

Federal Exemption + Qualification by Permit

The most common legal strategy for conducting a direct public offering in California is coupling a federal securities law exemption with obtaining a permit from the California Department of Business Oversight (called qualification by permit). At the federal level, the most common exemptions relied on for conducting a DPO are the federal Intrastate Exemptions (Rule 147 or Rule 147A), federal Rule 504 of Regulation D, and the federal nonprofit exemption. Unlike many other states, California has yet to adopt a state level intrastate crowdfunding exemption and it does not have a state level nonprofit exemption. In order to advertise a securities offering to the general public in California, therefore, a client must obtain a permit from the Department.

The federal intrastate exemptions can be found under Rule 147 and Rule 147A.¹⁰ Both regulations are effective, but Rule 147A is slightly more flexible and was designed to more easily facilitate online advertising. A securities offering relying on Rule 147 or Rule 147A must be limited to one state, and the issuer must be “doing business” in that state.¹¹ There is no limit on the aggregate raise amount under this exemption and it is self-executing, meaning that nothing needs to be filed with the SEC when relying on this exemption.

Federal Rule 504 of Regulation D is another common exemption, that when used in conjunction with a state-level registration, can be relied on to conduct a direct public offering.¹² When a client wants to raise from two or more states a Rule 504 offering may qualify for coordinated review, which can help streamline the process of state-level review across the multiple states.¹³ Rule 504 raises are capped at \$5 million in a 12-month period and do require a notice filing with the SEC (Form D).

Section 3(a)(4) of the federal Securities Act of 1933, known as the nonprofit exemption, exempts securities issued by organizations that operate exclusively for religious, educational, benevolent, fraternal, charitable, and reformatory purposes.¹⁴ This exemption does not have a cap on the aggregate

offering amount, does not place geographical restrictions on the offering, and is also self-executing.

To obtain a permit from the Department, an application is generally made under section 25113 of the Corporations Code of California.¹⁵ The filing fee for obtaining a permit to offer securities is up to \$2,500, depending on the aggregate amount of the offering. State regulators, however, have a fair amount of discretion to apply various limitations on the offering, such as investor suitability requirements or impound/escrow account requirements, to ensure that the offer and sale of the securities will not be unfair, unjust, or inequitable to the initial purchasers.¹⁶

REGULATION CROWDFUNDING

There are differing opinions about whether a capital raise relying on Regulation Crowdfunding (Reg. CF)¹⁷ is truly a direct public offering. Regardless of that debate, I discuss it separately because it does have some unique characteristics.

Regulation CF, which became effective in 2016, was specifically designed to facilitate Internet-based investment crowdfunding campaigns. Authorized under Title III of the Jumpstart Our Business Startups Act (Jobs Act), Regulation CF is also an exemption from federal registration requirements. The aggregate raise amount is currently capped under Reg. CF at \$1,070,000 in any 12-month period. Reg. CF also preempts state regulation of offerings utilizing the exemption. So if an enterprise or organization were to organize a campaign under this exemption, it could accept investments from *any* resident of *any* U.S. State, without having to comply with each state’s securities.

Another thing that sets a Reg. CF raise apart from a traditional direct public offering is that securities offerings relying on this exemption must be made exclusively through a regulated 3rd party web portal (also known as a intermediary), meaning that almost all communications about the offering need to be conducted on that web portal. The web portals do charge a fee, which is typically a percentage of the amount raised (e.g., 6-8% of the aggregate raise amount). The 3rd party portals do not provide regulatory or legal counsel, however, so even though

the portals often provide templates and take care of required reporting to the SEC, clients interested in using this option may still need legal assistance with crafting related documents that are appropriate for their raise.

Although escrow/impound account and investor suitability requirements can be applied at the discretion of state regulators when obtaining a permit in California, they are automatically imposed under Reg. CF.¹⁸ This means that similar to donation and rewards-based crowdfunding, the business will only receive the money if it reaches its target raise.

THE TAKEAWAY

Despite the risks, raising community capital is worth considering along with conventional financing options. Even though the concept of crowdfunding has in many ways become mainstream, direct public offerings are still an underutilized option for meeting a client's capital needs. This is, in part, because most lawyers do not learn about this strategy in law school and securities offerings are often associated with multinational corporations. As more lawyers learn about community capital, I hope this will change.

ENDNOTES

- 1 Jacob, Larry, Three Trends That Prevent Entrepreneurs From Accessing Capital, Ewing Marion Kauffman Foundation, https://www.kauffman.org/blogs/currents/2018/07/3-trends-that-prevent-entrepreneurs-from-accessing-capital?utm_source=newsletter&utm_medium=email&utm_campaign=iaw_7_26_2018 (last visited 8.1.18).
- 2 *Id.*
- 3 17 C.F.R. § 230.501. Accredited investors include an individual or spouses with combined assets of \$1 million or more (excluding residence, cars, furnishings); an individual with \$200,000 in annual income in the past 2 years and expected in the current year; spouses with combined \$300,000 in annual income in the past 2 years and expected in the current year; and entities with \$5 million in assets.
- 4 17 U.S.C. § 77b(a)(1); CAL. CORP. CODE § 25019.
- 5 *See* S.E.C. v. W.J. Howey Co., 328 U.S. 294 (1946).
- 6 *See* Silver Hills Country Club v. Sobieski, 55 Cal. 2d 811 (1961).
- 7 15 U.S.C. § 77q; CAL. CORP. CODE § 25400 *et. seq.*

- 8 Community Foods Market, <https://communityfoodsmarket.com/>; Berkeleyside Staff, *First in the nation: Berkeleyside raises \$1M from readers in direct public offering*, <http://www.berkeleyside.com/2018/04/12/first-in-the-nation-berkeleyside-raises-1m-from-its-readers-in-a-direct-public-offering>; California FarmLink, <https://www.californiafarmlink.org/>.
- 9 A federal exemption that can be used for private offerings that is not already discussed herein is Rule 506 of Regulation D (17 C.F.R. § 230.506). A common private offering exemption used in California is subdivision (f) section 25102 of the California Corporations Code, among others.
- 10 17 C.F.R. § 230.147 & 17 C.F.R. § 230.147A.
- 11 Under both Rule 147 and Rule 147A, “doing business” means either: 80% of the gross revenues of the business come from within the state, or 80% of the business’ assets are within that state, or 80% of the proceeds from the sales of securities during the offering are intended for use within that state, or a majority of the employees of the business are within that state.
- 12 17 C.F.R. § 230.504.
- 13 For more information on coordinated review, see this website managed by the North American Securities Administrators Association: <http://www.coordinatedreview.org/>. California is not a participating state, but many others are.
- 14 15 U.S.C. § 77c(a)(4).
- 15 For more specific information about what needs to be included in an application see 10 Cal. Code. Regs. § 260.113, and § 260.000 *et seq.* generally.
- 16 CAL. CODE. REGS. tit. 10, § 260.140.
- 17 15 U.S.C. § 77d(a)(6) and 15 C.F.R. § 227.100 *et. seq.* Reg A offerings are similarly unique but not discussed herein because they are used for raising larger amounts of capital than what is typically raised under a direct public offering.
- 18 Current investor limits under Reg CF are \$2,200 or five percent of annual income or net worth if annual income or net worth is less than \$107,000, 10% of annual income or net worth if annual income or net worth is equal or greater than \$107,000.

Beware the Pitfalls in Calculating California State Court Deadlines

By Julie Goren



Julie Goren is the author and publisher of *Litigation By The Numbers®*, the essential California civil litigation handbook revised twice yearly, *California Civil Litigation and Discovery*, its substantive companion, numerous articles, and a one-hour step-by-step calendaring video, “*Calendaring in California State Court: Steps and Traps for the Unwary*.” Formerly with the L.A. offices of Gibson, Dunn & Crutcher, and Buchalter, Nemer, Fields & Younger, Julie left the practice in 2003 to devote her time to writing, publishing, and teaching. She can be reached through her website, www.litigationbythenumbers.com.

There’s an old saying – “we learn from our mistakes.” That’s decidedly not how you or your staff should learn the many pitfalls and hidden traps inherent in calculating California state court deadlines. Instead, you can save a lot of time, and even avoid malpractice, by learning from other people’s mistakes.

THE RULES AND CONSEQUENCES

In California litigation, the Rules of Court and Code of Civil Procedure work in tandem to set out key deadlines for all stages of a case. Meeting these deadlines is critical. Parties can be precluded from asserting defenses, making counterclaims, serving discovery, or even responding to discovery, if dates are missed. Missing a key date can mean easily provable malpractice.

With the rules being clearly articulated and the consequences of making mistakes being high, it is imperative that practicing attorneys understand how the rules operate.

COUNTING FORWARD AND COUNTING BACKWARD

Under the applicable rules, some deadlines in litigation are calculated by counting back from a date certain. For instance, if you are making a motion, you begin with a hearing date and serve motion papers a certain number of days before the hearing date. Same with oppositions to motions and replies in support.

Other deadlines are calculated by counting forward from a date certain.

It is important to know which type of deadline you are calculating when you first set out to find your key dates, as different rules apply to each method. For example, applying to motion-related calendaring a set of rules applicable only to forward-counted dates can be fatal.

PRACTICING DEADLINE CALCULATION

In this article, we’re going to calendar two response due dates where something must be done within a specified timeframe *after* an event, i.e., we are counting *forward*.

In our first calendaring exercise, written interrogatories are *hand-delivered* on February 28, 2019. In the second, written interrogatories are *mailed* on February 28, 2019, to a service address within California. If you have experience calendaring deadlines, you may be able to calculate the two response due dates in the next minute on your own. You may have already finished!

For our purposes, unlike real life, the answers are not nearly as important as the procedure. I urge you to focus on the many steps involved in calculating a deadline. There are steps you’re taking without even realizing it; steps your staff may be missing. It’s even more important to become aware of the myriad errors that can be made in the process of calculating these or other deadlines. You might be making them yourself. Your staff might be making them. If you are new to this, go slow and take heed of the steps and traps. You will benefit most from learning how to do this correctly from the outset.

Now, please grab a 2019 calendar (I suggest a hard copy, so you can check off days as you count), and let’s get started.

Step 1: Identify the triggering event

The first step is to recognize that an event has occurred that has triggered one or more deadlines, i.e., there is something to calendar. I've done that step for you by giving you the exercises, but, in every day practice, it's not as easy, particularly for the novice. If the triggering event is not recognized, nothing will be calendared. While there are ways to learn to recognize triggering events and there are tools which alert you to them, you should look for a triggering event any time a document is served on you, by you, filed with the court, or received from the court.

Step 2: Identify the deadlines triggered

The second step is to identify the deadline(s) that have been triggered by that event. In our case, the service of interrogatories triggers a single deadline clearly related to the triggering event -- the response due date. But it is often not so simple.

What to Watch Out for:

- Multiple unrelated deadlines. An event may trigger multiple deadlines which bear no logical relation to the event. The filing of a complaint is a perfect example. In addition to triggering the obvious deadline to serve the complaint, it triggers deadlines relating to challenging the judge assigned to the case, the case management conference, motions for summary judgment, and trial.
- New deadlines. New deadlines are added from time to time. For example, on January 1, 2016, and January 1, 2018, statutes creating new meet and confer deadlines went into effect. The service of a complaint has since triggered those additional deadlines.¹

Step 3: Identify the Applicable Time Limits

The third step is to determine the applicable time limit for the triggered deadline. The deadline in question could be common knowledge, e.g., 30 days for responding to interrogatories, which only a novice would need to research in Civil Procedure Code section 2030.260. Where the procedure is more esoteric, you might not even know that the deadline exists. For example, let's say you've received another party's notice of intent to appear at a hearing by telephone. Would you

know that you have until noon on the court day before the hearing to give your own notice of intent to appear by telephone?² Would you even know there was a deadline?

What to Watch Out for:

- Changing time limits. Time limits change from time to time. Here are just two examples. (1) The notice period for regular motions has been 15 days, 21 days, and is currently 16 court days.³ (2) The deadline to object to evidence in support of a motion for summary judgment changed from *three court days* prior to the hearing to *14 days* prior to the hearing.⁴
- Case type/jurisdictional time limits. The applicable time limit for a given deadline may vary depending upon the case type and/or the court, or the deadline might not exist at all. For example, in "regular" cases, Proof of Service of Summons must be filed within 60 days of filing the complaint⁵, but the deadline in Collections Cases is 180 days.⁶ Moreover, any court may, pursuant to Rules of Court, Rule 3.720(b), exempt from the "regular" case management rules specified types or categories of general civil cases filed before January 1, 2020. Los Angeles County has done so with limited civil cases and Personal Injury Actions.⁷
- Cheat sheets. Because time limits change, cheat sheets are not your friend unless they are kept up to date. It would be better to research the deadline each time than to unwittingly rely on an outdated cheat sheet.

Step 4: Ascertain What Events to Count From and To

The next step is to ascertain what event to count *from* and what event to count *to*. While deadlines may run *from* a variety of events, e.g., date of filing, date of receipt, etc., *to* a variety of events, e.g., filing, mailing, submission, etc., discovery response deadlines run from *service* of the demand to *service* of the response. Thus, for example, California Code of Civil Procedure section 2030.260, states: "Within 30 days after service of interrogatories ... the [responding party] shall serve [the response]." Sounds easy enough, but only if you understand when "service" occurs in this context.

What to Watch Out for:

- Misunderstanding when something is served on you. Consider this question: “We’re responding to discovery served by mail. . . . Do we start counting on the day it was mailed or the day it was served?” This person does not understand when service occurs. There is in fact no difference between the date the discovery was mailed and the date it was served. It was served (by mail) on the date it was mailed, just as it would be served (by fax) on the date it was faxed. Regardless of whether she mistakenly believes that “service” means “receipt” or that the date of service is determined by adding five days for mail (see below), or something else entirely, she will start counting from the wrong day, and will wind up with the wrong deadline.
- Misunderstanding when something is served by you. Consider this question: “If Code of Civil Procedure section 1005(b) requires an opposition to be filed and served 9 days before the hearing, wouldn’t you have to personally serve if you waited until the 9th day?” Now, I’ve cautioned against applying the procedures in this article to motion-related deadlines, but this perfectly illustrates the issue. Nothing requires the opposition to be *received* by the ninth day; only *served* by the ninth day. In fact, the statute requires it to be served by any allowable means “reasonably calculated to ensure delivery . . . not later than the close of the next business day . . .”⁸

Step 5: Count in Accordance with Applicable Rules

Before we can calculate either of our deadlines, we need answers to the following three questions. Where the interrogatories were served by mail, we will need additional guidance.

- What day to start counting: We don’t count the service date. We count the day after the service date as Day 1.⁹ So, where service occurred on February 28, 2019, Day 1 is March 1, 2019, Day 2 is March 2, . . .
- Whether to count interim weekends and holidays: Where the code or rule refers to “calendar days” or simply “days,” we count every day; if it refers to “court days,” we exclude weekends and holidays. (Saturdays and Sundays are actually “holidays,”

but I like to use both terms for clarity.) Because the deadline in California Code of Civil Procedure section 2030.260 is “30 days,” we count every day.

- What to do when the last day is a weekend or holiday: Code of Civil Procedure section 12a(a) provides: “if the last day to perform an act which must be performed within a specified time falls on a holiday, the deadline is extended to the next court day.” So, if the last day falls on Saturday, the deadline is extended to Monday so long as Monday is a court day, and if not, it is extended to Tuesday, etc.

What to Watch Out for: The last two steps require you to recognize court holidays. This is no easy task. California Government Code section 6700 designates “the holidays in this state.” California Code of Civil Procedure section 135 designates “judicial holidays” (holidays on which the courts are closed), which include all state holidays listed in Government Code section 6700, with express exceptions, and adds others.

- Accidental holidays. In 2015, this confusing set-up resulted in the creation of Native American Day (the fourth Friday of September) as a *judicial* holiday when the intention was to create a *state* holiday. The error occurred when the holiday was added to the California Government Code section 6700 list of state holidays, but not simultaneously excepted from California Code of Civil Procedure section 135. By the time that the fourth Friday in September came around, it was only a state holiday; in late June a budget trailer bill added Native American Day as an exception in California Code of Civil Procedure section 135. Not only could this happen again, a bill that would make the exact same mistake was recently proposed and subsequently failed.¹⁰
- Suddenly created non-court days. On July 29, 2009, the Judicial Council declared the third Wednesday of the month from September 2009 through June 2010 to be non-court days for calendaring purposes. It happened once; could that happen again as well?
- State court holidays that are not federal holidays. California celebrates holidays that are not federal holidays: Lincoln’s Birthday (February 12); Cesar

Chavez Day (March 31); and the Day after Thanksgiving. If you are calculating California state court deadlines, you must use an accurate calendar. (See below.)

Believe it or not, we have finally amassed the information we need to calculate the last day to respond to interrogatories personally served on February 28, 2019. Let's do it.

- Count 30 days (counting every day) starting with March 1, 2019, as Day 1.
- Day 30 lands on Saturday, March 30.
- Apply Code of Civil Procedure section 12a(a) and extend the deadline to the next court day.
- The next court day is Tuesday, April 2, 2019.

We have successfully calculated the deadline to serve responses to interrogatories served by hand on February 28, 2019: April 2, 2019. If you thought it was April 1, 2019, check your calendar. Does it show Cesar Chavez Day on April 1, 2019? If not, you are going to continue to miscalculate deadlines.

Now, on to our second exercise. In this scenario the interrogatories were served on the same day as the prior exercise (February 28, 2019), but they were served by mail instead of by hand. A special rule applies.

- Adding time for service method: Where the triggering event was the service of a document by any means other than personal service, and the response due date is being calculated, the response due date is extended by a specific number of days. The extensions are: (1) by mail to a service address within California – five days (longer for service to an address outside California)¹¹; (2) by fax or overnight delivery – two court days¹²; or (3) eService – two court days.¹³

What to Watch Out for:

- Exceptions to the rule on extensions. Code of Civil Procedure sections 1013 and 1010.6 specifically provide that they do not extend the time for filing notice of intention to move for new trial, notice of intention to move to vacate judgment, or notice of appeal. They also state that they are inapplicable whenever a statute or rule of court says they do not apply.¹⁴

In our exercise we must extend the response due date by five days because the interrogatories were served by mail, and no exception applies. The question is *when* in the calendaring process is the extension added? There are two options.

Option 1: Add five days to the April 2 response due date we just calculated for service by hand the very same day.

- That takes us to Sunday, April 7, which, pursuant to Code of Civil Procedure section 12a(a), would be extended to the next court day.
- The next court day is April 8, 2019.

Option 2: Start with the 30th day and add the extension there.

- Day 30 landed on Saturday, March 30.
- Add five more days, landing on April 4, 2018.

So, we have two different deadlines: April 8 and April 4, reached by using two different methods. Which is correct?

There are three reasons I'd go with the method which results in the earlier date: (1) The later deadline was reached by adjusting twice for the "last day:" first, when Day 30 landed on a Saturday, and second, when the fifth day for mailing landed on a Sunday. How could there be two "last days" in one calculation? (2) Federal Rules of Civil Procedure, Rule 6(b) provides that whenever a document is served by any means other than hand delivery, "3 days are added after the period would otherwise expire under Rule 6(a)," i.e., under the Federal rules you calculate the deadline for hand delivery and then add the extension. Had the California legislature or Judicial Council intended that to be the rule, they could easily have said so. (3) The simplest reason is this: When in doubt, err on the side of caution, here calendaring the earlier date.

We have successfully calculated the deadline to serve responses to interrogatories served by hand on February 28, 2019: April 2, 2019. If you thought it was April 1, 2019, check your calendar. Does it show Cesar Chavez Day on April 1, 2019? If not, you are going to continue to miscalculate deadlines, because your calendar does not show the California state court holidays that are not federal holidays.

I mentioned at the outset that the calculation of deadlines that are counted backwards are in some ways an entirely different animal. It's imperative that you remember this and do not apply the above rules and procedure where you should not. Here are two examples; there are surely others.

- Misapplication of Code of Civil Procedure section 12a(a). Please learn from the following true story!

A while back I received a call from an attorney who had just been served with a reply contending his opposition was untimely.¹⁵ He explained: "I counted back nine court days, and when the ninth court day landed on Monday, Martin Luther King Day, I applied Code of Civil Procedure section 12a(a) like you said in your article and extended my deadline to give notice to Tuesday." His first shocking blunder aside (a holiday is never a "court day"), this is an improper use of Code of Civil Procedure section 12a(a)! When something must be filed/served at least nine court days prior to the hearing, it's late if you file/serve it only eight court days prior to the hearing. Period. A good rule of thumb is to never switch directions when you're counting, that is unless you are calendaring the discovery cut-off date (30 days prior to the initial trial date pursuant to Cal. Code Civ. Proc. § 2024.020), in which case you do reverse direction (see C.C.P. § 2016.060).

- Confusion over extensions for fax and overnight delivery. The extension of time for fax and overnight delivery under California Code of Civil Procedure section 437c (motions for summary judgment) and California Civil Procedure Code section 1005(b) (regular motions) is two *calendar* days, not two *court* days. Before adding time for fax and overnight delivery, you must be sure to apply the correct extension.

As you can see, regardless of the ease with which you may have calculated the deadlines for our simple calendaring exercises, traps lurk at every step of the way. Not only must you know when, what, and how to calendar, you must keep up with changes.

AUTOMATED CALENDARING SYSTEMS

Finally, a word about automated rules-based calendaring systems. With these tools, you select the court in which

your case is pending, the case type, and the event in question. The system instantly applies the applicable rules to calculate and list all deadlines triggered by the event.

I'm a huge fan of solid systems that accurately calculate applicable deadlines; Deadlines.com has always been my favorite. However, you'll need to know how to calendar by hand when your computer is unavailable or when you and opposing counsel disagree on a deadline.

You'll also need to know enough about calendaring to input the correct information and to train your staff to do so. If your staff does not understand when service occurs, they will input the wrong service date. Automated rules-based calendaring will not avert this error. Instead, it will base the calculation on the same erroneous information they input.

While an automated rules-based calendaring system can go a long way towards correctly calculating your deadlines, there are some errors that it just cannot remedy. For more detail on this topic, including challenges unique to hearing-related deadlines, and more calendaring exercises, check out "Calendaring in State Court: Steps and Traps for the Unwary [video]" under the SHOP NOW tab at www.litigationbythenumbers.com.

ENDNOTES

- 1 CAL. CIV. PROC. CODE §§ 430.41, 435.5 & 439.
- 2 See CAL. CT. R. 3.670(h)(2).
- 3 CAL. CIV. PROC. CODE § 1005(b).
- 4 CAL. CIV. PROC. CODE § 437c(b).
- 5 CAL. CT. R. 3.110(b).
- 6 CAL. CT. R. 3.740(d).
- 7 L.A. SUPER. CT. R. 3.23.
- 8 CAL. CIV. PROC. CODE § 1005(c).
- 9 CAL. CIV. PROC. CODE § 12.
- 10 See S.B. 383 (2017-2018 Reg. Sess.), proposing to add Yom Kippur as a state holiday under CAL. GOV. CODE § 6700 without simultaneously excepting it from CAL. CIV. PROC. CODE § 135.
- 11 CAL. CIV. PROC. CODE § 1013.
- 12 CAL. CIV. PROC. CODE § 1013.
- 13 CAL. CIV. PROC. CODE § 1010.6.
- 14 See, e.g., CAL. CT. R. 3.1312(a) relating to proposed orders.
- 15 CAL. CIV. PROC. CODE § 1005(b) requires an opposition to be filed and served at least nine court days prior to the hearing.

Coach's Corner: Four Steps to Take When People are Angry at You



Eleanor Southers, owner of Professional Legal Coaching, coaches attorneys across the US at all stages of their development who want greater success and fulfillment in their careers. She is the author of *Be A Better Lawyer* (ABA 2014)

and is an American Bar Foundation Fellow.

By Eleanor Southers

You might consider a few therapy sessions if these simple suggestions don't work for you. Because, let's face it....you can't be a successful, happy attorney unless you can handle negativity. Solos have it even worse because they frequently don't have anyone to "vent" or discuss the turmoil in their practices.

Anyway, let me give you a couple of ideas that might help or at least "band-aid" your angst.

First, remember that none of this is **PERSONAL**. It is not about YOU. Most of the people who give you a tough time are doing it for reasons that have nothing to do with reality. It is about how they are choosing to handle the situation. Also, let's face the fact that some people have anger as their go to means of confronting a challenge. Sometimes by acknowledging this you can deescalate the situation. A simple feeding back something like "I understand your frustration and feelings about this situation" may help. Careful not to just tell them that you can "see they are angry". That may seem belittling and increase their anger. Also you can try active listening which entails repeating what you have heard them saying about the situation. Again, however you need to preface this with, "Let me be sure I am understanding you"...so they don't feel you are just patronizing them.

Second, after assessing the situation to see if there are things you can learn from it, see if there is any action you can take. Action means that you are tackling the problem, not letting it rest.

Now many times, action is not appropriate. In these cases, such as when a judge tells you that your argument is stupid, first assess the comment to see if he/she is at least partially right. After that write down what you learned and what you can do to rectify your error. Then tear up the paper and flush it down the toilet. Then read a really trashy book, go to a George Clooney/Brad Pitt movie or watch a comic TV show.

Third, and probably the most difficult situation to handle is when you feel you failed a client and the client is angry. The case is not going well for whatever reasons and you are in the dumps. Again, if you can do something about it, do it! If not, then work on other cases that are more fulfilling because it is better to be a work- alcoholic for a short time, than to obsess on feeling bad about something you have little or no control over. This is also a good time to have a volunteer opportunity open to you. Those people appreciate you and want you to feel good and doing something for others and can turn around your feelings quickly.

Fourth, you may need to prepare to have negative experiences on a regular basis. This is especially true if your practice is in a highly volatile field like Family or Criminal Law. It may help to take a class in handling angry clients or in honing your mediation skills. Mediation is a time when you learn to handle hostility in a neutral fashion. Again, you will learn that it is not about You, so you can remove your feelings from the tumult.

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Maximizing the Outcome and Experience in Mediation with Large Firms:

Insights and tips for small firms and sole practitioners

By Jan Frankel Schau



Jan Frankel Schau has successfully mediated over 1500 litigated cases since giving up her litigation practice and becoming a full-time mediator in 2003. She has been a panel member at ADR Services for over a decade and is widely

regarded as one of L.A.'s preeminent mediators, being recognized by the Los Angeles Daily Journal as a Top 50 Neutral. A former President of the Southern California Mediation Association, Jan is also a Distinguished Fellow of the International Academy of Mediators and a member of the United States District Court's Settlement Officers Panel. Jan specializes in mediating employment, business and tort disputes. Jan is the author of numerous scholarly articles and a book, "View from the Middle of the Road: A Mediator's Perspective to Life, Conflict and Human Interaction". For more information, see: www.schaummediation.com.

Famed philosopher Fortune Barthelemy de Felice opined that negotiations can be an antidote to weakness if those weaker powers wisely observe the maxim that "it is always best to submit to negotiation those things that one cannot contest by arms. Such conduct depends on continual negotiations and on friends and allies; it is the unique but sure resource of the weak, and it is most useful for tempering the excessive force of the powerful."¹

Success in mediation may be a particular challenge to the small firm or sole practitioner who, like a small nation, may find itself insufficiently armed to combat a more forceful power. Through careful preparation and effective advocacy, though, you may find you can "win support and rid [yourself] of the most troublesome [cases]."²

In a hypothetical case of sexual harassment in the workplace, imagine the scenario in which your client, Sally, engages you to bring a legal action against her former employer for wrongful termination in retaliation for reporting sexual harassment. You become aware that many of the alleged acts of misconduct are barred by the relevant statute of limitations, however your

client was only fired recently after six other women came forward to charge sexual harassment against their Supervisor³ and she participated in an interview in their case.

Before commencing litigation, and aware that the other six women have an on-going lawsuit currently, you write a demand letter to the former employer, which triggers their response requesting an early mediation before filing this action.

HOW DO YOU GET THE BEST RESULT FOR YOUR CLIENT AGAINST A NATIONAL LAW FIRM WITH THREE PROMINENT LAWYERS ALREADY DEFENDING A SIMILAR ACTION AGAINST BIG CO.?

Timing the Mediation for Maximum Success

- Before you agree to mediate, you and your client will want to carefully consider the advantages and disadvantages of early mediation. While the Company will have had an opportunity to investigate, you may be coming from a disadvantage with respect to information if the mediation is conducted pre-filing. The good news is that you may

set conditions upon an early mediation. Laying out the minimum information you will need in advance of the mediation will not only “arm” you with some power but will engender respect from your adversary. If you need to see their investigator’s report, or review your own client’s personnel record, or take statements from the other plaintiffs, you may engage in that kind of informal discovery as a prerequisite to a mediation.

- If you believe that a mediation will not be successful until Defendants have had the chance to hear your client’s statement, you may want to volunteer to have an informal meeting where the two of you meet with defense counsel and allow them to question her informally, or to wait until her deposition is taken.
- If, on the other hand, your client is eager to get some compensatory damages as soon as possible but knows that many of her complaints will ultimately be knocked out by either demurrer or motion for summary judgment, you may want to seize the opportunity to explore settlement as early as possible, and before an answer to your complaint is due.

In cases where the mediation takes place after the case has been filed or is at issue, you may want to schedule the mediation hearing before engaging in discovery motions that may result in scorched earth tactics which will undoubtedly have the potential of polarizing the two sides. Remember that in mediation, you need two willing participants to earnestly engage in the kinds of series of compromises that will be necessary to achieve a mutually acceptable settlement. Engaging in expensive and intrusive motion practice can effectively discourage that kind of cooperation.

You may also consider waiting until immediately before trial, to maximize the leverage and potentially even the damages in your matter. This is risky, because by then the parties may have dug in their heels and also spent so much time, energy and costs

that the terms of a settlement will be evaluated differently.

The main point is that the sole practitioner or small firm may have many different considerations than your large firm counterparts and the timing of the mediation should take into account both you and your client’s interests as well as the likely interests of your adversary before choosing the ideal time in the life of the conflict to mediate the dispute.

Preparing for Mediation Against a Mega-firm

- Once you have decided to move forward with a mediation, you have a unique opportunity to prepare your opposing counsel (and his/her client) for the mediation **by sharing a well-written and comprehensive brief**. Your brief should lay out the facts, how you intend to plead or get around any obvious legal defenses and a general outline of damages⁴. In most cases, the damages will be a range, but if possible, should also include either your own recent and relevant experiences with similar cases or those that you can find that have been published and may be useful for comparison. If you are an attorney who has enjoyed some success in settling or trying this type of case, you want to highlight that for your adversary.
- One of the disadvantages of the predominance of settlements, as opposed to verdicts in this area of the law (and many others) is **that it is a challenge to figure out a “market value” for cases**. What’s more, the large defense firms have the benefit of a volume of work, so that they can usually offer up contrary experiences where a weaker case or less compelling plaintiff did poorly at trial, lost in motion practice, or settled for far less than you wish to accept. **Be prepared to counter those anecdotes with whatever strong results you can find.**
- Once you have shared your brief, you may also want to **provide a cover letter with your initial demand but be prepared to move off of that demand even as an**

opening offer at the mediation. In other words, be careful to make a demand that is “high enough”, but not so high as to discourage the Defense from participating in an earnest negotiation.

Prepare your own client for the Mediation

In order to stay the course for long enough to get to a successful outcome, clients should be warned that you will not be intimidated by the big firm/big Company’s defenses and neither should she. If you are going to achieve the desired outcome, she will need to be prepared to undergo some scrutiny about the facts, either directly in a joint session or confidentially with the mediator.

You should prepare your client that mediation itself is a process, not an event, and that she must be prepared to spend what may seem like an inordinate amount of time examining her factual and legal claims even before any negotiation is begun.

Once the negotiation begins, your client should also be prepared to hear what she will view as insults and offensive offers back and forth, perhaps for hours. This is unfortunate, but part of the normal process in commercial mediation. If you want to keep your client engaged in the process, it’s a good idea to remind her that flexibility is key and that it takes a while to get the other side to loosen up and get into a range that both sides can agree is within the “zone of possible agreement”. This may be far below your initial demand and is likely far above their initial offer. You can normalize this for your client so that neither of you are feeling bullied or taken advantage of in the negotiation against a big firm or big company.

Prepare your mediator for successful negotiation

Many advocates still don’t recognize that it is perfectly acceptable to engage in ex parte communication with your mediator in advance of or during the mediation. If you have unique concerns arising out of legal defenses, factual or evidentiary issues or a particularly difficult client or adversary, your mediator can help to overcome those challenges best if you communicate them to her in advance of the mediation.

For example, if you know that, in the hypothetical set above, that the most egregious of the misconduct directed towards your client occurred beyond the relevant statute of limitations, or that your client has accepted, but not yet begun a new job at a higher salary, you may want to disclose those issues confidentially to your mediator before the Defense takes advantage of the day to assert them as defenses. In doing so, your mediator may help to develop strategies for keeping the new job confidential and/or highlighting only the most recent misconduct and negative publicity that has come out of the other pending lawsuit.

Another example may be if you have already had a particularly contentious discovery dispute with the adversary and you need your mediator to help smooth some ruffled feathers before the cooperative negotiation can begin. A strategic and private “heads up” to the mediator can go a long way towards getting to “yes” by the end of the day.

Take Advantage of the Mediation Process Strategically

One extremely effective approach to mediation is to harness the ambiguity of those facts or that evidence which has not been yet substantiated so that each side is effectively working from the same set of “imperfect” information or facts. To do this, the clever lawyer may withhold key evidence from the brief at initial submission and may instead choose to dole it out in “small drips”.

In my hypothetical, consider the power that may be achieved if the Plaintiff’s lawyer comes to the mediation armed with a series of key documents on his iPad or laptop, ready to share with the mediator, but not to be given to the adversary without formal discovery.

In other words, if you have a financial analysis, witness statements, or key documentary evidence (text messages, medical reports, email), those may be used strategically at mediation to disarm the more powerful law firm and cause the bigger defendants to re-evaluate the settlement value as well as the likely extensiveness of discovery that will be required should the matter not settle. In some cases, holding back from a full and transparent exchange of information may give you and your clients some

needed leverage for negotiation purposes. By controlling the flow of information at mediation, you will be re-claiming some of your power in the negotiations that follow.

BE A STRATEGIC NEGOTIATOR

Most litigators know themselves well enough to know whether they approach negotiation competitively or cooperatively as a general rule. Being from a small firm or being a sole practitioner is not a true predictor of one's general inclinations when it comes to negotiation style, nor does it portend whether the settlement will be achieved or who will be most likely successful. **What gives you power over the larger firms is your mastery of the art of negotiation.**

When you begin the negotiation from a very competitive position (asking for something that is well beyond the "credible zone"), be mindful and attentive to the response. If your adversary responds with a very competitive offer (also well below the ZOPA, or zone of possible agreement), you will quickly be headed towards impasse. If, in response, instead of making another very competitive move, you demonstrate your strategic prowess and respond by making a cooperative move, your adversary is likely to reward that by a cooperative move as well. In other words, both flexibility and strategy are required to get to a settlement in every dispute. Stay attentive to each move to interpret its message and carefully tailor your responses accordingly.

Whether you are from a big firm or small, your expertise in the negotiation process can lead to big success with some careful planning. **Indeed, you can readily overcome any disadvantages that may otherwise appear to arise from being a smaller, less powerful negotiating partner by superior planning and strategic participation.**

In order to be most effective in mediation, small firms and solo practitioners may need to have a sharper grasp of the power of mediation to effectively achieve their clients' most favorable outcome.

By making your mediator your ally, you gain an important resource in tempering the undue power of larger firms representing larger clients. Careful preparation of your adversary, your client

and your mediator may also set you on more equal footing than you thought possible in certain circumstances. Then, while you are in the mediation, the better negotiator will routinely get the best results, irrespective of the size or financing of their firms.

Ultimately, litigators exist and thrive only because there are counter-parts who represent the other side of each dispute. By approaching conflict with a view towards achieving your client's desired outcome, you may not only satisfy your clients, but also gain a well-deserved reputation for civility, integrity and success within the legal community and with the professional mediators who assist you in resolving cases. Only then, as with other great statesmen, will you be able to consider yourself amongst friends and allies even in the most contentious of battles.⁵

ENDNOTES

- 1 CHAS. W. FREEMAN, JR., THE DIPLOMAT'S DICTIONARY (United States Institute of Peace, 1994, 1997).
- 2 *Id.* at 184 (paraphrased).
- 3 The facts of this hypothetical are entirely fictional, although based upon a compilation of cases mediated by the author. This assumes that the Supervisor that is the subject of the other lawsuit is a different person than the alleged harasser of Sally.
- 4 The damage analysis should include the elements of each claim for damages and a range of values. For example, in my hypothetical, the lawyer for Sally would want to include the elements of past lost wages, prospective future lost wages, emotional distress damages for the retaliatory termination and attorney's fees. The ranges would be something like: 1-3 years future lost wages, 1-3 times special damages for emotional distress and pre-litigation to through trial likely award of attorney's fees if Plaintiff is entitled to recover fees under FEHA.
- 5 The reader is requested to forgive the use of the gender specific, "statesmen" here. Diplomacy has not yet adjusted its vocabulary to include "statespersons" in a way that gets the same point across, but the reader is asked to assume that the same would apply to women.

Fighting Fifth Amendment Claims: Can a Receiver Obtain Business Records When a Fifth Amendment Right Against Self-Incrimination Is Asserted?

By Richard Weissman

Assume a receiver has just been appointed over Acme Corporation in a civil enforcement action brought by a state or federal regulatory agency. The order of appointment authorizes the receiver to take possession and control of all of Acme's assets, its ongoing business enterprise and all its business and financial records (expansively defined to include documents, computer hardware, software and all computer based records, floppy disks, CD-ROMs, "smart" cell phones, computer passwords and access codes, etc.). The receiver then serves the order on Acme's president, Mr. Smith, and immediate turnover of and access to the financial records.

Mr. Smith refuses, and the attorney for both Mr. Smith and Acme states that her clients are exercising their respective Constitutional rights against self-incrimination under the Fifth Amendment, which rights (it is asserted) preclude the receiver's obtaining Acme's records. The attorney also discloses that some of Acme's records are now in her possession (having



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been delivered by Mr. Smith). She asserts an attorney-client privilege in refusing to turn over these documents.

Is the Receiver sunk? Are these insurmountable Constitutional protections afforded to Acme and to Mr. Smith? Does the Fifth Amendment privilege against self-incrimination prevent the receiver from executing his duties set by the court? Does the attorney-client privilege apply under these facts? The short answer is: No, no, no and no!

IS THERE A CORPORATE PRIVILEGE?

May the receiver enforce the court's order granting him possession of the corporation's financial records against Acme? Absolutely. A corporation is not afforded any right or privilege against self-incrimination by the Fifth Amendment. The Fifth Amendment privilege against self-incrimination is a personal right, reserved only to a "natural person", who must directly assert the privilege.

The U.S. Supreme Court has stated it is well established that artificial entities such as corporations, partnerships, unincorporated associations (and similarly constituted entities), are not shielded by the Fifth Amendment. Acme, as a statutorily created entity, has an unconditional duty to produce records prepared and maintained in the ordinary course of business if required by court order or a subpoena for the production of records.

Acme does not possess a Fifth Amendment privilege precluding production of corporate financial records,

correspondence, marketing and sales documents or the like even though such records would tend to establish that illegal activities took place. A corporation, as a creation of the state, is amenable to state action, and both an order and a subpoena mandating production of Acme's records are forms of state action.

The right against self-incrimination is limited to its historical function of protecting a natural person against compulsory self-incrimination through his own testimony or personal records. The reasoning behind denial of the Fifth Amendment privilege to artificial entities enunciated by the Supreme Court is the corporate records are deemed public in nature, rather than private papers which would be protected by the Fifth Amendment. The Fifth Amendment privilege is inapplicable to corporations, regardless of their size (as small as one shareholder).

The protections of the Fifth Amendment are also denied to partnerships, formal and informal associations, and dissolved corporations and partnerships (including entities that have been through bankruptcy). It is clear all of Acme's corporate documents and records, in whatever form they are maintained, including computers, software files, hard drives, disks, CD ROMS, smart cell phones and the passwords and access codes to such information are not shielded and must be produced.

MAY AGENTS AND REPRESENTATIVES OF THE CORPORATION INVOKE A PERSONAL FIFTH AMENDMENT PRIVILEGE AND REFUSE TO PRODUCE CORPORATE RECORDS?

A corporation functions only through its agents and representatives, directors, officers and employees. These agents perform the business and statutory duties of the corporation on its behalf. They prepare and maintain corporate records, and produce them if required by subpoena or order. Generally, there is at least one person within each artificial entity who maintains possession of these records and is responsible for their preservation and maintenance in the ordinary course of business, and for their production for review as required by law. This custodian of records acts solely in a representative capacity on behalf of the corporation.

A custodian may be the chief executive officer, the president, a member of the board of directors, and/or any employee formally designated as the custodian of records. The law considers a custodian's act of producing records pursuant to court order a function of the corporation, not a personal or individual act by the custodian. For that reason, the custodian's act of delivering the corporate records under law is not considered to be "compelled testimony" of the individual custodian (which would be protected under the Fifth Amendment). This is the case even where the records may tend to provide incriminating evidence against the custodian.

In our hypothetical, Acme's counsel states that there is no one to produce the records because the individual directors, officers and employees are each asserting their personal right against self-incrimination under the Fifth Amendment. They refuse to deliver the records on the grounds production of the documents may criminally implicate them in some way. They argue that forcing them to deliver the corporate records is the equivalent of compelling them to testify as to their personal knowledge about the documents and potentially establishing their personal guilt (or culpability) for Acme's alleged illicit activities.

This argument fails. The content of the records is not at issue because the custodian's act of producing them is not considered to be testimony as to the content of the documents. The custodian acts as a representative of the corporation: the act of production is deemed that of the corporation, not of the individual. The legal reality is Acme's directors, officers and employees serve only as representatives and agents of the Corporation and are bound by its obligations to produce the records. In particular, Smith, the president of Acme in our hypothetical, holds the records only as Acme's agent and custodian, not in his personal capacity. He cannot assert any personal Fifth Amendment privilege to shield the corporation from producing the documents.

The Supreme Court has consistently denied a custodian's attempt to "back door" this use of the Fifth Amendment privilege. If Smith were allowed to assert a personal Fifth Amendment privilege to prevent his production of the documents on the grounds that such production constituted his

testimony, it would be “tantamount to a claim of privilege” by Acme, a privilege which it does not possess. A custodian’s production of corporate records is mandated notwithstanding any potential they may personally incriminate him or her.

“A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State’s ... powers.”

Acme must find a means to comply with the order, even if it requires appointment of an alternate custodian. If so, it is incumbent on Smith to ensure that this alternate custodian has sufficient knowledge about the existence, nature and scope of the records so as to be able to properly comply with the order. Otherwise, “the solution [i.e. appointment of an alternate custodian] is a chimera.”

WHAT ABOUT DOCUMENTS IN THE POSSESSION OF ACME’S ATTORNEYS?

The fact that Acme’s counsel has possession of the corporation’s records (prepared by Acme’s personnel and agents) does not mitigate her duty to comply with the order and to deliver the records forthwith. The documents in an attorney’s possession are not the subject of attorney-client privilege merely because they were delivered to counsel to avoid their production. If the documents are not protected by the Fifth Amendment privilege, their delivery to counsel does not spontaneously afford the documents either Fifth Amendment or attorney-client privilege protections.

The rule is: if the records are producible by Acme, they are producible by its counsel, despite the fact the records are delivered to counsel for the purpose of obtaining legal assistance. Only if the records are not obtainable from the client under a subpoena or other lawful order will the records be unobtainable from counsel by reason of the attorney-client privilege. Where Acme cannot avoid producing its records, neither can its counsel under the guise of attorney-client privilege.

ENFORCING THE SUBPOENA OR COURT ORDER

The refusal of Acme, Smith (its president) and Acme’s counsel to deliver the records requires an immediate reaction. An ex parte application to the court for the issuance of an order to show cause regarding contempt should be promptly brought. All the United States Supreme Court cases addressing these issues upheld contempt citations against recalcitrant corporate custodians and attorneys who refused to comply with production orders for corporation, partnership and association records.

It is appropriate and necessary for the court to be made aware of any obstructionist conduct of the corporation and its agents, to enable the court to control and direct the course of administration of the receivership. Expensive and time-delaying depositions, interrogatories and other forms of discovery open the door for the deponent or declarant to assert “personal” rights against self-incrimination as to his personal knowledge sought through these traditional discovery means.

Direct production of corporate records upon service of the receivership order avoids such peripheral impediments. Pursuing a contempt citation that provides for a civil contempt penalty (incarcerating the agent pending full compliance with the order) may be a cost efficient and expedient tool against Acme’s obstructive agent(s) and counsel.

The requisite proof elements for contempt are: (1) the citee was served with the order; (2) demand was made for production of the records sought under the order; (3) the citee had the ability to produce the records; and (4) the citee’s failure to produce the records. Once these elements are established, a contempt citation will follow.

A claim the documents are no longer available to the citee or they have been destroyed are dynamics beyond the scope of this article. Suffice it to say, however, that the Court does have various methods it may employ to enforce compliance with its orders, including jail time pending compliance.

A citee’s claim of “I can’t” is really his legal statement of “I won’t.” His contention is not legally viable and the court should support the receiver’s pursuit of the

records. A command to the corporation is, in effect, a command to those who are officially responsible for the conduct of its affairs.

“As the corporation can only act through its agents, the courts will operate upon the agents through the corporation.”

ENDNOTES

- 1 *Hale v. Henkel*, 201 U.S. 43, 75 (1906).
- 2 *Bellis v. United States*, 417 U.S. 85, 89 (1974).
- 3 *Braswell v. United States, et al.*, 487 U.S. 99, 102-107 (1988).
- 4 *Id.*
- 5 *Wilson v. United States*, 221 U.S. 361, 383 (1911).
- 6 *Hale v. Henkel*, 201 U.S. at 75.
- 7 *Bellis v. United States*, 417 U.S. at 90 (1974).
- 8 *Bellis*, 417 U.S. at 88, 100.
- 9 *Braswell v. United States*, 487 U.S. at 104 [which decision also comments that if a sole proprietorship is involved a different inquiry is required].
- 10 *Fisher v. United States*, 425 U.S. 391, 412 (1976).
- 11 *Bellis v. United States*, 417 U.S. at 90; *Braswell v. United States*, 487 U.S. at 110.
- 12 *Id.*
- 13 *Id.*
- 14 *Fisher v. United States*, 425 U.S. at 408-409, 410-411.
- 15 *Braswell v. United States*, 487 U.S. at 118.
- 16 *Bellis v. United States*, 417 U.S. at 90.
- 17 *Wilson v. United States*, 221 U.S. at 383. ; *Braswell*, 487 U.S. at 110.
- 18 *Bellis v. United States*, 417 U.S. at 100; *Braswell v. United States*, 487 U.S. at 110-111, 112.
- 19 *Id.*
- 20 *Curcio v. United States*, 354 U.S. 118, 123-4 (1957).
- 21 *Braswell v. United States*, 487 U.S. at 117.
- 22 *Fisher v. United States*, 425 U.S. at 397, 403.
- 23 *Id.*, at 403, 405.
- 24 *Id.*, 403-405.
- 25 *Wilson v. United States*, 221 U.S. at 377.



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