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On Direct: Mia Yamamoto

Turnover and Preference Law

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Pull up a chair alongside an Angeleno on a pleasant summer evening and say the name “Vin.” Many—even those with no interest in baseball—will assume you can only be referring to one individual: Vincent Edward Scully. For 67 years, Vin’s mellifluous voice has been calling the play-by-play of the then-Brooklyn and, since 1958, L.A. Dodgers. He was first heard over large radios and small TVs operated with dials and tubes, then pocket transistor radios, and, today, big screen TVs using LED technology. In October, however, Vin will leave the broadcasting booth for good, and the mike that has carried his recognizable voice through many memorable games will go silent.

In April 1950, Vin began his Dodger career at 22 when he joined the team’s other announcers, Red Barber and Connie Desmond, at Philadelphia’s Shibe Park. In 1982, he was enshrined in the Baseball Hall of Fame as a recipient of the Ford Frick award honoring broadcasters. In May, *Sports Illustrated* noted Vin “ranks with Walter Cronkite among America’s most-trusted media personalities.”

Over Vin’s career he called three perfect games, including the only one pitched by Don Larsen in the World Series; Sandy Koufax’s four no-hitters; Hank Aaron’s 715th record-breaking home run; and Kirk Gibson’s shot that propelled the Dodgers to their last world championship in 1988. Incredibly, he has been the Dodgers’ announcer for nearly half the games since the team was formed in 1890.

Technology and baseball history aside, consider the course of American jurisprudence over Vin’s career. Despite Jackie Robinson’s breaking baseball’s color line in 1947, “separate but equal” was still good law in this nation when Vin joined the Dodgers. The U.S. Supreme Court did not render its decision in *Brown v. Board of Education* until 1954. Coincidentally, the Supreme Court has since issued decisions with party names matching other noteworthy Dodgers like *Obergefell v. Hodges*, *Roe v. Wade*, and *Caplin and Drysdale, Chartered v. United States*.

Vin’s broadcasting techniques and his ability to capture and hold listeners’ attention offer lessons that attorneys can apply to their advocacy skills: Paint a picture with words. Vin’s call of the last inning of Koufax’s perfect game in 1965 began with, “It is 9:41 P.M. on September the ninth. There are 29,000 people in the ballpark and a million butterflies.” Two batters later, “Sandy backs off, mops his forehead, runs his left index finger along his forehead, dries it off on his left pants leg. Into his windup, and the 2-1 pitch to Kuenn: swung on and missed, strike two. It is 9:46 P.M. Two and two to Harvey Kuenn. Sandy into his windup. Here’s the pitch: swung on and missed, a perfect game!”

Give context to the story. This was Vin’s call of Aaron’s record-breaking home run: “It is over, at 10 minutes after nine o’clock in Atlanta, Georgia. Henry Aaron has eclipsed Babe Ruth. You could not get two more opposite men—the Babe, big and garrulous, oh so sociable, immense in all his appetites—and then the quiet lad out of Mobile, Alabama, slender.”

A pregnant pause can give emphasis to your closing. After Vin announced Gibson’s game-winning home run, he let the crowd speak for 67 seconds before he delivered his memorable line, “In a year that has been so improbable, the impossible has happened.”

Vin’s retirement will leave a deafening void. We thank him for the gift and legacy he has graciously shared with us as a broadcaster without peer.
Mia Yamamoto Criminal Defense Attorney

MIA YAMAMOTO | Cofounder of the Asian Pacific Islander Law Student Association and the Multicultural Bar Alliance of Southern California (a coalition of minority, women’s, and LGBT bar associations of Los Angeles), Mia Yamamoto has practiced law since 1974, first as a public defender and, since 1984, in private practice. She has been named “Southern California Super Lawyer” by her peers in Los Angeles magazine from 2005 to 2016.

What is the perfect day? I’ve got a court appearance, I have a motion on calendar, and I get to help somebody.

You are a private criminal defense attorney. What is your biggest challenge? Working against the odds, working against the power, working against the establishment.

From 1974-84, you worked as a Public Defender. Why did you leave? For freedom; I loved the job, but I didn’t love the limitations.

You have been practicing for decades. What has changed? The biggest change is the technology. Technology is overtaking the practice of the profession, and you have to keep up with it.

Were you frightened the first time you appeared in front of a Judge? I was never afraid.

In 1943, you were born in an internment camp in Arizona. How did that inform your childhood? My mom insisted I call them concentration camps. She said not to use euphemisms, candy-coated words. I was too young to remember the camp, but I do remember the aftermath of the war, the anti-Japanese sentiments.

The reality of your birth gender dawned upon you at an early age. What caused the epiphany? I was about five years old and I had three older brothers; they were violent bullies. But I had a little sister, and once we were in the tub together. She looked at my body and said, “You are turning into one of the brutes.” I didn’t want to be one of those guys.

You were a mediocre student at Maryknoll Elementary School and Cathedral High School, but later got serious at Los Angeles City College. What motivated you? I flunked out with all fails; I had 30 units of zero points. So, I had to get all As to get to a 2.0. I had to study hard and I started to enjoy it.

As a student, you visited libraries studying gender dysphoria. Was there much on the subject? I read over 100 cases studies. There were so many other people dealing with the same issues, but every single person I read about was extraordinarily unhappy.

After getting your bachelor’s degree in English and government, you went to serve in Vietnam during the height of the war. Why? I was constantly thinking about suicide, and the war was an attractive alternative.

You were sent to the infantry in Pleiku. Were you scared? I was only in the field for a couple of months. It was the monsoon season, and there was not a lot of engagement.

In Transgender in Law you wrote that you witnessed the politics and payoffs of military bureaucracy. How so? For valor awards, the higher your rank, the higher your award. There was a lot of hierarchy—it was a good old boys’ club that way. If you’re a lifer, the only thing that distinguishes you is the medal.

You enrolled in UCLA Law School in 1968. Why did you want to become a lawyer? My dad was a lawyer; I felt it was the way to help people.

How did your clients react when you made your transition? I came out to them all, individually. They said, “No shit, man, you’re really going to do that.” Then, they said, “I’ll stick with you.”

You were voted a Southern California Super Lawyer for more than 10 years in a row? What sets you apart? I don’t know; I just try to do my job.

What is an example of a “cultural defense”? I believe that every single person’s experience shapes his or her perceptions. That has to be taken into consideration by the trier of fact and placed in context. It is relevant to the mens rea.

You cofounded the Multicultural Bar Alliance, a coalition of minority, women’s, and LGBT bar associations of Los Angeles. What is its goal? To bring together all the minority bar associations of those who have suffered some kind of exclusion.

What is the biggest legal challenge facing the transgender community? There is exclusion in just about every part of society. That is a huge challenge. We are uncommon, but utterly ordinary.

You have said that you are a card-carrying, die-hard member of the ACLU. Why? They were the only ones who stood up for the Japanese Americans against the overwhelming sentiment of the country—it mattered to me.

What characteristic did you most admire in your
mother? Oh, my mom...she was a fighter. My dad died when I was 13, and she became a single mom of six children.

What was your best job? Being a public defender.

What was your worst job? Working in a gas station on Pico and Union.

If you were handed $10 million tomorrow, what would you do with it? I would donate to International Bridges to Justice and the ACLU. I would endow UCLA Law School, where I went, and Loyola Law School, where my father went.

Who is on your music play list? Bruce Springsteen and the E Street Band, the Rolling Stones, and the Beatles—I’m old; that’s my sound track.


Which magazine do you pick up at the doctor’s office? Sports Illustrated.

Where is your favorite vacation spot? Poipu, Kauai. My parents were from Hanalei, Kauai—I feel like it’s a return to my roots.

What do you do on a three-day weekend? Play the guitar. I was in a rock ’n roll band for 25 years. It was called Use a Guitar, Go to Prison.

Do you have retirement plans? No.

What is your favorite sport as a participant? Basketball.

Do you have a favorite exercise? Ballet.

If your house were on fire, what would you grab on your way out the front door? My vintage Les Paul guitar.

Which feature on your iPhone do you wish you could operate? I can barely use Uber.

Who is your favorite movie star? Gregory Peck, especially in To Kill a Mockingbird.


If you could eat only one entrée for the rest of your life, what would it be? Filé gumbo.

What are the three most deplorable conditions in the world? Poverty, ignorance, and war.


What is the one word you would like on your tombstone? Kindness.
The Challenges of Working with First-Time Experts

EXPERTS COME FROM ALL different backgrounds and practices. While some come from academia and may have provided expert testimony in dozens—even hundreds—of cases, others are working professionals who may have little to no experience in a legal setting. Working with the latter group presents special challenges. First, these experts may be unfamiliar with their role and any associated privilege considerations and might show little regard for counsel’s concerns about potential disclosure of damaging information. Second, first-time testifying experts may rely too heavily upon counsel in preparing their reports, which can undermine the expert’s credibility and even lead to the exclusion of his or her opinions.

One early challenge is determining what role the expert will play. In most cases, experts are retained to provide 1) consulting or advisory services before or during the course of litigation or 2) testimony in the litigation. The differences between the two roles are stark. Generally, the consulting expert’s work is limited to assisting counsel in the “preparation of pleadings, the manner of presentation of proof, and cross-examination of opposing expert witnesses” while the testifying expert’s work will include findings and opinions “that go to the establishment or denial of a principal fact in issue.” Although the consulting expert’s work product and communications with counsel enjoy at least qualified protection against disclosure, the testifying expert’s report must be produced, and his or her prior work product and communications with counsel may also be discoverable.

As a result, determining the expert’s role may have significant consequences. For example, a testifying expert’s opinion, once produced to the opposing party, will be exposed to criticisms regarding credibility, reliability, and admissibility, while a consulting expert’s work will include findings and opinions “that go to the establishment or denial of a principal fact in issue.” Although the consulting expert’s work product and communications with counsel enjoy at least qualified protection against disclosure, the testifying expert’s report must be produced, and his or her prior work product and communications with counsel may also be discoverable.

As a result, determining the expert’s role may have significant consequences. For example, a testifying expert’s opinion, once produced to the opposing party, will be exposed to criticisms regarding credibility, reliability, and admissibility, while a consulting expert’s opinion will not be disclosed and therefore will not be subject to the same scrutiny. Counsel should consider the expert’s public speaking abilities, presentation style, prior statements or work product related to the topic, and communications with counsel before deciding whether the expert should testify, as each of these issues may be exposed to the trier of fact.

Once the expert’s role has been determined, counsel must manage process and communications to protect against the disclosure of damaging information. Counsel should closely monitor materials provided to the expert and, in general, avoid making privileged materials available to the expert, as those materials could become discoverable. Counsel should also remind the expert that his or her communications may be discoverable, particularly in state court where there are few protections against disclosure of a testifying expert’s materials. First-time experts may need frequent reminders of this, particularly if they are prone to self-deprecation or off-hand remarks that could undermine their credibility or the weight of their opinions. Counsel should consider conducting all communications telephonically to minimize the risk that these remarks will be subject to production.

A second challenge lies in preparing the testifying expert’s report. Developing a report that presents the testifying expert’s opinions in the most logical and persuasive manner is critically important. That report may be submitted in support of summary judgment or at trial, and can help persuade fact-finders to accept a particular fact or theory. In light of this, counsel might be tempted to take a primary role in drafting the expert’s report, and may even be asked by first-time experts to prepare the first draft of the report so the expert has something on which to base future efforts. Counsel must resist this temptation.

One series of questions the expert is sure to be asked in deposition is: “Who prepared your report? How was it prepared? What assumptions did you make in preparing it?” If the answers suggest the expert merely adopted the opinions developed by counsel, there is sure to be a significant fight over the credibility, reliability, and admissibility of the expert’s report and testimony. This can largely be avoided by making sure the expert had primary responsibility for drafting his or her report and that any edits from counsel are provided in the form of comments or suggestions—not instructions.

Finally, first-time experts may not know what to expect during their deposition or trial testimony. Counsel should always inform the expert in advance whether the deposition will be audio- or videotape recorded, and should provide guidance regarding attire, tone, and mannerisms. More important, however, counsel should ensure the expert knows everything about his or her own written report—including citations—and is prepared to speak about his or her opinions and the bases for them. As with fact witnesses, preparation is key. Many first-time experts require assistance and guidance from counsel to complete their assigned roles. Working with these experts requires counsel to walk the fine line between providing that assistance and avoiding any implication that the expert merely adopted opinions developed by counsel. While challenging, successful navigation of these issues can have a tremendous impact on the litigation and lead to a better resolution for the client.

Sarah Kelly-Kilgore is a securities litigation associate at Paul Hastings LLP and a member of the Barristers Executive Committee.

Footnotes:
1. In some cases, an expert who provides consulting services may later be designated as a testifying expert. See DeLuca v. State Fish Co., 217 Cal. App. 4th 671, 690 (2013) (evaluating expert’s dual role).
8. Federal courts have excluded expert testimony when counsel had primary responsibility over drafting the report. See, e.g., Bekaert Corp. v. City of Dyersburg, 256 F.R.D. 573, 579-80 (W.D. Tenn. 2009).
IN THE COURSE OF COLLECTIONS ACTIVITIES, a creditor can become singularly focused on aggressively pursuing enforcement of a debt by levying against the debtor’s property or by demanding and receiving payment from the debtor. However, if and when a debtor files for bankruptcy, the creditor may become the target of unwanted litigation when it levied against or received property that, through the mere occurrence of the debtor’s bankruptcy filing, is considered property of the bankruptcy estate. Thus, the creditor becomes part of the bankruptcy estate trustee’s litigation efforts to marshal property back into the bankruptcy estate under either turnover or preference law, depending on whether the creditor’s collections activities extinguished the debtor’s interest in property prior to the bankruptcy filing.

To put a bankruptcy estate trustee’s marshaling efforts against a creditor into context, it is helpful to understand that today’s bankruptcy law exists to provide a debtor a financial “fresh start” from burdensome debts. As stated by the Supreme Court in 1934, the law’s purpose has both a public and a private interest, in that “it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.”

To provide this fresh start, modern bankruptcy law has been formulated as an exchange between a debtor and his creditors of assets for a discharge. This exchange is rooted in Congressional legislation passed in 1833, abolishing the English-originated legal practice of imprisonment for debt and paving the way for today’s decriminalization of bankruptcy. Fundamental to effectuating this modern exchange are the several ways in which the current Bankruptcy Code provides for the maximization and marshaling of a debtor’s assets from the way in which property of the estate is broadly defined to turnover and preference law provisions. These recovery tools are designed to maximize payment to creditors on a ratable basis, so that when a discharge is ultimately granted to a debtor, the exchange is not only modern, but fair.

Property of the Estate

Under the Bankruptcy Code, a major tool for maximizing a bankruptcy estate is how property of the estate is defined, which includes 1) all nonexempt “legal or equitable interests of the debtor in property,” as of the bankruptcy filing—otherwise known as the petition date, 2) all interests of the debtor and the debtor’s spouse in community property as of the petition date, and 3) certain property that the debtor acquires (or becomes entitled to acquire) within 180 days after the petition date.

Property of the estate is also defined to take into account a trustee’s marshaling work against creditors by including property in which a debtor has no possessory interests as of the petition date but which the trustee recovers from creditors. Moreover, the term “property” has been generously construed to include “all kinds of property, including causes of action, disputed, contingent or reversionary interests, and all other forms of property.”

Turnover and Preference Law

A bankruptcy estate trustee has two principal tools to recover property that was levied by or paid to a creditor prior to the petition date. They are turnover and preference law.

Under the Bankruptcy Code, turnover law is focused on bringing back property of the estate that is in the hands of a third party so that the bankruptcy estate trustee may monetize the property for the benefit of the bankruptcy estate and its creditors. Specifically, turnover law applies when a noncustodian entity is in possession, custody, or control of estate property at any time during the case, and the property is of a type that a trustee may use, sell, or lease, to the benefit of creditors. Unless the property is of inconsequential value or benefit to the estate, the entity is required to deliver and turn over the property or its value to the trustee.

In fact, this turnover power has been construed to allow a trustee...
to recover property or its value from a creditor who once had, but no longer has, possession, custody, or control of the property at the time a turnover motion is filed.\textsuperscript{13} Current possession, custody, or control is not required, but possession, custody, or control at any time during the case is sufficient.\textsuperscript{14} By allowing a trustee to seek recovery from any creditor so long as it had possession, custody, or control of estate property at some point during the case reinforces the principles underlying turnover law, which are to marshal assets back into the bankruptcy estate and to affirmatively require a creditor to turn over estate property that comes into the creditor’s possession.

Similarly, preference law is aimed at bringing back property of the estate into the hands of a third party, but unlike property subject to turnover law, this property had been transferred to the third party prior to the petition date. Additionally, preference law serves the additional purpose of guarding against a debtor who, while sliding into bankruptcy, favored one creditor over another by making a payment or other transfer to that creditor. Preference law avoids the preferential transfer so that the recovered property may be marshaled back into the bankruptcy estate to be redistributed ratably among its creditors.

Specifically, under the Bankruptcy Code, any transfer made by a debtor within 90 days of the petition date\textsuperscript{15} is statutorily defined as preferential if and when the transfer is made to or for the benefit of a creditor, for or on account of an antecedent debt, and the result of which enables the creditor to receive more than it would have received—in a Chapter 7 liquidation, had the transfer not been made—and in the bankruptcy case, as otherwise provided for under the Bankruptcy Code.\textsuperscript{16}

There are some defenses, for example new value, ordinary course of business, and contemporaneous exchange.\textsuperscript{17} However, in essence, under preference law, a creditor is targeted for recovery on account of a certain payment or transfer statutorily defined as preferential so that assets may be marshaled back into the estate for a ratable distribution to creditors.

Whether a trustee uses turnover or preference law against a creditor will depend on whether there was a transfer in ownership or title of property. If there was an incomplete transfer, the debtor and the estate would retain some identifiable property interest that would be included in the broadly defined property of the estate, and turnover law would apply. If there was a complete transfer in ownership or title, the debtor and the estate would not maintain any identifiable property interest to be included in property of the estate. In this circumstance, the property must be recovered first through avoidance of the transfer before the property may be included in property of the estate.\textsuperscript{18}

Whether there was a transfer in ownership or title of property prior to the petition date will depend on state law. While bankruptcy law provides for what a debtor’s interests in property is included in property of the estate, it is state law that determines the extent of a debtor’s interests, if any, in property itself.\textsuperscript{19}

IIllustrative Cases

In re Churchill Nut Co. is an unusual case that highlights how turnover and preference law are two sides of the same coin.\textsuperscript{20} In this case, a walnut grower delivered 236 tons of walnuts to the debtor, a nut processor, for processing. After receiving minimal payment, the grower sued the debtor for damages and to foreclose on its producer’s lien. The grower obtained a judgment in its favor and thereafter obtained a writ of execution. The sheriff levied on the writ by seizing 166 tons of shelled nuts from the debtor, but before the actual sale of nuts, the debtor filed for bankruptcy. The bankruptcy court found that under California law when the sheriff seized the shelled nuts, possession was transferred to the benefit of the grower. However, this transfer did not extinguish the debtor’s interest in the shelled nuts because 1) they were still subject to other producers’ liens and 2) they were tangible property with uncertain value that had to be liquidated into money in order to effectuate a title transfer. As a result, the grower and the sheriff, as a custodian of the debtor’s property, were ordered to turn over the shelled nuts to the bankruptcy estate trustee.

Had the sheriff completed the sale prior to the debtor's bankruptcy filing, so that the only duty left for the sheriff would be to turn over money to the grower,\textsuperscript{21} the sale would have extinguished the debtor’s interest prior to the bankruptcy filing and placed the money outside of turnover law. Nevertheless, the sale would be subject to avoidance under preference law as the sale would be a preferential transfer from the debtor to the grower.

In contrast to In re Churchill Nut Company, in which there was a money asset involved, In re Paul\textsuperscript{22} was a case in which the California State Board of Equalization levied the debtor’s bank accounts—a money asset—prior to the petition date. The bankruptcy court held that under California law, at the moment the notice of levy was served, ownership of the funds transferred to the Board. As a result, the bankruptcy court concluded that the funds were not property of the estate and therefore would only be recoverable as a preferential transfer.

Even when a money asset is involved, however, there may be a scenario in which a creditor’s levying activities will not terminate or overcome a debtor’s interest in the money asset because the debtor’s interest may be special or superior to any one creditor’s claim. In Hernandez,\textsuperscript{23} the sheriff levied funds on behalf of a judgment creditor but had yet to turn them over to the creditor when the bankruptcy was filed. The Bankruptcy Appellate Panel for the Ninth Circuit U.S. Court of Appeals found that the levied funds were exempt Social Security benefits; therefore, ownership had not transferred. “Because debtor had an exempt property interest in the [Social Security] funds, we conclude that [the creditor’s] levy did not operate to extinguish those interests.”\textsuperscript{24}

Another distinctive and nuanced scenario involving levying a money asset is a wage garnishment. In the Carlsen case,\textsuperscript{25} the IRS levied wages that had been earned prepetition. Because in California a wage garnishment merely creates a lien and does not divest the debtor of all interest in the wages, the bankruptcy court held that the garnished wages constituted property of the estate. The court determined that the IRS had a duty to take positive action to halt the postpetition continuation of the garnishment, and it had to return the garnished wages.\textsuperscript{26}

To the extent a collection activity creates a lien, a lien may be subject to avoidance under preference law unless the lien is perfected prior to the 90-day preference period. In the Hilde case,\textsuperscript{27} the Ninth Circuit U.S. Court of Appeals found that under California law a lien is created on all of the debtor’s nonexempt personal property from the date of an order to appear for a debtor’s examination once the debtor is served with the order, otherwise known as an ORAP lien. Likewise, an ORAP lien is created on the debtor’s personal property in the hands of a third party when the third party is served with a notice of the order.\textsuperscript{28} If a turnover order is issued at the end of the debtor’s examination, another lien is created that relates back to the ORAP lien. Therefore, if a bankruptcy proceeding is filed more than 90 days after an ORAP lien is created, the ORAP lien is not avoidable under preference law and has priority over the claim of a bankruptcy trustee. In this case, the Ninth Circuit held that the ORAP lien was not avoidable because it was created more than 90 days prior to the petition date and therefore attached to all of the debtor’s nonexempt personal property in the bankruptcy.\textsuperscript{29}

Under California law, creditors are within their rights and powers to proceed against a debtor to enforce and collect on debts. However, creditors should be aware that should a debtor file for bankruptcy, all that a creditor may have completed, whether it be levying on property or receiving payment on the debt, may be subject to unwinding, and the creditor may be required to return property included
in property of the estate. A bankruptcy estate trustee, or a debtor-in-possession in a Chapter 11 reorganization case, under turnover or preference law, would be tasked in the fundamental work of marshaling property of the estate for the benefit of the bankruptcy estate and its creditors, as an essential part of modern bankruptcy law.

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1 Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (emphasis in original).
5 11 U.S.C. §541(a)(2) (all community property is included in property of the estate, except for community property that is under the sole management of the debtor’s spouse).
7 United States v. Sims (In re Feiler), 218 F. 3d 948 (citing S. REP. No. 989 (1978), 3 A.M. BANKR. INST. L. REV. 5, 6, 16 (1995)).
9 11 U.S.C. §101(31) (“insider” is defined to include an individual debtor’s relatives, general partners, partnership, and corporation of which the debtor is a director, officer, or person in control, among others).
10 The term “entity” is defined as including person, estate, trust, governmental unit, and U.S. trustee. 11 U.S.C. §101(15).
12 Id.
13 Shapiro v. Henson, 739 F. 3d 1198, 1200-01 (9th Cir. 2014).
14 Id.
15 This 90-day preference period is extended to one year as to insider-creditors. 11 U.S.C. §547(b)(4)(b).
16 See also 11 U.S.C. §547(b)(4)(b). See also 11 U.S.C. §101(31) (“insider” is defined to include an individual debtor’s relatives, general partners, partnership, and corporation of which the debtor is a director, officer, or person in control, among others).
17 11 U.S.C. §547(c).
20 Richardson v. Wells Fargo Bank (In re Churchill Nut Co.), 251 B.R. 143 (Bankr. C.D. Cal. 2000) (the bankruptcy court also conducted a preference analysis to conclude that the shelled nuts constituted recoverable property of the estate, but its main reasoning was that a transfer of ownership had not occurred prior to the bankruptcy).
21 See also Ramirez v. Fuselier (In re Ramirez), 183 B.R. 583 (B.A.P. 9th Cir. 1995) (The B.A.P. reversed the bankruptcy court, finding that the California levy statute did not specify that a completed levy—in this case, an installation of a keeper on the premises by the Marshal—transfers ownership in property; the property had to be liquidated; and the property of client files was necessary for the attorney-debtor’s representation of clients. The B.A.P. held that the judgment debtor retained a possessory and reversionary interest in all the levied property, thus the property constituted property of the estate. The B.A.P. remanded the case to determine whether the Marshal’s violation of the automatic stay was willful and whether actual and punitive damages were appropriate.)
22 In re Paul, 85 B.R. 850.
24 Id. at 724.
26 But see In re Crosier, No. LAX 90-52768 VZ, 1991 Bankr. LEXIS 1102 (Bankr. C.D. Cal. July 5, 1991) (The IRS levied the debtor’s IRA prior to the bankruptcy filing. The bankruptcy court held that the IRA was intangible property and that the levy transferred title and ownership to the IRS, thus the IRA was not property of the estate).
Guidelines for Managing a Forensic Inspection of ESI

**FORENSIC INSPECTION HAS BECOME** a powerful new tool in civil litigation as discovery focuses more on electronically stored information (ESI). Although forensic inspections can vary in scope and purpose, most involve the copying (or mirror imaging) of a computer hard drive and the use of software to comb through data in an attempt to identify and recover files. Increasingly, forensic inspections also involve the examination of web-based e-mail and cloud storage accounts.

In the digital age, a forensic inspection is a potential game-changer in almost any litigation involving electronically stored evidence. It can uncover a “smoking-gun” document, or even evidence of spoliation, the latter of which may lead the court to issue severe—even terminating—sanctions. For this reason, courts are quickly becoming more versed in (and receptive to) forensic inspections. Certain considerations and guidelines may assist in securing and managing a forensic inspection of ESI.

**Demonstrating the Need**

The first step in conducting discovery of ESI is to demonstrate the need. To secure a forensic inspection of another party’s hard drives or e-mail accounts, an attorney first must be able to show the court that such an inspection is needed. Generally, courts are looking for evidence that the opposing party failed to conduct an adequate search for documents in response to discovery requests. To prove the failure, counsel may consider using depositions and interrogatories to explore the scope of the other side’s document searches: What hard drives, e-mail accounts, and other electronic platforms were searched? What types of files were searched? What search terms were used? Or counsel may point to discrepancies and inconsistencies in document productions, such as the production of e-mail with missing attachments or metadata. For example, in *White v. Graceland College*, the federal district court granted in part a motion for a forensic inspection after the moving party revealed inconsistencies in the creation and sent dates of certain e-mail and attachments that the opposing party was unable to explain. Furthermore, counsel should examine e-mail and correspondence that include multiple senders and recipients. Did some of the senders or recipients fail to produce their copies of the same e-mail? If so, this may demonstrate that those people did not conduct adequate searches of their e-mail (or improperly destroyed evidence). In *Advante International Corp. v. Mintel Learning Technology*, for example, the district court for the Northern District of California granted a forensic inspection after the plaintiff produced “materially-different versions” of the same e-mail, indicating that the e-mail may have been “altered.”

In addition, evidence of spoliation—whether negligent or intentional—can also provide a compelling basis for a forensic inspection. This is especially true when there is reason to believe a forensic examination may be able to resurrect deleted or corrupted files. Even if the inspection does not result in the recovery of actual documents, it may uncover additional evidence of spoliation, for example, evidence that the user downloaded and ran software designed to erase files. In the same vein, courts often grant forensic inspections when a party fails to issue a litigation hold, reasoning that lack of preservation efforts increases the chance that electronic data has been deleted and can only be recovered through a forensic inspection.

While it is a common misconception that courts will order a forensic inspection only when the moving party can show intentional spoliation or bad faith, courts, in fact, regularly award inspections for negligent or inconsistent document searches—or even in the absence of any discovery misconduct whatsoever. As long as the potential benefit of the forensic inspection outweighs the burden, there is an argument to be made for the inspection.

**Planning for an Inspection**

Once an inspection has been ordered, negotiated, or authorized, the next step is to make a plan. Forensic inspections generally are conducted pursuant to a protocol that sets out the scope of the inspection (i.e., what hard drives and e-mail accounts will be searched), the methods by which the forensic examiner will conduct the inspection, and the schedule for completing the inspection. Because many courts do not have extensive experience with forensic examinations, it is advisable to include a draft forensic inspection protocol with any motion to the court. This will help the court understand exactly what is being sought. Indeed, some courts will not even consider a motion for forensic inspection without first seeing a detailed protocol.

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In Thompson v. Workmen’s Circle Multicare Center, for example, the federal district judge held that “before [the court] could determine whether to grant plaintiff access to defendant’s computers, she would need to obtain an expert forensic technician and submit a specific proposal identifying the expert, describing his credentials, and setting forth the precise nature of the inspection he intended to conduct.”

To draft a forensic inspection protocol that both fits the client’s needs and will be more amenable to a court, an attorney should review protocols that have been adopted by other courts—a judge may be more comfortable adopting a protocol that is substantially similar to those that have been approved in the past. The attorney should also confirm that the protocol is workable for his or her case and the types of devices at issue, often by showing the protocol to someone experienced in this area to ensure that it doesn’t specify timelines or results that are unrealistic. The attorney should also be sure the proposed protocol is broad enough to cover all anticipated needs and identifies all electronic devices, hard drives, and cloud-based storage that may yield discoverable information. For e-mail, the protocol should identify all the relevant e-mail accounts for each party-affiliated witness and specifically request that each witness disclose his or her usernames and passwords.

The attorney should consider incorporating into the protocol steps for privilege and privacy review by opposing counsel. For example, the protocol may direct the forensic examiner to first send all of the inspection results to the opposing counsel for review and redaction. Although there may be situations when this type of provision is akin to the fox guarding the hen house, in other cases, these precautionary measures will make it difficult for the other side to oppose the inspection. In Playboy Entertainment v. Welles, for example, the district court overruled privacy and privilege concerns, reasoning that counsel “has[s] an opportunity to control and review all of the recovered [documents],...and produce...only those documents that are relevant, responsive, and non-privileged.”

The goal should be to show the court that if it grants the motion for a forensic inspection, the inspection will proceed according to an orderly and self-executing plan. This will alleviate what is likely to be one of the court’s primary concerns in granting such a motion: that it will have to spend its valuable time overseeing and intervening in the inspection process.

Choosing an Examiner
A forensic examination is only as good as the examiner. Accordingly, it is critical to choose a reliable and reputable forensic examination firm. This is true not only because the forensic examiner will play a crucial role in the forensic inspection but also because he or she may submit reports to the court, or even testify at a hearing or trial, regarding the results of the forensic inspection. The court will likely give the examiner’s opinion significant weight since the court appointed the examiner on the basis of his or her expertise. In addition, when disputes arise between the parties regarding the scope of the forensic inspection (for example, whether a particular forensic test or report is called for by the protocol), the forensic examiner may end up playing the role of a de facto mediator. Indeed, some courts formally appoint the forensic examiner as an “officer of the court.”

Thus, the attorney should take the forensic examiner selection process seriously. Courts often ask each party to submit a list of acceptable examiners. The attorney should diligently vet each examiner’s credentials and capabilities, and be sure to run conflicts checks.

An attorney seeking a forensic inspection may also wish to retain a forensics consultant to help navigate the process. This individual is someone hired and paid independently, outside of the court-approved forensic inspection. This consultant can advise the attorney as to the likelihood of recovering useful data (i.e., whether the potential benefit of the forensic inspection is worth the expenditure of time and money), assist in drafting the forensic inspection protocol submitted to the court, and review and help make sense of the results of the forensic inspection. The attorney should consider engaging the forensic consultant early in the process to garner these benefits.

Who Pays?
While some courts require the moving party to pay for the forensic inspection, other courts split the cost between both parties. Other courts require the opposing party—the party whose conduct necessitated the inspection—to pay the full cost. In Helget v. City of Hays, for example, the district court held that the defendant should “bear the cost of the forensic examination” because the defendant “had an obligation to preserve this information...[r]egardless of whether it was destroyed intentionally or negligently.”

Whether an attorney should ask the court to force the other side to pay for the inspection will depend on the circumstances of the case. Certainly, the case for such an allocation will be stronger when there has been deliberate misconduct by the opposing party. However, when there is no evidence of bad faith, a party will likely appear more reasonable—and its motion will be easier to grant—if it offers to pay for some or all of the inspection.

Some courts prefer to shift the costs of the forensic inspection down the road, depending on the results. For example, a court may initially require the moving party to pay for the inspection, but then shift the costs to the opposing party if the inspection ultimately reveals discovery misconduct. Alternatively, the court may initially require the opposing party to pay for the inspection and then shift the costs to the moving party if the inspection is not fruitful (although arguably the opposing party should still pay, because its conduct compelled the inspection in the first place).

Managing Expectations
Any attorney seeking a forensic inspection must be careful to manage expectations. Before moving the court for a forensic inspection, the attorney should carefully consider the costs and the realistic benefits. What documents are likely to come out of the inspection, and is it realistic that the inspection will uncover those documents? This is something a forensics consultant can help assess.

For example, is the opposing party a large corporation that maintains sophisticated backup and storage systems? Or is it an individual who recently replaced his only computer and phone? An inspection in the former case is more likely to be fruitful, but also more expensive. If the scope of the forensic inspection will include e-mail, the attorney should consider whether they are Web-based e-mail accounts (like Gmail), or server-based e-mail accounts (like Outlook). Some Web-based e-mail accounts permanently erase deleted e-mail after a relatively short period of time, such as 30 days, making recovery of deleted e-mail unlikely. Managing expectations regarding the outcome of the forensic inspection is therefore critical.

With increasing frequency, litigants are using forensic inspections of their opponent’s hard drives and e-mail accounts to recover key evidence not produced in the ordinary course of discovery. Knowing how to get a forensic inspection—and then how to properly manage the inspection process—can provide a potent new weapon in the civil discovery arsenal.

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5. See Advante Int’l Corp. v. Mintel Learning Tech., 2006 WL 3371576, at *1 (N.D. Cal. Nov. 21, 2006);
see also, e.g., Ameriwood Indus., Inc. v. Liberman, 2006 WL 3825291, at *4-5 (E.D. Mo. Dec. 27, 2006) (ordering a forensic inspection when the requesting party identified an e-mail that the defendant should have produced but did not); Simon Prop. Group L.P. v. mySimon, Inc., 194 F.R.D. 639, 641 (S.D. Ind. 2000) (allowing the plaintiff to mirror image the defendant’s computers when there were "troubling discrepancies with respect to defendant’s document production").


9 See A.M. Castle & Co v. Byrne, 123 F. Supp. 3d 895, 899 (S.D. Tex. 2015); Brady v. Grendene USA, Inc., 2015 WL 453220, at *9 (S.D. Cal. July 24, 2015) (denying a motion to compel forensic examination because the moving party was unable to establish that “such an examination is likely to yield emails that have been deleted or purged”).

10 See Thompson v. Workmen’s Circle Multicare Ctr., 2015 U.S. Dist. LEXIS 74528, at *5 (S.D. N.Y. June 9, 2015) (finding that the “plaintiff has not met the threshold requirements for forensic examination of defendant’s computers or other equipment because it is not clear that she has selected an expert, and she has not specified what tests her expert would perform”).


13 See id.; Dodge, Warren & Peters Ins. Servs., Inc. v. Riley, 105 Cal. App. 4th 1414, 1421 (2003) (affirming an injunction that “require[d] the preservation of electronic evidence by prohibiting Defendants from destroying, deleting or secreting from discovery any of their electronic storage media and…allow[ing] a court-appointed expert to copy all of it, including computer hard drives and discs, to recover lost or deleted files”).


16 See, e.g., https://support.google.com/a/answer/151128?hl=en (Google’s e-mail retention policy); see also Brady v. Grendene USA Inc., 2015 U.S. Dist. LEXIS 97734, at *26-27 (S.D. Cal. July 24, 2015) (denying a forensic inspection request in part because “[t]he defendants have not established through declaration or exhibit...that such an examination is likely to yield emails that have been deleted or purged”).
ANYONE who has ever watched a California sunset or gazed out at Los Angeles’s city lights at night knows firsthand how spectacular and unique these images can be. Therefore, it should come as no surprise that people pay a significant premium for Los Angeles properties that display one or more of the city’s stunning views. Despite the significant monetary and emotional value attributed to views, most people know very little about whether their views are protected. They are dismayed when they later discover that California law does not protect views absent an express written agreement or restriction. They mistakenly believe that because they paid extra for their view, it must be protected. Even home buyers who review title and confirm that there are recorded restrictions protecting the views are blindsided when they later discover that such restrictions are not enforceable.

View protection disputes are on the rise and likely to continue. Homeowners and developers are increasingly remodeling hillside properties, often disregarding the impact on neighboring properties. Armed with deep pockets, the developers often play a game of chicken with the affected homeowners. Either the homeowners lack the resources to engage in an expensive drawn-out litigation, or if they do, the developer can rely on a laundry list of affirmative defenses that may render the applicable deed restrictions unenforceable.

In a recent high-profile view dispute involving two properties situated in the “Bird Streets,” the plaintiff and defendant were next-door neighbors in a residential planned community known as the Beverly Highlands.1 The Beverly Highlands, which consists of properties spread out along Blue Jay Way and many of the surrounding streets, is governed by a declaration of restrictions that was recorded in 1952 and subsequently amended in 1960 to include a recorded Schedule F.2 Because of the community’s topography, the developer included height restrictions in Schedule F, which have the effect of protecting the residents’ privacy and preserving their city and ocean views. Schedule F restricts the height of any structure on the respective properties to no more than 16 feet above grade and one story.

The defendant purchased his property in 2009. At the time, the plaintiff’s property was owned by an A-list actress who was filming a feature movie abroad. Sometime between late 2009 and early 2010, the defendant, without requesting a variance from his neighbors, began second-floor construction on his property. The plaintiff’s predecessor-in-interest was unaware of the second-floor construction on his property. The plaintiff’s predecessor-in-interest was unaware of the second-floor construction on his property.

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construction. Several neighbors complained to the defendant, sending him written notice that the second-floor construction violated the declaration’s height restrictions and reminded the defendant of his obligation to obtain a variance before proceeding. Despite the neighbors’ objections, the defendant completed the remodeling.

The plaintiff purchased the property in 2013. Sometime in late 2014, the defendant began expanding the existing second floor of his property thus impacting the plaintiff’s panoramic view of the Los Angeles basin. The defendant ignored the plaintiff’s requests to halt construction. With no homeowner’s association to help protect his rights—the Beverly Highlands Homeowners Association had been dissolved in 1999—the plaintiff filed suit, alleging causes of action for breach of restrictive covenant, private nuisance, and declaratory relief relating to the infringing 2010 construction and separately for the infringing 2014 construction. The plaintiff immediately moved for a preliminary and mandatory injunction, seeking not only to halt the infringing 2014 construction but also to tear it down. Subsequently, the court granted the plaintiff’s motion and issued a mandatory injunction ordering the defendant to tear down the infringing 2014 construction within thirty days, whereupon the defendant immediately appealed the ruling.

After nearly a year and a half of contested litigation, including a full briefing of the appeal, the parties reached a global settlement. Under the terms of the ensuing agreement, the defendant would sell his property to a third party who would agree to tear down the entire second floor, honor the height restrictions in Schedule F so long as they remained enforceable, pay the plaintiff’s attorney’s fees, and provide the plaintiff with a 60-year view easement. The plaintiff, in return, would withdraw the lis pendens recorded against the defendant’s property and dismiss the case.

Although the plaintiff obtained a favorable result, the defendant did raise several potentially colorable defenses. The defendant’s primary argument on appeal was that the height restrictions are neither covenants that run with the land, nor equitable servitudes but rather personal powers of the association that were abandoned with the association’s dissolution. In addition, the defendant raised the following defenses: lack of notice, statute of limitations, laches, estoppel, waiver, changed circumstances, and that height restrictions are unreasonable.

Covenants That Run With the Land

There are two basic methods of enforcing land use restrictions like the declaration: 1) covenants that run with the land, or 2) equitable servitudes. Only covenants specified by statute run with the land, primarily those in Civil Code Sections 1462 and 1468. Under Section 1462, a covenant that benefits the property may run with the land, but not one that burdens it. Under Section 1468 both benefits and burdens can run with the land, but the former Section 1468 only applied to a covenant between the owner of land with the owner of other land. Section 1468 was amended in 1968 and 1969 to apply to covenants between a grantor and grantee after their enactment.

In the Bird Streets litigation, the defendant argued that the height restrictions burdened the defendant’s land and thus did not run with the land under Section 1462. Further, former Section 1468 does not apply because the declaration of restrictions applied between the grantor (declarant) and the grantee (purchasers of the individual lots).

The plaintiff responded that the height restrictions are mutual covenants involving an entire subdivision, thus the burdens can also be classified as benefits. As the defendant correctly pointed out, however, the mutual benefit theory was rarely applied under Section 1462. The majority of cases rejected the mutual benefit theory. It is unlikely that the court of appeals would have found the height restrictions enforceable as covenants running with the land under either Section 1462 or former Section 1468.

Equitable Servitudes

Equity courts, recognizing that the limitations on covenants running with the land led to inequitable results, adopted the concept of “equitable servitudes”—restrictions on the use of land that run with the land. The three requirements of an equitable servitude are that 1) the deeds must reflect the intention of both the grantor and the grantee that the property be restricted pursuant to a general plan, 2) the deeds must show that the parcel conveyed is subject to the restriction at issue in accordance with the plan for the benefit of all the other parcels in the tract and such other parcels are subject to the same restriction for its benefit, and 3) the dominant and servient tenements must be adequately described. However, when a declaration of restrictions is recorded before the first deed out from the subdivider, all lots in the subdivision will be governed by the restrictions whether or not each deed expressly references the recorded declaration.

Courts have drawn a distinction between an equitable servitude and a personal power. Generally, when a grantor reserves the right to enforce or waive a deed restriction, it is considered a personal power of the grantor and not an enforceable equitable servitude that runs with the land. A personal power lacks the mutuality of enforcement characteristic of an equitable servitude. The determination of whether a restriction is personal or runs with the land is factual and rests upon intent, notice, and other equitable factors.

In the Bird Streets litigation, the defendant argued that while some provisions in the declaration might be enforceable equitable servitudes, the height restrictions were personal powers. The defendant focused on Section 4.01(b) in Schedule F, which the defendant argued gave the declarant discretion to approve changes to the height restrictions. The manner in which the declarant approved variations was set forth in Section 7.01 of Schedule F, and any variation required written approval of the declarant. Finally, the defendant argued that under Schedule F the approval rights and powers of the declarant could only be assigned to the association and not to individual homeowners. Thus, the defendant concluded that the language of the declaration clearly indicated that the height restrictions were intended to be a personal power of the declarant and its assignee association, and not mutual equitable servitudes enforceable by individual homeowners.

In response, the plaintiff argued that the declaration satisfied the requirements for an equitable servitude. The declaration 1) was recorded and provided a legal description of the properties in the subdivision, 2) stated that each of the restrictions therein would bind and benefit each parcel as a planned community, 3) stated that the intention of the declarant to establish a general plan for the development and improvement of the described property and to subject the properties to the restrictions therein, including the height restrictions, and 4) stated that each of its restrictions ran with the land and were binding on grantees and successors.

The plaintiff rejected the defendant’s personal power argument. Section 7.01 of Schedule F, Approval of Plans, did not address how to obtain a variance. To the contrary, it addressed how to obtain approval of construction plans, all of which must be compliant with the declaration’s restrictions. Further, the discretion of either the declarant or the association, or both, is limited to ensuring that any proposed structure is not “inharmonious or out of keeping with the general plan.” Either the declarant or association, or both, had a fiduciary duty to enforce the restrictions in good faith. If the homeowners were dissatisfied, Article XIV of the declaration gave them the right to remove the declarant’s approval power. Accordingly, the plaintiff concluded that neither the declarant nor the association had absolute discretion to vary the height restrictions. Rather, to obtain a variance, the defendant was required to comply with the procedure set forth in Article XIV, which can be employed by any
MCLE Test No. 260

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<th>Question</th>
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<tr>
<td>1.</td>
<td>Two methods of enforcing land use restrictions contained in a recorded declaration of restrictions are as covenants that run with the land or as equitable servitudes.</td>
<td>True</td>
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<tr>
<td>2.</td>
<td>Only covenants specified by statute run with the land.</td>
<td>True</td>
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<td>3.</td>
<td>Under Civil Code Section 1462, a covenant that benefits or burdens the property may run with the land.</td>
<td>True</td>
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<td>4.</td>
<td>Civil Code Section 1468 was amended in 1968 to include covenants between a grantor and grantee and can be applied retroactively.</td>
<td>True</td>
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<td>5.</td>
<td>Whether or not a declaration of restrictions is recorded before the first deed out from the subdivider, lots in the subdivision will only be governed by the restrictions if each deed expressly referenced the recorded Declaration.</td>
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<td>6.</td>
<td>The determination of whether a restriction is a personal power or runs with the land is factual and rests upon intent, notice, and other equitable factors.</td>
<td>True</td>
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<td>7.</td>
<td>A restrictive covenant is not enforceable against a subsequent grantee unless the grantee had notice of the restriction at the time title to the property was received.</td>
<td>True</td>
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<td>8.</td>
<td>A recorded restriction constitutes constructive notice, which has the same effect as actual notice.</td>
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<td>9.</td>
<td>A homeowner may rely on the title report received from the insurance company as the accurate status of title.</td>
<td>True</td>
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<td>10.</td>
<td>A cause of action for violation of a restrictive covenant must be filed within four years from the time the person seeking to enforce the restriction discovered, or through the exercise of reasonable diligence should have discovered, the violation.</td>
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<td>11.</td>
<td>For purposes of determining when the statute of limitations begins, what a plaintiff knows, or reasonably should know, is a question of fact.</td>
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<td>12.</td>
<td>A laches defense requires a showing that the delay in asserting the right to enforce the restriction was unreasonable such that enforcement of the restriction now would cause material prejudice to the party against whom enforcement is sought.</td>
<td>True</td>
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<td>13.</td>
<td>The laches defense may be applicable even when the party seeking enforcement has notified the violating party of the violation yet the party continues to violate the restrictions.</td>
<td>True</td>
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<td>14.</td>
<td>For a demurrer to be sustained on the grounds of laches, both the delay and injury must be disclosed in the complaint.</td>
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<td>15.</td>
<td>Estoppel may apply when the offending party detrimentally relies on the actions of the party seeking to enforce the restriction.</td>
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<td>16.</td>
<td>Under the doctrine of changed circumstances, a restriction may become unenforceable when the original purpose of the restriction has become obsolete and continued enforcement would be oppressive and inequitable.</td>
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<td>17.</td>
<td>The defense of changed circumstances does not apply so long as the original purpose of the restriction can still be realized, even if the unrestricted use of the property would be more profitable to its owner.</td>
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<td>18.</td>
<td>Courts may enforce equitable servitudes even if they are determined to be unfair or inequitable.</td>
<td>True</td>
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<td>19.</td>
<td>Reasonable height and view restrictions are enforceable.</td>
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<td>20.</td>
<td>To create a uniform general plan, as long as the general plan or scheme applies to all of the parcels in the tract, specific restrictions may apply differently to separate parcels within the tract.</td>
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1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
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ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

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property owner and is not contingent upon the existence of the declarant, association, or review board. The language of the declaration evidenced a clear intent to create a common plan, with each of the restrictions running with the land, and enforceable by individual homeowners. Finally, the plaintiff argued that the court of appeals had already determined that the declaration “clearly create[d] covenants running with the land or equitable servitudes.”16 Although Committee to Save Beverly Highlands Home Association v. Beverly Highlands Home Association dealt with Article X of the declaration, Article X was subject to the identical approval and assignment rights as the height restrictions. By the same logic, the plaintiff argued, if Article X runs with the land, so do the height restrictions.

Although the issue was not ultimately resolved in the Bird Streets litigation, whether a restriction is a personal power or equitable servitude has significant ramifications especially in Los Angeles County where many of the covenants, conditions, and restrictions were drafted in the 1950s and 1960s and contain poorly drafted language. Whereas on the face of the declaration, it appears that the intent was to create equitable servitudes that run with the land, in practice their poor construction may result in a finding of personal powers.

**Abandonment of Height Restrictions**

What was the effect of the dissolution of the association on the height restrictions? The defendant argued that because the height restrictions were a personal power of the declarant and its assignee association and because the homeowners dissolved the association, the height restrictions have been abandoned. The defendant conceded, however, that other than dicta in Beverly Highlands, the defendant could not find any other California decisions that have addressed this precise issue. As a result, the defendant relied on a series of out-of-state authoritites.17

The plaintiff rejected the defendant’s abandonment argument and claimed that Article XVI of the declaration specifically gave individual homeowners the right to enforce the declaration. In fact, in Beverly Highlands, defendants who were officers of the association, in support of their argument that the association should be dissolved, asserted that “even if the Association is dissolved, the Beverly Highlands property owners still can enforce the Declaration.”18 Although dicta, the court of appeals agreed.19 The plaintiff also referred the court to the appeals unpublished decision in Chevrets v. Dockson dealing with the same declaration and the precise issue of abandonment.20 Chevret wanted to build on Lot 53 even though Section 10.05 of the declaration expressly prohibited any “building or other structure” to be erected on it “without the written approval of the Association.” When other property owners objected, Chevret brought suit and, like the defendant in the Bird Streets litigation, argued that because the declarant and association were dissolved, the declaration was no longer enforceable.21 The trial court ruled in the defendants’ favor, and the court of appeals affirmed, determining that although “the Association [was] now defunct,” Article XIV set “forth the method for obtaining approval to build on the lot.”22

Not surprisingly, the defendant objected to the plaintiff’s reliance on the unpublished decision in Chevrets. While Chevrets seems to conflict with the out-of-state authority cited by the defendant, as it stands there are no published California decisions addressing the defendant’s abandonment argument. Given the rise in property prices, poorly drafted declarations from the 1950s and 1960s, and dissolution of many homeowner associations, it is just a matter of time before California courts will have to issue a published decision addressing this issue.

**Lack of Notice**

A restrictive covenant is not enforceable against a subsequent grantee unless the grantee had notice of the restriction at the time title to the property was received.23 A recorded restriction, however, constitutes constructive notice, which has the same effect as actual notice.24 This is true even if the recorded restriction is not referenced in any of the deeds to the property described in the declaration.25

In the Bird Streets litigation, the defendant argued that there was insufficient notice to enforce the height restrictions against him because the title company did not provide him with the restrictions at the time he purchased his property.26 The plaintiff countered that the notice was proper not only because the restrictions were recorded but also because the defendant had received a copy from his neighbors. Further, the defendant could not rely on the title report as the status of title.27 Judge O’Brien granted the plaintiff’s motion for injunctive relief finding that the notice was sufficient. The defendant did not raise this issue on appeal.

**Statute of Limitations**

A cause of action for violation of a restrictive covenant must be filed within five years28 from the time the person seeking to enforce the restriction discovered, or through the exercise of reasonable diligence should have discovered, the violation.29 What a plaintiff knows, or reasonably should know, is a question of fact.30 In the Bird Streets litigation, the defendant’s demurrer argued that the plaintiff’s cause of action relating to the 2010 construction was time-barred. The complaint was filed in October 2014. The defendant asked the court to take judicial notice of certain Los Angeles City Building Department records that the defendant alleged showed significant second-floor construction on his property since September 2009. The court granted the defendant’s request but refused to take judicial notice of the truth of the matters asserted therein. Regardless, the court determined that nothing in the building records suggested any second-floor construction. Further, the court reasoned that because the plaintiff also claimed a height restriction violation, it may have been impossible for the plaintiff to have known about the violation until after construction was completed.

While the court in the Bird Streets litigation acknowledged in its ruling on the plaintiff’s demurrer that it may be impossible to determine a violation of a height restriction until construction is complete, there is no assurance that other courts will reach the same conclusion. As such, it is important to keep in mind that the statute of limitations serves as an absolute bar to maintaining a cause of action against the alleged wrongdoer.

If property has been affected by infringing construction, one should act promptly and expeditiously to resolve the matter informally and, if that fails, to file suit and seek injunctive relief. Even though within the statute of limitations, any delay in filing suit may potentially bar a claim.

**Laches**

A laches defense requires a showing that the delay in asserting the right to enforce the restriction was unreasonable such that enforcement of the restriction now would cause material prejudice to the party against whom enforcement is sought.31 Laches is not applicable when the party seeking enforcement has notified the violating party of the violation yet the party continues to violate the restrictions.32 Additionally, when construction is completed before a violation of a restrictive covenant can be confirmed, laches is not a defense because “it would not have mattered whether plaintiff was diligent.”33 Finally, for a demurrer to be sustained on the grounds of laches, both the delay and injury must be disclosed in the complaint.34

In the Bird Streets litigation, the defendant’s demurrer alleged that the plaintiff’s claims relating to the defendant’s 2010 construction were barred by the doctrine of laches. The defendant argued that the neighboring homeowners were aware of the violation but stood idly by and watched the defendant incur costs yet did nothing.
neighboring behavior constituted prejudice and acquiescence by the homeowners, including the plaintiff as successor-in-interest.

In response, the plaintiff argued that the defendant failed to cite any legal authority establishing that the neighbors’ failure to bring suit was unreasonable, or that it resulted in delay attributable to the plaintiff. The plaintiff’s predecessor-in-interest was unaware of the violation until after construction was complete. The defendant was notified of the violation yet continued the infringing construction.

Although the court declined to rule on demurrer whether laches applied, the court seemed somewhat convinced by the defendant’s laches argument. The best way to discard this defense is to act diligently if a neighbor begins infringing construction, i.e. immediately request that the infringing party cease and desist from further infringing construction, and if that proves unsuccessful, be ready to promptly initiate litigation.

**Estoppel**

Estoppel may apply when the offending party detrimentally relies on the actions of the party seeking to enforce the restriction. Thus, in the Bird Streets litigation, the defendant’s demurrer contended that the plaintiff was estopped from enforcing the height restrictions because the plaintiff’s property violated the same restrictions. To support its allegation, the defendant asked the court to take judicial notice of an old construction application for the plaintiff’s property. The court rejected the defendant’s argument, finding that it was based on matters outside the scope of the complaint and not subject to judicial notice.

When evaluating the applicability of the estoppel defense, it is important to understand that in many neighborhoods in Los Angeles County, homeowners have worked around height restrictions by building below the lot’s grade level, i.e. they have technically created a “basement.” For example, although the Bird Streets lots are generally limited to one-story buildings, many lots contain two-story residences with the first floor built below grade.

**Waiver**

The right to enforce a restrictive covenant may be deemed generally waived when there are a sufficient number of waivers so that the purpose of the general plan is undermined. Further, a restriction can be waived if a plaintiff fails to meet the burden of demonstrating fair and uniform enforcement. A waiver may also occur when a plaintiff knowingly delays bringing suit.

In the Bird Streets litigation, the defendant made two separate waiver arguments. First, he argued that the height restrictions had been waived because several other homes in the immediate vicinity exceeded the height restrictions. Then, he argued that the plaintiff’s delay in asserting the right to enforce the height restrictions relating to the 2009 infringing construction constituted waiver.

The plaintiff responded that the defendant’s only evidence that other properties exceeded the height restrictions—a declaration from the defendant’s contractor—did not lay proper foundation that the allegedly infringed properties were in the same tract or that they exceeded 16 feet above grade level. Relying on declarations of other homeowners in the tract, the plaintiff argued that Beverly Highland homeowners had complied with the height restrictions, continued to believe that they are enforceable, and requested that the defendant bring his property into compliance. In granting mandatory injunction, the court determined that the plaintiff had not waived the right to object to the 2014 construction.

Similar to the estoppel defense above, it is important to keep in mind that in many neighborhoods in Los Angeles County, homeowners have worked around height restrictions by building below the lot’s grade level—exactly what many homeowners in the Bird Streets had done while complying with the deeded height restrictions.

**Changed Circumstances**

A restriction may become unenforceable when, by reason of changed circumstances, the original purpose of the restriction has become obsolete and continued enforcement would be oppressive and inequitable. Whether this equitable defense may be invoked is a factual determination with no fixed formula. One important factor is the location of the changed conditions—changes within the disputed tract are given greater weight than changes outside the tract that are not subject to the same restrictions. However, so long as the original purpose of the restriction can still be realized, it will be enforced even though the unrestricted use of the property would be more profitable to its owner.

In the Bird Streets litigation, the defendant’s opposition to the injunction motion argued that the declaration relied on the association for the execution and enforcement of many of its provisions, including the height restrictions. Because the association had dissolved, there was no procedure for the defendant to request a variance. Thus, under the doctrine of changed circumstances, the height restrictions were unenforceable.

In response, the plaintiff asserted that the original purpose of the declaration to create a residential planned community subject to certain restrictions, including height restrictions, was still intact. The other properties within the tract had continued to comply with the declaration. Further, to obtain a variance, the defendant would have to comply with the procedures set forth in Article XIV of the declaration.

The court’s order granting injunctive relief indicates that the court found the defense of changed circumstances inapplicable because the land area surrounding the defendant’s property is being used the same way as it had been over 10 years earlier when the restrictive covenants were first imposed on the property. As long as the neighborhood continues to be used for residential purposes, it is unlikely that this defense will apply.

**Unreasonable Restrictions**

Courts will not enforce equitable servitudes that are determined to be unfair or inequitable. Reasonable height and view restrictions are enforceable. Courts will examine the restrictions by applying an objective standard of reasonable intent to give a just and fair application of the restrictions as would be understood and intended by a reasonable person. Courts will weigh all factors, including whether the harm caused by the restriction is disproportionate to the benefit of its enforcement.

To create a uniform general plan, it is not necessary that the restrictions apply identically to all parcels within the community. As long as the general plan or scheme applies to all of the parcels in the tract, specific restrictions may apply differently to separate parcels within the tract.

In the Bird Streets litigation, the defendant’s appeal presented a many-pronged argument challenging the reasonableness of the height restrictions. Many of the arguments have already been addressed above and will not be repeated here, but the defendant did raise two new arguments. First, the defendant argued that several lots in the tract were not subject to height restrictions, thus enforcement of height restrictions against the defendant’s property would be unfair and discriminatory. The plaintiff countered that the clear intent of the declaration was to create a general plan for the Beverly Highlands. Out of the 63 lots in the tract 58 are subject to height restrictions to ensure that adjacent lots do not impair each other’s light, air, and views. The five lots without height restrictions are situated in a canyon below a hill and, due to their natural topography, could not possibly block the view of another lot.

The defendant’s main argument challenging the reasonableness of the height restrictions was a variation of the abandonment argument. The defendant argued that under the declaration only the declarant or association could approve changes to the height restrictions and that power was not assignable to the individual homeowners. It would be
unreasonable to allow homeowners to enforce the height restrictions because it would create chaos as each homeowner would have a veto right over every minor change a neighbor wants to make to his or her property. The plaintiff’s response to this argument largely mirrored the response made to the personal power and abandonment argument. The plaintiff emphasized that Article XIV of the declaration provided the mechanism for homeowners to request a variance since the association has been dissolved.

Because the defendant raised this issue for the first time on appeal, it is unclear what, if any, merit the court of appeals would have given it. That said, there are a number of California cases finding that height restrictions are not unreasonable.

Given the rise in real estate prices and the emotional attachment people ascribe to their views, it is likely that we will see an increase in view disputes. The Bird Streets litigation highlights only some of the issues that may arise when a homeowner seeks to enforce recorded height restrictions. These disputes can be expensive and drawn out. It is advisable that homeowners develop relationships with their neighbors in an effort to prevent disputes. If that does not work, however, and your neighbor begins construction in violation of recorded height restrictions, it is important to act swiftly in order to preserve all available remedies.

1 The Beverly Highlands is not a “community interest development” as defined by the Davis Sterling Act. See Committee to Save Beverly Highlands Home Ass’n v. Beverly Highlands Home Ass’n, 92 Cal. App. 4th 1247 (2001); see also Davis Sterling Act, CIV. CODE §§4000 et seq.
2 The declaration was recorded with the Los Angeles County Recorder’s Office on June 27, 1952, in book 39264, p. 95 of the official records. Schedule F was recorded on March 22, 1960, as Instrument No. 2948.
4 CIV. CODE §1460.
6 Anderson, 12 Cal. 4th at 355.
7 Id. at 353.
11 Id. at 174.
14 Id. at 438.
20 Horz v. Rich, 4 Cal. App. 4th 1048, 1057 (1992). This type of defense may not apply to a restriction enforceable by statute as a matter of law. Moreover, restrictions in common interest developments are presumed reasonable unless proven otherwise. See CIV. CODE §§54000 et seq.
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In California, the United States, and around the world, corporations and their general counsel are increasingly seeking compliance with sustainability and human rights initiatives.

THE ROLE of lawyers within companies and law firms is evolving, and the corporate sustainability agenda is presenting new opportunities for them to more effectively manage risk and create value. Enlightened lawyers understand that clients need to know not only what is legally permissible but also what is socially acceptable. Counsel are advising clients on how a responsible business ought to conduct itself. Such lawyers are leading the way as key guardians of their firm’s reputation and advisers on corporate sustainability, including on such matters as developing a human rights policy, conducting supply chain due diligence and environmental and social risk assessments, considering the human rights impacts of merger and acquisition transactions, and responsible corporate tax practices.

Demand for this advice is growing. More than 8,000 companies across 160 countries have made explicit commitments to respect universal principles on human rights, labor, the environment, and anticorruption through the United Nations Global Compact, the UN’s corporate sustainability initiative. More than 1,600 companies in over 40 countries have taken the step of being certified as B Corporations, a social and environmental certification program for for-profit companies.

Around the world, societal expectations for responsible corporate behavior are increasingly being enacted as laws and regulations. For example, the UK Modern Slavery Act of 2015 requires all companies with annual worldwide revenues above £36 million that do any part of their business in the UK to publish an annual slavery and human trafficking statement. In the United States,

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the California Transparency in Supply Chains Act of 2010 requires companies with annual revenues above $100 million to disclose “efforts to eradicate slavery and human trafficking from [their] direct supply chain.” President Barack Obama issued an executive order in 2012 to avoid human trafficking in federal contracts. The president also recently signed a law allowing for stronger enforcement of the Tariff Act of 1930, which aims to block the import of products of forced labor. Investigation of and enforcement against bribery of government officials is also on the rise, not only under the Foreign Corrupt Practices Act but also under local laws in other countries.

At the same time, businesses are increasingly engaging in voluntary initiatives that go beyond legal responsibilities, as the connection between the corporate bottom line and their environmental, social, and governance practices becomes more clear. In a 2013 study by the UN Global Compact and Accenture, 93 percent of the more than 1,000 CEOs surveyed considered sustainability important to the future success of their business; 80 percent saw it as a route to competitive advantage in their industry; and 78 percent viewed it as an opportunity for growth and innovation. In addition to the business case, many businesses today recognize the moral responsibility to go beyond the law. For instance, in a 2014 survey by The Economist, 83 percent of 853 senior executives agreed that human rights is a matter for business as well as governments, and 71 percent further stated that their company’s responsibility to respect these rights goes beyond compliance with local laws.

The UN Global Compact

The UN Global Compact is tasked by the UN General Assembly with the ambitious agenda of promoting responsible business practices and UN values among the global business community and within the UN system itself. It creates opportunities for companies to learn and share good practices on corporate sustainability and provides a reporting framework, called the Communication on Progress, for companies to report on their progress to their own stakeholders.

To promote further implementation within companies, the UN Global Compact aims to bring greater specificity to what companies should and can do to become more sustainable. Through country level networks in more than 85 countries, the UN Global Compact promotes geographic specificity by engaging with various stakeholders—including businesses, governments, investors, academia, and civil society—to advance corporate sustainability as it relates to a specific country or region. Through working groups, special initiatives, and guidance materials on a range of corporate sustainability themes including human rights, labor, climate, water, anticorruption, peace, rule of law, and women’s empowerment, the UN Global Compact promotes issue specificity. Through a forum with industry associations, the UN Global Compact and the International Chamber of Commerce are exploring sectoral specificity, for example how various industry associations, including those for basic materials, consumables, finance, healthcare, industrial and transport, can support their members to act responsibly and advance corporate sustainability. One of the most recent and promising areas the initiative has been exploring, and which has led to engaging lawyers on a much greater level than the past, is functional specificity within companies, including legal, procurement, risk, or production. The UN Global Compact began its focus on functional specificity by looking at the role of corporate boards in corporate sustainability. The initiative also worked with lawyers, especially within companies, to understand better how they were viewing and acting in their role in achieving their organization’s sustainability goals and the opportunities to leverage corporate sustainability to be more effective in their legal roles.

The concept of corporate sustainability has evolved over time. Initially, sustainability had a strong environmental focus. However, as understanding of business impacts on society, both negative and positive, has grown, the concept has expanded to encompass other dimensions. The UN Global Compact defines corporate sustainability as the creation of long-term value by a business in economic, social, environmental, and ethical terms—a quadruple bottom line. While the definition speaks of value creation, also implicit within the definition is the idea that businesses should not give with one hand and take with the other—good deeds in one area cannot compensate for causing harm in others. There are opportunities, but there are also responsibilities and they cannot be offset against each other. These two dimensions—responsibility and opportunity—are thought of as respect and support. “Respect” means not causing harm, taking responsibility for addressing businesses’ own impacts or externalities on society and the environment and not just focusing on the risks to businesses. It is the minimum that corporate sustainability requires. “Support” means additional voluntary action that a company may take that goes beyond avoiding or addressing harm. It can be core business actions like product or service innovation, use of social marketing, access pricing, job creation, or inclusive sourcing and distribution practices. Support may also take the form of philanthropy or strategic social investment, public policy engagement, or partnerships and other forms of collective action.

Sustainable Development Goals

The field of sustainability received a significant boost in September 2015 with the adoption of the 17 Sustainable Development Goals (SDGs) by all 193 member states of the United Nations. The SDGs and Agenda 2030, of which the SDGs are a major part, were key outputs of a process set in motion in 2012 to guide international and national action towards sustainable development for the next 15 years. They succeed the Millennium Development Goals, which expired at the end of 2015. Along with civil society, the business community was extensively engaged in the consultations.

The SDGs present an enormous opportunity for businesses. Businesses are not islands apart from the communities in which they operate, but rather are organs of society and their long-term success depends increasingly on the state of the societies in which they operate. Issues like climate change, health crises like Ebola and Zika, the large numbers of refugees and other displaced persons, rising income inequality within countries, youth unemployment, corruption, violence and conflict, and the rise of all kinds of fundamentalism pose threats—sometimes existential ones—to businesses. These issues also present opportunities for responsible companies to assist in addressing such challenges and risks and turning them into value for society and for businesses.

The SDGs extend to all aspects of sustainable development—economic, social, environmental, and governance—including, in Goal 16, the importance of the rule of law, calling for access to justice for all and “effective, accountable and inclusive institutions.” Achieving the SDGs will require, and create the opportunity for, unprecedented levels of cooperation by companies, including cross-functional collaboration within companies, allowing for and necessitating greater alignment of corporate and societal goals. The SDGs are a long-term universal benchmark for all societal actors in their own goal-setting and other planning processes because of the international consensus on which they were built to achieve sustainable development. They set the overarching direction for governments and others around the world for a 15-year period. Because there is a follow-up process in governments to track implementation progress, all countries will be using them and they are expected to shape stakeholder expectations, policy direction, and investment flows throughout this period.

As corporate sustainability rises on the agendas of a growing number of corporate boards, in-house lawyers have an opportunity...
to make a renewed value proposition to their companies. The legal content of sustainability is also growing as some areas of soft law are hardening into binding legal requirements and sustainability itself is increasingly being seen as imperative for businesses. Such changes facilitate greater alignment of lawyers’ professional duties with clients’ enlightened interests creating the opportunity for lawyers to play a more proactive role in corporate sustainability. For companies, this is also an opportunity to explore organizational synergies and cost savings between legal and other departments and to minimize risks by engaging with their in-house counsel at earlier opportunities. When identified at an early stage, some risks linked to corporate sustainability issues can be mitigated or eliminated by ensuring that the right internal and external stakeholders are engaged in addressing such risks effectively. For instance, corporate sustainability, engineering, and legal specialists of a mining company, seeking to set up operations in a given country, proactively engage with representatives from government and the indigenous community to ensure that, wherever possible, human rights—including culture, health, land and water—are protected and respected in the establishment of those operations.

A growing number of in-house counsel are already involved in value creation through community initiatives sometimes in partnership with law firms. For example, in-house lawyers in the technology and other sectors in the San Francisco Bay Area provide pro bono legal services to community members. In doing so, they help improve access to justice in the community. But they also build their companies’ social license to operate in an area where there is wide income inequality and sometimes protests against business activity. Another example is the CEO and general counsel of LexisNexis, who worked together to spearhead an initiative promoting the role of businesses in advancing the rule of law, which also engages customers. General counsel who embrace values-based management and proactively help to build a company culture with high integrity also add value in terms of employee morale, productivity, and loyalty as well as saving the costs of noncompliance. Lawyers can be more effective over the long term and contribute to the sustainability of client organizations by taking the opportunity to build and maintain relationships with the community, rather than sacrifice them for short-term victories. Sustainability is synonymous with embracing a long-term view.

Advancing Corporate Sustainability

From the UN Global Compact’s work on engaging the legal profession in corporate sustainability, two main resources have emerged. The first is the Guide for General Counsel on Corporate Sustainability (Guide). The Guide was launched in June 2015 after 18 months of interviews with general counsel around the world about their evolving role, including on dimensions of corporate sustainability. It was born out of recognition that companies increasingly needed and were seeking advice on what is socially acceptable, not just what is legally permissible, and that the answers were informed by universal principles such as those of the UN Global Compact. The Guide offers practical guidance based on emerging good practices on how general counsel can leverage the corporate sustainability agenda to be more effective in their legal functions and to create long-term value.

The interviews confirmed that many general counsel are seeing their role as trusted advisers expand and that others who have not experienced this change welcomed guidance on how to open doors to play this broader role. While there is concern about the challenge of exercising expanded roles in the context of limited resources, there is also a recognition that corporate sustainability may help drive greater collaboration with other departments, including to enable more effective risk management. Both in-house lawyers and corporate sustainability officers confirmed the traditional perception of the legal department as the “department of no” and were eager for guidance to help change this dynamic. There is need for, and interest in, capacity building as many legal teams are not yet fully prepared for their role as advisers on corporate sustainability. There is also a strong desire for metrics to drive engagement and measure progress, to show that the legal department is a strategic investment and not just an operational cost.

Complementary to the Guide is Business for the Rule of Law Framework (Framework), also launched in June 2015. This initiative seeks to demystify the notion of the rule of law for businesses and to encourage them, often through the office of general counsel, to explore ways relevant for their companies to strengthen the legal framework in countries in which they operate. The UN Global Compact has also compiled over 110 examples of how businesses are already supporting the rule of law. The examples gathered include Microsoft’s development of online tools to help businesses identify the risks of human trafficking, development of a program to aid government investigation of child exploitation, development of a refugee registration system used by the UN Refugee
Agency in the distribution of aid and reunification of families, and public advocacy in favor of same-sex marriage. Another project led by the legal department of Symantec offers pro bono legal support to community members on issues ranging from landlord-tenant disputes to the protection of survivors of domestic violence. Other initiatives include the provision of mobile and web systems to register births (with legal identity being essential to access basic services such as healthcare and education), support for training of judges and prosecutors, and advocacy for law reform in line with international standards.

The Framework highlights an emerging trend that businesses are increasingly playing an active role in helping governments to fill gaps in the rule of law. Existing initiatives are primarily driven by necessity as weak rule of law makes it harder for companies to operate sustainably and with integrity. Strengthening the rule of law in line with international standards is therefore a matter of precompetitive common interest, and businesses are prepared to collaborate with one another to level the playing field. To foster collaboration, there is a real need to share information about ongoing efforts.

While several aspects of lawyers' professional training, position, and relationships within companies make them well placed to perform this new expanded role with respect to corporate sustainability, there is also an opportunity and a need for additional capacity building. In particular, this will likely require the building of multidisciplinary capacities and skills that are not currently being taught in most law schools or in continuing legal education on a wide scale. While the legal department need not become an expert in corporate sustainability to effectively spot issues, it is encouraged to proactively partner with various corporate functions, especially corporate sustainability specialists, and invest in some capacity building in order to transition from being the department of no to effectively leveraging the corporate sustainability agenda to manage risk and create value. Additionally, in-house lawyers may turn to law firms for guidance and support in navigating this new terrain. Fortunately, CLE provides lawyers, within companies and law firms, the opportunity to develop these new skills and support responsible businesses in effectively managing risk and creating shared value for the long term.

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4 See participants list at http://www.unglobalcompact.org.
5 See http://www.bcorporation.net.
14 See ENGAGE LOCALLY, UN GLOBAL COMPACT, at...

15 See OUR WORK, UN GLOBAL COMPACT, at https://www.unglobalcompact.org.what-is-our-work/all.


Many ways that civil attorneys can assist veterans who have experienced military sexual trauma (MST). Each situation is unique, but one common area of need is a discharge upgrade. The trauma of the sexual harassment or assault itself within the military is often compounded by a frustrating reporting process. These experiences can lead to MST-related conditions, including post-traumatic stress disorder (PTSD), depression, and other difficulties that can negatively affect job performance. This can result in discharge with one of the stigmatized characterizations, i.e. besides honorable. This type of characterization is termed “bad paper” and deprives veteran survivors of MST of benefits that would otherwise be available to them.

A discharge upgrade is a restorative legal process that enables survivors of MST to obtain valuable benefits and helps put the pieces of their lives back together after military service. Successfully upgrading a less than honorable discharge extinguishes survivors’ bad paper, unlocking valuable educational benefits and disability compensation while opening the door to free mental health and medical care. In addition to knowing the law, it is important that lawyers representing MST clients understand the singular components of military culture, which are unique markers of the military experience that often contribute to sexual assault and harassment.

Military Sexual Trauma

MST is defined as “psychological trauma which...resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment.” The Uniform Code of Military Justice, the military’s penal code, defines “sexual assault” as the commission of a sexual act on a person by threat, force, or while the person is asleep or otherwise unaware the sexual act is occurring. Sexual harassment is “repeated, unsolicited verbal or physical contact of a sexual nature which is threatening in character.” The U.S. Department of Defense (DoD) estimates that 18,900 service members in 2014 were victims of sexual assault. A 2015 study by the Department of Veterans Affairs found that two in five women endure MST while in military service, making women 10 times more likely than men to be sexually assaulted or harassed.

Since survivors commonly fear retaliation, the majority of people who experience MST choose either not to report the
assault at all or to file a restricted report. (A restricted report is one in which the sexual assault is not reported to the victim’s commander or to military law enforcement officials, a procedure affording medical and mental health assistance without triggering a formal criminal investigation.) The DoD estimates that 75 percent of the service members who were sexually assaulted in 2014 did not report the assault to their leadership or to law enforcement in any way. Unfortunately, it is not only the assault or harassment itself that can be traumatic to a service member but also the process of reporting it. Marine Corps General James F. Amos stated in 2014 that many female survivors do not come forward because “they don’t trust their chain of command.” Researchers have found that “[v]eterans with MST fear stigmatization and do not discuss their military experience with friends or partners, leaving them feeling isolated, with fewer supports or coping resources for dealing with emotional distress.”

Characterizations of Service and Discharge Upgrades

Every service member receives a characterization of service upon completion of his or her tenure in the military, essentially a grade depicting personal performance during a military career. There are five types of characterizations of service, consisting of—from best to worst—honorable, general (under honorable conditions), other than honorable, bad-conduct, and dishonorable. Eighty-five percent of service members receive an honorable discharge. Any of the four types of characterizations besides honorable is referred to by advocates in the field as “less than honorable,” carrying with it a social stigma. A less than honorable discharge damages a veteran’s postservice employment opportunities and disqualifies him or her from many VA benefits depending on the type. The latter two types, bad-conduct and dishonorable, known as punitive discharges, can bar a veteran from virtually all VA benefits.

Many MST survivors experience symptomatology in the immediate aftermath of the assault that negatively affects their job performance and may lead to low-level misconduct, including misuse of drugs and alcohol, insubordination, or absenteeism. The National Coalition for Homeless Veterans has found that women who experience MST are nine times more at risk for PTSD than those who do not experience MST. PTSD is a disability that can have MST as its cause, along with other physical or mental traumatic events, for example observing a colleague killed in combat. Other common MST-related conditions include depression and other mood disorders, as well as substance use disorders.

As a result, survivors disproportionately receive a characterization of service that is less than honorable, that is, bad paper, making them ineligible for, inter alia, the Post-9/11 G.I. Bill, the extraordinary educational benefit that pays for four years of college tuition and an approximately $2,000 per month living stipend. Focusing solely on a survivor’s postrauma behavior—rather than the factors, including the MST, that lead to it—a survivor’s overall service record can be distorted. In issuing the bad paper, the survivor’s command team may either be unaware of the sexual assault or, in some tragic instances, may retaliate against the survivor because of it.

Discharge Review Board

There is a way, however, to amend bad paper postservice, allowing a veteran to improve the characterization of service. A discharge upgrade is an administrative process by which a veteran’s characterization of service, or paper, may be improved or increased from a less desirable to a more desirable type. Each branch of the military has an administrative agency called a Discharge Review Board (DRB)—a cadre of officers empowered to evaluate and change a veteran’s characterization of discharge in certain circumstances. A veteran has 15 years from the date of separation to file an application with the DRB of his or her former branch. For instance, a former army service member would file with the army’s DRB. By regulatory fiat a DRB adopts a “presumption of regularity in the conduct of governmental affairs,” a policy under which military officials are assumed to have acted properly in the assignment of the applicant’s characterization of service and wherein military records are assumed to be correct. The veteran thus carries the burden of presenting “substantial credible evidence” that the original characterization was improper.

A DRB is authorized to upgrade a discharge characterization on the basis of either propriety or equity. A characterization of service will be changed on the basis of propriety if an “error of fact, law, procedure or discretion occurred, and the error was prejudicial to the veteran during the discharge process.” Propriety will also serve as the basis for an upgrade if a statute or administrative rule has changed since the separation date, and the change would have affected the discharge type. In this way, veterans who received a general (under honorable conditions) characterization of service due to the Don’t Ask, Don’t Tell policy can apply and receive an honorable characterization on the basis of propriety since the rules regarding service by homosexual military personnel have changed subsequent to their separation.

Alternatively, upon consideration of the veteran’s complete record, the DRB will upgrade a discharge on the basis of equity if the characterization does not accurately represent the quality of service. A more nuanced analysis than when propriety is at issue, an equity challenge takes into consideration a veteran’s overall military performance, including annual evaluations, decorations and commendations, length of service, acts of merit, and postservice record. An application made on the grounds of equity also considers more abstract concepts, including “total capabilities” and “family and personal problems,” as well as an examination into whether an “arbitrary or capricious action” was taken against the applicant. The quality of a veteran’s advocacy is often the decisive factor in how persuasively these latter factors are set forth in the application paperwork—complex, layered concepts well-suited to lawyers’ rhetorical abilities, critical reasoning, and analytical skills. Without legal assistance, a MST survivor’s chances of success in an equity situation are low.

DRB applicants are able to decide how they would like the review process to occur. They can either opt for a records review in which the DRB simply reviews the application and supporting documents, a personal hearing in the Washington, D.C. area, or a personal hearing before a traveling board. An applicant’s odds of success are increased by a personal appearance in which live testimony can convey the destructive force of military sexual trauma more poignantly than words on a page can. However, travel costs are borne by the applicant, which can be a burden for California-based veterans attending hearings in Washington, D.C. Pursuant to the Administrative Procedures Act, denial can be appealed to the district court in which the applicant resides.

Board for Correction of Military Records

If more than 15 years have elapsed since the date of discharge, a veteran is ineligible to apply for an upgrade to the former branch DRB. In these instances, however, there is still a path to upgrading bad paper, namely, through application to the Board for Correction of Military Records (BCMR). As with DRBs, each branch of the military has a BCMR—an administrative agency of last resort that possesses much broader powers than does a DRB. BCMRs have wide-ranging authority to alter or modify the military service record of a service member or veteran, including changing the characterization of service listed on a former service member’s certificate of discharge—a document commonly referred to as a DD 214. BCMRs are also...
authorized to change inaccurate performance evaluations, alter reenlistment codes, and, in certain limited cases, order a veteran to be reinstated into military service.22

A MST survivor has three years after discovering an “error or injustice” in his or her military records to apply to the BCMR for correction.23 While not codified, the argument is frequently made in the discharge upgrade context that the error or injustice triggering the three-year clock is the denial by the DRB. This approach allows a veteran who experiences MST to apply to the BCMR as a kind of appellate process post-DRB rejection. Courts have held that actual knowledge of the error or injustice is required for statute of limitations purposes.24 The BCMR is authorized to waive the three-year time limit “in the interests of justice.”25 As the board is required to review the application before ruling on whether the time limit should be waived or not, submission of an application after the deadline has expired is almost always the wisest course of action.

As part of its vast powers, the BCMR can upgrade a punitive (bad-conduct and dishonorable) discharge issued by a special or general court-martial on clemency grounds.26 (A DRB has no corresponding capacity.) Curiously, “clemency,” “error,” or “injustice” is not defined by either statute or regulation, leaving commentators to suggest that the practical meaning of the latter two terms is the same as “impropriety” and “inequity” in the DRB context.27 Postservice conduct is considered to be particularly critical in the clemency context since members of the BCMR are positively influenced by evidence of

a MST survivor’s rehabilitation, exemplary citizenship, and salubrious contributions to society.28

Military Culture

Skillful interaction with a client who has experienced MST and effective advocacy in the discharge upgrade context requires an understanding of the defining components of military culture. The day-to-day lifestyle of members of the military is unlike the mainstream, civilian lifestyle with which most civil attorneys are familiar. Military culture is a sui generis blend of norms, values, and customs that the U.S. Supreme Court calls a “specialized society separate from civilian society.”29 Researchers have found that the military experience is characterized by five factors: (1) strict regulation of personal conduct, (2) an authoritarian, hierarchical leadership system based on obedience to orders, (3) tight-knit, “familial” bonds amongst members, (4) a code of honor, and (5) aggressive masculinity.30

In contrast with civilian life, in which the government manages a relatively small swath of daily activity, military directives “essay more varied regulation of a much larger segment of the activities of the more tightly knit military community.”31 Service members can be held criminally liable for being disrespectful to their bosses, late to their jobs, and derelict in carrying out their duties. Certain friendships and sexual relationships are barred as inappropriate, certain tattoos are deemed prejudicial to good order, jewelry must be displayed in certain ways (even when off duty), and specific language must be used (or

THE CASE OF LINDA

Consider the case of “Linda.” (The actual name and some other personal details of the case have been changed, but Linda’s story is typical of the survivors of military sexual trauma.) A 19-year-old woman from a small town, Linda is naturally introverted, having joined the army directly out of high school, wanting to serve her country, see the world, and receive financial assistance for college. She attended basic combat training at Fort Jackson, South Carolina, her first time outside of California and away from her family for any length of time. From the moment Linda arrived at boot camp, she received unwanted sexual attention from the males in her platoon in the form of gestures, comments, and innuendos—behavior she countered by adopting a more masculine appearance and closing down emotionally. A few of her female colleagues complained about the sexually charged atmosphere to the sole female drill sergeant, only to be told to “suck it up and drive on.” Despite the low-level harassment—which she said to herself was just boys being boys—she felt at home within her platoon, developing close bonds with her colleagues and a deep admiration for the senior drill sergeant, a 28-year-old infantryman with a strict manner reminiscent of her father. On the last day of boot camp, there was a party to celebrate finishing 10 long weeks of being yelled at, running in formation at the break of dawn, and firing an M4 semi-automatic rifle for hours on end at the range. Linda drank four or five beers that night—the first time she had drunk alcohol since enlisting—and eventually passed out on a bed in a friend’s room. When she awoke, her clothes were off and there was a man on top of her. She realized to her terror that he was having sexual intercourse with her. She said “Stop!” and pushed at the man’s face, at which point her assailant jumped up, grabbed his clothes, and was gone before she was fully conscious. Lying on her back in stunned amazement, Linda’s world shattered into pieces, and her faith was replaced by betrayal, fear, anger, and emptiness. A couple of days later, she confided in a female friend, who told her there was no point in reporting the incident and that nothing was going to happen because “you don’t know who did it.” “Plus,” the friend said a moment later, “if you report, it’s just going to tear the platoon apart. Do you want that?”

A civil attorney, however, agreed to represent Linda on a pro bono basis, assisting with an application for discharge upgrade. Turning to alcohol to cope in the wake of being raped rather than “tearing the unit apart” by reporting to her chain of command, Linda had been involuntarily separated from military service a short time thereafter when her work performance was suffering and a bottle of gin was discovered in her desk drawer. Showing compassion and understanding, her attorney established an attorney-client relationship built on trust, a dynamic that facilitated Linda’s sharing the details of the assault and resultant impact on her life. That trust allowed the attorney to gain the information needed to make the strongest legal case for Linda. When her discharge was later upgraded to honorable, Linda enrolled in college via the Post-9/11 G.I. Bill, received PTSD counseling from specially trained psychologists, and was granted a generous living stipend, all of which provided a transformative change of circumstances that set her life on an entirely new course.*

* There are many resources that are available to provide assistance to MST survivors, including LACBA’s Veterans Legal Service Project and other services at Patriotic Hall. Also, each VA facility has a designated MST coordinator.
not used) at certain times. Recognizing that the terminal purpose of the armed forces is to fight and win the nation's wars, the Supreme Court allows increased governmental intrusiveness in the personal conduct arena because "[n]o military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting."32

One consequence of living within a culture in which dress code, physical fitness, and meal times are prescribed—and in which lives are placed in one another's care—is that powerful attachments form between members. There is a level of interdependence and connectedness in which members rely on one another's word for both vocational success and personal well-being. Bonds bordering on familial start to take root during the indoctrination phase, the 10-week character development program known as basic training or boot camp, when largely 18-year-old recruits cast off their civilian willfulness and learn to think, look, and act like each other. Obedience to orders, respect for the chain of command, and putting the good of the group above personal interest are painstakingly instilled into trainees during boot camp. Researchers have found that young recruits transfer the trust previously reposed in parents, teachers, and coaches to their drill sergeants, while the emotional closeness of sibling relationships transfers to platoon members.33 A military unit's familial dynamic is in fact the essence of military culture—the factor underlying its code of honor—in which selflessness is a central tenet, disloyalty is the ultimate sin, and risking your life to protect your comrades in the face of danger is performed reflexively.

**Rape Subculture**

While the idiosyncrasies of military culture “produce men and women who comprise perhaps the most powerful fighting force on Earth,” the cruel irony is that the factors also combine to create what researchers describe as a “rape subculture.”34 A rape subculture is said to exist in which the number of sexual assault incidents exceed the norm, victims are frequently blamed for their assaults, and internal forces collaborate to deincitivize reporting to authorities. Dr. Kristen Zaleski, a professor and psychotherapist at the USC School of Social Work who works with survivors of MST, says that the touch points of military culture “can rapidly turn into rape-supportive attitudes if a victim is seen as ‘not a part’ of the collective group and therefore an acceptable target of violence.”35

Even with more women in uniform today than ever before, they still make up only 15 percent of the active duty military.36 Women’s “outsider” status is accentuated by the dichotomy of military language, a gendered vocabulary in which “girls” and “ladies” describe substandard performers, and toughness—a first-order value—is associated with being a “man.” The research has found correlations between the “othering” of women and sexual violence against women. Connections have also been drawn between the military’s masculinized culture and the emphasis on enduring pain in silence, on the one hand, and the reluctance of MST victims or survivors to report being assaulted, on the other.37

The rape subculture is exacerbated by an “us versus them” dialectic that predominates the military’s combat-masculine-warrior mentality. In order to acculturate recruits to kill the enemy without a second thought and pull the trigger instantly in war-time situations, recruits are trained to dehumanize their combat opponents and instructed to give no consideration to the enemy’s feelings, emotions, or lives. Effective in turning young people into fighting machines, the highly developed capacity to dehumanize other people can have unintended consequences in non-combat scenarios, a skill set capable of devastating misuse in off-duty situations. Brought into the barracks context, in which 18- to 24-year-old men and women interact socially against a background of high-stress jobs, readily accessible alcohol, close-quarter gossip, and sexual politics, the ability to dissociate from others—to dehumanize outsiders—can result in “unspeakable acts of sexual violence (committed) on its own members.”38 The cross-currents of the “us versus them” dialectic and the familial bond dynamic may collide to intensify the resultant trauma. The MST survivor, like the incest survivor, must continue to interact with the perpetrator on a daily basis, pressured to withhold the information in order to protect the perpetrator, a brother-in-arms, and the military unit as a whole.

**Repercussions of Reporting**

A variety of factors within military culture discourage victims from reporting instances of sexual assault. As Elizabeth L. Hillman, president of Mills College and formerly a professor of law at UC Hastings, writes in *Front and Center: Sexual Violence in U.S. Military Law*, “Reporting fellow troops for sexual misconduct can...be interpreted as disloyal; it can lead to the humiliation and punishment of the military offender and cause damage to the public image of the armed forces.”39 The perception of being disloyal to one’s unit—a military member’s surrogate family—is fraught with risk.

Many MST survivors tell of being ostracized in the wake of informing authorities about their assault, accused by their leadership of being weak, or of having brought the incident upon themselves by their own “slutty behavior.”40 Wrenching criminal investigations can ensue that force unit members to take sides, which may result in a division of allegiances that often turns in favor of the male perpetrator, with the survivor unable to move to another unit and forced to work in proximity with the assailant. Perpetrators, frequently older and more senior in the hierarchy, insulate themselves against accusations by fostering close relationships within the chain of command while simultaneously selecting survivors who lack meaningful political support. In what often turns out to be a “he said, she said” situation, perpetrators have carefully grease the wheels in their favor long in advance.41

Whether or not MST survivors choose to report, the trauma they sustain routinely leads to their separation from the military with a less than honorable discharge, i.e. bad paper. Self-medication with drugs or alcohol or both, depression, eating disorders, and many other physical and psychological conditions stemming from trauma can diminish work performance, lead to antisocial behavior, and result in positive drug tests, thus causing the chain of command to initiate involuntary separation proceedings against the MST survivors. In particular, denial of the Post-9/11 G.I. Bill—a necessary result of bad paper—throws a

**INDEED, effective advocacy in the MST context often turns on the lawyer’s understanding the military cultural experience that led to the MST. Many layers of trust often have already been destroyed before a MST survivor meets with a lawyer since the bonds have been broken with his or her surrogate military family.**
MST survivor’s postmilitary life into chaos. Instead of attending four years of college for free along with an approximately $2,000 living stipend, an MST survivor with bad paper is forced to find and hold a civilian job, negotiate the fallout of the MST, and repair their broken identities at the same time. In addition, medical benefits are often denied as a result of bad paper, leaving survivors without a viable option for critical therapeutic services.

**Advocacy**

Restoration occurs through a successful discharge upgrade. The chances of success increase exponentially when a lawyer prepares the veteran’s discharge upgrade application, be it before the DRB or BCMR. An application consists of a standard legal brief accompanied by declarations, medical documentation, and other supporting evidence. The brief tells the veteran’s complete story—a version of reality often diametrically opposed to the version contained in the survivor’s official military file—by describing the MST, the attendant trauma, and the cause-effect relationship between the symptomology and the survivor’s downward career trajectory. Without adept legal assistance and untrained in developing evidentiary records, a veteran—uncertain of what is important—will almost certainly fail to convince either the DRB or the BCMR to change the characterization of discharge.

Indeed, effective advocacy in the MST context often turns on the lawyer’s understanding the military cultural experience that led to the MST. Many layers of trust often have already been destroyed before a MST survivor meets with a lawyer since the bonds have been broken with his or her surrogate military family. Additionally, telling the story of the underlying experience often triggers the feelings that arise out of the MST. An attorney can avoid further trauma on the part of the MST survivor and help him or her on the appropriate path through a willingness to listen to the survivor’s experiences without judgment, thus creating an environment that fosters trust.

In this context, lawyers are at their most effective when they are aware of their use of language when interacting with MST clients. It is frequently useful to allow the client to describe his or her experiences in the client’s own language. Indeed, a good rule of thumb is to mirror the language that the client is using back to him or her. If a lawyer feels it is necessary to use different phraseology in order to explain certain legal definitions, it can help to clearly articulate to the client why different language is being used. Then, the client will not mistakenly think the lawyer is defining the client’s experience in a way with which the client may not identify.

Also, it can be helpful for lawyers to jet-
tion expectations formed from past experiences or histories. That is, it is advisable to exercise caution about trying to make one’s client into a “perfect victim.” Thus, it is important to take care before even labeling the client a victim at all.

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31 Parker, 417 U.S. at 749.
33 ZALESKI, supra note 30, at 22-24.
34 Id. at 20.
35 Id. at 21.
37 ZALESKI, supra note 1, at 23.
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41 MBIETE WELLS, UNDERSTANDING MILITARY SEXUAL TRAUMA 58 (2013).
42 For a more in-depth discussion on trauma memory, see ZALESKI, supra note 30, at 82-83.
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Using Assignment and Charging Orders to Enforce Judgments and Orders

THE ENFORCEMENT OF JUDGMENTS ACT contained in Civil Code of Procedure Sections 680.010 to 724.260 can be thought of as a tool chest requiring the practitioner to use the right tool for the right job. When doing repairs around the home, you want to use the correct utensil, and a lawyer trying to enforce a judgment or an order also needs to use the right utensil. If the tried-and-true wage garnishment or bank levy is not effective to reach a debtor’s income or assets, an assignment order and charging order are additional tools a judgment creditor can use.

Code of Civil Procedure Section 708.510 authorizes a court to assign a debtor’s right to receive a payment even if that right is conditioned upon future events that are out of the control of the debtor. An assignment order is akin to a wage garnishment or earnings withholding order, which is useful in cases in which a debtor receives money from third parties other than by salary or as a contract worker, for example royalties for books or music, residuals, profit participation, and partnership distributions. When seeking an assignment order, the request for the order and the actual order must specify from which entity the debtor’s income stream should be taken. The American Society of Composers, Authors and Publishers (ASCAP) or Broadcast Music Inc. (BMI), which license music, collect licensing fees, and pay royalties, are used regularly by musicians.

It is important to know the debtor’s sources of income prior to filing the motion for assignment order, or in a family law matter a request for order (RFO) for an assignment order. A third-party judgment debtor examination order may be required for a trade guild (for example, SAG/AFTRA, DGA). In conducting the judgment debtor examination, be sure to ask about all streams of income, even potential income, which may come in many forms, for example distributions from limited liability companies or limited partnerships, spousal support, or one-time payments such as lottery winnings. Assuming the motion or RFO is granted, you will need to serve it on any third parties that have been paying monies to the debtor. One advantage of an assignment order is that the creditor can discover the money before the debtor has a chance to hide it. Going directly to the source of the funds assures the order will be honored.

If a debtor has an interest in a limited partnership or limited liability company and is not receiving distributions from the partnership or limited liability company, a charging order may be effective. Assets of a general or limited partnership or limited liability company are not liable for the debts of a debtor. However, the way to reach the interest of a partner (in a general or limited partnership) or member of a limited liability company is to apply to the court for an order charging the debtor’s interest pursuant to Section 708.310.

A motion for a charging order and request for an assignment order require a declaration from the creditor. The declaration must show the debtor has an interest in a partnership or limited liability company. If this information has not been obtained, follow the same procedures for a motion for an assignment order: obtain a third-party judgment debtor examination order directed to the partnership with the records of the partnership or limited liability company, including a copy of the partnership agreement or operating agreement (or both), showing the debtor’s interest in the partnership or limited liability company.

The motion or RFO, when filed, is served on the debtor and all partners or the partnership, all members or the limited liability company. Filing the motion and service on the partnership or limited liability company creates a lien on the debtor’s interest in the partnership or limited liability company.1 The lien is in effect until the charging order is issued or, if the motion for charging order is denied, the lien is extinguished.2

Once obtained and properly served, the charging order acts as a lien on the debtor’s interest in the partnership or limited liability company. This is similar to a lien on real property, and the creditor can be paid if the debtor’s interest in the partnership or limited liability company is liquidated by the partnership or limited liability company itself or if the entire partnership is sold. A charging order that is not fully understood may also cause a debtor to think his or her interest in the limited liability company or partnership will be sold. It may also cause the debtor embarrassment among other members of the partnership or limited liability company.

Assignment and charging orders are powerful tools for enforcement of judgments and orders. Like most collection methods, they are not mutually exclusive. It is usually a good idea to file for both an assignment order and a charging order at the same time. Although it is possible to file them at the same time, some courts require that they be filed separately or that two filing fees be charged. It is best to be creative and not limit the scope of the request to the court. The worst outcome is the judicial officer denies the request, but it may be possible to persuade the judicial officer to grant the request and strike gold with these new enforcement hammers.

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