

Contra Costa Lawyer

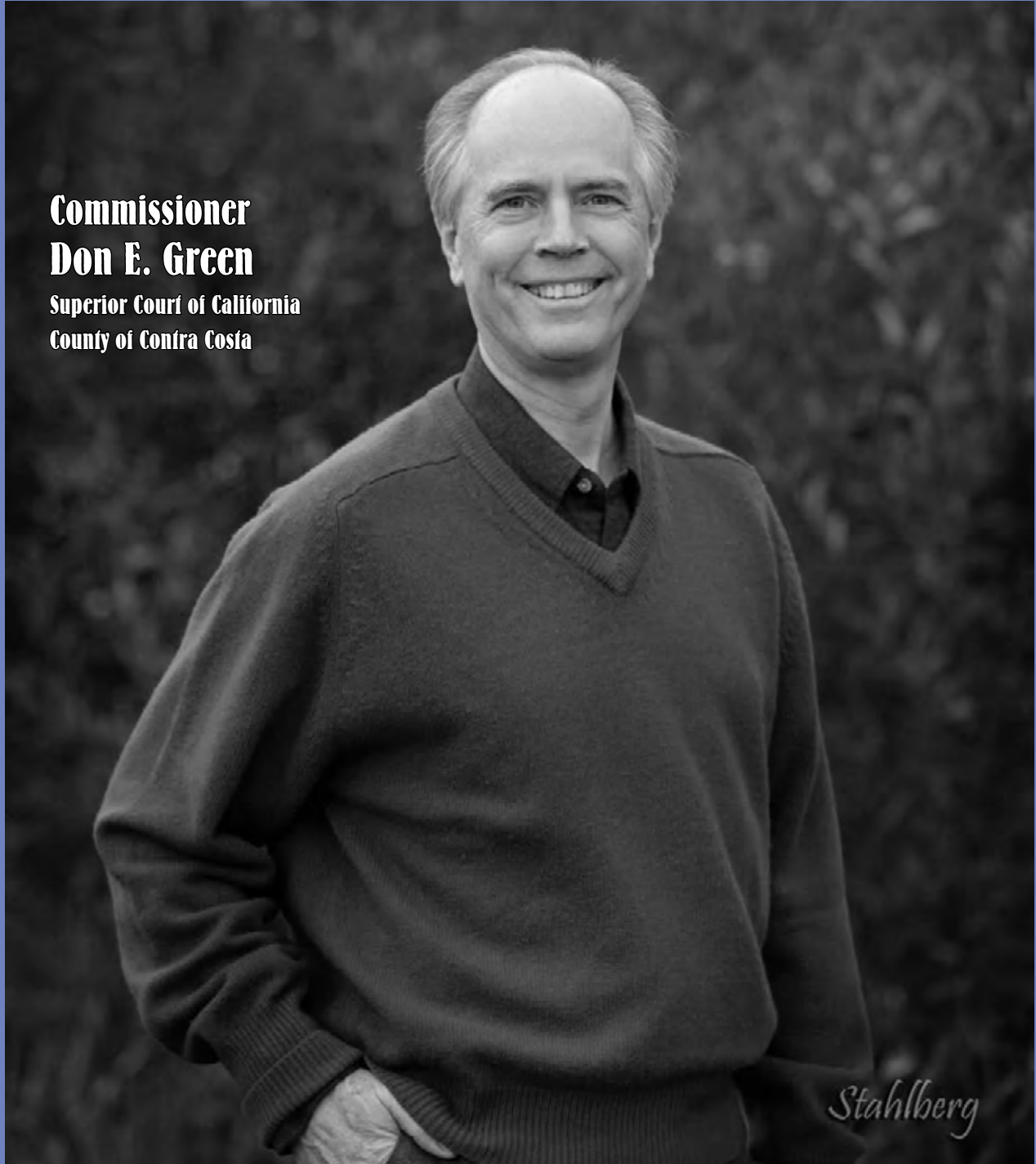
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BAR ASSOCIATION

Commissioner Don E. Green

Superior Court of California
County of Contra Costa



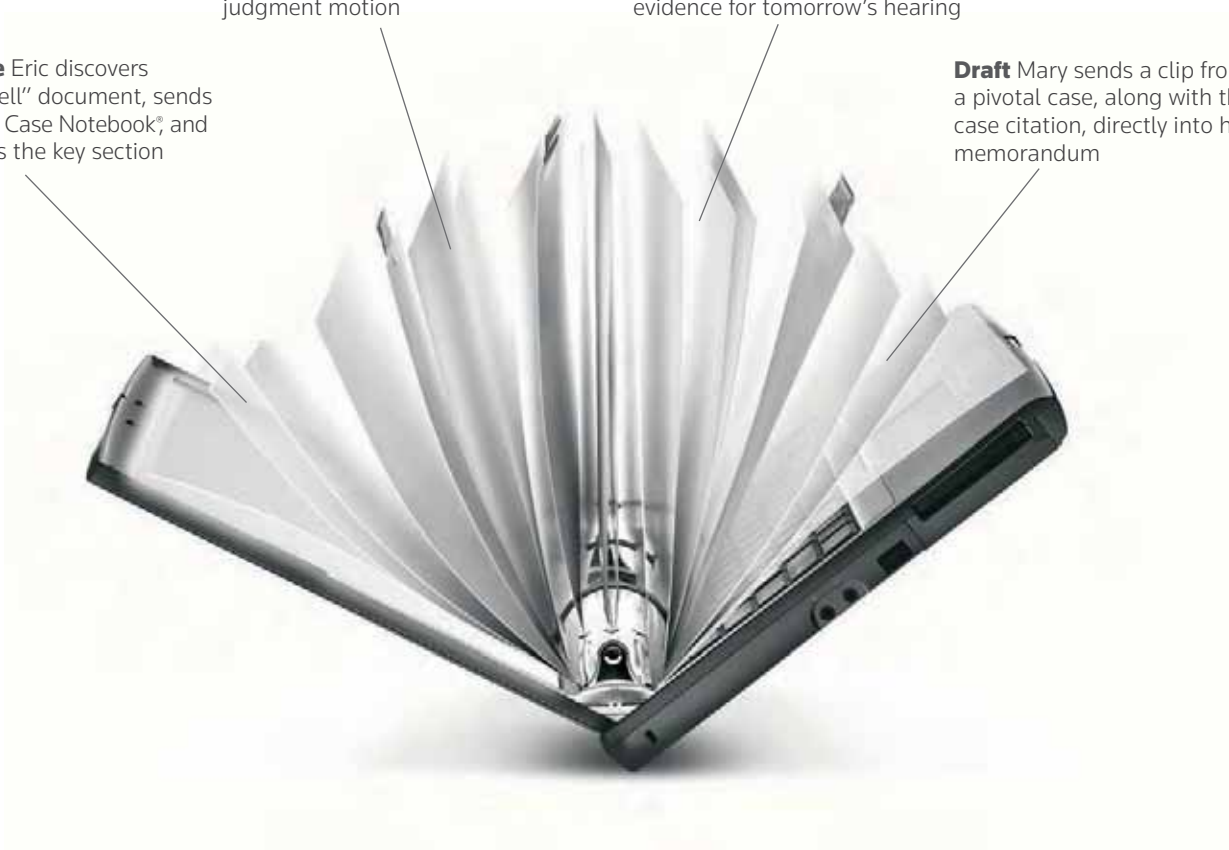
Inside Elder Law/Probate

Organize Eric discovers "bombshell" document, sends it to West Case Notebook®, and annotates the key section

Strategize Amy runs a Key Facts report to jump-start her summary judgment motion

Find Bob uses five minutes at the airport to run a search for the evidence for tomorrow's hearing

Draft Mary sends a clip from a pivotal case, along with the case citation, directly into her memorandum



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Volume 23, Number 2 • February 2010



CONTENTS

features

- 6 **PARTING THOUGHTS . . . REFLECTIONS
FROM THE OTHER SIDE OF THE BENCH**
AN INTERVIEW WITH COMMISSIONER DON E. GREEN
Magany Abbass
- 10 **THE WHITE-COLLAR ABUSER**
Loren Barr
- 14 **COLLECTING FROM THE DECEASED**
Margaret M. Hand
- 18 **ESTATE PLANNING AT THE MOVIES®**
FOR ATTORNEYS BEFORE COMMISSIONER GREEN
Keith Schiller

departments

- 4 **INSIDE**
Arlene Segal and Norm Lundberg
- 13 **QUESTION MAN**
WHAT IS THE CRUELEST ELDER SCAM
OUT THERE THESE DAYS?
- 17 **ETHICS CORNER**
Carol M. Langford
- 20 **PRO BONO SPOTLIGHT**
CENTER FOR HUMAN DEVELOPMENT
ELDER MEDIATION PANEL
Nicole Mills
- 22 **CLASSIFIEDS**



About the cover . . .

*After 11 years on the Probate Bench, we wish
Commissioner Don E. Green a bittersweet farewell.
(See his interview on page 6.)*



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inside



by Arlene Segal



and Norm Lundberg

While we regret that Commissioner Green's retirement has been the impetus for this Elder Law/Probate edition of the *Contra Costa Lawyer*, we are grateful for the opportunity to once again focus on elder law, guardianship, conservatorship, trust and probate — some of the history, issues that come into play, and resources. In working on this issue, the two of us have enjoyed the experience of planning this edition together.

We begin the issue with Commissioner Green's gracious and thoughtful interview with Magany Abbass. We are sure you will agree that this interview provides us with a multi-faceted view of Commissioner Green, as well as his perspective on his tenure in Contra Costa County. We thank the Commissioner and Magany for melding the personal and the professional, and for the consideration of the human issues at stake every day in the Probate Department.

Next, Loren Barr's article on the "semi-professional" con artist alerts us to the warning signs of these predators and also provides some insights and guidance into dealing with them in litigation. And, speaking of litigation, we do not want to forget that many elder law matters (though not likely the ones Loren refers to) are particularly well suited for mediation. Nicole Mills, in her "Pro Bono Spotlight," introduces us to the Center for Human Development and its Conflict Resolution Program. A resource worth knowing about, the center provides free or low-cost elder law mediation with specially trained mediators.

Margaret Hand discusses a somewhat sensitive issue: collecting debts from a deceased debtor. It is a wonderful, succinct piece dealing with one of those unique issues that impacts not only the members of both the CGPT and Elder Law Sections, but also affects many other areas of practice from litigation to general business law practice. We think all of you will find it very informative and helpful.

Finally, Keith Schiller's article on Estate Planning at the Movies® blends in a humorous way Don Green's departure with solid, practical and important legal updates. It is not always the case that lawyers can successfully blend humor with education, and we are pleased this article does both of these things very successfully.

On behalf of our two sections, we wish all of you a happy and prosperous new year. ♦

— *Arlene Segal, president of CCCBA's Elder Law Section, focuses her litigation and mediation practice on real property issues, trust/estate disputes, and financial abuse of elders. Norm Lundberg, president of CCCBA's Conservatorship, Guardianship, Probate & Trust Section, primarily focuses on probate, estate planning and post-death trust administration, and also practices in the area of health care contract regulatory compliance.*

2010 Contra Costa Lawyer THEMES AND DEADLINES

<u>Issue</u>	<u>Theme</u>	<u>Deadline</u>
January	Annual Bar Issue	November 20, 2009
February	Elder Law/Probate	December 18, 2009
March	Taxation	January 20, 2010
April	Family Law	February 19, 2010
May	The Internet	March 19, 2010
June	Law Practice Management/ Business Development/Technology	April 20, 2010
July	Employment	May 20, 2010
August	Real Estate	June 18, 2010
September	Health Care/Insurance	July 20, 2010
October	Bench/Bar	August 20, 2010
November	Bankruptcy	September 20, 2010
December	Readers' Choice	October 20, 2010

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Parting Thoughts...

Reflections from the Other Side of the Bench

An interview with Commissioner Don E. Green

by Magany Abbass



It was late afternoon and court personnel were preparing to leave for the day. Commissioner Green's retirement date was imminent; after 10 years on the bench — hearing many cases, and seeing many successes and failures — he had a lot of stories to share, both personal and professional. The lateness of the day did not dampen his spirits as he sat down for a frank, genuine discussion.

Thank you for taking time out of your busy schedule for this interview, Commissioner Green. I'm sure it will be very informative for our readers. When exactly are you scheduled to retire from the Bench?

January 29 is my last day, Magany, and February 1 is the official retirement date — the first day I will be officially unemployed.

Why are you retiring now and how does it feel?

There is a salad of emotions, and so many fun things I'm eager to do — long trips without an agenda, reading science fiction books, having dinner with my wife instead of working late. And since my wife has already retired, I want to devote more time

to her. Although I find the work very rewarding, the probate assignment is difficult, intellectually and emotionally. I find I need to pass it on to someone else.

If you could wave a magic wand, what are some things you'd like to see happen within your department?

Number one is getting more money for Evidence Code 730 evaluations in contested guardianships. Decisions we make profoundly affect the lives of children, so society should devote the resources needed to ensure we do the best job possible. Number two is getting the money to appoint attorneys for the parents, as

guardianship cases profoundly affect them as well. Cases filed by Child Protective Services get an attorney, but probate guardianship proceedings don't. Fairness is always essential to justice.

Looking back, can you think of one or two of the most difficult decisions you had to make?

Consistently, the most difficult decisions I've had to make are the early decisions in guardianships, when I have fragmented and highly contradictory information. Yet when it seems clear that some child is at risk, I have to make a decision. The decisions I make can profoundly affect the lives of the parties and those children.

Do your cases ever keep you up at night?

No, I'm lucky to be a very good sleeper, but I do worry about some cases when I'm awake.

Are there things that you wish lawyers practicing in this area would do to facilitate some of those difficult decisions?

The attorneys are tremendously helpful, and the word that comes to mind is "wonderful."

It is your 10-year anniversary on the bench in Contra Costa. How did you get started here?

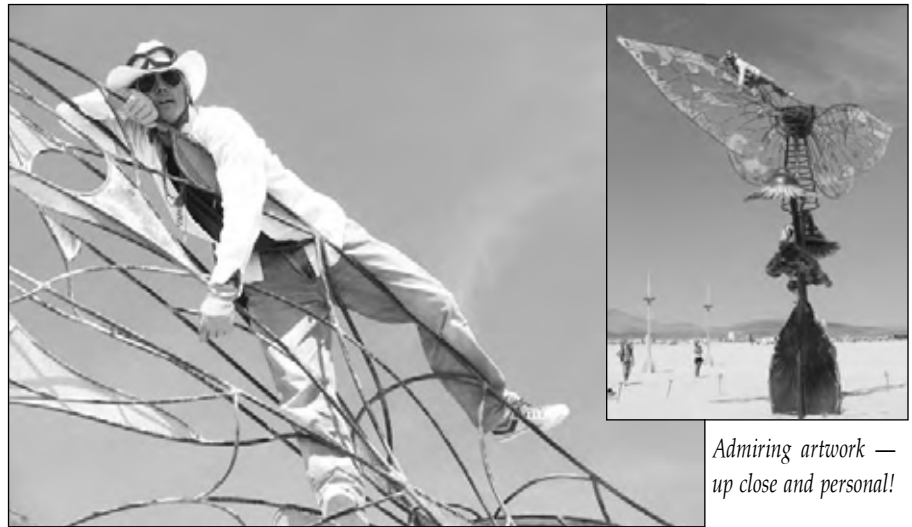
I applied for the job as Probate Commissioner in Contra Costa because this county uses its commissioners in dedicated positions. When I was a staff attorney in the Sacramento court, the last judge I worked for decided he wanted the staff attorneys to cover his hearings instead of bringing in other judges. He called me one morning saying he was sick and wanted me to cover for him. That was how I got started. I have to follow the law and not just apply my personal values. That combination of clarity and purity is rare in the real world.

Do you have any suggestions for attorneys practicing before you?

Yes. They should memorize the entire Probate Code, the California Rules of Court, and all the local rules. But that's nearly impossible. Some attorneys take a passive approach — they don't file papers carefully, figuring they will get a tentative ruling anyway. But that is more work on our end and I wish they would do it correctly the first time. Another suggestion: When I ask an attorney a question, there is no need to go into a big explanation. A simple answer would suffice.

Describe your start in the legal field.

I started off as a sidekick for an old-fashioned trial lawyer who liked to smoke cigars, play Liars' Dice, and was fearless in the courtroom. The more tension, the happier he was. After working as his sidekick for four years, I figured out that since I dislike fighting with people, being in civil litigation was not a good idea. So



Admiring artwork — up close and personal!

I looked around for other fields, and settled on estate planning and probate. After several years, there was an opening for a staff attorney at the probate court. It wasn't as prestigious, but I wanted a job that had less pressure and regular hours (although it did not turn out to be as regular as I was expecting).

Around the time I landed that job, another attorney had badgered me into applying for a State Bar committee, one I had not heard of (now the Executive Committee for the Trust and Estate Section). Not only did he badger me into sending in my application, I heard later he badgered them into accepting my application!

So you wound up working in the legislative process as well?

Yes. I ended up getting involved in probate because, unlike a private attorney, you see a lot more cases. If there is a problem with a statute, you are likely to see it come up more often. I began identifying changes that needed to be made to make things clear. I proposed that the section sponsor legislation to clear up those ambiguities.

What's the one piece of legislation you consider a big success?

When I was chair of the State Bar committee, I took the lead in getting through the trust notification rules that state when

a trustor of a revocable trust dies, the successor trustee has to send out a notice that the trust is no longer revocable, so heirs and beneficiaries can look at the trust. Before we got that legislation through, we routinely received massive filings in the probate department by an heir who was being denied the right to look at the trust. The heir assumed that since she was not allowed to look at the trust, there must have been an evil cover-up going on. So the heir hired an attorney to come into court with, what I used to call, a civil procedure manual. The attorney came in filing every motion he had ever heard of in law school. I discovered this was going on around the state. Playing hide-the-ball with the trust produced an enormous amount of unnecessary paperwork.

What do you think about the new rules regarding the no contest clause?

I think they are wonderful... because they will result in more fairness. All litigation is miserable; the idea that we should carve this out in the modern world makes no sense to me. It made sense at one time, but the new law (except for a few little areas) is much clearer than the old one. If you had reasonable cause to file the contest then, as a matter of public policy, you cannot be disinherited. By the time you get through that trial, it will be obvious to the court in 99% of the cases ►



Enjoying the great outdoors with his wife, Laurel.

whether or not this was frivolous. If it was, you deserve to be disinherited.

We have howling deficits in our state and county budgets. People are hurting financially across the board. What is the greatest impact you see in the court?

The desperation of poverty often creates situations that lead to the cases in our courts, and it has worsened in this economy. There seems little the courts can do about it. Instead, we must try to understand the situation and make the best rulings we can with that understanding.

What are some of the most positive changes you have seen over the years?

Technology. When I first started here, we would literally cut and paste our tentative rulings, make photocopies, and read them into a phone. Posting them on the internet has been good. One of the biggest and best changes: we get access to the state's criminal records, so we can do case background checks.



Always adventurous — even as a toddler.

What do you think is the burgeoning area in the probate departments?

I've seen a real growth in trust litigation. When the wave of trust mills hit, there were predictions that these were going to be produce a lot more litigation. But they did not. It just took a while for them to mature.

The current population survey from the California Office of Finance Projects shows there will be 25 million more Californians by 2050; Hispanics are projected to be the state's majority ethnic group by 2024. Have you see that kind of change reflected in your department?

I don't know. I hope the reason for that is that I'm color blind and don't pay attention to individual ethnic groups. I have no idea if we are getting more Hispanics. Of all the problems I have to deal with, their ethnicity is never on the list.

Is language a barrier?

Yes, but I'm fortunate to have interpreters when needed. It seems to me that civil justice requires that we have interpreters for all language groups in all cases, but economically we can't. But I have not seen a case where there has been an injustice because someone did not know how to assert his or her rights.

How about the attorneys and processes — have they changed over the years?

In my career, there has been a growing number of women attorneys. There have been two long-term trends over my career.

One is the increased use of ADR and the other is the increase in the number of female attorneys. I suspect (but cannot prove) that those are not merely coincidental. Over the years, I know those two long-term trends have occurred together.

There is a lot of research that cites women as effective peacekeepers. The United Nations has made a concerted effort to bring women into the fold in the resolution of armed conflict. They are also brought in because they comprise over 50% of the world's population. It helps to bring all parties to the table.

You are not offended that those two trends might be interrelated?

I happen to agree that the two are interrelated. By nature, humans have an innate need to belong and identify with a group. Do you believe that mediation contributes to that and, if so, is that why you are a big proponent of mediation?

In the probate area, our county conducts more mediation than we did when I first arrived. I think I have contributed to that, and it has been a good thing. Even men can be peacekeepers. So, we all ultimately have to be judged as individuals, but I think the group effect is there.

Any advice for attorneys starting out in this area of law?

Being civilized, as well as trustworthy, really pays off. Long-term attorneys who don't have those two characteristics are very unlikely to be successful in this area of practice.

Any words of wisdom for attorneys aspiring to be judicial officers? Is it somewhat isolating?

Having the opportunity to make decisions that produce justice is as meaningful as any work could be. The intellectual stimulation is often challenging and engaging. And, yes, being on the bench is isolating. Most of us were very much a part of the legal community before taking the bench, and we miss those relationships.

Any advice for the new person replacing you?

See the lawyers as people, and work with them. Let them help you, so you can help them resolve the issues. ♦

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Until there's a cure, people with the disease will need caregiving and legal advice. According to the Alzheimer's Association, approximately one in ten families has a relative with this disease. Of the four million people living in the U.S. with Alzheimer's disease, the majority live at home — often receiving care from family members.

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The White-Collar Abuser

by Loren Barr

Elder Abuse. Attorneys, as well as the public in general, have increasingly become aware that most financial elder abuse is committed by children of the victim or the victim's caregivers. It is less well known, however, that these crimes are also often committed by individuals who can aptly be described as semi-professional con artists or white-collar abusers, sharing several common characteristics. And if they are sued, they typically employ a predictable defense strategy. This article identifies some of the characteristics of these predators and describes what practitioners and their clients should expect if litigation becomes necessary.

All attorneys (and particularly those practicing estate planning or elder law) should be on the lookout for trustees, money managers, financial planners, or insurance agents who fit the following profile:

Prior law suits. Very often, the white-collar abuser has previously been sued, typically for fraud, elder abuse, or breach of trust. It goes without saying that clients should be wary of a trustee or investment advisor who has frequently been sued by his clients.

Nothing in their names. Not surprisingly, many of these individuals do not own anything. Again, clients should be concerned if the person who wants to handle their money does not appear to have any resources of his/her own. Accordingly, the practitioner should perform an asset search if s/he suspects a client could be involved with a professional predator.

Dubious job description. This type of predator does not usually have a 9 to 5 job. Rather, s/he is self employed as a financial advisor, professional trustee, or real estate investor. While these are all legitimate occupations, the white-collar abuser is not employed with an established company or organiza-

tion such as a bank or full-service broker. Instead, s/he typically has a "home office" and will do anything to get close to the client's money. Often the victim will meet the white-collar abuser at a financial or estate planning seminar.

Religious affiliation. Sadly, another common place victims meet professional predators is within churches and other religious organizations. Church members tend to let their guard down within the community and are less likely to ask for qualifications or references from someone they meet within an organization they trust.

If the predator already has the client's money and refuses to give it back, litigation is often the only recourse. Before filing the case, counsel should advise their clients of what they may be up against.

Manipulation of the system. The most common characteristic of the white-collar abuser is a familiarity with the legal system and the collections process. Most people are frightened at the thought of depositions, trial, and judgment, but the white-collar abuser is not. S/he has been through it all before and is aware that the consequences of abusing the legal system are often not severe. Above all, the white-collar abuser

is aware of the enormous financial and emotional cost of litigation and the victim's (legitimate) fear — even if successful at trial, the client may still be unable to collect his/her judgment. Knowing this, the white-collar abuser aims to make the lawsuit as long and as expensive as possible, making the abuser judgment proof.

Switching attorneys and going pro per. Switching attorneys allows the white-collar abuser to prolong the litigation. The new attorney, after all, must be given time to "get up to speed." It also allows the abuser to blame any misconduct on the attorney. Conversely, the pro per abuser can blame the misconduct on his/her own ignorance.

Prevalence of perjury. The lies told by professional predators are many and large, and are often presented to the court under penalty of perjury with a boldness that beggars description. While the possibility of a perjury charge might terrify the average litigant, it's just another day at the (home) office for the professional predator. However, experience teaches that judges tend to react negatively when counsel accuses an opposing party of "lying" to the court. Counsel might consider pur-

chasing a thesaurus and studying the various synonyms for the word “lie” so as not to offend the court or those who steal money from old people. (“Fabrication” and “prevarication,” perhaps because they have multiple syllables, have been used with some success.)

Not afraid of judgment. One might think that a defendant facing punitive damages and attorney fees would be eager to settle. This is not the case with the professional predator, who knows that the judgment only signals the end of the first half of the game, and that the second half — the collections process — is where s/he truly excels.

No fear of criminal charges. Since elder abuse is a crime, many wonder why these cases are not handled by the district attorney. The professional predator is aware that prosecutors are overworked and underfunded and often do not have the resources to pursue financially complex cases that may be resolved in civil court. Hence the practitioner should not expect that a criminal case is likely to bring the client any relief.

An example illustrates the difficulties of litigating a case against the professional predator who has mastered the playbook listed above. The author was involved in a case against a defendant who held himself out as a professional trustee. He placed the victim’s assets in an irrevocable “constitutional trust” purportedly governed by the laws of the Turks and Caicos Islands. A private investigator hired to locate the defendant declined the job due to a conflict of interest: in an effort to make himself invisible to future creditors, the defendant had previously hired the investigator to discover as much about the defendant as possible.

Not surprisingly, this defendant avoided service of process. He then filed a motion to quash, followed by two demurrers. He took the Fifth Amendment in response to written discovery and in response to a court-ordered ►

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accounting. He failed to appear for deposition. He lost three motions to compel. He was found guilty of contempt, but the court suspended sentencing. Prior to sentencing, his attorney substituted out of the case and he substituted in *pro per*, whereupon he immediately filed a notice of removal to federal court, depriving the state court of jurisdiction. When the case was remanded, the federal judge noted that removal was untimely (by several months) and there was no basis for federal jurisdiction. A new attorney — from out of state — substituted into the case and promptly filed another notice of removal to federal court. The case was again remanded and the defendant was enjoined from filing any further removal actions. Not lacking energy, this new attorney filed a federal lawsuit against the 87-year-old victim (alleging money laundering) and a federal interpleader action. Both were dismissed. The second attorney then withdrew, but not before communicating various threats purportedly made by the defendant against plaintiff's counsel. On the eve of a hearing for terminating sanctions, the defendant (again acting *pro per*) filed for bankruptcy protection, requiring the plaintiff to obtain relief from the automatic stay. In his bankruptcy schedule, the defendant claimed that he had never been issued a social security number.

In the end, the court issued terminating sanctions and the plaintiff got her money back, but only because an investigator located real estate that the defendant owned in a fictitious name.

Attorneys can better protect their clients from professional predators if they are familiar with these common warning signs. If litigation becomes necessary, counsel should advise clients of what they are facing and prepare them for particularly long and frustrating litigation. ♦

— *Loren Barr is an estate planning, trust & probate certified specialist with Barr & Barr Attorneys in Danville. The firm specializes in elder abuse litigation and estate and trust litigation.*

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What is the cruelest elder scam out there these days?



My 85-year-old client received a phone call and was cajoled into becoming a credit card machine sales person. They faxed her a form to sign for the \$149 sign-up fee. She charged the fee to her Visa card. They then lifted her signature by scan off of the \$149 receipt, and scanned it into three different invoices, totaling 19,000, for marketing materials and various email marketing tools. The bank was contacted, disputing the amounts since invoices were produced with her signature. The stress nearly hospitalized my client as she never remembered signing invoices totaling almost 19,000. The bank declined to reverse the charges, and my client is stuck paying bill.

Guy Chism

Solo, Martinez

There are simply too many to pick just one. However, what makes me the saddest is when I see children of seniors fighting over who will get what, not paying attention to their parents, and waiting for them to die so they can have their money. Too heart-breaking.

Jessica Braverman

Braverman Mediation & Consulting



I think the worst scam is phishing for seniors' bank information and then wiping out their savings.

Rand Stephens

Law Offices of Rand L. Stephens, Inc.



This actually happened to my folks: Ringggg. "Hello." "Hi, Grandma, it's your favorite grandson!" "Oh, Aaron, how are you?" "Actually, I had an accident in a rental car in

Seattle. I need \$5000 to settle with the rental company and I really don't want to tell my dad because he told me to always buy insurance. Could you lend it to me?" "Wow, okay, where do I send it..." It gets sent by Western Union, a confirmation number is all that's needed to pick up the money. This plays on the love and affection between grandparents and grandchildren. It's basically a cold call with a skilled scammer ending up with the \$5,000. Beware!

David A. Brown

Law Office of David A. Brown, Richmond

Is there really any swindle, cheat, scam, rip-off, con, fraud or bilking of elders that, by definition, isn't cruel? Maybe the ones by immediate family members should be deemed more malicious and deserve a higher ring in the inferno than those of strangers, but really, once you make the decision to either harm children or rob from the elderly their dignity and means of support, should not all such acts be treated with the same level of contempt, derision and scorn?

Geoffrey Wm. Steele

Nevin, Ramos & Steele



If you rank them, you're just giving the "less cruel" people government permission to rip off the elderly.

Kurtiss Jacobs

Solo, Concord



The cruelest elder law scam is giving an unsuspecting elder a subprime loan on his or her long-term residence, which is most likely paid off. There's absolutely no excuse for this — it's simply mean, cruel, greedy and criminal.

Magany Abbass

Law Offices of Magany Abbass



Health care reform.

Gary A. Cornwall

Solo, Walnut Creek

The cruelest elder scam is the "sweetheart scam." A young stranger ingratiates him/herself to an elderly person, wins the affections of that person and eventually takes over the elder's financial affairs. The scam typically continues until all of the money is gone. The "sweetheart" then leaves the elder, causing emotional and psychological damage in addition to the financial loss.

S. Samantha Sepehr

JFKU Elder Law Clinic

No increase in Social Security benefits but at least a 10% increase in Medicare premiums.

Wayne V. R. Smith

Attorney-Mediator, Martinez



Collecting from the Deceased

by Margaret M. Hand



What should a creditor do when a debtor dies without paying? Using examples to first illustrate the easy scenario, then progressively more difficult ones, this article outlines strategies for collecting from deceased debtors. It is also a primer for keeping a lawsuit "alive" against a defendant who dies before judgment is rendered.

Many litigators are surprised to learn that a plaintiff cannot recover against a defendant who dies while the action is pending, unless the plaintiff does *all* of the following: 1) files a claim; 2) has the claim rejected by the decedent's personal representative or elects to treat the claim as rejected; and 3) within three months of the rejection, applies to the court for an order substituting the personal representative for the defendant.¹ The one exception to this rule applies to plaintiffs seeking to establish liability within the limits of the decedent's insurance. These plaintiffs may commence or continue the action without joining the personal representative.²

Even more surprising is the fact that judgment creditors must file claims.³ Only creditors who have reduced their judgments to execution liens can escape this rule.⁴

THE LUCKY CREDITOR

Collecting from a deceased debtor is easiest when the debtor's estate is administered in a formal probate under Division 7 of the Probate Code. In a probate, the decedent's "personal representative" is required to send notice of administration to all of the decedent's known or reasonably ascertainable creditors.⁵ The lucky creditor will receive such a notice and need only follow the instructions provided.

The instructions must be followed with haste. There is an absolute one-year statute of limitations on actions to collect

a debt from someone who has died.⁶ The only action that may be commenced outside this period is one seeking to establish the decedent's liability for insured damages within the policy limits.⁷ The section 366.2 one-year statute of limitations cannot be tolled, and it may be extended only by filing a probate creditor's claim,⁸ accepting a trustee's invitation to make a claim,⁹ or petitioning for declaratory relief regarding whether a proposed action would violate a no-contest clause.¹⁰ (Note: the passage of Assembly Bill 759 probably eliminated this third type of extension by repealing Probate Code §21320, the declaratory relief statute.) In addition, the personal representative effectively shortens the already short time for making claims by serving Notice of Administration.

Creditors who receive a Notice of Administration must make their claims before the later of four months after the date that the letters were issued to the personal representative, or 60 days after the date the Notice of Administration was given. [Probate Code §9100.] Claims are barred if not filed in the required manner and within the time provided by Part 4, Division 7 of the Probate Code, beginning with §9000.¹¹ This means creditors must both file their claims with the court and serve them on the personal representative or on one who is later appointed and qualified as the personal representative.¹²

Additionally, the claim must be prepared in the manner required by the Probate Code. The best practice is to prepare a claim that would suffice as a complaint, i.e. a claim stating all the facts and making all the allegations necessary to avoid a demurrer.¹³ If the claim is based on a written instrument, the original should be attached to the filed original claim. If the original instrument cannot be found, the creditor should offer an explanation.¹⁴

NOT TOO LUCKY, NOT TOO BAD

Creditors can sometimes get Notice of Administration not knowing they have a claim because the facts giving rise to the claim are unknown to the creditor. Such a creditor may get a small extension of time to file this claim, but only under rare circumstances.¹⁵

More often, creditors entitled to file claims are not given Notice of Administration. These creditors may simply file a claim provided they do it within four months of the letters being issued. Creditors unable to meet this deadline, however, must petition for permission to file a late claim and be able to allege in the petition certain threshold criteria.¹⁶ These statutes and the cases that interpret them make it quite clear — it is the public policy of this state to promote the speedy administration of decedents' estates. Creditors who delay filing claims do so at their peril.

THE CREDITOR WHO MUST SUE

Even creditors who know they will collect only after suing must file a claim. The proper party to such suits is the decedent's personal representative and a creditor may not bring an action against a decedent's personal representative without first filing a claim.¹⁷

THE UNLUCKY CREDITOR

The unlucky creditor knows nothing except that his/her debtor has died. Perhaps the creditor can learn something from the debtor's family. But unless the creditor learns of the existence of a probate, this creditor will have to make his own luck.

The goal is to get a claim filed and served on a personal representative. The first step is to check with the clerk of the court in the county in which the debtor was domiciled.¹⁸ If a probate has been opened and letters were issued less than four months earlier, the creditor is in luck. This creditor need only prepare, file and serve the claim. If there is no probate opened, the creditor must decide whether to self-petition for the appointment of a special administrator. If the anniversary of the decedent's death is approaching, the creditor should act without delay. Remember, there is an outside time limit of one year for filing claims against a decedent.¹⁹

Seeking the appointment of a special administrator is not the same as petitioning for probate, though one uses the same Judicial Council form. A special administrator may be appointed to perform specific acts and for a limited purpose.²⁰ Creditors who are in a frantic hurry to get someone appointed may nominate themselves,²¹ but a creditor who has a little more time should look for the decedent's will in the Superior Court's Office of the Clerk in the county in which the decedent's estate may be administered. The custodian of an original will must lodge it with the clerk within 30 days of the testator's death. Although this law is often ignored, a custodian who fails to lodge the will is liable for all damages to any person injured by this failure to do so.²² Often, pointing ►

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this out is enough to get the custodian going, so the next place to look for the will is in the hands of the debtor's family members and attorneys. A letter sent to all of them, mentioning Probate Code §8200(c), should suffice.

Searching for the will may take some time, but may also prevent the waste of time later. The person named as executor has the right to appointment as such²³ and has priority of appointment as special administrator.²⁴ If the named executor wishes to serve, petitioning to appoint the creditor as special administrator will just produce opposition. On the other hand, if the nominated executor does not consent to serve; or if the creditor cannot find the will; or if there is no will; or if the creditor simply runs out of time, the creditor should seek to be self-appointed.

If appointed special administrator, the creditor will not have the power to approve or pay his/her own claim.²⁵ But that should not trouble the creditor at this stage. The goal is to get a claim filed before the statute of limitations runs. Worry about payment later.

THE TRULY UNLUCKY CREDITOR

The truly unlucky creditor is the one who must collect what is due from the trustee who administers the deceased debtor's revocable trust. Unlike probate estates (which are "subject to the rights" of creditors and beneficiaries alike²⁶) trust assets are administered by trustees who owe no duties to creditors,²⁷ unless the trust instrument creates such duties. Unlike wills, trust instruments are not made public when the settlor dies. Thus, most creditors never learn whether assets are administered in a trust by someone duty bound to pay debts. And Probate Code §19001(a) creates a false sense of security when it says:

Upon the death of a settlor, the property of the deceased settlor that was subject to the power of revocation at the time of the settlor's death is subject to the claims of creditors of the deceased settlor's estate and to the expenses of administration of the estate to the extent that the deceased settlor's estate is inadequate to satisfy those claims and expenses.

A layperson reading that long sentence would reasonably think trustees should pay debts, but lawyers should recognize the terms of art "claims of creditors" and "expenses of administration" and "estate." These terms are straight out of Division 7 of the Probate Code, the statutes of which govern formal probate administration. As the *Dobler* court explained, once a creditor has obtained a judgment against the personal representative, the creditor may collect from the trustee. In the meantime, the trustee has no duty to the creditor and may distribute assets to the trust beneficiaries. These beneficiaries take subject to distributee liability,²⁸ but no creditor wants to chase beneficiaries in an effort to collect on a claim allowed by the personal representative or perfected in a civil action against the personal representative. Creditors who must collect from a trustee are unlucky, but the truly unlucky must collect from the trust beneficiaries after the trust has been distributed.

To collect from a trustee who does not invite creditors to file claims, the creditor should take the following steps: First, keep in mind that the one-year statute of limitations cannot be tolled and the typical creditor can extend it only by filing a probate creditor's claim.²⁹ Next, file a claim in a probate. The steps for doing this are outlined above. Finally, file a petition under Probate Code §850(a)(3)(C). This section provides creditors the means of enforcing the rights given them by Probate Code §19001(a). *Dobler* suggests the time to file the 850 petition is after a claim is allowed or judgment had, but it's probably not a good idea to wait that long. This author would file an 850 petition along with the creditor's claim. To survive a demurrer, she might also file points and authorities packed with eloquent statements about creditors' rights to payment. *Dobler* notwithstanding, the Court of Appeal must have lauded these rights somewhere. After all, this economy is built on credit and it is still standing. So we can all keep borrowing, the court should make sure creditors can get paid.

— Margaret M. Hand, a certified specialist in estate planning, trust and probate law, is a member of the Executive Committee of the State Bar's Trust and Estates Section and the past editor of its *California Trusts and Estates Quarterly*.

¹Probate Code §9370. Note: there is no parallel provision in Division 9, Part 8, the trust creditor claim sections (commencing with Probate Code §19000), i.e., the plaintiff may not accomplish his objective of maintaining the suit by making a claim against the trustee of the decedent's revocable trust.

²Probate Code §550.

³Probate Code §9300.

⁴Probate Code §§9300, 9303.

⁵Probate Code §9050.

⁶CCP §366.2.

⁷Probate Code §551. If the limitations period otherwise applicable to such an action has not expired at the time of the decedent's death, the action must be brought within one year after the expiration of the otherwise applicable limitations period. *Id.*

⁸CCP §366.2(b)(1), referring to claims made according to Division 7 of the Probate Code (commencing with §9000).

⁹CCP §366.2(b)(2), referring to Division 9 of the Probate Code (commencing with §19000, a procedure trustees may but need not use).

¹⁰CCP §366.2(b)(3), referring to Division 11 of the Probate Code (commencing with §21300).

¹¹Probate Code §9002.

¹²Probate Code §9150 (claims not filed and served are "invalid").

¹³See Probate Code §9151.

¹⁴Probate Code §9152.

¹⁵See Probate Code §9103(a)(2).

¹⁶See Probate Code §9103.

¹⁷Probate Code §9351.

¹⁸Regardless of where a decedent died, if domiciled in California, the proper place of administration is the county in which the decedent was domiciled. Probate Code §7051.

¹⁹CCP §366.2.

²⁰Probate Code §8540.

²¹Of those entitled to appointment as administrators, creditors have nearly the lowest priority [see Probate Code §8461(q)], but the court will appoint a creditor as special administrator, if it is necessary to prevent the running of the statute of limitations.

²²Probate Code §8200(c).

²³Probate Code §8420.

²⁴Probate Code §8541.

²⁵Probate Code §9252.

²⁶Probate Code §7001.

²⁷*Arluk Medical Center Industrial Group, Inc. v. Dobler* (2004) 116 Cal.App.4th 1324 ("Dobler II").

²⁸Probate Code §19400.

²⁹CCP §366.2(b)(1), referring to claims made according to Division 7 of the Probate Code (commencing with §9000).



by Carol M. Langford

Dear Ethics Corner,

I am a lawyer who handles a wide variety of cases: a sort of “jack of all trades,” if you will. I had a client come in who wanted representation in a simple DUI case. I decided to handle it on a flat-fee basis, as I do in many of my other non-criminal matters (e.g. drafting a will or writing a letter in a business dispute case). I charged him a flat fee of \$5,000 through trial (if trial was needed), and designated the flat fee “non-refundable.” The case settled early for a plea of wet reckless, and now the client wants the unused portion of the retainer back. There is no unused portion; it was a flat fee! Plus, the guy had a blood alcohol level over the limit and probably would have lost at trial. This was a good result. Should I give that jerk any money back?

Signed,

Wondering in Walnut Creek

Dear Wondering,

Flat fees are the best thing ever, until you have to deal with chumps who suddenly seem to not understand the fee agreement when they get a good, quick result. A flat fee means that you charge a certain amount of money for either the whole case, or a portion of it, whether it takes you one hour to do the work or 20 hours to do so. I handle a lot of my cases on a flat fee, and I find that much of the time I end up putting in more hours than the flat fee charged, thus ensuring that my “retirement plan” will be to die at my desk. However, I do get cases that I can resolve quickly, which make up for the loss.

You should add a sentence that says words to the effect of: “This flat fee means that even if I work less than \$10,000 worth of time on your case, I still keep the

entire \$10,000.” As long as the \$10,000 flat fee is, in itself, reasonable (i.e. if it is not out of bounds of what an ordinary practitioner would charge as a flat fee for, say, a DUI through trial, then the fee is reasonable, even if you worked only two hours and got it resolved quickly).

You will also need to set an hourly fee rate in the agreement in case you get fired. The client has an absolute right to fire an attorney, and you will have to refund your client the unused portion of the retainer if that occurs. You can include something like: “Lawyer charges at a rate of \$300 an hour if services are terminated before the representation ends.”

Where you made a mistake in your fee agreement is in calling the fee “non-refundable.” No fee is non-refundable; if you get fired, you die, or become disabled and can’t handle your client’s case you will have to return the fee. So in reality there really is no such thing as a “non-refundable” fee. There is such a thing, however, as a “true” retainer, and it is as rare a sight as a yellow-bellied, sap sucking, blue spotted plover. It is earned on receipt and is paid just to have you available for the case. You don’t bill against it; you bill on top of it. So, if you charge the client a true retainer of \$5,000 and an hourly rate of \$500, then after you work 10 hours, you get paid \$5,000—the client does not get a “credit” of \$5,000. A true retainer need never be paid back and you need to do no work to earn it. But it must be designated as such, and is refundable if you become unavailable. See

Matthew v. State Bar (1989) 49 Cal.3d 784 — attorney disciplined for not refunding unearned fees that were designated “non refundable” without discussion of the term, and *Matter of Phillips* (2001) 4 Cal. State Bar Ct. Rptr. 315 — unless a fee is a true retainer, calling it “non-refundable” does not make it so.

Now we come to the bottom line here: Should you refund this ingrate anything considering he got a good result? It is hard to say, as I don’t have your fee agreement with him in front of me (you did not mail a copy to me). But I do think that it is always best to maintain good relations with clients, so why not offer him back \$500 and tell him you stand by your fee agreement and will refund no more. If he still complains, he can take it to fee arbitration, a low-cost and effective way of resolving fee disputes.

— Carol M. Langford is a lawyer specializing in State Bar discipline and ethics matters in Walnut Creek. She is also an adjunct professor of professional responsibility at U.C. Hastings College of the Law.

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(If your question is answered in a future column,
your name/firm name will be omitted.)



FOR ATTORNEYS BEFORE COMMISSIONER GREEN

by Keith Schiller

Contra Costa County attorneys bring a unique perspective to the cinema...

applauding the worldly judge in *Anatomy of a Murder*;¹ excoriating the lack of ethics and weak research skills of Ned Racine (played by William Hurt) in *Body Heat*;² or respecting the gutsy cross-examination of Jack Nicholson's character by Lt. Daniel Kaffee, played by Tom Cruise, in *A Few Good Men*.³

Estate Planning At The Movies® assists attorneys in their communication with clients by reminding professionals and clients that many of the issues of concern may be better appreciated and understood through our collective experiences at the movies. Attorneys appearing before the Probate Court in Contra Costa County have enjoyed the unique experience of responding to Commissioner Don Green. He is well-versed in procedures and law, but also brings a sense of humor in the face of contending counsel and client behavior that can run common sense off the rail.

IS ESTATE TAX REALLY THE TRANSFER TAX OF CONCERN?

Tim Robbins' character provides inaccurate tax advice in *The Shawshank Redemption*,⁴ when he tells a brutal guard to give his inheritance to his wife in order to save estate tax. The guard's concern about estate tax feeds the public's misconception that estate tax is a broad-based tax. After all, if a person of modest means worries about death taxes on a \$35,000 inheritance, who is safe?

Actually, estate tax is irrelevant to most people. Capital gains taxes are more likely the transfer tax of concern.

In 1976, 7.65% of all deaths generated an estate tax return. With an increase in the estate tax exemption equivalent to \$3.5 million in 2009, estate tax arises in about 2 of 1000 deaths. In this setting, attorneys need to re-think what taxes are of concern. At the same time, actions that may have been adverse for estate tax savings actually create an income tax benefit. There is no free lunch. This presents added challenges for the Probate Court, which is faced with the issue of termination or continuation of an irrevocable trust for which the estate tax purpose may have blurred the non-tax reason, if any, for creating the trust.

From a purely tax standpoint, attorneys may need to change their recommendations respecting the use of trusts. For example, consider: 1) using trusts primarily for non-tax purposes if the value of the combined estates is under the estate tax exemption amount, and likely to remain so; 2) allocating growth assets to the non-exempt, survivor's share to enhance the step-up in basis when the surviving spouse dies; and 3) recognizing that there is no free lunch.

The relative estate tax impacts on planning are not lost on Commissioner Green. After all, he taught estate tax law for several years.

TAXES ARE NOT EVERYTHING

*King Lear*⁵ reminds us all that security and control over one's affairs are more important than taxes. After giving away his kingdom to his "loving" daughters, Lear is left broke and pathetic. Given all of the family disputes Commissioner Green has seen by now, he could probably write his own edition of *King Lear* in modern text,

complete with many recitations of the deceptive children taking advantage of the elderly parents.

Ask yourself and your clients, *Why test the point?* Placing ownership of assets in the hands of a child or any third party creates significant risk. Therefore, avoid joint tenancies, giving up legal control of businesses (without receiving contracts or leases to protect income), or making excessive gifts.

BRING OUT THE SKELETONS

Will contests also arise from secrecy

Clients need to be honest with their advisors, respecting their assets and family members. The film, *Australia*,⁶ concludes with an illegitimate pre-teen boy (the son of a wealthy aboriginal mother) who is about to start his walk-about on the road to maturity. The husband, a ranch foreman, will not publicly acknowledge his parenting of the boy (though in modern times, a DNA test would prove the point). Upon the death of the boy's mother by a Japanese bombing raid at the outbreak of World War II, her husband is presumably the heir to her fortune since she had no other surviving family.

As a result, the father of the boy would have become very wealthy. Subsequent to the vesting of his rights, his unacknowledged child and presumptively sole issue would become very wealthy as an omitted heir. Of course, Australian law, at that time, did not recognize omitted heir claims of aboriginal children.

The law of that nation no longer draws distinctions based on race. Even more to the point, a parent-child relation exists in California regardless of marital status.

Unless referenced and excluded by the will, the native child, under modern law, would return from this walk-about as a very wealthy young lad on the death of his “father.”

Taken in the context of modern times and values, lawyers should encourage their clients to be open when undertaking estate planning. Clients need to inform the attorney about inconvenient truths to protect the estate plan, or run the risk of unwanted surprises in the distribution of the estate.

PERSONAL EFFECTS CAN BRING OUT THE WORST

By this time, it should shock no one that Commissioner Green may prefer to have paper plates in his home. After all, he has had to endure too many disputes over dishes, personal effects and just stuff.

Disputes over the possessions can be more intense than division of the investments and real estate. Division of the personal effects can bring out all sorts of jealousies, hidden agendas, greed, or decency and empathy.

In *Gran Torino*,⁷ a bigoted widower and Korean War veteran dies, whose prize possession was a 1972 Gran Torino. His punked-out whining granddaughter covets the car. At the “reading” of the will, she cannot restrain her lust to receive. Alas, her grandfather had other wishes.

At least the granddaughter waited for death before trying to get the car. In *Zorba the Greek*,⁸ the village women begin ransacking the home of an elderly lady while she is alive, but close to death.

These scenes depict the greed or theft in the battle for chattel. Yet, on how many occasions have attorneys witnessed a similarly intended, if more refined execution, of the effort to possess? Encourage clients to detail their wishes.

SELECTING AND REJECTING CLIENTS

Clients may have agendas, expressed or concealed. If the attorney is not ethically focused, he or she can be ensnared in schemes of the client. This is particularly of concern in tax law, although not so limited.

Body Heat and *The Maltese Falcon*⁹ represent opposite ways in which the tempted professional responds to the appeal of the attractive client. The ethically challenged attorney played by William Hurt in *Body Heat* falls for the passion of Kathleen Turner, and ends up in jail.

He would have been better served emulating Sam Spade (played by Humphrey Bogart) in *The Maltese Falcon*. Spade realizes that his beautiful client is guilty of murder. He dismisses her flirting and reports her to the police with classic dialog.

The selection, or rejection, of a client may be the most important action in any practitioner’s practice. *Body Heat* reminds practitioners that it is necessary at times to just say “no.”

MULTI-MARRIAGE FAMILIES

Commissioner Green’s probate calendar has been clogged with post-death marital dissolutions. Of course, one spouse is dead. However, the disputes over the character of property, as between separate and community property, can arise before the coffee pot cools at the funeral reception.

With divorce afflicting one half of all marriages, the dynamics and jealousies within multi-marriage families have become more prevalent. *A Cinderella Story*¹⁰ updates this conflict to a high school setting, involving the control and succession of a coffee shop.

The story ends happily because the surviving child is able to locate a will that protects her rights. Of course, if the will had been left with a trusted third-party advisor in the first place, the child would not have undergone years of emotional abuse and financial loss.

*Cinderella*¹¹ underscores the importance of closely considering the non-tax aspects of estate planning and takes a realistic view of relationships and agendas.

The distribution of the multi-marriage estate places additional stress on estate planning. It is particularly important that trustees be appointed who will protect the plan, that valuations implement real economic division (not simply tax desires), and that estates be divided or trusts used to protect the interests of the loved ones.

Steve Rosenbloom, the Los Angeles Rams’ operations manager, was fired by his step-mother, the oft-wed Georgia Frontiere, following her inheritance upon the drowning death of Carroll Rosenbloom. The widow of Ralph Dale Earnhardt refused to allow her step-son to continue the third-generation family business with NASCAR and use of the sacred stock car #8. Jr. left the family business to drive for a competitor.

To what extent the deceased entrepreneur would spin in his/her grave at the exile of a beloved designated child from the family business is a matter left to speculation. Yet, it is hard to believe that two sons, groomed so carefully in the family business by fathers who died unexpectedly by accident, would have foreseen or accepted these results. Spin or not, such disputes end up in Probate Court, mediation and a variety of hearings and loads of legal fees before they are resolved.

THE LIGHTS COME UP

Hopefully, our cinematic journey will arm local attorneys with humorous or poignant references that may ease tensions and fears of the client. These references may encourage the client to move forward with their estate or business succession planning, and enhance the position of the attorney as the trusted advisor. They may also lend sympathy for the types of issues that Probate Courts must consider.

— For further information on the activities of Keith Schiller in relation to Estate Planning At The Movies® or to book a presentation of Estate Planning At The Movies® visit www.EstatePlanningAtTheMovies.com. (Keith Schiller, Schiller Law Group, Orinda, CA. ©November 2009. All rights reserved.)

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Pro Bono Spotlight



by Nicole Mills

Center for Human Development Elder Mediation Panel

Changing Lives, Transforming Communities. Those are some lofty goals. They are also the slogan for the Center for Human Development. • Sitting at the edge of a business park in Pleasant Hill, the Center for Human Development's Conflict Resolution Program has changed lives and transformed the community for over two decades by providing free or low-cost mediation services. Within the last two years, the Center has created a special panel of mediators specifically trained in elder mediation. I sat down with David Harcos, Program Coordinator, and attorney Barbara Proctor, Program Director, to learn more about this program.

Can you tell me a little about the Center's Conflict Resolution Program?

Our philosophy is centered on the basic premise that people are capable of resolving their own disputes, and that doing so leads to a better result than involving the court system. However, when communication breaks down between disputing individuals or groups, the situation can escalate, often leading to expensive legal action or even violence. The Conflict Resolution Program provides trained, volunteer mediators who can diffuse anger and help both parties reach a win-win resolution at a fraction of the cost of legal services.

While there can be a nominal fee to help defray the costs of the Center, it is very small and nobody is ever turned away because they cannot afford mediation.

In addition to elder mediations, the Center handles a variety of community-based mediations, which include family/

domestic, business, and neighborhood disputes; and guardianship mediations referred directly from the Probate Court.

Barbara, why did the Center decide to start a panel of elder mediators?

While writing a grant for the John Muir Foundation, I conducted research on the future of the aging population in Contra Costa County. Not surprisingly, reports predicted that the number of older residents would outpace the resources. Many cities and agencies responded with new, innovative plans for delivering services that allow seniors to stay in their homes. I felt this was a perfect time to reinvigorate a program that we had begun in the early 2000s, "*Family Transition Mediation*." We canvassed our volunteer mediators about this new endeavor and the response was overwhelming. Since we began this program, we have received tremendous

support from county agencies that are working with the aging population—there is real cooperation among the organizations, with encouragement and sharing of resources.

As we saw an increase in the number of mediations involving elderly participants, we began to truly appreciate that mediating with elderly participants really does require a different skill set — one we have set out to develop more fully in our mediators with our advanced elder mediation training.

While, in some instances, we have been able to make significant breakthroughs and heal families, in others we work to provide a new set of ground rules for moving forward.

One success story involved a woman who lived in the home of her ailing mother, taking care of her for many years. As the mother's health declined, conflicts with



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her daughter escalated. The other siblings had a plan for their mother and estranged sister but communication was so flawed that there was no hope short of legal action to evict the caregiver. In mediation, each side came to see the other's difficulties and communication resumed. The family agreed on a plan that enabled the mother and daughter to resolve their issues and live together with mutual respect and understanding. In another instance, we mediated between two 84-year old women who each had taken a punch at the other and now had restraining orders. Once they heard of mediation, they realized that was the better avenue to take and we were able to help them resolve their issues without dragging each other into court.

What are some of the unique issues raised by mediating with seniors?

There are many issues a mediator must be sensitive to when dealing with elderly participants. Probably the most commonly encountered are issues relating to the capacity of the senior. Our panel members are trained to be aware of issues relating to mental capacity — dementia, inability to follow the conversation, inability to recall pertinent facts, etc.

We encourage our panel members to honor the capacity that is present. A determination of decreased capacity is not the same as a determination of no capacity. Sometimes it can even be situational mediations scheduled in the mornings and for shorter time periods (two to three hours) can allow some people to participate

at the time of day they are clearest, rather than late in the day when they may not be capable of participating. Of course, it is not always that simple but, whenever possible, we encourage participation to the extent of each person's abilities.

What kind of training do you provide to or require of your panel?

In addition to the basic mediation training required of all mediators, our volunteers are required to take part in mediations as an observer before serving as a mediator.

To be a member of the elder mediation panel, we also require that a mediator take part in specialized training in elder mediation. We just had a two-day training for our elder mediators, for example, that focused on issues including capacity (both mental and physical) and screening for abuse (physical, emotional or financial). We also have a screening tool used during the intake process, which is also given to our mediators to make them more aware of indications of the various forms of abuse.

Additionally, we are sponsoring a series of talks focusing on issues of elder mediation. Virginia George, an adjunct faculty member and Director of the Elder Law Clinic at JFK, was our first speaker. She spoke for about two hours about financial abuse of an elder and the advantages of using mediation in these situations instead of going to the criminal system. Our second speaker was Judge Joyce Cram, who presides over the Elder Court for Contra Costa County. We anticipate having at least two more speakers over the coming months.

How many elder mediations does the Center typically handle?

We typically do intake on four or five elder mediations a month, in addition to all the other mediations we do, but will schedule, on average, one or two actual elder mediations per month. We would love to do more. In fact, a newly-formed outreach team has contacted each senior center in Contra Costa and has begun scheduling presentations to be given at each center. This is a unique and important component that will reach seniors where they congregate. However, as you know, the process is completely voluntary and, unlike our guardianship cases (which are referred by the Probate Court), most of our elder mediations are not coming by way of court or even attorney referral. Consequently, many times the second party to the mediation simply will not agree to attend.

To the attorneys out there, we would encourage you to discuss mediation with your elderly clients as an alternative to the legal system.

For those who would like to volunteer as mediators, how can they learn more about your program?

To learn more, please feel free to explore our website: www.chd-prevention.org or call Barbara Proctor, Program Director, or David Harcos, Program Coordinator, at 925.687.8844. ♦

— Nicole Mills is a mediator specializing in elder and civil mediations and is a member of the Center's Elder Mediation Panel.

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Law Offices of David M. Lederman	15
Mechanics Bank	12
Mullin Law Firm	9
Mark V. Murphy	9
Pedder, Hesseltine, Walker & Toth, LLP	20, 22
Scott Valley Bank	11
West	2
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