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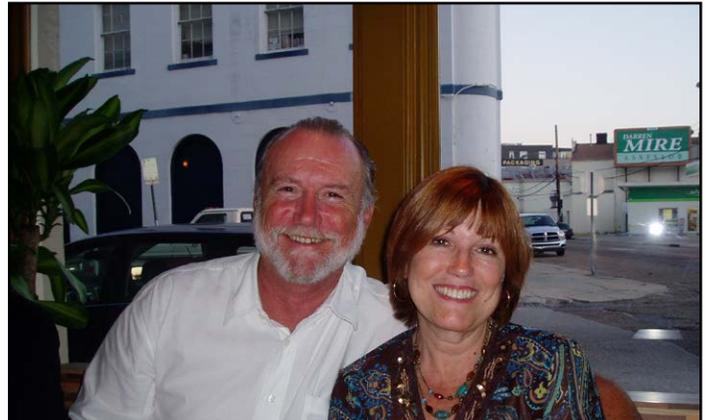
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Jim King with his wife, Mari, on vacation in New Orleans

planning future seminars on the intersection between taxes and bankruptcy, chapter 13 issues and the Bankruptcy Appellate Panel. In addition, preparations are underway for the Second Annual James T. King Bankruptcy Symposium which this year will be called “Dear Congress,” which we hope will include Professor Katherine Porter, Judge Lundin, Judge Jury and Jonathan Hayes. Finally, we are looking forward to the Calvin Ashland Award Dinner scheduled for November 5, 2015 which will honor our dear friend James T. King.

As you are all aware, the Board of Judges voted in favor of our proposal to increase the Chapter 13 RARA fees. The fee increases went into effect on March 23, 2015. The fee for non-business cases has increased to \$5,000. The fee for business cases has increased to \$6,000. Please remember that you may still agree with you client to bill at your hourly rate in accordance with 11 U.S.C. Section 330 instead of filing a RARA. I encourage attorneys to select cases to bill at the hourly rate in order to keep the chapter 13 trustees and judges abreast of the cost and time involved in preparing and prosecuting chapter 13 cases from retainer to confirmation. Otherwise, trustees and judges will have no choice but to assume that the RARA fee is presumptively reasonable and it may take another nine years to see an increase in the RARA fee.

The Board of Directors is working to provide our

From the President

By: Nancy B. Clark

nbc@blclaw.com

Dear Members:

We have had a strong start in 2015. The Ninth Annual Ninth Circuit review was very successful as always. Our Litigating with HOA and Unscheduled Lawsuit seminars were illuminating and educational. Our next seminar will be on Reaffirmations and Redemptions and is scheduled for May 16, 2015. Our panel will include Judge Zurzolo, Christian Cooper and myself. We are also

members with a full day seminar on litigation. Our goal is to provide an intensive practicum on specific aspects of litigation including discovery, motions, pretrial stipulations and trial. We will provide more information on the details of this seminar in the future. Additionally, this edition of the Newsletter includes an article for MCLE credit open to all attorneys. All you have to do is read the article, answer the questions regarding the information provided in the article and mail your answers with a check made out to CDCBAA. We will email the answer key to you along with a certificate for one hour of MCLE credit. If this experiment is successful we hope to bring you more MCLE credit articles in the future.

As always, the CDCBAA's goal is to provide our members and our community with quality continuing legal education. You may now help support our efforts by sending a tax deductible donation. We thank you for your continued support.

Sincerely,
Nancy B. Clark
CDCBAA President 

The Legacy of James T. King: The Art of Giving

By: Michael Gouveia
mgo29@att.net

On April 16, 2015, the cdcbaa and Public Counsel held an unprecedented event to honor our friend and colleague, James Thomas King in the Courtroom of the Honorable Judge Robert Kwan in the Roybal Federal Building. As you are aware, Jim passed away on February 9, 2015 after a long battle with prostate cancer. This is the first time ever in the history of our Bankruptcy Court in the Central District of California that an event has been held in the courthouse itself to honor one individual person. In attendance were over 60 friends and cdcbaa and DAP colleagues, Jim's wife Mari and his family, and 7 Bankruptcy Judges. Cdcbaa's Sargeant-at-Arms, Dennis McGoldrick served as the Master of Ceremonies and provided many stories and anecdotes that he had with Jim over the years.

"Jim had a special way with people. One year he sent me a birthday card with a \$2.00 bill inside. I did not know

how he found out about my birthday, but that was such a nice gesture. Then every year thereafter he sent me a birthday card with a \$2.00 bill and I looked forward to his gift." Dennis described how at the first Calvin Ashland Dinner, Jim had the idea to honor Judge Ashland by wearing a bow tie and he invited the cdcbaa board to do the same. Shortly before the event a box arrived at my office and it was a box tie sent by Jim. He had sent bow ties to all the board members. I spent two days learning how to tie a bow tie. Finally I learned how to do it and wore it to the event. And to this day I wear bow ties due to the generosity of Jim King."

DENNIS THEN INVITED THE BANKRUPTCY JUDGES PRESENT TO TALK ABOUT JIM.

"I met Jim at Public Counsel and presented him an award. Jim was instrumental in establishing the self help desk in San Fernando Valley. Often he would fill in when no one was there to man the desk. We will all miss Jim King."

HON. THOMAS DONOVAN

"I did not know Jim well, but I remember his smile and his warmth. Jim's face could light up a room. He once told me that "a stranger was just a friend that he had not met yet."

I will remember Jim for his smile and a pleasure to be around. Jim was a person who grabbed life and held on. He set an example for us all".

HON. CHIEF JUDGE SHERI BLUEBOND

"Jim helped us remember that the Courthouse belonged to all citizens. Jim helped everyone in our community. Jim was a true mensch. Many people talk about doing the right thing. Jim did the right thing.

HON. VINCENT P. ZURZOLO

"The cdcbaa asked me to say a few words of remembrance of Jim King, our colleague and friend, who passed away on February 9th. I knew Jim, or Rabbi Jimmy, as Jeff Hagen calls him, for about 10 years.

Sandra Brown asked me to handle a bankruptcy tax matter where Jim was the opposing counsel. She said he was a really nice guy, and she was right. We worked the

matter out. In my early years on the bench, I got to know Jim as a fellow Inn instigator.

Last year we named the Inn after Jim. We had organized the Inn in 2007. Usually the Inn are named after Judges like Peter Elliot or Warren Ferguson for example. For some reason we did not pick out a name when we formed the Inn.

During our early meetings, someone suggested Judge Ashland? However we had a dinner named after him. Someone said how about Judge X. "Noooo, he is a creditors Judge!" We could not agree on a Judge so we left the name of the Inn open for years and we just called it the Southern California Bankruptcy Inn of Court. Now our Inn is called the James T. King American Inn of Court.

Meanwhile, I got to know Jim a lot better and he invited me to cdcbaa meetings and St. Patrick's Day celebrations at Casa King.

I learned that Jim has a

big Irish family, and that was probably the secret of his success or charm. Whatever Jim did, he treated you like family. Maybe it was his paradigm in life, like cdcbaa or the Inn, was the Irish family.

Jim was a leader of the bankruptcy bar and he led by example. Jim was always thinking about how to give back to the bar and give back to the community. He was always bringing people together to help them think of how to better the profession and the community. It wasn't just talk, but backed by action.

Whether cdcbaa, the Inn, Debtor Assistance Project, or Court Bar Liaison Committee, Jim was there when necessary. Whether emceeding at an event, conducting an auction for the Hagen Golf Tournament, or making a bid, training new lawyers on Chapter 7 for Public Counsel, giving input on bench bar committees like the Chapter 13 RARA, or being a volunteer mentor for

James T King

1948 - 2015

You will be missed.



a disciplined attorney regarding law practice management, Jim did it. But he stepped back to allow others to come into leadership and the limelight. Jim motivated everyone to do good.

Why then is the Inn named after Jim? In October 2014, Jim spoke to us about what the Inn meant to him. He said he always wanted something like the Inn which he did not have when he started off as a lawyer. The Inn is a place for bankruptcy lawyers, particularly new lawyers, to get together with judges to learn the law, learn the practice of law and to learn how to get along better.

In the 10 years I got to know Jim, I admired his dedication to the bar, the community and his family. He did so much and he did them so well. He had a great practice, had a wonderful family and many friends and did a lot for the bar and the community. It was a wonderful life. What better person than Jim to name the Inn because his life is an inspiration, a lesson for all of us on how to do good for the bar, for the community and for ourselves.

I told Jim that we would do well to follow his example of enthusiasm and grace in all things and carry on the work of the Inn which so much he loved being part of.

There is little that can be said to ease your grief now (Jim's wife Mari and his family and his friends)---but I hope it helps to know that your loved one touched many lives and will always be remembered with love.

HON. ROBERT N. KWAN

Dennis asked Nancy Clark, cdcbaa 's president to say a few words:

"It has been over two months since Jim's passing and his absence is tangible. Every board meeting, every committee meeting I take part in I feel the loss. He cared so much about this community. He knew everybody and everybody liked him. Someone came up to me after his passing and said, "I'll never be remembered like he will be." At first, I thought that was a strange thing to say but the more I thought about it-I understood. Most of us want to be remembered after we are gone. We hope that our life had some meaning and that the sum of who we were made an impression, made a difference. Having one person be sorry we are gone, remember us, miss us, love us is the most we hope for. Life is so complicated to be more to more people.

Only a few people have the energy to make a positive impact on many. Jim was one of those people. Being decent

cdcbaa

Central District of California Bankruptcy
Attorneys' Association

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and friendly and available and supportive and hard working and enthusiastic seemed to come easily to him. I felt silly crying at his wake after so many of his friends and family spoke about him in far more intimate contexts. I knew Jim mostly as a colleague. I was fortunate enough to be invited to baseball games and Saint Patrick's day parties as many here have. I was not family or a life long dear friend-but I cried anyway. Because he was such a nice man who noticed me; liked me; let me know I mattered and that my contributions to this community made a difference. And I think that was Jim's greatest gift.

This extremely special man made us all feel we were special too. He gave more than he ever took. So, I would just like to say to Jim, you were noticed, you made an impression, your life had meaning, your legacy lives on and you made a difference. We all miss you very much. Godspeed."

NANCY CLARK

OTHERS IN THE ROOM TO SHARED MEMORIES OF JIM:

"Two years ago, I was a member of the Inns of Court with Jim and he did not attend a meeting. I asked his long time assistant Cynthia where he was? Cynthia said "That he was on a vacation trip with his twelve year old grandson for a week".

The next time I saw Jim was at the Golf Tournament that year and I asked him about it. He said that he did that with each of his grandchildren. He would ask the child what he or she would like to do and then they would set out to do it for a week.

One year he went to Broadway and watched shows

because the child loved the theater. Another year with a different child he went to different baseball parks around the country. Jim said it was something that his Grandfather had done for him and now he was passing it on to the next generation.

He said his grandchildren loved going away with Grandpa for a week and it created a lifetime memory for them. I told Jim I was going to borrow his idea when my children had kids.

Jim, your legacy will live on. Thank you Jim for all you have done for me and for many people you have touched in your professional and personal life".

MIKE GOUVEIA

"Jim always made me feel welcome. Jim was giving in his time and energy to me as new lawyer. One of the last times I saw him, he said to me "Make sure you help out the organization and volunteer when you can."

CHERYL DEPTOWICZ-DIAZ

Jim was a worthy opponent. He took me under his wing. Jim taught me that bankruptcy is a collective process. We are working for a solution. I am forever grateful to Jim.

WES AVERY

SOME PEOPLE CHOSE TO WRITE ABOUT JIM KING:

" Mr. King was more than just my boss, he was my mentor and someone who in a very nonchalant way was able to make me feel confident about my knowledge and ability to practice in the area of Bankruptcy law. He approached each case with easiness and smile on his face. Like an artist who breathes life into a painting, he breathed life into a case. What an extraordinary man.

I remember coming back from a hearing on one of my first adversary proceedings, and I already knew that I said too much. By the time I got from downtown to the office in Glendale he already knew what took place and what I said. He looked at me with his kind eyes, smiled and told me "Kiddo, one of the most important lesson in litigation is knowing when to pick your battles." I remember that Mr. King and try to follow it every time.

Every day I am grateful to him for taking a chance on me. He goes on living in my heart and I am forever thankful for having an opportunity to meet him, and to call



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him my mentor and friend. Rest in peace, we shall meet again.”

REGINA ZETLSER

“You recall that in my blast to the bankruptcy community about Rabbi Jimmy’s passing, I commented that on those numerous occasions where I found myself at continuing education programs, functions or meetings with Jim, I always hoped that I’d get to sit next to him, or at least at his table, as I was always certain to hear the most entertaining stories.

From the “If you work in this industry long enough, you’ll eventually witness just about anything and everything” file, one of the better ones had to be the time Rabbi Jimmy told me about a meeting he had with a client that, despite being able-bodied and ostensibly capable, hadn’t worked in over five years and had burned through his savings and his retirement.

When Rabbi Jimmy asked the client why he hadn’t been able to find work for so many years, the client’s response was that he had plenty of opportunities to work, but had been so convinced reading internet blogs and treatises that the world was going to end on 12/21/2012 as arguably predicted by the ancient Mayans and other cultures, that he just didn’t see the point in working. Classic.”

JEFF HAGEN

One of the last speakers was Maggie Bordeaux who summed up what Jim King meant to her personally and to the cdcbaa and to the greater bankruptcy community.

“This is a bittersweet day as remember Jim King and it is hard to believe it has been two months since he passed.

I remember that Jim welcomed Public Counsel into his family” He took clients, he mentored new attorneys and volunteered in the Public Counsel program. Jim was a dear friend to me.

*“Ever since the world’s existed
There’s one thing that is certain
There are those who build walls
And those who open doors”*

-Jackson Browne “Walls and Doors”

Jim opened doors for new attorneys and we should all live by his example and continue to give back to the community.”

MAGGIE BORDEAUX

Dennis then concluded the celebration and invited the guests to enjoy the rest of the evening in Jim King’s memory.

The cdcbaa would like to thank the Honorable Judge Kwan and his staff and the Court Services team for letting us use his Courtroom. Thank you to Chief Judge Sheri Bluebond and Kathy Campbell, the Clerk of the Court.

A big thank also goes out to Keith Higginbotham for coordinating the event and for Nancy Clark, Roksana Moradi, Sylvia Lew, Christine Kingston and Pedro Mayer for making the celebration come together. A special thank you to Maggie Bordeaux and Christian Cooper whose advice and support was critical to the success of the event. And thank you Dennis McGoldrick for being our master of ceremonies. 🙏

Interview with Judge Catherine Bauer

By: Christine Kingston
attorneychristine@gmail.com

The Honorable Catherine Bauer sits on the United States Bankruptcy Court, Central District of California in Santa Ana.

I. TELL ME A LITTLE BIT ABOUT YOUR LEGAL CAREER BEFORE YOU TOOK THE BENCH.

I worked for Bank of America’s Office of General Counsel for sixteen years. I started learning about student loans while at Bank of America. Then, I worked for the United States Attorney’s Office for nine years representing large creditors. I can tell you that there are more laws on the side of the government, for sure.

When I took the bench five years ago in Riverside Division, I inherited 4,000 cases out the gate. These were tough cases, with much to do about mortgage problems. There were very few adversary proceedings at the time. Now, we are past the recession, and I see more adversaries and more expensive homes.

2. SINCE YOUR TIME ON THE BENCH, CAN YOU THINK BACK ON A PARTICULARLY LARGE OR INTERESTING CASES THAT YOU PRESIDED OVER.

Unfortunately, there is not one case that stands out in my mind. I can say that the larger cases usually have more experienced lawyers and are well thought out prior to filing.

I do enjoy the consumer cases. I like issues that bring in the human elements from a view of the underlying purpose of the Code, when there is no case law. A particularly interesting issue along this line would be determining household size in a Chapter 13 case.

3. WHAT WOULD YOU SAY YOU SPEND MOST OF YOUR TIME ON THE BENCH DOING? WHAT KINDS OF CASES ARE YOU SPENDING YOUR TIME PRESIDING OVER?

7, 11, 13 and adversaries: How much time is spent calendaring. Calendar management is challenging because of handling quite a mix of cases including trials and courtroom management. You learn under fire.

4. WHAT IS YOUR BEST ADVICE TO THE BAR ON HANDLING BANKRUPTCY MATTERS?

Consumer bar is different from commercial bar. Join a group like CDCBAA and have a mentor when you are first starting out. It is a lot of work for the bench to work with the new lawyers. I would support a sanction of attorneys which would require them to join groups like CDCBAA and take CLE courses. Also, do not blame your secretary. Do not go there. They are foreigners and it does not work either.

Understand that there is only one Bankruptcy Code. Know about fraud, hijackings and BPPs throwing debtors into multiple bankruptcies and be aware of cases where homeowners with large homes who have a sense of entitlement file with the husband filing first, then the wife. When the judge wants the client to attend the hearing, know that the judge will back up the lawyer and will explain to the debtor that the budget will fail. The judge

The Ten Must Haves/Knows of Being a Great Consumer Bankruptcy Attorney

- 1) Know Your Judge: Every judge in the Central District of California lists the judge's individual preferences on the court's website. Look at cacb.uscourts.gov.
- 2) Know the Local Rules: It is critical to familiarize yourself with the local rules. Every year you should endeavor to review the local rules. I find that every time I do, I find myself not only acquainting myself with the new rules but it triggers a review of the Federal Bankruptcy Procedures Rules.
- 3) Read the Court Manual: It is important that you read the Court Manual to understand the nuances of the local rules.
- 4) Check the Court's Tentative Rulings: The Tentative Rulings are usually published after 4:00 pm the day before the scheduled hearing. These are not only a great resource for the Judges' thoughts on your case but they are collectively a great way to learn about the judge and how she or he may rule on particular matters. In addition, they are a great source for sample motions, responses, oppositions, replies, applications, etc.
- 5) Look Out for Fliers regarding Brown Bag Seminars held at the Court: Brown Bag Lunches usually are conducted by members of the court or trustees' staff. These seminars are free and give you an opportunity to meet members of the court or trustees offices in a more casual setting.
- 6) Download the free application for Tentative Rulings: For those of us tied to our smart phones, the Court has provided a convenient application.
- 7) Check out the Chapter 13 Trustee's websites: Each Chapter 13 Trustee has their own website with valuable information regarding your client's case. Some Trustees provide a portal to upload documents.
- 8) Join a Consumer Bar Organization: Of course, I am partial to the CDCBAA as we provide you with a listserv, 8 two hour seminars a year and the Calvin Ashland Award Dinner but there is more than one bankruptcy bar to choose from.
- 9) Attend Court Hearings and 341(a)'s: Some of you retain appearance attorneys, who are very good at representing you and your clients at hearings, but you should make an effort to attend those hearings periodically to better understand how hearings are conducted and what is required of debtors and attorneys. In addition, it is an opportunity for the court or trustee to put a face to the name.
- 10) Join a Consumer Bankruptcy Listserv: Listservs are a great research tool. They are a starting point for research on a particular subject and an opportunity to learn from the questions and issues that other bankruptcy attorneys are facing.

By: Nancy Clark

will talk to the debtors to help them understand.

5. WHAT ARE SOME OF THE FUNNIEST/DUMBEST THINGS YOU SEE THAT YOU CAN TALK ABOUT SUCH AS MISTAKES THAT ATTORNEYS MAKE AND PARTICULAR HEARINGS?

During a trial when the debtor was on the stand, I was typing notes to stay awake. I was not paying too much attention when the debtor said, "...and then I was arrested for prostitution." It took me about 15 minutes to get control. I probably should have taken a short recess to go into the hall and laugh. The debtor was a massage therapist.

During a reaffirmation hearing when the judge was explaining reaffirmations, the Debtor came up and raised his arms, then said: Oh great and wise judge....please say NO!"

When I was trying to continue a matter, the lawyer said to me: "my baby is due that week can we make it the next month because I really want to keep this wife."

A comment to me: "Yes Dear."

6. WHAT DO YOU PREFER TO WEAR UNDER YOUR ROBE?

Unless I have a meeting, it is jeans and flip flops!

7. HAVE YOU EVER TAKEN A ZUMBA CLASS WITH JUDGE SMITH?

Yes I have!

8. WHAT WOULD YOUR ADVICE BE FOR SOMEONE WANTING TO BE A BANKRUPTCY JUDGE?

Other judges have their niche backgrounds and they will seek information from their colleagues on a consult basis. They offer resources to each other and pick each other's brains.

More than anything you must guard your reputation. You can get another client, but you can lose your reputation in a minute.

9. WHAT HAS SURPRISED YOU ABOUT MOVING FROM RIVERSIDE TO SANTA ANA BENCH?

A rather disparate culture shock: from humility to a sense of entitlement. Debtors asking for fee waivers to stop a foreclosure on a multi-million dollar home in Laguna Niguel. A debtor argued that she was discriminating against him because he lives in Laguna Niguel. Another debtor drove her hummer to court and wanted a fee waiver. Yet, another argued that she needed 2 Mercedes cars to split the mileage and stating that that it is what smart people do.

In another case, where the net monthly income was negative, the Judge stated to the debtor that she could help

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Pat Green with Desmond Hayes

You do not have to be a Board Member to join a committee. If you are interested in joining a committee, please contact the Chairman. Your participation will be welcome.

Newsletter Layout by Desmond Hayes: dh@desmondhayes.com

with his debt, but she could not help him with his income. The debtor responded with “Well, that’s disappointing.”

10. WHAT IS YOUR SUPER POWER AND WHY?

I am a cat whisperer. Cats love my voice. I have two cats at home: an old one and a kitten.

Many thanks to the Judge for her time in giving this interview. 

Revenge of the Client

By: Christine Kingston
attorneychristine@gmail.com

It is just another average day in the office when walks in one of the Real Housewives’ husbands to file for bankruptcy. You innocently give the husband your usual consultation and after that, he hires you to represent both himself and his wife. After the case is filed, you as the attorney become aware of errors and file amendments on behalf of the clients.

While the bankruptcy case is pending, your clients become the subject of an investigation for fraud. They later enter a plea deal and both end up serving time. Then, as if that was not interesting enough, you are slapped with a malpractice lawsuit. The Teresa Guidice malpractice suit against her former bankruptcy attorney, while probably lacking in merit, is still nothing to sneeze at and could happen to any practitioner.

The suit alleges that the attorney never met with the wife prior to filing the bankruptcy case and never even spoke with the wife. Also alleged is bankruptcy counsel’s failure to perform a reasonable investigation concerning the debtors’ petition, schedules and statement of financial affairs. There were numerous problems with the petition, schedules and statement of financial affairs as filed by the attorney, including, but not limited to: (a) the failure to list the debtors’ employment; (b) failure to list debtor’s income from her employment; (c) failure to identify any automobiles owned or leased at the time of filing; (d) failure to identify certain business interests; (e) failure to list income from rental property; and (f) failure to list certain bank accounts. The suit claims the amendments were negligently prepared because they did not cure all of the numerous problems as well as that the attorney negligently represented the debtors’ at both the Section 341(a) meeting and subsequent Rule 2004 examination.

cdcbaa Upcoming Calendar

June 20, 2015

Intersection of Tax Law and Bankruptcy

November 5, 2015

Calvin Ashland Awards Dinner

Meetings to be held at Southwestern Law School.

Please check www.bklawyers.org for up to date MCLE meeting information.

11 U.S.C. §707(b)(4)(C) provides, “The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and (ii) determined it is well grounded in fact; and (iii) warranted by existing law . . .”

11 U.S.C. §707(b)(4)(D) provides, “The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.”

The elements of a legal malpractice suit require that the Plaintiff must prove he or she would have won the underlying case, but for the attorney’s negligence in handling the matter. In spite of the high standards to prove a legal malpractice case, the following will focus on what, if anything, the average bankruptcy attorney can do to protect their practice.

1. Personally meet with your clients.
2. Know why they are seeking to file bankruptcy.
3. Review the documents with your client before filing them with the court and be sure your client understands

they are signing their bankruptcy documents under penalty of perjury.

4. Do not get tangled up with the wrong clients! You know, those that want to hide a Ferrari in your garage, or want to commit bankruptcy fraud.

5. Know the rules and protect your reputation. It takes a lifetime to earn your reputation and one case to ruin it.

6. Do your Due Diligence; do not just take your client's word.

A great practice point also would be to closely manage your client's experience and have personal knowledge and a personal relationship with each client. Be sure to stay current on changes to bankruptcy law and practice in our local courts by joining and reaching out to colleagues through the Central District Consumer Bankruptcy Attorney Association. 

Attorney Kingston practices in Huntington Beach representing clients in Chapter 7 and 13 bankruptcy cases as well as adversary proceedings. Her practice also includes post-discharge cases involving the Fair Debt Collection Practices Act and Fair Credit Reporting Act claims. Also a student loan lawyer, Ms. Kingston takes student loan bankruptcy adversary cases; and private student loan collection defense cases in state court on behalf of consumers only. She was lead counsel in *In re Schaffer*; 2:11-ap-01878-RN where the court discharged student loans under Undue Hardship Test

Why FRBP 3002.1 is Important to Debtors in Chapter 13

By: Nancy B. Clark
nbc@blclaw.com

EARN ONE HOUR OF MCLE CREDIT FOR SPECIALIZATION AS WELL AS GENERAL EDUCATION. RESPONSE SHEET ON PAGE 9.

On December 1, 2011, Federal Rule of Bankruptcy Procedure 3002.1 entitled *Notice Relating to Claims Secured by Security Interest in the Debtor* went into effect. This rule requires claimants that are "secured by a security interest in the debtor's principal residence"¹ who are "provided for under Section 1322(b)(5) of the Code in debtor's plan"² to provide notice of mortgage payment changes³ and notice of fees, expenses, and charges⁴ related to the underlying secured claim. The purpose of providing notice is to alert the debtor, debtor's attorney and the chapter 13 trustee of additional charges related to mortgage loans and homeowner's association fees during the chapter 13 plan term. By providing such notices, the debtor, debtor's attorney and the trustee may object to or provide

Support the *cdcbaa*

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We thank you for helping us make a difference. Your ongoing support and commitment are invaluable.

for those fees, expenses and charges during the chapter 13 plan term. *In re Carr*, 468 B.R. 806, 808 (Bankr.E.D.Va. 2012). Thus, ensuring debtors a fresh start upon discharge.

Prior to enactment of Rule 3002.1, it was not unusual for debtors to find themselves in foreclosure after receiving a discharge of their chapter 13 bankruptcy. *In re Herrera*, 422 B.R. 698, 712 (BAP 9th Cir. 2010). Secured creditors were reticent to provide debtors with notice of any escrow changes, mortgage payment changes, or notice of additional fees, expenses and charges accrued and added to the underlying loan during the chapter 13 plan term for fear of being found to be in violation of the automatic stay. FRBP 3002.1 requires secured creditors with a security interest in debtors' residences to provide debtors with appropriate notices without fear of being sued for stay violations. *In re Bodrick*, 498 B.R. 793, 800 (Bankr. N.D. Ohio 2013)⁵.

DETERMINATION OF FEES, EXPENSES AND CHARGES DURING THE BANKRUPTCY

FRBP 3002.1(c) states:

The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in

connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

The debtor, debtor's counsel and the trustee must review these notices to make certain that the fees, expenses and charges are actually being noticed within 180 days of being incurred, and are recoverable against the debtor or the residence. Most notes include provisions which allow for lenders to charge borrowers any reasonable attorney's fees, costs and charges related to protecting the lender's interest in the real property.⁶ Therefore, it is not unusual for residential secured creditors to file a Notice of Postpetition Fee, Expense and Cost adding attorney's fees for reviewing the chapter 13 plan, or preparing the proof of claim, or for fees related to a Motion for Relief from

Stay, or fees related to an Objection to Chapter 13 Plan Confirmation.

FRBP 3002.1(e) provides a recourse for the debtor, debtor's attorney, and the trustee to challenge the notice of additional fees, expenses and charges.⁷ FRBP 3002.1(e) states:

On motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

Debtor's attorney and the trustee should examine these added attorney's fees, expenses and charges with an eye toward necessity and reasonableness (i.e., was the preparation of the proof of claim ministerial; did it require the services of an attorney; could it have been prepared by an account specialist at a more reasonable fee; etc.). In addition, the debtor's attorney and trustee need to determine whether or not the fee, expense or charge was necessary to protect the interest of the secured creditors (e.g., is a property inspection fee necessary when the debtor has resumed making mortgage payments). Finally, the debtor's attorney and the trustee must review these notices with an eye toward: (1) duplication of fees (e.g., were the fees for preparing the proof of claim and reviewing the plan already included in the proof of claim); (2) the date the fee was incurred; (3) possible future Motions for Relief from Stay; and (4) issues that may arise at the time of discharge.

PROCEDURES AND REMEDIES UNDER FRBP 3002.1 PRIOR TO DISCHARGE

FRBP 3002.1(f) states:

Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

In the Central District of California, most of the trustees have been filing the notice required under FRBP 3002.1(f). Should the trustee fail to file such a notice,

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the debtor or debtor's counsel may file the notice stating that the default has been cured and all payments required under the plan have been made. The filing of this notice at the conclusion of debtor's chapter 13 plan term triggers subdivision 3002.1(g), which states:

Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

Subdivision (g) of the rule requires secured creditors to acknowledge whether or not the debtor is fully current with payments. And if not current, it must file a statement that **itemizes** the postpetition amounts that it contends are delinquent. If a statement is filed, the debtor, debtor's attorney and the trustee may review the statement with an eye toward previous notices required to be filed as of December 1, 2011 under FRBP 3002.1. There may be serious repercussions for secured creditors who failed to file the appropriate notices during the bankruptcy term. If the postpetition amounts are warranted, debtors will have an opportunity to "come current." However, if there is a question regarding the validity of the postpetition default listed in the statement, debtors may exercise their rights under FRBP 3002.1(h) to have the Court determine the validity of the postpetition charges prior to discharge.

FRBP 3002.1(h) states:

On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

Under FRBP 3002.1(h) debtors now have a mechanism available to challenge the holder of a claim who has misapplied payments made during the bankruptcy, or failed to notice payment changes, fees, expenses and charges during the bankruptcy, or even challenge the validity of the charges under the underlying note or nonbankruptcy law. Even if the payment changes or the additional fees, expenses and charges were properly noticed under FRBP 3002.1(b) and (c), debtors who failed to object under FRBP

3002.1(e) may ask the court for a determination of whether the debtor has cured the default and paid all required postpetition amounts. Therefore, failure to object within one year of the service of notice under FRBP 3002.1(e) does not bar a debtor from objecting under subdivision (h) before discharge.

FAILURE TO PROVIDE REQUIRED NOTICES DURING AND AFTER BANKRUPTCY

If secured creditors fail to provide notice of changes in payment amounts or notice of additional fees, expenses, or charges in connection with the loan, they face serious consequences under FRBP 3002.1(i), which states:

If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

This provision grants the estate and the debtor a recourse for secured creditor's failure to properly notify debtors, debtor's attorney and the trustee of the change in the mortgage payment or the accrual of additional fees, expenses and charges. Unlike other subdivisions, FRBP 3002.1(i) does not state a deadline by which the debtor, debtor's attorney or the trustee must file an action against a secured creditor who fails to provide the proper notices outlined in subdivisions (b), (c), or (g). The debtor, debtor's attorney and the trustee may bring a motion at anytime during the plan term to redress secured creditor's failure to provide proper notice. As stated previously, debtor attorneys should review all Motions for Relief from Stay to be sure that the defaults listed in the motion were not related to a failure of the secured creditor to provide notice of a payment changes under subdivision (b), or for additional fees, expenses and cost under subdivision (c). If a failure to notice in accordance to FRBP (b) and (c) is discovered, the debtor, debtor's attorney or the trustee may chose to request that the omitted information be waived and attorney's fees be awarded.

Furthermore, the debtor, debtor's attorney and the trustee may bring a motion or file an adversary proceeding against secured creditor holding a security interest in

debtor's principal residence after the discharge has been issued and the case has been closed. FRBP 3002.1(i) does not contain a time limitation.

In addition, secured creditors are subject to the discharge injunction under 11 U.S.C. Section 524(i), which provides:

The willful failure to a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

Together Section 524(i) and FRBP 3002.1(i) provide a means to reopen debtor's bankruptcy after a discharge has been issued and the case has been closed. Furthermore, secured creditor's failure to apply payments according the plan (e.g., postpetition mortgage payments being applied to the pre-petition arrears, thus accruing additional late fees, expenses and costs for the servicer), and its failure to provide notice of postpetition payments changes, fees, expenses and charges as required under FRBP 3002.1, together may constitute as a discharge violation, subject to contempt and sanctions under 11 U.S.C. Section 105(a), Section 524(a)(2) and FRBP 3002.1(i).

The importance of FRBP 3002.1 cannot be overstated. It allows lenders and homeowner's associations with a security interest in debtor's principal residence to provide notices without fear of violating the stay. It provides the debtor, debtor's attorney and the trustee notices that may affect the secured creditors claim and the chapter 13 plan and an opportunity to cure. It also provides a recourse for the debtor, debtor's attorney and the trustee to hold secured creditors accountable for failure to provide required notices. Collectively, FRBP 3002.1 provides the tools to ensure a fresh start post chapter 13 discharge. 

1. FRBP 3002.1(a)
2. Id.
3. FRBP 3002.1(b)
4. FRBP 3002.1(c)
5. *Citing to the Advisory Committee Note*, Fed. R. Bankr.P. 3002.1, Advisory Committee Note (West 2013).
6. Most Fannie Mae loans include these provisions in covenants 9 and 14.
7. These additional attorneys' fees are subject to FRBP 3002.1(e) but may also be subject to review under 11 U.S.C. § 330, FRBP 2016 and *In re Atwood*, 293 B.R. 227 (BAP 9th Cir., 2003). *In re Pittman*, C/A No. 14-034040HB (Bankr. S.C., March 16, 2015).

MCLE Self Assessment Test

Complete the following questions and return with a \$25 check paid to "CDCBAA" to:

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4559 San Blas Avenue, Woodland Hills, CA 91364

Name: _____

CA Bar Number: _____

Email Address: _____

- T F** 1. FRBP 3002.1 applies to all secured creditors in chapter 13 bankruptcy.
- T F** 2. Providing notice of fees, expenses and charges in connection with a claim secured by debtor's principal residence is a stay violation.
- T F** 3. FRBP 3002.1 applies to notices provided before December 1, 2011.
- T F** 4. FRBP 3002.1(c) requires lenders to provide debtors with notice of mortgage payment changes.
- T F** 5. FRBP 3002.1 was crafted to provide debtors with notices of fees, expenses and charges accrued postpetition.
- T F** 6. FRBP 3002.1(e) allows the trustee and only the trustee to address violations of FRBP 3002.1(b).
- T F** 7. FRBP 3002.1(g) requires the secured creditors with a secured interest in debtor's principal residence to apply postpetition mortgage payments to the pre-petition arrears.
- T F** 8. FRBP 3002.1(f) allows the debtor to provide notice that the final cure payment has been made and all plan payments have been completed, if the trustee fails to provide timely notice.
- T F** 9. FRBP 3002.1(h) allows the debtor or trustee to file a motion within 21 days of service of the statement under FRBP 3002.1(g) to determine whether the debtor has cured the default and paid all required postpetition amounts.
- T F** 10. FRBP 3002.1(i) requires debtors to pay secured creditor's attorney's fees in connection with the discharge?



2015 Membership

I hereby apply for membership in the cdcbaa, Central District Consumer Bankruptcy Attorneys Association, a nonprofit association, for calendar year 2014. I understand the basic goals of the organization are to: address issues and concerns which affect consumer bankruptcy attorneys and their clients in the Central District of California; and to provide educational and networking opportunities for attorneys who primarily represent consumer bankruptcy debtors. As a condition of membership, I declare as follows:

- 1. I am a duly-licensed attorney presently authorized to practice law in the Central District of California; and
2. I am interested in consumer debtor practice; and
3. I support the basic goals of the cdcbaa as outlined above.

I understand the cdcbaa is incorporated as a 501(c)(6) nonprofit organization and that a portion of my dues will not be deductible as a business expense because cdcbaa advocates within California for legislation on behalf of consumer debtors.

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