

All in a Day's Work

Small-firm attorneys Warren and Joan Kessler and John B. Marcin never seem to have time on their side as opposing lawyers try to wear them down, but they love the challenge and a good fight.

BY LEONARD NOVARRO

Sometimes it seems as if small-firm lawyers are being papered to death. Time is never on their side as opposing attorneys try to wear them down by dragging things out. And the full weight of the federal government or a 500-attorney law firm bearing down on them is all in a day's — and sometimes, a year's — work.

They do it because they love the challenge; they do it because they love a good fight. And while playing to a jury turns them on, playing David to someone else's Goliath is what really motivates them.

Such is the case with Warren and Joan Kessler, a husband and wife team who went beyond their spousal partnership to form their own Century City firm six years ago, and John B. Marcin, who took a friend's advice to leave a large San Francisco firm to set up his own law offices, also in Century City, in 1992.

In July, the Kesslers successfully represented two taxpayers in defeating a partial summary judgment motion brought by the Internal Revenue Service. The case, the *Estate of Morton B. Harper, Deceased, Michael A. Harper, Executor v. the Commissioner of Internal Revenue*, 19336-98, before the U.S. Tax Court 9th Circuit, could spell the way in which the tax agency deals with family limited partnerships in the future.

In the other matter, *Loren Peterson v. Bowne of Los Angeles Inc., Bowne & Co. Inc.*, BC198904 (L.A. Super. Ct.) Marcin won a \$3.5 million wrongful termination verdict for a client fired from his job on claims of sexual harassment.

However, according to Marcin, it didn't come easily. Referring to the defendant's attorneys, Latham & Watkins of Los Angeles, he says, "They tried to overwhelm me with paperwork. They'd file papers before lunch. I'd grab a diet Coke, go to the county library to do research and come back for a court appearance."

In the end, however, the preparation helped him.

"Working up a case and doing all the menial work, you're able to talk plainly and truthfully to a jury and explain facts," Marcin says. "The reading, the endless writing, the studying. It pays off. It comes off the tip of your tongue when you're speaking to the jury."

For the Kesslers, Goliath came in the form of the IRS agent auditing their clients' estate tax return.

"He raised more legal questions than any revenue agent in my experience ever raised," Warren Kessler says. "He just dragged things out and tried to paper us

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Attorneys Warren and Joan Kessler, a husband and wife team, went beyond their spousal partnership to form their own Century City firm six years ago.

SIDEBAR

Case: *Estate of Morton B. Harper, Deceased, Michael A. Harper, Executor v. the Commissioner of Internal Revenue*, 19336-98, U.S. Tax Court 9th Circuit.

Type: Motion for partial summary judgment.

Ruling: Granted in favor of the plaintiff.

Attorneys: Plaintiffs — Warren and Joan Kessler, Kessler & Kessler, a Law Corporation, Los Angeles.
Defendant — Donna Herbert, Steven Roth, IRS, Westlake Village.

Judge: Thomas B. Wells, chief judge, U.S. Tax Court.

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to death, asking questions when he had no authority to make a settlement on legal issues. He was the Goliath we dealt with in this case."

What made the case somewhat unusual was that it was argued over the telephone in six conference calls from Century City and Westlake Village, where IRS attorney Donna Herbert is assigned, and presided over by Thomas B. Wells, chief judge of the U.S. Tax Court, from his Washington, D.C., office.

The Kesslers did win a ruling from Wells that a limited partnership designed to protect the assets of their clients was consistent with California law. The IRS had argued that the tax code should supersede local law because it was more restrictive.

What has to be decided for tax purposes is what the partnership is worth. For that, according to the Kesslers, Wells probably will meet with both sides in Los Angeles in the spring.

Customarily, the IRS "doesn't comment on any open cases," agency spokeswoman Deborah Guajardo explains. However, Warren Kessler says his clients' tax liability is a little more than \$400,000.

"If the IRS had prevailed on these motions, the interest on these estate taxes would have been huge," he adds.

In 1994, the Kesslers set up a limited partnership between Morton Harper of Palm Springs and his chil-

dren, Michael and Lynn Harper, to protect his assets in an event of his death. A person who is a limited partner is permitted a discount on a partnership interest so that the value of the estate can be reduced for tax purposes, although the Kesslers argued that was not the purpose of the partnership.

"The size of the discount may be disputed," Warren Kessler says, "but entitlement to that is not disputed and is well recognized in case law."

The IRS, however, saw it differently. A little over a year after the agreement, Harper died, whereupon his heirs filed an estate-tax return claiming a 35 percent discount on taxable assets in a class A limited partnership worth \$410,000.

In 1996, the IRS audited the return and claimed that under Section 2703 of the tax code the partnership was not a valid business agreement but a device for estate planning and, therefore, the assets that were passed on were not subject to a discount. The Kesslers, on behalf of the heirs, filed a motion for partial summary judgment under 2704(b) of the tax code last year, arguing that the right to liquidate the partnership and transfer assets was no more restrictive than California law, which would apply in the absence of any partnership agreement.

The IRS stipulated that while 2703 did not apply, 2704(b) of the code restricted the right to liquidate the

agreement and, therefore, the partnership's terms could not be used in evaluating the partnership's interests.

A 1999 opinion in a similar case in Texas, *Kerr v. Commissioner*, 113 T.C. 449 (1999), held otherwise. Wells asked both sides to argue whether or not that ruling applied in this case. As a result of the Kesslers' argument, the judge concluded that "the limitations on liquidation contained in the partnership agreement are not applicable restrictions within the meaning of section 2704 (b) and, consequently, must be taken into account in valuing the limited partnership interests ... in the ... case."

"We were not going to walk away from this case," Warren Kessler says.

"We've been doing a good job of beating down the IRS on their positions and we can see the light at the end of the tunnel," he adds.