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**BANKRUPTCY BULLETIN ACCEPTING APPLICATIONS FOR  
EDITORIAL BOARD POSITIONS**

The Bankruptcy Bulletin is accepting applications for the Bankruptcy Bulletin Editorial Board. The term will last for two years commencing in June of 2005. If you are interested, please contact Bill Fisher, Dennis Ryan or Steve Meyer by May 1, 2005.

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**Trustee Lacks Standing to Bring Attorney Malpractice Claim on Behalf of Bankruptcy Estate**

*In Moratzka v. Morris (In re Senior Cottages of America, LLC) Adv 03-3132 Bankr. D. Minn. (February 18, 2005), Order re: Motion of Defendants Richard Morris and Morris, Carlson, Hoelscher, P.A. for Dismissal ("Order").*

The trustee of the Debtors' estates brought an adversary proceeding in connection with the bankruptcy cases of Senior Cottages of America, LLC ("SCA") and Senior Cottages Management, LLC ("SCM"; collectively, with SCA, the "Debtors") against a former in-house counsel of the Debtors as well as an outside lawyer and his law firm who represented the Debtors prior to the bankruptcy ("Outside Counsel"). The Order which dismissed two out of three counts alleged in the complaint was entered pursuant to the motion of Outside Counsel to dismiss.

Before the bankruptcy, the trustee alleged Murray Klane, an attorney, was the CEO of SCA and in complete control of the daily operations of the Debtors. By 1998, the trustee asserts, SCA was borderline insolvent, although many of its assets had high profit potential. The adversary complaint alleges that, on the advice of Outside Counsel, Klane transferred all of Debtors' assets to a newly created entity, Millennium Properties, LLC. This transfer, according to the trustee, avoided the

unsecured creditors of the Debtors and rendered both Debtors completely insolvent. The largest creditors of the Debtors, the complaint states, brought an action against Klane, and the state court determined that the transfer of assets was fraudulent. On the basis of this determination, the trustee asserts that Klane, who is also in bankruptcy, has had his debts declared nondischargeable. The trustee's complaint seeks recovery based on the following causes of action: attorney malpractice ("Count I"); aiding and abetting a breach of fiduciary duty ("Count II"); and equitable subordination ("Count III"). Instead of answering the complaint, Outside Counsel moved to dismiss, arguing that the trustee lacked standing with respect to Counts I and II and that the equitable subordination claim asserted in Count III cannot be pursued since Outside Counsel did not file a proof of claim.

With regard to standing, the Court defined the issue before it as whether the trustee sufficiently plead that SCA, in its own right, suffered an injury that could be redressed under the theories of attorney malpractice and aiding and abetting a breach of fiduciary duty. While the Court recognized that the complaint alleges injuries suffered by the creditors of the Debtors, "it was incumbent on the [trustee] to point out where, in the complaint, he pleaded a harm to that [D]ebtor's own interests, as a legal person, that would have given it a right to recover from the [Outside Counsel] on a viable legal theory." For instance, the Court noted, the

trustee failed to plead that the transfer deprived SCA of a viable ongoing enterprise in excess of the total claims against it. As a result, the Court held that trustee lacked standing on the facts plead and dismissed the claims under Counts I and II against Outside Counsel.

With respect to Count III, Outside Counsel asserted that they were entitled to dismissal of the equitable subordination claim because they had not formally filed a proof of claim, and therefore the trustee's claim was unripe and premature. Although Outside Counsel had not filed a formal proof of claim, the trustee noted that, after the petition was filed, Outside Counsel had submitted invoices for pre-petition services. Stating that there was nothing prohibiting Outside Counsel from later asserting a claim against the estate under an informal proof of claim theory, the Court would not dismiss the claim for equitable subordination on the theory that it was not ripe.

#### **Eighth Circuit Requires Committee Consultant Be Paid From Amounts Recovered by Unsecured Creditors.**

In *Official Committee of Unsecured Creditors v. Farmland Industries, Inc. (In re Farmland Industries)*, No. 03-3335 (8<sup>th</sup> Cir. 2005) the Eighth Circuit affirmed the Eighth Circuit B.A.P.'s decision to require that the Unsecured Creditors' Committee's advisors' success fee be paid from funds recovered by those creditors whose interests were represented by the committee employing the advisor.

Because two large groups of creditors in the bankruptcy case had competing claims, the United States Trustee, pursuant to 11 U.S.C. § 1102(a), appointed two creditors' committees in the case. One of the creditors' committees represented the trade creditors (the "Unsecured Creditors' Committee"), and the other one represented

the bondholders (the "Bondholders' Committee").

Each committee retained its own financial advisor to protect its interests. The financial advisors for each committee were to be compensated by a flat monthly fee plus a contingent or "success" fee based upon the amounts ultimately recovered by the members of the employing committee. The Bondholders' Committee proposed to pay the success fee from amounts recovered by the bondholders. The Bankruptcy Court approved the Bondholders' Committee's request.

The Unsecured Creditors' Committee, on the other hand, proposed that all creditors pay its financial advisor's success fee as a general administrative expense. One of its arguments was that because the parties had agreed that payments to professionals would be treated as an administrative expense claim, failure to pay these expenses out of the debtor's fund would have the effect of undermining the priority scheme contemplated under 11 U.S.C. § 507. The Eighth Circuit disagreed with the Unsecured Creditor's Committee's interpretation. The Eighth Circuit stated that the Unsecured Creditor's Committee's financial advisors would only be paid if the unsecured creditors themselves received a distribution from the debtor. Therefore, if the unsecured creditors received a distribution, then it follows that they could pay their financial advisor's success fee out of that distribution. The Eighth Circuit affirmed the Bankruptcy Court and the Eighth Circuit B.A.P.'s decision to require the Unsecured Creditors' Committee to pay the success fee from amounts recovered by the unsecured creditors.

The Eighth Circuit also rejected other arguments raised by the Unsecured Creditors' Committee. The Court rejected the Unsecured Creditors' Committee's

argument that 11 U.S.C. §§ 330 and 503 were a basis for allowing its success fee as an administrative expense claim against all creditors. The Court concluded that neither 11 U.S.C. § 330 nor § 503 required that compensated services benefiting the debtor's estate *must* be paid from the debtor's funds; it was within the Court's discretion to order that the financial advisor be paid its success fee from the amount recovered by the Unsecured Creditors' Committee.

As an aside, the Eighth Circuit notes that Congress has conferred broader appellate jurisdiction on the B.A.P. than on the Circuit Court of Appeals. The Eighth Circuit directed readers to compare 28 U.S.C. § 158(b) with § 158(d).

#### **Res Judicata Applied to Debtors' Homestead Exemption Claim**

In *Ladd v. Ries (In re Ladd)*, No. 04-6040 MN (B.A.P. 8th Cir. Feb. 1, 2005), the debtors filed a Schedule C in which they asserted a homestead exemption for their farmland pursuant to the federal exemption statute, 11 U.S.C. § 522(d)(1). The trustee filed an objection to the claimed exemption. The debtors did not respond to the objection nor appear at the hearing. Thus, the bankruptcy court entered an order sustaining the trustee's objection and disallowed the debtors' homestead exemption.

Over one year later, the debtors filed an amended Schedule C claiming a homestead exemption in the farmland property pursuant to the homestead exemption provided under Minnesota law. The trustee objected. At the hearing on the second objection, the debtors asserted that they did not respond to the first objection because they believed that they had an absolute right to amend their exemptions pursuant to F.R.B.P. 1009(a). The bankruptcy court maintained that the doctrine of *res judicata*, or claim preclusion,

applied and sustained the trustee's objection to the debtors' state-law-based homestead exemption claim.

On appeal, a majority of the B.A.P. panel agreed with the bankruptcy court, stating that "[t]his is a simple case of *res judicata*." Claim preclusion applies where: (1) an earlier suit resulted in a final judgment on the merits; (2) the earlier suit was based on proper jurisdiction; (3) both suits involve the same cause of action; and (4) both suits involve the same parties or their privies. The argument focused on whether the objections to the federal exemption and the state exemption were the same cause of action. The debtors argued that they were not, asserting that *res judicata* does not apply to bankruptcy motions, as distinguished from a civil lawsuit. The B.A.P., however, stated that a bankruptcy motion in a contested matter under F.R.B.P. 9014 is the equivalent of a civil lawsuit. Allowing the debtors to amend after entry of the order sustaining the objection to the debtors' federal exemption would be the same, the majority held, as allowing a party to add a new claim to a complaint after entry of judgment. Pursuant to F.R.B.P. 9014 and 7054, and F.R.C.P. 54, the first order was a final judgment. Although F.R.B.P. 1009 may give the debtors the right to amend their exemptions at any time prior to the case closing, it does not mean that the exemption will be allowed.

The debtors also argued that, pursuant to Judge Kishel's prior decision in *In re Cochrane*, 178 B.R. 1011 (Bankr. D. Minn. 1995), the bankruptcy court (Judge Kishel presiding) would not have allowed them to plead the alternative homestead exemptions in their Schedule C. The B.A.P., however, maintained that the seemingly clear language in *Cochrane*, that "there is no basis under the [F.R.B.P.] for proposing an 'alternative' claim of exemptions at the same time as one asserts a 'main' claim in a

Schedule C,” was taken out of context, was dicta and did not mean that Judge Kishel would not allow alternative pleadings of exemptions. *See id.*, 178 B.R. at 1017-18. According to the B.A.P., what the debtors should have done when the objection to their federal exemption was raised was to respond to the merits of the objection and also request, in the alternative, that they be allowed a homestead exemption under Minnesota state law instead. Instead, having filed no response of any kind, the B.A.P. held that the debtors failed to preserve their right to later assert the state law exemption.

In dissent, Judge Mahoney disagreed with the majority’s interpretation of the application of *Cochrane*. She also disagreed with the majority’s finding that an objection to a claim of exemption is akin to a civil lawsuit. Rather, she stated that she would find that an objection to a claimed exemption is analogous to the filing of a proof of claim that is objected to. F.R.B.P. 3008 permits reconsideration of the resulting order on the proof of claim objection. Similarly, the dissent maintained that Rule 1009(a) also gives the debtor a second bite at the apple.

The moral of this lesson: do not ignore an objection to a claimed exemption believing that you can later amend Schedule C.

#### **Failure to Remove Foreclosure Notice Does Not Violate Automatic Stay**

In *In Re: Jacqueline P. L’Heureux*, 2005 WL 433392 (8<sup>th</sup> Cir. BAP Ark.), the United States Bankruptcy Appellate Panel for the Eighth Circuit held that where a creditor promptly cancelled a foreclosure sale upon receiving notice of the debtor’s chapter 13 filing, the creditor avoided violation of the automatic stay despite its failure to ensure that notice of the sale was removed from the wall of the county courthouse. Further, the

Court found that the debtor failed to prove damages for emotional distress due to such failure.

Jacqueline L’Heureux (“Debtor”) filed a voluntary chapter 13 bankruptcy petition on August 20, 2001. As of the date of filing, Homecomings Financial Network (“Creditor”) had pending a foreclosure sale of the Debtor’s residence scheduled for August 27, 2001.

On August 21, 2001, counsel for the Debtor, by written facsimile, notified Creditor’s attorney, of the bankruptcy filing. The next day Creditor’s counsel e-mailed the auctioneer and sent a letter to the circuit clerk to cancel the sale. Notice of the sale had been posted at the county courthouse prior to the bankruptcy petition date. Although the Debtor’s attorney contacted the Creditor’s attorney and requested that the notice be removed, it was not removed until the morning of the originally scheduled sale. The Debtor testified that on the sale date, several members of the public came to view the home prior to the scheduled sale, and claimed she became ill over the event. The Debtor also alleged that members of the public stated that they saw the public notice on the wall of the county courthouse.

The Debtor filed a complaint alleging violation of the automatic stay as a result of failure to timely remove the sale notice. The Debtor also testified and presented evidence that visits by individuals interested in bidding at the foreclosure sale caused illness and emotional distress to herself and her son resulting in her having to incur medical expenses.

The bankruptcy court held that the failure to remove the notice was not a violation of the automatic stay, and that the Debtor had failed to prove damages for emotional distress resulting from such failure. The bankruptcy court entered an order

dismissing the complaint and the Debtor appealed to the B.A.P.

The B.A.P. affirmed the bankruptcy court decision stating that the automatic stay of 11 U.S.C. § 362(a) generally prohibits continuation of a judicial, administrative, or other action that commenced before the commencement of the case. Nowhere in the complaint was a specific subsection of Section 362(a) alleged. The Court found no case law requiring a creditor in a foreclosure proceeding to remove a notice of sale which has been cancelled. The Court also noted that upon receipt of notice of the bankruptcy filing the Creditor's counsel promptly cancelled the sale. The B.A.P. also stated that failure to remove the notice of sale is not similar to an action or failure to act

which the courts have found involve violations of the automatic stay.

As to the allegations of illness and emotional distress, the B.A.P. found that the bankruptcy judge, after evaluating the evidence, determined it was not related to the six day delay in failing to remove the foreclosure notice. The B.A.P. held that the bankruptcy court properly determined that the Creditor had no affirmative duty to remove the foreclosure notice and that such failure to remove the notice was not a violation of the automatic stay. The B.A.P. further concluded that damages asserted by the Debtor did not result from the failure to remove the foreclosure notice.

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## NEWS FROM THE COURT

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See attached CM/ECF Update.

# CM/ECF Update

United States Bankruptcy Court for the District of Minnesota



A new approach to information management  
[www.mnb.uscourts.gov](http://www.mnb.uscourts.gov)



March 2005

## Court to "Go Live in 2005"

The U.S. Bankruptcy Court for the District of Minnesota will "go live" with the new case management/electronic case filing (CM/ECF) system this fall. Before migrating to CM/ECF the Court will convert from a Solaris operating system to 2.6 Linux. Since the date and impact of this conversion are still unclear, the Court's CM/ECF "go live" date is also uncertain, but details regarding the date and conversion procedures will be posted on the Court's web site [www.mnb.uscourts.gov](http://www.mnb.uscourts.gov) in the coming months.

### Current CM/ECF Status

The data dictionary for the new system is complete and staff are currently developing forms. The systems staff has mapped nearly 3,700 dictionary events between the current Bancap and the new CM/ECF systems, and will soon make its first test conversion. Ongoing test conversions will be conducted until the move to CM/ECF.

### Attorney Conversion to CM/ECF

There are currently nearly 1000 certified ERS attorneys. A simple procedure has been developed for attorneys to log in to ERS and generate a new CM/ECF password. The attorney's ERS user name, which begins with an "A", "B", or "T", will remain the same. A CM/ECF password will be necessary for attorney test filings before the conversion.

Since the Court has adopted mandatory electronic filing and the conversion to CM/ECF will occur over a few days, all attorneys will be required to file test documents prior to converting to CM/ECF. The test filings will be designed to highlight the differences between ERS and CM/ECF, and will help ensure a smoother conversion. More information about the conversion procedures will be posted on the web.

### Training

The Court will offer a number of training opportunities for attorneys and their staff.



#### Computer based training

Links to computer based training can be found on the Court's home page, [www.mnb.uscourts.gov](http://www.mnb.uscourts.gov) at the "CM/ECF" button on the top of the page.

- ◆ ECF 101 - an interactive training tool which provides an overview of CM/ECF.
- ◆ Computer-based training modules  
A link to the CM/ECF attorney computer based training modules (CBTs) is now available. More comprehensive than the ECF 101, these CBTs include:
  - File management (2 CBTs)
  - Adversary opening
  - An introduction to CM/ECF
  - Bankruptcy case closing
  - Converting document to pdf
  - Filing a motion
  - Filing an answer to complaint
  - Filing an objection to motion
  - Filing proofs of claim
  - Logging in
  - Queries
  - Setting up automatic email notification
  - Uploading a creditor matrix

These interactive computer-based training modules are designed to introduce users to CM/ECF. Each module includes step-by-step instruction as well as an optional quiz at the end.

(The CBTs should be used as a general guide only, since the CM/ECF system in Minnesota will be enhanced to include some features found in ERS.)

For best results, use **Internet Explorer 5.5** or above. The modules run in pop-up windows, so any pop-up blockers need to be disabled on your computer to view the CBTs.

### Demonstration/ Q&A Training

The Court will offer sessions which include a demonstration and discussion of CM/ECF. These sessions will be held later this spring.

### Hands-on training

Hands-on training will be available starting this summer. Two-hour training sessions will be conducted in the training room at the Minneapolis courthouse. Scheduling for hands-on training will begin in May.

### Good Email Management Practices

When the Court converts to CM/ECF, parties to a case will receive an email each time there is docketing activity in the case. Other courts have found that good email management is essential for managing the volume of email generated by the new system.

CM/ECF offers two email delivery options: email as documents are filed (24 hours-a-day) or a daily summary. Attorneys will be able to select the most convenient option. In preparation for CM/ECF the Court has posted a manual entitled "Managing Email" on the home page, [www.mnb.uscourts.gov](http://www.mnb.uscourts.gov), at the CM/ECF button, *News and Information*. The *Setting Up Automatic Email Notification* CBT is also a helpful guide to working with CM/ECF's email notification feature.



Attorneys are urged to update their personal information with the Court, including changes in telephone numbers, mailing, or email addresses. ERS provides a mechanism for attorneys to change this information in ERS using *Option 4* on the Filing Options menu. Any changes should also be sent to Pam Berhow at the following address:

301 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, Minnesota 55415

### Text Only Entries

The judges recently authorized the creation of several text only entries in CM/ECF.

#### ORDER CLOSING CASE

Docket text: *IT IS ORDERED (O' Brien, J): The case is closed and the trustee is discharged.*

#### ORDER DISCHARGING TRUSTEE (ch 13 only)

Docket text: *IT IS ORDERED (Kishel, C.J.): The Trustee is discharged.*

APPOINTMENT OF TRUSTEE (this is the appointment of a "substitute trustee" following rejection by the originally appointed trustee).

Docket text: *Appointment of Trustee [insert trustee name].*

#### ORDER ON PETITION FOR ADMISSION PRO HAC VICE

Docket text: *Application for Admission pro hac vice granted by Richard Sletten, Clerk of U.S. District Court, District of Minnesota.*

The judges also authorized the sending of all orders through the BNC. Attorneys who are parties to the case will receive an email when the order is docketed, as well as a hyperlink to the image, without waiting to receive a paper copy through the mail.

### How Does CM/ECF Differ From ERS?

Depending on the user's petition software, CM/ECF offers three case filing options:

- ▶ A one-step filing option enables filers to create the debtor file, petition, schedules, and matrix using petition software and then open cases through their petition software without re-creating the debtor information in CM/ECF.
- ▶ Case upload enables filers to create the debtor file, petition, schedules, and matrix using petition software, then log on to CM/ECF and upload the files without re-creating the debtor information in CM/ECF.
- ▶ Users without petition software can create the required debtor file using the CM/ECF case opening option and then upload the petition, schedules, and matrix to complete the filing.



CM/ECF also includes a judge/trustee assignment component. This feature can be exercised each time a new case



is filed, or can be used after filing a series of cases to enable the attorney to group hearings. This feature includes not only setting the judge/trustee assignment, but the 341 hearing date and location, and the objection to discharge date.

Users will be able to charge filing fees over the Internet. A credit card feature will enable users to pay fees immediately or within a period defined by the Court. Failure to pay within the required time will result in termination of filing privileges until the fees are paid.

CM/ECF also provides text boxes in several filing options to enable an attorney to describe the docketing action or document filed.

The Court has integrated some features of ERS into CM/ECF. Filers currently have an "unlisted document" filing option to submit documents for which there is no ERS option. The filer submits the pdf document along with a brief description of the document and the docket entry is made by the case administrator. The CM/ECF system will include this feature as well.

CM/ECF will also include help text which lists all the documents required for each filing, along with a check box to indicate whether the document is included in the pdf file. The docket text reflects all documents submitted with the filing.

**P**acer Unlike ERS, CM/ECF requires users to pay for viewing and downloading information. Each attorney of record in a case will receive an email notice which includes a description of the activity as well as a hyperlink to the filed document. One free look is available to each attorney of record. Attorneys can list multiple email addresses for their filer log-in so interested parties can be notified of filings as well, however, the free look will only apply to the email recipient for each attorney's email account who accesses the document first. The hyperlink expires after fifteen days or after the first free look. Anytime the same hyperlink is accessed after it has expired the user will be asked for a Pacer log-in and will be charged to view the document at a charge of \$.08/page. There is a 30-page cap of \$2.40 on case-related documents and reports (excluding transcripts).

Instant Pacer registration is available at [www.pacer.psc.uscourts.gov](http://www.pacer.psc.uscourts.gov). The Pacer Service Center recommends that passwords for all Pacer

accounts be changed at least every 90 days to prevent their unauthorized use.

### **St. Paul Bankruptcy Court Move to Minneapolis**

In June the St. Paul divisional office of the bankruptcy court will move to Minneapolis for approximately two years during renovation of the Warren E. Burger Federal Building. Some systems staff as well as computer equipment have already been moved, with the judges' and clerk's office staff scheduled to move in mid-June.

Effective June 20, 2005, all correspondence and inquiries relating to St. Paul cases should be directed to the Minneapolis division:



301 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, Minnesota 55415  
(612)664-5200

Also effective June 20, all hearings before Chief Judge Kishel and Judge O'Brien will be conducted in Minneapolis. In general, Chief Judge Kishel and Judge Dreher will share courtroom 7 West, while Judge Kressel and Judge O'Brien will share courtroom 8 West.

### **Web Site Will be Down March 24**

The Court's web site will be down starting at **3:00 p.m. on Thursday, March 24**, for transfer of computer equipment from St. Paul to Minneapolis. The site will resume operation as soon as the equipment has been reinstalled, which we anticipate will be sometime on Friday, March 25.

We urge attorneys to postpone filing until the site is operational; however, the Court will accept emergency filings. For an emergency filing, please call the divisional office in which you will be filing for directions regarding how to submit the filing.

### **CM/ECF Training Registration Form**

A sample CM/ECF training registration form is shown below. **Each attorney with an ERS user name and password is required to complete and submit this form.** Attorneys will soon receive an email with a link to this online form and are asked to complete and submit the form as soon as possible. Questions about the form should be directed to 651-848-1073.

## CM/ECF Training Request Form

Each attorney with an ERS user name & password must complete this form.  
Please complete this form and click on the "Submit Form" button below. For assistance, please call 651-946-1033.

**Do not use punctuation**

<b>Attorney First Name</b>	<input type="text"/>
<b>Last Name</b>	<input type="text"/>
<b>Firm Name</b>	<input type="text"/>
<b>Firm Address</b>	<input type="text"/>
<b>Address (cont.)</b>	<input type="text"/>
<b>City</b>	<input type="text"/>
<b>State/Province</b>	<input type="text"/>
<b>Zip/Postal Code</b>	<input type="text"/>
<b>ERS User/ Log-In Name</b>	<input type="text"/>
<b>Work Phone</b>	<input type="text"/>
<b>E-mail</b>	<input type="text"/>
<b>Petition Software Used</b> (if applicable)	<input type="text"/>

All attorneys will be required to successfully file test documents to the Court's CM/ECF training database before certification to file to the live CM/ECF system.

### CM/ECF training options

**Option 1.** I want to file the required practice documents **without attending training.** (You will be notified when test filing information is posted on the web site.)

**Option 2.** I want to attend and/or send a staff member to a **demonstration-Q&A session.** Please enter the names of those who will attend a session. (You will be notified when demo/Q&A sessions are scheduled.)

**Option 3.** I want to attend and/or send a staff member to a **two-hour hands-on training session** in Minneapolis. (You will be notified when hands-on training sessions are scheduled.)

**Please select one**

1. I want to file the required practice documents without attending training

### Additional staff to attend training sessions

	Name: First	Name: Last	Email address	Select choice 2 or 3 for training
1.	<input type="text"/>	<input type="text"/>	<input type="text"/>	2. Demo/Q&A training <input type="checkbox"/>
2.	<input type="text"/>	<input type="text"/>	<input type="text"/>	2. Demo/Q&A training <input type="checkbox"/>
3.	<input type="text"/>	<input type="text"/>	<input type="text"/>	2. Demo/Q&A training <input type="checkbox"/>
4.	<input type="text"/>	<input type="text"/>	<input type="text"/>	2. Demo/Q&A training <input type="checkbox"/>
5.	<input type="text"/>	<input type="text"/>	<input type="text"/>	2. Demo/Q&A training <input type="checkbox"/>

Submit Form

Reset Form