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FEBRUARY 2014 • \$4

A Publication of the San Fernando Valley Bar Association

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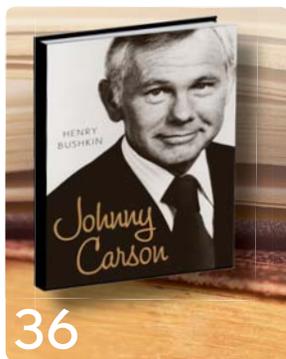
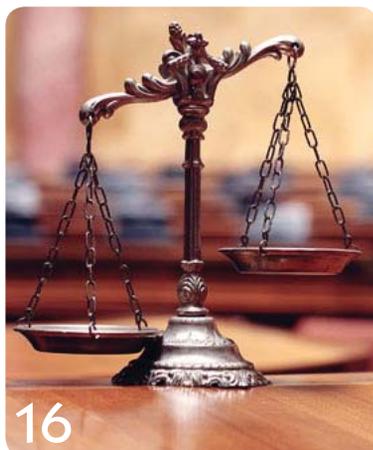
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## Diversity

FEBRUARY 2014



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5567 Reseda Boulevard, Suite 200  
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Phone (818) 227-0490  
Fax (818) 227-0499  
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Irma Mejia

#### GRAPHIC DESIGNER

Marina Senderov

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# Teach Your Children Well

**ADAM D.H. GRANT**  
SFVBA President



[agrant@alperr.com](mailto:agrant@alperr.com)

**M**ANY YEARS AGO, CROSBY, STILLS, Nash & Young shared a song with this country that many people identified with and gravitated toward. Graham Nash wrote the famous song, people say, to address the very difficult relationship he had with his father, who spent time in prison. Reflecting on the thought of putting one of my daughters on a plane to study abroad in Botswana for five months causes me to focus on a particular portion of the song: "Teach your children what you believe in. Make a world that we can live in."

Of my three daughters, Jordan, my eldest, is by far the most adventurous and the one who will be traveling to Botswana. Jordan chose this particular study-abroad program because she wanted to make her studies meaningful and have an opportunity to volunteer in the surrounding villages as a teacher. As parents, my wife and I were torn between two extreme feelings. On one hand, we smiled at the thought that we had taught Jordan well; she deeply understands the obligation to give back to those in need even when such efforts put you outside your comfort zone. On the other hand, as parents, we wanted to keep her close, safe and within our reach should she need us at any time.

Jordan is only 20 years old, but my wife and I have known for a very long time that she is an "old soul," wise well beyond her chronological years. We have learned to respect her acumen, sensitivity and intuition. And so, she leaves for an adventure of a lifetime; one which has been planned for months, but will likely twist, adjust, turn and flow in a way that we can't imagine at this time. In the end, we know she will grow and return with many life lessons.

So, why you ask, am I writing about such personal angst in this column? Because Jordan's trip reminds us, as members of the San Fernando Valley legal community, that there are many opportunities to give back. In December, I attended many holiday parties, including the party hosted by the SFVBA. At each event, I brought gifts to be donated to those in need. One very cold morning, I drove to a homeless shelter and participated in Blanket the Homeless, an amazing program sponsored by the SFVBA for many years. At the same location, the Bar provided a free legal clinic to those in need. We gave away over 1,500 blankets

and addressed the legal needs of dozens of people. In so doing, we directly impacted the lives of people in need.

At the beginning of a new year, many people participate in the ritual of making resolutions. Many of the times the resolutions are about self-improvement: "I will lose weight," "I will become more organized," "I will work more hours," or "I will make more time for leisure." I suggest that the attorneys of the San Fernando Valley Bar Association turn from resolutions involving the self to resolutions involving others. Please don't make a resolution that can't be achieved during the year. A resolution, like any goal, should be one that you can achieve and feel good about throughout the process.

The resolution can be financial, such as making a larger donation to a particular charity, but it need not be financial at all. In fact, personally, I find that resolutions that include the gift of time and effort are far more meaningful to both parties involved—the individual making the resolution and the recipient of the effort.

The SFVBA provides so many opportunities to give back. The Valley Community Legal Foundation (VCLF), as the charitable arm of the Bar, is the avenue through which the Bar provides scholarships and grants to young adults interested in a legal career. The VCLF is credited with funding the Children's Waiting Rooms in the Van Nuys and San Fernando courthouses. The Bar's numerous section meetings allow attorneys to discuss law-related matters and constituent-specific programs to benefit the Valley. The Bar is also forming a mediation center to address the alternative dispute resolution needs of the Valley's low-income litigants.

While there are many existing opportunities to give back, I urge you not to be constrained by such programs. The SFVBA is always looking for other areas in the community that need help. Please contact the Bar's office or email me directly with such opportunities.

As we wind through the days and months of 2014, I hope you achieve your goals, fulfill your resolutions and, most importantly, make a difference in a meaningful way. In the meantime, my wife and I will rely on Skype and email to talk with Jordan while she fulfills her resolutions. May your year be filled with health, happiness and endless laughter. 

SUN	MON	TUE	WED	THU	FRI	SAT
<b>BLACK HISTORY MONTH</b>						<b>1</b>
<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b> <b>Valley Lawyer Member Bulletin</b> Deadline to submit announcements to editor@sfvba.org for March issue.	<b>6</b> <b>Employment Law Section 2014 Update in Employment Law</b> 12:00 NOON SFVBA OFFICE Sue Bendavid and Nicole Kamm will discuss the latest developments in employment law. (1 MCLE Hour)	<b>7</b>	<b>8</b>
		<b>11</b> <b>Probate &amp; Estate Planning Section</b> <b>What Does Equality Really Mean for Same Sex Couples?</b> 12:00 NOON MONTEREY AT ENCINO RESTAURANT Wendy Hartmann discusses laws affecting same-sex couples who consider marriage as well as possible moves out of California. (1 MCLE Hour)	<b>12</b> <b>Business Law Section Valuation Issues</b> 12:00 NOON SFVBA OFFICE Melissa Silverman of Avenue M Advisors will discuss valuation issues and how they impact your business law practice. (1 MCLE Hour)		<b>14</b>  <b>15</b> 	
<b>9</b> <b>Tarzana Networking Meeting</b> 5:00 PM SFVBA OFFICE 	<b>10</b>	<b>13</b> <b>Board of Trustees</b> 6:00 PM SFVBA OFFICE				
<b>16</b>	<b>17</b> 	<b>18</b> <b>Taxation Law Section United States v. Home Concrete, LLC</b> 12:00 NOON SFVBA OFFICE Stephen Turanchik will discuss the impact of the recent U.S. Supreme Court ruling and its effect on the IRS and Treasury. (1 MCLE Hour)	<b>19</b> <b>Workers' Compensation Section Medical-Legal Reform under SB 863</b> 12:00 NOON MONTEREY AT ENCINO RESTAURANT Judge Ralph Zamudio will discuss the latest changes re SB 863. (1 MCLE Hour)	<b>20</b> <b>Intellectual Property, Entertainment &amp; Internet Law Section Mediation of I.P. Cases</b> 12:00 NOON SFVBA OFFICE Mediator Erica Bristol leads the discussion. (1 MCLE Hour)	<b>21</b>	<b>22</b>
		<b>24</b> <b>Family Law Section Trial Tech Four: Documentary and Physical Evidence</b> 5:30 PM SPORTSMEN'S LODGE Our outstanding Trial Tech series continues with a distinguished panel of speakers: Judges Christine Byrd and Lloyd Loomis and attorneys Christopher Melcher and Patrick DeCarolis, Jr. (1.5 MCLE Hours)	<b>25</b> <b>Bankruptcy Law Section Settling with the Trustees</b> 12:00 NOON SFVBA OFFICE Two panel trustees and trustees' counsel will address how they handle settling matters. (1 MCLE Hour)			
<b>23</b>		<b>26</b>	<b>27</b> <i>Annual Judges' Night Dinner</i> 5:30 PM WARNER CENTER MARRIOTT See page 31		<b>28</b> <b>Diversity Committee</b> 8:15 AM SFVBA OFFICE	
		<b>WINTER OLYMPICS MIXER</b>  See page 21				



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SUN	MON	TUE	WED	THU	FRI	SAT
<b>WOMEN'S HISTORY MONTH</b>						<b>1</b>
<b>2</b>	<b>3</b>	<b>4</b>	<b>Valley Lawyer Member Bulletin</b> Deadline to submit announcements to editor@sfvba.org for April issue.	<b>Membership &amp; Marketing Committee</b> 6:00 PM SFVBA OFFICE		<b>Mardi Gras</b> 6:30 PM MONTEREY AT ENCINO RESTAURANT Sponsored by NARVER INSURANCE  See page 39
<b>9</b>	<b>Tarzana Networking Meeting</b> 5:00 PM SFVBA OFFICE 	<b>Probate &amp; Estate Planning Section</b> 12:00 NOON MONTEREY AT ENCINO RESTAURANT <hr/> <b>Board of Trustees</b> 6:00 PM SFVBA OFFICE	<b>12</b>	<b>13</b>	<b>14</b>	<b>15</b>
<b>16</b>	<b>St. Patrick's Day</b> 	<b>Taxation Law Section</b> <b>Asset Protection Planning for the Tax Lawyer</b> 12:00 NOON SFVBA OFFICE Steven Gleitman will discuss how best to protect assets. (1 MCLE Hour)	<b>Editorial Committee</b> 12:00 NOON SFVBA OFFICE <hr/> <b>Workers' Compensation Section</b> 12:00 NOON MONTEREY AT ENCINO RESTAURANT	<b>20</b>	<b>All Section Meeting</b> <b>Advising Your Client on Retirement Plans and Finances</b> 12:00 NOON SFVBA OFFICE Join us for this informative seminar led by Michele Berson on how best to advise your clients on building a healthy retirement plan, distribution essentials and busting stock market myths! Lunch sponsored by Berson Money Management. Free to Current Members! (1 MCLE Hour)	<b>22</b>
<b>23</b>	<b>Family Law Section</b> <b>Trial Tech Five: Examination of Child Custody Evaluator</b> 5:30 PM SPORTSMEN'S LODGE Our outstanding Trial Tech series continues with another distinguished panel of speakers. (1.5 MCLE Hours)	<b>25</b>	<b>26</b>	<b>27</b>	<b>Diversity Committee</b> 8:15 AM SFVBA OFFICE	<b>29</b>
<b>30</b>	 <b>Cesar Chavez Day</b>	<b>31</b>				



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Wesley Hampton  
[whampton@narver.com](mailto:whampton@narver.com)



Diane Wood  
[dwood@narver.com](mailto:dwood@narver.com)



Debra Mondragon  
[dmondragon@narver.com](mailto:dmondragon@narver.com)



Crystal Veiga  
[cveiga@narver.com](mailto:cveiga@narver.com)



Michelle Mitchikoff  
[mmitchikoff@narver.com](mailto:mmitchikoff@narver.com)

# Diversity Matters

**IRMA MEJIA**  
Publications & Social  
Media Manager



[editor@sfvba.org](mailto:editor@sfvba.org)

**T**HIS MONTH *VALLEY LAWYER* ADDRESSES the issue of diversity. It's a topic that sometimes causes discomfort as we collectively reflect on our own biases. But it's a topic that remains extremely relevant and important. Achieving diversity in the legal profession has a positive effect on the administration of justice and society's perception of an impartial judicial system.

The articles in this issue touch upon constructive steps that can be taken to increase diversity and ultimately eliminate bias. Myer Sankary's article on the cognitive science perspective of bias offers great insight into how the human mind operates and how bias may initially be created. By understanding the science and root cause of our biases, Sankary challenges the reader to identify implicit biases and provides suggestions for their management and elimination.

Brian Sheppard's column raises the issue of economic inequality and the market for legal services. There is much economic diversity among potential law firm clients. The

challenge is that a large number of lawyers are without work while a growing sector of the population is unable to participate in the current market because legal services are priced beyond their reach.

In our cover story on the 2014 Judge of the Year, Hon. Richard H. Kirschner discusses the importance of diversity in our judicial system, from court staff, to bench officers, to the jury pool. His work with the Teen Court Program is just one of example of the court's initiatives to reach out to underrepresented groups.

David Jordan presents information on the efforts to increase diversity in the legal profession through outreach at the community college level. Finally, Lisa Miller provides a report on the San Fernando Valley Bar Association's Diversity Committee and its partnership with local educational programs and ongoing anti-human trafficking efforts.

It is my hope that these articles inform and challenge readers to strengthen their commitments to diversity in the legal profession and beyond. 

## BULLETIN BOARD

*The Bulletin Board is a free forum for members to share trial victories, firm updates, professional and personal accomplishments.*



**David S. Kestenbaum** announces the opening of his new criminal defense firm Kestenbaum Law Group, APC in Van Nuys. The firm will also have a presence in Ventura and Century City. Kestenbaum can be reached at [david@kestenaumlawgroup.com](mailto:david@kestenaumlawgroup.com).

**David G. Jones** and **Artemio M. Santiago** announce the opening of their new firm, Santiago & Jones in Woodland Hills, focusing in Probate and Estate Litigation, Employment Law, General Civil and Business Litigation, and Family Law. Jones can be reached at [djones@santiagojoneslaw.com](mailto:djones@santiagojoneslaw.com).



**Alfonso J. Martinez** has launched his own practice in Ventura, focusing on family and criminal law. Martinez was recently recognized for his service to the legal community and was awarded the James Loebel Public Service Award by the Ventura County Bar Association.

Martinez can be reached at [alfonsomartinezlaw@gmail.com](mailto:alfonsomartinezlaw@gmail.com).

It is with great sadness that we acknowledge the passing of longtime SFVBA member **Dee Miller Siegel**. Dee was a cherished member of the Probate & Estate Planning Section and a former President of the Valley Community Legal Foundation. Though short in stature, she cast a long shadow, always quick to smile and impart a kind word. She was a force to be reckoned with, the way she entered a room charged the atmosphere with sheer positive energy. Along with her husband Al, Dee was a seasoned traveler. She had an insatiable curiosity about the world and her sense of wonder delighted all who knew her. She will be greatly missed.



*Email your announcement to [editor@sfvba.org](mailto:editor@sfvba.org). Announcements are due on the fifth of every month for inclusion in the upcoming issue. Late submissions will be printed in the subsequent issue. Limit one announcement per firm per month.*



# Advancing the Case for a More Diverse Legal Profession

By David Jordan

coming from diverse ethnic backgrounds and more than 55 percent of students being female.<sup>5</sup>

One remarkable person to attend the California Community Colleges is our own California Supreme Court Chief Justice Tani Cantil-Sakauye who attended Sacramento City College. In the video *“When you Dream ... Community College Pathway to Law School”* produced by the Council on Access and Fairness of the State Bar (COAF), the Chief Justice describes her initial exposure to the idea of law school as a community college student. It was there that she joined the speech and debate team and entered “the great unknown” where for the first time she had to express ideas and debate before a group of people. It turned out to be an activity she enjoyed. People took notice of her skills and encouraged her to attend law school. “Community college offered that kind of opportunity to find out things about yourself,” she says.<sup>6</sup>

She further describes her experience as a new attorney at a time when there weren’t many female and minority attorneys: “People would look at me because, first, there weren’t a lot of females; second, there weren’t too many ethnic female prosecutors. And I looked very young ... Coming in as an ethnic female, new, young, I was mistaken for the clerk, I was mistaken for the court reporter, I was mistaken as the runner. But eventually, with a sense of humor you realize that people had sort of stereotypes about what they expected the lawyer to look like.”<sup>7</sup>

One of the premier districts in the California Community Colleges system is the Los Angeles Community College District (LACCD). Since 1937, the LACCD has served “almost three times as many Latino students and nearly four times as many African-American students as all of the University of California campuses combined. Eighty percent of LACCD students are from underserved populations.”<sup>8</sup>

Los Angeles Mission College (LAMC) is an LACCD institution that primarily serves the educational needs of

**I**T SHOULD NOT BE A SURPRISE THAT OUR educational institutions are an important melting pot for our diverse populations. At the core of American values is the idea that all individuals should have the opportunity to succeed and that education is the key to ensuring that success. The State Bar of California is determining how best to provide opportunities for success to a wider demographic with the ultimate goal of making the Bar more reflective of the state’s diverse population.

While 60 percent of California’s population consists of racial/ethnic minority groups, only 20 percent of California lawyers are from minority groups.<sup>1</sup> In fact, a 2012 survey of randomly selected attorneys reveals 79% are white and 60% are male.<sup>2</sup>

Though the legal profession may not be reflective of California’s diverse population, the state’s community colleges are. The California Education Master Plan, adopted in 1960, “established an admissions principle of universal access and choice” with the state’s community colleges directed “to admit any student capable of benefiting from instruction.”<sup>3</sup> Described as the “the largest postsecondary education system in the world,” the California Community Colleges system serves more than 2.3 million students on 112 campuses throughout the state.<sup>4</sup> Not surprisingly, community college students are extremely diverse with more than 60 percent of students

the San Fernando Valley. LAMC is unique within the LACCD because 70% of its student population is Hispanic and first generation to attend college.

The fact that the community college system serves groups that are underrepresented in other higher education systems makes it “essential for reducing racial/ethnic disparities in educational attainment” and professional achievement.<sup>9</sup> The United State Census Bureau reports that Latinos make up 38 percent of the state population and African Americans make up about 7 percent.<sup>10</sup> In 2003 Latinos represented 29 percent of all students enrolled in community colleges but only 24 percent of all California State University (CSU) students and only 14 percent of University of California (UC) students. African Americans represented 8 percent of enrolled students in community colleges but 6 percent of CSU students and only 3 percent of UC students.<sup>11</sup>

Under the California Education Master Plan, the four year University of California and California State University systems “give priority in the admissions process to eligible California Community College transfer students”<sup>12</sup> By working with community colleges, the State Bar can help create an effective pipeline to law school for historically underrepresented minorities.

### Designing a Pathway to Law School

In a letter to Chief Justice Tani Cantil-Sakauye, the Council on Access and Fairness of the State Bar wrote:

“One of the major COAF goals is to achieve diversity in the legal profession and judiciary. For the State Bar, diversity encompasses racial and ethnic groups, women, LGBT, persons with disabilities and older attorneys. ... Another [goal] is to ensure access and fairness and impartial treatment for court users. ...Judicial Council surveys of court users show that failure to have a diverse legal profession and judiciary severely impacts the public confidence and trust in the legal system. The public’s perception of fairness in the court process is directly related to the level of diversity at all levels of the judicial system.”<sup>13</sup>

The COAF has focused its efforts on community college initiatives that bridge the gap in the diversity pipeline from community college to law school to the profession.<sup>14</sup> Because so many of California’s students enrolled in higher education are at the community college level, the State Bar understands that to get a pool of attorneys reflective of the population, the State Bar must seek to create pathways that these students can follow from community college to a four-year university, then law school and ultimately into the courtroom. This understanding led to the creation of the Community College Pathways to Law School (Pathways) initiative.

The State Bar invited each California community college to submit a letter of interest for consideration to be among

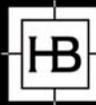
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20 selected colleges “to participate in the innovative diversity outreach pipeline initiative.”<sup>15</sup> Under the Pathways initiative, “students who meet certain requirements from these 20 selected California community colleges may be granted guaranteed admission or given priority enrollment to at least four top accredited law schools in California.”<sup>16</sup>

The initiative creates “a clear pathway from community college to law school,” including support for students, mentoring, pre-law counseling, stipends to faculty members participating in the initiative or for organizing pre-law activities such as law school visits or law day conferences, and faculty professional development. The initiative also identifies specific community college courses which follow a set of “success factors” shown to help create effective lawyers.<sup>17</sup>

LAMC sees the opportunity to partner with the State Bar in creating pathways for students as a natural progression of the work already being done on campus. For the past 26 years, LAMC’s Paralegal Studies Program, under the leadership of attorneys L. Edmond Kellogg and David Jordan, has offered a vocational Paralegal Program Certificate, which consists of 12 classes or 36 units and certifies California paralegals pursuant to Business and Professions Code Section 6400 and 6450. The curriculum for the certificate exposes students to courses on contracts, torts, partnerships, civil litigation, bankruptcy, family law, probate administration, property rights, evidence, and legal research and writing.

The LAMC Paralegal Studies Program is recognized for its achievements in preparing the program’s diverse students to enter the legal field and the high caliber of legal faculty is well-situated, based on student population, to increase the flow of diverse students from community college to law school. The Program has graduated students who went on to work at prominent companies and firms, including Disney, the District Attorney’s office, various insurance companies, Fortune 500 law firms, environmental law firms, and non-profit corporations.

### **Faculty Diversity Initiative**

The faculty members teaching in the Paralegal Studies Program are diverse and reflective of the local community. To achieve diversity in its law faculty, LAMC Paralegal Studies Program has participated in an LACCD diversity program, Project Match, or Mentors Act to Change History.

Project MATCH, which was initiated over 20 years ago, was designed to address the diversity needs of the Los Angeles area by preparing and recruiting a diverse community college faculty sensitive to the needs of the students and community it serves.<sup>18</sup> This innovative program assigns its diverse interns to work with faculty mentors thorough the district for an entire semester. It is through this mentorship that interns learn how to teach and diverse new faculty are integrated and incorporated into the fabric of the excellent and committed faculty of Los Angeles Community College District

colleges, including LAMC. For the last 16 years all adjunct law faculty hired by the LAMC Paralegal Studies Program have graduated from Project MATCH.

Our most current graduate is Edna Chavarry. Edna earned two Bachelor of Art degrees from UCLA in International Development Studies and Sociology, her Masters of Arts in Higher Education at UCLA, and her Juris Doctorate at Loyola Law School, Los Angeles. Edna is also a product of the California Community Colleges system. Her research interests include higher education and its role in society, community college transfer initiatives, education law and policy, and institutional accountability through self-assessment and evaluation. Edna is scheduled to teach the Introduction to Law class in the spring for our LAMC Paralegal Studies Program.

### **Practical Educational Training**

Just as Project MATCH provides opportunities for professionals to become faculty, the LAMC Paralegal Studies Program gives opportunities to community college students to see themselves as part of the legal profession through engagement in community service. The Pathways initiative recommends that one of the success factors for our diverse students to achieve future success in the legal profession is to actively engage in service to the community through internships. LAMC is always open to partnering with legal firms and organizations to provide richer experiences to students.

LAMC provides its paralegal students with internship opportunities through the Los Angeles Superior Court (LASC) Outreach Paralegal Internship Program. The LASC Outreach Paralegal Internship Program places interns in the San Fernando and Van Nuys courthouses with the main goals of exposing students interested in working in the legal field to the functions and operations of the court; providing training and work experience to students; and developing possible employment candidates for the court.

LAMC has also partnered with Neighborhood Legal Services of Los Angeles County (NLSLA) to provide students with educational volunteer opportunities at a Workers’ Rights Clinic at LAMC and at NLSLA courthouse based self-help centers. This partnership has provided LAMC students practical experience to help their legal careers.

Another strong partner is the San Fernando Valley Bar Association (SFVBA) which has in the past collaborated to improve the Workers’ Rights Clinic at LAMC. The SFVBA’s Diversity Committee has also reached out to LAMC to support its diversity initiatives with the ultimate goal of increasing overall diversity in the legal profession and SFVBA membership.

All of these organizations and programs have expressed a strong support of LAMC’s mission of offering high quality educational opportunities and “providing services and programs that improve the lives of the diverse communities [it] serve[s].”<sup>19</sup> They have also submitted letters of support to

the COAF expressing their hopes that LAMC will be approved to participate in the State Bar's Pathways initiative.

This new year brings renewed hope and motivation to advance the case for more diversity in the California legal profession through such programs as the Community College Pathways to Law School, Program MATCH, the LASC Outreach Paralegal Internship Program, NLSLA services through its various clinics and the activities of the Diversity Committee of the San Fernando Valley Bar Association. 

<sup>1</sup> State Bar of California. "Community College Pathway to Law School' Initiative Request for Letters of Interest," September 30, 2013, available at <https://docs.google.com/file/d/0B8OQTSWUbc1oeXJfMxg4R21NX3c/edit?usp=sharing>.

<sup>2</sup> "Predominantly white male State Bar changing... slowly," *California Bar Journal*, January 2012, available at <http://www.calbarjournal.com/January2012/TopHeadlines/TH1.aspx>.

<sup>3</sup> "California Master Plan for Higher Education," University of California, available at <http://www.universityofcalifornia.edu/aboutuc/masterplan.html>, accessed January 15, 2014 [hereinafter Masterplan].

<sup>4</sup> "Key Facts about California Community Colleges," California Community Colleges Chancellor's Office, <http://californiacommunitycolleges.cccco.edu/PolicyInAction/KeyFacts.aspx> (accessed January 15, 2014).

<sup>5</sup> Id.

<sup>6</sup> Council on Access and Fairness, State Bar of California, *When You Dream... Community College Pathway to Law School*, available at [http://www.youtube.com/watch?v=5beBX1s\\_FQM](http://www.youtube.com/watch?v=5beBX1s_FQM).

<sup>7</sup> Id.

<sup>8</sup> "About LACCD," Los Angeles Community College District, <https://www.laccd.edu/About/Pages/default.aspx> (accessed January 13, 2014). See also "Fast Facts," Los Angeles Community College District, <https://www.laccd.edu/Departments/Research/Pages/Fast-Facts.aspx>.

<sup>9</sup> Ria Sengupta and Christopher Jepsen, "California's Community College Students," *California Counts: Population Trends and Profiles*, Vol. 8, No. 2, Public Policy Institute of California, November 2006.

<sup>10</sup> "State & County Quick Facts: California," United States Census Bureau, <http://quickfacts.census.gov/qfd/states/06000.html> (accessed January 15, 2014).

<sup>11</sup> Sengupta & Jepsen, *supra*.

<sup>12</sup> Masterplan, *supra*.

<sup>13</sup> "Strategic Evaluation Report, Item SP 12-05: Invitations to Comment," July 17, 2012, available at [http://www.courts.ca.gov/documents/SP12-05\\_State\\_Bar\\_of\\_CA\\_COAF.pdf](http://www.courts.ca.gov/documents/SP12-05_State_Bar_of_CA_COAF.pdf).

<sup>14</sup> Audrea J. Goulding, "Notes from the Chair," *Achieving Diversity in the Legal Profession*, October 2013, available at <http://cc.calbar.ca.gov/CommitteesCommissions/Special/CouncilonAccessandFairness/AchievingDiversity.aspx#13chair>.

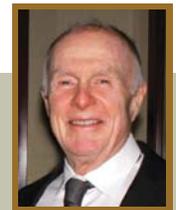
<sup>15</sup> State Bar of California, *supra*.

<sup>16</sup> *Ibid*.

<sup>17</sup> See Marjorie M. Schultz and Sheldon Zedeck, "Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions," *Law School & Social Inquiry*, Vol. 36, No. 3, 620-661, Summer 2011.

<sup>18</sup> "Project MATCH," *Los Angeles Community College District*, <http://www.laccd.edu/Employment/Pages/Project-MATCH.aspx> (last accessed January 13, 2014).

<sup>19</sup> "College Mission Statement," Los Angeles Mission College, approved by LACCD Board of Governors on October 17, 2012, available at <http://www.lamission.edu/community/aboutmission.aspx>.



**David Jordan** is full-time law professor and Director of the Paralegal Studies Program at Los Angeles Mission College. He can be reached at [jordandc@lamission.edu](mailto:jordandc@lamission.edu).



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# Eliminating Bias in the Legal Profession: Lessons from the Cognitive Sciences

By Myer J. Sankary

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Humans are often unaware of their implicit biases, which often were developed early in childhood, prior to the development of critical thinking. As a result, bias can seep into daily activities, including administering justice or advocating for a client. Understanding the science of bias can have a significant impact on the management and ultimate elimination of bias in the legal profession and beyond.

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**W**HAT IS BIAS? AND WHY DOES THE STATE BAR require lawyers to take at least one hour of training every three years on elimination of bias in the legal profession as a condition to maintain their right to practice law in California? The rule has existed for almost 20 years. Hasn't the profession and society as a whole eliminated bias by now? Aren't we in a post-racial, post-bias era? Aren't decisions by judges impartial, fairly decided based on an objective evaluation of the facts, and don't juries reach verdicts based on the evidence without regard to a person's race, gender or ethnic origins? Isn't there an equal playing field with laws that protect everyone equally? Can today's lawyers benefit from elimination of bias programs or is it just a waste of time and money?

### **History of the MCLE Requirement**

Arguments against compulsory bias programs were raised over 20 years ago when the MCLE program was adopted by the Board of Governors. In *Greenberg v. State Bar of California*, 78 Cal.App. 4th 39 (2000), the plaintiffs, members of the bar, claimed that the MCLE program violated their "First Amendment right to be free of compulsory governmental propaganda in favor of an ideological purpose with which appellants do not agree, and which is not 'germane' or rationally related to the legitimate goals of legal education for practitioners." Over plaintiff's objection, the *Greenberg* court concluded that they were required to "affirm the trial court's ruling, under the compulsion of the recent majority opinion of the California Supreme Court in *Warden v. State Bar* (1999) 21 Cal.4th 628 (*Warden*), which upheld the constitutionality of the MCLE program for California attorneys."

In denying the claimants' First Amendment argument of the right to be free of compulsory propaganda, the appellate court found that the MCLE courses were rationally related to the "consumer protection" goals of the legislation, the needs of the legal profession, and legal practitioners' professional roles within that system. In reaching that conclusion, the court stated that "... the elimination of bias in representation and decision making, where improperly based on irrelevant personal characteristics, has long been a goal of the legal profession, and is germane and rationally related to the special nature of law practice and the consumer protection goals of the MCLE program."

The State Bar requires "at least one hour dealing with the elimination of bias in the legal profession by reason of but not limited to sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation."<sup>1</sup>

In 2002, a resolution was proposed to expand the scope of the bias program by eliminating the requirement that the program be limited to bias in the legal profession. The argument against expanding the scope of an educational program on this topic was that the bar should focus on educating its members in ways that lawyers could address the issue of bias within the legal profession and not by addressing the issue in society generally as a whole.<sup>2</sup>

To support its claim to focus on bias within the legal profession, the State Bar cited a comprehensive draft report on gender bias in the California court system issued by the Judicial Council in 1990 entitled "Achieving Equal Justice for Women and Men in the Courts." The report found significant and widespread gender bias in the California court system and made 68 recommendations that were adopted by the Judicial Council.<sup>3</sup> One of the recommendations "urged the State Bar to conduct MCLE programs and other lawyer education programs on the issue of gender bias. As a result of this recommendation, the MCLE Committee drafted a rule requiring education on eliminating bias in the legal profession against specified classes."

In addition to the program on bias, the Supreme Court adopted Rule 2-400 of the California Rules of Professional Conduct, which made it a disciplinary offense for an attorney in the management or operation of a law practice to unlawfully discriminate against protected classes of people.

Based on these arguments, the MCLE program on Elimination of Bias was restricted to its application in the legal profession and issues involving the general public were not addressed. Many programs focused on the importance of diversity both in the bar and the bench as a means of dealing with discrimination.

However, during its October 2013 meeting, the State Bar's Board of Trustees approved several changes to the MCLE rules for attorneys and providers, including expansion of the scope of the elimination of bias requirement. Effective July 1, 2014, programs designed to satisfy the requirement regarding the elimination of bias will be approved if they offer content relating to both the "recognition and elimination of bias in the legal profession and society."<sup>4</sup>

In part due to the awareness of bias and discrimination in the legal profession, great advances have been made for those who were in groups discriminated against, particularly women and minorities. As law school enrollments for women increased, more women and minorities were prepared to join the ranks of practicing lawyers and distinguished themselves in every aspect of law. Today many leaders of bar associations and judicial officers are women or minorities, including California's Chief Justice of its Supreme Court, who is a woman of diverse ethnic background.<sup>5</sup>

### **The Need for Understanding Implicit Bias**

Although many MCLE bias programs provide important information about the consequences of bias and discrimination in the legal profession, particularly concerning the difficulty for women, minorities, those with disabilities, and gay and lesbian attorneys to get jobs and get promoted, few programs have explored the vast research over the past 20 years in social science, social psychology and neuroscience that provide important and transformative understanding of personal and group bias.

Even a cursory examination of the literature would confirm that understanding bias, stereotyping and prejudice based on

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the research of cognitive scientists is very relevant to every lawyer's practice and management of their law firms. To be unaware of the scientific information about how people think, believe, form attitudes and influence behaviour is like driving a car without learning how to use the gas pedal, brakes, directional signals or rearview mirrors.

### **What is Bias?**

In its simplest definition, bias is a choice based on a person's preference, mindset, attitude, or belief system, either for or against another individual or group, expressed in a way that may be viewed as unfair to the persons against whom bias is exhibited. Bias can come in many forms and is often considered to be synonymous with prejudice or bigotry.

Cognitive bias, or the human tendency to make systematic decisions in certain circumstances based on cognitive factors rather than evidence, has been studied by social psychologists since the early 20<sup>th</sup> century and focuses on information processing, thinking and decision-making systems of the brain. These processes include information-processing shortcuts, motivational factors, and social influence.

The human mind evolved to understand the world by creating categories.<sup>6</sup> Survival depended on the ability to make the right choices (often immediately and automatically without deliberative thought) such as choosing a mate; choosing friends and others who could help you and your family; choosing food that was nutritious and satisfying; and avoiding people, animals, and foods that posed a danger. To survive it was important to decide quickly whether a stranger was a potential threat or friend. Studies have shown that “[w]ithin less than a second, using facial features, people make ... ‘spontaneous trait inferences’” that influence how people categorize and treat one another.<sup>7</sup>

Over generations, preferences known as “in-group” or “out-group” biases became an automatic thought process. As modern society evolved, people were connected to many in-groups such as family, communities, regions, religious affiliations, schools, colleges, professions, sport teams, racial and ethnic groups, and political affiliations. A bias naturally favored the group you were a part of and disfavored those persons and groups with whom you were not affiliated.

Some social psychologists believe that bias and prejudice arise from an early uncritical mindset. Once we have formed a mindset as a youth without thoughtful examination of our beliefs at a time when critical thinking and reasoning has not matured, we learn to behave mindlessly toward others in that category of the out-group.

Ellen Langer, the first woman tenured at Harvard in clinical and social psychology, found that bias and prejudice arise from “premature cognitive commitments.” In her book *Mindfulness* (1989), she concluded that humans apply patterns acquired in the early childhood period without reflection to later events and encounters. These patterns become “mindless behavior,” as though on automatic pilot. As a result, we tend to make

generalizations such as “All women are” ...; “all blacks are...;” “all Catholics/Baptists/Jews/Mormons/Moslems are...;” “all liberals are...”, all conservatives are...”

Most of us grew up and spent time with people like ourselves.<sup>8</sup> However, when we confronted someone who was different, we dropped the assumption of commonality and looked for differences—we looked for negatives in people who were in the out-group. Early attempts to learn about others may have led to a falsified view of the world and we cling to those beliefs as we mature. Prejudice arises from judgments about others that were premature, not based on adequate knowledge about the other and often inaccurate. We then generalize from our experience from a few encounters with persons in the out-group, and then create a stereotype impression that everyone who is a member of that out-group has behavioral characteristics that we find offensive or objectionable.

In general, when bias is a matter that affects the personal life of an individual such as preferring a Mercedes over a Cadillac, little or no harm can arise from such a preference. However, when a person in power has the ability to impose penalties to deprive someone of his life or liberty (e.g., a judge or jury) then it is essential that the person in authority makes a decision based on the objective evidence without regard to one's status, race, gender, age, sexual preference, or other group identification. There is a fundamental constitutional belief in this country that everyone should be treated equally under the law and the law should provide equal protection regardless of what group you may belong to.

### **Science of Implicit Bias**

Since the 1990's hundreds of studies by social psychologists have provided us with extensive insight into the nature of bias both explicit and implicit. It is estimated that less than 20 percent of the population today would overtly express explicit bias—such language is generally condemned as “politically incorrect,” often with consequences of losing one's position. But studies have shown bias still exist in more subtle forms that are unknown to most people. Through new forms of testing, scientists have demonstrated that implicit or covert bias is pervasive and is often difficult to detect.

In the 1990's, Anthony Greenwald, a psychology professor at the University of Washington, developed a new test that revealed implicit bias through the use of the Implicit Association Test (IAT). He collaborated with Mahzarin Banaji, a professor of psychology, who was then at Yale University, to expand the test to include ways of detecting biases in many different categories such as gender, sexual preference, age, disability, race, etc. The test, which has been validated by many social scientists, was placed on the internet where over 4.5 million people have taken it.<sup>9</sup>

Research contained on the IAT website compared two types of bias that still exist in American society: explicit and implicit. Explicit bias is intentional, expressed, deliberative and conscious. Individuals are fully aware of explicit bias

and it is generally expressed in the form of animus toward others. Implicit bias is intuitive, reactive and unintentional. It often is expressed in the form of immediate judgment though individuals are unconscious of it. Individuals are unaware of their implicit bias and deny its existence.<sup>10</sup>

The IAT testing showed that implicit bias is “largely automatic” with “the characteristics in question (skin color, age, sexual orientation) operat[ing] so quickly... that people have no time to deliberate.”<sup>11</sup> People are usually surprised to learn that they have shown implicit bias, saying “in good faith that they are fully committed to an antidiscrimination principle with respect to the very trait against which they show a bias.”<sup>12</sup> Test findings show that bias exists outside of conscious awareness or outside of conscious control.

Implicit bias is also found to be pervasive, appearing in the majority of sample populations. For example, over 80% of respondents showed implicit bias against the elderly and 75-80% of self-identified Whites and Asians showed implicit bias in favor of Whites over Blacks.<sup>13</sup> Additionally, implicit bias can predict behavior. Individuals with greater implicit bias have been shown to display greater discrimination in all types of situations from acts of friendliness and inclusion to more serious acts such as evaluation of work quality.<sup>14</sup>

In a recent law review article, implicit bias is explained as “the subconscious associations we make between a particular object and the meanings we attach to it ... [I]mplicit biases result in automatic associations between an individual’s race and corresponding stereotypes and attitudes. Perhaps most importantly, we now know that implicit bias predicts actual behavior.”<sup>15</sup>

### Effects of Bias in the Legal System

Bias exists in almost every area of law and society from a social science perspective, including property law, criminal law, torts, employment law, health law, education law, corporations law, tax law, intellectual property, environmental law, federal Indian law, and capital punishment.<sup>16</sup>

Bias in the legal system has detrimental effects for society as a whole. It undermines the public’s trust and confidence in the legal system by creating the perception that the system is unfair. Bias denies due process and equal protection to all defendants and results in the conviction of the innocent. According to the Innocence Project, nearly 70 percent of the 312 people exonerated by DNA testing are people of color.<sup>17</sup> Additionally, unjust convictions have long-lasting effects, often resulting in the denial of employment opportunities.

While the innocent are convicted based on bias, the guilty remain free to commit more serious crimes. In the notorious Central Park jogger case, five Latino and African-American youngsters under the age of 17 were arrested in the violent rape and beating of a white woman. The accused gave false confessions, were convicted, and served lengthy prison sentences before being exonerated based on DNA evidence and the confession of the real perpetrator to the crime. At the very time the youngsters were prosecuted, the real perpetrator

raped and killed other victims but the investigators and prosecutors failed to evaluate the evidence that showed the youngsters could not have committed the crime.

Ironically, the real perpetrator was arraigned on another matter before the same judge who heard preliminary evidence against the five youngsters. The investigators and prosecutor who obtained the conviction were opposed to the exoneration and angry with the judge and the district attorney who obtained the reversal. This is known as “cognitive dissonance”—the uncomfortable feeling that your self-assessment that you are good person and your bad behaviour are in conflict.<sup>18</sup>

### Managing Bias

Based on extensive research it appears that bias is part of a complex hard wiring in the brain and cannot be eliminated, but it can be managed by a commitment to be open-minded and fair in the way we respond to and interact with people from out-groups. Humans are wired to respond with fear (the fight or flight reaction) when seeing someone of a different race. However, Robert M. Sapolsky, professor of neuroscience at Stanford University, reports that scientists have discovered that “simply thinking about someone as a person rather than a category makes that supposedly brain-based automatic xenophobia toward other races evaporate in an instant.”<sup>19</sup>

If lawyers today believe that bias does not exist and that they should not be compelled to attend programs to eliminate

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bias, they should consider the cost of bias and discrimination in our community in just a single city agency, as well as costs to major business organizations.<sup>20</sup>

Bias can be managed but requires conscious effort, including:

- Understanding and being aware of both implicit and explicit bias
- Being aware of the social consequences and costs of bias and prejudice
- Judging others based on individual merits, not on preconceived stereotypes.
- Using rational, effortful thought process to overcome the emotional, intuitive, snap judgment
- Speaking out against bias and encouraging diversity in law firms and other organizations
- Being mindful of Rule 2-400 of the California Rules of Professional Conduct against discrimination
- Participating in training programs and helping others become aware of bias
- Showing empathy, tolerance and compassion to others
- Listening carefully with respect, especially to someone whose background, identity and culture may be different from your own
- Communicating authentically with compassion
- Developing and implementing a diversity program within your law firm or organization to which you belong<sup>21</sup>

It is hoped that the reader will find in this article sufficient reasons for understanding the importance of MCLE programs on Elimination of Bias and will support the expansion of the program to include understanding bias generally within our society. By expanding programs to understand the cognitive science of bias, lawyers will gain a greater insight into their own beliefs, attitudes and perspectives which inform their decisions, judgments and behaviours. And through our own self-awareness, we can become more effective advocates and trusted advisors on behalf of our clients.

It is also hoped that elimination of bias programs will not be viewed as a waste of time nor to promote propaganda of the leaders of the bar, but will be accepted as an essential and beneficial insight into the way lawyers understand their

own thinking, judgments and behaviour as well as those of others. 

<sup>1</sup> Rules of the State Bar, Title 2, Div. 4, Rules 2.72(A)(2).

<sup>2</sup> State Bar Resolution 2-04-2002 on MCLE Requirement—Elimination of Bias.

<sup>3</sup> State Bar Resolution, *ibid*.

<sup>4</sup> E-mail from State Bar of California Staff to Myer Sankary (January 17, 2014, 11:58 AM PST) (on file with the author). See also "Title 2. Rights and Responsibilities of Members, Rule 2.72," State Bar of California, updated October 12, 2013 (available at [http://rules.calbar.ca.gov/Portals/10/documents/Rules\\_Title2\\_Div4-MCLE-pending-redline.pdf](http://rules.calbar.ca.gov/Portals/10/documents/Rules_Title2_Div4-MCLE-pending-redline.pdf)).

<sup>5</sup> See Kelly Robbins, "California Women Lawyers: Strong Roots Promise a Bright Future," *Contra Costa Lawyer*, Aug 2013 (presenting a brief historical survey confirming some of the progress regarding women in the legal profession: "Women attorneys practicing in California have increased from 1 percent in the 1960s... to 39.4 percent in 2011. ... Regarding women judges: Between 1958 and 1977, 4 percent of judicial appointments were female... and currently our judiciary is comprised of 31.3 percent females (end of 2012)." See also Epstein et al, "Glass Ceilings and Open Doors; Women's Advancement in the Legal Profession," *Fordham Law Review*, Vol 64, Issue 2 (1995).

<sup>6</sup> See Mahzarin R. Banaji and Anthony G. Greenwald, *Blind Spot: Hidden Biases of Good People*, Delacorte Press, 2013, pp. 71-93.

<sup>7</sup> Craig Lambert, "The Psyche on Automatic," *Harvard Magazine*, November-December 2010, available at <http://harvardmagazine.com/2010/11/the-psyche-on-automatic>.

<sup>8</sup> The author notes that he grew up in Ft. Worth, Texas during the 40's, 50's and early 60's, when segregation was in full force and it was important to survive to know one's place in the social structure of the dominant white society. Those who felt oppressed the most were blacks, Hispanics, Asians and Jews, as there were laws which restricted access and set clear boundaries. Women were considered "homemakers," and not associated with the category of "professional," except as a teacher or secretary (not considered professions in those days).

<sup>9</sup> See [www.implicit.harvard.edu](http://www.implicit.harvard.edu).

<sup>10</sup> See *12 Angry Men*, Dir. Sidney Lumet, United Artists, 1957.

<sup>11</sup> Christine Jolls & Cass R. Sunstein, "The Law of Implicit Bias," Discussion Paper No. 552, The Harvard John M. Olin Discussion Paper Series, June 2006, available at [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Jolls\\_et%20al\\_552.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Jolls_et%20al_552.pdf).

<sup>12</sup> *Id.*

<sup>13</sup> JoAnn Moody, "Cognitive Errors and Unintended Biases: A Very Quick Review," available at <https://www.middlesex.mass.edu/diversityandequityaffairs/downloads/domcoeger.pdf>.

<sup>14</sup> *Id.*

<sup>15</sup> Jonathan Feingold & Karen Lorang, "Defusing Implicit Bias," 59 *UCLA L. Rev. Disc.* 210, 2012.

<sup>16</sup> *Implicit Racial Bias Across the Law*, Justin D. Levinson & Robert J. Smith, eds., Cambridge University Press, 2012.

<sup>17</sup> "Know the Cases: DNA Exonoree Case Profiles," Innocence Project, <http://www.innocenceproject.org/know/>, accessed January 13, 2013.

<sup>18</sup> See Sarah Burns, *The Central Park Five: The Untold Story Behind One of New York City's Most Infamous Crimes*, Alfred A. Knopf, 2011.

<sup>19</sup> Robert M. Sapolsky, "Are humans hard-wired for racial prejudice?" *Los Angeles Times*, July 28, 2013.

<sup>20</sup> See Michael Finnegan, Ben Welsh and Robert J. Lopez, "New LAFD recruit class is nearly all male, overwhelmingly white," *Los Angeles Times*, January 6, 2014. Los Angeles taxpayers have paid \$20 million since 2005 to settle claims of racial discrimination and sexual harassment in the LAFD. In November 2013, a jury awarded a black firefighter \$1.1 million based on his claim of 30 years of discrimination.

<sup>21</sup> Many law firms and businesses have adopted diversity policies and programs to provide opportunities for diverse groups of individuals. One example can be found on the website of Fulbright & Jaworski LLP, available at <http://www.nortonrosefulbright.com/us/about-us/diversity/diversity-action-plan>: To engage all personnel (including diverse groups such as lawyers of color, women lawyers, LGBT lawyers and others) to support and participate in our diversity efforts and to ensure we all understand that diversity is essential to making us the best that it can be and enriching our lives and connections across the world.



**Myer J. Sankary** is a member of the SFVBA Probate & Estate Planning Section, a former SFVBA Trustee and is currently the Chair of the SFVBA Mandatory Fee Arbitration Program. He is the past president of Southern California Mediation Association and has been a full-time mediator with ADR Services, Inc. since 2008. He can be reached at [myersankary@gmail.com](mailto:myersankary@gmail.com).



# Test No. 64

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour in Elimination of Bias. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

- Greenberg v. State of California* held that compelling a lawyer to take courses on bias and substance abuse violated the first amendment right to be free of compulsory governmental propaganda.  
 True  False
- The *Greenberg* court also held that programs on elimination of bias in representation and decision making were proper requirements for California lawyers even though it was unrelated to the practice of law.  
 True  False
- The rule requiring one hour on elimination of bias does not require that it be limited to bias in the legal profession.  
 True  False
- The rule requires one hour on elimination of bias based only on sex, race, religion, and age discrimination.  
 True  False
- In 2002, a resolution was proposed to expand the scope of the elimination of bias requirement to include bias in society outside the legal profession.  
 True  False
- In October 2013, The Stat Bar Board of Trustees again rejected a proposal to expand the scope of the elimination of bias requirement to include bias in society outside the legal profession.  
 True  False
- California Rules of Professional Conduct 2-400 states that it is not ok for an attorney to discriminate against people in protected classes, but it is not a disciplinary offense if you do.  
 True  False
- Despite the implementation of MCLE programs on elimination of bias, little progress has been made in eliminating bias against women in the legal profession since 1970.  
 True  False
- Bias is simply a preference for the way you want to deal with other persons and little is known about why we have biases.  
 True  False
- The human mind evolved to understand the world by creating categories.  
 True  False
- Once you join a group of people who are like you, you may tend to develop an "in-group" bias against someone in the "out-group."  
 True  False
- Some social scientists claim that bias and prejudice arise from premature cognitive commitments in which beliefs are formed at an early age before the development of critical thinking.  
 True  False
- When a person in power, such as a judge or prosecutor, is biased for or against someone, severe consequences can result, depriving a party of equal protection and due process.  
 True  False
- The difference between explicit bias and implicit bias is that the person who has an implicit bias may be unaware of his or her bias and will often deny that they are biased.  
 True  False
- Implicit bias is often hard to detect but can be pervasive in a population.  
 True  False
- One of the effects of bias in the legal system is that it can create an impression that the system is not fair.  
 True  False
- Because of the bias of some judges, prosecutors and investigators, the innocent may be convicted and the guilty may remain free to commit other crimes.  
 True  False
- Humans apply patterns acquired in the early childhood period and as result we tend to make generalizations about groups of people.  
 True  False
- One of the ways to manage bias is to be aware of the possibility that you may have an implicit bias against a protected group and to adjust your behaviour to overcome your bias.  
 True  False
- By encouraging the hiring of many diverse qualified individuals from different backgrounds, including such characteristics as gender, race, religion, sexual orientation, age, national origin, blindness or other physical disability, the profession of law can become more tolerant and productive.  
 True  False

## MCLE Answer Sheet No. 64

### INSTRUCTIONS:

- Accurately complete this form.
- Study the MCLE article in this issue.
- Answer the test questions by marking the appropriate boxes below.
- Mail this form and the \$15 testing fee for SFVBA members (or \$25 for non-SFVBA members) to:

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5567 Reseda Boulevard, Suite 200  
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State Bar No. \_\_\_\_\_

### ANSWERS:

Mark your answers by checking the appropriate box.

Each question only has one answer.

1.  True  False

2.  True  False

3.  True  False

4.  True  False

5.  True  False

6.  True  False

7.  True  False

8.  True  False

9.  True  False

10.  True  False

11.  True  False

12.  True  False

13.  True  False

14.  True  False

15.  True  False

16.  True  False

17.  True  False

18.  True  False

19.  True  False

20.  True  False



*Photo by Robert Reiter*

# SFVBA Names Judge Richard H. Kirschner Judge of the Year

By Irma Mejia

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On February 27, the San Fernando Valley Bar Association will honor Supervising Judge Richard H. Kirschner for his service on the bench, his commitment to fair and impartial administration of justice and his outreach activities in the community at large. For his exemplary leadership and dedication, Judge Kirschner is named the SFVBA's 2014 Judge of the Year.

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**T**HIS MONTH THE SAN Fernando Valley Bar Association honors Judge Richard H. Kirschner as the 2014 Judge of the Year. As Supervising Judge for the Northwest District, Kirschner is an affable jurist who strives to always uphold that delicate balance between administering justice in a firm yet fair manner. He also maintains a deep appreciation of the importance of the public's perception of and participation in our judicial system. With over 40 years of experience in the legal field, Judge Kirschner brings a wealth of experience and wisdom to the bench. His respectful demeanor and knowledgeable leadership have earned him the Bar's highest honor this year.

A lifelong Angeleno, Kirschner received his law degree from UCLA School of Law and then served as a federal prosecutor in the United States Attorney's Office in Los Angeles. He also served as a Special Prosecutor in Washington D.C. and Miami before establishing a white collar criminal defense firm in Southern California. Through his firm, he handled a variety of criminal matters, including tax fraud, securities violations and money laundering.

Over the years, Kirschner has received many honors and accolades for his expertise and hard work. He has taught courses on evidence, trial tactics, and white collar crime at Loyola Law School and written many articles on federal criminal law issues, judicial independence and the Federal Sentencing Guidelines. He has also served as President of the Los Angeles chapter of the Federal Bar Association and as Chair of the Federal Indigent Defense Panel for the Central District of California. Kirschner was also appointed Deputy General Counsel to

the Board of Police Commissioner's Rampart Independent Review Panel following the Rampart police corruption scandal.

He was first appointed to the bench in 2001 and became Supervising Judge for the Northwest District in 2008. He continues to preside over a felony court and fills in as needed in courtrooms where bench officers are ill or out for various reasons. Since sitting on the bench, Kirschner has been called upon to serve on various committees, including the Los Angeles Superior Court's Budget Working Group which dealt with the LASC's recent budget crisis. He has also been appointed by Chief Justice Tani Catil-Sakauye to the California State-Federal Counsel through 2016.

Judge Kirschner's duties are not limited to the Van Nuys courthouses. When speaking with him, it quickly becomes clear how proud he is of the Van Nuys High School Teen Court Program. Along with California Court of Appeal Associate Justice Sandy Kriegler, he has operated the program for nine years. During those years, he has seen the program grow from a small group of students meeting in cramped classrooms to about 100 student participants per session. The culmination of his commitment was his successful effort to lobby the Los Angeles Unified School District for funds to build the San Fernando Valley's first mock courtroom at Van Nuys High School.

Kirschner is able to balance his judicial responsibilities with his personal life by maintaining an active lifestyle. He is a dedicated runner and cyclist, having completed more than 60 marathons and two ultramarathons. He is also an avid traveler, seeking adventure wherever he goes, be it a safari trip or a whitewater rafting

excursion. These activities are what he calls his "decompression strategy," allowing him to stay sane through his long list of commitments inside and outside the Van Nuys courthouses.

*Valley Lawyer* recently spoke to Judge Kirschner to learn more about his experience on the bench and his outlook on the courts, legal profession and justice system.

**Q What made you want to practice law?**

**A** As a history major at UCLA, I was in line for a Woodrow Wilson teaching fellowship. Halfway through my senior year, I decided I didn't want to teach full-time because it would be too boring. I didn't know much about law but I decided to take the LSAT. I did well and attended UCLA School of Law. I was one of the few people who really enjoyed law school. It provided a different way of thinking. There was no right answer; what mattered was how persuasive you were. It was a good fit because I always liked logic and deductive and inductive reasoning. Plus I couldn't go to medical school since I was lousy at math.

**Q What advice would you give to current law students?**

**A** The teaching of law and the practice of law unfortunately are two very different things. Current students should take as many clinical courses as possible. They should clerk for a judge if they can, intern if they can, or work in a clerk's office. It will give them a wealth of experience as to what the real world is about.

**Q How was your first appearance in a courtroom as a new attorney?**

**A** I was scared to death, trembling, when I made my first appearance in a trial court. I'll never forget it. I was



**Irma Mejia** is Editor of *Valley Lawyer* and serves as Publications and Social Media Manager at the San Fernando Valley Bar Association. She also administers the Bar's Mandatory Fee Arbitration Program. She can be reached at [editor@sfvba.org](mailto:editor@sfvba.org).

a very young Assistant U.S. Attorney appearing before the Honorable Manny Real, a jurist with a reputation for sternness. The case was a one-note counterfeit passing case. I was over-prepared but didn't know how difficult it was to prove intent so I lost the case mightily. My fervent hope was that the judge not scream at me.

**Q What made you want to serve on the bench?**

**A** My life has been blessed with wonderful opportunities. I strongly believe that if you are fortunate to have something great, then you need to give back to the community in some way. I started giving back during my years in private practice. The natural culmination of those efforts really was to seek a judgeship. I see judicial office as a genuine community service opportunity. It's the kind of thing that makes the job worthwhile. I'm certainly not doing it for the money but rather for the ability to make the system work and to influence people's lives in a meaningful way.

**Q Are you any different now than when you first presided over a courtroom?**

**A** That's a tough question. You'd probably have to ask the folks who I've dealt with over the years. I'd like to think experience has made me wiser and more tolerant of the pressures placed on busy lawyers. I came from a federal litigation background, which is very different and more formal than state practice. I've adjusted to the state cultural model and firmly believe it produces justice and excellent litigators. I have always endeavored to be courteous and respectful to everyone in my courtroom because everyone deserves to be heard. I maintain control by explaining the reasons for my decisions in a respectful manner, showing that I've carefully considered the issues, reviewed the case and read everything.

**Q What do you enjoy most about serving on the bench?**

**A** My favorite moments are when I see folks appear before me succeed. When I see someone on probation who has gone the extra mile and turned his life around or when there's a civil case in which both sides are equally disgruntled but the result is fair—that makes me smile. Those are the good times on the bench.

**Q What is the most difficult aspect of your work?**

**A** Sentencing in criminal cases.

**Q How do you handle that serious duty?**

**A** You never become personally involved. You simply evaluate the facts objectively and operate with an even and firm hand. It sounds corny and trite but that is what you try to do. The punishment has to fit the crime but must not be excessive or lenient. You mete out sentences consistent with the protection of the public and deterrence as well as the rehabilitative function of sentencing. It's a difficult balance

but one for which we always strive. Our ultimate goal is to achieve fairness and consistency. To do that, we must recognize personal biases that we all have and put them aside to be fair and even handed.

**Q Do you have a favorite jurist that you look up to?**

**A** I have several favorites: Learned Hand, Oliver Wendell Holmes, Jr. and George Sutherland. Holmes and Sutherland were members of the "Hughes Court" which issued the eloquent and authoritative description of the role of the prosecutor in administering criminal justice in *Berger v. United States*. It is no overstatement to say that *Berger* has become a virtual anthem to the prosecutors' duty not simply to win a case, but to ensure that justice is done, to protect the innocent and to strike hard but not foul blows.

**Q How do you view the current Bench-Bar relationship?**

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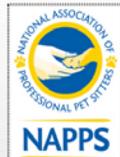


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**A** I am incredibly thankful for the San Fernando Valley Bar Association and I say that with all sincerity. The Bar provides great services via volunteer programs, referrals, or even just bringing pizza to the Van Nuys Teen Court at the end of the school year. It's an extremely important relationship and one that we cherish in the courts. On many occasions, the Bar is the voice we don't have because of the restrictions placed on the Bench. Many times we can't come forward and explain certain things to the public but the Bar can. Bar associations are tremendous assets in all kinds of ways, including meeting with legislators about increasing court funding and promoting innovations like Expedited Jury Trials. The Bar is an integral partner. I don't know what we would do without it and I mean that.

**Q As supervising judge, what are your duties?**

**A** The supervising judge does all the things nobody else wants to do! I oversee 36 bench officers and handle courtroom assignments and complaints from the public. I make sure the district runs smoothly. I do a lot of community outreach, constantly looking at the needs of the community. It's an administrative function as varied as scheduling vacations for judges to filling in when someone is sick in small claims or traffic court, which I love to do. That's really where most people see justice. The majority will never be in the criminal courts or in large civil disputes. They are there in small claims and traffic court. That's where they receive their first impression of what this court is about. It is extremely important they go away with a good feeling of how they were treated and how the system works.

**Q How do you handle complaints from the public?**

**A** I receive complaints in their raw form, usually in the form of letters from litigants who felt they were treated inappropriately. Often they are just unhappy with the decision and they are directed to the appellate process. The

most difficult complaints are the ones in which the litigants feel they were treated rudely or not given an opportunity to be heard. I take those very seriously. Our constituency is the public. They are the folks that need to be satisfied.

When those complaints come in, I have to investigate them, review the case file, the transcripts, file notes, and the docket entries to make a determination as to what really happened. If necessary, I make recommendations for remedial measures with respect to that bench officer. It's not a fun part of the job. It's a very difficult but important task. We as judges serve the public, not ourselves. This is a meaningful oversight function.

**Q Do you ever wish you could go back to the simpler days before you had all of these administrative tasks?**

**A** Sometimes. But honestly, I enjoy my job as Supervising Judge. We have a tremendous bench with great collegiality. Our judges are working very hard with fewer resources. The challenge is to maintain the collegiality needed to serve the public. I have no one who is recalcitrant to do what they need to do to maintain a sense of collegiality in the face of crippling budget cuts. Van Nuys is a place where people want to come to work. Hopefully that gets translated to the folks and lawyers we serve.

**Q How has the Superior Court's budget cuts and restructuring affected the courts you supervise?**

**A** The draconian budget battles over the last decade have had a crippling effect on all of our courthouses, Van Nuys included. Van Nuys is no longer a full-service neighborhood court. Unfortunately, we have had to close courtrooms, lay off staff, and shift functions to "hub" courts. A traffic trial court, a probate court, an unlawful detainer court, a juvenile traffic court and a misdemeanor compliance court have been closed. We have gone from twelve civil courtrooms to nine. Currently, we have four judicial vacancies—two

in criminal, two in civil—and several retirements on the horizon. And with the closing of the Malibu courthouse, we expect an additional 4,000 misdemeanor filings, without a corresponding increase in judges or staff.

The losers of this budget fight are not just the public and the Bar, but the great staff and employees who have supported us for years and are now laid off. Van Nuys has 62 fewer staff. Given this 27% reduction in staff, we are only able to maintain access to justice at the price of delays and backlogs.

**Q Have you seen any positive effects from the Superior Court's Consolidation Plan?**

**A** The Consolidation Plan has been helpful in some ways. It has made us reevaluate what we do and how we do it. For the first time in five years, we have no structural operating budget deficit. Our fiscal situation and our workforce are stabilized for the first time in years. We now have the ability to build rather than dismantle.

Through the reevaluation process, we will capture resources within the court to improve access to justice and create a more resilient court organization. We now have a more centralized case management system for personal injury cases with three downtown master calendar courts, handling all pretrial matters and then assigning trial-ready PI cases to the 31 new trial courts throughout the county—five of which are in Van Nuys.

The good news is the master calendar courts have immediately transferred every trial-ready case to a trial court. Timely commencement of trial precipitates settlements, which is the best defense against backlogs.

There is a new and dynamic emphasis on technology. Our court administration and leadership have come up with a plan to acquire technology aimed at improving court efficiency. The planned innovations include automation of mundane processes to free up staff, starting with traffic violators being

able to go online for continuances or to pay a ticket; the processing and inputting of all filed civil documents at the beginning of a case instead of at the end; and the replacement of all 12 case management systems and two query systems that don't interact with one another. The system upgrade will include an e-filing component that's easy to use. Over time, these changes will significantly reduce our largest and most troubling backlogs and delays.

**Q** Since you were first admitted into practice, have you seen the increase in diversity in the legal profession?

**A** Absolutely. The complexion and gender of the practice has changed dramatically, all for the better. The first inroads were made with the support staff in the clerks' offices. The staff there has more women and more minorities in numbers greater than their numbers in the general population. The Bench was slower to come to that level of diversity but it has progressed. Judge Lee Smalley Edmond was the first female Presiding Judge and did a terrific job blazing a trail in the Los Angeles Superior Court. Judge Carolyn Kuhl, another outstanding jurist, will take on that role next year.

**Q** What more can be done to help increase diversity in the courts?

**A** The court has implemented a number of outreach programs to attract folks who might not have otherwise considered the law as a profession. Programs like Teen Court also help reach out to underrepresented groups. Judges participating in community meetings help demystify the process to the public. While judges can't speak about specific cases, they can talk about how the system works and opportunities within the system.

It is particularly important to speak about jury service. Most people who haven't served think it's the worst thing in the world. People who have

## SFVBA TO HONOR BENCH OFFICERS AT ANNUAL JUDGES' NIGHT

**T**HE SAN FERNANDO VALLEY BAR ASSOCIATION SETS ASIDE a special evening every year to honor our esteemed judicial officers for their tireless work. In addition to Judge of the Year Richard H. Kirschner, the SFVBA honors the following distinguished jurists:



**Judge James A. Steele**  
*Administration of Justice Award*

Judge Steele was appointed in 2007 by Governor Arnold Schwarzenegger and presided over general unlimited civil and probate matters in Van Nuys from 2008 to 2013. He currently handles probate trials at the Stanley Mosk Courthouse and dedicates a tremendous amount of time to teaching probate and related courses for judicial officers. He was instrumental in designing and implementing the widely successful Probate Settlement Program.



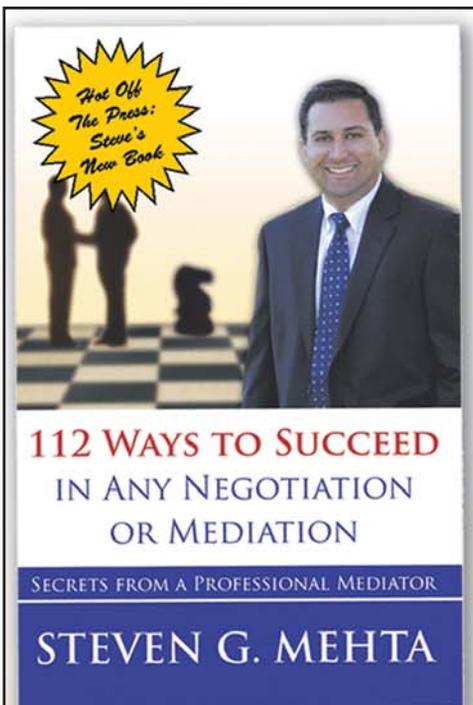
**Judge Mitchell L. Beckloff**  
*Judicial Leadership Award*

Judge Beckloff served as Supervising Judge of the Probate Division of the Los Angeles Superior Court from 2009 through the end of 2013. Before his appointment in 2007 by Governor Schwarzenegger, he served as a Superior Court Commissioner presiding over family law matters, later probate matters. Prior to that, Judge Beckloff had served several years as a Superior Court Referee in the Juvenile Delinquency Court. He currently is serving in the Stanley Mosk Courthouse in the Independent Calendar, General Civil Court.



**Judge Graciela Freixes**  
*Horace Mann Honorary Award*

Judge Freixes was also appointed in 2007 by Governor Schwarzenegger and currently serves in the North Valley District, Chatsworth courthouse. Prior to her appointment, she served as a Superior Court Commissioner presiding over small claims, unlawful detainers and misdemeanor arraignments. She has volunteered for numerous programs but most notably has served as a volunteer coach and judge in local mock trial programs for more than a decade.



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served have a very different view. I tell my perspective jurors, "You may think you are losers because your friends succeeded in avoiding jury service. But you aren't. I challenge you: you may have a bad attitude coming in but you're going to have good attitude coming out."

After the trial, I speak to the jurors about their experience. Out of the 200 trials I've presided over, I've only had two or three jurors who said they hated it. Most people realize how important jury service is and how they enable justice to be served. When a true cross-section of the public understands how the system works, that ultimately promotes diversity.

**Q Why is the Teen Court Program so important to you?**

**A** It's extremely important for the juvenile justice system to spot problems early before they become more serious. It's a collaborative justice program where students sit in judgment of their peers accused of fairly minor crimes. People in the juvenile justice system are able to opt out and go into the Teen Court system. The probation officers select the cases to bring to us. There are no prosecutors, no defense lawyers. It's the jurors asking riveting, deep questions.

As the judge, I instruct them on the law and, if after deliberations they find the juvenile guilty, they recommend a sentence. It's a probationary sentence, usually with an order to maintain a GPA of a C or better; to write an essay about the crime; or to apologize to the victim. The program helps student jurors understand the system and, more importantly, it makes the juvenile offender realize the potential consequences of his actions. It functions as an early intervention program. If the juvenile finishes probation after six months, the case is dismissed and he or she has no record.

It's a wonderful opportunity to prevent kids from getting into the

adult criminal justice system. The program gives kids the opportunity to see what's happening in the criminal system and it turns their lives around.

The Van Nuys High School Teen Court Program in particular has been a labor of love. It was important to build the mock courtroom at the school because it makes a huge difference for the students to be in a setting that accurately resembles a courtroom. The program receives no funding from the state and is an excellent example of what the court can do with the aid of the community.

**Q If you had not gone into law, what do you think you would have done?**

**A** I am an archaeology buff stemming from my days as a history major in college. I consider myself a frustrated Egyptologist. In fact, I got into the archaeology certificate program when I graduated from UCLA but chose not to complete it because it required too much time.

My ultimate goal is to spend a season at Chicago House in Luxor, Egypt. I'd love to do that. I'd clean up the kitchen, do anything they asked. I've always been fascinated with archaeology. When I was 13 years old I read *Gods, Graves & Scholars*, an old book about great explorers and discoveries. It piqued my interest. I always wanted to be the kid who dug up treasure in the backyard.

**Q What advice do you have for attorneys appearing in your courtroom?**

**A** Be a paragon of civility. I highly value civility and professionalism. It is the mark of an experienced litigator. Be prepared, be honest, be objective, and don't take yourself too seriously. Definitely don't bicker. Try the case, not opposing counsel. You become an effective advocate for your clients and our justice system by doing so. An attorney's reputation is the key to developing credibility with colleagues and the bench. 

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*Administration of Justice Award*



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**Judge Graciela Freixes**  
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# On The Future of Lawyers and Lawyering

By Brian J. Sheppard



**A**CCORDING TO THE AMERICAN BAR ASSOCIATION, only fifty-six percent of new lawyers from ABA-approved law schools found legal work within nine months of graduation last year.<sup>1</sup> The State Bar should form a consortium of law schools and experienced lawyers to help new lawyers jumpstart their law practices by working with middle class people who find legal fees exceed their means. Even now, the State Bar is considering licensing non-lawyers for legal work in areas such as family law, domestic violence and immigration. Whether the State Bar will seek to extend this exemption to other areas of practice is unknown.

I think the situation for new lawyers will get worse, not better. This trend is likely to continue and grow because it is a result of a perfect storm of increasing economic inequality, technological change, and outsourcing.

In *The Price of Inequality*, Nobel Prize-winning economist Joseph E. Stiglitz writes: "(O)ver the last three decades those with low wages (the bottom 90%), have seen a growth of only around 15% in their wages, while those in the top 1% have seen an increase of almost 150% and those in the top 0.1% of more than 300%..."<sup>2</sup>

Recently, former Labor Department Secretary Robert Reich stated on Bill Moyers' public television show that 95% of the income gains from 2009-2012 went to the top 1% of earners. In a September 19, 2013 interview conducted by the *Los Angeles Times*, the Secretary (and UC Berkeley professor)

said "...consumers just don't have the ability to buy what the economy is capable of producing."<sup>3</sup> Secretary Reich argues that after accounting for inflation, the median worker makes less than he or she did thirty years ago.

If middle class people cannot afford legal representation at current rates, either rates have to drop or they will not get representation. Large firms with well-heeled clients may not be hurt by this wealth and income shift, but middle class workers simply cannot hire lawyers at current market rates. The result is less work to be done and fewer attorney jobs, even as the State Bar looks for ways to license non-attorneys to do legal work.

Technology is also reducing the need for attorneys. In the last twenty years the internet has evolved into an ever-present and increasingly useful tool; scanning has become commonplace; dictation software has become cheap and accurate; the smartphone has become omnipresent; and many attorneys have a website, sometimes with a plethora of information. These technologies were not in existence or not as prevalent in 1994. These changes have increased the productivity of lawyers and reduced their need for associates. By the economic laws of supply and demand, the costs of representation should fall.

Technology also enables firms to outsource work to specialized non-legal firms for discovery and other purposes. It has made it possible to allow the drafting of discovery and complaints in countries such as India where wages are much



**Brian J. Sheppard** is an attorney focusing his practice on estate planning, conservatorships and probate in the San Fernando Valley. He can be reached at [bjsheppard@aol.com](mailto:bjsheppard@aol.com).

lower. Additionally, companies such as LegalZoom and NOLO Press convince many that anyone with a computer can produce their own legal documents. Technology has created a steady downward pressure on the need for new—and continuing—attorneys in a contracting market.

For the vast majority of lawyers who are not at the top, who are not senior attorneys with years of specialization in a highly sought-after area, who do not have wealthy clients in regular need of legal services, the future of the profession has been dramatically changed.

Only by recognizing that many people cannot afford lawyers at current rates, that our standards must be retained and enhanced to protect the public, and that consumer are best protected when licensed attorneys do their legal work, can the State Bar protect access to quality services. The State Bar must realize there is a benefit to licensed lawyers performing legal work, and must establish a means to connect new lawyers with mentors and middle and working class clients who cannot afford the going rate for experienced attorneys.

New attorneys, even those with large law school debts, must accept the reality of the legal marketplace where many consumers cannot now participate because it is simply too expensive. Action by the State Bar and some entrepreneurial spirit by new attorneys might work wonders.

Creating such a program could have additional benefits, such as enabling law school graduates to pay their student loans, buy houses, and participate in the economy as both consumers and producers. The labor force participation rates for young people are at their lowest ever and the State Bar should not pass up this opportunity to protect the public and attorneys by fostering such programs. The Bar leadership, currently focused on outsourcing legal jobs to non-attorneys, should instead focus on how to make legal services affordable to the middle class and enabling law graduates to use their expensive and hard-earned educations.

With evermore attorneys serving an evermore stretched middle class, something's gotta give. Even rising minimum wages will not create new clients. Even as Google, Facebook and other hi-tech companies grow, they do not create very many jobs.

New attorneys may have to settle for being respected and contributing members of society who help people in need. That's not such a bad bargain. 

*The opinions stated are the author's only and do not purport to represent opinions of the SFVBA. Alternative views and comments are also welcome and will be considered for publishing in Valley Lawyer.*

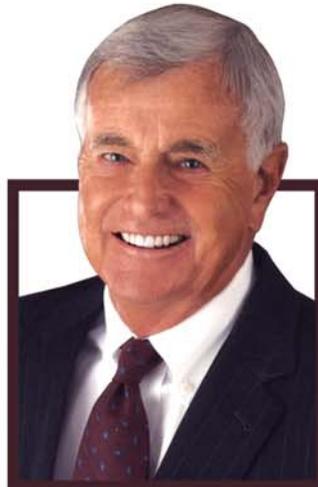
<sup>1</sup> Mark Hansen, "Barely half of all 2012 law grads have long-term full-time jobs, data shows," ABA Journal, March 29, 2013, 10:50 AM CST, [http://www.abajournal.com/news/article/barely\\_half\\_of\\_all\\_2012\\_law\\_grads\\_have\\_long-term\\_full\\_time\\_legal\\_jobs\\_data...](http://www.abajournal.com/news/article/barely_half_of_all_2012_law_grads_have_long-term_full_time_legal_jobs_data...)

<sup>2</sup> Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future*, Norton, W. W. & Company, Inc., 2012, p. 8.

<sup>3</sup> Robert Reich discusses his new documentary 'Inequality for All,' *Los Angeles Times*, September 19, 2013, <http://www.youtube.com/watch?v=8vmjWZkL9Us#t=22>.



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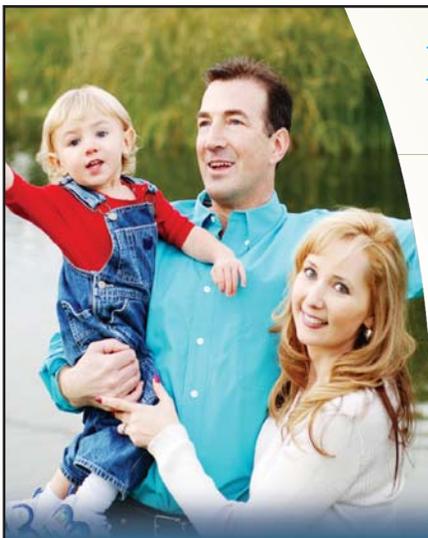
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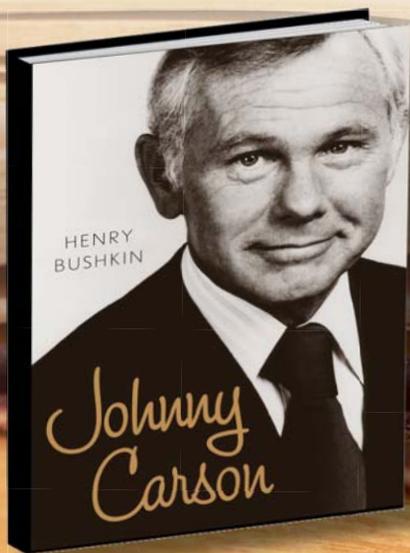
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# Attorney-Client Privilege and Celebrity Clients:



## A Review of Henry Bushkin's *Johnny Carson*

By David Gurnick

**M**ANY LAWYERS IMAGINE THE GLORIES OF entertainment law: representing high-powered celebrities, negotiating big deals, being on-set or back-stage at glamorous events, traveling the world's most fashionable places, enjoying fine foods, wines and the attention of assistants, waiters and hangers-on of every sort. It would seem a lawyer who, for 18 years represented the nation's foremost comedian, Johnny Carson, would have had it all.

Everyone knows Carson's wit, good looks and charm. We know this mostly from the *Tonight Show* he hosted for 30 years (1962-1992). In Henry Bushkin's memoir of his all-consuming engagement, *Johnny Carson* (Houghton Mifflin, 2013), the author opens the curtain, bringing us behind-the-scenes into the attorney-client relationship. What Bushkin shows us is not glamorous or pretty, or even funny. Bushkin exposes his off-stage client as crude, depressed, impulsive, selfish, self-absorbed beyond what we expect from a star, a poor father to his sons, serially unfaithful in each of his four marriages, prone to tantrums, and, even amidst others, lonely and alone.

*Johnny Carson* is also a law book, exposing a lot about Bushkin. Described by Carson in a 1978 interview as "probably my best friend,"<sup>1</sup> Carson's self-described longtime personal lawyer, confidant and friend proves to be neither a

faithful lawyer, nor a trustworthy confidant, nor a friend. A friend, faithful lawyer or confidant, would not have trashed his client as he does in this book.

Yet the book is enthralling. Bushkin recounts their chance introduction. As a new 27-year-old lawyer, Bushkin was asked if he would like to meet Johnny Carson. Of course he would. The meeting was brief. Bushkin realized, shortly after, that he had been interviewed. Soon he was accompanying Carson and an entourage, unlawfully entering the separate apartment of Carson's second-wife Joanne. Carson suspected she was having an affair (which turned out to be with Frank Gifford) and wanted proof.

*My first reaction was to be appalled. No way, I thought. Members of the bar do not break and enter apartments. I am an officer of the court. I am the heir to a great legal tradition. I thought of Clarence Darrow. I thought of Learned Hand. And yet, this was an immense opportunity at the beginning of my professional life to land a very major client and launch my career into the stratosphere.*

With a concocted legal analysis, Bushkin rationalized participating—providing a first window into his character.

Soon we readers are along for a ride as Carson fires his other advisors, replacing them with Bushkin, who

then renegotiates Carson's business deal with NBC and represents Carson in divorcing Joanne. We join Carson's annual vacation to France, yearly trip to Wimbledon, cruises on fancy yachts, poker games among Hollywood's elite, dinners at the finest restaurants, performances in Las Vegas, and titillation, including sexy skinny-dipping showgirls. We also witness Bushkin's infidelities and divorce and his relationship with actress Joyce DeWitt (of *Three's Company* fame).

We see a sometimes softer side of Johnny Carson, who gave generously to others, having once given \$100,000 to the widow of his producer Fred de Cordova. We witness Carson deciding not to fire his personal valet—who was caught stealing Carson's money—if he promised not to steal again. We also see monotonous hours, painful to Bushkin, spent humoring Johnny Carson: during hour-long interludes between early and late Las Vegas shows, or on the tennis court where Carson cheated on line calls and once forced Bushkin to play, despite Bushkin being painfully ill.

We see Carson, so selfish that he demanded Bushkin join him to watch a film the night before Bushkin (having relocated from New York) began the California Bar Exam. We see Carson so filled with his own celebrity that he only reluctantly agreed to M.C. a 1981 inaugural event for President Reagan, followed by a rift because Carson's wife received a lesser seating location than Ed McMahon's wife. The new President of the United States had to phone Carson to apologize.

We learn what we must have already known: the lawyer is subservient and on call 24/7/365. The lawyer had no time to attend to his spouse. And more than once, including when Bushkin dated Ms. DeWitt, Carson tried to exercise the lord's privilege of *droit du seigneur*, and was only narrowly rebuffed.

Bushkin stretches believability in recalling details of conversations from forty years ago, as if they were transcribed. Recall that accurate is doubtful, and is more likely constructed to give a flavor of what maybe was said. Nor is it credible when Bushkin claims that out-of-the-blue Carson gave him 10% ownership in Carson Productions, Johnny Carson's valuable production company. Like the justification for illegally entering Joanna's apartment, Bushkin is often self-serving and not believable.

From a lawyer's perspective, the most troubling aspects are apparent violations of attorney-client privilege and savage disparagement of a former client. The memoir is filled with revealed confidences. At one point, Bushkin says

Carson asked if he could be trusted to keep discussions confidential, and Bushkin replied he could not legally reveal their conversations during Carson's lifetime. It is as if Bushkin believes the privilege simply ends at the client's death.

The attorney-client privilege does not end at death, but does end eventually. In "the case of an individual client who is deceased . . . the personal representative of the client becomes the holder of the privilege." Thereafter, "once the client's estate is distributed and the personal representative is discharged, the privilege is terminated."<sup>2</sup>

Possibly Carson's estate has been distributed so the privilege may have ended. Also, some contents of the book were previously subjects of media attention and may have already been disclosed.<sup>3</sup>

Also, at the end of their relationship, Carson distrusted Bushkin and sued for malpractice. "Generally, the filing of a legal malpractice action against one's attorney results in a waiver of the privilege, thus enabling the attorney to disclose, to the extent necessary to defend against the action, information otherwise protected by the attorney-client privilege."<sup>4</sup> So the disclosure of confidences in this instance may have some legal justifications.

Whether or not Bushkin satisfied or violated the lawyer's duties "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client,"<sup>5</sup> the author is no friend and no confidant, to have told all.

Contemporary media is filled with news of Edward Snowden, the NSA contractor who broke the law by releasing information. We are riveted at the information made public, and Snowden's crime may lead to some good in exposing government misconduct. Likewise the information disclosed by Bushkin is captivating. He has told us more about a famous celebrity and let us enter a world that is closed to most. But he savaged his former client and betrayed a trust of 18 years. In both cases, the information is welcome and valuable, but the disclosures were wrong. 

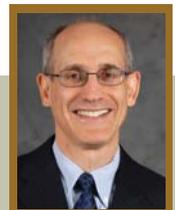
<sup>1</sup> Tynan, *Fifteen Years of the Salto Mortale* (New Yorker, Feb. 20 1978).

<sup>2</sup> *Melendrez v. Superior Court* (2013) 215 Cal.App.4th 1343,1353.

<sup>3</sup> See e.g., Akst, *Canceled Skit: Why Johnny Carson, "Bombastic Bushkin Are Pals No Longer—entertainer and Lawyer Part Over Business Questions; Was Land Deal Involved*, (Wall St. Journal May 2, 1988); Rosenfeld, *The Off-Camera Carson* (L.A. Times July 6, 1986); Tynan, *supra* note 1.

<sup>4</sup> *Reilly v. Greenwald & Hoffman, LLP* (2011) 196 Cal.App.4th 891, 900; Cal. Ev. Code Sec. 958.

<sup>5</sup> 5. Cal. Bus. & Profs. Code Sec. 6068(e)(1).



**David Gurnick** is an attorney at the Lewitt Hackman firm in Encino, practicing in the areas of franchise law, trademarks, copyrights and other intellectual property. Gurnick is a State Bar of California Certified Specialist in Franchise and Distribution Law. He can be reached at [dgurnick@lewitthackman.com](mailto:dgurnick@lewitthackman.com).

# Diversity Committee in Action



By Lisa L. Miller and Rosie Soto Cohen

**T**HE SAN FERNANDO VALLEY Bar Association is committed to creating a more inclusive legal profession by actively developing and participating in programs designed to improve diversity. Consistent with the Bar's mission, the SFVBA Diversity Committee has taken the lead by sponsoring enlightening seminars and trainings for the Bar, and mentoring programs that encourage students of diverse backgrounds to consider careers in law.

## Anti-Human Trafficking Training

Committee members Lisa Miller and Alfonso Martinez are exploring training seminars for attorneys interested in pro bono opportunities to help victims of human trafficking. Volunteer attorneys will receive training materials needed to work with federal and local law enforcement agencies to represent victims of trafficking who are mired in the U.S. justice system. In almost all cases, these clients are without language skills, contacts, support, or funds, and do not realize that in the United States, they are considered victims of a crime.

"I am pleased that my membership on the Diversity Committee has allowed

me to combine my military training with this terrific opportunity to serve my local community," family law attorney and sole practitioner Alfonso Martinez says. "The Air Force has some of the most up-to-date anti-human trafficking training in the world and I am proud to be able to share that with the Bar."

## Diversity Pipeline

The Diversity Committee is collaborating with local community colleges. Committee members Joanna Sanchez, Elayne Berg-Wilion and Judith Sack have made significant progress with their respective projects involving Los Angeles Pierce College and Los Angeles Mission College.

Sanchez has arranged for Pierce College students to attend Diversity Committee meetings. The Committee now has a sense of some of the challenges community college students face, as well as how students interested in pursuing a career in law believe the SFVBA can best serve them. The Committee will introduce a Law Post at Pierce College in the spring 2014 and supply and coordinate speakers to inspire and answer questions students may have about a career in law.

Berg-Wilion and Sack have taken the lead on a collaboration between

Mission College and the Committee. In late 2013, the Committee received a request from David Jordan, Director of the school's Paralegal Studies Program, to support Mission College's participation in the State Bar's Community College Pathways to Law School Initiative (Pathways), a program which will create a clear pathway from community college to law school. Last month, SFVBA President Adam D.H. Grant sent a letter to Patricia D. Lee, State Bar of California Special Assistant for Diversity & Bar Relations, endorsing the Committee's support for Los Angeles Mission College participation in the Pathways initiative. The Committee plans to roll out projects regardless of whether Mission College is selected to participate in Pathways. Formal announcements about the schools selected for the Pathways initiative will be made in February 2014.

"I am brimming with pride and gratitude over the incredible support received on these and so many other programs," says John Stephens, Chair of the Diversity Committee. "We try to make the profession as accessible as possible, and provide continuity of contact among the Valley's student body and its legal professionals." 

*The SFVBA Diversity Committee meets at the Bar offices in Tarzana at 8:15 a.m. on the last Friday of each month.*



**Lisa L. Miller** is a trial lawyer at Marcin Lambirth, LLP. She teaches courses on the First Amendment at USC and CSUN. Miller is the Chair of the Small Firm & Sole Practitioner Section and can be reached at [llm@marcin.com](mailto:llm@marcin.com). **Rosie Soto-Cohen** is the San Fernando Valley Bar Association's Director of Public Services. She can be reached at [rosie@sfvba.org](mailto:rosie@sfvba.org).

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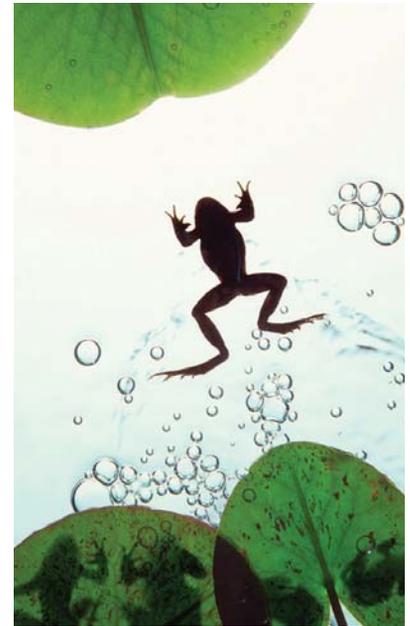
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## The Case That Should Have Settled

**O**VER THE COURSE OF A career, a litigation attorney will see all kinds of cases walk through his or her doors—large cases, small cases, cases that may impact more than just the parties involved, cases that have already impacted a larger audience, and, sometimes, cases that should never see a courtroom.

These cases are usually few and far between (one would hope), but every once in a while one comes through. This is the case that no one wants—not necessarily because it does not have merit or is not a “good” case, but perhaps because the defendants are already judgment proof or because the evidence does not support the facts or because the main witness is a shaky one. Whatever the reason or reasons, the attorney usually knows fairly soon, and to their core, that this is a case that should settle. (Setting aside those unscrupulous types who might be anything for fees, most attorneys would likely hesitate before spending a client’s money unnecessarily.)

Sometimes, these cases are referred to as dogs and sometimes they are used as teaching opportunities for younger attorneys, allowing them to cut their teeth in court or certain aspects of litigation. Regardless, these cases can often be the elephant on the desk of the attorney, being moved around or put to the side until it absolutely cannot be avoided.

Where do they come from? Why do they get filed? Why do they torment us so? How do you handle them? And can they be settled? Many years ago, when I was still a young

AMY M. COHEN  
SCVBA President



amy@cohenlawplc.com

attorney working at a firm over the hill, I worked on a case like this. We were counsel for the defendant who was passionate about his position—that he did nothing wrong, did not owe the plaintiff a penny and had claims of his own equal to or above those of the plaintiff. The plaintiff was dogged in his determination to pursue our client over perceived wrongs. As the case went on, thousands upon thousands of pages of paper were used in copies (I spent several weeks in a room with 100 boxes full of documents, looking for the needle in the haystack) and motions flew back and forth with the regularity of the daily United Airlines JFK to LAX non-stop flight.

At some point in that case (which stretched over 18 months or so), it began to look like the case should not be tried and that it should settle. Unfortunately, by that point, both parties were so deeply entrenched in their positions that it was unlikely to go anywhere but to a jury and, normally, it might have. Except in that particular case, the judge—also recognizing that the case should settle—stone-walled the parties and threatened to trail the case for months unless it was settled. It did finally, and with neither party very happy.

In another case, the facts supported liability on several causes of action and the plaintiff, feeling wronged and trod upon, wanted his day in court. The matter was filed and the defendants made several procedural motions over the course of four months, some of which were granted and some which were not. By the time the case was at issue, almost

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ten months had passed since the original complaint had been filed. In all likelihood, both sides had already spent more in attorneys' fees than either could hope to gain.

The plaintiff adamantly believed that the defendants were hiding something and the defendants refused to be pushed around and made a negligence offer to settle and nothing more. The case continued to roll to trial. In a candid conversation between counsel just a few weeks before trial was scheduled to begin, the plaintiff's counsel asked the defendants' counsel why a more substantial or meaningful settlement offer had not been made. The plaintiff's counsel truly wanted to understand the reasoning behind the defendants' position, knowing that both sides had already incurred substantial attorney bills and that a settlement could possibly be had for less than the cost to try the case. That case did not settle.

Often, emotions run high in litigation. In that case, the defendants' counsel revealed to the plaintiff's counsel that part of the reason several of the defendants did not want to settle was that they felt personally attacked by the filing of the case and were offended, even though the heart of the matter was a business dispute.

In that same example, there was no judge stepping forward to force the parties to settle. Did the attorneys do their clients a disservice by not trying harder to settle, particularly when any

recovery was far below the amount spent by both sides in fees? Did the case use system resources that might have been better spent on another matter? Or, by virtue of the fact that the case went through the process, was tried and reached a result, did the system work, since the parties were given their day in court and an opportunity to be heard?

As attorneys, we try to evaluate the merits of a case before we take it on, and try to keep our clients' expectations realistic, hoping to focus our time and energy on matters that will have a positive result for our clients. When faced with cases we may personally believe should settle, we are still bound to pursue them (to the extent they are not frivolous or without merit) and follow the clients' wishes. Sometimes, those cases resolve themselves and the clients are happy.

Other times, the clients may believe that another result was possible. Is trying those cases to conclusion, rather than trying harder to settle them, a drain on the system? Is it a disservice to our clients if we favor settlement over litigation?

Perhaps even in the current culture of budget cuts and reorganization, which might favor alternative dispute resolution, there are civil cases that still need to be tried and simply by pursuing them through to their litigated end, we are continuing to support the system and keep the wheels of justice (however she is viewed), turning. 



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Granada Hills  
(818) 363-3144  
ebroitman@sbcglobal.net  
*Estate Planning, Wills and Trusts*

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Michael Burgis & Associates, P.C.  
Sherman Oaks  
(818) 994-9870  
Mburgis@burgislaw.com  
*Workers' Compensation*

**Stephen Danz**  
Stephen Danz & Associates  
Encino  
(877) 789-9707  
stephen.danz@employmentattorneyca.com  
*Labor and Employment*

**Alan Dickson**  
Holland & Knight, LLP  
Los Angeles  
(213) 896-2415  
alan.dickson@hkllaw.com  
*Government Contract Law*

**Justine N. Eldridge**  
Sherman Oaks  
(619) 251-3318  
justinenewcomb@gmail.com

**John D. Faucher**  
Westlake Village  
(818) 889-8080  
jdf@johndfaucher.com  
*Taxation*

**Caroline Brown Fawley**  
Oakland  
(805) 807-2163  
carolinefawley@gmail.com  
*Entertainment*

**Carla Galindez**  
Los Angeles  
carla\_galindez@yahoo.com

**Dr. Stanley L. Goodman M.D.**  
Encino  
(818) 986-7826  
marketing@goodmanforensic.com  
Associate Member  
*Workers' Compensation*

**Justin Lee Gordon**  
Van Nuys  
(818) 371-0490  
jlgordon@me.com  
*General Practice*

**Jason Toolin Grutter**  
Morris & Associates  
Burbank  
(818) 524-2336  
jgrutter@jgmorrislaw.com  
*Estate Planning, Wills and Trusts*

**Allen Haroutounian**  
Nemecek & Cole  
Sherman Oaks  
(818) 788-9500  
aharoutounian@nemecek-cole.com  
*Insurance Law*

**Kathleen Kelso**  
Newport Beach  
(561) 596-6049  
katekelso@gmail.com  
*Litigation*

**Roy S. Kim**  
Los Angeles  
(949) 533-2382  
rkim009@gmail.com

**Ashley Melikian**  
LexisNexis  
Fresno  
(559) 273-5228  
ashley.melikian@lexisnexis.com  
*Associate Member*

**Daniel A. Moss**  
Westlake Village  
(805) 390-2593  
damoss@uci.edu  
*Public Interest*

**David A. Obrand**  
Harbor City  
(310) 951-1032  
obrand68@gmail.com  
*Civil*

**Daren M Schlecter**  
Los Angeles  
(310) 553-5747  
daren@schlecterlaw.com  
*Bankruptcy*

**Marc J. Schwartz**  
Law Offices of Marc J. Schwartz, PC  
Encino  
(818) 804-4691  
mschwartz@mjslawfirm.com  
*Estate Planning, Wills and Trusts*

**Tiffany Spivey**  
Law Offices of Marcia L. Kraft  
Woodland Hills  
(818) 883-1330  
tspivey@kraftlawoffices.com  
*Family Law*

**Allison Steele**  
Sunland  
(818) 601-4683  
allisonmsteele@gmail.com  
*Family Law*

**Robert Vosburg**  
Law Office of Robert Vosburg  
Encino  
(323) 559-6756  
vosburglaw@gmail.com  
*Bankruptcy*

**Jacqueline D. Yu**  
Santiago & Jones  
Woodland Hills  
(818) 657-5600  
jyu@santigojoneslaw.com  
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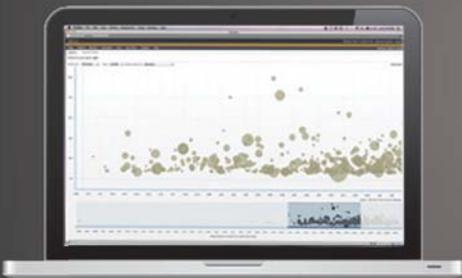
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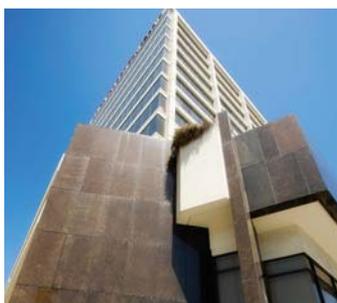
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