# VALLEY LAWYER

MAY 2014 • $4

A Publication of the San Fernando Valley Bar Association

## Attorney Moms Balance Careers and Families

## Understanding *Missouri v. McNeely*

Earn MCLE Credit

www.sfvba.org

# NARVER

## Providing SFVBA members With exclusive Lawyers Professional Liability programs.

**ALL LAW FIRMS**

**COMPETITIVE PRICING**

**ALL AVAILABLE LIMITS OF LIABILITY**

**OPTIONAL DEFENSE COSTS IN ADDITION TO THE LIMITS OF LIABILITY**

**DEFENDANTS REIMBURSEMENT COVERAGE**

**PERSONAL INJURY COVERAGE**

**FREE TAIL FOR RETIREMENT, DEATH, OR DISABILITY**

**COVERAGE ENHANCEMENT DESIGNED SPECIFICALLY FOR SFVBA MEMBERS**

Narver Insurance is committed to providing the SFVBA members with diverse, niche specialty insurance products, offered through exclusive Lawyers Professional Liability Insurance programs.

Narver products are provided through insurance companies with an A.M. Best "A" rating. Narver products and services deliver long-term profitability utilizing 100 years of unique liability insurance experience to the table.

Each of our advisors below has decades of experience in insurance broking.

Call us today for a second opinion consultation or a quote at (626) 943-2200 or visit our website at www.narver.com.

Narver Insurance is a supporter of the San Fernando Valley Bar Association.

Wesley Hampton
whampton@narver.com

Diane Wood
dwood@narver.com

Debra Mondragon
dmondragon@narver.com

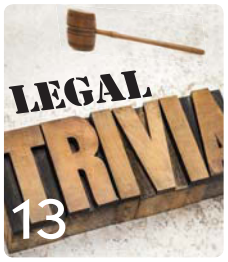
Crystal Veiga
cveiga@narver.com

Michelle Mitchikoff
mmitchikoff@narver.com

# CONTENTS

VALLEY LAWYER
A Publication of the San Fernando Valley Bar Association
MAY 2014

## Criminal Law










## FEATURES



## COLUMN



On the cover *(L-R)*: *Michelle Short-Nagel, Anie N. Akbarian and Michelle E. Diaz. Photo by Marco Padilla.*

## DEPARTMENTS

# VALLEY LAWYER

**SAN FERNANDO VALLEY BAR ASSOCIATION**

5567 Reseda Boulevard, Suite 200
Tarzana, CA 91356
Phone (818) 227-0490
Fax (818) 227-0499
www.sfvba.org

**EDITOR**
Irma Mejia

**GRAPHIC DESIGNER**
Marina Senderov





**Valley Lawyer** is published 11 times a year. Articles, announcements, and advertisements are due by the first day of the month prior to the publication date. The articles in Valley Lawyer are written for general interest and are not meant to be relied upon as a substitute for independent research and independent verification of accuracy.

*Printing Southwest Offset Printing*

# Duck, Duck…Boat!

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

agrant@alpertbarr.com

I MUST ATTRIBUTE THE TITLE AND SOME CONTENT of this month's article to my daughter, Jordan, who is currently studying abroad in Africa. However, as I have learned during her absence these past few months, there is much to learn as a parent, an adult, a child or student, from such an adventure. Jordan currently blogs about her experience in Gaborone, Bastwana to, in part (I think), keep her parents up to date on all the details of her life thousands of miles away, and in part to memorialize in her own words, thoughts, experiences, and feelings she has during this amazing time.

The following is an excerpt from her most recent blog, entitled, "Duck, Duck…Boat!

> "Today I spent my first morning with the splendid young minds on Batlang Support Center. Batlang is a small, quaint building about 30 minutes outside of Gabarone where a group of enthusiastic, warm and vibrant women teach students from the local area basic, what we might call, 'pre-school skills': the alphabet, numbers, colors, introductions. Essentially however, the goal is to get students to socialize, to play and to laugh. Because that's really what childhood is all about, no matter where you go in the world."

During the next few hours Jordan and her colleague walked the children through the lesson they prepared for the day. Toward the end of the lessons, they realized that they still had 45 minutes left. So, they decided that a rousing game of "Duck, Duck, Goose" was in order. After explaining the game in as much detail as they could, the children played with boundless energy. However, much to Jordan's surprise, given Jordan's limited ability to converse in Sestwana (the native language in the area), the game became "Duck, Duck…Boat!" Not wanting to quell such exuberance, Jordan decided that is exactly what they should play.

She then had the opportunity to watch the actual teachers conduct their lessons. On that subject, Jordan blogged,

> "Their level of warmth and enthusiasm with the kids was infectious and I found myself smiling the entire time! Kids crawled around, under and over tables to point to numbers and letters. I loved how the teacher was not concerned with posture or mode of travel. All she insisted was that each student was cheered for when they gave their answer. The cheer went something like, 'Clever girl/boy, clever girl/boy, you're a star, you're a star and you shine!' The kids loved the cheer and the support it showed for their peers."

In part, I must confess, it is a bit cathartic to write about my daughter who is thousands of miles away. However, as the President of the SFVBA, I truly look to all sources to learn and to share what I learn for the betterment of the Valley and its legal community.

As a bar association, we are unique. We are one of the largest local bar associations in California. As a legal community, I am in awe of the number of individuals who regularly spend hours upon hours giving back to the Valley in countless ways. It seems each of us has our unique way of encouraging each other to rise above the adversary nature of our practices and work together. Much like the young children at the Batlang Support Center, we create our own pathways to success. The children learned a new game and shared their constant support. We share of our time and find new ways to support the community.

I am becoming very involved in the Open Courts Coalition, an opportunity to increase funding for the courts throughout California. As your President, I will be advocating for additional funding here in the Valley. I ask that you support this effort by speaking with your state representatives. Ultimately, our own unique way of advocating our position will help us prevail and right this "boat." As incentive, I want to share with you a picture of my daughter, Jordan, with her unique smile, helping in her unique way.

| SUN | MON | TUE | WED | THU | FRI | SAT |
|---|---|---|---|---|---|---|
| | | | | **1** LAW DAY 2014<br>AMERICAN DEMOCRACY AND THE RULE OF LAW<br>WHY EVERY VOTE MATTERS<br>**Membership & Marketing Committee**<br>6:00 PM<br>SFVBA OFFICE<br>**New Lawyers Section and Criminal Law Section**<br>See page 12 | **2** | **3** |
| **4** | **5** *Valley Lawyer* **Member Bulletin**<br>Deadline to submit announcements to editor@sfvba.org for June issue. | **6** | **7** **Employment Law Section**<br>**EDD Claims, Hearings and Appeals**<br>12:00 NOON<br>SFVBA OFFICE<br>Attorney Tim Rhodes will discuss strategies in advising clients seeking or challenging an award of unemployment benefits.<br>(1 MCLE Hour) | **8** | **9** | **10** |
| **11** Happy Mother's Day | **12** **Tarzana Networking Meeting**<br>5:00 PM<br>SFVBA OFFICE<br>THE ESQUIRE NETWORK | **13** **Probate & Estate Planning Section**<br>**Managed Care Organizations, Conservatorships and Your Client's Wishes**<br>12:00 NOON<br>MONTEREY AT ENCINO RESTAURANT<br>Attorney Russ Balisok will discuss evaluating managed care physician declarations when considering public guardian petitions for conservatorships.<br>(1 MCLE Hour)<br>**Board of Trustees**<br>6:00 PM<br>SFVBA OFFICE | **14** | **15** **University of West Los Angeles and American Arbitration Association**<br>**The New AAA Arbitration Rules**<br>6:00 PM<br>UWLA<br>CHATSWORTH CAMPUS<br>This two hour MCLE seminar is free to current SFVBA members.<br>See page 37 | **16** | **17** |
| **18** | **19** **Family Law Section**<br>**Trial Tech Module Seven: Examination of a Forensic Accountant II**<br>5:30 PM<br>SPORTSMEN'S LODGE<br>Our outstanding Trial Techniques series continues with a distinguished panel of speakers discussing property issues.<br>(1.5 MCLE Hours) | **20** **Taxation Law Section**<br>**Tax Ramifications of a California Divorce**<br>12:00 NOON<br>SFVBA OFFICE<br>Certified Family Law Specialist Mitch Jacobs will discuss tax issues related to divorce in California. This seminar should be of interest to both tax attorneys and family law practitioners.<br>(1 MCLE Hour) | **21** **Workers' Compensation Section**<br>12:00 NOON<br>MONTEREY AT ENCINO RESTAURANT | **22** | **23** | **24** |
| **25** | **26** Memorial DAY | **27** **Editorial Committee**<br>12:00 NOON<br>SFVBA OFFICE | **28** **Networking Mixer**<br>6:00 PM<br>EL PATRON, TARZANA<br>EL PATRÓN MEXICAN RESTAURANT & CANTINA<br>Free to SFVBA Members<br>**Sponsored by**<br>CITY NATIONAL BANK The way up. | **29** | **30** | **31** |

# CALENDAR

## JUNE 2014

| SUN | MON | TUE | WED | THU | FRI | SAT |
|---|---|---|---|---|---|---|
| 1 | **2** *Valley Lawyer* Member Bulletin<br>Deadline to submit announcements to editor@sfvba.org for July issue. | **3** | **4** Employment Law Section<br>**What Civil Employment Attorneys Must Know about Workers' Comp**<br>12:00 NOON<br>SFVBA OFFICE<br>George and Adam Savin will discuss what you need to know regarding workers' compensation. (1 MCLE Hour) | **5** Membership & Marketing Committee<br>6:00 PM<br>SFVBA OFFICE<br>---<br>All Section<br>**Does Your Liquidated Damages Provision Hold Water?**<br>12:00 NOON<br>SFVBA OFFICE<br>See page 16 | **6** | **7** |
| **8** | **9** Tarzana Networking Meeting<br>5:00 PM<br>SFVBA OFFICE<br>THE ESQUIRE NETWORK | **10** Probate & Estate Planning Section<br>12:00 NOON<br>MONTEREY AT ENCINO RESTAURANT<br>---<br>Board of Trustees<br>6:00 PM<br>SFVBA OFFICE | **11** Litigation Section<br>**Analyzing Damages: Pre and Post Tax and Maximizing Recovery**<br>6:00 PM<br>SFVBA OFFICE<br>Barbara Luna, CPA, forensic accountant, shares her valuable insights into analyzing damages. | **12** Real Property Section<br>**Recent Developments in Foreclosure**<br>12:00 NOON<br>SFVBA OFFICE<br>Join us for the kickoff of our new and improved Real Property Section. Attorney Steve Shapero will outline the latest developments in foreclosures. (1 MCLE Hour) | **13** Annual Member Appreciation Reception<br>5:30 PM TO 7:30 PM<br>THE STAND ENCINO<br>Join us at The Stand for a casual dinner on the patio. Free to Current Members.<br>THE STAND "Always the Finest" | **14** |
| **15** Happy Father's Day | **16** | **17** Taxation Law Section<br>**Cancellation of Debt Income**<br>12:00 NOON<br>SFVBA OFFICE<br>Michael A. Smith will update the group. (1 MCLE Hour) | **18** Workers' Compensation Section<br>12:00 NOON<br>MONTEREY AT ENCINO RESTAURANT | **19** | **20** | **21** |
| **22** | **23** Family Law Section<br>**Trial Tech Module Eight: Minor's Testimony**<br>5:30 PM<br>SPORTSMEN'S LODGE<br>Our outstanding Trial Techniques series continues with a distinguished panel of speakers discussing examination of a minor. (1.5 MCLE Hours) | **24** Editorial Committee<br>12:00 NOON<br>SFVBA OFFICE | **25** | **26** | **27** | **28** |
| **29** | **30** | | | | | |

MCLE The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. Visit www.sfvba.org for seminar pricing and to register online, or contact Linda Temkin at (818) 227-0490, ext. 105 or events@sfvba.org. Pricing discounted for active SFVBA members and early registration.

# Seeking the Bar's New Leaders

**ELIZABETH POST**
Executive Director
epost@sfvba.org

THE SFVBA NOMINATING COMMITTEE IS SEEKING ATTORNEY members who aspire to lead the San Fernando Valley Bar Association and who wish to be considered for nomination as a candidate for the SFVBA's 20-member Board of Trustees.

The Committee's aim is to select the most qualified candidates for office who are committed to the growth of the SFVBA and who reflect the diversity of the Bar's membership, from areas of practice to members of law firms to sole practitioners.

The responsibilities of the Board include setting policy and overseeing the association's finances. Trustees work closely with other Bar leaders and professional staff to improve and develop programs for the public, expand benefits and services for members, and enhance and promote the public image of lawyers and the justice system.

The time commitment varies for each Board member. All trustees are expected to actively participate on committees and to support the SFVBA's activities, including attending the annual Installation Gala on September 17 and a board retreat later in September. Trustees are obligated to attend a monthly board meeting at the Bar offices, held on the second Tuesday of each month at 6:00 p.m.

The Nominating Committee, chaired by Immediate Past President David Gurnick, will select up to 12 candidates for six open trustee seats on the Board. Trustees are elected to two-year terms. Following the September 10 election, two additional members will be appointed to one-year terms.

Sounds intriguing? The *Application for Nomination to the San Fernando Valley Bar Association Board of Trustees* can be downloaded from the news scroll at www.sfvba.org. Have questions? Feel free to contact me at (818) 227-0490, ext. 101.

## 2014 TRUSTEE ELECTION DEADLINES

| | |
|---|---|
| **May 17** | Nomination form must be received |
| **June 10** | Nominating Committee issues Report to Secretary |
| **July 1** | Nomination Committee Report sent to members |
| **July 25** | Additional nominations signed by 20 active members must be received by 5:00 p.m. by the Secretary. |
| **August 11** | Ballots mailed to members |
| **Sept 10** | Board of Trustees Election (Deadline to return ballots) |
| **Sept 17** | Installation Gala |

## NEW LAWYERS SECTION AND CRIMINAL LAW SECTION

# NUTS AND BOLTS OF DUI DEFENSE

## MAY 1, 2014
### 6:00 PM
### SFVBA OFFICE

Veteran criminal defense attorney David S. Kestenbaum outlines the ins and outs of a DUI defense, from interview to trial, including DMV aspects. This dinner is free to members of the New Lawyers Section and Criminal Law Section. (1 MCLE Hour)

**Space is limited.**
**RSVP Soon!**

**Sponsored by**


IN MARCH, VALLEY LAWYER TESTED YOUR KNOWLEDGE OF THE history of women in the legal field. Several readers participated in our online quiz or submitted their answers by email. Many answered all the questions correctly while one keen member, Mark Schaeffer of Nemecek & Cole in Sherman Oaks, pointed out a mistake in our printed quiz. Question 9 of the quiz as it was originally published erroneously alluded to Chief Justice Tani Cantil-Sakauye as the first female Chief Justice of the California Supreme Court. She is the second female Chief Justice in California history.

Below is the revised quiz that was published online and emailed to members. Check your answers with those listed below.

1. In what year was the first female attorney admitted to practice law in California?
   **1878**

2. Who was the first female attorney admitted to practice in California?
   **Clara Shortridge Foltz**

3. In what year were women first allowed to serve on juries in California?
   **1917**

4. In 1914, who became the first female judge in Los Angeles?
   **Georgia Bullock**

5. In 1977, who became the first female Chief Justice of California, and the first female justice ever appointed to the Supreme Court of California?
   **Rose Elizabeth Bird**

6. In 1987, who became the first female President of the SFVBA?
   **Barbara Jean Penny**

7. In 2010, who became California's first female Attorney General?
   **Kamala Harris**

8. In 2011, who was elected the first female Presiding Judge of Los Angeles Superior Court?
   **Lee Smalley Edmon**

9. In what year were women in California legally allowed to enroll in law school?
   **1879**

10. In 2012, who became the first female District Attorney of Los Angeles County?
    **Jackie Lacey**

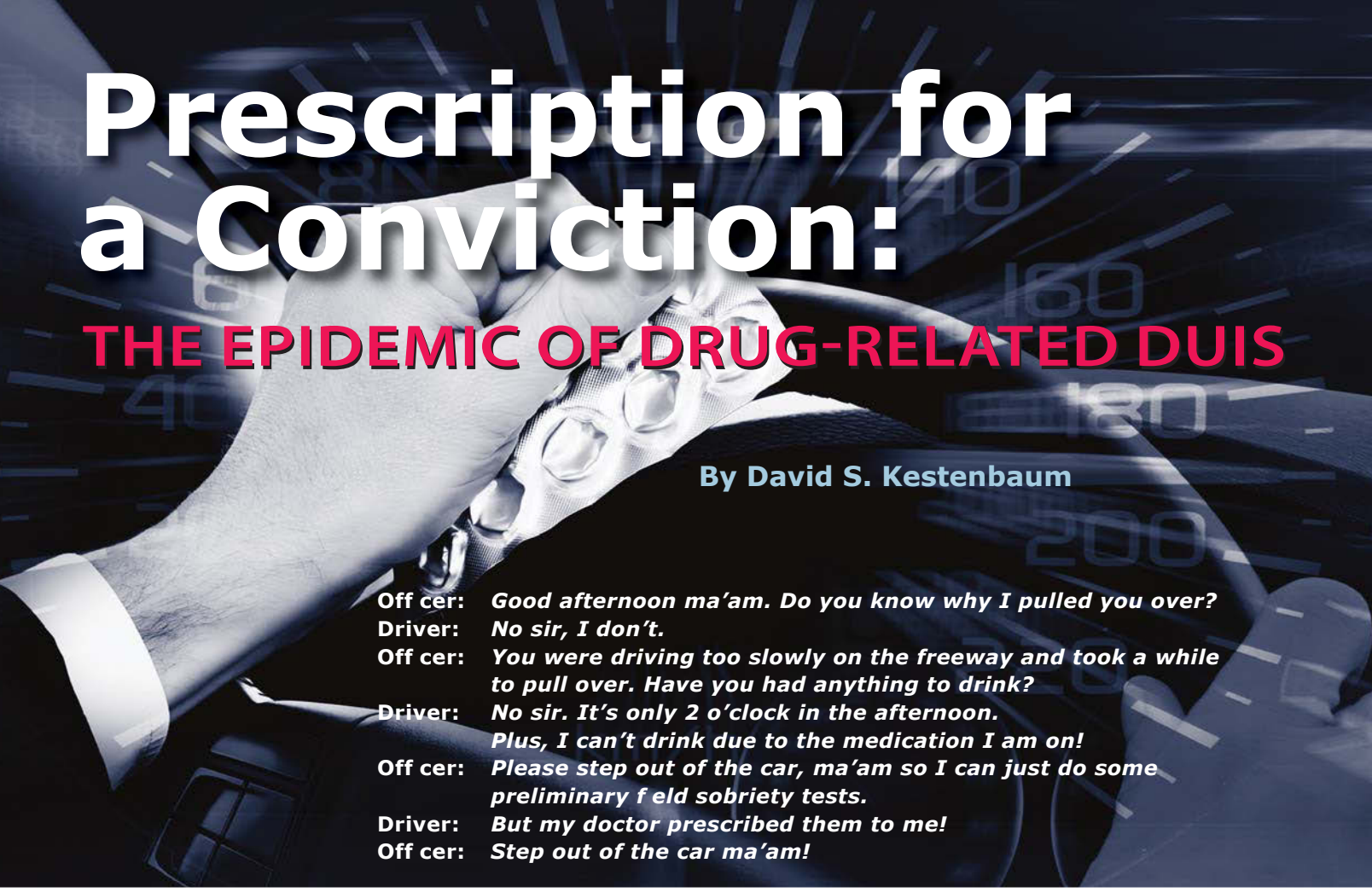
## *Congratulations*

to **Hunt C. Braly** of Poole & Shaffery, LLP in Valencia. Hunt is the lucky trivia participant who won the drawing for a P.F. Chang's gift card and AMC Theatres tickets.

# Prescription for a Conviction:

## THE EPIDEMIC OF DRUG-RELATED DUIS

By David S. Kestenbaum



**Off cer:** ***Good afternoon ma'am. Do you know why I pulled you over?***
**Driver:** ***No sir, I don't.***
**Off cer:** ***You were driving too slowly on the freeway and took a while to pull over. Have you had anything to drink?***
**Driver:** ***No sir. It's only 2 o'clock in the afternoon. Plus, I can't drink due to the medication I am on!***
**Off cer:** ***Please step out of the car, ma'am so I can just do some preliminary f eld sobriety tests.***
**Driver:** ***But my doctor prescribed them to me!***
**Off cer:** ***Step out of the car ma'am!***

THIS SCENARIO PLAYS OUT EVERY DAY ON THE highways in California. According to the National Highway Traffic Safety Administration, arrests for driving under the influence (DUI) of drugs have drastically risen in the past few years. It is not uncommon for criminal defense attorneys to have clients in their office telling them they didn't know they couldn't drive after taking medication as long as it was prescribed by a physician.

Due to the public's confusion, the NHTSA utilized a panel of experts to try to develop a list of medications which are safe to take prior to driving and, conversely, a list of medications which affect a driver's ability to safely operate a motor vehicle.[1]

This article will inform attorneys about the differences in assessing DUIs caused by alcohol from those caused by legal drugs. For that reason, illegal drugs such as cocaine, heroin and methamphetamine are not discussed, but marijuana that is recommended by a doctor is included.

### California Law

On January 1, 2014, the California legislature enacted a separate Vehicle Code section dealing with driving under the influence of drugs. Vehicle Code §23152(e) states "It is unlawful for a person who is under the influence of any drug to drive a vehicle." Prior to that change, Vehicle Code §23152(a) stated that stated that "[i]t is unlawful for any person who is under the combined influence of any alcoholic beverage and drug, to drive a vehicle." Vehicle code §23152(a) now simply states that "[i]t is unlawful for a person who is under the influence of any alcoholic beverage to drive a vehicle."

To understand the importance of this change, we need to review the state of the law prior to the enactment of the "per se" section, Vehicle Code §23152(b), which made it illegal to drive with a certain amount of alcohol in your system (now at .08%), regardless of the person's driving.

Prior to the addition in 1989 of the per se statute, in order to be convicted of driving under the influence of alcohol, the prosecution had to prove that the individual could not safely operate a motor vehicle. This was usually done by the officer testifying about the individual's driving pattern, performance on the Field Sobriety Tests (FSTs), and their blood-alcohol level obtained by taking a breath, blood or urine test. Once the per se section was enacted, all that needed to be proven under Vehicle Code §23152(b) was that the person was driving and had a blood-alcohol level over the proscribed level.

The enactment of Vehicle Code §23152(e) has now placed the burden once again on the prosecution to not only prove the presence of a drug causing the driver to be under the influence, but that the driver was not able to safely operate a motor vehicle.

While Vehicle Code §23152(e) appears simple and straightforward, it is anything but. It is now necessary to determine if the individual was "under the influence" of the

drugs found in their system. Jury instructions state that "a person is under the influence if, as a result of (… taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances."[2]

It goes on to explain that "a drug is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to drive as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would drive under similar circumstances."[3] Lastly, "it is not a defense that the defendant was legally entitled to use the drug."

Simply put, in cases not involving alcohol, the prosecution must show that the drug affected the ability of the person to safely operate their car, not just that they were under the influence. For example, if the police come in contact with the individual at a sobriety check point, and there is no bad driving observed, the mere presence of a drug in their system does not bring them within the purview of Vehicle Code §23152(e). This is a very important distinction from people who have over a .08% blood-alcohol level where no bad driving is required.

**Client Representation**

When first interviewing a client charged under this section, it is very important to go over the driving pattern and the reason for the stop. If the individual is in a traffic accident and has legally prescribed medication in their system, the prosecution will use the accident to prove that the defendant couldn't safely operate a motor vehicle.

Other common reasons for the stops where the individual is under the influence of a prescription include being stopped at a green light, weaving outside their traffic lane, and driving too slow on the freeway. In these cases though, the prosecution still must prove that the medication caused the bad driving. Thus, it becomes important to know what drug it is, what the therapeutic dose for the client is and what qualitative level is present at the time of driving.

The most important evidence in these cases is the blood or urine sample collected by the police. It is not uncommon for the arresting agency to request a blood or urine sample if there is bad driving or the person appears to be under the influence of something, but blew .00% on the breathalyzer test for alcohol.

Another important tool for the prosecution is the use of a Drug Recognition Expert (DRE). These are police officers who have been trained, usually by other officers, to detect whether someone is under the influence of a drug. These officers usually are called in by the officer who pulled over the driver and therefore are not percipient witnesses to the driving. They either are called to the scene or see the arrestee in the station where they conduct a series of tests and make observations to determine if the individual is under the influence and of what particular drug.

Of course, the arresting officer has usually told the DRE of their suspicions or the driver has admitted to taking a certain medication, so they know what they are looking for. It is very important for the defense to have these reports reviewed by a defense expert for a medical opinion as to the degree, if any, of impairment.

It is imperative for a defense attorney to prepare a split order for the judge to sign at arraignment for an independent lab to obtain a portion of the sample for testing. Currently, the prosecution lab will test only for the presence of the drug but not for the amount. It is necessary to have the result from the independent lab reviewed by an expert, usually a forensic doctor, to see if the amount of drug found in the system was enough to impair the person's ability to drive to an appreciable degree. For instance, the mere presence of Vicodin in the sample doesn't tell you whether it was a trace amount, the therapeutically prescribed amount, or over the prescribed amount.

Additionally, for people with chronic pain, the amount of drug necessary to relieve pain increases as the individual's system becomes more tolerant to it. Thus, that person may be able to safely operate a vehicle, whereas another person who was just prescribed the same medication may not be able to safely drive.

An expert can also explain why the use of urine to sample (no longer approved for alcohol levels) is far less accurate than blood. It should also be noted that the police can insist on a blood or urine test if they have a reasonable belief that the driver is under the influence of a drug that cannot be detected by a breath test. In those situations, a refusal to take the additional test can be used against the defendant in trial.

The hardest concept for the client to understand is how they can be in violation of the law if they are just following their doctor's orders. That concept has also found its way into the jury room, according to the Ventura County Deputy District Attorney in charge of filing cases involving drug-related DUIs. According to the deputy, juries have acquitted defendants where there has been evidence that they simply took the drug as prescribed. They view the defendants very differently from individuals who have been drinking alcohol and feel they can still make it home ok. These people have simply done what their physician has told them to do and the juries are somewhat sympathetic.

**Marijuana DUIs**

The attitude is different, however, where the drug alleged to be in the person's system is marijuana, whether it is lawfully recommended or not. The common scenario in marijuana DUIs is the officer smelling the odor of burnt marijuana emanating from the car. The driver is then given some FSTs such as checking their ability to keep track of time, condition of their eyes, and a visual observation of their mouth. That is often

followed by a statement from the driver about when they last ingested marijuana.

If the person admits to smoking or otherwise taking marijuana within the past hour or so, they may very well be under the influence. However, the prosecution must still show that the person's ability to safely operate a motor vehicle has been appreciably affected. Again, if the stop is for a mechanical violation or at a sobriety checkpoint, this may be hard to prove.

The time of ingestion of the marijuana is very important in that, according to another study by the NHTSA,[4] while THC may appear in the sample, the active ingredient, known as Delta-9 THC, only remains in the system for three hours. In other words, the studies cited in the report that people who used marijuana were affected by it for a maximum of three hours, steadily diminishing after the initial ingestion. Therefore, when having your lab test the sample provided by the arresting agency, you must request that they test not just for the presence of the THC, but also the amount of Delta-9 THC. This will allow your expert to come to a conclusion as to whether the individual was, at the time of driving, under the influence to the point of not being able to safely operate a motor vehicle.

Further, unlike prescribed medications whose manufacturing is highly regulated, marijuana has many different strengths depending upon the strain and the method in which it was grown. It has also been shown that in chronic users, higher levels may be present, but not affecting the individual the same way as it would a new user. Thus, it is also important to have your client explain how long they have been using marijuana as well as their preferred method of ingestion (smoking or eating) as these facts are important to your expert rendering a useful opinion as to whether your client was violating the law.

As with prescribed medications, you will often hear your client tell you that they have a medical marijuana card or recommendation. That will not prevent them from being convicted of driving under the influence if the prosecution presents enough evidence that their driving was not safe. It is also why it is best for clients in general not to make any statements to the police if they are being detained for a DUI investigation, since those statements are going to be used by the prosecution to show impairment.

## Unresolved Issues

At present, there is no bright-line level of drugs in a person's system that renders him or her under the influence of prescription drugs or marijuana as there is with alcohol in California. However, it must be noted that several states have tried to legislate that a person is driving under the influence if they have a certain amount in their system.

For the reasons stated above, determining a level where everyone is under the influence will be difficult and will certainly face many medical as well as legal challenges. However, as the number of accidents and arrests caused by people under the influence of drugs continues to rise, the state legislatures will continue to try to develop laws that will protect the public on the roads.

While the Vehicle Code sections regarding driving under the influence of alcohol or drugs appears straightforward,[5] the jury instructions, which have not yet been updated to include the (e) section, require not just that the driver is under the influence, but they are under the influence to a degree at which they can't safely operate their car. Thus, you must look at the entirety of the case in determining whether your client should go to trial or not.

This article did not discuss cases where there is a combination of alcohol and drugs. It is interesting to note that by changing Vehicle Code §23152(a) and enacting §23152(e), there is no longer a charge of driving under the combined influence of alcohol and drugs.

Since this law is in its infancy, it will no doubt have speed bumps in its use. For instance, what does the prosecution allege where the individual presents with a breath test of .04% blood-alcohol level and then a blood test showing the presence of a prescribed medication that would affect the ability to safely operate a motor vehicle? This used to be covered under Vehicle Code §23152(a) which now only covers alcohol. Do they have to charge and prove both Vehicle Code §23152(a) and (e)?

These and other questions will be likely answered by the appellate courts in the coming years. In the meantime, it is best to recommend that people don't mix alcohol with their medications and not drive after taking any medications that have the warning on the bottle to "not operate any heavy machinery" unless, of course, they can lift their car!

---

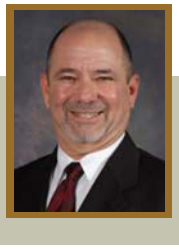
[1] Kay, G. G., & Logan, B. K., (2011). Drugged Driving Expert Panel report: A consensus protocol for assessing the potential of drugs to impair driving. (DOT HS 811 438). Washington, DC: National Highway Traffic Safety Administration.

[2] CALCRIM No. 2110.

[3] *Id.*, emphasis added.

[4] Couper, F.J. & Logan, B.K. (2004) Drugs and Human Performance Fact Sheets (DOT HS 809 725). Washington, DC: National Highway Traffic Safety Administration.

[5] Vehicle Code §23152.



**David S. Kestenbaum** has been practicing criminal law exclusively since 1979. His firm, Kestenbaum Law Group, is based in Van Nuys. He is also an SFVBA Trustee and Chair of the Criminal Law Section. Kestenbaum can be reached at david@kestenbaumlawgroup.com.

# Encouraging Incarceration

By Grace E. Ayers

IF I HAD A NICKEL FOR EVERY time I said, "If it was me, I would take the jail time," I would be swimming in nickels. Why?

In order to alleviate the severe overcrowding in California's 33 state prisons, low-level offenders are now being housed in county jails. These jails, already suffering from their own epidemic of overcrowding, are then left with no choice but to release inmates, oftentimes far in advance of their scheduled release dates. The ultimate result is that people end up doing only about 10 percent of their time, sometimes even less. Consequently, as a defense lawyer, I frequently find myself advising clients that it may be in their best interest to "take the time."

Last year, I had a female client sentenced to ninety days in jail on a case out of Long Beach; she was released two days later. Another client was sentenced to one year in jail on felony assault charges; he went in on December 3 and was released from house arrest on February 12.

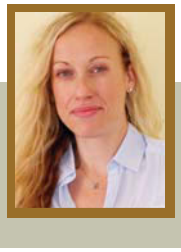
Recently, I had a client who was charged with his third DUI, along with hit and run allegations involving six other vehicles, driving without a valid driver's license, driving without having an ignition interlock device installed, and a violation of his probation. He was facing potential prison time if we were to lose at trial and the evidence against him was very strong. So I worked out a deal with the prosecution that included 170 days of jail time and what would have amounted to about $4,000 in court fines and fees. However, instead of paying this amount to the court, he had the option of doing an additional 23 days in jail or performing the same number of days of community labor.

I told him he should absolutely take the additional jail time since the practical difference between 170 days and 193 days is negligible. He went in on February 18 and was released on March 23, a whopping 34 days later. Had he not taken the additional 23 days, he would no doubt have spent the next few years in debt to the court, having to return to ask the judge for extension after extension in order to pay it off at a reasonable rate. Or he could have accepted more than three weeks of long, hard eight-hour days doing manual labor. Instead, he got it all wiped out by doing an extra one or two days of a significantly reduced jail sentence.

I could go on to list a dozen or so others who did only a small fraction of their jail sentence. Based on each client's case and circumstances, it indeed seems to be in their best interest to "take the time."

So how is this possible? How did we get to a point where the best deal involves going to jail? The answer begins with California's long history of prison overcrowding problems.

In 1995, the District Court in *Coleman v. Wilson* addressed the severe mistreatment of mentally ill prisoners, finding an overwhelming deficiency in the care provided to these inmates due to understaffing and incompetency.[1] A Special Master was appointed to oversee mental health care. In 2007, he filed a report stating that despite several years in which efforts were made to improve these conditions, the quality of mental health care within the prison



**Grace Ayers** is a criminal defense attorney in Beverly Hills. She also runs a special appearance service called Grace's Cases, and can be reached at grace.ayers@gmail.com.

system was continuing to deteriorate due to increased overcrowding.

In 2006, Governor Arnold Schwarzenegger issued a Prison Overcrowding State of Emergency Proclamation, citing 29 of California's 33 prison facilities as housing some 15,000 inmates in sub-human conditions that created "substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them."

These risks include: increased rate of violence, higher rate of weapons confiscations, greater likelihood of riots, greater risk of transmission of infectious illnesses, increased security risks for prison guards, overwhelmed electric, sewer and water systems, and increased rates of inmate unrest. These risks, coupled with less access to rehabilitative or vocational programs, were shown to lead to an even higher rate of recidivism. The decree cited another shocking statistic: an average of one inmate suicide per week.

Next came *Plata v. Brown*, which addressed the treatment—or lack of treatment—of prisoners with serious medical conditions. The court emphasized the unacceptable number of fatalities due to inadequate care, stating that an inmate died needlessly every six to seven days due to constitutional deficiencies in the medial delivery system.

In 2011, the United States Supreme Court issued its opinion in *Brown v. Plata*, a consolidated ruling on the earlier cases of *Coleman* and *Plata*.[2] The Court upheld the lower court's ruling that California's prison overpopulation constituted cruel and unusual punishment, in violation of the eighth amendment. For eleven years, the state's correctional facilities operated at about 200 percent of their intended capacity, prompting the Supreme Court to find that "the degree of overcrowding in California's prisons is exceptional." The state was subsequently ordered to reduce the prison inmate population by approximately 32,000 to alleviate these inhumane conditions.

In response to the Court's ruling, California passed the 2011 Public Safety Realignment Legislation, which allows non-serious, non-violent and non-sex offenders to be housed in county jails instead of state prisons.[3] The burden of housing this overflow of inmates was now put squarely on the shoulders of local government, much to the chagrin and consternation of public officials at the time.

According to their most recent data, in the 2012 Annual Report by the California Department of Corrections and Rehabilitation, the state's total inmate population had been reduced to 132,785, a 10 percent reduction from the previous year.[4] In other words, the facilities were operating at 150 percent capacity, a 17 percent reduction, with the state remaining in violation of the Supreme Court's command.

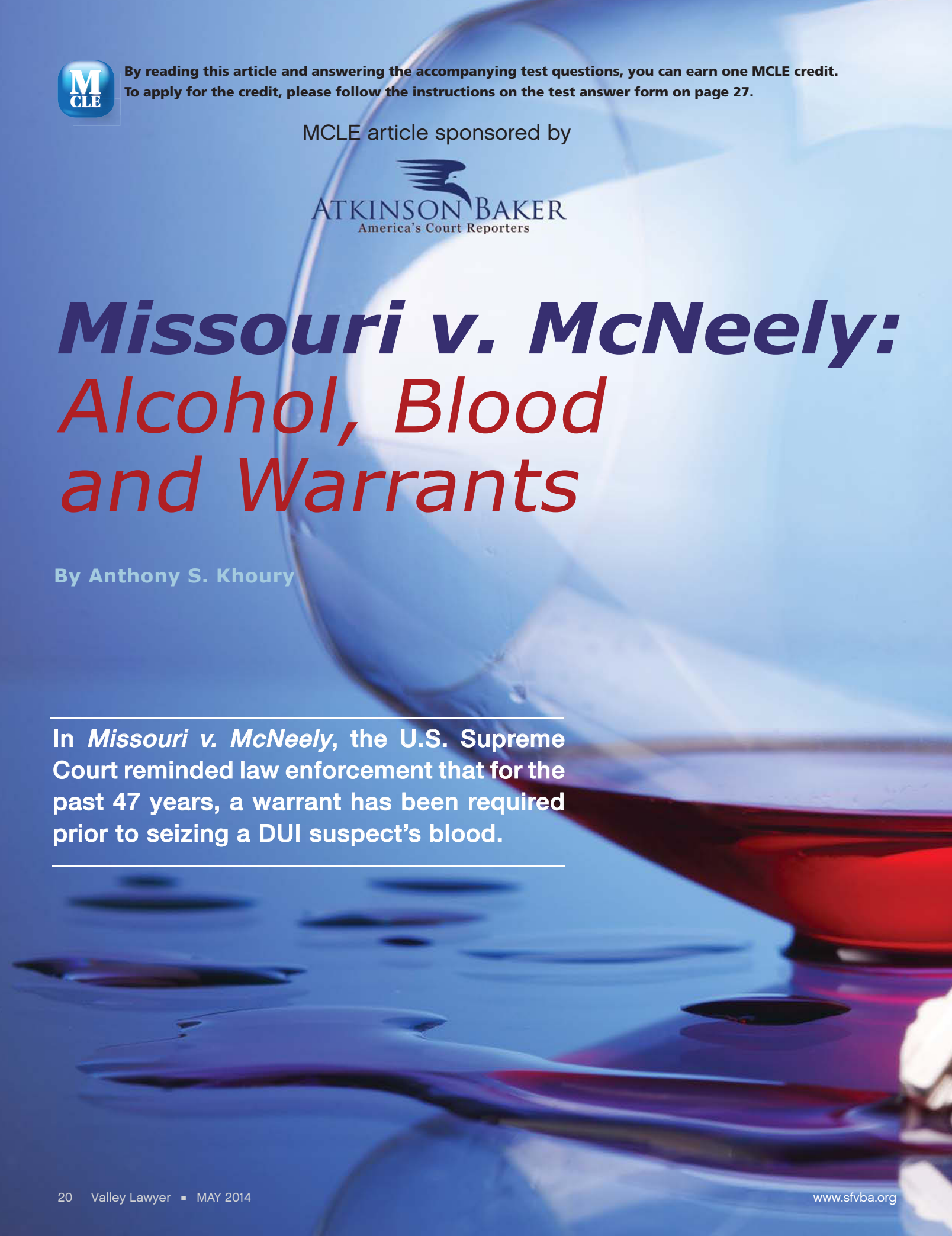
On February 10, 2014, a panel of three federal judges granted another two-year extension for California to comply with the Court's 2011 ruling.[5] Meanwhile, people continue to be released from jail after serving only a small fraction of the time to which they are sentenced.

So, what's the moral of this story? Until drastic prison population reform is implemented, Los Angeles defense lawyers should take full advantage of the broken system, even though it means encouraging incarceration.

*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.*

---

[1] *Coleman v. Wilson*, (1995) 912 F.Supp. 1282, 1306-08.
[2] *Brown v. Plata* (2011) 131 S. Ct. 1910, 1922-23.
[3] Assembly Bills 109 and 117.
[4] http://www.cdcr.ca.gov/Reports/docs/CDCR-2012-Annual-Report.pdf.
[5] http://edca.typepad.com/files/206136151-federal-judges-grant-california-two-year-extension-on-order-to-lower-prison-population.pdf.



**By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 27.**

MCLE article sponsored by

ATKINSON BAKER
America's Court Reporters

# *Missouri v. McNeely:* Alcohol, Blood and Warrants

By Anthony S. Khoury

**In *Missouri v. McNeely*, the U.S. Supreme Court reminded law enforcement that for the past 47 years, a warrant has been required prior to seizing a DUI suspect's blood.**

OUTSIDE OF EXPERIENCED DUI DEFENSE attorneys and prosecutors, most people are probably unaware that since 1966, when the United States Supreme Court decided *Schmerber v. California*,[1] law enforcement officers, absent an emergency, have been required to first obtain a warrant prior to seizing a sample of a DUI suspect's blood. One of the main reasons for that lack of awareness is pretty simple: law enforcement officers in California never sought to obtain a warrant prior to seizing a sample of a DUI suspect's blood, and California courts failed to uphold that particular holding of *Schmerber* in any significant way.

On April 17, 2013, however, the Supreme Court decided to remind the law enforcement community that despite their failure to adhere to *Schmerber*, a warrant is still—and *has always been*—required prior to the seizure of a sample of a DUI suspect's blood, unless "special facts" exist establishing exigent circumstances. In *Missouri v. McNeely*,[2] the Supreme Court specifically held that "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."[3] The Supreme Court further held that "in drunk driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant."[4]

### Facts of the McNeely Case

While on routine patrol at approximately 2:08 a.m. on October 3, 2010, Missouri State Highway Patrol Corporal Mark Winder stopped Tyler McNeely's truck after observing it exceed the posted speed limit and repeatedly cross the center dividing line. Upon making initial contact, Cpl. Winder observed several signs that Mr. McNeely may have been intoxicated, including that Mr. McNeely's eyes were bloodshot, that he had slurred speech, and that the smell of alcohol was on his breath. Mr. McNeely acknowledged to Cpl. Winder that he had consumed a couple of beers at a bar and he appeared unsteady on his feet when he exited the truck.

After Mr. McNeely performed poorly on a battery of field-sobriety tests and declined to use a portable breath-test device to measure his blood alcohol concentration, he was placed under arrest by Cpl. Winder. The corporal proceeded to transport Mr. McNeely from the scene of the arrest, but when Mr. McNeely indicated that he would again refuse to provide a breath sample, Cpl. Winder changed course and took Mr. McNeely to a nearby hospital for blood testing. The corporal made no attempt at securing a warrant.

Upon arrival at the hospital, the corporal asked Mr. McNeely whether he would consent to a blood test. Reading from a standard implied consent form, the corporal explained to Mr. McNeely that under Missouri law, refusal to submit voluntarily to the test would lead to the immediate revocation of his driver's license for one year and could be used against him in a future prosecution. Mr. McNeely nevertheless refused.

Corporal Winder then directed a hospital lab technician to take a blood sample, and the sample was secured at approximately 2:35 a.m. (and later tested for blood alcohol content). Mr. McNeely was subsequently charged with driving while intoxicated, the Missouri equivalent of a violation of California Vehicle Code § 23152(a) (driving under the influence of alcohol and/or drugs), at the time of the McNeely decision.[5]

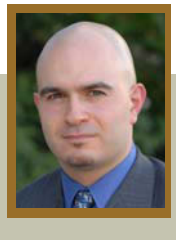
### *Schmerber* and the Dissipation of Alcohol

The Missouri Supreme Court's decision to uphold the trial court's granting of Mr. McNeely's motion to suppress the results of the blood test was based largely upon the United States Supreme Court's ruling in *Schmerber*. The Missouri Supreme Court reasoned that "*Schmerber* directs lower courts to engage in a totality of the circumstances analysis when determining whether exigency permits a nonconsensual, warrantless blood draw."[6] The Missouri Supreme Court further concluded that *Schmerber* "requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case."[7]

According to the Missouri Supreme Court, "exigency depends heavily on the existence of additional `special facts,' such as whether an officer was delayed by the need to investigate an accident and transport an injured suspect to the hospital, as had been the case in *Schmerber*."[8] Finding that this was "'unquestionably a routine DWI case' in which no factors other than the natural dissipation of blood-alcohol suggested that there was an emergency, the [Missouri Supreme Court] held that the nonconsensual warrantless blood draw violated [Mr.] McNeely's Fourth Amendment right to be free from unreasonable searches of his person."[9] The United States Supreme Court ultimately affirmed the Missouri Supreme Court's decision, which, as detailed above, relied primarily on *Schmerber*.

In *Schmerber*, the United States Supreme Court was very clear in expressing its concern regarding the seizure of blood from a DUI suspect absent a warrant. The Supreme Court held that:

> Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that the inferences to support the



**Anthony S. Khoury** is a criminal defense attorney who specializes in DUI defense in Los Angeles, Santa Barbara, and Ventura Counties. He is a former prosecutor with more than 10 years of experience in the field of criminal law. Khoury can be reached at ask@askhourylaw.com.

> search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' [...] The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great."[10]

However, the *Schmerber* court was also clear in establishing an exception to the warrant requirement—when a law enforcement officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'"[11] The Supreme Court held that:

> the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.[12]

This language in the *Schmerber* decision was used for 47 years by law enforcement officers and prosecuting attorneys to justify never seeking a warrant prior to seizing a sample of a DUI suspect's blood. Prosecuting attorneys trumpeted this language as having established a *per se* exigency due to the inherent *dissipation of alcohol*. In other words, prosecutors believed that there always existed "special facts" establishing exigent circumstances that justified the seizure of a sample of a DUI suspect's blood without a warrant. California courts, as well as courts in most states, acquiesced to this interpretation of the *Schmerber* decision for 47 years until *McNeely* was decided.

In fact, the specific issue in *McNeely* was "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases."[13] Of course, the *McNeely* court concluded that it does not.

## "Special Facts" and Exigent Circumstances

The question then remains: under what circumstances may a law enforcement officer forego the warrant requirement prior to seizing a sample of a DUI suspect's blood? While the *McNeely* court did not specifically determine *all* such circumstances, the Supreme Court did discuss several scenarios in which foregoing the warrant requirement may be appropriate, including instances during which "[there are] anticipated delays in obtaining a warrant;" when "the police [need] to attend to a car accident;" and when "the procedures in place for obtaining a warrant or the availability of a magistrate judge, may affect whether the police can obtain a warrant in an expeditious way."[14]

Of course, while the *McNeely* court declined to establish a per se exigency based upon the dissipation of alcohol (i.e., destruction of evidence), the Supreme Court did point out that "the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required."[15] In other words, law enforcement officers should seek a warrant unless "special facts," such as the ones mentioned by the McNeely court, exist, but trial courts examining this issue in a motion to suppress blood evidence hearing, for example, should also consider the dissipation of alcohol as a factor in evaluating an officer's conduct.

If that seems confusing, don't be alarmed—the Supreme Court often leaves room for interpretation, and there is no right answer here. Not surprisingly, the *McNeely* court, near the end of the Court's opinion, declared, "[t]he relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending on the circumstances in the case."[16]

When the Supreme Court favors a case-by-case inquiry, as it did in *McNeely*, it allows both prosecutors and defense attorneys some room to rightfully argue the interpretation that best suits their respective positions. Accordingly, trial courts hearing those arguments are given quite a bit of latitude in determining the most correct interpretation based upon the specific circumstances in the case before them.

Nevertheless, the *McNeely* court did make it very clear that law enforcement officers could only rely on "special facts" to justify foregoing the warrant requirement—having to delay an investigation a few minutes in order to seek a warrant is not a plausible justification. As stated by the *McNeely* court:

> …because a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test, some delay between the time of arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant. [...] [T]he warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.[17]

## The Issue of Consent

A major point of contention in the interpretation of *McNeely's* holding has been the issue of consent. Many prosecuting attorneys have interpreted *McNeely* as only requiring a warrant to be sought, absent exigent circumstances, prior to seizing a sample of a DUI suspect's blood when said suspect has refused to consent to such a seizure. Of course, that was

the factual scenario in *McNeely*, where Mr. McNeely refused to give his consent for a blood draw. But the McNeely court did not, at any point, *specifically* limit the warrant requirement to non-consensual encounters. In fact, the Supreme Court, in its majority opinion, never addressed the issue of consent at all, and, the holding of *McNeely* (as previously mentioned) was that, "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."[18] That holding wasn't, by its plain language, limited to non-consensual blood draws.

However, Justice Sotomayor, in delivering a portion of the opinion in which only three other justices joined, did address the issue of *implied* consent. She explained that:

> As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. [...] Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.[19]

In other words, Justice Sotomayor was not convinced that requiring an officer to obtain a warrant prior to seizing a sample of a DUI suspect's blood would seriously hamper law enforcement efforts to enforce DUI laws. For instance, in California, refusing to provide a blood or breath sample to a law enforcement officer when requested could result in the suspension of one's driving privilege for one year.[20] The implication is that there are penalties in place to deter a DUI suspect from refusing to consent to a blood draw, such that any obstacle posed by a warrant requirement wouldn't significantly undermine law enforcement efforts.

As the issue of consent wasn't technically before the Supreme Court in the *McNeely* case, it wasn't addressed in any substantive way, thus leaving prosecutors and defense attorneys to pick at *dicta* in attempting to further the most beneficial interpretation to their respective causes. As they stand, the *Schmerber* and *McNeely* decisions tend to favor the interpretation furthered by prosecutors because the defendant, in both cases, refused to give consent for a blood draw. Accordingly, the holdings of both cases were specific to a factual scenario in which the blood draw was warrantless and non-consensual. That being said, the burden is always on prosecutors to prove that consent to a warrantless search was free, voluntary, and unequivocal.[21]

### Obtaining Warrants through Telephonic or Electronic Means

As the *McNeely* court noted, there have been "advances in the 47 years since *Schmerber* was decided to allow for the more expeditious processing of warrant applications."[22] For example, in California, warrant applications for seizure of blood may be made using telephonic or electronic means.[23] After the *McNeely* decision, the California legislature also amended the Penal Code §1524 to include subdivision a, paragraph 13, to add an additional ground for issuance of a search warrant (operative as of September 20, 2013). The paragraph reads:

> When a sample of the blood of a person constitutes evidence that tends to show a violation of Section 23140, 23152, or 23153 of the Vehicle Code and the person from whom the sample is being sought has refused an officer's request to submit to, or has failed to complete, a blood test as required by Section 23612 of the Vehicle Code, and the sample will be drawn from the person in a reasonable, medically approved manner. This paragraph is not intended to abrogate a court's mandate to determine the propriety of the issuance of a search warrant on a case-by-case basis.

Although the statutory language doesn't follow *McNeely* word-for-word, it does capture the essence of the warrant requirement. Whether or not law enforcement agencies in California follow suit in practice is yet to be determined, but the California Highway Patrol (the law enforcement agency with the most DUI arrests in California year-to-year) did announce after the *McNeely* decision that officers would no longer seek forced blood draws in routine (i.e. misdemeanor) DUI cases. On December 23, 2013, the California Highway Patrol issued a news release reminding California motorists that the legislature had amended the Penal Code to allow for warrants to be sought prior to seizing a sample of a DUI suspect's blood.

---

[1] *Schmerber v. California* (1966) 384 U.S. 757.
[2] *Missouri v. McNeely* (2013) 569 U.S. ___ (slip opinion, at 9).
[3] See *McDonald v. United States*, 335 U. S. 451, 456 (1948) ("We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative").
[4] *McNeely, supra at* ___ (slip opinion at 9).
[5] As of January 1, 2014, Vehicle Code § 23152(a) was amended to remove "and/or drugs." Subdivision (e) now pertains specifically to drugs, and subdivision (f) pertains to the combined influence of alcohol and drugs.
[6] *McNeely, supra at* ___ (slip opinion at 3).
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Schmerber, supra* at 770.
[11] *Id.*
[12] *Id.* at 770-771.
[13] *McNeely, supra at* ___ (slip opinion at 1).
[14] *McNeely, supra at* ___ (slip opinion at 22).
[15] *Id.*
[16] *Id.*
[17] *McNeely, supra at* ___ (slip opinion at 11).
[18] *McNeely, supra at* ___ (slip opinion at 9).
[19] *McNeely, supra at* ___ (slip opinion at 18).
[20] See, e.g., Vehicle Code § 13353.1.
[21] See, e.g., *Bumper v. North Carolina* (1968) 391 U.S. 543, 548-550.
[22] *McNeely, supra at* ___ (slip opinion at 11).
[23] *See Penal Code § 1526.*

# Test No. 67

**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. 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.**

1. In California, a warrant for the seizure of a DUI suspect's blood can only be obtained in writing.
   ❑ True ❑ False

2. In California, a DUI suspect who refuses to submit to chemical testing could lose his or her driving privilege for no longer than six months.
   ❑ True ❑ False

3. In *Schmerber*, the U.S. Supreme Court held that the dissipation of alcohol always presents an exigent circumstance allowing law enforcement to forego the seeking of a warrant prior to the seizure of a sample of a DUI suspect's blood.
   ❑ True ❑ False

4. In *McNeely*, the United States Supreme Court struck down implied consent laws promulgated by all 50 States.
   ❑ True ❑ False

5. The California legislature amended Penal Code §1524 to include a provision allowing a law enforcement officer to seek a warrant prior to seizing a sample of a DUI suspect's blood.
   ❑ True ❑ False

6. For 47 years, California law enforcement officers have routinely sought warrants prior to seizing blood samples from DUI suspects, pursuant to *Schmerber*.
   ❑ True ❑ False

7. The California Highway Patrol acknowledged after the *McNeely* decision that its officers would no longer seek forced blood draws in routine DUI cases.
   ❑ True ❑ False

8. Justice Sotomayor was the lone dissenting United States Supreme Court Justice in the *McNeely* decision.
   ❑ True ❑ False

9. The need for a law enforcement officer to attend to the scene of a traffic collision presents an exigent circumstance allowing the officer to forego the warrant requirement prior to the seizure of a sample of a DUI suspect's blood.
   ❑ True ❑ False

10. The need for a law enforcement officer to make more than one telephone call in seeking a warrant does not present an exigent circumstance that would ever allow the officer to forego the warrant requirement prior to the seizure of a sample of a DUI suspect's blood.
    ❑ True ❑ False

11. A DUI suspect is required to affirmatively prove that he or she did not consent to a blood draw that was performed without a warrant.
    ❑ True ❑ False

12. In the *McNeely* decision, the United States Supreme Court affirmed the ruling of the Missouri Supreme Court.
    ❑ True ❑ False

13. Mr. McNeely refused to consent to a blood draw upon request by Cpl. Winder, but the blood draw was nevertheless performed.
    ❑ True ❑ False

14. Mr. McNeely was convicted of driving while intoxicated after a trial by jury.
    ❑ True ❑ False

15. The *McNeely* court declined to establish a per se exigency, based upon the dissipation of alcohol, that would allow a law enforcement officer to forego the warrant requirement.
    ❑ True ❑ False

16. The Missouri Supreme Court explicitly disagreed with the *Schmerber* decision when ruling in the *McNeely* case; the United States Supreme Court ultimately reversed that ruling.
    ❑ True ❑ False

17. The United States Supreme Court has made it clear that a DUI suspect cannot challenge a warrantless seizure of a sample of his or her blood unless he or she explicitly refuses to consent to a blood draw.
    ❑ True ❑ False

18. Only special facts establishing exigent circumstances can excuse a law enforcement officer from seeking a warrant prior to seizing a sample of a DUI suspect's blood.
    ❑ True ❑ False

19. The *Schmerber* court was very concerned with warrantless intrusions into the body.
    ❑ True ❑ False

20. The *McNeely* court ruled that there isn't enough time for a law enforcement officer to seek a warrant while transporting a DUI suspect to a medical facility for a blood draw.
    ❑ True ❑ False

## MCLE Answer Sheet No. 67

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

   San Fernando Valley Bar Association
   5567 Reseda Boulevard, Suite 200
   Tarzana, CA 91356

METHOD OF PAYMENT:
❒ Check or money order payable to "SFVBA"
❒ Please charge my credit card for $_____.

_____
Credit Card Number Exp. Date

_____
Authorized Signature

5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0490, ext. 105.

Name_____
Law Firm/Organization_____
_____
Address_____
City_____
State/Zip_____
Email_____
Phone_____
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 |

# Attorney Moms Balance Careers and Families

**By Irma Mejia**

*Photos by Marco Padilla*

This Mothers' Day, *Valley Lawyer* shines the spotlight on a few of the SFVBA's working mothers. These attorney moms discuss the challenges and rewards of balancing both career and motherhood.

POWERFUL WOMEN LIKE Marissa Mayer and Sheryl Sandberg are breaking boundaries and shifting perceptions of mothers in the workplace. They are not alone in carving a path that's all their own. Many SFVBA members have found the right balance and have made their careers work hand-in-hand with their commitments as parents. They have established their own businesses, making sure to tailor their careers to the needs of their family life. In celebration of Mothers' Day, *Valley Lawyer* is shining the spotlight on a few of these impressive members.

## Michelle Diaz

Law Office of Michelle E. Diaz, Northridge

Having been in practice for 16 years, Diaz learned early in her career that her ultimate happiness would be achieved as a sole practitioner, able to tailor her schedule to her own needs. Her current practice is focused almost exclusively on family law. Her previous experience is in civil litigation in the areas of catastrophic personal injury, insurance coverage and employment discrimination.

**Q: When did you decide to have children?**

**A:** My husband and I met while I was in law school and were married after I began practicing law. We had our children after I'd been practicing for several years.

**Q: Were you concerned about the impact children may have had on your career?**

**A:** I wasn't very concerned because I was older and had been practicing law for several years when my children were born. Having worked in various practice areas and at a few different kinds of law firms, I learned that getting on a partnership track was not what I wanted. I'm happiest when I have independence and the ability to set and control my own path in life.

**Q: How much time did you take off for maternity leave?**

**A:** I had a high-risk pregnancy so I was ordered to stop working immediately. I was really mad about it at the time. Now I have to laugh at myself about that, as it was obviously in the best interests of myself and my children. Boy, was I upset at the time! I got over my initial anger and just accepted that I had to sacrifice working for the sake of my kids. After they were born, I was out on disability for quite a while. When that ended, I stayed home with the children until just after their third birthday. At that time, the economy was starting to look pretty unstable so I decided to get back to work. I was concerned that if I waited longer to return to work, I'd have trouble getting a job in a tight job market. Luckily I got several job offers, including one close to home that I really wanted.

**Q: Did your decision to have children make your work as an attorney more difficult?**

**A:** No, I didn't view it that way.

**Q: How has being a mother influenced your work as an attorney?**

**A:** I've always been passionate about the law, and that will never change. I've made career choices that allow me to achieve the right balance between being a wife and mother and having a fulfilling career. Early in my career, before I had children, I liked working for others. It allowed me to focus on building my knowledge of the practice of law from others, while knowing that I'd have a steady paycheck. Several years ago, I made the decision to work for myself, and now I could not imagine ever

working for someone else again because of the flexibility it gives me. If I want to be at my boys' school for a couple hours one morning, I can do that. My office is close to their school and to my home. I take cases at the venues that I want to work and refer others out.

**Q: How do you strike a balance between being a mom and being an attorney?**

**A:** I don't know if I'd have been able to balance things as easily 15 years ago. Technology is very important to my ability to communicate and be connected even if I'm not sitting in my office. I allow clients and opposing parties to send text messages to me, which is helpful when you cannot get a quiet spot for a phone call. Email and fax are also available on my phone when I'm not at my desk. I have a cloud-based practice management software that is secure and encrypted so that I can enter billable time as work is completed, no matter where I am doing the work. I sometimes have to work later hours but I would not trade the flexibility that I have. Of course, it helps that I have a very supportive husband. I could not imagine doing all of this without his support.

**Q: How do you cope with the stress?**

**A:** You just do it. You juggle priorities as needed. I've always had at least one job since age 14. I love working. I do take a bit of "me" time every day by reading in the morning and at night–usually the news or a book that's not work-related. It is tough to find time with girlfriends who also have families and other responsibilities but I try to do that as well. I also have hobbies that I enjoy when I can, like sewing, photography and various crafts.

**Q: Do you feel you gave up anything by deciding to have children?**

**A:** I learned that a traditional path of working at a large firm and becoming a partner was not for me, so it's tough to say that I gave up that career path because I wanted children. I did have the pleasure of working with women and men at bigger firms who are supportive of working mothers. I'd actually say that becoming a mother has helped me find the career path I'm enjoying now. I would not have considered working for myself before but now I cannot imagine working for someone else ever again. It has, of course, a lot of additional responsibility but the flexibility and independence are worth it to me.

**Q: Do you have any advice for women who may be hesitant about becoming working mothers?**

**A:** Seek out work with people who are willing to support your goal to be a mother and an attorney. Or create your own job. Seek out mentors (male and female) who you see as balancing being a parent with having a productive career and speak with friends from law school about how they are doing it.

## Michelle Short-Nagel

Law Office of Michelle S. Short-Nagel, Woodland Hills

Short-Nagel has been practicing family law for 16 years. A significant portion of her practice, more than 30 percent, is dedicated to representing minor children in the midst of high-conflict family law cases through court appointments. Her approach to motherhood in the workforce is one of compartmentalization and careful decision-making. The lessons she's learned as a mother have impacted her practice for the better.

**Q: What impact has being a mother had on your performance as an attorney?**

**A:** It has changed everything about me—what's important, how I work, when I work and my perspectives. For me, it is all about the children—whether it is my children or my clients who are children or my client's children. It is about them, not me.

**Q: When did you decide to have children?**

**A:** I had my first child in my second year of law school. My second child came to our family 10 years ago while I was practicing with the Los Angeles County Child Support Services.

**Q: Did you worry about the impact that children would have on your career?**

**A:** I was not concerned about the impact on my career, but I knew that there would be a lot of adjusting to do. I did not know how much being a mom would impact my whole life. But all of these changes, some hard and some easy, have made me a better mom and wife, a better person, and even a better lawyer. I have more focus and understand the preciousness of time. I understand as a family law attorney that the decisions being made relate to the most precious gift we ever get–our children.

**Q: Did you take any maternity leave while pregnant or when you adopted?**

**A:** For my first child, I was on bed rest and in law school. For a while, I went to classes and put my feet up, which is not what the doctor ordered. Eventually, I was put on 24/7 bed rest and missed school. I was allowed to retake finals in January (I had my son in November as he was two months early). For my second child, we adopted her. I was off for a couple of months and was able to return part-time as the county was doing furloughs at that time. I think I went back full time after about five or six months.

**Q: Did your decision to have children make your work as an attorney more difficult?**

**A:** It does not make it more difficult; it makes it more complicated. There were more needs to balance and time seemed more limited. My children are now much older and I am lucky that my husband has been able to change his schedule so that I can be at court in the mornings on time.

**Q: What do you do to find balance as a working mother?**

**A:** You just find the balance you need. I had to learn the word "no". Sometimes that word is at work and sometimes it is at home. I have had to really take a look at and clarify my priorities. I then ask myself two questions: Does this serve my family or work? Does this forward a priority and

value in my life? Most of the time I get it right. Sometimes I get it wrong and have to evaluate what happened. Where was the flaw in my thinking and analysis? How do I not make the same mistake again?

**Q: How do you deal with the stress of raising children and representing clients?**

**A:** I keep those issues very separate. I do not share my cell phone with clients. I do not allow clients on my Facebook or other social networks. I do 95% of my work in my office. Stress is stress and it will be there, wherever you are. When I am feeling stressed, I ask myself: Are my children and husband okay? Are they well and thriving? If yes, then I take a breath and just move forward. I also remind myself that my client's family struggles are not mine. I sympathize with them, and even empathize with them. But I must keep an objective perspective so that I can help them move forward.

**Q: Do you have any "me" time? What do you that's just for you?**

**A:** My weekends and evenings are precious and I enjoy my time with my family. I carve out some time for myself when I can. I spend time with friends, knit, play mah jongg. I also do a "friends' weekend" once a year and just relax.

**Q: Do you think you sacrificed anything by deciding to have children?**

**A:** Outside of my time with the county, it was always my choice to be in a smaller firm environment. I made choices about my career based on my needs, my family's needs, and my wants. However, I don't feel that there were sacrifices, just choices.

**Q: What would you say to a female attorney who may be concerned about the effect of children on their careers?**

**A:** Be clear on why you are having children. They are a great deal of joy and work. Have children for the right reasons for you. Pressure from others does not lead to good decisions. You will make choices everyday based on your wants and needs. Be clear about your priorities. Make sure you have an awesome and committed partner before making the choice to have children. Having a good partner will make it all so much easier for your whole family. And enjoy the ride!

## Anie N. Akbarian

Law Offices of Anie N. Akbarian, APC, Glendale

Akbarian's background as a legal secretary enabled her to establish and manage her own practice and create her own rules to accommodate her needs as a mother. In practice for 17 years, Akbarian works in the area of personal injury, workers' compensation, medical malpractice and family law. Her experience raising a family was challenging but remains an achievement that brings her great joy and satisfaction.

**Q: When did you decide to have children?**

**A:** I was pregnant with my first child during the last year of law school.

**Q: Was the choice to have children a difficult one?**

**A:** Having children for me was more of a blessing than an obstacle. I had a lot of support from my family and school faculty. I never concerned myself

about how having a child may impact my career. If anything, I must say that having children has made me a better person and given me wisdom.

**Q: Were you able to take any maternity leave?**

A: Unfortunately, I did not take time off from work or school during my pregnancies and it was not easy at all. I worked until the last day. After my second child was born, I took off only two weeks before I had to appear in court for one of my cases. But everyone was so courteous and accommodating. I never felt that I was being treated any differently than anyone else. As a sole practitioner, I couldn't just walk away from work. But I did have the privilege of giving myself whatever time necessary in between my work. I had the privilege of creating my own hours.

**Q: How has being a mother influenced your work as an attorney?**

A: Motherhood has given me patience and has taught me how to deal with circumstances in life with a much deeper thought process. Working as an attorney and a mother raising my beautiful children has been a great blessing. Bearing a child for women should be a choice and once it is made then I believe that an instinctive strength comes upon us to strive for better. I decided from the beginning that I wanted to become a great part of my children's life and didn't want to work two jobs or 80 hours per week. Fortunately, having ample experience as a legal secretary and paralegal, there was no question in my mind that I wanted to have my own law practice. To this date, I have no regrets because setting up my own practice has given me the flexibility to attend to both my children while still having a solid work schedule.

**Q: Did children make your work more difficult?**

A: I must admit that it is not easy to be a devoted parent and have a law practice. However, I don't believe the decision to have children makes working as an attorney any more difficult than doing most other jobs. Having children and having a job are two separate commitments that come with lots of responsibility and dedication. We just have to learn to bring the two together as both are equally important.

**Q: How do you balance your responsibilities as a mother with your responsibilities as an attorney?**

A: We all can imagine how difficult it is to raise children nowadays and how vigilant we need to be. Having my own law practice gives me the privilege of having flexible hours. This allows me to care for my children and accomplish my tasks. That's how I balance my responsibilities as a parent and as an attorney.

**Q: How do you manage the stress of raising children and representing clients?**

A: I am sure most attorneys will agree with me that practicing law is a very stressful job. However, my family is my sanctuary. For me, raising my children is an instinct and it is what defines me. Representing my clients is a privilege in which I take pride. I cope with the practice of law objectively.

**Q: What do you do in terms of activities and hobbies that's just for you?**

A: I wish I could say that I have enough time for myself. Then again, I think it is relative. We all make time for ourselves and what could be satisfying for one may not be for another. Between a very heavy work schedule and raising children, it is difficult to have "me" time. However, I try to create that time for myself when possible. I take joy in exercising, decorating, shopping, traveling and spending time with my family.

**Q: What do you think about the concern some women may have about sacrificing their career progress for children?**

A: I find the word "sacrifice" quite strong in this context. Having children is a choice that most women will make in their lifetime. Nothing is easy to accomplish in life, but to forego an opportunity to have the gift of a child because of one's career may in itself be a bigger sacrifice. I truly don't feel that I have given up anything by having children.

**Q: What advice do you have for female attorneys who may be concerned about the impact that children may have on their careers?**

A: As a mother, I have not experienced any difficulties while raising my children and practicing law. If anything, having children has been the most beautiful experience in my life. Thus, a decision to become a parent is a lifetime commitment that cannot and should not be compromised. I truly believe that it is not the children that have a larger impact on our career but rather the limitations we place in our minds.

**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.


LALAWLIBRARY

# Law Week 2014: Expanded Educational Opportunities

By Ryan Metheny

THE LA LAW LIBRARY IS A CONVENIENT AND accessible research and education resource for attorneys in Los Angeles County. In addition to its research services, the library hosts weekly MCLE programs that primarily focus on practical, nuts-and-bolts topics. Recent presenters have spoken on drafting and service of subpoenas; the basics of anti-SLAPP law; trade secret and non-competition law; and the transition to a paperless office. MCLE programs are presented by speakers from all major practice areas. A list of the library's upcoming MCLE courses is available online at www.lalawlibrary.org.

One of the library's largest educational traditions is its annual Law Week celebration. This year the library will celebrate with a series of free MCLE seminars and events for the legal community and society at large. Law Week, held in late April and early May, is the library's week-long celebration built around the national holiday of Law Day, which celebrates the rule of law and American democracy. This year's slate of Law Week programs run from April 28 to May 2.

The 2014 ABA Law Day theme is "American Democracy and the Rule of Law: Why Every Vote Matters." Two timely programs on voting rights will be offered at the main library on Friday, May 2. The first session is "Is Voting Right a Human Right?" and will feature a panel of foremost experts on domestic and international voting law. The second session will feature a distinguished panel discussing the topic of "Voting Rights Post-Shelby: What Should Congress Do Now?"

Panelists will engage in a discussion of the current state of federal voting rights protections and assess the need for changes to the Voting Rights Act. Library staff and partners invite everyone to join in a reception following the two programs to wind down the Law Week celebration with dessert and music.

As part of the Law Week celebration, the library will host additional free programs on topics such as legal research, starting a nonprofit organization, the Public Records Act, legal do's and don'ts for small businesses, and a series on the rights and responsibilities in landlord/tenant law.

A highlight event will be a program on the "civil Gideon" movement featuring Justice Earl Johnson, Jr. (Ret.). It will be followed by a mixer set to the sounds of Gary Greene, Esq. and his Big Band of Barristers. Attendees will also be able to enjoy a display of original courtroom sketches by Bill Robles, the courtroom artist who has sketched the trials of Michael Jackson and Charles Manson.

On the officially observed Law Day, May 1, the San Fernando Valley Bar Association's own Attorney Referral Service will conduct outreach at the Van Nuys branch of the Los Angeles Public Library, where SFVBA presenters will give an introduction and overview of the ARS's programs.

Learn more about Law Week online at lawweek.lalawlibrary.org.

**Ryan Metheny** is the Members Program and Educational Partnerships Librarian at the Los Angeles Law Library. He was admitted to the State Bar of California in 2010. He can be reached at rmetheny@lalawlibrary.org.

# Practice Update: Changes to AAA Commercial Arbitration Rules

**By Michael R. Powell**

ARBITRATION IS USED BY thousands of organizations from every sector, many of which count on the American Arbitration Association (AAA). As part of its ongoing efforts to directly address users' stated preferences for a more streamlined, cost-effective and tightly-managed process, the AAA has issued revised Commercial Arbitration Rules that will apply to cases filed as of October 1, 2013.

The multi-year rule revision process included a task-force comprised of AAA and International Centre for Dispute Resolution (ICDR) Board Committees, advisory groups, and the most eminent arbitration practitioners, arbitrators and scholars throughout the country.

Among the significant changes is the addition of a mediation step. Subject to the ability of any party to opt out of the mediation process, all cases with claims that exceed $75,000 are expected to mediate their dispute at some time during the arbitration. Several of the other significant changes address the efficiency of the arbitration process by clarifying the arbitrator's authority. These changes include:

- **Information exchange (discovery).** Arbitrators have a greater degree of control to limit the exchange of information, including electronic documents.
- **New preliminary hearing rules.** Arbitrators and parties are provided with detailed guidance on preliminary hearings to help ensure the arbitration proceeds efficiently.
- **Availability of emergency measures of protection.** The AAA will appoint an emergency arbitrator within one day to rule on requests for emergency in contracts that

**Michael R. Powell** is the regional Vice President of AAA's Los Angeles office. He assists corporate, legal and public sector communities on dispute avoidance and resolution techniques, and in designing dispute resolution systems to meet their specific needs. He can be reached at powellm@adr.org.

have been entered into on or after October 1, 2013.

- **Access to dispositive motions.** Arbitrators are provided with guidance on the standards to be used to consider dispositive motions.

The process of referring a commercial dispute to arbitration is, for the most part, quite simple. The challenge is taking proactive measures to distance arbitration from litigation. From filing to award, the arbitration process must be tightly-managed to avoid the high cost of litigation. Thus, the revised AAA Commercial Rules, updated to conform to law and practice, provide the users of arbitration with the muscular efficiencies they need to resolve disputes in a timely and cost-effective manner.

Below is a detailed listing of significant AAA rule changes.

*R-9: Mediation*

In all cases where a claim or counterclaim exceeds $75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties.

Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

*R-21: Preliminary Hearing*

It is the AAA's experience that structured and organized preliminary hearings put the arbitration process on the right track. Paragraph (a) of new Rule R-21

provides that at the discretion of the arbitrator, and depending upon the size and complexity of the matter, a preliminary hearing is to be scheduled as soon as practicable following the appointment of the arbitrator. Parties as well as representatives should be invited to attend and the hearing can be conducted either in person or by telephone.

*R-22: Pre-Hearing Exchange and Production of Information*

This new rule provides clarity to former R-21 Exchange of Information. Paragraph (a) conveys to the arbitrator greater control over the exchange of information, with a view toward achieving an economical resolution, while also balancing each party's ability to present their case.

*R-23: Enforcement Power of the Arbitrator*

This new rule provides arbitrators with specific enforcement authority and powers to issue orders necessary to accomplish the goals of a fair and efficient arbitration process. Paragraph (a) addresses orders involving confidential documents and information. Paragraph (b) imposes reasonable search parameters for electronic and other documents. Paragraph (c) allows the arbitrator to allocate the costs of producing documentation. Paragraph (d) specifies the type of actions that the arbitrator may take in the case of willful non-compliance with any order and paragraph (e) provides that applicable law may authorize the arbitrator to issue other types of enforcement orders.

*R-33: Dispositive Motions*

This new rule specifically grants to the arbitrator the authority to make rulings upon a dispositive motion provided the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

*R-38: Emergency Measures of Protection*

This rule will enable parties to apply for emergency interim relief before an arbitrator that will be appointed within 24 hours of the AAA's receipt of the request for emergency relief. In prior versions of the Commercial Rules, the Rules for Emergency Measures of Protection were optional, and had to be agreed to either post dispute or by specific reference in the parties' arbitration agreement.

Amendments to the current rule make these procedures available in all cases where the underlying contract has been entered into as of the date of the rule amendments. This rule is similar to the one adopted in the ICDR's International Rules, where the Emergency Measures provisions were successfully incorporated into those rules and very well received by users.

The amended rule incorporates much of the language of the prior Commercial Rules Optional Rules of Emergency Measures. However, those provisions are no longer optional in the sense that they have been made a part of the rules and are available in all arbitrations conducted under agreements entered into on or after the effective date of amendment of the rules. The rule provides that a party may seek emergency relief by notifying the AAA and the other parties to the arbitration. The AAA will then quickly appoint an emergency arbitrator who will promptly establish a schedule for consideration of the relief sought.

*R-57: Remedies for Nonpayment*

This rule was implemented to address issues and increasing concerns where parties refuse to deposit their share of arbitrator compensation or administrative charges.

This revised rule provides that any party may advance the fees for a non-paying party so that an arbitration may proceed. However, paragraph (a) provides that if allowed by law, a party may request that the arbitrator take specific action relating to a party's non-payment. Paragraph (b) suggests that an arbitrator may limit the non-paying party's ability to assert or pursue their claim. In no event, however, may the arbitrator preclude the non-paying party from defending a claim or counterclaim. Paragraph (c) grants to a party the right to oppose a request for such measures arising from non-payment. Paragraph (d) confirms that the paying party who is making a claim must submit evidence as required by the arbitrator for the making of an award. Paragraph (e) grants to either the AAA or the arbitrator the authority to order suspension of the arbitration for non-payment. Paragraph (f) states that either the AAA or the arbitrator may terminate the proceedings if full payment is not made within the time specified following a suspension.

*R-58: Sanctions*

This rule was implemented as a result of the parties to commercial arbitration desiring to grant arbitrators the power to address objectionable and abusive conduct in the arbitration process.

Paragraph (a) of this new rule grants to the arbitrator the authority if requested by a party to order sanctions where a party fails to comply with its obligations under the rules or with an order of the arbitrator. If the sanction limits any party's participation in the arbitration or results in an adverse determination, the arbitrator must explain in writing the reason for the order and require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction. Paragraph (b) states that prior to making a determination regarding imposition of a sanction, a party that is subject to a sanction has the right to respond.

Expectations are changing and parties are demanding an even more efficient arbitration process. AAA's revised Commercial Rules directly address this demand and provide users of arbitration with the efficiencies of alternative dispute resolution they expect—a tightly managed process from filing to award that helps avoid the high cost of litigation.

# Mardi Gras
## celebration












On March 8, Narver Insurance sponsored a Mardi Gras celebration at Monterey at Encino for SFVBA members and their guests. The party was lively, with guests arriving in masquerade costumes. Entertainment included samba dancers and a court jester. A delicious buffet and hosted bar was provided, compliments of Narver Insurance. SFVBA members James Felton and Maya Shulman were crowned the King and Queen of Carnival.

# Can Good Customer Service Ever be *Bad*?

**AMY M. COHEN**
SCVBA President

amy@cohenlawplc.com

AS WE GET OLDER, WE sometimes find ourselves bemoaning the level of customer service being provided by the younger generations that follow. Trying hard not to sound too much like our parents and grandparents, we wonder aloud about the rudeness of salespeople who would obviously much rather be somewhere–anywhere–else but there, and for whom a simple "thank you" or even a genuine smile seems far too much to ask.

With the threat of poor customer service ever-looming, when we do get great (or even good) service, we appreciate it. Sometimes, the service is so good that we want to tell all of our friends and encourage them to shop in the same store. But is it too good to be true? I recently encountered such a situation that made me wonder.

In the process of making some changes to my firm's cellular phone account, I needed to accomplish two things. I went into a cellular phone store near my home, hoping to make the necessary changes to our account and get new phones. Although it was early evening, the store was busy and shortly after we got there, one of the two sales associates left, leaving our sales associate on her own.

As more people came and went in and out of the store, the associate deftly handled inquiries from other customers, while still working with us. Although she could not make the changes to the account that we requested, she did tell us that we would be able to get the new phones that we wanted (despite our having been told at another store that we would have to wait until April 1).

Because the store was busy and our children were hungry, we opted to leave our account in her seemingly capable hands and stepped out across the street for dinner. I came back to the store about 45 minutes later to find it still busy, and the associate still manning it on her own. We completed the final paperwork and left the store with two new phones, a new home phone set-up and a promise that the account changes we wanted could easily be done the next day by phone, using the 1-800 number she provided.

If you are thinking this was too easy, you are correct. My husband (and law partner) was skeptical and said as we were driving home, that it could not have been that easy and that something had to go wrong. He was right.

The next morning, we first attempted to call the 1-800 number our sales associate had provided, only to find that it was incorrect. After calling the store to get the correct number, we called our cellular phone company and attempted to make the account changes we needed. The first step relating to our old account was easy. When we attempted step two relating to our new account and new phones, we encountered (of course) problems.

The corporate representative that I spoke with told me that the store

sales associate had set things up incorrectly and instead of having three lines on our account, we currently had five and the new phones would not be able to be moved to our old numbers. I was told that I would have to go back to the store and have them terminate and unwind everything. Once that was done, corporate could set things up the way we needed. I was also told that we were not supposed to get new phones that early, and that the store we had gone to was not a company store, but rather an authorized retailer, something that is impossible to know just by looking at the store.

When I returned to the store, the associate we had worked with was not in. I explained the situation to the other associate, who obviously did not want to unwind her co-worker's sale. She called her co-worker and I was told that it was actually the corporate office who did not understand what was happening, and that it could be easily resolved. (I still find the finger-pointing humorous.)

I spent much of the rest of the afternoon bouncing back and forth between my office and the store, hoping that the two associates could resolve the issues, fix our account, and still get us the phones. At the end of the day, the second associate did have to terminate the two new lines and return the new phones, unwinding a good portion of what had been done the night before. I found myself apologizing to her, not wanting to cause problems because I appreciated the hard work of the associate from the night before. However, at the same time I was frustrated that it was not as easy as I was told it would be, and that I had to spend time trying to fix things.

If you are getting good customer service, but it is not accomplishing what you need to accomplish, or you end up with the wrong equipment or products, does it render the customer service bad? If you consider this situation from a different angle—perhaps one of the stereotypical used car salesman—does that make the service bad?

It could be that I was so relieved to be speaking with someone who was acknowledging my needs, who was smiling, and who was able to handle a crowd and still answer my questions, that I lost sight of what I really needed, and let the "good" service cloud my judgment. (Again, looking at it from a used car standpoint, did I get snowed? Did I leave with things that I did not need because she was such a good salesman?) We did say no to several of the upgrades and up-sells that she was offering, but at the same time, did we say yes too much?

It is easy to dismiss bad customer service and vow never to return to a particular store because of it. But what if you still are not sure if the service you got was good or bad? How will you ever know?

We will know when we get our first bill whether or not things were handled appropriately and if all issues were fixed. My partner's money is on things not being correct. If that ends up being the case, I will be the one spending more time on the phone with the company and possibly more time in the store, dealing with the associate.

It could be at that point, that the "good" service I may have initially received is outweighed by the time spent in correcting mistakes, rendering it "bad" service. Or it could be that our first bill will be correct, allowing me to relax and enjoy the good customer service I think I got and feel more comfortable about possibly returning to the store. In the meantime, at least I have my new phone to play with.

*The Santa Clarita Valley Bar Association holds monthly CLE seminars and mixers for its members. Visit www.scvbar.org for information on upcoming programs and events.*

## NEW MEMBERS

**The following were approved as members by the SFVBA Board of Trustees in April 2014:**

**Richard L. Bisetti**
Magana, Cathcart & McCarthy
Los Angeles
(310) 553-6630
rlb@mcmc-law.com
*Product Liability*

**Eric Egaas**
City National Bank
Los Angeles
(310) 282-2997
eric.egaas@cnb.com
*Associate Member*

**Amani T. Hassoun**
Woodland Hills
(818) 999-1950
ahassounesq@gmail.com

**Steven M. Mayer**
Mayer Law Group, A.P.C.
Encino
(818) 528-2858
smayer@mayerlawla.com
*General Practice*

**William Martin Molfetta**
Northridge
(818) 261-1969
molfettaw@yahoo.com
*Alternative Dispute Resolution: Arbitration and Mediation*

**Jacob O. Partiyeli**
Los Angeles
(310) 801-1919
jacoboren@icloud.com
*Personal Injury*

**Scott A. Quigley**
Winnetka
(207) 240-5481
squigley777@gmail.com
*Litigation*

**Patricia Denise Salcedo**
West Hills
(818) 438-5637
pattysalcedo01@gmail.com
*Law Student*

**A. Lysa Simon**
Law Offices of A. Lysa Simon
Northridge
(818) 701-5200
lsimon@culawyer.com
*Bankruptcy*

# CLASSIFIEDS

## ATTORNEY-TO-ATTORNEY REFERRALS

**STATE BAR CERTIFIED WORKERS COMP SPECIALIST**

Over 30 years experience-quality practice. 20% Referral fee paid to attorneys per State Bar rules. Goodchild & Duffy, PLC. (818) 380-1600.

## SPACE AVAILABLE

**SHERMAN OAKS**

Executive suite for lawyers. One window office (14 x 9) and one interior office (11.5 x 8) available. Nearby secretarial bay available for window office. Rent includes receptionist, plus use of kitchen and conference rooms. Call Eric or Tom at (818) 784-8700.

**WOODLAND HILLS**

Two window offices (15x10) in Warner Center for lease. Use of conference room/ kitchen. Call Laurie at (818) 992-1940.

## SUPPORT SERVICES

**PROFESSIONAL MONITORED VISITATIONS AND PARENTING COACHING**

Family Visitation Services • 20 years experience "offering a family friendly approach to" high conflict custody situations • Member of SVN • Hourly or extended visitations, will travel • visitsbyllene@yahoo.com • (818) 968-8586/(800) 526-5179.

**LEGAL ADMINISTRATIVE SUPPORT SERVICES**

Transcription • Word Processing • Personnel Referral Service • On Demand Legal Secretaries. *The Valley's Premiere Full Service Legal Support Agency.* www.lassusa.com • (818) 305-5305.


PRESIDENT'S CIRCLE

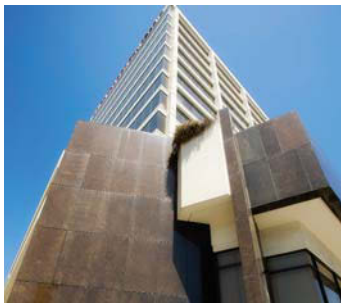
- SFVBA membership for every firm attorney and paralegal
- Prominent listing in *Valley Lawyer* and firm logo on President's Circle page of SFVBA website
- Recognition and 5% discount on tables at Bar-wide events, including Judges' Night
- Invitations to President's Circle exclusive events with bench officers, community leaders and large firms

**WE RECOGNIZE THE FOLLOWING PRESIDENT'S CIRCLE MEMBERS FOR THEIR DEMONSTRATED COMMITMENT AND LEADERSHIP IN SUPPORTING THE LEGAL PROFESSION AND ITS WORK IN THE COMMUNITY.**

*Alpert Barr & Grant APLC*
*Christie Parker & Hale LLP*
*Law Offices of Goldfarb Sturman & Averbach*
*Kantor & Kantor LLP*
*Kestenbaum Law Group*
*Eisner & Gorin LLP*
*Law Offices of Marcia L. Kraft*
*Pearson Simon & Warshaw LLP*
*Greenberg & Bass LLP*
*Oldman Cooley Sallus Birnberg & Coleman LLP*
*Stone Cha & Dean LLP*
*Wasserman Comden Casselman & Esensten LLP*
*Lewitt Hackman Shapiro Marshall & Harlan ALC*
*Neighborhood Legal Services of Los Angeles County*
*Nemecek & Cole*
*Parker Milliken Clark O'Hara & Samuelian APC*
*University of West Los Angeles School of Law*

**Contact SFVBA Executive Director Liz Post at (818) 227-0490, ext. 101 or epost@sfvba.org to sign up your firm today!**

# The Power You Need
# The Personal Attention You Deserve




Lewitt Hackman is a full-service business, real estate and civil litigation law firm. As one of the premier law firms in the San Fernando Valley, we are a powerful and forceful advocate for multinational corporations, privately held and family businesses, start-up companies, and individuals. At the same time, we are personal enough to offer individual and detailed attention to each and every client, no matter what their size.

*Protecting Your Business.*
*Protecting Your Life.*

LH LEWITT HACKMAN

LEWITT, HACKMAN, SHAPIRO, MARSHALL & HARLAN
A LAW CORPORATION

16633 Ventura Boulevard, 11th Floor ■ Encino, California 91436-1865
(818) 990-2120 ■ Fax: (818) 981-4764 ■ www.lewitthackman.com

**BUSINESS PRACTICE AREAS**
*(Transactions & Litigation)*

- Corporations/Partnerships/LLCs
- Commercial Finance
- Employment
- Environment
- Equipment Leasing
- Franchising
- Health Care
- Intellectual Property, Licensing & Technology
- Land Use/Development
- Mergers/Acquisitions
- Real Estate Finance/Leasing/Sales/ Acquisitions
- Tax Planning

**CONSUMER PRACTICE AREAS**

- Family Law
- Personal Injury/Products Liability
- Tax and Estate Planning
- Probate Litigation/Will Contests