VALLEY LAWYER

NOVEMBER 2015 • $4

A Publication of the San Fernando Valley Bar Association

A Brief Look at the Mind of John G. Roberts

Online Negativity: How to Fight Back

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– Darrell Forgey, Judicate West

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NOVEMBER 2015

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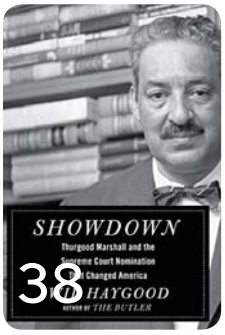

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VALLEY LAWYER

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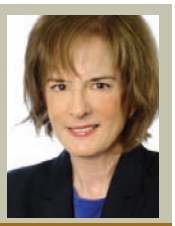
Printing Southwest Offset Printing

Shifting the Debate

CAROL L. NEWMAN
SFVBA President



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I AM WRITING THIS PIECE A FEW days after Yom Kippur, the Day of Atonement, and coincidentally, the day after my installation as President! Yom Kippur services caused me to ponder the role of religion in our lives. Even those of us who do not call ourselves religious, or who do not belong to any organized religion, cannot deny that we're surrounded by religion, either voluntarily or involuntarily. We may or may not voluntarily embrace a religion, but even if we don't, the news is full of stories about religion, from the massacres committed by Isis to the Pope's gala visit to the United States. We can't escape thinking about it and hearing about it.

On the day that I am writing this piece, Kim Davis, the county clerk in Kentucky whose name is now a household word, announced that she will never put her name on a same-sex marriage license but she will not quit her job because that would be contrary to God's will and God's law. Kim Davis probably never previously contemplated that being elected as a county clerk in rural Kentucky would result in her becoming known around the world for what she says are her religious convictions.

I can't dispute that she (and everyone else) should be entitled to religious freedom. But there is a fine line, which seems to be getting finer, between religious freedom and imposing one's religion on everyone else. Personally, I do not have a problem with private citizens deciding with whom they will or will not deal, based on their religious beliefs. (Once again, this is my personal view, not an official view of the SFVBA or a summary of existing law.) So for me, if a cake baker does not want to bake his or her cakes for me because I am LGBT, I would accept that. I would simply go to the next cake baker down the street who would hopefully not be prejudiced. That's the free market at work, of which I'm a big supporter. The second cake baker would get my money, as opposed to the first one with issues.

But we will have a serious problem in this country if government officials are allowed to refuse to follow the rule of law—secular law—because it allegedly violates "God's law." If God's law trumps the U.S. Supreme Court, the result will be chaos, not because we don't believe in God (many of us do), but because there cannot be any agreement as to what God's law is. Is it Catholicism? Is it Judaism? Is it Sharia law? Is it Evangelical Christianity? Is it the Church of Religious Science? Which church or religious organization can best interpret what God intends? Certainly my reform Jewish rabbi, who is an LGBT rights activist, will not agree with Kim Davis' interpretation of God's law.

If government officials do not want to follow the rulings of the U.S. Supreme Court for conscientious reasons, they have a choice. They do not have to do what they think is wrong. But that shouldn't give them free reign to stay in their jobs and refuse to perform them. If they do not want to obey the Supreme Court, they should resign from their government positions. If they resign, they would no longer be in a position which would cause them moral torment. If they do not resign, they are preventing the work of the government from being done. To the extent that government has a legitimate function, no individual government employee should be allowed to dictate what that function is.

It is particularly offensive to this 38-year lawyer that not only Kim Davis, but also the Chief Justice of the Alabama Supreme Court, as well as several political candidates, revile the U.S. Supreme Court as not being the law of the land.

We are in an evolving legal and political landscape. The U.S. Supreme Court's decision legalizing same-sex marriage has merely shifted the debate to religious freedom. This issue has many tentacles which might be explored in future President's Messages. Stay tuned.

Giving Thanks

ELIZABETH POST
Executive Director

epost@sfvba.org

I ANNOUNCED LAST MONTH that *Valley Lawyer* lost its esteemed editor, Irma Mejia, to a legal tech firm. I am currently in the midst of interviewing a number of highly qualified candidates and my expectation is we will have a new editor on staff before the next issue is circulated.

Even with an experienced editor on board, publishing a magazine of *Valley Lawyer*'s scope and quality is not an easy undertaking for a bar association of the SFVBA's size and resources. And it would be an almost impossible task without the dedicated and talented members who volunteer on our Editorial Committee. Their contributions cannot be understated.

I would like to use this column to personally give thanks to the following members of the SFVBA's Editorial Committee for your assistance throughout the year, and especially acknowledge your help to the magazine over recent months:

David Gurnick, Chair
Terri L. Asanovich MFT
Daniel A. Cantor
Mel Kohn, CPA
Lisa Lerner Miller
Kimberly K. Offenbacher
Michelle S. Robins
Mark S. Shipow
and our newest recruits,
Jonathan Arnold and
Bill Daniels

All SFVBA members are invited to participate on the Editorial Committee. The Committee is responsible for setting the tone and direction of *Valley Lawyer*. While not involved in its day-to-day production, members write, edit and solicit articles; brainstorm on new content that hopefully will be of interest to members (like our newest columns, Book Review and Dear Phil); and help plan the annual editorial calendar and cover stories.

You don't need to have served on law review to join the Editorial Committee. If you enjoy reading and writing, join us on the fourth Tuesday of each month for lunch at The Stand in Encino to share your ideas about how to enhance our magazine. Our next meeting is November 24 at 12:30 p.m.

In past years, *Valley Lawyer* would announce the upcoming year's editorial calendar in the November issue but this year we will wait until we can benefit from the involvement of our new editor. This does not mean we have stopped soliciting articles for 2016; we are looking for articles in all areas of law and practice.

Don't know what to write? Have writer's block? Maybe you have written a well-researched brief that you can turn into a thought-provoking feature article? Are you writing a book and would like to preview a chapter with Valley colleagues? Do you have an interest in current events and public policy? Write about California's new assisted suicide law or cases before the U.S. and California Supreme Courts. Give me a call and we can brainstorm!

Wishing you and your families a Happy Thanksgiving!

NATIVE AMERICAN HERITAGE MONTH

SUN	MON	TUE	WED	THU	FRI	SAT
1	**2** *Valley Lawyer* Member Bulletin Deadline to submit announcements to editor@sfvba.org for December issue.	3	**4** Employment Law Section and Intellectual Property, Entertainment & Internet Law Section **When Intellectual Property Creates Employment Issues** 12:00 NOON SFVBA OFFICE Attorneys Robin McKibbin and Marc Hankin will discuss how to avoid getting sued while retaining what your employees have created. (1 Hour MCLE)	**5** Membership & Marketing Committee 6:00 PM SFVBA OFFICE	6	7
8	**9** Tarzana Networking Meeting 5:00 PM SFVBA OFFICE THE ESQUIRE NETWORK	**10** Probate & Estate Planning Section **New Laws** 12:00 NOON MONTEREY AT ENCINO RESTAURANT Jim Birnberg will give an important annual update. (1 Hour MCLE) Board of Trustees 6:00 PM SFVBA OFFICE	**11** VETERANS DAY 	12	**13** Bankruptcy Law Section **Future Changes to Chapter 13** 12:00 NOON SFVBA OFFICE Judge Maureen Tighe and attorneys R. Grace Rodriguez and David Shevitz update the group. (1.25 MCLE Hours)	**14** Valley Community Legal Foundation Gala 2015 5:30 PM BRAEMAR COUNTRY CLUB 
15	16	**17** Taxation Law Section **New Rules Affecting Taxation of Real Estate** 12:00 NOON SFVBA OFFICE Sharyn Fisk leads the discussion. (1 MCLE Hour)	**18** Workers' Compensation Section **The Exercise of Reasonable Diligence** 12:00 NOON MONTEREY AT ENCINO RESTAURANT Workers' Comp Judge Shiloh Rasmusson will present a survey of injury issues in workers' compensation. (1 Hour MCLE)	19	20	21
22	**23** Family Law Section **Hot Tips** 5:30 PM MONTEREY AT ENCINO RESTAURANT Don't miss out on hot tips from Gary Weyman and the family law bench, a must for all family law attorneys. Approved for Legal Specialization. (1.5 MCLE Hours)	**24** Editorial Committee 12:00 NOON SFVBA OFFICE	25	26  	27	28
29	30					

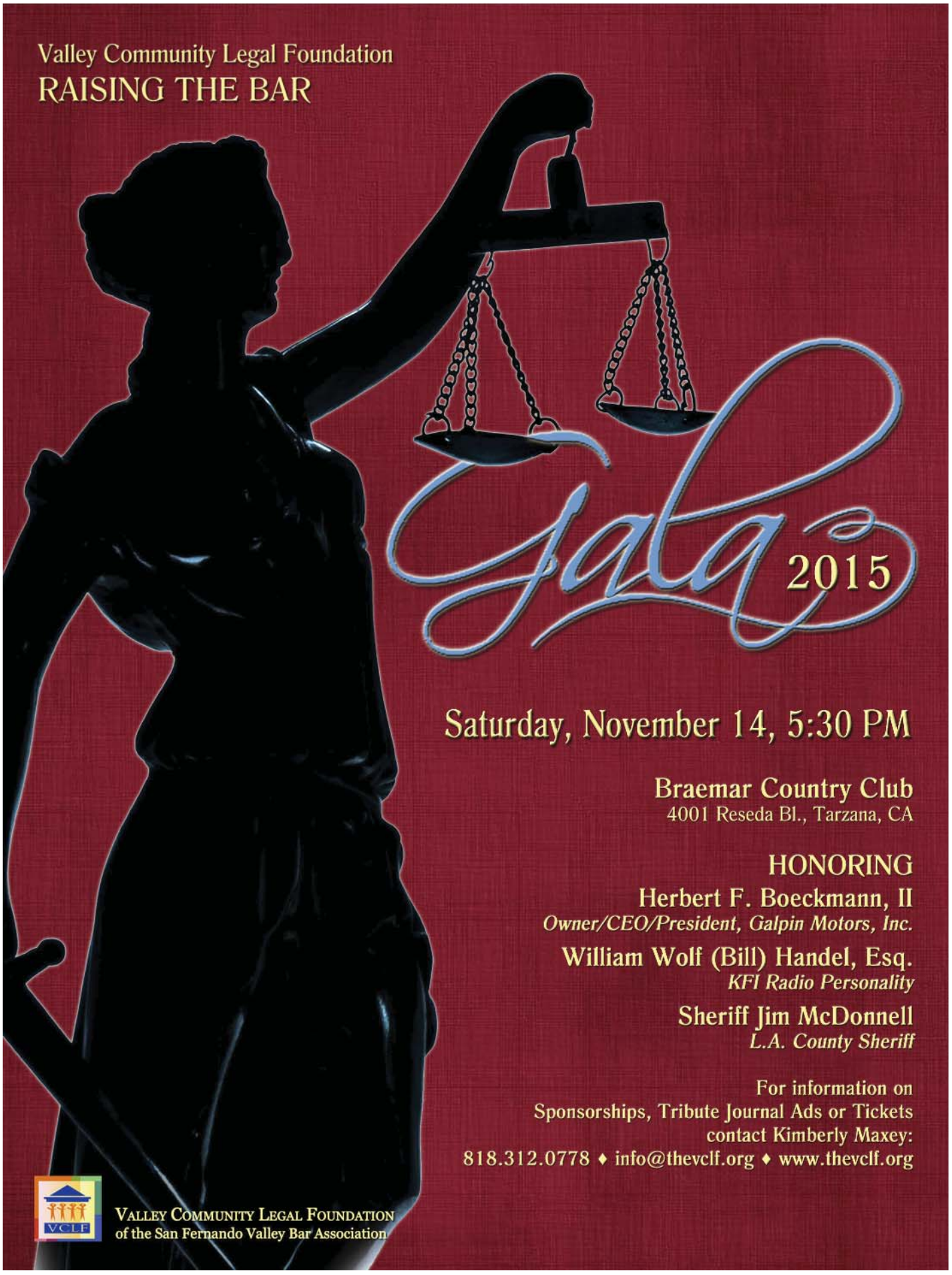
CALENDAR

DECEMBER 2015

SUN	MON	TUE	WED	THU	FRI	SAT
		1 *Valley Lawyer* Member Bulletin Deadline to submit announcements to editor@sfvba.org for January issue.	2	3 Membership & Marketing Committee 6:00 PM SFVBA OFFICE	4 IOLTA Accounts and Doing Business with a Trust Department Sponsored by CITY NATIONAL BANK The way up. 12:00 NOON SFVBA OFFICE Free to all current members! (1 MCLE Hour)	5
6	7	8 Probate & Estate Planning Section 12:00 NOON MONTEREY AT ENCINO RESTAURANT SFVBA Holiday Open House! See ad below	9	10	11 Bankruptcy Law Section Exemptions 12:00 NOON SFVBA OFFICE Michael Kwasigroch discusses exemptions and the federal and state laws that apply. (1.25 MCLE Hours)	12
13	14 Tarzana Networking Meeting 5:00 PM SFVBA OFFICE TEN The Esquire Network	15	16	17	18	19 Blanket the Homeless and ARS Legal Clinic
20	21	22	23	24	25 Christmas DAY	26
28	27	29	30	31		

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.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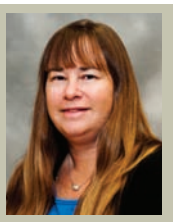
SFVBA Partakes in Legislative Process

TAMILA C. JENSEN AND CARYN BROTTMAN SANDERS



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THE SAN FERNANDO VALLEY BAR ASSOCIATION again sent a delegation to the Annual Conference of Delegates of the Conference of California Bar Associations (CCBA) in Anaheim in October. Every year the Conference of Delegates meets and considers resolutions which proponents hope will eventually become law. This year the SFVBA was represented by past presidents Caryn Sanders and Tamie Jensen and longtime delegate Roger Franklin.

The Conference is funded through conference fees and donations. The Conference works throughout the year to get ready for the three-day meeting every fall. Local bar associations and groups of likeminded people prepare resolutions proposing various changes in the law.

Once approved at the local level, resolutions are submitted to the CCBA, where they are reviewed by a state level resolutions committee. All the resolutions from throughout the state are accumulated and distributed back to the bar associations. Delegations meet and review each resolution and adopt a position which is sent to CCBA. By the time the Conference starts in the fall, each resolution has been thoroughly reviewed, reports have been written, and the Conference is ready for the debate.

This year, Caryn Sanders authored a resolution (8-6-15) which seeks to permit the expungement of certain criminal offenses for people who have been the victims of human trafficking. For example, if a woman is the victim of human trafficking and was arrested and convicted of prostitution, on demonstration she was trafficked, there would be a way to remove the conviction because she was forced into prostitution. Similar laws have been adopted in 18 states and are under consideration in several others. Sander's resolution was approved. CCBA will now work to find a sponsor for a bill embodying the resolution in the state legislature. The legislative process will then take its course.

CCBA has one of the most effective legislative programs in California. 2015 was an especially successful year. The legislature adopted and the governor signed nineteen bills embodying 22 resolutions which were adopted by the Conference between 2012 and 2014. Proponents are honored with a signed copy of their bills autographed by the sponsoring legislator. Roger Franklin received such an honor two years ago.

The San Fernando Valley Bar Association has been active in the Conference for decades (starting when the Conference was part of the State Bar) and its delegation continues its work each year. Anyone who is interested in joining the delegation or wanting more information should contact Tamie or Caryn.

Online Negativity: How to Fight Back

By David Gurnick, Tal Grinblat and Nicholas S. Kanter

As the use of the internet has grown, individuals and businesses are becoming increasingly vulnerable to electronically posted falsehoods, invasions of privacy, revenge and other negative content through review websites, social media and information hacks. There are several strategies and legal tools for victims and lawyers to fight back against improper negative online speech.

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 23.

THE INTERNET IS A POWERFUL CHANNEL FOR communication, with great strengths compared to other media. It has been referred to as the "largest public space in human history."[1]

Internet communications can reach an unlimited number of people worldwide. In contrast, the reach of television and radio broadcasts are limited by geography. Internet communications are stored. Once written, messages can be accessed repeatedly and over extended lengths of time. Television and radio broadcasts are transitory.

Unlike television, radio and print, the internet is interactive, enabling two-way participation. And internet messages can be more dynamic in their range of designs, text, visuals, audio, and use of data, compared to other communication methods. The internet's capacity so far seems unlimited. Almost every message ever sent remains accessible. Internet messages appear on desktops, laptops, tablets, phones, and even wristwatches—comprising a larger number of access points compared to the number of televisions or radios, or print runs of books and periodicals.

While the internet is a source of information and communication, its power can be misused. People and businesses suffer from electronically posted falsehoods, disparagements, exaggerations, invasions of privacy, rants, revenge, and other negativities that become widely and permanently accessible. These posts come from disgruntled ex-employees, dissatisfied customers, competitors, political opponents, ex-sweethearts, and pranksters. Compounding these problems is a widely-held sense that little can be done to effectively challenge or remove or obtain other relief for improper negative content posted on the internet.[2]

But the despair over negative online content is partly misplaced. While the internet benefits from principles of free speech, First Amendment protection has limits. Increasingly, victims, lawyers and other consultants discover creative ways to fight back against improper negative online speech. This article discusses several strategies.

Various Categories of Negative Online Speech

As use of the internet has grown, so have the ways people can send false, defamatory or other negative messages or content. A perpetrator can post content that is false, disparage a product or service, expose embarrassing private facts, use someone copyrighted content without the owner's consent, or misuse someone else's trademark.

Review and Rating Websites. At sites like Angie's List, Avvo, Yelp, and TripAdvisor, satisfied or dissatisfied customers, or students in the case of the professor/teacher ratings sites, can post compliments, but can also post rants, criticisms or even false information.

Revenge Websites. These sites invite submissions, purported facts, embarrassing photos or other content as a way to obtain vengeance for perceived wrongs done against them by ex-friends, ex-lovers, employers, co-workers, neighbors, or others.

Social Media. Social platforms allow negative comments like Facebook posts, YouTube comments, Tweets or Reddit posts, all with potential to go viral quickly.

Information Hacks. Private content, such as internal emails and memos from within Sony, or subscriber identities from the Ashley Madison website, for example, can be exposed.

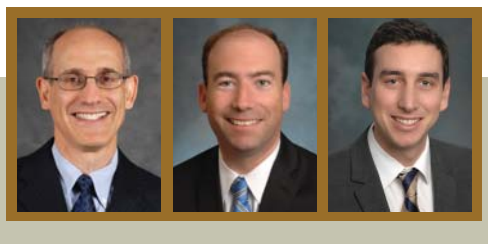
Personal Sites. False or defamatory statements are easily made on blogs or other sites.

Challenges to Fighting Back

The United States has a strong commitment to the First Amendment and free speech.[3] Partly from this commitment, Congress enacted Section 230 of the Communications Decency Act, stating that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[4] This provision grants website operators broad protection against claims arising from speech posted by third parties.

Immunity from liability frees web hosts from legal risk or any sense of obligation to restrict content posted on their sites. Provocative content may attract more visitors. This may benefit the host.

Free speech has also been used to protect anonymous online posters. For example, *Thomson v. Doe*[5] concerned an anonymous review on a site that posts reviews and ratings of lawyers. The lawyer was accused of lacking basic business skills, detachment from fiduciary duties, professional failures, and not protecting a client. The lawyer subpoenaed the website (Avvo) seeking the poster's identity. The Washington State Court of Appeals relied on the First Amendment to rule that because the lawyer did not make a prima facie evidentiary showing of defamation, the subpoena would not be enforced.



David Gurnick, **Tal Grinblat** and **Nick S. Kanter** are with the Lewitt Hackman firm in Encino. Their practices include defense of reputation on the internet, franchising, trademarks, and copyrights and litigation. They can be reached at dgurnick@lewitthackman.com, tgrinblat@lewitthackman.com and nkanter@lewitthackman.com, respectively.

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Another variant of the free speech defense is the anti-SLAPP statute. Laws in California, 28 other states, and the District of Columbia let a defendant obtain early dismissal of actions deemed to chill free speech. These lawsuits are referred to as "Strategic Lawsuits Against Public Participation," hence the acronym, "SLAPP."[6] Under these laws, when an action is brought arising from something the defendant said, the defendant can ask the court to dismiss the action, on the ground that it is an improper SLAPP lawsuit.

Recently, an online lender suffered the dismissal of an action as a SLAPP.[7] A husband and wife seeking a home loan misrepresented information. After the lender's loan commitment expired, the lender told the customer it could not fund the loan. Soon after, negative posts appeared on websites. Among these were statements that: "The guy that was supposed to handle closing could barely speak English;" "Everyone I talked to at this company were [sic] incompetent. They reviewd [sic] my credit rating and promised a quick close. Then the list of things got longer and longer;" and "They asked for an explanation of $200 out of a $30,000 deposit to make sure we were not 'borrowing money' for closing. It was my sons [sic] birthday money for god's sakes!!!!"

An appellate court upheld dismissal of the lawsuit under Texas's SLAPP statute, ruling that the statements were not defamatory; that implying someone is incompetent is nonactionable opinion; and stating that the lender was excessively demanding was a subjective opinion.[8]

But not all SLAPP motions are successful. In *Clay Corporation v. Colter*, a Nissan dealer in Massachusetts sued two brothers over a Facebook page called "Boycott Clay Nissan," an online petition and a Twitter account used to urge potential customers not to do business with the dealership. The brothers claimed the dealer fired their sister because she had brain cancer and they posted that the dealer discriminated against cancer patients and was unethical. The dealer denied the allegations and claimed it invited the sister to return to work and offered to pay her back pay.

Massachusetts' SLAPP statute is narrower than in other states, protecting only against claims for trying to influence the government. The court found the car dealer's claims were not for efforts to petition the government, and therefore denied the SLAPP motion.[9]

There are other legal, cultural and technological challenges to fighting against negative online content. One of these challenges is the ease for posters to conceal their identities. The ability to speak anonymously on the internet "allows individuals to express themselves freely without fear of economic or official retaliation or concern about social ostracism."[10] Also, content circulates fast on the internet. Large portions of posted content are quickly searched and

copied to other locations and archived. Sites draw information from other sites and save cached copies of content. Search engines continuously crawling and indexing the web make it easy to find information. Once any content is posted, it can soon appear elsewhere, and is unlikely to ever disappear.

Many people might be surprised at how much information about them is already publicly available. Numerous sites contain names, addresses, phone numbers, family histories, identities of relatives, work histories, social relationships and the like. Many people are astounded that social networks like Facebook and LinkedIn are able to accurately suggest or identify people with whom a subscriber has family or social relationships.

Accidental releases of information, misdirected emails, inadvertent posts, and intentional releases of hacked information are additional sources of unwanted online information. These challenges are compounded by the slow pace at which lawmakers and courts are able to assess and address these circumstances, compared to the speed of transmissions on the internet and the dexterity of social media commentators, bloggers and hackers.

Practical Strategies and Legal Tools for Fighting Back

The many challenges do not mean that the goals of avoiding, stopping, fighting back or remedying negative online reviews and content are hopeless. Individuals, businesses, legislatures and courts are increasingly aware of these problems. And a variety of strategies and tools for fighting back are increasingly coming into focus. Different methods and combinations of methods must be selected for any particular situation.

Proactive Conduct. While self-evident, one way for businesses and individuals to reduce the incidence of negative comments is to use care in their activities and operations, acting properly, trying to avoid giving offense, delivering quality products and services at fair prices, being attentive to customers, apologizing promptly and sincerely for mistakes, and being kind and nice. These steps, even if followed rigorously, will not avoid all negative comments. Some people cannot be pleased. Some are looking for a dispute. Some will become upset at even the mildest perceived slight. But following these principles will reduce the number of people who may think they have a grievance, and reduce the number of negative comments about a particular individual, group or business.

Take No Action. Sometimes taking no action is the best action. No one wants a negative email or tweet, or negative online review on Yelp, RipOff Report or elsewhere about themself. But a response that disputes the review, or criticizes the person who posted it, may have an effect that is opposite what is desired. That response may draw more attention to the message. Instead, silence may avoid drawing attention, so that the message soon becomes obscured by hopefully more favorable messages.

A thoughtful look and assessment whether the negative post has any real and substantial affect, and real costs, is worthwhile. With increasing numbers of negative content, revenge and the like on the internet, more people today understand that not every rant or criticism is to be taken seriously. Sometimes, it is better to ignore a negative post rather than engage and draw more attention to a remark that would otherwise have passed into obscurity.

Business Terms and Conditions. In some business relationships it may be appropriate to include in the company's standard website terms and conditions or in service agreements, a clause in which customers agree not to post negative online statements or not to make any post, without first getting the company's written consent. This method will not work in every relationship. But there are environments in which it could work, such as a small business with an intimate clientele.

Check Sites Terms of Use and Procedures. Most websites that accept posts from the public and most social media have terms of use that are accessible from their home page and other pages. Often these terms include a procedure for responding to negative or other inappropriate content. For example, the well-known magazine *The Economist* encourages the public to post messages. Its website states:

> The Economist welcomes your thoughts, comments and arguments. To post comments to our blogs and articles or participate in our online debates, you must first register. During registration, you may select a pen name, which will appear alongside anything you post to Economist.com.[11]
>
> The magazine's terms of use state:
> It is not possible for The Economist to fully and effectively monitor Messages [for] infringement of third-party rights. If you believe that any content infringes your legal rights, you should notify The Economist immediately by contacting our customer service centre for your region or by using the "Report Abuse" function on reader comments. Repeated misuse of the "Report Abuse" function will result in your access to the Forums being terminated.[12]

In the above statement, the phrase "customer service centre" is a link that can be clicked on to reach the contact information page. Therefore, in the event of a post that contains defamatory, infringing or other inappropriate content, one potential course of action is to use the magazine's stated procedure, contact the customer service center, explain the problem, and request that the content be removed.

An aggrieved person need not be restricted to the site's stated procedure. Other steps are possible. One additional step is to identify a decision maker or influential person at the company, such as an officer or legal counsel. Contact those persons to request assistance. For many sites that do not include contact info or have only limited contact info available online, other sources of information may exist from which decision makers or influential persons can be identified. Here are some examples:

- If the social media or site has a registered trademark, contact information for the site or for their trademark lawyer may be found at the U.S. Trademark office database, www.uspto.gov.
- If the site has registered a copyright, possibly some contact info would be at www.loc.gov.
- The site may have an agent to receive DMCA (Digital Millenium Copyright Act) notices. The list and contact information for agents is at http://copyright.gov/onlinesp/list/a_agents.html.
- If the person to be contacted is an attorney, such as the website's general counsel, contact information on the person can possibly be found at the state bar's website.

With this information a request can be made to the site to remove the content, and the request can be elevated to someone higher up in the company.

Ask Poster to Remove or Modify. Other possibilities include communicating with the poster directly or offering some restitution or discount in the future. Where someone posted a negative online review they can be asked politely to remove or edit it. Sometimes a polite response setting forth an explanation of what happened is helpful. Sometimes the response might be a post on the same website, maintaining a calm demeanor, and stating the facts. Sometimes offering the poster a modest discount at their next visit will be welcome. These steps should be taken with care, to avoid inflaming the poster and leading to multiple rounds of criticism.

Post a Polite Response. On many sites, bulletin boards and forums it is possible to post a response. A brief, respectful, even-tempered response explaining the circumstance, expressing regret for what happened, or for the poster's experience, and if appropriate, mentioning corrective action that was or will be taken, can partially neutralize some ill effects of a negative post. It does this by providing an alternative view to those who read the post.

Cease and Desist Demand. The next level of escalation is a formal demand that the poster "cease and desist" from their presumably unlawful conduct. Even these kinds of letters present a range of options. In one famous matter, counsel for the Jack Daniel's company sent a polite and friendly cease and desist letter to a recipient who was infringing its trademark. That letter, available on the internet,[13] is a model for trying to solve a problem without inflaming emotions or tempers. Letters with a more aggressive tone are also possible. However, as with everything else, cease and desist letters should be drafted with care, as it is fairly usual for recipients of these letters to post these on line as well.

Get Other Posts. An effective countermeasure to negative posts is to enlist other customers, friends and associates to post their own comments or reviews. This method may have the effect of causing negative reviews to be pushed down in the feed that contains such information.

DMCA Takedown Notice. The DMCA[14] includes a procedure for notifying internet websites of content that infringes a copyright and requiring them to remove that content.[15] Under the notice and takedown procedure, a copyright owner submits a notification, including a list of specified elements, to the service provider's designated agent. The service provider, by removing or blocking the content identified in the notice, becomes exempt from monetary liability and from liability for any claim based on having taken down the material.[16]

Complain to and Enlist Assistance of Government. A course of action that is inexpensive is to seek assistance of government officials and agencies. The Federal Trade Commission, U.S. Attorney General, state consumer protection agency, state attorney general, local consumer protection agencies, U.S. senators, U.S. representatives, state senators and state assembly members, and county and city officials are all possible sources of assistance. Where a perpetrator is in a regulated industry, or within the scope of a regulatory agency, then other possible sources of help are agencies that regulate the perpetrator. As is true for the other tools discussed in this article, seeking the government's assistance will not always be effective, but it is an option to consider and could be effective in some instances.

Litigation. Because of costs, time commitments and unpleasantness, litigation is rarely a first or preferred course of action. Rather, it is typically a course of last resort if the others have failed, or if assessment indicates the others are not likely to succeed. Courts can provide assistance to help identify an anonymous perpetrator. In some recent cases, courts have supported the issuance of subpoenas to identify anonymous posters.

As one example, in *In Re Anonymous Online Speakers*, an action was brought by a multi-level marketing company, complaining of an internet smear campaign by a company that provided its distributors with training, seminars and motivational literature. The multi-level marketing company deposed an employee of the defendant, asking him to identify certain anonymous online speakers. The employee refused and the district court ordered him to testify to identities of some internet posters. The Ninth Circuit recognized the importance of being able to speak anonymously, but ruled such right has limits. Because the district court required the marketing company to show it had evidence to prove all elements of its claims, the Ninth Circuit upheld the ruling requiring disclosure of identities.[17]

Courts are a forum for seeking injunctive or monetary relief for damage caused by posts that are unlawful and cause injury. Some legal theories that justify awards of damages include unlawful posting of sexually explicit material about someone[18] libel, slander, defamation, disparagement, unfair business practices, infringement of copyright or trademark, misappropriation of trade secrets, invasion of privacy, breach of contract, or violation of a right of publicity.

Some cases have awarded substantial damages to victims of negative online statements. In *Miss Universe L.P. v. Monnin*, a beauty pageant company won a $5 million award against a contestant who published defamatory statements

on Facebook and spoke on the *Today* show, claiming the pageant was rigged.[19] In *American University of Antigua College of Medicine v. Woodward*, a former medical student claimed his school routinely defrauded students, falsified grades, breached contracts, violated civil rights, committed crimes, and participated in ending the student's career. A U.S. District Court issued an injunction against continuing to publish these statements.[20]

In *Jones v. Dirty World Entertainment*, a jury awarded $38,000 of compensatory damages and $300,000 of punitive damages in favor of a cheerleader against a website operator that encouraged and even added his own comments to posts indicating that the cheerleader had sexually transmitted diseases and slept with every member of a professional football team. The court also denied the defendant's claim of immunity under the Communications Decency Act.[21]

Other creative responses are also possible. According to one report, a restaurant owner responded to an influx of negative Yelp reviews after he stopped advertising on the site by encouraging customers to intentionally post one-star reviews. Customers complied, though the additional reviews were humorous and tongue in cheek.[22]

Pay the Ransom. Some sites claim that signing up for their paid services have no affect on the placement of comments, but widespread anecdotal evidence disputes that. So while not first or desirable on anyone's list, another choice is to sign up for the services the site offers. Some business owners complain the fee is akin to a shakedown charge offered by organized crime or others for so-called "protection," but it may be a less costly choice to avoid further damage to the reputation of an individual or business.

Use Online Reputation Service. Online services claim they can help remove negative online postings. Examples include ReputationDefender[23] and Integrity Defenders.[24] These organizations charge fees for their services. ReputationDefender's claims include: "we push up the good and push down the bad,"[25] and that it will monitor blogs and websites for material that might be damaging or distressing to a client and "use [its] array of proprietary techniques developed in-house to correct and/or completely remove the selected unwanted content from the web."[26]

Questions have been raised about the effectiveness of these companies and methods they use. A respected law review notes "ReputationDefender refuses to disclose the exact nature of its so-called destruction tools." The review notes that the service uses the DMCA "notice and take-down procedures of copyright law;" (which are discussed above), "send[s] emails to blogs and websites hosting information that its clients want to disappear;"[27] and "likely also engage[s] in ... astroturfing and search-engine optimizing."[28]

Possibly anyone could, on their own, take some of the steps these services perform. But individuals or businesses may have better uses for their resources, and the charges for such services can be modest, making them at least an option to be considered among the tools to fight negative online content.

It is not necessary to just accept the injury and frustration that comes with being a subject of negative communications on the internet about oneself or one's business. Many tools and strategies exist for responding and fighting back.

---

[1] David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act*, 43 Loy. L.A. L. Rev. 373, 377 (2010).

[2] *See e.g.*, Bartow, *Internet Defamation As Profit Center: The Monetization Of Online Harassment* 32 Harv. J. L. & Gender 383, 389 (2009) ("Neither civil nor criminal laws offer effective tools to prevent, address, or punish online speech, which is viewed by many as being vested with very broad First Amendment protections.") and 423 ("countless . . . harassment victims [are] vulnerable today with no relief from extensive, invasive, and degrading public comments about their looks, intelligence, and personal lives.")

[3] *See e.g., Balboa Island Village Inn v. Leman* 40 Cal. 4th 1141, 1147 (2007) ("The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech...." This fundamental right to free speech is "among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." (*Lovell v. Griffin* (1938) 303 U.S. 444, 450, *Gitlow v. New York* (1925) 268 U.S. 652, 666.). Numerous decisions have recognized our " profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270)" (original ellipses, internal parallel citations omitted).

[4] 47 U.S.C. Sec. 230(c)(1).

[5] 2005 WL 4086923 (Wash. App. 2015). See also *Krinsky v. Doe 6* 159 Cal.App.4th 1154 (2008) (subpoena to Yahoo seeking identity of anonymous poster quashed for failure to make prima facie showing of defamation).

[6] For a list of state anti-Slapp statutes see www.anti-slapp.org/your-states-free-speech-protection/.

[7] *American Heritage Capital, LP v. Gonzalez* 436 S.W.3d 865 (Tx. App. 2014).

[8] *Id.*

[9] *Clay Corp. v. Colter* 30 Mass. L.R. 429 (Mass. Superior Court (2012).

[10] *In Re Anonymous Online Speakers* 661 F.3d 1168, 1173 (9th Cir 2011) (quoting *McIntyre v. Ohio Elections Commission* 514 U.S. 334, 341–42 (1995) (some internal punctuation omitted).

[11] www.economist.com/help/postcommentsteo.

[12] www.economist.com/legal/terms-of-use#usercontent.

[13] https://brokenpianoforpresident.files.wordpress.com/2012/07/jd-letter-entire-big1.jpg.

[14] 17 U.S.C. §512 et seq.

[15] 17 U.S.C. §512(c)(3).

[16] 17 U.S.C. §512(g)(1). The subscriber or poster can respond by filing a counter-notification, asserting that the material should not have to be removed.

[17] *In Re Anonymous Online Speakers* 661 F.3d 1168, 1176. *See also, Warren Hospital v. Doe*s 63 A.3d 246 (N.J. Superior Ct. 2013) (hospital was entitled to disclosure of identity(s) of individual(s) who hacked into hospital's intranet to compose and send defamatory emails to hospital employees).

[18] Cal. Penal Code Sec. 647 (criminalizing nonconsensual distribution of sexually explicit images) and Cal. Civ. Code Sec. 1708.85 (providing victim a private cause of action).

[19] 952 F.Supp.2d 591 (S.D.N.Y. 2013).

[20] *American University of Antigua College of Medicine v. Woodward* 837 F.Supp.2d 686, 701 (E.D. Mich. 2011).

[21] 965 F.Supp.2d 818 (E.D. Ky. 2013).

[22] *See, How one restaurant fought Yelp's alleged extortion* (Assoc. Press. Oct. 13, 2014) accessible at http://nypost.com/2014/10/13/restaurant-fights-yelps-alleged-extortion/. See also www.huffingtonpost.com/2014/10/02/botto-bistro-yelp_n_5923910.html.

[23] www.reputation.com.

[24] www.integritydefenders.com.

[25] www.reputation.com/about-us.

[26] Bartow, *Internet Defamation as Profit Center*, supra note 2 at 424.

[27] Bartow, *Internet Defamation as Profit Center*, supra note 2 at 425.

[28] Bartow, *Internet Defamation as Profit Center*, supra note 2 at 426. According to Professor Bartow, "Astroturf" is commentary manufactured to appear authentic, but is actually deceptive, it is internet content springing from artificial grass roots (hence the name), engineered to falsely appear as originating from diverse, geographically distributed, independently acting individuals. Id at 426-427.

Test No. 85

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. Because the internet is virtual rather than real, it is not considered a true public forum.
❑ True ❑ False

2. The internet did not exist when the Bill of Rights was adopted in 1791 so many internet communications do not enjoy First Amendment protection.
❑ True ❑ False

3. The Communications Decency Act immunizes website hosts, except for indecent and defamatory information.
❑ True ❑ False

4. The right of free speech has been used to keep online speakers anonymous.
❑ True ❑ False

5. Review and rating websites, revenge sites, social media, and personal sites are all examples of places where negative content can be posted on the internet.
❑ True ❑ False

6. Several states have enacted proper speech restrictions laws commonly known as State Laws Against Pornography and Profanity or SLAPP laws.
❑ True ❑ False

7. In Massachusetts two brothers could post on the internet that a car dealer discriminated against cancer patients and was unethical because the target of their remarks was not trying to influence the government.
❑ True ❑ False

8. Speaking anonymously on the internet lets individuals express themselves freely without fear of economic or official retaliation or concern about social ostracism.
❑ True ❑ False

9. Internet sites generally do not search or copy information from other sites because that would be copyright infringement.
❑ True ❑ False

10. One way to avoid negative comments on the internet is to provide good service and good products.
❑ True ❑ False

11. Even though a website's terms of use states a procedure for responding to negative online comments, an aggrieved victim may use that procedure and may also take other steps to address the problem.
❑ True ❑ False

12. When something negative is posted on the internet, ignoring it is always a bad choice. If it is not responded to aggressively it will get worse.
❑ True ❑ False

13. Many websites that accept posts from the public and social media have terms of use that state a procedure for responding to negative or other inappropriate content.
❑ True ❑ False

14. Since it is usually a good idea to ignore negative messages posted on the internet, it is a bad idea to ever post a response.
❑ True ❑ False

15. A cease and desist demand must be aggressive and hostile to scare the recipient into submission.
❑ True ❑ False

16. The Direct Marketing in Commerce Act provides a procedure for notifying internet websites of infringing content and requiring them to remove that content.
❑ True ❑ False

17. Because free speech is a right of the people against the government, there is no point asking the government's assistance in response to negative online posts.
❑ True ❑ False

18. Litigation is the most economical and efficient way to stop negative comments if pursued promptly and aggressively.
❑ True ❑ False

19. Some cases have awarded substantial damages to victims of negative online statements.
❑ True ❑ False

20. Questions have been raised about the effectiveness of the services offered by online reputation services companies.
❑ True ❑ False

MCLE Answer Sheet No. 85

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 $20 testing fee for SFVBA members (or $30 for non-SFVBA members) to:

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❑ Please charge my credit card for $_____.

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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.

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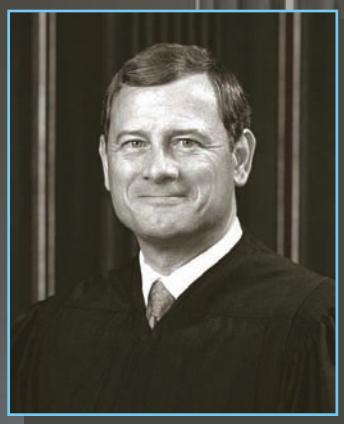
ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

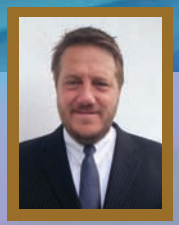
1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
10.	❑ True	❑ False
11.	❑ True	❑ False
12.	❑ True	❑ False
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False



JOHNNY & THE SCORPIONS:

A Brief Look at the Mind of John G. Roberts

By D. Shawn Burkley



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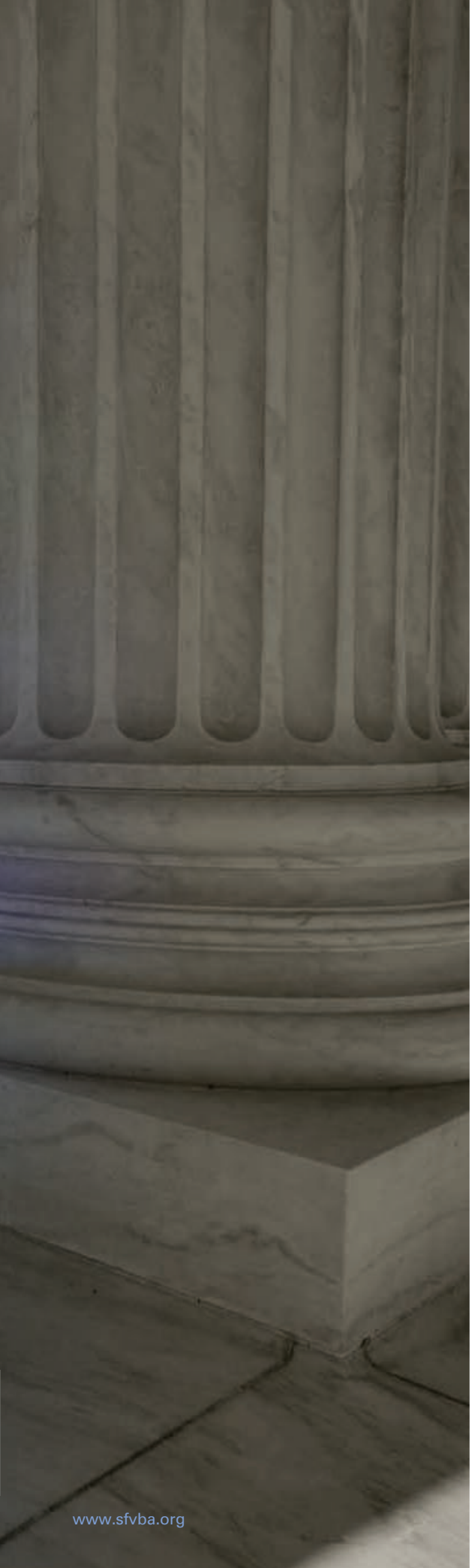

JUDGES ARE BY NATURE VEXATIOUS. PROOF OF THIS WAS apparent at a recent Republican presidential debate where several candidates expressed disapproval of the current Chief Justice of the United States Supreme Court, John G. Roberts—a justice nominated by a president and confirmed unanimously by senators from their own party.[1]

While this attribute is seen as a detriment in litigants, for the robed figure on the bench, it can often be a quality. The worry, distress and vexation that judges engender is often a by-product of their humanity, their intellectual evolution and, perhaps more succinctly, their pragmatic unpredictability. Therefore, if you accept Justice William O. Douglas's premise that lawyers search "for moorings where clients can be safely anchored," then the evolving judge may be, to paraphrase President Truman, no longer a lawyer's friend.[2, 3]

It has been said that a judge comes to the bench reborn. Yet from birth we try to cabin newborns by trying to affix on them a static and defining judicial philosophy. Nowhere is this phenomenon more visible than in the parlor game known as the Senate confirmation hearing.[4] The rules of the game are relatively straightforward. Prospective justices are forbidden, by Judicial Ethics Canon 3-A(6), from publicly commenting on issues that may come before them in the future. Knowing this, the members of the Senate Judiciary Committee provide lengthy commentaries on what they think makes a good candidate and summon their remembered legal skills trying to get the nominee to reveal how he or she would decide a future question. The judicial candidate repeatedly and tactfully declines the invitation. Ultimately, a vote is held, with the participants generally unaffected by the debate.

Roberts, at his hearing, dutifully avoided the questions but shared that he saw the judge's role as analogous to a baseball umpire.[5] His point was, because no one watches baseball to see the umpire, judges should act with a degree of humility. Much like Justice Robert H. Jackson, Roberts views the judicial branch in the role of an intermediary between the branches that are (to extend the analogy) the players: the executive and the legislature.

Roberts was no doubt aware that, as Chief Justice, he would play umpire to an additional team: the Supreme Court's associate justices. Once described by a clerk for Justice Frankfurter as similar to "scorpions in a bottle," Roberts saw success as contingent on being able to collegially tame the justices into avoiding academic, agenda-driven arguments and to speak with one voice as often as possible.[6, 7]

The most notorious set of "scorpions" was described in a 2010 book (of the same name) by Harvard Law Professor Noah Feldman.[8] Dismissed by some academics as hagiography, the book's value lies in its juxtaposition of several foundational judicial philosophies, personified by four justices appointed by Roosevelt to reverse the excesses of the *Lochner* era court.[9]

Felix Frankfurter, for example, saw judicial restraint as the best weapon for furthering liberal causes in an age when the judicially created fundamental "right to contract" was seen as an impediment to the New Deal agenda. Hugo Black asserted that the key to preventing conservative judicial overreach was strict adherence to the text of the constitution.

William O. Douglas eschewed Black's formalism and embraced legal realism's emphasis on social interests and policy as the more meaningful decisional framework. (This view would be expanded by contemporaries like Earl Warren and Thurgood Marshall to create the concept of a "living constitution" which sees the Court as having an "additional role as the expounder of basic national ideals of individual liberty, even when the content of these ideas is not expressed as a matter of positive law in the written Constitution.")[10] Last, Robert H. Jackson's reluctance to lay out a strict philosophy still betrays a Roberts-like pragmatism in his approach to the Court's role as a tool for balancing the competing forces of the legislature and executive branches.

Perhaps it is in cognizance of conservative vilification of the liberal excesses of the 1960's and 70's that, in his Senate Judiciary Committee confirmation hearings, Roberts emphasized his view "that a certain humility should characterize the judicial role."[11] Roberts claimed he came to the bench with no agenda.[12] Agendas, Roberts asserted in a 2007 interview, hinder unanimity, ultimately eroding the Supreme Court's credibility and legitimacy.[13] To this end, Roberts advised his colleagues on the bench to consider "the effect on the Court as an institution" when they write separately to dissent or concur.[14] This aversion to discord may be attributable to his experience in the D.C. Circuit, where "it is firmly embedded" that they should "function as a [unified] court."[15]

On the surface, Roberts' notion of humility mirrors Justice Felix Frankfurter's emphasis on judicial restraint. Frankfurter, an acolyte of Holmes and Brandeis, saw in the idea that "judges should not turn political beliefs into legal doctrine" a philosophical justification for undoing earlier court decisions which found worker protection laws violative of "[t]he general right to make a contract …[,] part of the liberty of the individual protected by the Fourteenth Amendment…."[16, 17] Similarly, six decades later, nominee Roberts found himself riding a backlash against "judicial activism" and, like Frankfurter, emphasized that "courts are passive institutions…. [without] the constitutional authority to execute …[or] make the law."[18]

It should be no surprise that applying this position has brought criticism on Roberts from both sides of the aisle. To the chagrin of conservatives, Roberts upheld the Affordable Care Act against an attack grounded in statutory construction, finding that in spite of the law's "inartful drafting, … in every case we must respect the role of the Legislature, and take care not to undo what it has done."[19] And while Roberts believes that, to protect the legislature's role as voice of the people, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,"[20] where the legislature has not acted, he believes the Court should refrain from acting in its place.

To the disappointment of liberals seeking a new ally, he expressed this point strongly, invoking the ghosts of *Lochner* and *Dred Scott*, while dissenting in the *Obergefell* case which struck down gay marriage bans. There, he accused the majority of succumbing to the temptation of "confus[ing its] own preferences with the requirements of the law."[21] The admonition is compelling when framed as the answer to the question "whether, in our democratic republic, [a] decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes…."[22]

Frankfurter, in his day, was also confronted with a question of unequal treatment. When faced with the question of race-based segregation, he wrote to a colleague that the "[l]aw must respond to transformation of views as well as to that of outward circumstances. The effect of changes in men's feelings for what is right and just is equally relevant in determining whether differentiation of treatment by law is a denial of the equal protection of the laws."[23] While the speed with which legislatures are prepared to act is possibly a factor in both judges' reasoning, Roberts seems inclined to exceeding patience for Congress to voice the population's feelings for what is right or just.

Arguably, none of the Scorpions' philosophies have been so co-opted by conservatives as Hugo Black's originalism: the view that "language and history … are the crucial factors" for constitutional interpretation, rather than "reasonableness or desirability as determined by justices of the Supreme Court."[24] Therefore, it is unsurprising that Roberts felt compelled in *Obergerfell* to mention that "[t]he Constitution itself says nothing about marriage," inferring from this absence that "the Framers thereby entrusted the States with the whole subject of the domestic relations of husband and wife."[25]

Roberts has stated that he prefers precedent over original intent.[26] Still, he has from his first dissent on the Court regularly invoked originalism.[27] And in this most recent session, he expressly chided a majority opinion that began, in his view, with policy rather than the Constitution.[28]

A brief survey of his decisions reveals a more originalist bent than Roberts has openly acknowledged. In one notable case, Roberts found granting Congress power to compel commerce (i.e., the purchase of

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health insurance) inappropriate in "the country the Framers of our Constitution envisioned."[29] In another, the Framers' intention is similarly invoked by the Chief Justice to give context to the applicability of international treaties in domestic law.[30] And at the end of a long and complicated affair that had devolved to a question on expert witness fees, Roberts included a three paragraph concurrence, asserting that Art. III §2 makes it clear that the Supreme Court's appellate jurisdiction is subject to congressional control but its original jurisdiction is not, adding, that"[t]he Framers presumably act[ed] intentionally and purposely" in making the distinction.[31]

These allusions to originalism may also be perceived as warnings that, while Roberts may not share Scalia's affinity for a "dead Constitution," his reasoning will not be comparable to that of Earl Warren, Warren Burger or, most notoriously, "Wild Bill" Douglas.[32]

For more than two decades, the Court adopted the Holmesian idea that constitutional questions "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."[33] From that proposition, they divined expansive and unwritten fundamental rights with respect to privacy (including decriminalizing abortions and freedom from anti-homosexual legislation) and forged new due process rights (including the right to be informed of one's rights when taken into custody and requiring the state provide an attorney to indigent criminal defendants).[34]

Roberts, on the other hand, sees fundamental right claims as falling "into the most sensitive category of constitutional adjudication" and accordingly insists "that judges exercise the utmost care in identifying implied fundamental rights, lest [they] … be subtly transformed into the policy preferences of the Members (sic) of this Court."[35] Looking again to Roberts's record, this exercise of care with respect to "creating" fundamental rights includes seeing the question of whether enemy detainees are entitled to habeas review as "an entirely speculative one," at least until all of a detainee's congressionally created remedies have been exhausted.[36] Oddly, this same caution includes striking down portions of the Voting Rights Act (VRA), a legislatively imposed solution created to protect fundamental rights, because Roberts deems the law to contravene another fundamental constitutional principle: "equal sovereignty among the States."[37]

While it is unlikely that the liberal Justice Douglas would have reached the same result in *Shelby*, Roberts uses Douglas-like reasoning to reach his conclusions. For instance, Douglas is most often identified with the philosophy of "legal realism," said to be premised on the "divorce of the 'is and the ought,' *i.e.* of facts and values[.]"[38]

Taking Roberts at his word, the fact that the VRA was deliberated on and passed by Congress should be sufficient to invoke the duty to respect the legislature's role as voice of the people and require that "every reasonable construction … be resorted to, in order to save [the] statute from unconstitutionality."[39] Instead, Roberts clearly states that Congress ought to have used contemporary data that reflected contemporary conditions before reauthorizing the law.[40]

Summoning Holmes, he reminds us that "[s]triking down an Act of Congress is the gravest and most delicate duty that this Court is called on to perform."[41] But then he does exactly that. Regardless of whether this was "an exercise of pure will, fueled by a desire to change settled law"[42] or a reasoned expression of the belief that all states should be treated equally, the fact remains that Roberts shows less judicial humility when he believes legislation is based on a flawed premise.

Roberts' modified humility also betrays a link between his thinking and that of Robert H. Jackson. Jackson emphasized that the Court could not rely on formalism if its rulings were to have real world legitimacy. As an example, where Jackson saw an alien held on Ellis Island whom the government argued was free to "leave in any direction but West," he noted that "[i]t overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound."[43] To be sure, Jackson was no fan of following "impeccable legal logic … to … artificial and unreal conclusion[s]."[44] To compare, Roberts has often espoused the legal logic of judicial respect for the legislature. But where the legislature uses "40 year old data" to treat states unequally, for Roberts, upholding such a law would be an artificial result. Therefore, he rejects it.

That Roberts occasionally finds himself intellectually aligned with Jackson should surprise no one. Roberts once clerked for William Rehnquist, who in turn clerked for Jackson. As a nominee for the D.C. Circuit Court of Appeals, Roberts wrote of his admiration for Jackson's "common sense and pragmatism."[45]

At the times both judges came to the Court, decisions of the previous decades were viewed as overly reflective of justices' personal views. Jackson was chosen by Roosevelt to protect New Deal legislation from defeat at the hands of activists. Roberts was nominated, in part, because his conservative bona fides were sufficient to ensure that he would not disappoint those who saw activist judges as a form of liberal super-legislature.

Ultimately their greatest similarity may be their de-emphasis on the importance of ideological labels or dogma. As one biographer noted, "[t]hings made sense to Jackson when they worked, when they did the job at hand, and ideas made least sense to him when they proved useless…."[46] Roberts approach is similar. When judicial humility would lead to an artificial result, it is abandoned. When originalism can serve the dual purpose of creating greater unanimity on the Court and expressing a just result, it is embraced. Where strict statutory construction would lead to undoing congressional intent, a broader reading is called for. For the lawyer seeking a rigid approach on which he can rely, this kind of pragmatism can prove problematic.

It is anecdotally interesting that former Supreme Court law clerk and current presidential candidate Ted Cruz released a remake of Ronald Reagan's "Bear in the Woods" campaign ad.[47] In the modern version, a scorpion replaces the bear. The ad was widely criticized for never stating clearly what the scorpion represents (Islamic terrorism, an influx of illegal aliens?).[48] Still, one wonders whether Cruz appreciates the irony of using Alexander Bickel's anthropomorphic image of a Supreme Court Justice when asking "shouldn't we recognize the scorpion for what it is…?"[49] Perhaps the answer is: vexatious.

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[1] See David G. Savage, *Chief Justice Roberts' record isn't conservative enough for some justices*, LOS ANGELES TIMES, September 25, 2015 (available at: http://www.latimes.com/nation/la-na-roberts-conservative-backlash-20150924-story.html); Charles Babington, *Roberts Confirmed as 17th Chief Justice*, THE WASHINGTON POST, September 30, 2005 (available at: http://www.washingtonpost.com/wp-dyn/content/article/2005/09/29/AR2005092900859.html)("The Senate voted 78 to 22 to confirm Roberts. All 55 Republicans, half the 44 Democrats and independent Sen. James M. Jeffords (Vt.) voted yes.")

[2] William O. Douglas, "*Stare decisis*," Speech delivered at the eighth annual Benjamin Cardozo Lecture at the New York City Bar on April 12th, 1949, reprinted in the Columbia Law Review, 49 Colum. L. Rev. 735.

[3] David E. Rosenbaum, *THE SUPREME COURT: News Analysis; Presidents May Disagree*, but Justices Are Generally Loyal to Them, N.Y. TIMES, April 7, 1994 (available at:http://www.nytimes.com/1994/04/07/us/supreme-court-analysis-presidents-may-disagree-but-justices-are-generally-loyal.html).

[4] In fairness, the "game" took a far more serious turn during hearings for Clarence Thomas and Douglas Ginsburg where substantive issues were addressed.

[5] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. at 55 (2005)(hereafter "Hearings").

[6] Yale Law Professor, Alexander Bickel.

[7] Jeffrey Rosen, *Roberts's Rules*, THE ATLANTIC, January/February 2007.

[8] Noah Feldman, *Scorpions: the battles and triumphs of FDR's great Supreme Court justices*, (1st ed. 2010).

[9] Eric A. Posner, *The Four Tops*, THE NEW REPUBLIC, October 14, 2010 (available at: http://www.newrepublic.com/book/review/the-four-tops-roosvelt-supreme-court).

[10] Thomas C. Grey, DO WE HAVE AN UNWRITTEN CONSTITUTION?, 27 Stan. L. Rev. 703,706.

[11] Hearings at 55.

[12] *Id* at 56.

[13] Rosen, *Roberts's Rules, supra.*

[14] *Id*.

[15] *Id*.

[16] *Feldman, supra at 31*.

[17] *Lochner v. New York*, 198 U.S. 45, 53 (1905).

[18] Hearings at 206.

[19] *King v. Burwell*, 135 S. Ct. 2480, 2483 ("inartful drafting"), 2496 (respecting the role of the legislature).

[20] *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 2594 (2012) (quoting *Hooper v. California,* 15 S. Ct. 207 (1895)).

[21] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015).

[22] *Id*.

[23] Christopher W. Schmidt, "*Freedom Comes Only from the Law": The Debate over Law's Capacity and the Making of Brown v. Board of Education,* 2008 Utah L. Rev. 1493, 1542 (2008)(citing Memorandum from Justice Felix Frankfurter 2 (Sept. 26, 1952), Earl Warren Papers, Container 571, Manuscripts Division, Library of Congress, Washington, D.C.)(internal quotations omitted).

[24] HUGO L. BLACK, *A Constitutional Faith*, at 14 (1968), taken from Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. Rev. 25, 66 (1994).

[25] *Obergefell*, supra note 21 at 2613-14 (internal citations omitted).

[26] Jeffrey Rosen, *Originalism, Precedent, and Judicial Restraint*, 34 Harv. J.L. & Pub. Pol'y 129, 130 (2011)(citing Hearings at 55-56, 550 (statement of John G. Roberts, Jr., Nominee, Chief Justice of the United States Supreme Court)).

[27] *Danforth v. Minnesota*, 552 U.S. 264, 292 (2008)(Roberts, J., dissenting)("[The majority's] result is contrary to the Supremacy Clause and the Framers' decision to vest in "one supreme Court" the responsibility and authority to ensure the uniformity of federal law. Because the Constitution requires us to be more jealous of that responsibility and authority, I respectfully dissent.").

[28] *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*., 135 S. Ct. 2652, 2678 (2015)(Roberts, J., dissenting).

[29] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, supra, note 20 at 2589 (2012).

[30] *Medellin v. Texas*, 552 U.S. 491, 515 (2008)("Our Framers … also recognized that treaties could create federal law, but again through the political branches, …. The dissent's understanding of the treaty route, … cannot readily be ascribed to those same Framers.").

[31] *Kansas v. Colorado*, 556 U.S. 98, 110 (2009)(internal citations omitted).

[32] Tasha Tsiaperas, *Constitution a 'dead, dead, dead" document, Scalia tells SMU audience*, DALLAS MORNING NEWS, January 28, 2015 (available at: http://www.dallasnews.com/news/community-news/park-cities/headlines/20130128-supreme-court-justice-scalia-offers-perspective-on-the-law-at-smu-lecture.ece).

[33] *Missouri v. Holland,* 252 U.S. 416, 433 (1920).

[34] *Roe v. Wade*, 410 U.S. 113, 164 (1973) *holding modified by Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992)(abortions); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)(sodomy); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)(advisement of rights);*Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963)(right to counsel).

[35] *Obergefell*, supra note 21 at 2616 (2015)(internal citations omitted).

[36] *Boumediene v. Bush*, 553 U.S. 723, 801 (2008)(Roberts, J., dissenting).

[37] *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2616 (2013)(internal citations omitted).

[38] *See e.g.*, *Legal Realism*, N.J. Law., OCTOBER 2000, at 30, 3.

[39] *Nat'l Fed'n of Indep. Bus. v. Sebelius,* supra note 20 at 2594.

[40] *Shelby Cnty.,* supra note 37 at 2627-31 (2013) (Roberts grounds his decision in the belief that legislative remedies must "speak to current conditions" rather than "decades-old data and eradicated practices.").

[41] *Id* at 2631 (citing, *Blodgett v. Holden,* 275 U.S. 142, 148 (1927) (Holmes, J., concurring))(internal quotation marks omitted).

[42] Linda Greenhouse, *The Real John Roberts Emerges*, N.Y. Times, June 29, 2013, p. SR 1.

[43] *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 220 (1953).

[44] *Id*.

[45] John Q. Barrett, *John Roberts and Justice Jackson*, THE JACKSON LIST. COM, July 28, 2005 (available at: http://thejacksonlist.com/wp-content/uploads/2014/02/20050728-Jackson-List-John-Roberts.pdf).

[46] John Q. Barrett, *A Commander's Power, A Civilian's Reason: Justice Jackson's Korematsu Dissent*, Law & Contemp. Probs., Spring 2005, at 57, 70.

[47] "Scorpions" Political advertisement created by Ted Cruz 2016 (available at: https://www.youtube.com/watch?t=26&v=f4K_uFZW9Jk).

[48] *See e.g.,* Stephen Stromberg, *Ted Cruz's dog-whistling 'scorpion' ad*, WASHINGTON POST Op Ed., September 16, 2015 (available at: http://www.washingtonpost.com/blogs/post-partisan/wp/2015/09/16/ted-cruzs-dog-whistling-scorpion-ad/); *Also, Cobert mocks Ted Cruz's "Scorpion In The Desert" Ad: Is it Terroism, Iran, Mexicans?* Real Clear Politics Video, RealClearPolitics.com, September 17, 2015 (available at: http://www.realclearpolitics.com/video/2015/09/17/colbert_mocks_ted_cruzs_scorpion_in_the_desert_ad_is_it_terrorism_iran_mexicans.html).

[49] "Scorpions" video, *supra*.

The Power of Metaphors

By Steven G. Mehta

STORYTELLING IS A CRITICAL PART OF persuasion and influence. Stories are part of our history and are a natural way of communicating information to others. Some of the greatest storytellers are able to bring disparate people from all walks of life together to create change. In other words, storytellers are often masters of influence. Martin Luther King's "I have a dream" speech is simply a man with a story of the future, yet that speech has inspired millions to take action. As attorneys, negotiators, and mediators, we can use stories to help persuade, convince, explain, and guide people to a better place.

Although there are many beneficial aspects of storytelling, one of the most powerful storytelling tools is the metaphor. Unlike any other figure of speech in the English language, metaphors are directly able to bypass the logical mind and can enter into the human psyche to assist in influencing another person.

Metaphors at their heart are simple creatures. They are figures of speech comparing two unlike things. A metaphor differs from the simile in the fact that instead of comparing two unlike things and clearly identifying the comparison with the word "like," the metaphor compares the two objects as if they are the same. The simile "the woman is like a rosebud," has less influence than the metaphor, the "woman is a rosebud." The metaphor uses the more familiar item to analogize about the less familiar item.

The metaphor is a powerful tool in helping compare a complex and abstract concept to something that is better known. For example, medicine is a very complex concept. It is easier to understand that blocked arteries clogged with cholesterol (the more complex topic) are simply plumbing pipes which are clogged with junk and debris (the simpler or more commonly understood concept). Similarly, the neurologist's job is easily explained as the electrician of the mind dealing with electrical signals in the body.

The metaphor helps to shape the understanding of an abstract concept in a lasting way. Part of the reason that the metaphor has a lasting effect on the recipient is that it relies on the recipient's understanding and knowledge to form the basis of the comparison. The above medicine examples require the reader to understand plumbing and electrical concepts to understand the concepts of medicine. Also, by discussing a plumber and electrician in context of the body, the reader may also now create their own job title for the rest of the body by thinking ahead and expanding the metaphor to the orthopedist who fixes bones as the carpenter of the body. In other words, the recipient is not receiving information but instead is creating an image of the abstract concept.

Researchers have also discovered that metaphors can change behavior. For example, using war metaphors with people who need to be motivated to take action to prevent cancer can backfire. Researchers at the University of Michigan found that war metaphors such as "the battle against cancer" or "the fight against cancer" had the unintended effect of hindering patients from taking preventative measures against cancer, like using sunblock to prevent skin cancer.

Other research has found that animalistic descriptions of violent crimes increase the punishment of the perpetrators of those crimes. Researcher Eduardo Vasquez found that juries were more likely to punish individuals if the crimes and the perpetrators were described with animalistic metaphors such as "leaving her to the wolves." Vasquez explained "this research is yet another reminder that justice may be influenced by more than the facts of the case."

Indeed, other research has found that using taste metaphors such as "sweet" or "bitter" can engage the actual sensors in the brain that are responsible for identifying the actual experience of sweetness or bitterness. In other words, the metaphor invoked the feeling of sweetness in the brain bypassing the rationale part of the brain that knows that there is no taste sensation.

Research has also found that learning about metaphors can enhance a person's ability to evaluate other people's emotions. Researchers asked two groups to read passages. One group read metaphors; the other read literal language. The group that read about metaphors was significantly better at understanding and identifying complex emotions based simply upon eye gestures. The mere fact of reading metaphors helped a person to be more sensitive to reading other people's emotions.

This body of research demonstrates that using metaphors not only influence people's perceptions and

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behavior, but that metaphors have a direct connection to people's emotions and feelings. Using metaphors allows people to replace an old image with something that you have helped them create. This tool can be effectively used to wipe away a painful memory just as Pavlov changed a reaction to a stimulus by conditioning the old experience with a new one.

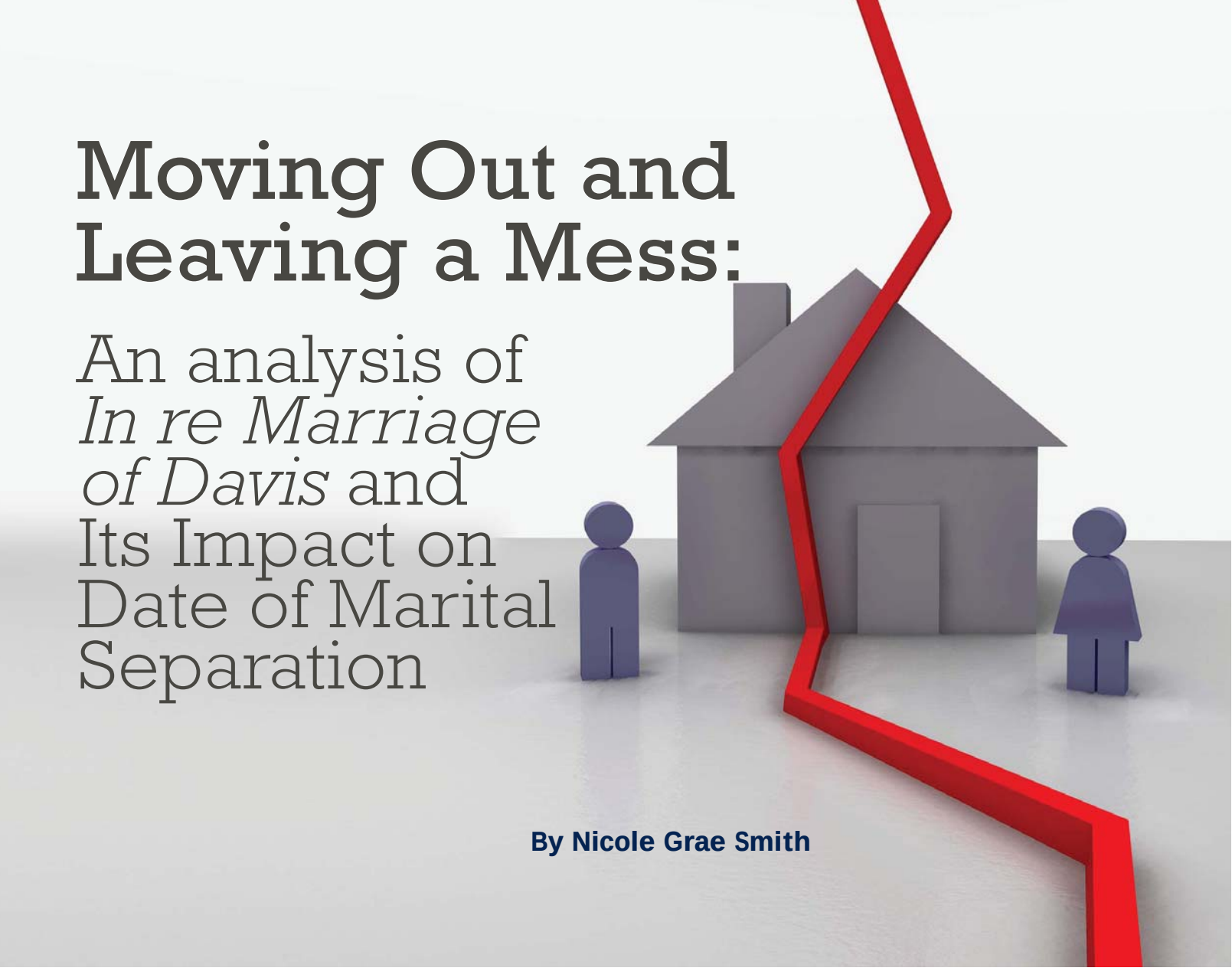
Once we understand the superpower of the metaphor, we can learn to use it in our practice. There are a few basic rules when using metaphors. First, make it simple. The more complex your metaphor, the more likely it is to break down. Second, keep it short. You will lose the listener if you use a metaphor that requires a lot of explanation. A mediator recently tried to explain that a negotiating technique was a "Jedi mind trick." The metaphor, in his mind, was sound but to most other people who are not Star Wars fanatics, the metaphor didn't make sense, and the mediator was required to explain the entire concept. This is not to say that you can't use movie metaphors. Instead, in the same mediation, the mediator tried to explain that the other side was "going to the mattresses, if the case didn't settle." They immediately understood the Godfather reference.

Next, you should consider your audience. If your explanation of the abstract is compared to something that the other party doesn't understand, the metaphor won't connect to the brain. Just as with the examples above, the mediator failed to realize that the clients were not Star Wars fans and made a failed metaphor.

Next, it is helpful if you can make your metaphors engage as many of the five senses as possible. For instance, a metaphor of the mediator as a firefighter who has been called to the scene of a fire should resonate with all parties. It is hard to see through the smoke of the fire, and it is hard to tell who started it. The mediator's job is to help put out the fire, but if the parties continue to pour gasoline on the blaze, it will be very hard to put out the fire and the heat, smoke, and blaze will continue to blaze until it is out of control and the sky is full of smoke and the ashes are falling on the ground.

Finally, it is important to not mix metaphors. Mixing metaphors confuses the listener as to your message. Take for example, "You can't change the spots on an old dog." Is this metaphor talking about leopards or a dog learning a new trick?

The metaphor is a tool that attorneys, mediators, and all negotiators can use. When used properly, these metaphors can directly bypass the logical mind and connect with the listener on a subconscious or emotional level. By working on this subconscious level, you are better able to persuade your audience.



Moving Out and Leaving a Mess:

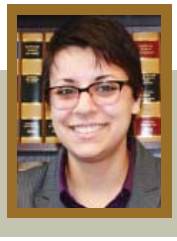
An analysis of *In re Marriage of Davis* and Its Impact on Date of Marital Separation

By Nicole Grae Smith

WITH THE DIVORCE RATE showing no sign of waning, knowing the rules of divorce can make the difference between personal financial ruin and simple decoupling. As the rules of marriage are replaced with rules of divorce, the divorce process takes the singular legal marital unit of two people and creates two single units. Due to a recent California Supreme Court decision, the rules of how and when the relationship of marriage is officially over have changed. With change comes discussion. Is this change better for the lives of Californians, or merely a shortcut for overburdened judges and lawyers?

In marriage, the earnings of either spouse go into a community pot, shared equally, regardless of who earned the assets. For the last forty years, when parties decided that their marital relationship had ended and were separated, that shared accumulation ended. The legal language comes from Family Code Section 771(a), which states, "[t]he earnings and accumulations of a spouse ..., while living separate and apart from the other spouse, are the separate property of the spouse."

The date of separation has rarely been the date of filing for divorce. In most cases, the relationship disintegrated long before divorce papers were filed. For years, the court viewed "separation" as requiring



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that the parties had no intention of resuming their marriage and that their actions demonstrated the marriage was over. This was not a bright line rule, and a lot of litigation has occurred trying to determine when the relationship was over. The determination of this date of separation is crucial to deciding when the community pool of assets splits into two separate pools of individual earnings and assets.

Unlike other fields, the laws of the family are not clean. In family law, violence, mental health issues, drugs or alcohol can make a complex situation increasingly volatile. To further complicate matters, some people indicate their intention to divorce and file the paperwork, but then return home and continue to sleep together. Others say their relationship is over but take vacations together as a family. Some still do their spouse's laundry even as their family law attorneys try to sort out where the down payment for the community property house came from. Sometimes parties have had reunifications followed by even messier cataclysmic detonation, only to make up a few weeks later, further confusing the date of separation issue.

If there's one thing courts detest, it is chaos; judges and attorneys, especially in the capricious world of family law, crave tidy resolutions. In *IRMO Davis*[1], the California Supreme Court tried to pull out their legal mops to clean up the date of separation issue by analyzing the meaning of "living separate and apart." The case involved a married couple, S. Davis and K. Davis. The Davises married in 1993 and had two children. The marriage was tumultuous and the relationship really began to deteriorate in 1999 when their intimate relationship ended.

A few years later, they no longer slept in the same room. They did some activities together with their children, shared a bank account and sometimes vacationed together. By 2006, all of that ended. Ms. Davis announced the marriage was over and they substantially separated their finances. They lived under the same roof, but as roommates, for the sake of the children.

In late 2008, Ms. Davis filed for divorce, listing as the pivotal date of separation the date in 2006 when she announced she no longer wanted to be in a relationship with Mr. Davis. Mr. Davis first listed the separation date as just past the date of filing, then amended his separation date to the date when Ms. Davis moved out of the house in 2011. This allowed Mr. Davis to set up his argument that the parties begun to live separate and apart only on that date and since Ms. Davis was the higher earner, allowed him to lay claim to assets earned by Ms. Davis as community property for the entire time they resided under the same roof. By Ms. Davis' date, that accumulation would have stopped a full five years earlier. Unsurprisingly, the stakes were high and many family law attorneys watched this case with great interest.

The Supreme Court of California decided to create a bright line rule. Simply stated, they ruled that living separate and apart required separate homes. For a date of separation to be established, there must be a move-out by one of the parties. At first glance, it seems a clean rule: if you want to split up, the court says you must physically split up. It is a tidy, neat and simple solution to a problem that has bounced around since the 1800s. Judges and attorneys will no longer have to spend precious court time litigating last kisses, laundry and shared vacations.

For the last 40+ years, determining the point of separation has been a matter of evaluating the totality of the circumstances. Not all dissolutions are the product of hate. Some couples decide that, although

they like each other enough as people, they are not right for each other. These couples may continue to live together until the conclusion of the dissolution legal proceedings. Should they be forced into the expense of separate residences to create a date of separation?

Other situations are less pleasant to consider. Imagine a wife who owns her house as her separate property and asks her abusive husband to leave and states that the marriage is over. He moves out of her room but not out of the house. What if she is too fearful or timid, after years of abuse, to seek a restraining order? What if he stays another ten years? Prior to this ruling, an attorney would have likely told her that as long as it was clear they were living separate and apart, even under the same roof, she was at a limited risk of further accumulation of community property. This is no longer true, and that wife is now in dire straits. What if, as has happened in several cases, after a move out, financial circumstances require a party to move back into the community home? Should this party be barred from a community resource and face homelessness rather than upsetting a date of separation?

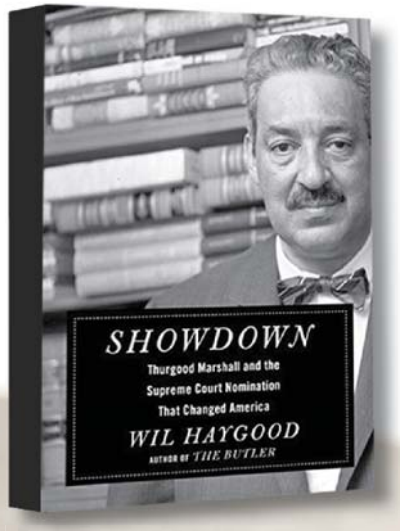
For couples who have substantial resources, moving out to create a concrete date of separation may not be a big issue. What about less affluent litigants forced to live together by a lack of resources? It is not hard to imagine these scenarios creating imbalances and leading to unjust results. Forcing the date of separation to the date of physical separation will almost always benefit one party over the other. A totality of circumstances rule is not as tidy, but it may be more accurate and fair.

The California Supreme Court carved out a small divot in its ruling. In a footnote, it stated this case did not consider the circumstances where the parties live in separate residences within the same home. It would be easy to see this as an exception, but the language does not create an exception. Rather, it merely states that the issue was not before the court at the time.

Many will argue that the simplicity of *IRMO Davis* outweighs any potential for complications. In other areas of law, black and white thinking makes for clear and just decisions. Sadly, the murky waters of family law are far too mercurial for such simplicity. Divorce is an attempt to reign in the chaos and turmoil of love lost. Is it really such a shock that breaking of the bonds of the intersection of love and family doesn't neatly and naturally split into two?

The courts cannot forget that if it was simple, the legal system would not need to be invited to the intimate dance of divorce. It is not realistic to define divorce as a legal solution to an emotional problem, nor a clean solution to a dirty problem. If the courts are to be just, then it will be necessary to again delve into the sordid reunifications and psychological dirty laundry in order to surface with an honest picture of the aftermath of the messiest of legal conundrums.

[1] *In re Marriage of Davis* 61 Cal.4th 846 (2015).



The Story Behind Thurgood Marshall's Confirmation Hearings

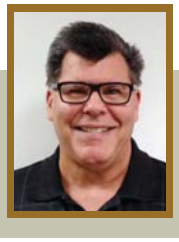
By Reid L. Steinfeld

"No, sir; I think the Constitution as a living document needs somebody to interpret it."

AGAINST THE BACKDROP of widespread political upheaval, the Vietnam War, and the racial past of the United States, Wil Haygood's *Showdown: Thurgood Marshall and the Supreme Court Nomination That Changed America* is the story of the nomination and hearings to confirm the first African-American to the United States Supreme Court.

Showdown takes you through the life of Thurgood Marshall, from his birth in Baltimore in 1908, through the relationships he developed in college at Lincoln University in Pennsylvania and law school at Howard University in Washington D.C., to his founding and becoming the Executive Director of the NAACP Legal Defense and Educational Fund, and his travels to the Southern states wherein he argued for civil rights for African-Americans. This led him to win numerous cases before the Supreme Court. His major victory occurred in 1954 in the landmark decision of *Brown v. Board of Education of Topeka*, as he successfully argued that "separate but equal" no longer applied to public education. Haygood, a journalist and author of "*A Butler Well Served by This Election*," the Washington Post's article which became the basis for the award-winning movie *The Butler*, describes numerous trial court and appellate court cases that Marshall argued in the South that ultimately led to the *Brown* decision.

Prior to his nomination to be a Justice of the Supreme Court, Thurgood Marshall was appointed by President John F. Kennedy as a Justice on the Second Circuit Court of Appeals (after Marshall turned down an appointment as a federal trial judge). In 1965, President Lyndon Johnson appointed Marshall to be the first African-American



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Solicitor General, wherein he represented the United States before the Supreme Court.

We learn how Thurgood Marshall was revered by African-Americans throughout America and was disdained primarily by Southern whites. According to the book, President Johnson had a strong affinity to African-Americans and wanted them to succeed in an America by being treated equally and not as second-class citizens. (Johnson believed that his support of African Americans led to his original election to the House of Representatives and then to the Senate.) Johnson highly respected Marshall, and when he became President, Johnson told anyone who would listen that he was going to appoint an African-American to the Supreme Court. That day came when he was able to convince Justice Tom Clark to retire so that he could fulfill his wish to nominate the first African-American to the Supreme Court.

On June 13, 1967, President Johnson nominated Thurgood Marshall to be the 96th Justice of the United States Supreme Court. The nomination occurred during one of the most turbulent times in American history. Even though the Civil War had ended over 100 years before, there was still major hostility by Southern whites against African-Americans and there was rioting in the streets, especially in Detroit.

The book takes us through five grueling days of hearings before the Senate Judiciary Committee. The hostility of the Southern senators on the committee is palatable; they will do anything and everything in their powers to prevent the confirmation. Transcripts from the Judiciary Committee are contained in the book and the reader can feel the hostility toward the nominee.

What is fascinating and difficult about this book is that interspersed throughout the hearing process is the history of the key players in the Judiciary Committee, cases argued by Marshall, and relationships that were forged by Thurgood Marshall throughout his life. There is so much information that one needs to have pen and paper handy to make notes to be able to follow all of the people and events. It almost seems that the writer is trying to put too many facts into *Showdown* in order to establish his credibility, which may be because of Haygood's background as a reporter.

I also believe the difficulty in reading this book is that the facts being portrayed appear a little disjointed in that the author jumps around in time so the reader loses track of what the author is actually trying to show. Far too many times he jumps from events during the 1940's to the 1960's, which makes it difficult for the reader to grasp all of the nuances of the story.

Make no mistake, however, *Showdown* is a history lesson that will take time to digest. The author has attempted to capture a very important moment in history. It is written based upon the events leading up to the nomination and confirmation using the language of the 1960s, which may be uncomfortable for our politically correct society, but the writing captures and portrays how difficult it was for African-Americans to succeed in America even in the 1960s.

I highly recommend this book for lawyers and non-lawyers alike to learn about one of America's truly great citizens and a lawyer that should be on Mount Rushmore.

INSTALLATION CELEBRATION & LINTZ AWARD DINNER

On September 24, 2015, the San Fernando Valley Bar celebrated the installation of **Carol L. Newman**, the Bar's new President. A sold-out crowd was also on hand to honor **Alan J. Skobin**, Vice President and General Counsel of Galpin Motors, with the Stanley M. Lintz Award for his outstanding contributions to the legal profession and the community.

Photos by Paul Lester


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Valley Community Legal Foundation Public Interest Grant Impacts Law Students and Community

By Elizabeth Post

THIS PAST SUMMER, SOUTHWESTERN LAW student Laura Guerrero worked full-time with Neighborhood Legal Services of Los Angeles County (NLSLA) to help provide free family law legal services to domestic violence survivors in the San Fernando Valley. For her ten weeks of hard work, Guerrero received a $5,000 grant.

The Family Law Public Interest Grant was made possible by the generous contributions of the Valley Community Legal Foundation (VCLF), the charitable arm of the SFVBA, and the Wendy and Elaine Friedenthal Family. Established by the Foundation is 2013, grant recipients must be a Southwestern student in good standing who currently lives, or lived or worked, in the San Fernando Valley.

The first grant was awarded in 2014 to Juan Carlos Moran, who has since graduated law school, passed the bar, and is now working for A New Way of Life, a reentry project for formerly incarcerated women. "Summer programs such as this are a win-win for all involved," declares Southwestern Clinical Professor Laura Cohen. "Law students gain valuable legal experience along with exposure to working in public interest, while providing legal services that would not have otherwise been available to the community."

(L-R) Southwestern Clinical Professor Laura Cohen, VCLF Officer Michael Kaplan, Southwestern law student Laura Guerrero, NLSLA Director of Pro Bono Sharon Bashan, NLSLA attorney Julie Rivera-Coo, and VCLF Past President Etan Lorant

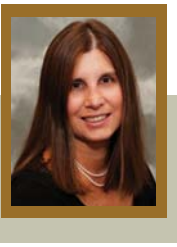
"The grant provided me the opportunity to work with dedicated lawyers at Neighborhood Legal Services," says 2015 grant beneficiary Guerrero. "I received a substantial legal education both in terms of the knowledge they shared from their legal careers as well of from the practical experiences of working directly with clients."

"I had the chance to observe a Hague child abduction hearing and to meet with an elderly client facing a critical housing issue with an impending eviction," Guerrero recollects. "Prior to working with NLSLA, I was not truly aware of the struggles ordinary people face when trying to work through the legal system on their own without the financial resources to seek legal counsel.

"I was privileged to be entrusted with each client's story, and seeing their challenges first hand was an eye opening experience that affected me deeply. I am grateful to NLSLA for having selected me and will carry what I learned with me into my future legal career."

Guerrero's supervisor this summer, NLSLA staff attorney Julie Rivera-Coo, recognizes the Foundation's support and the impact the grant has on the community. "At a time when legal services funding continues to dwindle, having the support from the VCLF and Friedenthal Public Interest Grant enables NLSLA to help more victims of domestic violence find safety and a path towards breaking the cycle of abuse.

"Laura was an invaluable member of our team. She helped us see an extra 18 clients that we would not have been able to see without her assistance. The VCLF and Friendenthal Public Interest Grant funding impacted the lives of many of our clients and community partners and we are grateful for the opportunity to work with the fellow."



Elizabeth Post is Executive Director of the San Fernando Valley Bar Association, a position she has held since 1994, and Publisher of *Valley Lawyer*. She can be reached at epost@sfvba.org.

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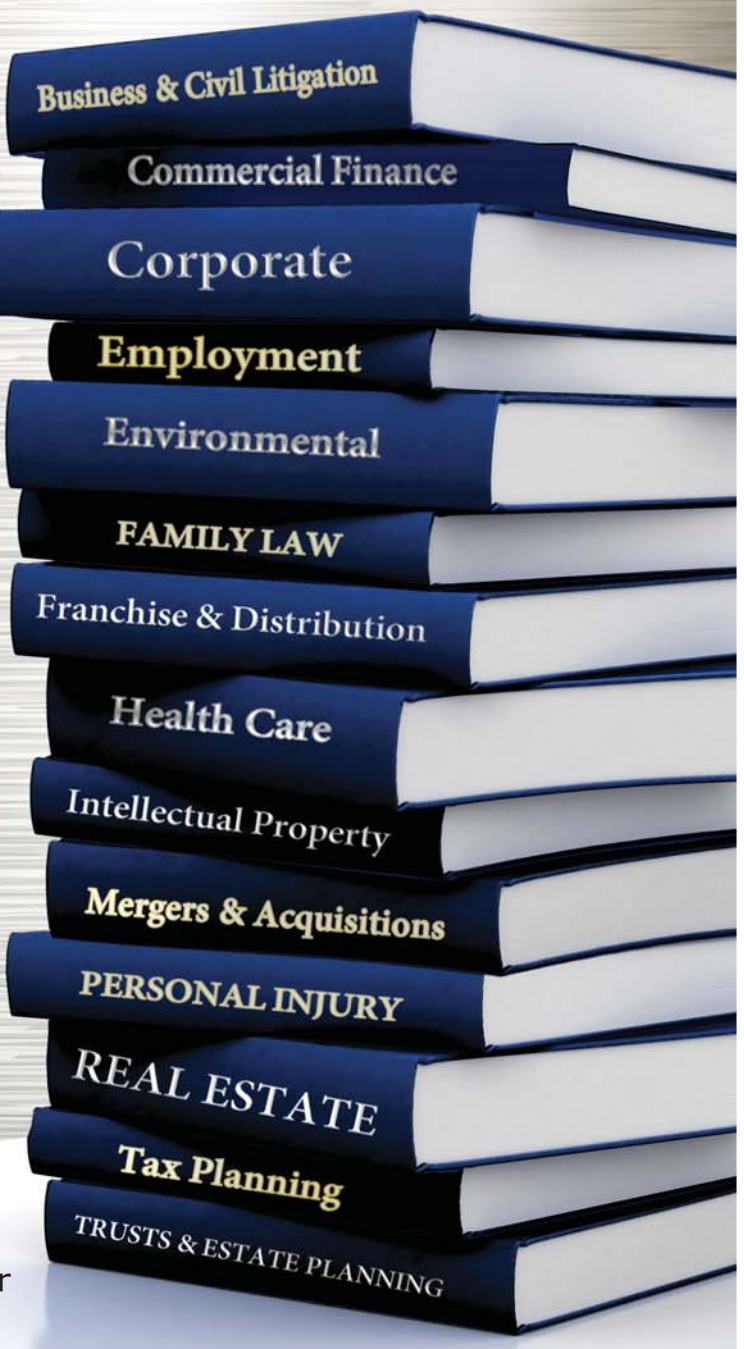

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