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SEPTEMBER 2015 • $4

A Publication of the San Fernando Valley Bar Association

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Civil Law Update: Recent California Supreme Court Decisions

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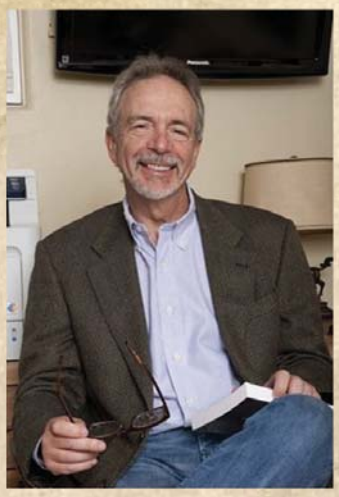
Featuring
Robert Rotstein



A Los Angeles native raised in the shadows of MGM Studios, Mr. Rotstein became hooked on legal dramas at an early age and perhaps inevitably became an attorney and writer of novels about a lawyer. With a focus in the entertainment industry, Mr. Rotstein has represented such clients as James Cameron, Michael Jackson, Quincy Jones and all of the major motion picture studios, among others. He is a partner with Mitchell, Silberberg & Knupp, LLP, where he co-chairs the IP Department.

Mr. Rotstein has published three books featuring lawyer Parker Stern, including *Corrupt Practices* (2013) which received a Booklist starred review, *Reckless Disregard* (2014) which was a Kirkus Review top thriller and *The Bomb Maker's Son*, his most recent release.

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SEPTEMBER 2015

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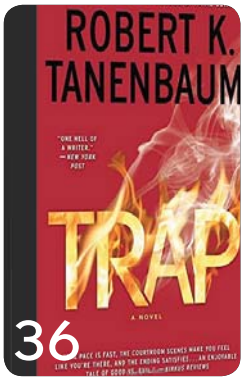

On the cover: *San Fernando Valley Bar Association President Carol L. Newman*
Photo by Paul Joyner

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VALLEY LAWYER

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Farewell and Thank You

CARYN BROTTMAN SANDERS
SFVBA President

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MY YEAR AS SFVBA PRESIDENT is coming to a close. Thank you for supporting me in my presidency and indulging me as I explored what I hoped were timely and relevant topics in this column.

I had intended my final article to be only a thank you and farewell but events of the last month have prompted me to address one last legal topic: Is there an irreversible blurring of the lines between legal and illegal? As lawyers, how do we explain this to non-lawyers? The examples are endless, from music downloading to bootlegged movies to counterfeit goods.

Lately, my daughter has become obsessed with Disney pin trading, a hobby I strongly urge you not to start. Pins that originally sold for $5 can be valued at more than $1,000 depending on the age and the character depicted. These pins, from the ones worth $5 to the ones worth hundreds of dollars, have been widely counterfeited to the extent that my daughter traded a pin with a Disney executive and the pin she received was fake. To most people, they look identical but experienced traders have developed ways of detecting a majority of the fakes. While counterfeiting goods is illegal, not enough is done to stop the import and sale of counterfeit goods. The sheer proliferation of them blurs the line of legality.

Perhaps a more profound example of these blurred lines occurred this week when I attended a concert at the Hollywood Bowl. We went to see a popular band who was touring with a popular solo artist. The band's fan base is very broad and I personally knew kids from ages 10 through 17 in the audience. The soloist performed first and opened the show with a video depicting himself smoking marijuana with naked women. As if the display of nudity to an audience of all ages was not enough, he proceeded to smoke joints while on stage and, on more than one occasion, encouraged the audience to light up with him, a request they gladly obliged.

During the break, my daughter said, "That's illegal. Why was it allowed?" Two other adults told me their children asked the same question and further asked why all of the security guards and police officers weren't doing anything about it.

I was pleased the children knew the activity was illegal but was at the same time very disappointed that I could not provide a reason based in the law as to why the illegal activity was allowed to take place very publically and with the implication that it was absolutely accepted.

That it was permitted because the performer is famous is not a good enough explanation for why it is allowed in a public place owned by the County of Los Angeles, patrolled by the Los Angeles Police Department, and without limitation for the age of the audience. The creation of this blurred line between legal and illegal was unacceptable and appalling as a parent and particularly as an attorney.

It's a conundrum we all will face at some point in our careers and personal lives. I appreciate having a space to explore these questions and, hopefully, inspire further discussions on the topic.

As this year winds down, I am often asked if I am happy that it is almost over. I find this question to be understandable, but at the same time a little odd. I wanted to be President and went into this wonderful position with my eyes wide open. Why did I do it? I think that the SFVBA is a wonderful organization that plays an important role in the legal profession and the local community and I wanted to be an integral part of it. I had chaired several committees and, given my ever increasing involvement, it seemed like a natural step to become President.

I started my term without a pet project or a grand plan but instead with a goal of getting more people involved in the organization and encouraging more people to become leaders in sections, committees, and the Board of Trustees. If even only a few people caught the bar leadership bug and pursue or continue with leadership roles, then I will consider my stint as President a success. Thank you and farewell.

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Valley Lawyer Legacies

IRMA MEJIA
Publications & Social Media Manager

editor@sfvba.org

LAST MONTH, THE SFVBA lost longtime member James M. Fizzolio. He passed away a month shy of his 96th birthday. Members will recognize Fizzolio from the article "Reflections and Guidance: World War II Veterans Share Their Story" published in the November 2014 issue of *Valley Lawyer.* He was featured in the story because of his military service during World War II and his subsequent legal career in the San Fernando Valley.

Fizzolio and his brother established the storied law firm Fizzolio & Fizzolio in Van Nuys. He served as president of the now defunct Burbank Bar Association and later continued his practice with the firm Fizzolio and McLeod. He retired after more than 50 years of service to the Valley legal community.

In the short time that I spent with him during the interview last year, it was clear to me that he loved being an attorney. His buoyant personality shone through as he recalled memories of the early days of his practice. On more than one occasion, he couldn't help but let out a characteristic laugh.

I am glad to have been able to feature him in the pages of this publication. He provided a tremendous service to our country and to the legal profession. I did not have a chance to follow up with him after we published the article. I can only hope that he liked it and that he had a nice time speaking with me.

The SFVBA will honor his legacy by making donation in his name to a veterans' support organization.

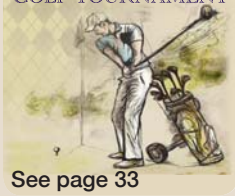
Many of our members have incredible stories to share. My goal is to highlight those stories to help bring us closer together. It's an enjoyable endeavor that offers readers a better understanding of their peers. For example, this month's cover story on SFVBA's new President, Carol Newman, provides members with little known details about her experience and personality.

Features like these can help us better understand one another and find common ground when working to improve our organization or the community. Hopefully, the practice of sharing stories will become contagious and more of us will find ourselves learning about each other's fascinating stories in person.

SUN	MON	TUE	WED	THU	FRI	SAT
LATINO HERITAGE MONTH (SEPTEMBER 15 – OCTOBER 15)						
		1	2	**3** Membership & Marketing Committee 6:00 PM SFVBA OFFICE	4	5
6	**7** *Valley Lawyer* Member Bulletin Deadline to submit announcements to editor@sfvba.org for October issue. 	**8** Probate & Estate Planning Section California's New Statutory Definition of Undue Influence 12:00 NOON MONTEREY AT ENCINO RESTAURANT Howard Horwitz will update the Section on the new law and discuss the implications to your practice. (1 Hour MCLE) Board of Trustees 6:00 PM SFVBA OFFICE	**9** Business Law & Real Property Section Top Mistakes Made by Start-ups and Early Stage Companies 12:00 NOON SFVBA OFFICE Criminal Law Section DUIs 6:00 PM SFVBA OFFICE Free to current Criminal Law Section Members! **See page 37**	**10** SFVBA ELECTION DAY Employment Law Section Improving Your Results at Mediation 12:00 NOON SFVBA OFFICE Steve Pearl will outline how to engage in successful mediations. (1 Hour MCLE)	11	12
13	14	15	**16** Workers' Compensation Section The Three Wise Men: The View From the Bench 12:00 NOON MONTEREY AT ENCINO RESTAURANT Judges David Brotman, Mitchell Bushin, and Robert Sommer share their perspectives. (1 Hour MCLE)	17	18	19
20	21	22	23	**24** INSTALLATION CELEBRATION & LINTZ AWARD DINNER **See page 15**	**25** Bankruptcy Law Section Opinions of the Woodland Hills Bankruptcy Judges 12:00 NOON SFVBA OFFICE Always one of the most important and popular seminars of the year. (1.25 MCLE Hours)	26
27	**28** Family Law Section The Many Perspectives of Domestic Violence and Family Law 5:30 PM MONTEREY AT ENCINO RESTAURANT Judges Susan Lopez-Giss and Harvey Silberman and attorney Donna Laurent will discuss domestic violence. Approved for Legal Specialization. (1.5 MCLE Hours)	**29** Taxation Law Section Crazy Deal Structures and Why They Were Used 12:00 NOON SFVBA OFFICE Litigation Section Calendaring in State Court: Steps and Traps for the Unwary 6:00 PM SFVBA OFFICE Julie Goren will teach the complexities of calendaring through exercises that will highlight dangers, with a focus on deadlines for pleadings and discovery. (1.5 MCLE Hours)	**30**			

CALENDAR

OCTOBER 2015

SUN	MON	TUE	WED	THU	FRI	SAT
LATINO HERITAGE MONTH						
				1 Membership & Marketing Committee 6:00 PM SFVBA OFFICE	2	3
4	**5** *Valley Lawyer* Member Bulletin Deadline to submit announcements to editor@sfvba.org for November issue.	6	7	8	9	10
11	**12** Tarzana Networking Meeting 5:00 PM SFVBA OFFICE THE ESQUIRE NETWORK VALLEY COMMUNITY LEGAL FOUNDATION COLUMBUS DAY GOLF TOURNAMENT  See page 33	**13** Probate & Estate Planning Section 12:00 NOON MONTEREY AT ENCINO RESTAURANT Board of Trustees 6:00 PM SFVBA OFFICE	**14** Business Law & Real Property Section and Criminal Law Section Business Transactions Involving Marijuana Laws 12:00 NOON SFVBA OFFICE Michele Brooke will discuss the intricacies of the marijuana laws. (1 Hour MCLE)	15	16	17
18	19	**20** Taxation Law Section IRS Summons 12:00 NOON SFVBA OFFICE Chad Nardiello will discuss what to do when your client receives an IRS summons. (1 MCLE Hour)	**21** Workers' Compensation Section Do You Hear What I Hear? 12:00 NOON MONTEREY AT ENCINO RESTAURANT Andrew Berman, M.D. discusses the anatomy of the inner ear and industrial traumas. (1 Hour MCLE)	22	23	24
25	**26** Family Law Section Bankruptcy and Family Law 5:30 PM MONTEREY AT ENCINO RESTAURANT Approved for Legal Specialization. (1.5 MCLE Hours)	**27** Editorial Committee 12:00 NOON SFVBA OFFICE	28	29	30	31 

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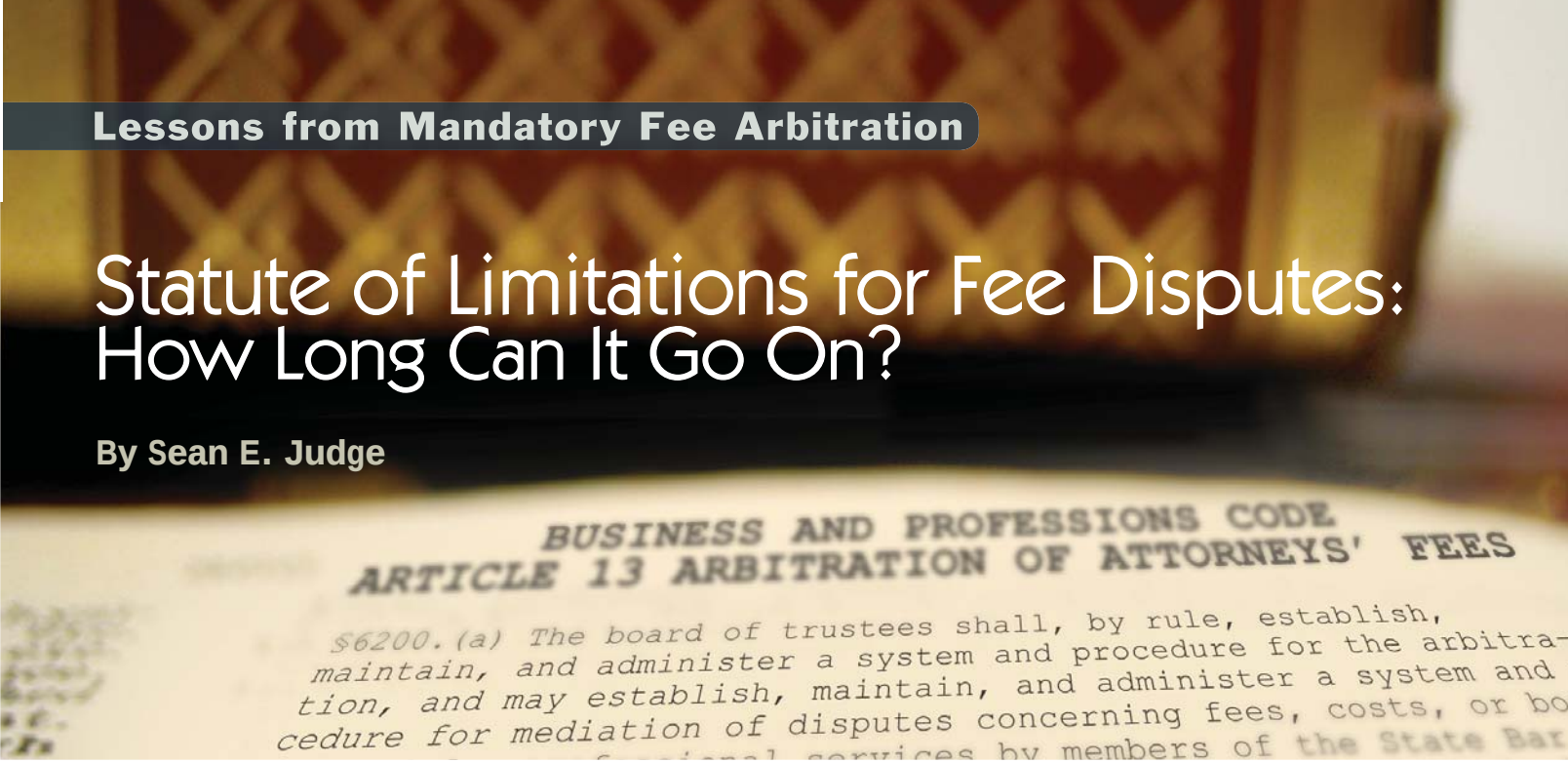
Statute of Limitations for Fee Disputes: How Long Can It Go On?

By Sean E. Judge



THIS ARTICLE DISCUSSES THE APPLICABILITY of possible statutes of limitation that have been raised in fee arbitrations.

The threshold question that each arbitrator must address in all fee arbitrations is whether the attorney followed formalities of an enforceable fee agreement. The answer to this question will determine the statute applied in the arbitration. Business and Professions Code Section 6148 provides that a legal fee agreement that contemplates total expenses (costs and fees) in excess of $1,000 must be written, with an executed copy exchanged with the client. Further, the agreement must clearly spell out the bases of compensation, the nature of services to be provided, and the respective responsibilities of the attorney and client.

It is imperative that all of the requirements of Section 6148 be complied with to enforce a written fee agreement. Failure to comply with these requirements will likely result in the application of *quantum meruit* to the fee agreement, and the value of services rendered may vary significantly between arbitrators. Counsel should refer not only to Section 6148 to assure compliance of his or her written fee agreement, but also to Section 6147, which governs contingency fee agreements and Sections 6200-6206, which address the attorney's obligation to offer fee arbitration to the client.

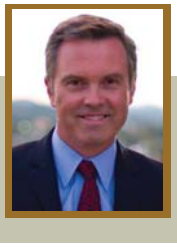
The statute of limitations issue is addressed thoroughly in Arbitration Advisory 2011-02 issued by the State Bar Committee on Mandatory Fee Arbitration.[1] Under Business and Professions Code Section 6206, arbitration must be commenced within the statute of limitations that generally applies to civil actions. However, if a lawsuit is filed by the attorney, then the right of a client to commence fee arbitration is revived if the statute of limitations would have otherwise expired.

In addressing the question of limitations of actions, it is important to understand what fee arbitrations cover and what they do not. Fee arbitrations reflect the arbitrator's (or panel's) determination of attorney fees between an attorney and client (or person responsible for the fee). Fee arbitrations do not address issues of malpractice, fraud or other causes of action that properly belong in court.

The issue of statute of limitations requires some analysis when the claims against an attorney in fee arbitration also involve the same contractual issues as those that could be asserted in an action for legal malpractice.

The Committee addressed this issue, noting that legal malpractice claims may sound in both tort and contract.[2] In *Levin v. Graham & James*,[3] the court determined that the charging of unconscionable fees was a proper basis for a claim of legal malpractice. The *Levin* court held that a civil claim for legal malpractice that was based on the charging of an unconscionable fee was time-barred by the one-year statute of limitations under the Code of Civil Procedure Section 340.6. The *Levin* court stated that "[i]n all cases other

Sean E. Judge is the principal of Judge Mediation in Woodland Hills and a Trustee of the SFVBA. He is currently co-chair of the Mandatory Fee Arbitration Committee. Judge can be reached at sean@judgemediation.com.



than actual fraud, whether the theory of liability is based on the breach of an oral or written contract, a tort, or a breach of fiduciary duty, the one-year statutory period applies."

In addressing this issue in the context of fee arbitrations, the Committee found that the Code of Civil Procedure Section 340.6 would not apply to fee arbitrations based upon claims of unconscionable fees. First, a claim for legal malpractice in court based upon an unconscionable fee is in a different forum governed by different rules that may provide different relief than one commenced before a few arbitrators.

Second, there is the issue of fairness. The purpose of fee arbitrations is to provide clients with a forum to resolve fee disputes with attorneys. Fee arbitrations have been established by the State Bar, which, it should not be forgotten, is a part of the Department of Consumer Affairs. With these factors in mind, the Committee believed that it would be fundamentally unfair to allow an attorney to commence a fee arbitration for collection of an unpaid fee in two or four years, only to compel a client alleging an unconscionable fee to do so within a year. The Committee determined that the Code of Civil Procedure Section 340.6, the one year statute governing actions for malpractice against attorneys, will not apply.

There are two final but crucial points that must be considered. For attorneys seeking to enforce their fee agreements, if a written fee agreement is found not to have complied with Business and Professions Code Sections 6146, 6147 or 6148, *quantum meruit* will be the basis by which the fee is determined. The statute of limitations on a compliant agreement seeking contractual fees is four years, but if the agreement is found to not have complied with Sections 6146, 6147 or 6148, the statute of limitations will be two years under the Code of Civil Procedure Section 339. Thus, if there is any doubt about strict compliance with the Business and Professions Code, an attorney is well advised to commence fee arbitration within two years of the breach.

For both attorneys and clients, in civil cases, statute of limitations is an affirmative defense raised by a party at any time during litigation; otherwise, it is waived. However, in fee arbitrations, the arbitrator or panel may raise the issue. Why? Again, fee arbitrations are at their core a part of consumer affairs and protection. Clients are often unrepresented at fee arbitrations and the pleadings are not framed as they often are in civil actions. One policy governing fee arbitrations is "to alleviate the disparity in bargaining power in attorney fee matters which favors the attorney by providing an effective, inexpensive remedy to a client which does not necessitate the hiring of a second attorney."[4] Thus, the raising of statute of limitations *sua sponte* is something that either side may expect.

[1] This and other Arbitration Advisories can be found at http://www.calbar.ca.gov/Attorneys/MemberServices/FeeArbitration/ArbitrationAdvisories.aspx.
[2] *Neel v. Magana, Olney, Levy et. al.* (1971) 6 Cal. 3rd 176, 181.
[3] *Levin v. Graham & James* (1995) 37 Cal. App. 4th 798.
[4] *Schatz v. Allen Matkins et. al.* (2009) 45 Cal. 4th 557, 567.

SAN FERNANDO VALLEY BAR ASSOCIATION

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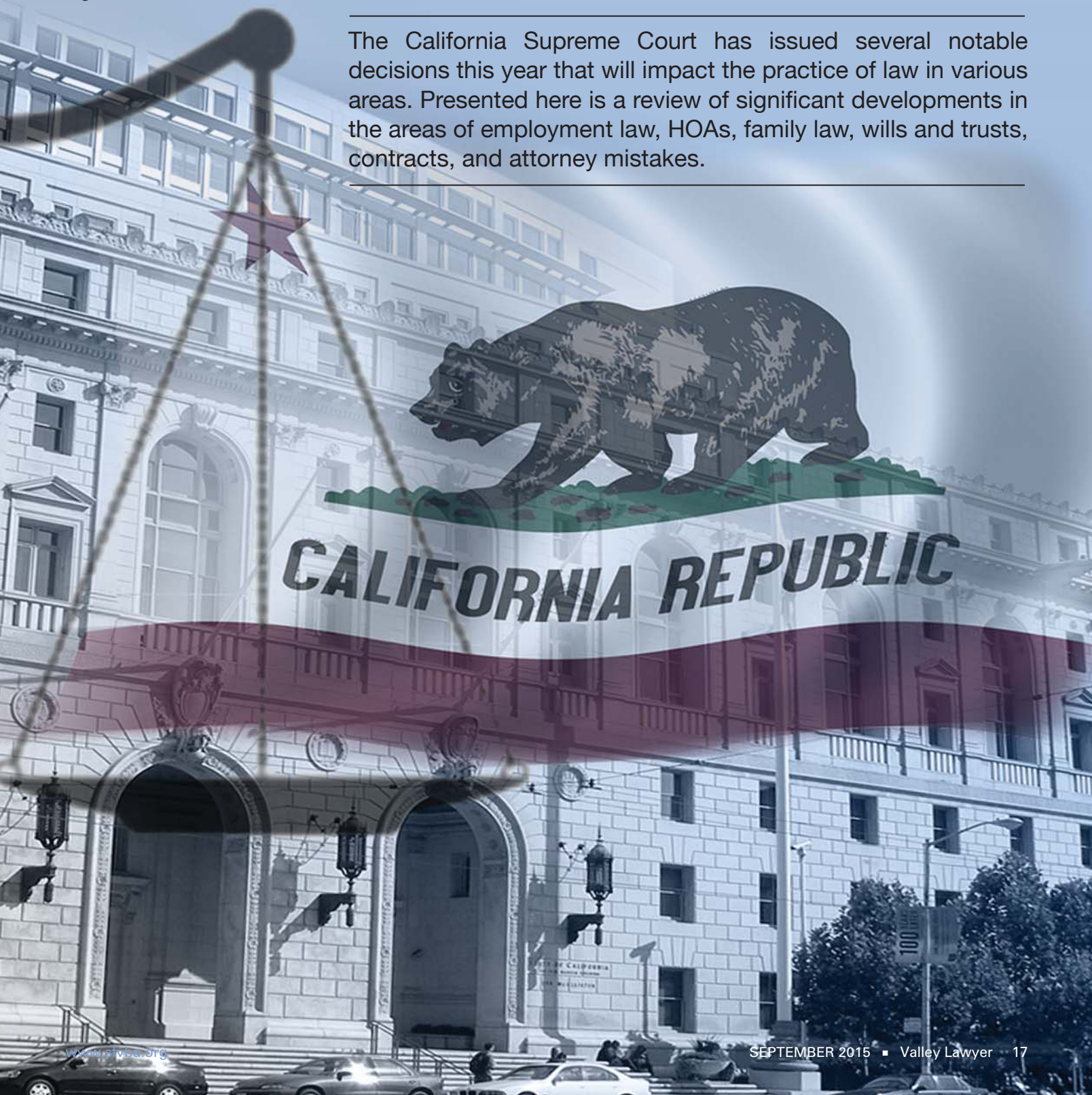
By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 25.

Civil Law Update: Recent California Supreme Court Decisions

By Neil M. Sunkin

The California Supreme Court has issued several notable decisions this year that will impact the practice of law in various areas. Presented here is a review of significant developments in the areas of employment law, HOAs, family law, wills and trusts, contracts, and attorney mistakes.



IN 2015, THE CALIFORNIA SUPREME COURT DECIDED several cases in the employment arena, including a decision concerning the court's power to reject arbitration awards and the recovery of court costs. The court also continued its development of the law concerning reformation of wills; clarified the date of separation to guide attorneys, litigants and judges in family law cases; and clarified purported conflicts in competing statutes and doctrines in areas of civil procedure.

Employment Law

Scope of the Review of Arbitration Awards Involving an Employee's Unwaivable Statutory Rights

In *Richey v. Autonation, Inc.*,[1] an employer terminated an employee who, while absent on approved medical leave, violated a written company policy prohibiting outside employment. The employee sued the employer for multiple claims under the California Fair Employment and Housing Act (FEHA),[2] the Moore-Brown-Roberti Family Rights Act (CFRA),[3] and the Family and Medical Leave Act of 1993 (FMLA),[4] including discrimination and retaliation, for the employer's failure to reinstate him following medical leave.

As a condition of his employment, plaintiff had signed an agreement requiring that any employment dispute be settled by arbitration. The arbitration agreement included a provision that required that arbitration awards be based "solely upon the law governing the claims and defenses set forth in the pleadings and the arbitrator may not invoke any basis (including, but not limited to notions of 'just cause') other than such controlling law."[5] The agreement did not include an express provision permitting courts to review an arbitration award for legal error but it did require the arbitrator to include a written reasoned opinion, and the agreement provided that the arbitrator's decision would be final and binding.[6]

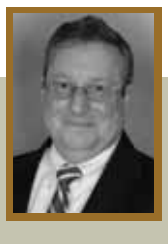
After an 11-day arbitration, the arbitrator issued a 19-page order in favor of the employer, finding, among other things, that the employer had an "honest belief" that the employee was abusing his medical leave and that the employer terminated the plaintiff for non-discriminatory reasons.[7] Upon motions to vacate and confirm the award, the trial court rejected the plaintiff's argument that the arbitrator committed reversible error in exceeding his powers by accepting defendant's honest belief defense as to plaintiff's medical condition, and the trial court confirmed the arbitration award.[8]

The *Richey* court observed that the honest belief defense is available mostly in certain FMLA cases in the federal Seventh Circuit but the California Supreme Court had not determined whether that defense was viable under California employment law.[9] The Court of Appeals reversed, concluding that the arbitrator had violated plaintiff's right to reinstatement under CFRA by misapplying the honest belief defense.[10]

The Supreme Court's analysis and decision focused on a court's power to review the arbitrator's decision and whether the arbitrator acted in excess of his powers when he had rejected the plaintiff's claim by misapplying the employer's honest belief defense. In California, courts generally cannot review arbitration awards for errors of fact or law, even when those errors appear on the face of the award or cause substantial injustice, or where the parties' agreement directs an arbitrator to rule on the basis of relevant law, rather than on principles of equity and justice.[11] Moreover, both the California Arbitration Act[12] and the Federal Arbitration Act[13] provide limited grounds for judicial review of an arbitration award. In both, courts are authorized to vacate an award only if the award was procured by corruption, fraud or undue means; issued by a corrupt arbitrator; affected by prejudicial conduct of the arbitrator; or in excess of the arbitrator's powers.[14]

An award may be corrected for evident miscalculation or mistake, issuance in excess of the arbitrator's powers, or imperfection in the form.[15] Arbitrators may exceed their powers by issuing an award that violates a party's unwaivable statutory rights or that contravenes explicit public policy.[16] Arbitrators, however, do not exceed their powers and awards cannot be vacated merely because an arbitrator reaches erroneous legal conclusions or factual findings.[17]

In prior cases, the Supreme Court discussed exceptions to the rule that an arbitrator's decision cannot be reviewed by the courts for errors of law or facts. In 1992, the court in *Moncharsh v. Heily & Blase* held that judicial review may be warranted when a party claims that an arbitrator has enforced an entire contract or transaction that is illegal and that confirming the award would result in a violation of a party's statutory rights.[18] In the 2000 case of *Armendariz v. Foundation Health Psychcare Services, Inc.*,[19] an employee argued that the limited scope of judicial review of arbitration awards made illusory vindication of statutory rights under FEHA because the arbitrator was free to disregard the law.[20] However, *Armendariz* arose from an appellate decision compelling the parties to arbitrate, and not from an actual arbitration award, so the court did not decide the standard



Neil M. Sunkin, a civil litigator with 30 years of experience and a former partner in a large, national law firm, has been a solo practitioner since 2003. His practice focuses on representing clients ranging from small businesses, entrepreneurs and individuals to celebrities, banks, and the FDIC in business, corporate, real estate, and employment litigation. He can be reached at nms@sunkinlaw.com.

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that was appropriate to protect statutory rights in that case, except to require the arbitrator to issue written decisions so that the arbitration award could be susceptible to judicial review.[21]

In 2010, the court discussed the standard of review for arbitration awards involving unwaivable statutory rights in *Pearson Dental Supplies, Inc. v. Superior Court.*[22] In this case, an arbitrator had misapplied a relevant tolling statute and incorrectly held that an employee's claim was time-barred, which, the court said, was a "clear error of law" resulting in the deprivation of a hearing on the merits.[23] The court held that when "an employee subject to a mandatory employment arbitration agreement is unable to obtain a hearing on the merits of his FEHA claims, or claims based on other unwaivable statutory rights, because of an arbitration award based on legal error, the trial court does not err in vacating the award."[24]

However, as the court noted in *Richey*, the court's holding in *Pearson Dental* and statement of the standard of judicial review was limited because, according to the court, rather than misinterpret the law governing the claim itself, the arbitrator had misconstrued the procedural framework under which the parties' had agreed the arbitration was to be conducted and had not explained in a written decision why the statute of limitations was not tolled, thereby depriving the plaintiff of the chance for a review on the merits.[25]

In *Richey*, however, the court still did not decide the question left open in *Pearson Dental*, because it concluded that even if the arbitrator committed legal error by improperly relying on the honest belief defense, the plaintiff had not shown prejudicial error. Moreover, the court said that it was not deciding whether or not the honest belief defense was viable in California.[26] Therefore, the court also could not decide if the arbitrator misinterpreted the law.

Reversing the Court of Appeal, the court said the arbitrator found plaintiff's firing was based on a clear violation of company policy—a legally sound basis for upholding the arbitrator's award—and would likely have made that finding regardless of the evidence or findings as to the employer's honest belief plaintiff was misrepresenting his medical condition. Thus, even if the arbitrator was mistaken in relying on an honest belief defense, plaintiff was not prejudiced thereby and the arbitrator's award in defendants' favor would stand.[27]

Prevailing Defendant in FEHA Discrimination Case is Entitled to Court Costs Only if the Plaintiff's Action Is Frivolous, Unreasonable, or Groundless

The Supreme Court decided another employment discrimination case, *Williams v. Chino Valley Independent Fire District*.[28] In this case, after the defendant prevailed on a cause of action for employment discrimination in violation of FEHA, the trial court awarded the defendant its court costs and the Court of Appeal affirmed. The plaintiff appealed, arguing that unless the trial court found the action was frivolous, unreasonable or groundless, the defendant was not entitled to an award of court costs.

Under California Code of Civil Procedure §1032, a prevailing party, whether plaintiff or defendant, is entitled to an award of recoverable costs which are "reasonably necessary to the conduct of the litigation"[29] as a matter of right.[30] However, FEHA gives the court discretion to award costs to either party. Government Code §12965(b) states that in actions brought under it, "the court, in its discretion, may award to the prevailing party… attorney's fees and costs, including expert witness fees."

Ordinarily, in employment discrimination cases, courts exercise their discretion to award the prevailing plaintiff both attorney's fees and court costs.[31] However, in federal civil rights actions, the court must find that the plaintiff's action was unreasonable in order to award a prevailing defendant attorney's fees, based on the case of *Christiansburg Garment Co. v. EEOC*,[32] where the United States Supreme Court interpreted a similar discretionary provision in Title VII of the 1964 Civil Rights Act to require a finding that the plaintiff's claim "was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."[33]

While California courts have followed that standard to award attorney's fees to prevailing defendants in FEHA actions, they have not applied that standard to award court costs to prevailing defendants in FEHA actions.[34] Moreover, federal court of appeals decisions have not applied the *Christiansburg* standard to federal Title VII cases; however, the Ninth Circuit did apply the standard to an action under the Americans with Disabilities Act.[35] The United States Supreme Court also has not applied its *Christiansburg* standard to an award of court costs in a Title VII case.[36] The *Williams* court, however, set the rule in California.

The Supreme Court concluded that Government Code §12965(b) is an express exception to the mandatory cost shifting of Code of Civil Procedure §1032(b) and does not provide a reciprocal right to recover costs to plaintiffs and defendants.[37] Accordingly, the court held that in a FEHA case, while a prevailing plaintiff ordinarily will be awarded its attorney's fees and court costs, including expert witness fees absent special circumstances, in contrast, a prevailing defendant will not be awarded its attorney's fees, court costs or expert witness fees, "unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so."[38]

HOA

Prevailing Defendant in Action to Enforce HOA's Governing Documents is Entitled to Attorney's Fees Even if It Is Determined that There Is No Common Interest Development

The Supreme Court also decided another case concerning the recovery of court costs. In *Tract 19501 Homeowners Association v. Kemp*,[39] the court reiterated the law that unless expressly provided otherwise in a statute, a prevailing party attorney fee statute provides a reciprocal right to attorney's fees for plaintiffs and defendants alike; this is the case even if the defendant proves that the plaintiff's action is not what he or she says it was. In this case, which interpreted the attorney's fee provision in the Davis Sterling Common Interest Development Act (CID Act),[40] a homeowners association and individual members of the association sued their neighbor for violating restrictions in documents governing their common interest development.[41] The relevant statute provided that "[i]n an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs."[42] The term "governing documents" is defined in the statute as the official documents governing "the operation of a common interest development."[43]

The defendant prevailed in the trial court by proving there was not a valid common interest development and was awarded attorney's fees under former Civil Code §1354(c).[44] The appellate court affirmed the judgment, agreeing that the plaintiff did not prove the existence of a common interest development, but reversed the award of attorney's fees to the defendant.[45] According to the appellate court, because the defendant prevailed by proving the CID Act was not even applicable, the defendant could not recover attorney's fees.[46] The Supreme Court reversed. Discussing analogous cases, the court observed that cases which have interpreted and applied other prevailing party attorney fee statutes show that where the legislature enacts a prevailing party attorney fee provision, there is a legislative intent to enact "a broad, reciprocal attorney fee policy that will, as a practical and realistic matter, provide a full mutuality of remedy to plaintiffs and defendants alike."[47]

Family Law

Living Together in the Same Home Is Not Living Separate and Apart

It is not altogether uncommon for married couples who consider themselves to be separated to continue to live together in the same home for various reasons, including co-parenting goals and, most often, economic reasons. Yet one or both spouses may have no intent ever to resume a marital relationship with the other spouse. Other than living together in the same home, the spouses live separate lives. Once a divorce is filed and the time comes to divide the couple's property, disputes as to the date of separation for the division of property inevitably arise.

California Family Code §760 provides that all property acquired by the spouses during the marriage is community

property "[e]xcept as otherwise provided by statute."[48] One important exception is provided by Family Code §771(a). This statute provides, "[t]he earnings and accumulations of a spouse… while living separate and apart from the other spouse, are the separate property of the spouse."

In *In Re Marriage of Davis*,[49] the parties, who continued to live together in the same home long after having decided not to reconcile, disputed the date of separation. The wife argued that the facts and circumstances should be considered as to the date of separation, while the husband argued for a bright line rule and that the parties could not have been separated while continuing to live together in the same house.[50]

To give guidance to judges and a measure of predictability to lawyers and litigants, the court set a bright line rule that a couple living together in the same home are not "living separate and apart" for purposes of §771(a).[51] The court held "that 'living separate and apart' refers to a situation in which both spouses are living in separate residences and at least one of them has the subjective intent to end the marital relationship, which is objectively evidenced by words or conduct reflecting that there is a complete and final break in the marriage relationship."[52]

At the same time, however, the court said that it was not deciding that there could not be circumstances whereby a spouse could show that he or she had established a separate residence with the requisite intent to never resume the marital relationship while continuing to live, literally, in the same residence.[53]

Wills and Trusts

Extrinsic Evidence Is Admissible to Reform an Ambiguous Will

In *Estate of Duke*,[54] a holographic will provided that upon the testator's death, his wife would inherit his estate and that if his wife died at the same time, specific charities would inherit his estate. The will did not make a provision in the event the testator's wife predeceased him. The will provided that the testator intentionally omitted all persons not otherwise mentioned in his will, specifically disinherited them should they make a claim under the will, and left for the testator's brother $1.00. The testator died without leaving a spouse or children.

The charities petitioned to probate the will and for letters of administration. The children of the testator's deceased sister filed a petition to determine their entitlement to distribution under the will. The relatives argued that they were entitled to inherit as the closest surviving heirs because the testator did not predecease his wife or die at the same time, and there was no provision in the will in the event that the testator survived his wife.[55] The charities argued that extrinsic evidence proved the testator's intent that his estate be distributed to the two charities in the event his wife predeceased him.[56] The probate court concluded that the will was not ambiguous and declined to consider extrinsic evidence of the testator's intent.[57]

While California law allows the admission of extrinsic evidence to establish that a will is ambiguous and to clarify ambiguities in a will, current law did not permit extrinsic evidence to correct a mistake in a will that is unambiguous.[58] Accordingly, the appellate court affirmed,[59] following the rule in *Estate of Barnes*[60], that extrinsic evidence may not be admitted to reform a will that is unambiguous.[61]

The Supreme Court reviewed developments of the law concerning the admission of extrinsic evidence in regards to wills and other donative instruments and concluded that the courts have developed principles guiding the admissibility of extrinsic evidence concerning a testator's intent, and that the legislature has codified the legal principles that have been developed by the courts.[62]

The court also said that the legislature has not intended to foreclose further development of the law concerning the admissibility of extrinsic evidence as to the testator's intent and that the legislature had not addressed the issue of reformation of wills.[63] Accordingly, the court concluded that it can "continue to develop the law concerning admissibility of evidence to assist in the determination of the testator's intent even when the language of the document is clear on its face."[64] The court also rejected arguments of *stare decisis*, noting that many other states permit the admission of extrinsic evidence to reform an unambiguous will.[65] The court held that extrinsic evidence can be admitted to reform an unambiguous will to conform the will to a testator's intent, but that the standard or proof is clear and convincing evidence.[66]

Contracts

Parties Who Are Jointly and Severally Liable on a Contract Can Be Sued in Successive Lawsuits; All Jointly and Severally Parties Need Not Be Joined in a Single Lawsuit; and Entry of Judgment Against One Co-Obligor Does Not Bar a New Lawsuit Against a Second Co-Obligor

In *DKN Holdings, LLC v. Faerber*,[67] several partners were each jointly and severally liable on a 10-year lease for commercial space. One of the partners sued the landlord for damages and rescission, alleging failures to disclose certain conditions related to the leased property. The landlord cross-complained for rent and other monies due and obtained a judgment against the one partner for over $2.8 million on the cross-complaint. Before that judgment was satisfied, the landlord filed another lawsuit against the other partners for breach of the lease.[68]

One of the defendants in the second action argued that the adjudication of the landlord's rights under the lease barred the second lawsuit based on the rule against splitting a cause of action. The case concerns an intersection of the

doctrine of joint and several liability and that of claim preclusion. The court held that there is no conflict between these doctrines and that parties who are jointly and severally liable on a contract may be sued in separate actions. Judgment in the first action does not bar judgments in later actions, even when they allege the same claim of wrongdoing, as long as the suits are against different parties,[69] and the obligation has not been satisfied.[70]

Attorney Mistakes

Code of Civil Procedure Section 1008 Applies to Attorney Declarations of Fault Under Code of Civil Procedure Section 473(b)

In *Evan Zohar Construction & Remodeling, Inc. v. Bellaire Townhomes, LLC*,[71] a default judgment of $1,701,116.70 was entered against the defendant. The defendant's attorney filed a 473(b) motion attesting that the fault was primarily his staff's, and that his reliance on his staff was a mistake and excusable neglect.[72] The trial court did not find his story credible.[73] After losing the motion, 33 days later, the attorney filed a renewed motion for relief from the default and submitted a new declaration with an entirely different explanation, that was inconsistent with his first explanation, but that showed that the default was not caused by any conduct of the lawyer's client.[74]

The plaintiff argued that the renewed motion was required to comply with Code of Civil Procedure section 1008.[75] Although the trial court concluded that the declaration and renewed 473(b) motion did not comply with Section 1008 and found the attorney's declaration was not credible, it nevertheless determined that it was compelled to set aside the default based on the mandatory provisions of section 473(b) based on *Standard Microsystems Corp. v. Winbound Electronics Corp.,*[76] which held that section 473(b) takes precedence over section 1008.[77]

The plaintiff appealed and the Court of Appeals reversed, holding that the failure of the motion to comply with section 1008 required rejection of the renewed motion for relief from default, declining to follow *Standard Microsystems Corp.*[78] The defendant appealed. The Supreme Court held that there is no conflict between sections 1008 and 473(b) and that a second motion for relief under section 473(b) must comply with the requirements of section 1008, and the court disapproved of cases that indicate otherwise.[79]

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[1] *Richey v. Autonation, Inc.*, 60 Cal.4th 909, 182 Cal.Rptr.3d 644 (2015).
[2] Cal. Gov. Code §12900 *et seq.*
[3] *Id.* §§12945.1-12945.2. The CFRA was enacted in 1992 to allow employees to take leave from work for certain personal or family medical reasons without jeopardizing their job security. *Richey*, 60 Cal.4th at 919 (citing *Nelson v. United Techs.*, 74 Cal. App.4th 597, 606, 88 Cal.Rptr.2d 239 (1999)). The employee's right to reinstatement is unwaivable but limited. The employer has certain defenses, including that an employee would have been fired had he or she been continuously employed during the CFRA leave period. *See, Richey*, 60 Cal.4th at 919. The provisions under the FMLA are similar. *See, id.* (citing 29 U.S.C. §2614(a)(1)).
[4] *Id.*
[5] *Richey*, 60 Cal.4th at 913.
[6] *Id.*
[7] *Id.* at 915.

[8] *Id.*
[9] *Id.* at 919.
[10] *Id.*
[11] *Id.* at 916.
[12] Cal. Civ. Proc. Code §1280 *et seq.*
[13] 9 U.S.C. §10 *et seq.*
[14] *Richey*, 60 Cal.4th at 916 (citing Civ. Proc. Code §1286.2(a); 9 U.S.C. §10(a)).
[15] *Id.* at 916 (citing Civ. Proc. Code §1286.6; 9 U.S.C. §11).
[16] *Id.*
[17] *Id.* at 917.
[18] *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 32, 10 Cal.Rptr.2d 183 (1992).
[19] *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 99 Cal.Rptr.2d 745 (2000).
[20] *Id.* at 106.
[21] *Id.* at 107.
[22] *Pearson Dental Supplies, Inc. v. Superior Court,* 48 Cal.4th 665, 108 Cal.Rptr.3d 171 (2010).
[23] *Id.* at 670.
[24] *Id.*
[25] *Id.*
[26] *Richey v. Autonation, Inc.*, 60 Cal.4th 909, 920-21, 182 Cal.Rptr.3d 644 (2015).
[27] *Id.* at 921.
[28] *Williams v. Chino Valley Indep. Fire Dist.*, 61 Cal.4th 97, 186 Cal.Rptr.3d 826 (2015).
[29] Cal. Civ. Proc. Code § 1033.5(c)(2). California Civil Procedure Code section 1033.5 lists the types of expenses that are recoverable.
[30] Civil Procedure Code section 1032(b) provides that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding."
[31] *Williams*, 61 Cal.4th at 100.
[32] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) ("*Christiansburg*").
[33] *Williams*, 61 Cal.4th at 100 (quoting *Christiansburg*, 434 U.S. at 422) ("In *Christiansburg*, the high court interpreted this discretionary provision as creating a different standard for awards of fees to prevailing defendants than to prevailing plaintiffs[.]").
[34] *See Williams*, 61 Cal.4th at 103-104. *Williams* discusses and ultimately disapproves of *Perez v. County of Santa Clara*, 111 Cal.App.4th 671, 3 Cal.Rptr.3d 867 (2003), *Knight v. Hayward Unified School District*, 132 Cal.App.4th 121, 33 Cal.Rptr.3d 287 (2005), and *Hatai v. Department of Transportation*, 214 Cal.App.4th 1287, 154 Cal. Rptr.3d 659 (2013). *Williams,* 61 Cal.4th at 115.
[35] *Williams*, 61 Cal.4th at 102-03.
[36] *Id.* at 102.
[37] *Id.* at 109.
[38] *Id.* at 115.
[39] *Tract 19501 Homeowners Ass'n v. Kemp*, 60 Cal.4th 1135, 184 Cal.Rptr.3d 701 (2015) ("*Kemp*").
[40] Cal. Civ. Code §1354(c), *repealed and reenacted without change on Jan. 1, 2014 as* Civ. Code §5975(c), 2012 Cal. Stats. ch. 180, secs. 1-3 (A.B. 805). Section 1354 was repealed and reenacted without change while *Kemp* was on appeal. *Kemp*, 60 Cal.4th at ___, 184 Cal.Rptr.3d at 703 n.1.
[41] *Kemp*, 60 Cal.4th at ___, 184 Cal.Rptr.3d at 703.
[42] *Id.*
[43] *Id.*
[44] *Id.* at ___, 184 Cal.Rptr.3d at 705. *See supra* note 40.
[45] *Kemp*, 60 Cal.4th at ___, 184 Cal.Rptr.3d at 705.
[46] *Id.*
[47] *Id.* at ___, 184 Cal.Rptr.3d at 709-710. The court goes on to discuss cases decided under California Civil Code section 1717, which authorizes an award of attorney's fees to the prevailing party in an action based on a contract where the written agreement provides for the recovery of attorney's fees, where the defendant prevails by proving there is no contract. Section 1717(a) provides in part:

> In any action on a contract where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable fees in addition to other costs.

The court also discusses cases construing former Civil Code section 3176 (now section 8558), which provides for the recovery of attorney's fees in an action against a construction lender to enforce a bonded stop notice, where a defendant prevails by proving there is no bonded stop notice. *Kemp*, 60 Cal.4th at ___, 184 Cal.Rptr.3d at 710.
[48] Cal. Fam. Code §760.
[49] *In Re Marriage of Davis*, 61 Cal.4th 846, 189 Cal.Rptr.3d 835 (2015).
[50] *Id.* at ___, 189 Cal.Rptr.3d at 838.
[51] *Id.* at ___, 189 Cal.Rptr.3d at 850.
[52] *Id.*
[53] *Id.* at ___, 189 Cal.Rptr.3d at 850 n.7.
[54] *Estate of Duke*, __ Cal.4th ___, 190 Cal.Rptr.3d 295, No. S199435, 2015 WL 4509412 (Cal. Jul. 27, 2015).
[55] *Id.* at ___, 190 Cal.Rptr.3d at ___, 2015 WL 4509412, at *2.
[56] *Id.*
[57] *Id.*
[58] *Id.* at ___, 190 Cal.Rptr.3d at ___, 2015 WL 4509412, at *4.
[59] *Id.*at ___, 190 Cal.Rptr.3d at ___, 2015 WL 4509412, at *2.
[60] *Estate of Barnes*, 63 Cal.2d 58, 47 Cal.Rptr. 480 (1965).
[61] *Id.*at ___, 190 Cal.Rptr.3d at ___, 2015 WL 4509412, at *2-*3.
[62] *Id.* at ___, 190 Cal.Rptr.3d at ___, 2015 WL 4509412, at *4-*8.
[63] *Id.* at ___, 190 Cal.Rptr.3d at ___, 2015 WL 4509412, at *8.
[64] *Id.*
[65] *Id.* at ___, 190 Cal.Rptr.3d at ___, 2015 WL 4509412, at *14-15.
[66] *Id.* at ___, 190 Cal.Rptr.3d at ___, 2015 WL 4509412, at *18.
[67] *DKN Holdings, LLC v. Faerber*, 61 Cal.4th 813, 189 Cal.Rptr.3d 809 (2015).
[68] *Id.* at ___, 189 Cal.Rptr.3d at 814-15. The court noted the landlord could have, but did not, seek to add the other partners to the first judgment under California Civil Procedure Code section 989, which permits a judgment creditor request a court order named but un-served joint debtors to show cause why they should not be bound by a judgment. *Id.* at 814 n.4. The court also observed Section 989 is permissive, not mandatory. *Id.*
[69] *Id.* at ___, 189 Cal.Rptr.3d at 814-15.
[70] *Id.* at ___, 189 Cal.Rptr.3d at 816-17.
[71] *Evan Zohar Const. & Remodeling, Inc. v. Bellaire Townhomes, LLC,* 61 Cal. 4th, 189 Cal.Rptr.3d 824 (2015) ("*Evan Zohar*").
[72] *Id.* at ___, 189 Cal.Rptr.3d at 826. Civil Procedure Code section 473(b) gives a court discretion to relieve a party from a default judgment or other adverse orders where the default was the result of "mistake, inadvertence, surprise, or excusable neglect." This section, however, also provides where the party's attorney states in an affidavit that the mistake, inadvertence, surprise, or neglect was his or her fault, a court "shall" relieve the party from the entry of default or default judgment. The relief is not mandatory if "the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or excusable neglect." *Id.* at ___, 189 Cal.Rptr.3d at 830 (quoting Cal. Civ. Proc. Code §473(b)).
[73] *Id.* at ___, 189 Cal.Rptr.3d at 826-27.
[74] *Id.* at ___, 189 Cal.Rptr.3d at 827.
[75] Civ. Proc. Code §1008. Civil Procedure Code section 1008(a) provides:

> When an application from an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The motion for reconsideration must be supported by a declaration.

Additionally, courts interpret this statute to require a moving party show it was diligent in presenting the motion for reconsideration and provide a satisfactory explanation for not having presented the new or different facts sooner. *Evan Zohar*, 61 Cal.4th at ___, 189 Cal.Rptr.3d at 825-26 (citing *Cal. Peace Officers Ass'n. v. Virga*, 181 Cal. App.4th 30, 45-46 & 46 nn.14-15, 103 Cal.Rptr.3d 699 (2010); *Garcia v. Hejmadi,* 58 Cal.App.4th 674, 688-90, 68 Cal.Rptr.2d 228 (1997)), 830-31 (citing *Virga,* 181 Cal. App.4th at 46-47 & 46 nn.14-15; *Garcia*).
[76] *Standard Microsys. Corp. v. Winbound Elecs. Corp.*, 179 Cal.App.4th 868, 102 Cal. Rptr.3d 140 (2009).
[77] *Evan Zohar,* 61 Cal.4th at ___, 189 Cal.Rptr.3d at 828.
[78] *Id.*
[79] *Evan Zohar*, 61 Cal.4th at ___, 189 Cal.Rptr.3d at 831-35. The court specifically disapproved of *Standard Microsystems Corp. v. Winbound Electronics Corp.*, 179 Cal.App.4th 868; *Ron Burns Construction, Inc. v. Moore,* 184 Cal.App.4th 1406, 109 Cal.Rptr.3d 417 (2010); and *Wozniak v. Lucitz,* 102 Cal.App.4th 1031, 126 Cal. Rptr.2d 310 (2002). *Evan Zohar*, 61 Cal.4th at ___, 189 Cal.Rptr.3d at 835.

Test No. 83

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. When errors appear on the face of an arbitration award, California courts generally may review such awards for errors of fact or law.
❑ True ❑ False

2. If an arbitrator violates an arbitration agreement that directs him to rule only on the basis of relevant law, a court may review the arbitration award for errors of fact or law.
❑ True ❑ False

3. Courts are authorized to vacate an arbitration award for any of the following reasons: the award was procured by corruption, fraud or undue means; the award was issued by a corrupt arbitrator; the award was affected by prejudicial conduct of the arbitrator; or the award was in excess of the arbitrator's powers.
❑ True ❑ False

4. Arbitrators exceed their powers if they issue an arbitration award which results in a violation of a party's unwaivable statutory rights.
❑ True ❑ False

5. It is not a defense to a claim for reinstatement under California's Family Rights Act that the employee would have nevertheless been fired had she continued employment, rather than be on leave.
❑ True ❑ False

6. Under the California Family Rights Act, an employee can contractually agree to waive her rights to be reinstated after a medical leave.
❑ True ❑ False

7. In a lawsuit filed under the Fair Employment and Housing Act (FEHA), a prevailing plaintiff is entitled to recovery of attorney's fees as a matter of right and it is error for a court to deny such recovery.
❑ True ❑ False

8. In a lawsuit filed under FEHA, a prevailing defendant will not be awarded its attorney's fees unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so.
❑ True ❑ False

9. The standard for awarding a prevailing defendant attorney's fees in a FEHA case is different from the standard for awarding a prevailing defendant court costs.
❑ True ❑ False

10. In a lawsuit filed under the Davis Sterling Common Interest Development Act for violation of the covenants of the governing documents of a common interest development, a prevailing defendant who proves that there is no common interest development, cannot recover attorney's fees.
❑ True ❑ False

11. If a defendant prevails in an action for breach of contract by proving that the parties never actually formed a contract, he will not be entitled to recover attorney's fees, even where the contract that the plaintiff sought to enforce provides for the recovery of attorney's fees.
❑ True ❑ False

12. In determining the date of separation for purposes of dividing property pursuant to Family Code § 771(a), the fact that a husband and wife continue to live together in the same home is but one of several factors to be considered.
❑ True ❑ False

13. As a result of the holding in the case of *In re Marriage of Davis,* evidence that a husband and wife live separately, even though they live in the same home, can never be admissible.
❑ True ❑ False

14. Where a will is unambiguous, extrinsic evidence is not admissible to prove that the testator had an intent different from that which appears in the four corners of a will.
❑ True ❑ False

15. Extrinsic evidence may be admitted to reform a will that is unambiguous, if such evidence is proven by clear and convincing evidence.
❑ True ❑ False

16. The only procedure to hold a co-obligor liable on a judgment is to join all of the co-obligors in the same action.
❑ True ❑ False

17. If a judgment creditor files a motion to show cause to add a co-obligor who had been named in a complaint but who evaded service and was not served, CCP §989 requires the court to add such joint debtor to the judgment.
❑ True ❑ False

18. A defendant, sued on a contract in which the plaintiff previously had obtained a judgment against a different party to the contract for the same debt created by that contract, can successfully defend based on the doctrine of claim preclusion.
❑ True ❑ False

19. Where a party files a motion for reconsideration by presenting evidence that is new from evidence presented in a prior motion seeking the same relief, so long as the motion is filed within 10 days and truly contains new evidence, the motion should be granted.
❑ True ❑ False

20. A second motion for relief from a default judgment filed pursuant to CCP §473(b) must comply with the requirements of CCP §1008.
❑ True ❑ False

MCLE Answer Sheet No. 83

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:

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

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

_____
Credit Card Number Exp. Date

_____
Authorized Signature

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

Name_____
Law Firm/Organization_____
_____
Address_____
City_____
State/Zip_____
Email_____
Phone_____
State Bar No._____

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

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

Meet the New SFVBA President
Carol L. Newman

By Irma Mejia

On September 24, the SFVBA welcomes its 85th President, Carol L. Newman. A thoughtful leader, Newman enters the role with a long-term vision of inclusion and growth for the bar association. She also establishes a significant milestone in the SFVBA's history as its first openly LGBT president.

ON SEPTEMBER 24, THE SAN FERNANDO VALLEY Bar Association will install its 85th president, Carol L. Newman, at Braemar Country Club in Tarzana. A thoughtful leader, Newman brings to the Bar 38 years of experience as a litigator and trailblazing community member. She steps into the SFVBA's top leadership role as its first openly LGBT president.

Raised in Connecticut, Newman received her undergraduate and graduate degrees from Brown University and her law degree from George Washington University School of Law. Early in her career, she worked as an anti-trust prosecutor with the United States Department of Justice before joining the private sector and becoming partner at the firm of Rosen, Wachtell and Gilbert in Los Angeles and the national firm of Keck, Mahin and Cate.

She established her own law firm in 1994, a practice she successfully maintained for 18 years. In 2012, she became a partner in the law firm of Alleguez & Newman, LLP in Woodland Hills, where her practice focuses on real estate and business litigation and legal issues relating to unmarried couples, particularly palimony or *Marvin* cases.

A longtime SFVBA member, Newman has held several roles of leadership within the Bar, where she is regarded for her intellect and innovative approach to the Bar's policies and programs. Over the years, she has served as Chair of the Business Law & Real Property Section and has been an active member of the Bar's Inclusion & Diversity, Bench-Bar, and Membership & Marketing Committees. She has also been a speaker at several MCLE seminars and contributed articles to this publication.

Her advancement to the office of President is welcomed widely by Bar members and staff. "Carol is a dynamic and experienced leader," says outgoing SFVBA President Caryn Brottman Sanders. "She is never satisfied with the status quo and is not afraid to get her hands dirty, digging in to find a solution and help implement it."

SFVBA Director of Education & Events Linda Temkin agrees. "Carol is forward-thinking and has a vision for the Bar that will extend beyond her presidency," she says. "She is attuned to our attorneys' needs and is appropriately focused on growing the Bar. She also strives to be inclusive. With her leadership, our Bar can become even more diverse."

Despite her East Coast upbringing, Newman remains steadfastly devoted to the Southern California community she calls home, where her interests extend beyond the practice of law and into local civic affairs. She is a current member of the Lake Balboa Neighborhood Council and a former board member of Commercial Real Estate Women (CREW)-LA and California Women Lawyers. She has also served as the first president of the Los Angeles City Board of Taxicab Commissioners and vice president of the Los Angeles City Transportation Commission. Adding to her accomplishments, she also ran for Attorney General of the State of California in 1986. Running on a third-party ticket, she earned a respectable 128,000 votes, or about two percent of total votes.

Her leadership experience within the SFVBA and the community has prepared her to meet the challenges of the upcoming year. Along with the goal of increasing the value of Bar membership, she has set for her presidency the following theme: "Claim Our Power," referring to the SFVBA's position as one of the region's most prestigious bar associations.

Newman begins her presidency with the confident backing of her peers. "Carol has already demonstrated her commitment to growing and improving the bar association," says Sanders. "I look forward to seeing her implement her ideas and to helping her see them through."

Newman shared her thoughts on the state of the bar and her plans for the upcoming year with *Valley Lawyer*. Her responses will provide members with a candid picture of her clear leadership style and priorities.

Q: You'll be installed as the first openly LGBT president in the SFVBA's history. How do you feel about being a part of this significant milestone?

A: I feel very proud that the SFVBA, now in its 90th year, has chosen me to be the first openly LGBT president. It was only a very few years ago that LACBA installed its first openly LGBT president and now our Bar is right there alongside the county bar.

As a child growing up, I always felt different. This is a common experience of LGBT people—we don't always know why we feel different from everyone else, but we sometimes do. I tried to compensate by being an overachiever. So I became one of the first female co-presidents of the Lesbian and Gay Bar Association (then known as Lawyers for Human Rights) in 1991; the first president of the city's Taxicab Commission; and probably the first openly gay candidate for State Attorney General.

The presidency of the Bar, in my opinion, is the greatest achievement, and I look forward to serving our more than 2,000 members.

Q: What do you think is the state of the Bar's diversity efforts? Do you think more can be done?

A: More can always be done, but we have progressed in our efforts. Our Inclusion & Diversity Committee, headed by John Stephens, has been very active, and is seeking to assist minority students in community colleges who want careers in the legal profession. That committee is also meeting with Valley judges to increase the Bar's profile.

The Bar is also a valued member of, and the only regional bar that is a member of, the Multicultural Bar Alliance (MCBA), the best group of bar leaders in L.A. County. The MCBA is comprised of the movers and shakers of all of the ethnic and minority bars in the region.

Soon we will have our first meeting with the National Lawyers Guild and the leaders of local Latino bar associations, including the Mexican American Bar Association (MABA). I think we can probably learn a lot from MABA and I'm looking forward to a relationship with them. We are trying to see how we can help each other as two large but independent organizations. I also want MABA members to learn more about the SFVBA and see it as a welcoming group so that members who have a connection to the Valley may consider joining our organization.

We have also made progress in diversifying our Board of Trustees. Our membership is comprised of people from the many varied ethnic groups of the Valley. Additionally, our Bar founded the Law Post Program in local high schools, which was designed to assist minority groups in transitioning into the legal profession. The Law Posts have proven so successful that they have now taken on a life of their own and have been spun off into a nonprofit that will be citywide.

More can always be done, but great progress has been made just in the time I have been on the Board.

Q: In your upcoming term, what issues or programs do you plan to focus on the most? What do you think can be improved? And what do you think already works well?

A: I plan to focus on membership, specifically in identifying and implementing the reasons why a lawyer should join the SFVBA. Why should a lawyer pay money to join an organization like ours? What benefits do lawyers want and what can we provide?

Additionally, I plan to focus on sponsorships. It was my idea a couple of years ago to form a Sponsorship Committee. It is now an active committee which will bring in revenue to assist us in providing benefits to our members.

Everything has changed in the last ten years, or perhaps even in the last five years. Old assumptions may no longer be valid. We need to keep abreast of what lawyers want, in this post-recession era. I think we are very fortunate to have as the head of our Membership & Marketing Committee our new Secretary, Alan Kassan, who is a forward thinker, and as the head of our Sponsorship Committee, Kathy Neumann, who is a motivator.

As far as what already works well, I believe that all of our committees are working well, but we need further progress in the two committees discussed above. This is a function of changing circumstances in the legal profession.

Finally, some of our sections need new blood or new ideas to generate more income. I intend to implement webinars to try to get more participation in certain sections. All of the comparable bar associations have already implemented webinars.

Q: What initially made you want to become involved in leading the SFVBA?

A: Truthfully, although I was on the Board for several years, leading the SFVBA was never my intention. I was just a happy Board member until a former President asked me to move up and become an officer. He reached down and lifted me up. That was a wake-up call. I realized that this would be the best thing I could do for public service and giving back to my community at the end of my legal career. There are very few organizations that have the prestige and gravitas of the SFVBA. This position fell into my lap, honestly, but I have genuinely appreciated the unexpected opportunity to have an impact.

Q: What was your first job out of law school?

A: I was selected for the U.S. Department of Justice's honors program in its Antitrust Division in Washington, D.C. Ordinarily, the DOJ did not hire lawyers right out of law school. That was a great government job, evaluating whether mergers might be anti-competitive and conducting criminal grand juries, investigating possible *per se* antitrust violations.

While it was a great government job, it was also, by definition, a government job. I realized that I was better suited for the private sector. I went into the private sector in 1980, after which I was an associate and then a partner in two law firms, including a 350-lawyer firm headquartered in Chicago. I formed my own law firm in 1994.

Q: Can you describe your first court appearance?

A: I have no recollection, as it occurred long ago. It must be a repressed memory. I'm sure it wasn't pleasant. Hopefully, I've honed my skills since then.

Q: Why did you become a lawyer?

A: I never wanted to become a lawyer. When I was a child in the 1950s, I had vague ideas about other professions. My mother taught me never to rely on anyone else and always to be able to support myself, which was pretty radical in the 1950s. I graduated with degrees in English literature, but realized that that wouldn't be a big moneymaker. I toyed with the idea of becoming an English professor, but then decided to go to law school because I didn't know what else to do.

The first time I went to law school, it didn't take and I dropped out. But after a couple of years, I decided to go back and finished with honors. It was then that I realized this was the perfect profession for me.

I didn't have lawyers in my family, so I had no one to relate to. It was only when I went back to law school that I realized I was made to be a lawyer. I've been a proud litigator for 38 years. I never looked back and never wished I had done anything else.

Q: Do you have any advice to give new lawyers or law school students?

A: Don't get discouraged. Get as much training in practical lawyer work as you can, even in law school. Work for another lawyer if you can. This profession isn't for everyone, but once you start to practice, you will find out if it is or isn't right for you. Try to find a mentor who can help you through the rough spots. Don't give up. This profession has many rewards and allows you to truly help people.

Q: What do you do for fun?

A: I'm a political junkie so I like to stay involved in politics in some way. Right now I'm a member of the Lake Balboa Neighborhood Council and on their business development and land use committees. I also like to watch old movies (my favorite channel is Turner Classic Movies) and read books, mostly fiction and mysteries. Additionally, I like learning about the history of Los Angeles. It is truly a fascinating city!

Q: What is your favorite movie?

A: I can't answer this as phrased. I have lots of favorites, depending on my mood, including *Duck Soup, A Place in the Sun, The Bad and The Beautiful, The Best Years of Our Lives, Tootsie, Some Like It Hot, Blazing Saddles*, and *Double Indemnity.*

Q: What is your favorite book?

A: I think it must be *The Forsyte Saga*, the collection of novels by John Galsworthy, because I've read them so many times. My second favorites are the novels of James M. Cain, which I've also read and re-read. I'm both an Anglophile and an LA-phile.

Q: What is your favorite ice cream flavor?

A: Chocolate, chocolate, and more chocolate. There's never enough chocolate.

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

FRO-YO NETWORKING MIXER

On July 21, the SFVBA hosted a networking mixer at Menchie's Frozen Yogurt in Sherman Oaks. Members mingled while enjoying sweet treats. The event was sponsored by Hutchinson and Bloodgood, LLP, a full-service accounting firm and the SFVBA's Silver Sponsor.

SWEARING-IN CEREMONY OF COMMISSIONER **MICHELLE SHORT**

Members of the SFVBA Board of Trustees, Family Law Section and Bar executive staff were on hand on July 24 to witness former SFVBA Trustee Michelle Short being sworn in as a Los Angeles Superior Court Commissioner by Northwest District Supervising Judge Huey Cotton.

VALLEY COMMUNITY LEGAL FOUNDATION OF THE SFVBA

COLUMBUS DAY GOLF TOURNAMENT

Proceeds to Benefit Homeless Veterans

*Monday, October 12, 2015**

BRAEMAR COUNTRY CLUB • TARZANA

**Columbus Day. Courts closed.*

9:00 AM – 11:00 AM Check-in / Continental Breakfast
10:00 AM – 11:00 AM Putting Contest
11:15 AM Shotgun Start—Best Ball Format per Group
Bar-B-Que Lunch Served at the Course / Open Bar
5:00 PM Awards Reception and Dinner

GOLFER'S PLAYER PACKAGE

- $150 "Early Birdie" Special (Purchase before September 1st)
- $175 (Purchase after September 1st)
- $560 "Early Birdie" Foursome Special (Purchase before September 1st)
- $540 Sponsor Active Military Personnel Foursome (32 Invited)
- $140 Sponsor One Active Military Personnel
- $600 Foursome (Purchase after September 1st)
- $150 Sitting/Retired Judges

Includes green fees, cart, tee gifts, beverages, continental breakfast, luncheon and awards reception and dinner.

FREE GIFT BASKET to each golfer. $275 Value, including one custom built pitching wedge and one hybrid fairway metal custom built courtesy of WARRIOR CUSTOM GOLF. (shipping not included).

SPONSORSHIP OPPORTUNITIES**

Eagle Sponsor $5,000
Includes two golf foursome packages, two additional tickets for awards dinner, on-course beverage station with sign, sign at tee, name/logo prominently displayed in promotional material and banner.

Birdie Sponsor $2,500
Includes one golf foursome package, one additional ticket for awards dinner, name/logo included in promotional material and sign at tee.

Hole-in-One Sponsor $1,500
Sponsorship sign will be placed on a par 3 hole on course. May hand out gifts and info to the golfers at sponsored hole. Includes two tickets for awards dinner.

Tee Sponsor $250
By sponsoring a tee/green sign on the course your firm or company can show support for the VCLF's goodworks. May hand out gifts and information to the golfers at sponsored hole. Includes two tickets for awards dinner.

OTHER SPONSORSHIP OPPORTUNITIES**

Cocktail Reception Sponsor $2,000
The awards reception will be a fun filled event! We will place sponsorship signs on the bar. Includes two tickets for awards dinner.

Lunch Sponsor – SOLD $1,500

LH Lewitt Hackman
Lewitt, Hackman, Shapiro, Marshall & Harlan

Photo Sponsor $1,700
Every golfer will receive a framed picture of their foursome and an individual shot of each golfer. Your logo will be included on the frame. Includes two tickets for awards dinner.

Beverage Station Sponsor – SOLD $1,500

Leavitt Group

Putting Contest Sponsor $1,000
We'll display a sign at the putting contest showing your support. We'll mention your sponsorship when we announce the winner of the putting contest. Includes two tickets for awards dinner.

Sponsor a Veteran $140 per veteran $560 per foursome

SOME OF LAST YEARS' SPONSORS

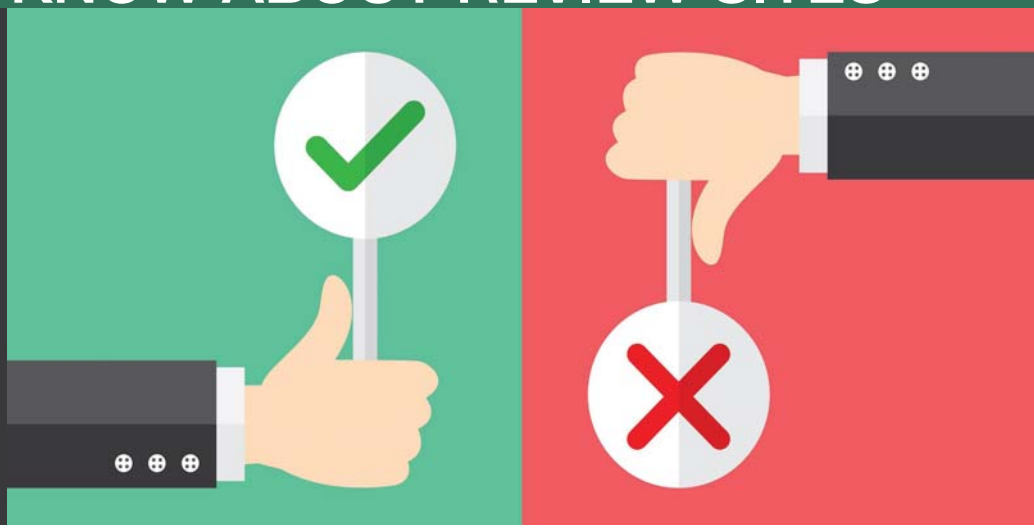
G&B Greenberg Bass
Galpin Ford
Greg Rynerson Bail Bonds
Wasserman Comden Casselman & Esensten
RIMA Renaissance Imaging Medical Associates
Law Offices of Marcia Kraft
Lexus of Woodland Hills
Dennis P. Zine, Councilman District 3, City of Los Angeles
LH Lewitt Hackman
Law Offices of Seymour Amster
Heffernan Insurance Brokers
Claudia & Mitchell Block (Commissioner)

Contact Bill Speer (818) 999-5197 or email bspeeriii@yahoo.com for player and sponsorship information.

****All sponsors receive recognition on the VCLF website, in *Valley Lawyer* magazine and acknowledgment at awards dinner.**

5 things ATTORNEYS SHOULD KNOW ABOUT REVIEW SITES

By Deborah S. Sweeney



ATTORNEYS RELY HEAVILY ON client referrals and word-of-mouth marketing, which makes sense as lawyers were prohibited by law from advertising for seventy years, until their right to market was restored in 1977 by the Supreme Court in *Bates v. State Bar of Arizona*.[1] And while Bates restored an attorney's right to advertise, state bar associations still heavily regulate the content of any marketing. The professional field has adapted to this in various ways, but recent developments in online marketing have thrown acceptable practice into question.

Online review sites have only been around for about a decade—sites specifically for the legal profession are even younger. There is still a considerable amount of debate as to how active an attorney should be on those sites, and whether practicing lawyers should even engage with them at all. To help clear the murky water of online feedback, here are five things every practicing attorney should know about review sites.

Review Sites Are Here to Stay

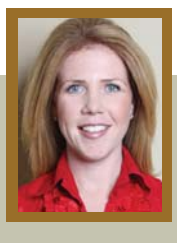
For years, people have asserted that these sites are a passing fancy. Either people will get tired of them, or they'll eventually get sued and shut down for defamation. In fact, attorneys have tried to do just that. In *Ratingz, Inc. v. Adrian Philip Thomas, P.A.*,[2] a lawyer based in Florida attempted to force one site to remove all the listed negative ratings. The case was settled with the attorney agreeing to drop all legal threats, and the site keeping the reviews listed. Further, studies are consistently finding a growing number of people who trust, use, and read review sites. So while there are plenty of legitimate complaints against, and problems with, online review sites, they have not diminished in popularity.

Most Clients Prefer Yelp

This surprises a lot of attorneys. Yelp is associated with dinner recommendations, not law firms. But a survey of over 3,000 users found that 58% of respondents turn first to Yelp when researching attorneys.[3] It is still important to pay attention to specialty sites like Avvo and Super Lawyers, but those should not be the sole focus—attorneys need to look more broadly. Unfortunately, interactions with sites like Yelp are more likely to conflict with the rules of professional conduct.

Rule 1-400 Might Apply

The State Bar of California hasn't set any hard and fast rules as to the extent attorneys can use review sites. Obviously, firms cannot publish testimonials as a form of marketing without including an express disclaimer, like "This testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the



Deborah S. Sweeney holds a JD/MBA from Pepperdine University, and her experience includes corporate and intellectual property law. Shortly after becoming in-house counsel at MyCorporation Business Services, Inc, she was promoted to general manager and oversaw its acquisition by Intuit. She later became CEO of MyCorporation. She can be reached at dsweeney@mycorporation.com.

outcome of your legal matter."[4] But even interacting with a review site could qualify as a form of communication.

Maintaining the page, interacting with reviews, and even adding pictures could mean an attorney has taken an active role on the site, and any messages on the site would arguably be by or on behalf of that attorney. Opinion is still split on this issue, but it's wise to play it safe and, if able, add a disclaimer to any site that doesn't clearly outline one in its terms of use.

Clients Look for Experience and Credentials First

Often, prospective clients look at online reviews as an initial step. This is not where an attorney needs to cement the firm as the best choice for the client. According to the study mentioned above, 48% of users admitted to looking first for the attorney's years of experience. Following that are credentials, and then education. Any attorney that takes an active role in maintaining their respective profile on an online review site should ensure that information is included and easily accessible.

Monitoring Is in the Attorney's Best Interest

This is true especially if that attorney is active on the site, and has included a means, or a call to action, for prospective clients to contact the firm on the page. Bad reviews will, obviously, impact a potential client's perception of an attorney, and it is important to know with which presumptions clients are approaching. But even a glowing review, if it contains untrue information, or highlights an expertise the attorney does not have, could contribute to a violation of Rule 1-400. Few sites allow the person reviewed to remove an endorsement, but an attorney can still show an attempt to disavow a misleading review by flagging it, or including a disclaimer.

The rules of professional conduct for online marketing are in a constant flux. Few matters are defined in hard terms, and while attorneys can, thankfully, use formal opinions like 2012-186 issued by the State Bar as a benchmark, it is ultimately up to the individual attorneys to distinguish what hard rules apply.

Online review sites are a major part of prospective client outreach, so it behooves attorneys and firms to, at the very least, monitor what is being said online. It is then up to them to decide how active of a role to take, and to ensure any actions taken are befitting of the State Bar's Rules of Professional Conduct.

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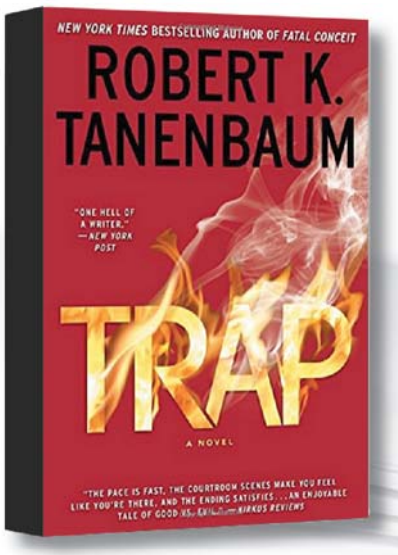
[1] 433 U.S. 350 (1977).
[2] No. 5:12-cv-00868-HRL (N.D. Cal. dismissed Apr. 9, 2012) (unreported).
[3] Chantelle Wallace, Software Advice, Inc., *How Clients Use Online Legal Reviews, IndustryView*, 2014 (May 28, 2014), http://www.softwareadvice.com/legal/industryview/how-clients-use-legal-reviews-2014.
[4] Cal. State Bar R. of Prof. Conduct 1-400, std. (2).



A Trial Thriller: Robert Tanenbaum's *Trap*

By Reid L. Steinfeld

"Like a hunter setting a trap for a wary tiger, his purpose had been to lead her down a path to the witness stand."

TRAP MARKS THE 27TH BOOK IN THE "BUTCH Karp" series written by Robert K. Tanenbaum. This book is very fast-paced and difficult to put down until you're finished. It sucks you in immediately and just takes off from there.

The nice thing about Tanenbaum's books is that you do not have to have read his previous books to understand the characters. However, having read several of his books, it is fun to get reacquainted with those characters.

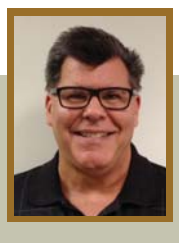
Butch Karp is the elected District Attorney of New York County. Karp's family is always front and center in Tannenbaum's books and this one is no different.

Trap begins with Karps' twin 17-year-old boys, Zak and Giancarlo, being held captive by a neo-Nazi bent on revenge for the death of his mother. The book is written in current times and has two major plot lines that ultimately come together: a small segment of neo-Nazi's in New York and a battle by the New York public schools to prevent the growth of charter schools.

The first part of the book takes the reader through a rollercoaster of emotions from outright disgust to sadness and near hatred as you learn about a little-known segment of the Holocaust (an issue relating to Jewish children raised by non-Jewish families). Even though this book is a legal thriller, it teaches some history about Jewish life during World War II and how people were treated in their communities. The author takes us through plot twists that seem difficult to grasp but it is done in such a way as to make it believable and understandable.

Tannenbaum cleverly ties the two plot lines together through the character who is the head of the charter school initiative and who is also a Holocaust survivor. When a bombing occurs, the plot lines become intertwined, leading to what Butch Karp does best: prosecute bad people.

Trap could have been wrapped up by chapter 19 but in Tanenbaum-style, chapter 19 begins nine months later at trial. For lawyers like myself, who do not practice criminal law, the trial seems believable with the evidence and witness testimony that is presented. The focal point of the entire second half of the book is the trial, which means the



Reid L. Steinfeld has been an attorney licensed in California since 1979. He is employed by the receivables management firm Grant & Weber in Calabasas. His practice includes representing providers before the Workers' Compensation Appeals Board as well as in civil court. He may be reached at reid.steinfeld@grantweber.com.

thrilling action of the story has ended with the focus shifted to the serious business of trial. For the first time, the reader understands why the book is named *Trap*.

With the presentation of facts and evidence, the reader feels like a member of the jury ready to deliberate. With modern-day technology, the reader learns how you may be able to determine when and to who emails were sent, even if the computer has been wiped clean. As a lawyer, I found this area of the trial fascinating and actually learned something, even though this book was a fictional novel.

What I liked about the book was that it is written for most everyone. Lawyers will find the book generally accurate in its portrayal of a trial. For the layperson, there is enough action that one would not be bogged down by the legal wranglings that occur with most courtroom scenes.

Trap is well-written, understandable, and includes several plot lines that are joined together. Although I would not call the courtroom scene dramatic, the writer takes you down a logical path and you feel satisfied at the end, hoping that a new Butch Karp book will be written soon.

The downside of this book is that since it is the 27th book written with the Butch Karp character, the writing seems a little formulaic. This book is not intellectually challenging and appears to follow a script. However, as an escape from day-to-day life and for a good afternoon read, I highly recommend it.

Fall Lineup of Events

AMY M. COHEN
SCVBA Immediate Past President

amy@cohenlawplc.com

IT SEEMS THAT I BLINKED AND, once again, a year has flown by. Summer is gone and school has started. Admittedly, it is difficult to think about fall and crisp autumn air when I sit here, at press time, watching the thermometer creep past 100°. I hope that all of you enjoyed your summer, and if the children are back to school, I hope you are getting a bit more peace and quiet.

As the calendar flips to September, the Santa Clarita Valley Bar Association (SCVBA) will once again feature an author of legal thriller novels at our Fourth Annual Dinner with the Author. This year's event, held at the Tournament Players Club (TPC)—Valencia on Thursday, September 17, will feature attorney and author Robert Rotstein. Open to the general public, tickets are $65 and include dinner with the presentation. Table sponsorships are also available (at varying levels), which include tickets to the event, recognition at the event and in our program, and copies of the speaker's books.

An attorney with extensive experience in intellectual property and entertainment law, Mr. Rotstein is a partner with Mitchell, Silberberg & Knupp, where he co-chairs the firm's intellectual property department. Raised in Culver City, Robert became hooked on legal dramas such as *Perry Mason, The Defenders*, and even lesser known shows like *Judd, for the Defense* and *The Young Lawyers*. He received his undergraduate degree from UCLA and graduated with honors from UCLA School of Law. After law school he clerked for Justice Anthony M. Kennedy, then Circuit Judge for the United States Court of Appeals for the Ninth Circuit.

Mr. Rotstein has published three books featuring his character Parker Stern. His first, *Corrupt Practices*, published in 2013, received a Booklist starred review. *Reckless Disregard* followed in 2014 and was a *Kirkus Review* Top Thriller. His latest book, The *Bomb Maker's Son*, was published in June 2015. We look forward to welcoming Mr. Rotstein to our event and hearing him speak on his experiences as both an attorney and an author. We hope that you can join us.

For ticket information or to inquire about table sponsorships, please visit our website at www.scvbar.org or contact Emily at (855) 506-9131. Plans are also in the works to have a bookseller at the event, featuring books by Mr. Rotstein, our past speakers, and other well-known legal thriller authors.

In October, the SCVBA will again feature local attorney Brian Koegle of Poole & Shaffery with his annual employment law CLE seminar. This year's event will include one hour of CLE credit and will highlight recent changes and important information for attorneys with employees and those with clients who have employees. For information or to register for the October event, please visit our website.

Our Annual Installation Dinner will be held in November, also at TPC, following the election of the 2015-2016 SCVBA Board. We will participate again in a local toy drive and will be collecting new and unwrapped toys at this event. Look for more information on this event on our website soon.

We look forward to seeing you at our upcoming events and thank you for your continued support!

NEW MEMBERS

The following new members were approved by the SFVBA Board of Trustees:

Jonathan Bakhsheshian
The Brahman Law Office
Woodland Hills
Personal Injury

Hasan Raef Barakat
Lancaster
Paralegal, Appellate

Baron J. Cerioni
Parker Milliken et al.
Los Angeles
Sports Law

Jean H. Choi
Neighborhood Legal Services of LA County
El Monte
Labor and Employment

Inna Demin
Injury Justice Law Firm LLP
Van Nuys
Personal Injury

Yeymi M. Flores
Neighborhood Legal Services of LA County
Pacoima

Stacy R. Goldscher
Nemecek & Cole
Sherman Oaks
Insurance Bad Faith

Jennifer S. Gutenberg
Anthony M. Solis, APLC
Los Angeles
Criminal

Demetra Geges Johal
Laughlin, Falbo, Levy & Moresi LLP
Pasadena
Workers' Compensation

David M. Kane
Neighborhood Legal Services of LA County
Pacoima
Healthcare

Rudolph G. Klapper
Parker Milliken et al.
Los Angeles
Labor and Employment

Ken Kronstadt
Kelley Drye & Warren LLP
Los Angeles
Business Litigation

Hunter H. Landerholm
Neighborhood Legal Services of LA County
Pacoima
Housing

Lisa Lee
Stone | Dean LLP
Woodland Hills
Litigation

Stephanie K. Lee
Neighborhood Legal Services of LA County
Pacoima
Healthcare

Diana Leon
Neighborhood Legal Services of LA County
Glendale
Landlord/Tenant

Cynthia Luna
Neighborhood Legal Services of LA County
Pacoima
Family Law

Bradford Mattes
Kleinberg & Lerner, LLP
Los Angeles
Intellectual Property

Paul McCullum
Santa Monica
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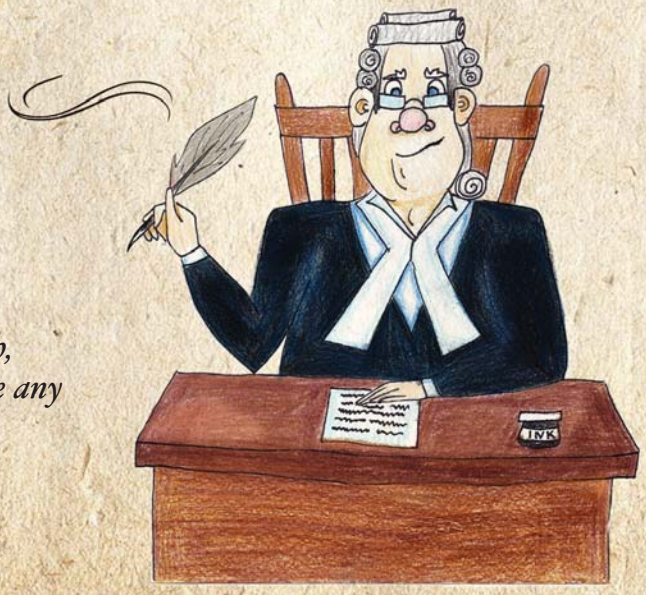
Dear Phil

Dealing with a Difficult Judge



Dear Phil,

I recently had a judge who was very difficult to deal with, which made my case much harder to litigate. Do you have any advice for dealing with these types of judges?

Sincerely,

Wanna Scream (at My Judge)

AT ONE TIME OR ANOTHER, EVERY ATTORNEY faces a difficult judge. The next time you do, keep the following tips in mind.

Know Your Judge

When your judge is assigned, check with colleagues or online to find out if he or she has any hot-button substantive or procedural issues or perceived biases. You can send out an inquiry using your SFVBA section's listserv feature, but ask people to respond directly to you instead of the entire listserv to avoid publicly insulting the judge. If you avoid irritating your judge, you avoid making a friendly judge difficult or a difficult judge more difficult.

If Necessary, Challenge Your Judge

If you feel your judge will be so difficult, your case will be jeopardized, you can reject him or her under Code of Civil Procedure Section 170.6. Problematically, however, you can generally do this only once per case and within short time limits with no guarantee that the replacement will be any less difficult. If you're in federal court, you cannot peremptorily challenge your judge.

Work with Your Judge

During your case, if you do something to irritate your judge, follow these steps: (a) apologize; (b) explain; (c) conclude, and (d) move on. For step (b), explain your actions and state that you're not giving an excuse. For step (c), state you won't do it again (e.g., file late) or how you'll fix the problem (e.g., redact account numbers). If the judge won't move on, repeat steps (a), (b), or (c) as necessary until the judge moves on, or try redirecting the judge to another issue.

If you're arguing before your judge, and you need something, like leave to amend, or need to avoid something, like sanctions: (a) be persistent but polite, as the squeaky wheel sometimes gets the grease; (b) ask the judge to explain his or her position, then address it; (c) find a sympathetic character for the judge (e.g., your client, their mother, et seq.); or (d) if you have erred or are otherwise out of options, fall on your sword and ask the judge not to punish your client for your mistake.

Conversely, don't tell your judge that his or her personal issue, like a root canal, is affecting his or her reasoning. If you believe this is the case, seek a continuance or later file a motion for reconsideration to trigger a *sua sponte* change. Don't tell your judge what another judge does unless your judge respects that judge. Finally, don't say, "If you had read my papers . . ." Instead, direct your judge to the text you wish to discuss.

Above all, don't get frustrated because if you lose your cool, you lose your case. If you get frustrated, avoid humor, especially sarcasm, unless you want to get found in contempt and fined.

Hopefully, your next judge won't be as difficult as your last, but if he or she is, these tips should help you cope.

Best wishes,

Phil

Dear Phil is an advice column appearing regularly in *Valley Lawyer* Magazine. Members are invited to submit questions seeking advice on ethics, career advancement, workplace relations, law firm management and more. Answers are drafted by *Valley Lawyer*'s Editorial Committee. Submit questions to editor@sfvba.org.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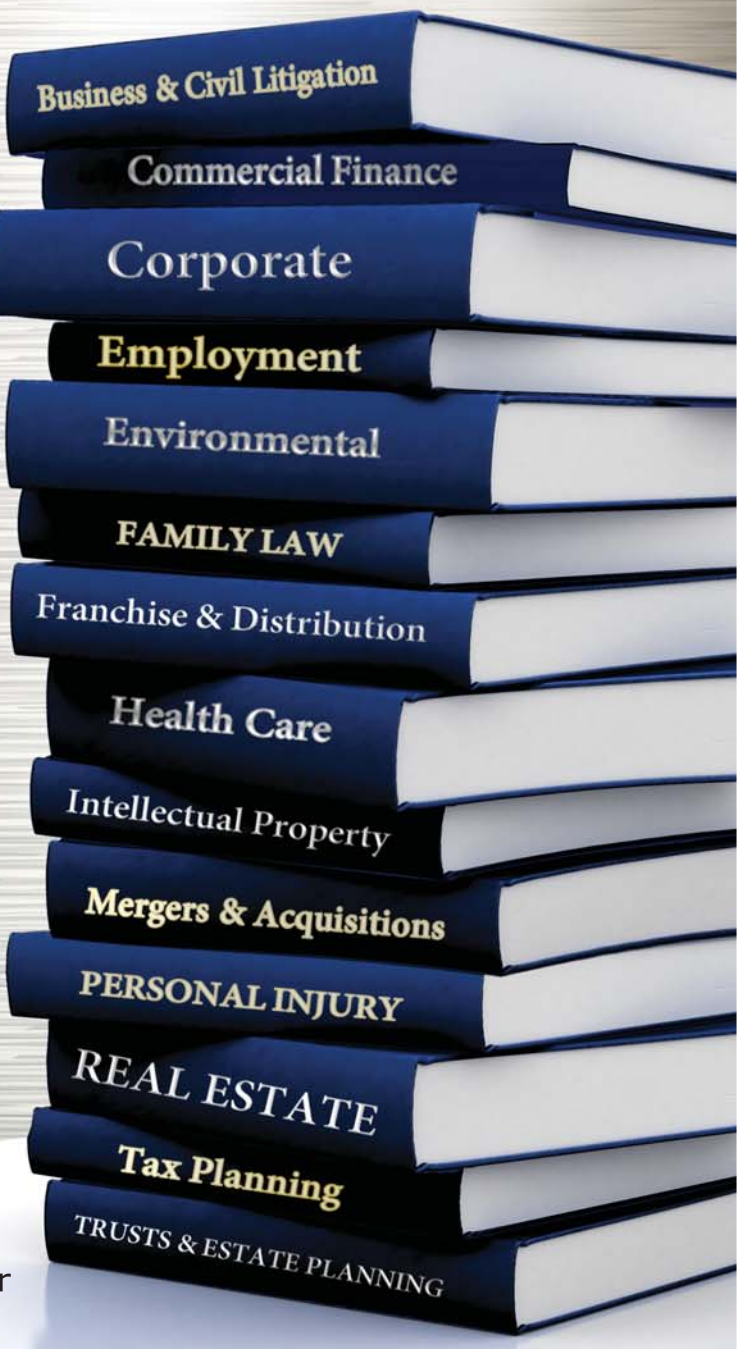

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