VALLEY LAWYER

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A Publication of the San Fernando Valley Bar Association

Special Jury Instructions: When CACI Won't Cut It

Earn MCLE Credit

Expedited Jury Trials

SFVBA Annual Judges' Night Dinner

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The Courts

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FEATURES

DEPARTMENTS

What If?

SEYMOUR I. AMSTER
SFVBA President

THIS IS A QUESTION SOME OF US ASK ourselves all the time. It is often an exercise in futility. A waste of time – neither a means of answering the question, nor a method of determining what would have happened if.

In September of 2009, I came face to face with this question, and had to consider, what if? At that time I found myself working on a death penalty case. By the time I was done working on this case, everything I had taken for granted, everything I had come to accept was challenged by this very question. For when the case was done, when the client's life had been saved, and it was time to reflect, I had to ask myself the question, what if?

Although everything I will disclose is in public record, I will only refer to the client in the death penalty case by his first name, Larry. This article is not about the death penalty, or if we should have it or not in our society. That is a political issue, to be discussed in a different forum. Instead, this is an article about a different topic that is not political in nature.

Larry had been accused of killing a storekeeper in South Central Los Angeles. He was further accused of taking money and goods from the store. Prior to this incident, Larry's adult life had been far from exemplary. He had an extensive criminal record.

Larry had been in and out of prison his entire adult life. Spending more time in prison then out – hardly ever having a job and addicted to drugs, he supported his habit by playing dice on the street.

I guess the one redeeming quality he did have was not receiving government assistance. That was not because he did not ask, instead it was because social security had listed him as dead, and he could not navigate himself through the bureaucratic procedure to correct this error. He did have two children but was not much of a father to them. He never financially supported them and was not involved in a parental role in any way whatsoever in their lives.

Larry had absolutely made no positive contributions to society. Here, I had been given the job to fight for this man's life and I could find no redeeming qualities in this individual. I was baffled and frustrated. I had gone through his entire file, and had no answers on how to prevent the ultimate sanction from being instituted. I saw death penalty written all over this file.

So I did what I had been trained to do in these situations. Gather all of the records of the client's life, from school records to records of criminal proceedings to incarceration records. I sat down and rolled up my sleeves and started to outline Larry's life.

It took no more than the first entry to send shock waves through my body. For the very first entry I entered was Larry's date and place of birth. Larry was one year younger than me. He had been born in 1958. I was born in 1957. He was born in South Central Los Angeles. I was born in the West Los Angeles area.

Two men born in the same city, at practically the same time, but living two entirely different lives – I come home each night to a nice home with respectful neighbors. Larry spent his nights in a jail cell with neighbors one would think twice before inviting over for dinner.

What if, I had been born in the socio-economic conditions Larry had been born into and Larry had been born in the socio-economic conditions I had been born into? Would it still have been me outlining his story and him sleeping in a jail cell each night, or would the roles have been reversed?

Each of us hope and believe that no matter what conditions or environment we are exposed to we will survive and succeed. But do we ever really know?

As I chronicled his life, I compared his life to mine, noting the contrasts and realizing the socio-economic advantages given to me and not to him as each of us took a step up the ladder to adulthood.

When Larry was five-years-old he had a front row seat to the Watts riots. He witnessed firsthand the pillaging, the violence, the burning. What was that like for a young child going to sleep each night among the sounds of chaos? Of course, I heard about the event in passing but slept comfortably each night not quite knowing about it or even caring, for it did not interfere with the tranquility of my life.

What about the aftermath of the Watts riots? Especially the school system, would teachers want to go and teach in the area that had been ravished by the Watts riots? Certainly the teachers

had no apprehension coming to teach in the schools in my neighborhood.

Larry's experience in a grammar school was certainly not an educational one. Larry had a learning disability which was recognized by his kindergarten teacher. Each successive year the learning disability was noted but no services were provided for young Larry. His grades clearly mirrored his learning disability with him receiving F's and D's throughout his stay at grammar school. Larry was a rather large child and so the teachers felt it was not in the best interest of the other children to hold Larry back. The records indicated that upon completion of grammar school, Larry was performing at a second grade level.

Larry's parents never made an inquiry nor monitored Larry's progress in school. They never realized that report cards were not being presented to them for signature. Larry's older sister signed the report cards for him.

Larry had his first experience with an artificial stimulus while in grammar school. He noticed the older kids in the neighborhood sniffing glue. They would use a paper bag for this purpose and abandon the paper bag once their sniffing had been completed. Larry picked up the paper bags and liked the feeling sniffing glue gave him. He felt good, it gave him a zing and it allowed him to escape from his feelings of inadequacies. He often attended school or went home being high. No one seemed to care nor notice, as Larry continued to escape into an euphoric dimension.

In contrast, I graduated grammar school after receiving a grade level appropriate education. My parents were involved in my education, monitoring my progress and attended school functions. I never had a thought nor desire to use an artificial stimulant.

Junior high school was not much different for Larry then elementary school. Without the proper foundation he floundered in middle school. But with one added dimension, Larry was a big kid, and this was the period when gangs started to emerge in the inner city. Larry was constantly being recruited to join a gang, and although he said no, this did not satisfy the evil recruiters. Larry had to often run home with gang members in hot pursuit. There were times when he was unable to evade his pursuers. His father's reaction to seeing Larry beaten up was to scold him for not being a good fighter.

Larry's home life during his junior high years was marred by the death of two of his siblings due to overdosing on drugs. Larry was close to these siblings and became depressed as a result of their loss. Because of his mother being devastated by the death of her children, there were strict rules in the house not to discuss nor mention anything about these two siblings. The records indicated that alcohol was plentiful in the house at this time, as the mother utilized alcohol to drown out her sorrow. Larry mirrored his observations and consumed alcohol as well. Once again either his parents did not notice or did not care. Not only did he consume alcohol during these years he also moved on to marijuana.

In comparison, my parents were concerned about the education I would receive in public school, so they enrolled me in private school where I flourished. During these years, my grandmother died. I remember being able to express my sorrow as the family would get together and talk about the wonderful things my grandmother did for all of us.

By the time Larry entered high school, he was barely reading at a fifth grade level. He wanted to play football but was not allowed because of his grades. There was one semester at high school when a noticeable improvement in his grades occurred. It was during this year he was able to take an auto mechanic class. It was only for one semester, for the program lasted for that semester and did not continue into the next. After that one semester, Larry's grades suffered as did his attendance and he became disenchanted with school.

It was during his high school years that Larry became involved with the criminal justice system. He went to a theater, paid for a ticket with a $50 bill and only received change for a five dollar bill. Larry complained, the manager refused to give Larry additional change, and Larry threw a trash can through a plate glass window.

Larry was arrested and the juvenile court had to decide what to do with Larry. The first option was for Larry to enlist in the military. But the military would not accept him because he could not read nor write at a level acceptable for enlistment. His mother was shocked by this and chastised Larry for not being able to read nor write.

The probation officer working on a plan for Larry's juvenile case repeatedly requested Larry's mother to enroll him in an anger management program. She refused, believing there was nothing wrong with Larry. Faced with no other option, the juvenile court judge sent Larry to the California Youth Authority.

Larry got involved in the wrong crowd at the Youth Authority, committed another crime while there. The matter was transferred to adult court where he received a felony conviction. Larry left prison with a felony record, little education and no self esteem. It is in this manner that he entered the adult world seeking employment. He could not find employment, became depressed, and sought refuge from his depression through the use of crack cocaine.

In contrast, my high school education was enriching. My parents were supportive and proud as I eventually graduated college and law school. I entered the adult world with a law degree and a feeling of accomplishment and found employment readily accessible.

We all would like to think that no matter where we were born, no matter what we had to go through in life, we would be successful. But is that always true? Can I say that if I had been raised in South Central Los Angeles, if I had parents like Larry, I would have turned out the same? Can it be said if Larry was raised in West Los Angeles, if he had parents like mine, he would have turned out the same?

Thus, the question remains — what if? The answer to this question will never be known. What is known is that Larry and I did not start off on the same level playing field. I had huge advantages, as well as parental support that Larry did not have. If the playing field was the same for both of us, would Larry had taken advantage of these opportunities and made sure they were not wasted?

A precise answer to this question cannot be given. Could Larry have been saved by the time he became an adult? Maybe, maybe not. We do not know. But what we do know is that there are young Larry's in our school system at this very moment. Young children are slipping through the cracks, not receiving the proper parental guidance, nor having enough exposure to the right role models.

If educated individuals such as ourselves take the time to help them, try to reach out to them counsel them, show them someone cares, help build a public school system for them, we might not only help their lives but also help the lives of their potential victims as well. After all, if we lead an individual away from a life of crime, we not only influence his life, we also affect the lives of the individuals he would have victimized.

We will not be able to save everyone. We might not be able to save many. We might only save just one. But, the one we might save might be the one who would have committed a terrible crime. Thus, by saving one life we save at least two, the troubled youth, and the innocent victim he would have preyed upon. If we accomplish this then the question what if, ceases to become an exercise in futility, but a means of helping society.

Seymour I. Amster *can be contacted at Attyamster@aol.com.*

From the Executive Director

Honoring the Valley's Best

ELIZABETH POST
Executive Director

I WOULD LIKE TO EXTEND A PERSONAL INVITAION to all our members, and especially the Valley's law firms, to attend and support the San Fernando Valley Bar Association's Annual Judges' Night Dinner on February 24 at the Warner Center Marriott. It is the SFVBA's must-attend event of the year, with hundreds of attorneys and bench officers turning out to socialize and honor the best of the Valley's Bench.

The evening's honorees include SFVBA Judge of the Year Susan M. Speer. Judge Speer is respected by the Bar for her demeanor, consistency and evenhandedness on the Bench. (Read Valley Lawyer's spotlight on Judge Speer on page 12 to find out which U.S. president she has a high regard for.) A graduate of Canoga Park High School, she is also admired for her long-standing service on the Board of Directors of the Valley Community Legal Foundation of the SFVBA.

Judge Morton Rochman will receive the Stanley Mosk Legacy of Justice Award. Since its establishment a decade ago, this award has been bestowed upon judicial luminaries Harry Pregerson, Barry Russell and Michael Nash. First appointed as a judge 40 years ago by Governor Ronald Reagan, Judge Rochman has spent the last 25 years presiding over juvenile delinquency proceedings at Sylmar Juvenile Court.

Northeast and North Central Supervising Judge Mary Thornton House will be recognized with the SFVBA Administration of Justice Award. Beginning in 2009, Judge House facilitated a state-wide working group of diverse organizations and interests which shaped and brought to fruition California's new Expedited Jury Trial (EJT) Program. (An analysis of EJT can be found on page 9 of this issue.)

Los Angeles Superior Court Presiding Judge Lee Edmon will be on hand to pay tribute to Judges Speer, Rochman and House. Your special invitation for this must-attend event can be found on page 24. See you there!

Liz Post *can be contacted at epost@ sfvba.org or (818) 227-0490, ext. 101.*

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Wells Fargo Insurance Services in partnership with the San Fernando Valley Bar Association offers an exclusive **Lawyers Professional Liability** insurance program for law firms of 1-10 attorneys.

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Expedited Jury Trials: It's About Time!

By Judge Mary Thornton House

California's new Expedited Jury Trials (EJT) legislation and statewide rules of court embody erstwhile concepts now needed in this new century of challenges. It is the quintessential idea whose time has come. So, why and how did this option find its way into the arsenal of lawsuit resolution weaponry? And, what is the new EJT?

Why This Expedited Jury Procedure Now?

The 'why' spews out of the imperfect storm of the foundering economy, shrinking resources for both the parties and the court system, and, if permitted to philosophize, electronically shortened attention spans of the internet-addicted juror. With courtroom closures, shortened clerk's office hours, continued furloughs and employee lay-offs impacting the morale of judicial officers and courtroom staff, the system strains to find the time, resources and inclination to conduct an on-average five day trial, much less a lengthy one.

When juror economy-driven angst is added to this mix, the side perceived to be wasting the jury's time gets punished by an adverse verdict or diminished award. Is there any doubt that the vanishing civil trial is the reality and not simply a perception? If a new procedure addresses these concerns without changing the known outcomes of the older system, well, to repeat, it embodies an idea whose time has come. That new procedure is California's new Expedited Jury Trial.

How Did This Happen?

In April, 2009, representatives from all facets of our justice system met in San Francisco and listened to representatives from New York and South Carolina explain their "summary" jury trial programs. Both programs have been in existence for over six years with hundreds of shortened trials conducted.

The first trials involved our equivalent of a limited jurisdiction case, but the nature, value and complexity of the cases evolved once it was discovered that no difference resulted in the verdicts or awards of these shortened trials versus longer, "normal" trials. The average plaintiff's award in New York for a one-year period was $150,000, and, South Carolina's results were anecdotally around the same as well. The ratio of plaintiff to defense verdicts remained the same, too.

It was intriguing enough for all there to commit to running it by their respective constituents to see if a California system of summary jury trials should be developed. Amazingly, all reported back with the desire and will to try. After a lot of hard work by everyone – meetings, drafts of rules, negotiations in and behind the scenes – a broad-based coalition of both the plaintiff and defense bars emerged. California's Expedited Jury Trial was born.

What are the Highlights of the New Law and Rules?

The new legislation is AB 2284 adding California Code of Civil Procedure §§630.03 through 630.12 and California Rules of Court 3.1545 through 3.1552. For a comprehensive introduction, please read them. But, in a nutshell, an EJT is a consensual, binding jury trial before a reduced panel of jurors with the goal of completion in a day. As each side has up to three hours to put on its case, one can think of an EJT as a voluntary, six hour jury trial using 8 jurors.

Frequently Asked Questions about EJTs

1. Isn't jury selection for a total of an hour something of a joke?
No, not really. Remember, only 8 jurors are to be selected. Only 6 total peremptories are to be exercised and no alternates are used. As the trial is to last only 6 hours, qualifying for hardships will all but be eliminated. To select 12 jurors and alternates, panels of 30 to 35 are summoned. Depending upon the length of the trial and juror hardships, it's not uncommon that multiple panels are called. These difficulties are avoided with the use of an EJT. Finally, the rules expressly encourage the use of juror questionnaires.

2. Can the parties use a pro tem? Or a paid judge from a dispute resolution company?
Yes to the first, but only a pro tem qualified by CRC 2.810-2.819 and assigned by the presiding/supervising judge. No, the parties cannot pay for any person to preside over an EJT. Some jurisdictions have this option, but it is the stalwart belief that to do so here in California would result in the improper use of public resources (county jurors, trial court clerks and staff) for a private purpose.

3. What would be Good Cause for a judge to refuse to permit an EJT or permit one side to withdraw?
The law affords greater protections for self-represented litigants and incompetent persons, so it is anticipated that any potential over-reaching by a represented side against an unrepresented would initiate greater judicial scrutiny over the consent order and the stipulations between litigants. As to Good Cause to permit a one-sided withdrawal, it would likely be an unanticipated event that resulted in some form of fundamental unfairness; but again, it would depend upon the circumstances.

4. What was the reasoning behind prohibiting an agreement to an EJT before a dispute arises?
The stakeholders were concerned that this procedure could be used like an arbitration agreement is used in employment and medical contracts to impact a party's complete rights to a full-blown jury trial.

5. Won't this option increase the number of trials?
Possibly. However, in both New York and South Carolina, no increase occurred. And, even if the number increased, the time and court resource expenditure is less overall. Further, this might well go further to build confidence in our justice system because the costs of trial are reduced, allowing for greater access to the jury trial which is fundamental to secure basic rights under our Constitution.

6. What types of cases seem to be the likeliest candidates for the EJT?
We are only limited by our imaginations. But, it is anticipated that matters with a predominant issue for determination are the likeliest candidates. For example, in a traffic accident case, the plaintiff's car was rear-ended, so with a stipulation to liability, the trial would only be about damages. The plaintiff, her doctor or expert would testify. The defense expert would testify as well. The admissibility of the medical records, the qualifications of the experts and pictures were all agreed upon at the 15 day conference.

You could have the reverse: the requested damages are reasonable, but liability is thin or there's some issue of comparative fault. The independent witness to the accident could testify by video deposition excerpts and the parties could explain their version of the accident or, accident reconstruction experts could lay a brief foundation for their respective computer animations.

Finally, the situation where all the issues except the credibility of the parties are undisputed after summary judgment motions were submitted and ruled upon might be ripe for EJT treatment. The parties could agree to an amount of damages prior to the trial if the jury ultimately found in favor of the plaintiff's credibility.

7. How are the 3 hours per side calculated?
Each side has three hours to put on their case. Cross-examination counts against the three hours of the side doing the cross-examination.

8. Are judges really going to be open to this?
Hmm, let's see…a shortened trial involving attorneys who have agreed on just about every aspect of the trial before jurors who have little to complain about due to the length of the case!!!? Quite frankly, it's a judicial officer's "dream" case. The biggest drawback from the perspective of the judicial officer is that the parties can stipulate to end the EJT process at any time. While this might result in a waste of time and resources, the time invested wouldn't be more than a day. Further, just like mediations or settlement conferences comprise a process that can ultimately lead to a disposition, EJTs can work to be that process as well.

9. Are jurors going to believe this is really a legitimate trial?
Sure. We have law-related television series where no trial takes longer than an hour. The big issue is: should jurors be specifically told they are part of an "expedited" trial? Does that make the trial seem less important or unique in an advantageous or disadvantageous way? The questions raised by this issue remain to be answered.

10. Couldn't all of this have been achieved without legislation or rules of court?
Yes. But, the introduction of EJT laws and rules legitimizes not only the procedures but the possibilities for change embodied in the concepts of the law and rules. Also, EJTs provide an option to litigants much like any other case resolution tool.

11. What's in it for the lawyers?
There are three obvious benefits: 1) an opportunity to do jury trials in an era of the vanishing civil jury trial; 2) ABOTA points; and 3) honing one's litigation skills for the benefit of the profession.

There are limited appeal rights that mirror grounds to vacate an arbitration award; the grounds comprise (1) judge misconduct that materially affected substantial rights of the parties; (2) jury misconduct; or (3) corruption/fraud/undue means. Jury selection is given an hour. Each side has fifteen minutes to voir dire the prospective jury and the court has its own 15 minutes. It is anticipated that remaining time could be used for opening statements. Each side has 3 pre-emptories.

The parties must prepare and sign a consent order for judicial approval to take advantage of an EJT. The consent order has certain mandatory requirements. The order must reflect that counsel has informed each named party and insurance carrier of the rules and procedures and that the parties have read the Judicial Council Approved Information Sheet, form EJT 010-INFO and that they understand and agree to waive all rights to appeal, to move for directed verdict, or make post-trial motions except as the EJT rules provide.

The court, upon good cause, can deny the parties' request for an EJT. The court must approve the use of any high/low agreements or other stipulations if a self represented litigant or the matter involves a minor, incompetent or

conservatee. The parties can stipulate to end the agreement at any time prior to the verdict. One party can ask the court to withdraw from the EJT consent order and the court, upon good cause, can grant that request.

The timeline to gear up for an EJT is simple: the parties must submit a proposed consent order no later than 30 days prior to the date set for trial. At 25 days prior to trial, the parties must exchange all documents, witness lists, exhibit lists, proposed jury questionnaires, verdict forms, motions in limine, summaries for trials and any other information for use at trial.

At day 20, the parties may supplement their pre-trial submissions based upon what they learned in the original exchange. At day 15, the court is required to hold a pre-trial conference in order to resolve evidentiary objections that ordinarily would be made at trial, rules on motions in limine and any other matters necessary to expedite the trial time. The use of summaries and other innovative methods of evidence presentation are encouraged.

EJTs do not change California's rules of evidence, attorney fee requests/awards, discovery, rights to subpoena, jury deliberation time and percentage of jurors needed for a verdict (3/4 = 6 of 8 jurors). Although, as a practical matter, trial evidence presented in a shortened time period will require re-working the rules and being creative. The rules stress flexibility in implementation.

In the course of the last few decades, innovative dispute resolution skills have been introduced and made part of the fabric of the civil litigation process: arbitration, mediation, early neutral evaluation, multi-disciplinary teams of mediators, just to list a few. It's always hard to predict whether really good innovative ideas will catch hold, but in this case, EJTs respond to the challenges America's justice system now face. Simply, it's about time.

Judge Mary Thornton House *is the Supervising Judge for the Northeast and North Central Districts for the County of Los Angeles Superior Court and is approaching her fifteenth year on the Bench.*

Spotlight on SFVBA Judicial Honorees

"The San Fernando Valley Bar Association is proud to recognize Judges Susan Speer, Mort Rochman and Mary Thornton House for their exemplary service on the Bench and their enduring contributions to our justice system and community." — Seymour I. Amster, SFVBA President

By Angela M. Hutchinson

Hon. Mary Thornton House

Hon. Morton Rochman

Hon. Susan M. Speer

THE SAN FERNANDO VALLEY BAR ASSOCIATION will honor three distinguished Valley jurists at the SFVBA Annual Judges' Night Dinner on February 24 at the Warner Center Marriott. The 2011 honorees include Judge Susan Speer (SFVBA Judge of the Year), Judge Morton Rochman (Stanley Mosk Legacy of Justice Award) and Judge Mary Thornton House (Administration of Justice Award).

Since 1992, the SFVBA Judge of the Year has been bestowed upon notable Valley judges Alan Haber, Marvin Rowen, Meredith Taylor, Judith Ashmann, Bert Glennon, William MacLaughlin, Juelann Cathey, Geraldine Mund, Michael Farrell, Michael Hoff, Howard Schwab, Kathryne Stoltz, Alice Hill, Sandy Kriegler, Kathleen Thompson, Michelle Rosenblatt, Michael Harwin, Ronald Coen and Maureen Tighe.

Q&A with Judge Mary Thornton House
Administration of Justice Award Recipient

Q: What does it mean to you to receive the Administration of Justice Award?
A: I'm extremely honored to be recognized by the SFVBA. Your organization leads the way for local area bar associations with your highly professional publications, innovative educational programs and volunteer opportunities that assist our courts.

Q: What are you looking forward to in 2011 as it relates to law or the courts?
A: I'm anxious and excited to see whether or not Expedited Jury Trials are put into play in any significant way in 2011. It's to be expected that adoption of the practice will take some time, but with the economy predicted not to improve for some years to come, it is my hope that we can still provide the public with their right to a civil jury trial through the Expedited Jury Trial procedures.

Q&A with Judge Susan M. Speer
SFVBA Judge of the Year

Q: Why did you choose the legal field as a profession?
A: After practicing nursing for about one year, I decided that I needed to further my education and career opportunities. Although I never had any academic interest outside of the life sciences, law school presented an interesting alternative career path. I planned to use my nursing background in conjunction with my law degree.

Q: What does it mean to you to receive the SFVBA Judge of the Year award?
A: The award provides validation that my work on the bench and contribution to the community are acknowledged and appreciated. I feel truly honored and humbled to be among the former distinguished honorees. I am very grateful to be recognized in such a meaningful way and this award serves as a milestone in my career.

Q: What do you like most about being a judge?
A: As a judge, I feel that I have the opportunity to make a meaningful and significant contribution to my community and to the litigants who appear in my court.

Q: What is the most challenging aspect of your job?
A: As a judge hearing serious felony cases, it is impossible not to be effected by the human tragedies one witnesses on a daily basis. Stress and depression are common occupational hazards. Crime extracts a very high price on the victims, witnesses, defendants, families and the community at large. I have to deal with the reality that not every victim can be saved and that not every defendant can be rehabilitated. Often times there is nothing that a judge can do to ameliorate the devastation that crime brings except to insure that the People and defendants receive a fair trial and sentence.

Q: How can the SFVBA work more in conjunction with the courts?
A: The SFVBA already contributes an enormous amount of work, energy and money into our court system. Without their continuing support, our courts would not continue to function at their present level. I say, just keep up the good work.

Q: What can attorneys do to make court proceedings or procedures operate more efficiently?
A: Attorneys can help to make the courts run more efficiently by good calendar management, making appearances on time, being prepared for each court hearing and minimizing continuances. All of these things will reduce court congestion and allow the courts to complete more jury trials in less time.

Q: If you could change one aspect of our judicial system what would it be?
A: This may not be a popular idea among trial attorneys, but I feel that our system of jury trials has become too cumbersome for the jurors and courts. The right to a jury trial should be limited, the number of jurors needed to constitute a panel reduced, and the number of peremptory challenges reduced in our less serious cases. Also, laws should be passed to give employers financial incentives to pay the salaries of their employees who serve on a jury.

Q: How influential were mentors throughout your career?
A: In every career, there have always been extraordinary people around me that exemplified greatness. These mentors have been available to listen and teach. This is particularly true among the bench officers. Judges tend to be special people who are always available to assist a fellow bench officer. Without such mentors, I certainly would not have achieved my level of success in any occupation.

Q: What advice can you give to attorneys that want to become a judge?
A: To all of those aspiring judges out there, I would say that you are smarter and more capable than you think, and you can achieve your goal if you keep trying. Remember your reputation is everything. Always maintain the highest standard of ethics and appropriate behavior in all situations. Case results are soon forgotten, but the impression you make as a person on others lasts a lifetime.

Q: What is your favorite non-fiction book and why?
A: One of my favorite books is *Truman* by David McCullough. The book seems even more relevant in these political times. This book helped me to know and love Harry Truman. Although plain in speech and looks, this ordinary man turned out to be one of our most dynamic presidents. Truman had a remarkable character and reputation for honesty, reliability and common sense. He was an eternal optimist, God-fearing, and humble man who idolized his wife and daughter. His presidency was dominated by enormously controversial issues and decisions that have since been validated in modern times. I strive to be like Harry Truman, as he was a great patriot, human being and true American hero.

To make a reservation for Judges' Night, contact Director of Education & Events ***Linda Temkin*** *at (818) 449-0490, ext. 105 or events@sfvba.org.*

MCLE ARTICLE AND SELF-ASSESSMENT TEST
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 17.

Special Jury Instructions: When CACI Won't Cut It

By Lisa Perrochet

TRIAL IS IMMINENT, AND IT'S TIME TO PREPARE a set of proposed jury instructions. Just whip out the list of California Civil Jury Instructions (CACI) instructions, check all the ones that conceivably apply, and the job is done, right? Well, not exactly, especially not if the plan is to keep one eye on any potential appellate proceedings down the road.

A recent appellate decision highlights the potential problems. In *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, the Court of Appeal reversed a verdict of over $15 million in a personal injury action, all because of instructional error. The plaintiff in *Bowman* sued the driver of the dump truck that caused his injury, as well as the city for whom the driver was working at the time of the accident, alleging negligence and vicarious liability.

Plaintiff prevailed and, on appeal, the court affirmed the judgment against the driver. But the court held the judgment against the city could not stand because the standard CACI form jury instruction on employment status was both erroneous and prejudicial. The court explained that "CACI No. 3704, given in the present case, did not correctly instruct the jury that it must weigh [multiple] factors to determine whether [plaintiff] was an employee or an independent contractor. Instead, it told the jury that if it decided that the City had the right to control how [plaintiff] performed his work, then it must conclude that [plaintiff] was a City employee. In other words, it told the jury that the right of control, by itself, gave rise to an employer-employee relationship." This instruction simply didn't capture existing precedent on the issue, which requires a more nuanced analysis.

This is not to say that the CACI committee – an advisory subcommittee formed by the California Judicial Council – isn't doing its job. Many questions of law are highly debatable. And the committee does a commendable job of deliberating over the phrasing of the instructions, monitoring new cases as they come down to determine whether the instructions should be revised and inviting public comment on draft instructions and revisions.

The committee is made up of appellate justices, trial judges, law professors and lawyers from a broad spectrum of civil practice (see Cal. Rules of Court, rule 10.58), and they work very hard to make trial lawyers' and jurors' jobs easier. That said, there may be room for correcting, supplementing or otherwise improving the standard form instructions depending on the circumstances of each case.

So what's a busy trial lawyer to do? Here are some tips for digging a little deeper when preparing proposed jury instructions.

It's never too early to be thinking about the jury instructions. Even when drafting or answering a complaint, it's useful to consider what standard of care, what affirmative defenses and what measure of damages the jury may be asked to apply. And when one thinks about the allegations to be pleaded (and, eventually, the evidence to be offered) in that light, the task of planning out the litigation strategy becomes much more concrete. To aid in the process, the Judicial Council makes the complete, searchable text of the CACI instructions available online for free on the California Courts' website at www.courtinfo.ca.gov.

Starting out by reviewing the CACI instructions is not a bad idea to get the lay of the land, but during the investigation phase of the case, it may become clear that some facts or legal theories just don't fit well into the standard rubric. When that preliminary review identifies a square peg that doesn't fit neatly into the round hole of a CACI instruction, it may signal the need for further factual investigation and refinement of litigation strategy.

In other words, the CACI instructions can be a checklist, of sorts, to make sure the legal requirements for a case going to trial are all taken into consideration. But that nagging feeling that there's a mismatch between the case and the instructions may instead signal the need for some additional research and some real creativity to come up with ideas for persuading the trial judge why the form instructions aren't quite the end of the story – they may be downright wrong, as the *Bowman* case discussed above demonstrates.

Look not only for grounds to *object* to inaccurate CACI instructions, but also for ways to *supplement* CACI with special instructions. Even as to CACI

instructions that are more or less accurate, they're not set in stone. Sure, they're officially approved by the Judicial Council – usually a safe bet for the trial judge who hopes to avoid reversal on appeal. But in some cases they could be clearer or more complete. Rule 2.1050 of the California Rules of Court designates the CACI instructions as the "official instructions for use in the state of California" and use of the new instructions is "strongly encouraged." But the rule further explains that a departure from CACI is appropriate if a judge "finds that a different instruction would more accurately state the law and be understood by jurors."

To the extent the CACI instructions can be framed more favorably, in a way that is supported by legal authority, go ahead and propose something from a wish list based on how the client's case can best be presented to the jury. After all, "[a] party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp* (1994) 8 Cal.4th 548.)

Just be sure to offer a fallback alternative instruction (perhaps from CACI itself), making clear that this is secondary to the special instruction. That way, if the trial court refuses the special instruction, the court won't later find any waiver of the right to have at least some guidance, imperfect as it may be, in the instructions given to the jury.

Note that simplicity is a worthy goal – rule 2.1055(e) admonishes that special instructions "should be accurate, brief, understandable, impartial, and free from argument." Understandably, judges often look crosswise at instructions that seem very detailed and complex. But many cases raise complex issues, and counsel sometimes need to remind the judge that a long, complicated instruction cannot be refused merely because it may take a little effort on the part of the jury to master. (See, e.g., *Nix v. Heald* 90 Cal.App.2d 723, 731 ["Appellants' final assignment is concerning the instructions given. It is first contended that they were too long and confusing. This contention is utterly without merit. Time consumed in instructing a jury is immaterial if the court's charge is clear, the issues are fairly discussed and the law is correctly applied. . . . .While the instructions were somewhat involved they were as simple as the complicated issues would allow"]; *People v. Reliford* (2003) 29 Cal.4th 1007, 1016 [rejecting notion that an instruction was too complicated for jury]; *City of San Diego v. Barratt American Inc.* (2005) 128 Cal.App.4th 917 ["although the above-quoted instructions involve complex concepts, they are not misleading or inaccurate statements of law"]; *O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 584 ["As between the competing instructions, the one chosen by the judge, while more complex, was clearly superior in the context of this case"]; *Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1475 [rejecting generalized attack on instructions as confusing: "Although complicated, the instructions, including those which appellants have singled out above, have not been shown to be erroneous or misleading in any respect"].)

Useful language to use in proposing alternative special instructions may be found in the BAJI instructions, which some judges frankly admit they prefer. Publisher Thomson Reuters still updates BAJI even though they are no longer California's official instructions, and a comparison table between BAJI and CACI is available for free online at the California Courts website. Other publishers offer pattern instructions as well, and these can be particularly useful in specialized areas of practice, such as product liability. Also consider examining other states' pattern instructions.

An advantage of using these resources is that a court may be less skeptical about instructions that don't appear to have been made up from scratch, and that appear to have been previously approved by someone with a more objective eye than that of counsel standing before the court.

On the other hand, it may not be best to pull an instruction straight from an appellate decision without analyzing whether the principle is suitably framed for a jury instruction. "'The admonition has been frequently stated that it is dangerous to frame an instruction from the opinions of the court.'[Citation.] 'Judicial opinions are not written as jury instructions and are notoriously unreliable as such." [Citation.] 'One of the reasons for care in adopting a court opinion verbatim as a jury instruction is that its abstract or argumentative nature may have a confusing effect upon the jury.'[Citations.]" (*Merritt v. Reserve Ins. Co.* (1973) 34 Cal. App.3d 858, 876, fn. 5; accord *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5.)

Appellate courts use terms of art, or sometimes old fashioned legalese, that just isn't appropriate for helping a jury figure out how to apply the law to the facts before them – which is, after all, the point of jury instructions.

Consider browsing online resources that might prompt new thinking. This new thinking should focus on grounds for objecting to an instruction as erroneous, or grounds for providing a complementary instruction to complete a concept that is only partially covered by CACI. For example, the Judicial Council issues periodic reports that reflect public comment on the evolving CACI instructions, and interesting information may be gleaned from the Judicial Council's archived redline versions of prior changes (See links under "Civil Jury Instructions (CACI)" in the chart posted on the California Courts' website.)

Similarly, check cases pending in the California Supreme Court, and perhaps other pending appeals or pending legislation that's reported to be in the works, to see whether a legal development might be brewing on an issue relevant to the case at hand. If so, try to anticipate any potentially favorable developments by outlining them in a proposed special instructions. That way, if the instruction is refused and an adverse judgment is entered, it may be possible to get a new trial based on instructional error in the court's refusal to give losing counsel's prescient proposal.

Consider writing directly to the CACI committee with suggestions for improvements. If a case is still in its early stages, with any trial date a long way off, there may be time to get a CACI revision in time for trial. As online reports of the committee's work (referenced above) indicate, they can be quite responsive to proposals.

Take care in the *form* of any special instructions to be proposed. Code of Civil Procedure section 609 specifically authorizes counsel to present special instructions; the judge has a duty to rule on such proposals, making clear whose instructions were given or refused, and ruling "in such a manner that it may distinctly appear what instructions were given in whole or in part." But a judge may correctly refuse a

requested special instruction if it does not conform to the *format requirements* of Rule 2.1055, which prescribes how instructions should appear on a page, and how they should be bound. (Rule 2.1058 requires that instructions use "gender-neutral" language.) Note that rule 2.1055 bars "local rules" under which a particular court or judge may attempt to dictate a format different from that outlined in the rule.

Get it all on the record. Counsel's brilliance in proposing creative and legally correct special instructions, and the judge's intransigence in refusing them, won't help the client get a new trial after an adverse verdict if the proposal occurred orally in an unreported conference in chambers, or if the scribbled addendum written on the instruction packet and shown to the judge doesn't make it into the court file. (See, e.g., *In re Marriage of Schultz* (1980) 105 Cal.App.3d 846, 857 [stipulations and rulings in chambers must be placed on the record: "Trial judges must be alert to insist upon it; counsel for the parties should be equally alert to their respective duties to their clients" to ensure an adequate appellate record].)

For the same reason, it is best to press the judge to allow the court reporter transcribe the judge's reading of the instructions to the jury. And make sure to lodge with the clerk a clear copy of proposed instructions, as well as objections made to the other side's proposals. That way, an appellate court will later be able to see how careful and creative counsel took every step to preserve the client's right to jury that has an accurate and complete description of the law to apply to the facts presented at trial.

Keep in mind that a party is *not* compelled to jointly request instructions offered on the other side's theories. Trial judges may urge counsel to do this, but it's possible to demonstrate professionalism and to show respect for the judge by agreeing readily on most of the instructions while standing on the right to say (politely) that the other side is responsible for the content of the instructions as to issues on which that side bears the burden.

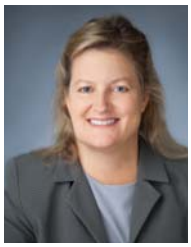
It may not be possible to identify a specific problem with any particular instruction the other side is proposing, but caution in agreeing to all instructions is warranted because a party who proposes an instruction will be deemed to have *waived* any error in the instruction that later comes to light. In contrast, even if trial counsel does not articulate an error in an instruction, counsel is nonetheless deemed to have objected to instructions proposed by the other side (and thus preserved claims of error for appeal), *absent an overt acquiescence in the instruction*. (See Code Civ. Proc., § 647.)

Thus, for example, a defendant need not join in requesting basic negligence instructions, and a plaintiff need not join in requesting a standard instruction on an affirmative defense, because each side's duty is only to make sure the instructions correctly cover the points pertinent to his or her own theory of the case. (See *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 949 ["To hold that it is the duty of a party to correct the errors of his adversary's instructions . . . would be in contravention of [Code of Civil Procedure] section 647"]; *Hensley v. Harris* (1957) 151 Cal.App.2d 821, 825-826 ["[e]ach party has a duty to propose instructions in the law applicable to his own theory of the case. He has no duty to propose instructions which relate only to the opposing theories of his adversary, and having no duty respecting them he has no responsibility for the latter's mistakes" or to "offer corrections of the instructions of his adversary pertinent only to the latter's theory of the case"]; *Valentine v. Kaiser Foundation Hosps.* (1961) 194 Cal.App.2d 282, 290 ["It has repeatedly been held that a defendant has no duty to propose instructions upon the plaintiff's theory of the case"].)

When resisting agreement on certain instructions proposed by the other side, counsel can explain that the evidence may not turn out to support giving the instruction, and counsel does not want the opponent to use any agreement on the instructions as some sort of acknowledgment to the contrary. In addition, counsel might be able to point to indications that the law is somewhat in flux, and counsel feels obligated to preserve arguments based on new authorities that later make the instruction erroneous. Or counsel can simply note that an article published in a legal magazine pointed out that it's not a good idea to waive appellate arguments by proposing instructions, even well established form instructions, that don't help the client's cause!

This is one of the many areas in which wise counsel is advised to "pick your battles." How hard to push for an aggressive special instruction, or how hard to resist the other side's proposed instructions, may turn on such intangibles as the perceived strength of the evidence on particular issues, the client's potential institutional interest in consistently advancing a legal theory, the dynamics of relations with opposing counsel, the trial judge's anticipated attitude toward creative legal thinking, and so forth. The practice pointers above are designed to get trial lawyers to look beyond their CACI form books when preparing to present a case to a jury.

Lisa Perrochet *is a partner at Horvitz & Levy, an appellate boutique firm in Encino, where she has been representing clients in civil appellate litigation for more than 23 years. She can be reached at lperrochet@horvitzlevy.com.*



MCLE Test No. 30

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. The CACI instructions are drafted by a anadvisory subcommittee of the California Judicial Council that consists of a select group of appellate justices.
   True
   False

2. Trial courts are required to give CACI instructions unless they are legally erroneous.
   True
   False

3. Rather than waiting until shortly before the due date for submitting proposed instructions, it's a good idea to think about likely instructions early in the case, at the pleading stage.
   True
   False

4. By paying a nominal fee, one can access the CACI instructions online.
   True
   False

5. A trial court has discretion to refuse a legally correct special instruction proposed by a party if the instruction is argumentative or cumulative.
   True
   False

6. A party may propose alternative versions of an instruction on the same topic.
   True
   False

7. Judges generally view holdings quoted from published decisions to be reliable sources for jury instructions when guidance to the jury is needed on a topic not already addressed by CACI.
   True
   False

8. A review of issues in play in pending Supreme Court or Court of Appeal cases can provide useful ideas for proposing special instructions to supplement or substitute for CACI instructions.
   True
   False

9. Public comments on existing or proposed CACI instructions must be submitted via the online form made available by the CACI committee, during periodic comment periods identified by the committee.
   True
   False

10. A trial court's refusal to give a proposed special instruction automatically entitles a party to a new trial if the trial court's rationale for refusing the instruction was legally erroneous.
    True
    False

11. A trial court is, by statute, required to rule on parties' proposed special jury instructions.
    True
    False

12. The format for proposed special instructions is dictated by the California Rules of Court and by local rules that further refine the format requirements.
    True
    False

13. An oral request for a special instruction can never suffice to preserve a claim of instructional error.
    True
    False

14. If a party's proposal to include special instructions is not reflected in the trial court record (by contemporaneous reporting of proceedings before the judge, by a reported oral summary of the party's position after unreported proceedings took place, or by a written summary lodged with the court), the party will be deemed to have waived a later claim of error in failing to give the proposed instruction(s).
    True
    False

15. Similarly, if a party does not object on the record to a legally incorrect instruction proposed by the other side, the party will have waived any claim of instructional error on appeal.
    True
    False

16. A party waives a claim of instructional error if the party does not propose a balanced set of instructions on the issues both sides have raised in the case.
    True
    False

17. A judge may not order parties to agree on a joint set of instructions.
    True
    False

18. It is never a good idea to acquiesce in any instructions proposed by the other side that bear only on the opponent's theory of the case.
    True
    False

19. A party whose counsel has identified a legal defect in an instruction proposed by opposing counsel has a duty to offer corrections or risk waiving any claim of error if the instruction is given as proposed by the other side.
    True
    False

20. The CACI instructions are identified in the California Rules of Court as the "official" instructions for use in California trial courts, and trial judges are strongly encouraged by the California Rules of Court to use CACI, so counsel who propose special instructions should not submit voluminous lists of special instructions in most cases, but should instead focus on those key issues as to which a revised version of CACI or a supplemental instruction has a realistic chance of making a difference in the case.
    True
    False

MCLE Answer Sheet No. 30

INSTRUCTIONS:

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

   San Fernando Valley Bar Association
   21250 Califa Street, Suite 113
   Woodland Hills, CA 91367

METHOD OF PAYMENT:

Check or money order payable to "SFVBA"

❒ Please charge my credit card for
❒ $_____.

_____
Credit Card Number Exp. Date

_____
Authorized Signature

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

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

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

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

FAMILY LAW MEDIATION UPDATE

By Cari Pines

THIS PAST YEAR HAS BEEN FILLED WITH A GREAT deal of drama for the court system in California and in particular the family law departments. Not only was the Los Angeles Superior Court (LASC) forced to lay off many members of the family law court staff because of the dramatic budget cuts, an entire family law courtroom was closed in Santa Monica.

The chair of the Executive Committee of the Los Angeles County Bar Association Family Law Section immediately set up a budget crisis committee to work with the LASC to resolve this devastating problem. At its first meeting, which included the Presiding Judge and many other significant players, the budget crisis committee decided that the only recognized form of assistance the Bar could provide at this early stage to assist the court in the current dilemma was to improve and encourage mediation among litigants to take the pressure off of the family law department's current caseload.

At this particular meeting, the committee discussed the potential benefit of having the Central District make more effective use of their Daily Settlement Officer Program, which provides an attorney serving as the mediator for the family law departments Monday through Friday. It was specifically acknowledged that if the Central District could emulate the tremendously effective program that the Valley has been using for many years, this could alleviate quite a bit of pressure and significantly reduce court wait time that was likely to be drastically increased by the loss of one court day per month when the furlough and, ultimately, the court closure days went into effect on the third Wednesday of each month.

An unintended benefit of these furlough/court closure days was the birth of the Third Wednesday Voluntary Settlement Conference (TWVSC) program. Designed to make the best of the disaster imposed by these Wednesdays when the courthouse doors would be closed to litigants, LACBA and SFVBA sponsored a mediation program which provided mediation for family law matters in the offices of private family law attorneys volunteering three hours of their time and attention without pay.

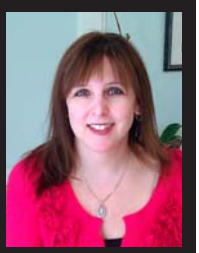
Cases were referred to this program by family law departments in the Central, North Valley and Northwest Districts based upon the need for mediation in cases readying for trial or long cause matters. In several cases, forensic accountants also offered their services as part of the mediation team free of charge. During the few months that the program operated, 60 cases were assigned and approximately half of those were resolved entirely – eliminating those matters from the trial calendar.

Although the TWVSC program ended due to the blessing of a renewed budget, the LASC continues to offer their long standing ADR programs. Central District offers a Daily Settlement Officer program where experienced family law attorneys sit as mediators every day for assignments from all of the family law departments. During the past year, experienced family law forensic accountants have been added to this process in a program brilliantly coordinated by Noel Applebaum, CPA. Also new this year, this same program offers the services of Spanish speaking mediators on Thursdays. Additionally, the ADR office offers three hours of free mediation by a randomly selected family law mediator in his/her private office, as well as a panel of mediators who can be selected by the participating attorneys for a nominal fee. There is also a retired judge MSC project operating on a monthly basis to further assist with cases more advanced in the litigation process.

In the Valley, SFVBA continues to run an exemplary mediation program that serves as a model for Central and other branch court's mediation systems. The Bar is proud to have mediation panels that serve the Van Nuys, San Fernando and Burbank courts, each painstakingly organized and administered by individual law firms.

The SFVBA Family Law Section Executive Committee is in the process of beginning a beautification process at the Van Nuys and San Fernando mediation offices. A case-data tracking system was implemented in January 2011 in order to determine which types of matters benefit most from this process, and whether or not representation at the mediation is an essential component for potential settlement.

Each of these panels is in dire need of additional volunteer mediators. Family law attorneys with at least five years of family law experience, who are not on at least one of these panels, are asked to volunteer. More information can be found on the LASC's website or information about the Valley's mediation panels can be obtained through the SFVBA.



Cari Pines *chairs the SFVBA's Family Law Section. She devotes her practice exclusively to family law. She has been certified as a specialist in the area of Family Law by the State Bar of California, Board of Legal Specialization since 2004. She can be reached at cari@pllfamilylaw.com.*

Teaching Real Estate Law Abroad

By Tamila Jensen

PAST SFVBA PRESIDENT TAMILA JENSEN recently returned from a trip to Pristina, Kosovo, where she taught a seminar on real estate law at the European College of Law and Development through the auspices of the Center for International Legal Studies (CILS).

Pristina is the capital of Kosovo, which was part of Yugoslavia and it is an exciting place to be at this time. There has been human habitation here for millennia, according to local lore, back to the Dardanians (for those who remember their *Iliad*). Each wave of people has built upon the physical structures of the group that went before them, with the result that few monuments from the earliest times are left standing. For example, the Roman Emperor Justinian was born here, but neither his hometown nor the town he built to honor his homeland any longer exists.

During the Yugoslavian era, much of the older Ottoman city was destroyed to make way for the dour modernist structures so beloved by communist regimes. A few buildings are left from the Ottoman era, including mosques, bath and a delightful home and compound now turned into a marvelous ethnographic museum. Much of the old bazaar survived Tito's modernization and is a real treat for the occasional tourist, with wonderful fruits, vegetables and nuts and grains for the shopper, among a thousand other things.

The building style after the recent war is very modern indeed, creating a mix of blocky concrete structures and glass skyscrapers, often of very imaginative design. Traffic is terrible, but pedestrians have the right of way and one simply steps into the roadway and waits to see whether the oncoming cars will give way. Mostly, they do. Parking is on the sidewalk, by the way.

Seventy percent of the population of Pristina is under the age of 40 and the city reflects the youth of its inhabitants. The result is a lively, vibrant city with a café, club, or hip shop seemingly every ten feet. The young people are in the city because there are so few opportunities for them in their home villages. Both public and private colleges and universities are available, but there are not enough jobs.

As a way of relieving some of the job pressure, the government has opened up the law schools to virtually all comers. In the law school at the University of Pristina, there can be as many as 800 students in one class.

Law schools in Europe are undergraduate programs, followed by a period of internship and then several levels of exams before one can be licensed to practice. In Kosovo, notaries handle transactions, acting more as a neutral than as an advocate. A notary is responsible for explaining the transaction, the legal effects and obligations involved, documenting it and recording or filing the document if necessary.

There are many small law offices where an "advokat" puts up his or her shingle, but this is a country where people are used to resolving their disputes themselves or just live with a deal gone bad, and are not accustomed to going to an attorney for assistance. This is a pattern that is common in the old Eastern Bloc countries which have only recently started to develop a civil law system.

When Serbian officials left after the recent war, they took with them many governmental records, including birth and real property ownership records. As a result, there is an agency solely devoted to resolving contests over ownership of property.

Most real property sales transactions are done in cash. Financing is expensive and availability is restricted. Deals are done face-to-face, money is exchanged and the transaction is recorded. A notary often assists with these transactions. There is no title insurance and, at least in the day-to-day transaction, no escrow. There are no guarantees as to the soundness of the structure after it is purchased. What you buy is what you get and the purchaser must live with the consequences if it turns out, for example, that the plumbing all needs to be replaced.

Although there are single family homes both in the city center and on the surrounding hillsides, much of the housing in Pristina is by way of common ownership of apartments. While the individual apartments are well kept by their owners, the common areas (mostly stairways, entrances and landings) suffer. There is no strong structure of homeowner associations to compel the payment of fees or to contract for maintenance. The owners all have to get together and agree on something before anything can be done.

Needless to say, people in Kosovo are very interested in how this is done in the California, although they are not so pleased that the enforcement options can be drastic. They also are very interested in the scheme for regulation of land use and development in California. After the recent war, before governmental structures were in place, some people went forward with building projects. This meant not only more demolitions of buildings of historic interest but also new structures were built without planning or permits. The government is now in the process of reviewing all these buildings and issuing permits, post facto.

Pristina is being rebuilt with the help of the United Nations, European Union and, of course, the United States (among other countries). Many local industries were shut down during the recent war and many of the main enterprises have yet to reopen. Also, major industries were state owned and are now being privatized.

Most of the economic activity is in the form of a myriad small shop, each specializing in one item, so that one buys a mobile phone in one shop and the SIM card in another. The best supermarket in town is the bazaar, where men with small carts will even carry your packages to your car.

The highlight of the trip was being asked to attend an Albanian wedding in a village about two hours outside of Pristina. The drive to the village through the countryside and small villages along the way was fascinating and the Albanian wedding turned out to be a truly wonderful event, consisting mostly of dancing for five hours straight. When the main band took a break, a Rom band of drums and wooden flutes took over to keep the rhythm going. The dancing never stopped until the cake was served and everyone was too tired to stand!

Tamila Jensen *is the Past President for the San Fernando Valley Bar Association. Her law practice areas include elder law, probate and conservatorship, wills and trusts, civil appeals, real estate, general business and civil litigation. She can be reached at tamila@earthlink.net.*

Real Estate Matters

By Steven D. Spile

IF A PERSON HAS EVER FELT like a giant hand has picked them up and dropped them into a strange dark room, in many ways that is the sensation many in the real estate industry have felt over the past couple years. The room is dark, unfamiliar and loaded with obstacles interfering with safe passage. More frustrating, just as the path seems to clear, new obstacles materialize. Quite a few professionals have had their toes stubbed during these difficult times.

Over the past months, several obstacles have actually been moved or at least cushioned. Unfortunately, there have also been new obstacles placed in the way. These developments include the following:

SB 931

A significant fear for short sale sellers has been the possibility lenders might pursue them for a deficiency between their loan amount and the amount paid to their lender through the short sale transaction. In fact, many lenders have attempted to convert non-recourse loans into recourse loans through their short sale approval process. SB 931 will provide some relief in this area.

If a lender in the first position approves a short sale on or after January 1, 2011, that lender may not pursue a deficiency against the seller. This restriction on the lender applies to any senior loans, including refinance loans. It does not, however, apply to any junior loans. In addition, it does not take place until January 1, 2011 and it is not retroactive.

SB 931 is not the same as SB 1178, which was passed by the Legislature, but vetoed by Governor Schwarzenegger. SB 1178 provided for borrowers who refinanced their homes to retain their anti-deficiency protections if all the money from the refinance was put into the home. With a new governor in Sacramento, efforts to pass a similar law in 2011 are anticipated.

Understanding these changes in the law is essential when advising clients on the viable options regarding possible short sales, modifications, foreclosure, bankruptcy, etc.

Short Sale Information Advisory (C.A.R. FORM SSIA 11/10)

This new advisory from the California Association of Realtors (C.A.R.) is a useful tool in assisting clients who are considering a short sale transaction. It addresses a myriad of issues and considerations which arise out of short sale transactions. Among the areas covered include:

1) What is a Short Sale?
2) Alternatives to a Short Sale
3) Lender Agreement to Short Sale
4) Seller's Continuing Liability on the Debt
5) Credit Consequences
6) Potential Improprieties
7) Tax Consequences
8) Buyer Considerations
9) Broker Role

While it is not a substitute for independent counsel, this advisory is a helpful starting point in helping clients understand some of their options and the potential ramifications of those options.

Short Sale Addendum (C.A.R. Form SSA, 11/10)

C.A.R. has also modified its Short Sale Addendum. There are three key changes. First, to avoid the risk of an open-ended period for lender approval, the new SSA provides that absent a time period inserted by the parties, the time for lender approval shall be 45 days. Second, the seller is obligated to provide a copy of the lender's term sheets within 3 days of the seller's receipt thereof. Third, all time periods are triggered upon the receipt by the buyer of the lender's term sheet.

Again, this form is a great starting point for making sure the parties understand and agree to some of the important terms for a short sale transaction. Counsel should make sure it is supplemented as deemed appropriate to meet the specific needs of a particular client.

Holmes v. Summer Appellate Court Case[1]

While the foregoing developments are likely to ease the risk for lawsuits, this recent case creates further risks and uncertainties for potential parties, in particular real estate professionals. The *Holmes* case contains a lengthy dialogue regarding the obligations of realtor estate brokers involved in transactions where a seller owes more than the likely sales price of the property. Distilled to its essence, the case holds that it is part of a listing broker/agent's duty of honesty and fair-dealing to advise all buyers, before they go to contract, that the seller owes more than the sales price.

The court asserts that it is the right of every buyer to know of this factor as it creates a risk that the seller will not be able to consummate the transaction. The potential scope of this case is still an open question, but it appears the courts are showing an inclination to expand the standard of care for real estate professionals.

Other People in the "Room"

Whether it is the Department of Real Estate, the Attorney General, the FBI or a number of other regulatory and law enforcement agencies, it is evident that the short sale, foreclosure and loan modification universe is on their radar. In fact, some of these agencies have stated that short sale fraud is the number one target on their list. With this in mind, all parties should recognize that the stakes are probably higher than they have ever been.

Given the speed at which changes in this area are transpiring, it is quite possible that there are already further developments. It is important for counsel to draw upon all resources available to remain current on how to best navigate the best path. Vigilance, in this regard, may very well protect one's toes from unexpected pain.

***Steven D. Spile**, a senior partner with Spile, Siegal. Leff & Goor, LLP, works closely with real estate and insurance professionals throughout California on a wide range of legal issues. He can be reached at (818) 784-6899 or sspile@spile-siegal.com.*

[1] *Holmes v. Summer* (2010) 188 Cal.App.4th 1510 [116 Cal. Rptr.3d 419]

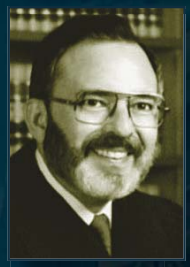
San Fernando Valley Bar Association

Annual Judges' Night Dinner

Hon. Susan M. Speer

Los Angeles Superior Court

2011 SFVBA Judge of the Year



Hon. Morton Rochman

Los Angeles Superior Court Juvenile Court

Stanley Mosk Legacy of Justice Award

Hon. Mary Thornton House

Los Angeles Superior Court

Administration of Justice Award

Special Recognition to Retired Judge Gregg Marcus

Thursday, February 24, 2011

Warner Center Marriott

21850 Oxnard Street, Woodland Hills

5:30 PM Cocktail Reception

6:30 PM Dinner and Program

Please return with payment by **February 18, 2011** to:
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Call (818) 227-0490, ext. 105 for sponsorship and program ad opportunities.

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*Please leave two seats for judicial officers.

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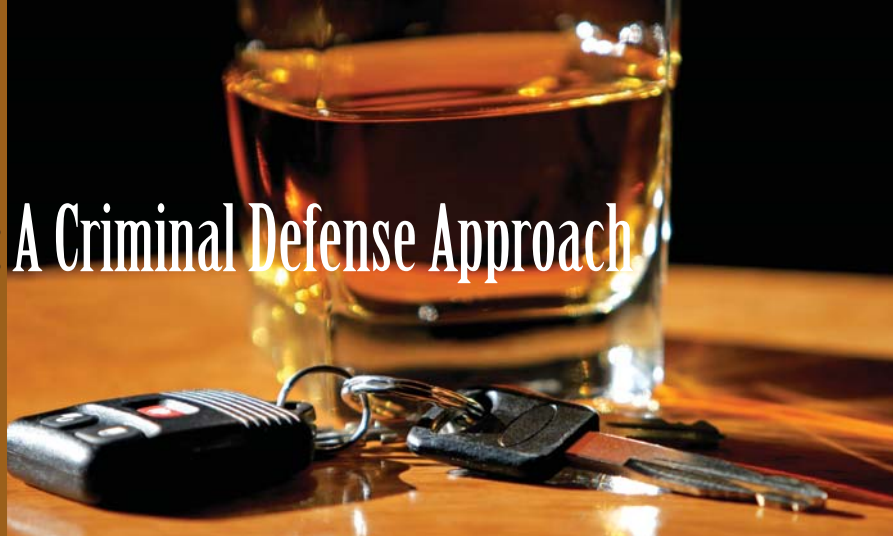
Dismissing DUI Charges: A Criminal Defense Approach



By Dmitry Gorin

DRIVING UNDER THE INFLUENCE (DUI) ARRESTS HAVE become an almost everyday occurrence. Probably every attorney licensed to practice law in California has received a call from a client who needs advice after a DUI arrest.

A DUI charge may be prosecuted as either a misdemeanor or felony in state court, depending on the level of injury (if any) and prior record. Importantly, there are two separate proceedings that commence after an arrest for drunk driving: DMV administrative action and a criminal prosecution. After arrest, the client will be issued a temporary driver's license which will be valid for only thirty (30) days after arrest. This is significant, as failure to timely request a DMV hearing will cause the suspension to begin aftert thirty (30) days.

Importantly, being arrested for drunk driving does not mean a client will ultimately be convicted of a DUI offense. A lower charge could be negotiated through plea bargaining by bringing to the government's attention problems of proof in their case. At the same time, these suggestions can also be used persuasively in a jury trial.

The following actions may help an attorney resolve their client's DUI arrest for something less than a DUI, meaning the drunk driving charge is dismissed, or help secure a trial acquittal.

Request a DMV hearing immediately. If a DMV administrative hearing and stay of the suspension are not requested within ten (10) days after the arrest, the client's driving privilege will be suspended by the DMV when the temporary license expires. The hearing is important to help assess the state's level of proof before the case is set for trial in criminal court.

Examine the probable cause for the stop. If the stop is not warranted, file the appropriate motions. Success on the motion can result in a complete case dismissal, for a violation of constitutional rights under the 4th Ammendment. This can be achived in both felony and misdemeanor drunk driving cases, where clients are facing the risk of substantial jail or prison time.

Examine the client's driving and signs of intoxication noted by the investigating officers in the reports. If the reason for the stop was not due to poor driving, this fact can help the attorney negotiate a reduced charge, causing the DUI charge to be dismissed. Further, this would be an important point to bring to a jury's attention should the case proceed to trial. Remember to examine the level of the officer's experience, as many of the officer's conclusions are highly subjective, and can be challenged.

Examine the narrative and the diagram of the Field SobrietyTests (FSTs) in the client's case. Performing well on the FSTs, or not performing them at all, can benefit the attorney's defense in the criminal proceeding and the DMV hearing. Performing well can demonstrate to the prosecutor or DMV hearing officer that the client was not impaired. A client not performing the FSTs can benefit an attorney's defense because the prosecution or DMV hearing officer will not be able to use that evidence to show the client was an unsafe driver on the roadway. Importantly, the client has an absolute right to refuse performing FSTs.

Examine the breathalyzer results. Make sure the officer obtaining the sample followed the California Title 17 Guidelines prior to administering the test. Low breathalyzer results can help an attorney negotiate a reduced charge and is also a great piece of evidence in trial. Also, examine the Preliminary Alcohol Screening (PAS) results against the breathalyzer results. Is there divergence and inconsistency?

Check the times the samples were taken to make sure the sample was not acquired more than three hours after the alleged driving. If the sample was taken more than three hours after the alleged driving, the .08% presumption under Vehicle Code Section 23152(b) does not apply.

Review the maintenance and calibration records of the PAS Device and/or Breathalyzer used to collect a client's breath sample. Law enforcement agencies keep these records in the regular course of business, and the attorney is entitled to review them as part of the criminal discovery process. It is important to determine whether the machine was working properly and accurately reading breath samples obtained from the client's deep lung tissue. If the records show the machine used to obtain the client's sample was not processing samples accurately, this may help the attorney reduce their client's charge and obtain a dismissal.

If a client chose to give a blood or urine sample, request a specimen split and have the sample retested for accuracy. A private toxicology service can be hired to perform this service. This is a crucial step: without a sufficient preservative in the drawn blood, the test results may have little probative value, causing the DUI charge to be dismissed.

Educate the client on the differences between the license suspension from the criminal proceeding and the DMV administrative hearing. An attorney may prevail on one and not the other. The court suspension is six (6) months and will require the client install an Ignition Interlock Device (IID) in the vehcile for a minimum of five (5) months. The DMV suspension is a minimum of four (4) months.

New Members

The following joined the SFVBA in December 2010:

Bryan H. Clements
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Gary Silverman
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(818) 325-3888

James Tenner
North Hollywood
(818) 760-4700 • lawjlt@aol.com

Paul H. Watkins
Los Angeles
(310) 794-9238 • pwatkins@mednet.ucla.edu
General Practice

Katharine Wolfrom
Sherman Oaks
(650) 387-5540 • katiewolfrom@yahoo.com

The suspensions do not automatically take effect on the same date and they do not always run concurrent. Try to set the DMV hearing and court date close to one another. If unsuccessful in reducing the charges and unsuccessful at the DMV hearing, the client's suspensions will be close in time and run during approximately the same period. The majority of the suspension periods will run concurrent. The client must comply with both suspensions. The suspension with the latest end date controls when the suspension ends. Failure to coordinate the criminal conviction with the DMV hearing could result in two separate suspensions and possibly one suspension after the other suspension has been fully served.

A reduced DUI charge can benefit your client in many ways. Obtaining a reduced offense such as a wet reckless (Vehicle Code Section 23103.5), Dry Reckless (Vehicle Code Section 23103) or Speed Contest (Vehicle Code Section 23109) has many benefits: (1) the client will not receive a criminal DUI conviction; (2) the client will not be ordered by the court to enroll a lengthy alcohol program; and (3) the client's driver license will not be ordered suspended by the court.

Importantly, even if a client avoids a DUI conviction in the criminal court, the client can still have the driving privilege suspended by the DMV through the administrative proceeding. Thus, it is extremely important to properly prepare for the DMV hearing to obtain a set aside of DMV action. An attorney can use the same evidentiary weaknesses (used in court) to prevail at the adminstrative action.

A thorough approach to DUI defense is essential for the best result in court and with the DMV. With an aggressive and deliberate strategy, a drunk driving charge could be dismissed, and the client's license saved.

Dmitry Gorin *is a former Los Angeles Deputy District Attorney. Gorin specializes in all criminal defense matters and is a firm partner in Kestenbaum Eisner Gorin LLP, an A.V.-rated law firm. Gorin is an Adjunct Professor at Pepperdine School of Law and UCLA. He can be reached at thebestdefense@gmail.com.*

Valley Community Legal Foundation

Charitable Efforts for the Courts

HON. MICHAEL R. HOFF, RET.
VCLF President

THE LOS ANGELES COUNTY court system is gigantic. The Los Angeles Superior Court is the largest court of general jurisdiction at the state level in America. Many of the branch courts, such as Van Nuys, are larger than the entire county courts of the other 57 California counties.

Attorneys who appear in court on a regular basis woe the days they have appearances in Compton and West Los Angeles on the same day. Years ago, there was an initiative that would have separated the Valley from the remainder of the city. The initiative failed, but even if it passed, it would not have impacted the courts because they were a county/state institution and are now totally a state operation.

Judges get front row seats to the logistical nightmare that faces the Los Angeles Sheriff's Department (LASD) in the movement of in custody defendants. LASD has a fleet of buses that transport the inmates for arraignments, trials, hearings, sentencings and other matters that require the personal appearance of the defendant. The LASD does a remarkable job in getting most of the custodies to where they are supposed to be and get them there on time.

Just imagine being a trial judge in a homicide case that took two weeks to pick a jury and the evidence will take four weeks to place before the jurors. It is a safe bet that many of the jurors are not pleased to be on a jury in the first place. Long cases places many of them in a jam with their jobs, family lives – such as dropping off kids at school and rescheduling various appointments – and can generally be quite disruptive. Fortunately, a very large number of our fellow citizens bite the bullet and serve on jurors as part of the American justice system.

At times, the LASD has difficulty in getting all the custodies to where they are scheduled to be on time. Suppose an attorney is involved in a long cause criminal case and has scheduled an expert witness to be present for testimony that was slated to begin at 10:00 a.m. That witness is being paid by either your client or the state and bills hourly, and probably has other places to be at that time. The trial defendant is late for one of numerous reasons. The reasons can range from a defendant hiding at the jail because he/she does not want to come to court; the defendant through no fault of him/herself is taken to the wrong courthouse; or the transportation bus gets into an accident or breaks down.

The opposing attorney has witnesses scheduled and the delay will throw that schedule out the window. At the close of the prior day's proceedings, the jurors were told to report back at 10:00 a.m. and they do. They are placed in the jury room to wait, or in some cases they are ordered to wait in the hall. By about 10:30 a.m., the jurors, who rushed through their morning routines to get to court on time, are getting a bit upset. By 11:45 a.m., the jurors are really getting upset and they let the bailiff know it.

The LASD finally delivers the defendant at 11:55 a.m. It does not matter whether it was the defendant's fault for being late by trying to hide or if the LASD goofed. The jurors are ordered to return at 1:30 p.m. and trial will then resume.

The jurors finally enter the courtroom and as a group emit an aura of frustration and anger. In this case, assume that the defendant had been hiding at county jail because he did not want to come to court. Unless the trial judge wants to have the conviction reversed, the judge must take the blame for the late start of testimony. What would an appellate court do if the trial judge told the trial jurors that the reason that they had to wait was because the defendant is in custody and was hiding at the jail because he/she did not want to come to court?

Many times the trial judge will apologize to the jurors and tell them that while it was really not the judge's fault that all their time was wasted, that the jurors are to blame the trial judge and to take out their frustrations out on the judge that has been trying quite hard to get the defendant to court. This approach seems to calm the jurors and when the judge adds that he/she will tell the jurors the true reason after the trial has completed, the issue of that bit of juror frustration is resolved.

What does any of this have to do with the Valley Community Legal Foundation? Dependent children also have to be transported from their temporary quarters, either Juvenile Hall or other temporary holding facility, by the LASD or members of the probation department or representatives of children's services branch of the county government.

In the past, the Foundation has undertaken significant and positive steps to assist children that find themselves in court. The Foundation was a major moving force in the establishment of children's waiting rooms at the Van Nuys and San Fernando courthouses. These facilities were made possible by donations to the Foundation by members of the San Fernando Valley Bar Association, SFVBA Attorney Referral Service, County Supervisors Zev Yaroslavsky and Mike Antonovich, private individuals and the Foundation's annual Law Day Gala (which will be held on June 11, 2011 – save the date).

The VCLF also assists other worthwhile causes with grants and scholarships. The Foundation has decided to devote much of its efforts this year to the Court Appointed Special Advocates (CASA) program. CASA volunteers assist the court, the community and above all dependent children that have been made wards of the court due to abandonment or rescued from squalid living conditions that are dangerous to the child's mental and physical health and well being.

Think of the number of stories of children victims of abuse, beatings, starvation or any number of depravations. Try to picture the helpless children and then try to simply ignore those small helpless victims. The VCLF hopes that attorneys will not ignore the victims and will join the Foundation in supporting CASA.

Remember, tax deductible donations can be sent to the Foundation through the SFVBA's offices. Members who donate will feel a personal sense of satisfaction and pride for helping abused and abandoned children.

Hon. Michael R. Hoff, Ret. *can be contacted at mrhoff2@verizon.net.*

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Calendar

Networking Mixer

Win a Pair of Lakers Tickets!*
Sponsored by Law Offices of Barry F. Hammond

February 3, 2011
6:30 PM to 8:30 PM

Harper's Bar & Grille
5545 Reseda Boulevard, Tarzana
Complimentary appetizers and one free beer or wine for SFVBA Members!

RSVP to events@sfvba.org or (818) 227-0490, Ext. 105.

*Must be an active SFVBA Member and present between 7:00 and 7:30 PM to be entered into free drawing for one pair of tickets to upcoming Lakers game.

Probate & Estate Planning Section
Ethics Rules for Trusts and Estates Practitioners

FEBRUARY 8
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorney Bruce Ross will outline what you need to know to stay ahead of the game.

MEMBERS
$35 prepaid
$45 at the door

NON-MEMBERS
$45 prepaid
$55 at the door

1 MCLE HOUR (Legal Ethics)

All-Section Meeting
An Introduction to Exchange Traded Funds

FEBRUARY 15
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Barry Pinsky, Vice President, Investments of UBS Financial Services, will discuss ETFs, a recent innovation similar to mutual funds. This seminar will be of interest to tax, estate and trust and family law attorneys and general practitioners.

FREE TO SFVBA MEMBERS!
Space is limited so RSVP ASAP!
1 MCLE HOUR

Workers' Compensation Section
Case Law Update

FEBRUARY 16
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Workers' Compensation Appeals Board Chief Judge Mark Kahn will outline the latest developments.

MEMBERS
$35 prepaid
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NON-MEMBERS
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1 MCLE HOUR

Santa Clarita Valley Bar Association

FEBRUARY 17
12:00 NOON
TOURNAMENT PLAYERS CLUB
VALENCIA

To RSVP, contact (661) 414-7123 or rsvp@scvbar.org.

MEMBERS
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$45 at the door

NON-MEMBERS
$45 prepaid

1 MCLE HOUR

Litigation Section and Intellectual Property, Entertainment & Internet Law Section
Litigating Under the New Talent Agency Act

FEBRUARY 17
6:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Attorney Max J. Sprecher will discuss the ins and outs of the Talent Agency Act and how it impacts you and your clients.

MEMBERS
$35 prepaid
$45 at the door

NON-MEMBERS
$45 prepaid
$55 at the door

1 MCLE HOUR

Business Law, Real Property & Bankruptcy Section

FEBRUARY 23
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

MEMBERS
$30 prepaid
$35 at the door

NON-MEMBERS
$40 prepaid
$50 at the door

1 MCLE HOUR

Family Law Section
Evidence

FEBRUARY 28
5:30 PM
MONTEREY AT ENCINO RESTAURANT
ENCINO

Judge Michael Convey will discuss what you need to know about evidence.

MEMBERS
$45 prepaid
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NON-MEMBERS
$55 prepaid
$65 at the door

1 MCLE HOUR

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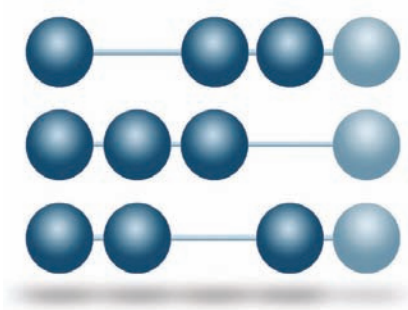

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