VALLEY LAWYER

FEBRUARY 2013 • $4

A Publication of the San Fernando Valley Bar Association

Appeals and Writs 101 for the Trial Lawyer

Earn MCLE Credit

A Conversation with Presiding Judge David Wesley and Assistant Presiding Judge Carolyn Kuhl

The iPad for Litigators

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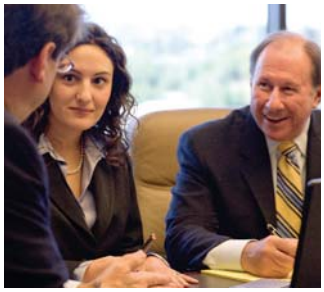

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whampton@narver.com

Debra Mondragon
dmondragon@narver.com

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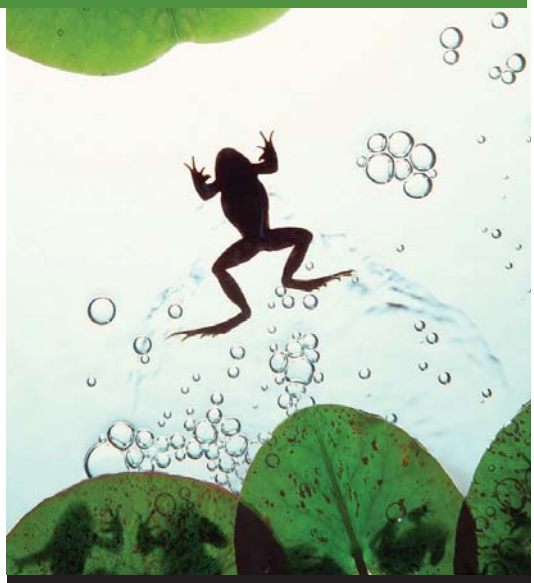

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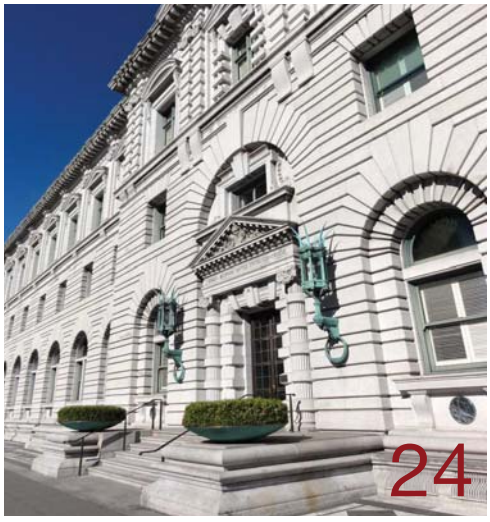

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VALLEY LAWYER

SAN FERNANDO VALLEY BAR ASSOCIATION

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

EDITOR
Irma Mejia

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

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A Growing Legacy of Diversity

DAVID GURNICK
SFVBA President
dgurnick@Lewitthackman.com

FEBRUARY IS BLACK HISTORY MONTH. Its origin is a 1915 Chicago exhibition celebrating the anniversary of Emancipation and in 1926 a weeklong commemoration, a first in our nation's history. February was chosen for the birth dates of two Americans who advanced civil rights: President Abraham Lincoln and abolitionist and former slave Frederic Douglas. 2013 is the 150th anniversary of Emancipation and 50th anniversary of the March in March on Washington and Dr. King's "I Have a Dream" speech.

Our national mission, the motive for the Mayflower Compact, the essence of the Declaration of Independence and our Constitution, the cause of the Civil War and abolition, the common reason for our laws is our great experiment and endless challenge: to prioritize our similarities; to subordinate our differences; to learn to live together; to respect each other and compromise. To paraphrase Rodney King, our continuing challenge is to learn how we can all get along.

Among many messages of Black History month is that reason prevails over prejudice. The tribulations of our ancestors, their struggles, flaws, hopes and dreams have brought us so far. The existence of right and wrong, good and evil have been confirmed. Nothing is inevitable but the human commitment to what is right and good, backed by reason and perseverance, which have so far prevailed. We have come far, along a winding, often painful, and perhaps endless road to the society of equality.

A hundred years ago the Valley was very different from today. California had been a state only about 60 years. For a sense of this, a century ago, California was about the same distance from statehood as we today are from the presidencies of Eisenhower and Truman. That year, a new aqueduct brought water to the Valley. In 1915, by a vote of 681 to 25, Valley residents voted to be annexed by the City of Los Angeles. Our Bar Association was founded eleven years later.

Our Valley's 706 voters could not have imagined today's population of more than 1.75 million, and their dry desert filled with trees, homes, businesses and traffic. Thus, it is hard for us to know the likes of our geography 50 or 100 years from now. But we can ponder, and dream. As Gandhi said, "A man is but the product of his thoughts. What he thinks, he becomes."

Our Valley saw incarceration of Japanese Americans in WWII. We had a trickle of African American migration after the war but through the 1960s Valley communities remained 95% to 100% white. In 1968, black students and white allies occupied the CSUN Hall of Administration. Only nonwhite students were charged with crimes. But times and much else has changed. Today the Valley is a majority-minority region. We are ever more diverse. We are working together, living together and embracing each other in brotherhood and sisterhood. There is progress.

For our Bar Association, our 2,000+ members, I have a vision I ask you to join. It is a vision of our legal community embodying the diversity of our Valley and our society. It is a rainbow of lawyers at the front of the march, locked in arms with Dr. King and each other, continuing to lead the way to a more just society. It is a community that is attracting and welcoming the diversity of coming generations of lawyers; celebrating our world of differences; achieving the dream of the Pilgrims, our nation's founders, our civil rights leaders, our leaders today—a dream that so many of us continue to hold.

So to honor Black History Month, to honor the fight of all whose shoulders we stand upon, to honor the process and rule of law, I ask our members to remain active, open-minded and forward-thinking. I ask you to encourage fellow lawyers of all backgrounds to join and lead our organization. Help the San Fernando Valley Bar Association embody the spectrum of colors, preferences, backgrounds and ideas that comprise our nation and our Valley's legal community.

Calendar

Employment Law Section
New Employment Update for 2013

FEBRUARY 6
12:00 NOON
SFVBA CONFERENCE ROOM

Attorney Sue Bendavid will address how new legislation and case law mandates will alter the way employers must deal with their employees in 2013 and beyond.

MEMBERS	NON-MEMBERS
$30 prepaid	$40 prepaid
$40 at the door	$50 at the door
1 MCLE HOUR	

Probate & Estate Planning Section
What to Expect at the Courthouse in 2013

FEBRUARY 12
12:00 NOON
MONTEREY AT ENCINO RESTAURANT

Substantial changes are occurring at our local courthouses. Attorneys Blake Rummel and Andy Wallet will address local and state developments that will impact your practice.

MEMBERS	NON-MEMBERS
$35 prepaid	$45 prepaid
$45 at the door	$55 at the door

Business Law Section
Immigration Law for the Business Lawyer

FEBRUARY 13
12:00 NOON
SFVBA CONFERENCE ROOM

Certified Specialist Alice Yardum-Hunter will cover why immigration law is important for business counsel and their clients; H-1Bs; business visas; and current Congressional proposals on immigration reform.

MEMBERS	NON-MEMBERS
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1 MCLE HOUR	

Taxation Law Section
Which is Best? S v. C v. LLC:

FEBRUARY 19
12:00 NOON
SFVBA CONFERENCE ROOM

Attorney Bill Staley will discuss S vs. C vs. LLC; stock buy-backs (entity purchase vs. cross-purchase); stock records; living trusts threats to S corp status; living trusts when there are multiple shareholders; professional corp vs. LLP; S corp distributions; and more.

MEMBERS	NON-MEMBERS
$30 prepaid	$40 prepaid
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1 MCLE HOUR	

Workers' Compensation Section
Implementation of SB863

FEBRUARY 20
12:00 NOON
MONTEREY AT ENCINO RESTAURANT

Attorneys Michael Sullivan and Bart Sullivan will discuss which regulations were implemented January 1, 2013, which will become effective in 2014, and everything in between!

MEMBERS	NON-MEMBERS
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$45 at the door	$55 at the door
1 MCLE HOUR	

Small Firm & Sole Practitioner Section
Getting Paid

FEBRUARY 22
12:00 NOON
SFVBA CONFERENCE ROOM

Attorney B. Austin Baillio will discuss collections for law firms—how can you ensure getting paid in a down economy?

MEMBERS	NON-MEMBERS
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1 MCLE HOUR	

Family Law Section
New Laws and Update on the Latest Changes by the Los Angeles Superior Court

FEBRUARY 25
5:30 PM
MONTEREY AT ENCINO RESTAURANT

Attorneys Barry Harlan and Michelle Robins will update you on the latest changes.

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1 MCLE HOUR	

Women Lawyers Section
Women's Roundtable

FEBRUARY 26
12:00 NOON
SFVBA CONFERENCE ROOM

Women helping women is the theme for our revitalized Section. The new format is designed to encourage networking, exchange ideas, discuss legal issues and earn MCLE credit. All those interested in joining the section are welcome to attend this complimentary kickoff luncheon.

Intellectual Property, Entertainment & Internet Law Section
Patent Law: Update on Apple v. Samsung

FEBRUARY 27
12:00 NOON
SFVBA CONFERENCE ROOM

Mike DiNardo and Mark Nielsen will discuss the latest in the highly publicized case between Samsung, manufacturer of a number of Android products, and Apple. The panelists will give an overview of design patents and review the claims raised in the *Apple v. Samsung* case, including requests for injunctive relief.

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1 MCLE HOUR	

Elder Law Section
Special Needs Trusts in Regard to the Elderly

FEBRUARY 27
6:00 PM
SFVBA CONFERENCE ROOM

Distinguished speaker Ruth Phelps, President of the National Academy of Elder Law Attorneys, Certified Elder Law Attorney and Certified Estate Planning, Trust and Probate Specialist, gives the latest on special needs trusts.

MEMBERS	NON-MEMBERS
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$45 at the door	$55 at the door
1 MCLE HOUR	

Bankruptcy Law Section
Judgment Debtor Exam

FEBRUARY 28
12:00 NOON
SFVBA CONFERENCE ROOM

Robert Klueger, Nick Kantor and Michael Davis join the panel of one of our most popular seminars.

MEMBERS	NON-MEMBERS
$35 prepaid	$45 prepaid
$45 at the door	$55 at the door
1 MCLE HOUR	

The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. To register for an event listed on this page, please contact Linda Temkin at (818) 227-0490, ext. 105 or events@sfvba.org.

Looking Forward

IRMA MEJIA
Publications & Social Media Manager
editor@sfvba.org

I AM HONORED AT HAVING BEEN granted the opportunity to serve as Editor of *Valley Lawyer*. This publication is a vital tool for member engagement. Through it, members can impart knowledge, offer opinions, share news and discover Bar programs and events. Assembling this magazine is no small endeavor but it is a challenge to which I look forward. I relish the opportunity to bring my creative talents to this wonderful publication and help it flourish.

As Editor, my objective is to continue *Valley Lawyer*'s tradition of providing informative articles while increasing members' participation. As members, this is your publication. Many among you are experts in your area of practice, have valuable wisdom to impart, or are able to signal the latest legal trends. This magazine is your opportunity to showcase your expertise, provide useful tips, and bring your colleagues up-to-speed on the latest legal development.

I encourage members to make this magazine your own by submitting articles for publication. Issue focuses and deadlines are in the Editorial Calendar on page 10. Feel free to submit articles that don't fit perfectly with the topics listed; articles written by members will always be considered. *Valley Lawyer* articles are also published on our Twitter and Facebook pages so don't miss this opportunity to contribute.

I also invite members to join the Editorial Committee where you will be able to shape the magazine's long-term goals and direction. The Committee meets bimonthly and offers assistance in soliciting and reviewing article submissions and offering content suggestions. Members who are interested in joining the Committee should contact me at the address above.

Next month's issue will also provide a new way for members to engage the publication: *Valley Lawyer* will launch a Member's Bulletin feature. The bulletin will be a free service allowing members to publish brief announcements about trial successes, new staff additions, changes of address, etc. This will provide another way for the SFVBA community to maintain its close ties. Look for more details to be sent by email.

Your contributions make *Valley Lawyer* valuable. As Editor, I hope to make it easy and enjoyable for you to get involved.

Consensus ad idem

Throughout the year, Valley Lawyer will conduct polls to gauge members' opinions on amusing topics. In honor of this month's Academy Awards, we're asking: What is the all-time greatest legal movie? Review the options below and check your email for your poll invitation. Not on our email list? Submit your vote to editor@sfvba.org. Poll participants will be entered into a drawing for movie and dinner gift cards.*
The list below is by no means exhaustive. Sound off on omitted titles and continue the discussion at facebook.com/sfvba.

*Only current members will be eligible to win.

2013 Editorial Calendar

VALLEY LAWYER

Content Focus	Editorial Deadline
Taxation	February 1
Family Law	March 1
Bankruptcy/Real Property	April 1
Criminal Law	May 1
Attorney-to-Attorney Guide	May 1
Elder Law/Probate and Estate Planning	July 1
IP, Entertainment and Internet Law	August 1
New Lawyers/ Law Practice Management	September 3
Employment Law	October 1

To submit an article or story idea, email editor@sfvba.org.

To advertise, visit **www.sfvba.org** for the 2012 Media Kit. To place your ad, contact the Bar office at (818) 227-0490, ext. 101.

BLANKET THE HOMELESS

Through the generosity of our members, since 1995, the SFVBA has been able to purchase and distribute more than 40,000 blankets to homeless and battered women shelters in the San Fernando Valley each December. We would like to thank the following members and firms who made donations to Blanket the Homeless this holiday season.

Ani Aghaeian, Sharley Allen, Alan Barlow, Moses Bardavid, Celia Bladow, Beaumont Gitlin Tashjian, Edythe Bronston, Erica Carter, Lilianne Chaumont, Jay S. Cohen, Aran Dokovna, Linda Dmytryk, Jonathan Evans, Nicole Fassanaki, Marcia Galindo, Laura Glickman, Abbas Hadjian, Hon. Jeffrey Harkavy, Barry Harlan, Ray Hassanlou, Russell Higgins, Hon. Michael Hoff, Ret., Andrew and Helen Hyman, Monet Jordan, Laurence Kaldor, Mitchell Kander, Sona Keshishyan, Sandra Canaday Knapp, Laurence Mandell, Gary Mann, John Marshall, Kira Masteller, Tom Melatis, Alan Nahmias, Steven Niebow, Bob Nolan, Gregory Owen, Kristine Paranukyan, Katherine Pene, Barbara Jean Penny, Daniel Perlman, Michael Prihar, Tara Radley, Reape-Rickett Law Firm, Merle Russ, Razmine Sahakyan, Marc Sallus, Richard Santwier, Al Shaffer, Janet Shaw, Debra Sheppard, Mark Shipow, Jeffrey Shuwarger, Richard Singer, Daniel Spitzer, Hon. Kathryn Stoltz, Ret., Lisa Tashjian, Lindsey Taylor, Meredith and Richard Taylor, Sheryl Templeton, Liz Vartanian, Robert Weissman, Brittany West, Jim Lee Wong, Christine Yi, Irving Zaroff and Stuart Zimring.

On December 15, 2012, SFVBA members, family and staff handed out more than a 1,000 blankets to area homeless and battered women shelters from LAFD Fire Station 84 in Warner Center. Later that morning, volunteer attorneys conducted a legal clinic at the U.S. Bankruptcy Court in Woodland Hills.

Membership Pride on Display

ELIZABETH POST
Executive Director
epost@sfvba.org

THE SFVBA BOARD OF TRUSTEES WANTS VALLEY LAWYERS to communicate your pride in belonging to the San Fernando Valley Bar Association by publicizing your membership to colleagues and the public.

On February 12, 2013, the Board of Trustees will vote to amend the bylaws to expressly authorize members to inform the public of your SFVBA membership and display the SFVBA logo on your stationery, office brochures, business cards, emails and websites. Below is the bylaw amendment and member logo to be considered by the Board of Trustees:

> A member or associate member who is in good standing may inform the public and others of his or her membership in the Association, and may display the Association's name and logo, according to rules adopted by the board of trustees. The display must not be misleading. Rules for the display of the name and/or logo may apply generally, or specifically to one or more members or associate members, or in a particular circumstance, as the board determines. A member or associate member shall stop and/or modify the use and/or display of the name and/or logo as requested by the Association at any time. The privilege of displaying the Association's name and/or logo is not assignable or otherwise transferable by a member.

PROUD MEMBER OF
San Fernando Valley Bar Association
founded in 1926

Following the Board's anticipated approval of the bylaw amendment, any member or associate member who is in good standing will be able to request the rules and a jpeg of our logo by contacting me.

San Fernando Valley Bar Association

Annual Judges' Night Dinner

Thursday, March 7, 2013

Warner Center Marriott
21850 Oxnard Street, Woodland Hills

Judge Mary Thornton House
Los Angeles Superior Court
2013 SFVBA Judge of the Year

5:30 PM Cocktail Reception
6:30 PM Dinner and Program

Judge Jerold S. Cohn
Workers' Compensation Appeals Board
Stanley Mosk Legacy of Justice Award

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* Please reserve two seats for judicial officers.

Improving Access to Justice with Limited-Scope Representation

ROSIE SOTO COHEN
Director of Public Services
referrals@sfvba.org

WHEN FEBRUARY COMES AROUND, MOST people think of Valentine's Day, a celebration of love and devotion, of renewed bonds and new commitments. But for some couples, there is trouble in paradise. They are considering divorce or are already engaged in property disputes and custody fights. Clients going through a divorce require a range of timely support and services for a complete understanding of their legal issues, personal needs and the needs of their families. Clients contact the Attorney Referral Service (ARS) of the San Fernando Valley Bar Association to find the very best attorneys in family law. Unfortunately for some clients, attorney fees can break the bank and jeopardize the immediate financial needs of their families. But with limited-scope representation in family law, quality and affordable legal representation is still attainable.

The ARS launched a Limited-Scope Representation (LSR) Panel nine years ago. The program was developed with the cooperation of top rated family law attorneys and Valley judges. Valley judges have been especially supportive of limited-scope representation in family law cases because it improves access to justice for people who would otherwise proceed without legal representation. The ARS often receives calls from pro se litigants, struggling for representation while their opposing party has gainfully retained legal counsel. Their calls to the ARS are the result of a judge's strong suggestion that they seek counsel, even if it is on a limited-scope basis. Such cases would be difficult to resolve if the self-represented litigant did not have any form of representation.

The ARS created a training program designed to help attorneys work on limited-scope legal representation. The 3-hour program is designed to train attorneys to be exceptionally careful in defining the scope of their work to clients. The training uses the materials developed by the Limited Representation Committee of the California Commission on Access to Justice. It covers the use of special forms approved by the Los Angeles Superior Court and sample service contracts provided by the ARS. The forms are designed for the client and limited-scope attorney to use once each agrees to limited-scope representation. The contract with the limited-scope client is very clear in defining what the lawyer will and will not be doing, in addition to defining what is expected from the client. Limited-scope contracts also clearly specify how clients will be charged and any fee arrangements that may be offered.

ARS attorneys continue to join the LSR Panel, but a debate is brewing among bar communities nationwide. Many lawyers don't fully understand limited-scope representation and believe there is no point in learning about it since they believe those cases aren't worth much in fees. There are also concerns that judges countywide won't honor limited-scope and that attorneys may be compelled to represent clients who can't pay additional fees. Questions about professional liability insurance coverage have also arisen. Can professional liability insurance companies prohibit limited-scope representation or unbundled services? Do they discourage the practice?

Without a doubt, ARS staff is careful in the screening of limited-scope referrals and panel members are careful in the selection of cases. The ARS recently surveyed its panel to find out how things are going for our LSR Panel members. The attorneys that participate in the program unanimously felt that it is for the public good.

"We are in the business of handling legal matters in the interest of the clients. Going in on a limited-scope hearing when the client has limited economic resources means a tremendous amount to the client and my clients are extremely appreciative of this limited service,"

explained LSR Panel member John Goffin. "These cases are well worth it to the client—that is who we are servicing,"

"Some lawyers caution against limited-scope representation," says panel member Michelle Diaz, "but I have done it many times and believe that, with good client communication, it is a great addition to my practice."

Regarding concerns over judges not honoring limited-scope, Diaz states, "I have never had a problem in family law or heard of this being a problem. We use a particular form for limited-scope representation (FL-950) and, in my experience, it has never been questioned by judges."

To help address the questions regarding professional insurance coverage for attorneys that perform limited-scope representation, the ARS turned to Wesley G. Hampton, President and CEO of Narver Insurance.

> "Valley judges have been especially supportive of limited-scope representation in family law cases because it improves access to justice for people who would otherwise proceed without legal representation."

The ARS posed the following questions: Can professional liability insurance companies prohibit limited-scope representation or unbundled services? Do they discourage such practices? Can rates increase if attorneys offer limited-scope services in family law cases?

"Upon considering these questions, I thought of the saying 'no good deed goes unpunished'," said Hampton. "Attorneys are held to a 'standard of care', regardless of what their client was willing to sign or waive. So, if a client agrees to a limited-scope of representation, the attorney may be held to a higher standard of care than what was originally agreed to. Most malpractice carriers discourage such practices, even though they are well intended and meant for the public good. Should malpractice suits against these practicing attorneys develop, it would complicate the firm's ability to obtain insurance coverage."

Despite successfully meeting a great public need, progress to date in this area has not been sufficient. Limited-scope representation may be new in some counties and some courts and lawyers may not be comfortable or familiar with it. But more and more lawyers are willing to take on limited-scope cases and awareness among judges is increasing. Only a fraction of Valley residents take advantage of the services they can get from the ARS. The ARS is working on public awareness and exposure with the hope of growing the program.

Lessons from Mandatory Fee Arbitration

The Case of Failed Contract Performance

By Sean E. Judge

This is the inaugural installment of a monthly column which will summarize recent cases that have been resolved through the SFVBA Mandatory Fee Arbitration Program. The goal of this column is to provide brief case studies of fee disputes in the hope that these examples will help Bar members avoid similar situations in their own practice.

Factual Summary

A client retained an attorney to represent her in petitioning the court to substitute herself and her grandparents as trustees of a special needs trust in place of a bank, which was resigning as trustee. The client paid her attorney a retainer of $5,000. The fee agreement/engagement letter set forth a schedule of fees to be applied against the retainer. The fee agreement was copied to the client, but was not signed by both the attorney and client. Attorney stated in the agreement that monthly billing statements would be provided.

A month later, the client called to complain about the lack of progress and wished to terminate the attorney's services. The client requested a full refund of the retainer. Her attorney then sent a follow up email requesting that she be allowed to complete the matter herself, but that if she did not hear from the client, she would refund the retainer in full.

The attorney provided various legal services but ultimately filed the petition in the wrong court a few months later. She also prepared various additional documents, some of which were not filed.

Soon thereafter, the attorney was terminated. The attorney sent an accounting to the client with only a portion of the retainer refunded. The parties submitted the case to binding arbitration on the question of whether a full or partial refund of the retainer was owed to the client.

The Law

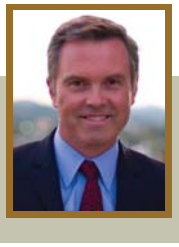
Business and Professions Code section 6148 provides that in any case in which the total fees and expenses will exceed $1,000, the contract shall be in writing and, at the time the contract is entered into, the attorney shall provide the client with a duplicate copy signed by both of them. Further, the contract is to include a description of the services that will be provided, the relative responsibilities of the attorney and client, and the basis of compensation. The contract is voidable at the option of the client, and at the time it is voided, the attorney is entitled to a reasonable fee.

The Takeaway

All attorneys should make sure to strictly comply with the provisions of Business and Professions Code section 6148 in matters that are to exceed $1,000 in costs and fees. In this case, because the fee agreement was not signed by both parties and copied to the client, it was held to be unenforceable, and the matter became one of *quantum meruit*.

The arbitrator ultimately found that, most importantly, because the petition was filed in the wrong court and was not performed in a timely manner, this work was of no value to the client. Although the petition was ultimately filed in the proper court by the client's subsequent attorney, there was no evidence to show that this petition was based on the drafting and filing made by the former attorney.

Though the attorney ultimately provided an accounting of the amount deducted from the retainer, the attorney failed to provide monthly billing statements as agreed to in the fee agreement. This dispute was ultimately about the performance of a contract. Attorneys must comply with their own fee agreements so that (1) they remain current on billings and (2) more importantly, there are no surprises to their clients in bills that haven't been sent out in a timely manner.



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

Affordable Cloud Mobility and Search Functionality with Firm Central

By Michael Kline

Welcome to R2-T2, Valley Lawyer's monthly foray into the world of trial technologies. Each month, column author and attorney Michael Kline (the SFVBA's resident expert in all things beginning with a lowercase "e" or "i") will investigate, analyze, demo, install, use, crash, uninstall, reinstall and push the limits of one of the myriad of software and cloud-based services that currently flood the legal market. Every month, R2-T2 will provide readers with a practical review of these products from the practical vantage point of an attorney, without all the geek-speak and IT mumbo-jumbo that cause many to run and hide. If you would like to see a software product or online service reviewed in a future column, email r2t2@sfvba.org.

Firm Central[1]
Provider: Thomson Reuters/Westlaw
Cost: $35/month

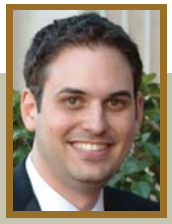
What They Say It Does: "Firm Central from Thomson Reuters is the only online practice management solution for solo and small firms that connects your legal research, drafting, matters, contacts, calendar, and more. As you use Firm Central, you'll discover how it helps you accomplish more for your clients with less effort and stress."[2]

What It Actually Does (In English): From the look of it, whoever designed Firm Central for Thomson Reuters read the Steve Jobs biography and took his closed-system/full-integration philosophies to heart. An online-only (i.e., cloud-based) service accessed through the company's litigator.westlaw.com website, Firm Central cleans up, organizes and centralizes Thomson Reuter's online legal research (Westlaw Next), drafting (Form Builder) and calendaring (Westlaw Legal Calendaring) subscription services in one place, allowing commonly used information (think client contact and case information) to be shared across all platforms.[3]

Firm Central's strength lies in its document management and search functionality. You know those Windows folders, subfolders and file names that you spent all that time organizing on your PC juuuuuust the way you like it? Simply drag and drop everything into the new "Firm Central" drive that appears on your computer, and a complete, organized copy will be uploaded to the proverbial "cloud." Once that's done, you will be able to *securely* access every one of those folders and files through a standard web browser on a desktop computer or supported smartphone anywhere, anytime (assuming you remember that password of yours … which, of course, you would *never* forget … right?!?).

Firm Central is far more than remote file access, however. What is most impressive about this product is what Firm Central does to your files *after* they're uploaded. How many times have you searched for an old document on your computer, only to come up empty? Sometimes you vaguely remember what you named the file, other times you're certain it's there, but after several minutes of searching … *nada.* Ever tried doing that search on a Windows computer by looking for a specific name or word within the body of those documents as well as their file names? How long did that take? Did you find what you were looking for?

Firm Central solves that problem by automatically indexing every single letter of readable text within all of your uploaded files, which are then made part of an ultra-fast search engine just for your practice.[4] It's just like



Michael Kline is an attorney who specializes in assisting solo practitioners and and small to medium sized firms with the creation of persuasive electronic presentations of arguments and evidence at trials, mediations and arbitrations. Mr. Kline can be reached at r2t2@sfvba.org.

Google for lawyers![5] Type in any term, phrase, or sentence that you're looking for, and Firm Central will find it and find it fast. Open the document, and you'll find that your citations have been magically transformed into clickable links that will take you directly to the source. Those citations will also be checked for conflicting authority. This applies not only to your own word processing files, but anything you receive from opposing counsel as well. Simply scan incoming documents to .pdf format, OCR them[6], drag and drop onto the Firm Central icon on your computer and … voila! You will now be able to instantly see which cases cited by your adversaries are ripe for attack in your responsive pleading.

Throw in the ability to upload emails directly from Outlook and include them within the aforementioned search and citation features, then sprinkle some of the calendaring functionality that Thomson Reuters plans to add later this year, and Firm Central gives platform-loyalists a simple, easy to use and understand gateway to several substantial, core services provided under the "Westlaw" banner.

What It Doesn't Do: If you're only looking to spend $35/month, you can pretty much forget most of what you just read. Clickable links to case and statutory citations are great … provided that you can actually access the text of the cases and statutes you're clicking on. That will cost you more per month. Want to create forms able to use some of that shared client and matter information you uploaded to Firm Central? That's another monthly subscription for Form Builder. Want to calendar your deadline to answer to the complaint you just uploaded? You guessed it—pay another monthly subscription fee![7]

Of course, all of the standard drawbacks associated with cloud-based computing apply with equal force to Firm Central. Sure, accessing all of your files in the cloud is a nice option to have when you're standing in front of a judge armed with nothing more than your iPad and a smile, but what happens when that age-old combination of concrete and despair comprising the courthouse wipes the final 4G signal bar from your iPhone? Better yet … what happens when the power goes out in your office? No power = no internet = no Firm Central.

Although an easy solution to this problem would have been for Firm Central to continuously monitor your selected computer folders and automatically update its own cloud-based file copies when you make changes on your local computer, such "sync" functionality remains conspicuously absent from the initial launch version of the program. While all your Firm Central folders and files can be accessed directly by clicking the "My Computer" icon on your PC, they are still up in the cloud and independent of their counterparts. Changing the Firm Central copy does nothing to the original file, and vice versa.

Although Firm Central is many things, a word processor it is not. While Thomson Reuters representatives tout the program's ability to allow users to place notes and highlights on uploaded documents (which can also be searched), all word processing must be done locally, before the file is re-uploaded and saved to Firm Central in place of its predecessor (or in addition thereto, depending on the circumstances). As a result, the aforementioned sync functions appear to have been placed at the bottom of the developer's priority list.

The Verdict: If you subscribe to one or more of the various West brand components that are incorporated into Firm Central, or if you are in a position to sign up for them, Firm Central is well worth it's minimal monthly fee. That said, even if you're locked into other solutions or committed to competing providers like Lexis-Nexis, you'll likely find Firm Central's search and mobile access functionality alone to be worth the price of admission.

Final Rating: 4½ out of 5

[1] Unless otherwise noted, all information within this review reflects the personal recollections and understandings of the author based upon internet research, program/service use and discussions with developer representatives. Any reference to pricing amounts or methods are specific to the author. None of the representations made herein shall be interpreted to have been made by, at the behest of, or with the knowledge of the developer, its representatives or any of its affiliates. The author has not been compensated in any way, shape or form for the opinions set forth herein. Let's be clear about this—all information provided herein is based solely on a personal product offering made by Thomson Reuters sales representatives to the author, his experience with the program and his resulting memory—they are most definitely not representations, warranties or claims by anyone regarding what the programs may or may not be able to do for anyone else.

[2] Thomson Reuters, Firm Central Sell Sheet, ©2012.

[3] As of mid-January 2013, Firm Central integration with Westlaw Legal Calendaring is not supported. However, company reps claim that Firm Central will be updated "in the next few months" to support such functionality.

[4] This happens automatically with supported word processing files from programs like Microsoft Word. While commonly used files from programs such as Adobe Acrobat may be uploaded as well, the user must make sure the file has rendered text that can be recognized by computers. If it is a flat image file instead, the user must run optical character recognition (OCR) on the file to render that text, at which time it can then be indexed by Firm Central following upload.

[5] Googlaw!

[6] See FN4, above.

[7] Pricing rates and methods vary. Contact Thomson Reuters/Westlaw for details.

Changes on the Horizon:

A Conversation with Presiding Judge David Wesley and Assistant Presiding Judge Carolyn Kuhl

By Irma Mejia

Presiding Judge David Wesley and Assistant Presiding Judge Carolyn Kuhl take over as chief administrators of the Los Angeles Superior Court.

HON. DAVID WESLEY BEGAN HIS TWO-YEAR term in January with perhaps the most arduous task ever to come before the office of the Presiding Judge: implementation of the most drastic restructuring plan in Los Angeles Superior Court (LASC) history. The plan announced last fall calls for closure of ten courthouses throughout Los Angeles County, consolidation of services and continued layoffs. The pending changes will have lasting effects on litigants throughout the county.

For lawyers and clients, access to justice will be delayed and oftentimes inconvenient. For judicial officers and court staff, the transferred caseload from shuttered courthouses will be added to already overburdened dockets. Despite the gloom, Judge Wesley sees a silver lining and remains optimistic that LASC will successfully implement the plan while maintaining service to the community in all areas of law.

The current economic crisis has had a tremendous effect on the operating budget of courts throughout California. Locally, these budget cuts have resulted in hundreds of staff layoffs, but overall LASC has managed to maintain its level of service to residents countywide. It has done so largely by relying on its reserve fund, which was created to carry the court through economic downturns. The fund enabled the court to absorb the brunt of the budget cuts with minimal effect on daily interactions with lawyers and clients. However, legislation and the new state budget have made the fund unavailable for the coming fiscal year beginning July 1. Consequently, LASC must take radical action to remain operational.

As the nation's largest trial court system, LASC serves a county of 9.5 million residents. Through 47 courthouses, LASC processes 3.3 million cases a year. In comparison, the state courts of Kentucky, with a population of 4 million, handle only 1 million cases.[1 2] Keeping such a large court system open in the midst of devastating budget cuts is no easy task. SFVBA President David Gurnick met with Judges Wesley and Kuhl to discuss how this challenging task will be accomplished.

David Gurnick: What is the broad objective for your time in office?

David Wesley: When the Municipal and Superior Courts merged in 2000, the judges came together with a vision that the new county court system would be the largest neighborhood court in the country—one in which people wouldn't have to travel far to have their day in court. I met with the new supervising judges of each district and our collective objective today is simply to keep the courts open—open in every discipline. It sounds easy but it's against the tide. We don't have all the funds or personnel but it is imperative that the courts remain open.

DG: The outgoing presiding judge gave a pessimistic outlook. Are you pessimistic about the future and your roles as administrators of the courts in these hard times?

DW: I'm optimistic. I'm confident in saying we have the best judges in the world. Together we will meet our obligations and provide a place for people to litigate. It may not be as timely as before and it may be inconvenient but I am optimistic that the talent on this court will succeed. I have a wonderful team of supervising judges, a great Assistant Presiding Judge and the support of the judges of this court. We know it will be difficult, but everyone is pitching in to help.

Carolyn Kuhl: As judges, we took on the role to be of service to the public. Judge Wesley and I have a great deal of confidence in our colleagues that they will do whatever it takes to provide resolutions to the disputes that come before this court. It may be slower but we'll keep going.

DG: Can you provide more details on the restructuring plan and the impact it will have on Valley attorneys?

DW: The plan calls for the closure of ten courthouses–Huntington Park, Whittier, Beverly Hills, West Los Angeles, Malibu, Pomona North, Beacon Street, San Pedro, Catalina and Kenyon. The locations will either be closed completely or repurposed, but no cases will be filed or heard at these locations.

DG: One practical effect is that other courthouses will be a lot busier.

DW: Exactly. The hundreds of thousands of cases heard in those courthouses will be transferred to other courts. We will create hubs for case types and revert to a master calendar system. Currently, cases are heard on an individual calendar system, in which cases are handled from start to finish in a single courtroom. The master calendar system calls for a division of labor in which certain courtrooms will be dedicated to handle only pre-trial matters while others are dedicated solely to trials.

CK: The complex courts and individual calendar courts will remain for matters that require more case management but the idea is similar to performing triage; the types of cases that require less specialized attention will be handled by the master calendar system.

DW: Other changes are planned that will affect every discipline. In juvenile court, we are closing Kenyon Juvenile Justice Center and terminating all referees, some of whom have been with the court more than ten years. Commissioners and judges will replace referees. Traffic court, which is currently in 27 locations, will be moved to 16 or less. Collection cases of limited jurisdiction will be filed in only two courthouses: Chatsworth and Norwalk. Small claims cases, which are currently heard throughout the county, will be consolidated into five hubs: Stanley Mosk, Alhambra, Norwalk, Van Nuys and Inglewood.

Central Arraignment Court will be reconfigured to adjust to pressures created by criminal realignment. Parole hearings for certain classes of felonies, which have traditionally been a state function, are now being transferred to the county level. Central Arraignment Court will be a parole court after July.

Unlawful detainer cases will be put in four courthouses: Stanley Mosk, Long Beach, Santa Monica and Pasadena. Unlawful detainer filings in Antelope Valley will not change but San Fernando Valley cases will be filed and heard in Pasadena and Santa Monica. All personal injury cases will be brought downtown to Stanley Mosk, as will all probate matters, with the exception of those filed in Antelope Valley. All other probate cases will be filed and processed in Stanley Mosk.

DG: Valley lawyers will be painfully aware of those changes.

DW: Yes, unfortunately lawyers are going to feel this round of cuts. This is not our vision of the largest neighborhood court, but it is in line with our vision of keeping the courts open. These decisions were not made lightly. Hundreds of hours were spent creating this plan. We researched our options, took many factors into consideration, even including bus lines, when drafting this plan. We have teams of judges and administrators working to implement it and we believe this plan will work.

DG: With all the changes you just described, is there any silver lining?

DW: These changes are forcing the court to try new efficiencies we might not have otherwise attempted. Had we tried to implement these kinds of changes when we weren't in a budget crisis, there would have been a lot of resistance. I hear people say, "You should never waste a good crisis." Well now is our chance to try new things. The family law courts have already been adapting. They've been very proactive in case management and working with the

Bar to do business in a whole new way. They initiated a settlement program that has been very successful. You will see more attempts at settlement in all disciplines.

DG: Do you see an expanded role for private judging through ADR organizations or individual lawyers?
DW: As pendency increases, there will be more pressure for private judging.

CK: We were at a point where cases were taking 11-12 months to go to trial. Now it's 18. One wonders what it will be later on. But it really is a small percentage of our cases that would economically support a transfer to private judging. Small claims, limited jurisdiction cases and all the collection cases—it's tens of thousands of cases that would not be amenable to private judging.

DW: Other resources are available, such as expedited jury trials, stipulations with respect to discovery, including the Voluntary Efficient Litigation Stipulations available on the court's website. Sadly, these tools haven't been widely used. Lawyers who have used expedited jury trials are happy with the option, yet it remains underutilized.

CK: These resources would not only save court time, they would save litigation costs for clients with no loss of effective advocacy. Lawyers are hesitant to do things differently but this is their opportunity to employ these resources to improve efficiencies in litigation.

DG: When will the restructuring plan be implemented?
DW: It will happen incrementally. We created teams of judges and administrators to implement the changes. Plans for implementation should be finalized by the end of February with the goal of initiating changes in March. However, the bulk of these changes will have to occur over a period of time. There are just so many factors to take into consideration. For instance, moving criminal cases requires coordination with police departments. The first change I hope to finalize completely is probate. I hope to move all those matters downtown soon.

DG: Some may say courthouse closures are not the end of the world. Federal court litigants, for instance, travel farther.
DW: But these changes represent the end of a vision that we cherish. It represents the end of the neighborhood court. Since 2002, LASC lost almost 1,400 employees, a 23% decline in clerical staff and clerks. As employees leave and fewer people remain at filing windows, lines get longer and access to justice is delayed.

CK: We're dealing with litigants who are not federal court litigants. They're small claims, unlawful detainer and child custody litigants. We're very sensitive to access issues.

DW: We are here to serve the citizens and lawyers of Los Angeles County. My job is to provide a forum for you to

litigate. We have to be responsive to the needs of lawyers and the needs of all litigants, from small claims to unlawful detainers to criminal court litigants to victims. We have to be responsible to all those people because every one of those cases is the most important case on earth to that person.

DG: Will programs like Teen Court and other community outreach programs continue at their level?

DW: I have been working with the Teen Court program for about 20 years and we have 20 courts doing that now. I've seen it grow with a secondary program called SHADES (Stopping Hate and Delinquency by Empowering Students) in conjunction with the Museum of Tolerance. And we have a California Association of Youth Courts which brings together all these programs throughout the state. The SFVBA has been very supportive of these programs. As long as I am Presiding Judge, they will continue. I hope we will maintain the enthusiasm for community outreach that we have now because it's all part of serving the community.

DG: Is there any particular message you want us to get out to our members? Is there anything the SFVBA can do to be more helpful to the court?

CK: One small but very helpful way to get the bar involved is to have the attorneys use the LASC website. When we eliminated court reporters for civil trials, we provided very helpful information through the website on how to bring in outside court reporters. The website will be instrumental in publishing details on the changes that will be implemented.

DW: Our budget may have been slashed but the cases keep coming. People will continue to file cases and we will continue to serve them as best we can. Lawyers can help in small ways. For example, they can bring in the documents they've filed to ensure the motion they want heard is before the judge. Lawyers can use the efficiencies we've created, like expedited jury trials. That will provide a tremendous help to the courts. These changes are going to be significant for the judges, lawyers, clients and staff. Patience on every side will go a long way.

[1] "Kentucky QuickFacts from the US Census Bureau," last revised December 6, 2012, http://quickfacts.census.gov/qfd/states/21000.html.
[2] "Newly elected district judges participate in orientation program," accessed January 6, 2013, http://www.kycountyattorneys.org/news-article.php?art=18.

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

Practicing Appellate Aforethought: Appeals and Writs 101 for the Trial Lawyer

By Herb Fox

The Devil's Dictionary defines an appeal as putting "the dice into the box for another throw."[1] Civil appeals are not all that dicey, of course. About 20% to 30% of appeals result in full or partial reversal. Thus, appeals and writs present hope and risk for both the appellant/petitioner and for the respondent/appellee. But there is more to winning an appeal than hope and fear. Good trial lawyers strategize to improve their client's chance of prevailing on review.


JAMES R. BROWNING UNITED STATES COURTHOUSE

AS WITH ALL ASPECTS OF LITIGATION, mastery of the appeals process and advance preparation is critical. Here then are ten tips toward practicing appellate aforethought—preparing oneself and one's case for potential appellate review before that first brief or writ petition is due.

Know the Interlocutory Appeals

One of the great appellate myths is that all interlocutory rulings are preserved for appeal from the final judgment. But that "One Final Judgment Rule" is as airtight as a sieve. In reality, there are scores of appellate opportunities and deadlines strewn throughout the pretrial and trial minefield, in both state and federal courts. Knowing when you have the right to an interlocutory appeal is essential to effective litigation.

Some interlocutory orders are made appealable by statute, such as orders granting or denying injunctions or most probate court orders.[2] Some other interlocutory orders that effectively dispose of the main issue in the case can sometimes be made appealable with leave of court.[3] Still other interlocutory orders can only be reviewed by an immediate writ petition, discussed further below.

The failure to timely appeal these and other interlocutory rulings from which there is a right to an immediate appeal, often waives your right to appellate review in a later appeal from a final judgment.

Other notable examples of immediately appealable interlocutory orders include:

- A pre-trial order that results in a final judgment for, or dismissal of, one of several co-defendants (e.g., dismissal per demurrer or motion for summary judgment)
- An order granting or denying an anti-SLAPP motion[4]
- A state court order denying class certification[5]
- An order granting or denying a motion to disqualify an attorney in state court[6]
- An order denying a motion to compel arbitration[7]
- An interlocutory order requiring the immediate payment of money, including sanctions over $5,000, or affecting certain assets in federal district court[8]

Know the Statutory Writs (State Court)

In addition to interlocutory orders that can be directly appealed, there are many state court interlocutory orders that pursuant to statute can only be reviewed by a writ petition filed immediately after the order is entered (so-called "statutory writs"). In these situations, failure to seek review by writ will bar later appellate review, and so trial attorneys must be aware of this limited appellate remedy when they are handling such motions.

There are two primary differences between an immediately appealable order and a statutory writ. First, writ review is discretionary with the appellate court, notwithstanding that a writ petition is the only means for review. Second, the deadlines for filing statutory writ petitions are extremely short (discussed below). Therefore, all statutory writs must be treated as urgent matters.

Among the most common orders for which the only method of appellate review is a writ petition are those that

- Deny disqualification of a judge, whether peremptory or for cause[9]
- Deny a motion for summary judgment[10]
- Deny a motion to quash service of the summons[11]
- Determines a motion for good faith settlement[12]
- Grant or deny a motion to reclassify a case from limited to unlimited or vice versa[13]

Know the Non-Statutory Writs

Any interlocutory order that is not immediately appealable (or subject to a state court statutory writ) is, in theory, reviewable by a non-statutory writ petition.[14] The decision to "take up" a non-statutory writ petition is, like statutory writs, discretionary with the reviewing court.

In order to win writ review, the petitioner must convince the appellate court that the order is not only erroneous, but is so prejudicial that the relief available by a later appeal from a final judgment is illusory. How difficult is it to win review of a non-statutory writ petition? Sometimes it must be literally a matter of life or death. As one court put it, the death of plaintiff's attorney just before trial can make a petition challenging the denial of a trial continuance "writ worthy."[15]

Before challenging an interlocutory order by writ petition, trial attorneys should be familiar with the factors that reviewing courts apply in considering whether to take up the petition. These factors include:

- Whether the party seeking the writ has no other adequate means, such as a direct appeal, to attain the desired relief
- Whether the petitioner will be damaged or prejudiced in a way not correctable on appeal
- Whether the trial court's order is clearly erroneous as a matter of law
- Whether the trial court's order is an oft-repeated error, or manifests a persistent disregard of the rules, or is of widespread interest to the bench, bar or public
- Whether the trial court's order raises new and important problems, Constitutional issues or issues of law of first impression[16]

Most writ petitions fail because they do not meet these standards. What are not grounds for a successful writ petition are factors such as inconvenience to the parties or counsel; the hardship and cost of engaging in trial; and the mere prospect that the order might be prejudicial to a party at trial. Considering their complexity, cost and the right to later review by an appeal, non-statutory writ petitions should be filed sparingly and only to attack the most egregious of orders.

Don't Overlook the Potential Arbitration Appeal

The hallmark of a binding arbitration award is, in theory, the lack of judicial review of the merits of the award. But the walls of appellate impenetrability of arbitration awards are crumbling, at least in cases governed by the California Arbitration Act.

For starters, the California Supreme Court recently held that parties to an arbitration can agree to allow judicial review of the merits of the award.[17] Further, the existing statutory grounds for vacating an arbitration award are broader than conventional wisdom holds. In one recent case, for example, an arbitration award was reversed on appeal because the arbitrator improperly refused to consider evidence material to the case—the functional equivalent of a reversal for evidentiary error.[18]

Other grounds for vacating an arbitration award include the failure of the arbitrator to disclose conflicts; failure of the arbitration proceeding to meet the terms of the parties' agreement; failure of the arbitrator to grant a continuance of the hearing; and the arbitrator's loss of jurisdiction for failing to render an award within the agreed-upon time.[19]

Finally, some of the major arbitration providers offer an optional appeal from the arbitration award, presided over by a panel of three appellate arbitrators. Trial attorneys facing an adverse arbitration award should therefore very carefully assess the available scope of judicial review and not simply assume that binding arbitration awards are beyond the reach of the courts or other appellate forum.

Preserving Error

One of the most important jobs of trial counsel is preserving error for review. An issue that is not properly preserved is usually waived on appeal, and waiver is one of the most common ways to defend a judgment from appellate attack.

Some appellate errors are preserved automatically without objection—most notably jury instructions (unless the error was invited).[20] But in most situations, error must be expressly preserved—from pleading affirmative defenses in the answer to filing a Motion for New Trial to assert excessive or inadequate damages, jury misconduct or newly discovered evidence.[21]

Few potential appeal issues are more prone to waiver than evidentiary error. In fact, the duty to preserve evidentiary error is codified.[22] Some of the thorniest evidentiary error preservation issues arise in the context of Motions for Summary Judgment/Adjudication. The summary judgment statute expressly states that evidentiary and foundational are waived if not made "at the hearing on the motion."[23]

Merely making an objection at the hearing is no guarantee that the judge will rule on it. Until recently, even properly made evidentiary objections in an MSJ proceeding were waived on appeal absent an effort to actually obtain a ruling from the trial judge. But the Supreme Court has now eased that burden on counsel, holding that as long as the evidentiary ruling is made in writing or raised orally at the MSJ hearing, it will be deemed preserved on appeal even if the trial court does not rule.[24]

Yet another tricky preservation issue arises from motions-in-limine. The general rule is that a motion-in-limine seeking the exclusion of specified evidence is

sufficient to preserve the evidentiary issue for appeal without renewing the objection. However, if the evidence (or its context) as later offered at trial is substantially different than that presented in the pre-trial motion, the party making the motion must renew the objection in order to preserve the issue for review.[25]

Finally, there is no more important aspect to preserving error than to have a reporters' transcript of the hearing or trial, something that has become more difficult with the recent Los Angeles Superior Court budget woes. The absence of a reporter's transcript can doom any appeal.[26]

If a motion hearing is set on a day where the court will not be providing a reporter, one must ensure to make arrangements to have one's own reporter. And for trials, there is no excuse for not having a reporter if there is any chance at all of an appeal. The alternative to a certified transcript—a settled or agreed statement[27]—is a procedural nightmare and a poor substitute for an accurate record of proceedings.

Invited Error: Beware of Getting What One Asks For

Error can be invited in two ways: by opening the door at trial to the error that you later raise on appeal, or, by overreaching at trial and creating an appellate issue for the opposing party. Either path can be a road to appellate disaster.

Invited error typically means an appellant's waiver of an appeal issue by "inviting" the erroneous ruling. Common examples include erroneous jury instructions or verdict forms that were proposed at trial by the appellant, and witness examination that opens the door to the erroneous admission of evidence, such as inquiring about topics that were successfully excluded by your own motion-in-limine.

There is an equally lethal type of invited error that comes from overreaching during trial, and inadvertently creating an appellate issue that the opposing party uses later if the judgment is in your favor. One example of overreaching is a successful motion to strike an expert's entire testimony because the expert strayed into a forbidden topic. The wholesale striking of the expert's testimony could result in a powerful appellate argument by the opposing party that it was denied the right to put on its case. A more limited motion restricted to the errant testimony might have been as effective and not lead to an appeal issue.

Other examples include proposing erroneous but favorable jury instructions; disregarding an order granting the opponent's motion-in-limine; and engaging in improper closing argument despite the court's admonitions. All such trial tactics may offer an immediate advantage to your client. However, by creating an appellate issue that might not otherwise exist, that short term gain could result in long term pain for your client.

Statements of Decision: Don't Leave Court Without One!

In a state court bench trial, there is no more important method of preserving potential appellate issues than making a timely and complete request for a Statement of Decision. (In federal court bench trials, the judge is required to prepare written findings without the necessity for any party to make the request.[28]) Yet few trial procedures are more misunderstood—or more frequently bungled.

The reason why a Statement of Decision is critical to an appeal is simple: it is, first and foremost, an appellate document whose main function is to guide the reviewing court in tracking how and why the trial judge came to the conclusions reflected in the judgment.

The absence of a request for Statement of Decision, or deficiencies in the Statement, can, in different ways and for different reasons, have a dispositive impact on the outcome of an appeal. On the appellant's side, the failure to make a timely and proper request for a Statement of Decision—or the failure to make proper and timely objections—waives any error in the sufficiency of the document. Worse, the omission compels the Court of Appeal to infer that the trial court made all of the findings necessary to sustain the judgment. In short, the failure to perfect a Statement of Decision can mean losing an otherwise winning appeal.[29]

There are two basic steps to perfecting a Statement of Decision. First, ask the trial court to issue a Statement of Decision. Second, object to the contents of the Statement of Decision if it is ambiguous or incomplete. A request for a Statement of Decision must be timely and must specifically identify all of the contested issues for which findings are requested. If the trial lasts eight hours or less, the request must be made before submission of the case; if the trial takes over eight hours, the request must be made within ten days of the announcement of the tentative decision.[30]

To be safe, the initial request for a Statement of Decision should be set forth in the trial brief, with a specific list of all issues that need to be resolved. To punch home the request, the request should be repeated during closing argument, refining the issues as they developed at trial. Once the trial court issues a tentative decision, another request should be made that specifically highlights any errors or ambiguities in the tentative. When the court or a party prepares a proposed Statement of Decision, a new round of proposals and objections begin. Finally, once the court signs and enters the final Statement of Decision, counsel must again assert any ambiguities or omissions within that final document, prior to entry of judgment or in association with a Motion for New Trial.[31]

While the burdens and penalties of Statements of Decision fall heavily on the appellant, the respondent is not out of danger. First, if a timely and proper request for a Statement of Decision is made and erroneously denied, the failure of the trial court to issue the document can be grounds for reversal per se. It is therefore risky to object to the preparation of the Statement of Decision. Further, once a request is made, trial courts will typically assign the task of drafting the Statement of Decision to the prevailing party (i.e., the future respondent). This is a task that the prevailing party should take seriously, because a deficient Statement of Decision can itself be grounds for reversal.[32]

Notices of Appeal: File Early and Often

Most trial lawyers are familiar with the general Notice of Appeal deadlines for unlimited jurisdiction cases: 60 days from service of notice of entry, and 180 days if there is no service.[33] That seems easy enough, but the exceptions—and the traps—are everywhere, and trial lawyers need to carefully analyze the Notice of Appeal deadlines in order to preserve their clients' appeal rights. The deadlines are jurisdictional. The state appellate courts have no discretion to extend the deadline, and while the 9th Circuit has the discretion to excuse a late filing, it will rarely do so.[34]

Here is one trap: the deadline for filing a Notice of Appeal from a federal district court judgment, and from judgments in state court limited jurisdiction cases, are both 30 days, not 60 days.[35] Other traps include:

- The 30 day period for filing a Notice of Appeal in the 9th Circuit runs from the date that the judgment is entered and is not governed by the date of notice of entry.[36]
- If multiple parties in state court serve notice of entry, or if the clerk mails a copy before any party does, it is the earliest service date that triggers the countdown.[37]
- A copy of the judgment or order with a proof of service attached is sufficient to start the clock (there is no actual need for a document called "Notice of Entry"), and the time runs from the date on the proof of service and not the date of receipt or the date of a file stamp.[38]

The deadline for filing a Notice of Appeal from an appealable state court order is similar, but not identical, to that for judgments. A common trap is the definition of "entry" of the order. If the minute order does not reflect the court's direction to a party to prepare and serve a formal Order after Hearing, the time to appeal runs from service of the minute order or a notice of entry of the same, or 180 days from entry of the minute order.[39] Under these circumstances, the deadline is not affected by a party's voluntary preparation and service of a formal order.

Writ Deadlines: No Time to Spare

Even more problematic are writ petition deadlines. The deadline for non-statutory writ petitions in the state courts are the same as for Notice of Appeal deadlines but for three critically important factors:

- There are no extensions.
- Writ petitions are subject to a laches analysis, and so unless there is a good reason to wait 60 days, don't.
- The deadline is for the petition itself, not a mere notice. Thus the effective equivalent of an opening brief and record must be filed within the 60 day period.

As for statutory writ petition deadlines, there is only one rule: read the governing rule. The time for filing varies from statute to statute, from 10 days to 20 days, and sometimes—but not always—the trial court has discretion to grant a short extension.[40] Again, it is the entire petition, equivalent to an opening brief, that must be filed within that 10 or 20 day period!

In short, all writ petitions must be treated as urgent matters with the highest priority in your office. And, if you intend to retain outside appellate counsel to handle the petition, do so as soon as possible, if possible, prior to entry of the ruling that is challenged.

Understand the Standards of Appellate Review

Finally, but perhaps most importantly, to prepare for appellate possibilities, trial attorneys should have a working knowledge of the standards of appellate review.

Appellate courts view cases through a prism called the "standard of review." There are only three such standards. In order of deference to the trial court and jury, they are:

- Substantial evidence (also called the "clearly erroneous" standard in the federal appellate courts)
- Abuse of discretion
- De novo or independent review

But that is where the simplicity ends. In fact, in many appeals the most contested and most important issue is what is the proper standard of review? The classic description of the substantial evidence standard of review is that: "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination…"[41]

In deciding whether to even raise a substantial evidence claim on appeal, counsel must remember that the appellate court accepts the evidence most favorable to the order as true and discards the unfavorable evidence, and that any inference that can be supported by the evidence will be affirmed.

The next standard of review, abuse of discretion, is the most amorphous. It is "not a unified standard; the required deference varies according to the aspect of a trial court's ruling under review."[42] What is clear, however, is when the evidence merely presents an opportunity for a difference of judicial opinion, the ruling was discretionary and the appeal is doomed. An appellate court will not substitute its judgment for that of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion, it must "clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice."[43]

Finally, there is the independent ("de novo") standard of review, which assures the appellant that the reviewing court will not merely defer to the trial court, but will instead decide the matter anew.[44] The de novo standard of review presents the best opportunity for the appellant who hopes to snatch victory from the jaws of trial court defeat.

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[1] See http://www.richardgingras.com/devilsdictionary/a.html.
[2] Civ. Pro. §904.1(a)(6); 28 USC §1292(a)(1)); Probate Code §§1300 et seq.
[3] See, e.g., Family Code §2025; 28 USC §1292(b); FRCP 23(f) and 54(b).
[4] Civ. Pro. §§425.16(i); 904.1(a)(13).
[5] *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429.
[6] *Meehan v. Hopps* (1955) 45 Cal.2d 213.
[7] Civ. Pro. §1294(a); 9 U.S.C. §16.
[8] *Lima v. Vouis* (2009) 174 Cal.App.4th 242; Civ. Pro. §904.1(a)(11,12); *United States v. Roth* 912 F.2d 1131 (9th. Cir., 1990)
[9] Civ. Pro. §17 0.3(d).
[10] Civ. Pro. §437c(m)(1).
[11] Civ. Pro. §418.10(c).
[12] Civ. Pro. §877.6(e).
[13] Civ. Pro. §403.080.
[14] Cal. Const., Art. VI, §10; 28 U.S.C. §1651.
[15] *Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242.
[16] *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App. 3rd 1266; *Bauman v. U.S. District Court,* 557 F.2d 650 (9th Cir., 1977).
[17] *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334. But see *Hall Street Associates, L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576 (no such right to consensual judicial review under the federal Arbitration Act).
[18] *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524; Civ. Pro. §128.2(a)(5)).
[19] Civ. Pro. §1286.2; see e.g., *Parker v. McCaw* (2005) 125 Cal.App.4th 1494; *Rusnak v. General Controls Co.* (1960) 183 Cal.App.2d 583.
[20] Civ. Pro. §647.
[21] Civ. Pro. §657; *Schroeder v. Auto Driveaway Co.*, (1974) 11 Cal.3d 908.
[22] Evidence Code §§353, 354.
[23] Civ. Pro. §437c(b),(d).
[24] *Reid v. Google, Inc.* (2010) 50 Ca.l4th 512.
[25] *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155.
[26] See, e.g., *Aguilar v. Avis Rent-A-Car System, Inc* (1999) 21 Cal.4th 121.
[27] Rules of Court 8.134, 8.137.
[28] FRCP 52.
[29] Civ. Pro. §634; see Marriage of Arceneaux (1991) 51 Cal.3rd 1130 and Marriage of Ditto (1988) 206 Cal.App.3d 64.
[30] Civ. Pro. §632; Rule of Court 3.1590.
[31] Civ. Pro. §634; Rule of Court 1590(c),(e,f,g).
[32] Marriage of Hardin (1995) 38 Cal. App.4th 448.
[33] Rule of Court 8.104(a).
[34] Rule of Court 8.104(b); FRAP 4(a)(5).
[35] FRAP 4(a)(1)(A); Rule of Court 8.122.
[36] FRCP 77(d).
[37] Rule of Court 8.104(a)(1).
[38] Rule of Court 8.104(a).
[39] Rule of Court 8.104(d)(2).
[40] Compare, for example, Civ. Pro. §170.3(d) [judicial disqualification, 10 days, no discretion to extend) and Civ. Pro. 403.080 (reclassification, 20 days plus discretion to extend by additional 10)
[41] *Bowers v. Bernards (*1984) 150 Cal.App.3d 870.
[42] *Haraguchi v. Superior Court* (2008) 43 Cal. 4th 706.
[43] Estate of Gilkison (1998) 65 Cal.App. 4th 1443.
[44] *Stone Street Capital, LLC v. California State Lottery Commission* (2004) 165 Cal. App. 4th 109.

Herb Fox is a Certified Appellate Law Specialist with over 25 years of appellate experience. He handles a wide variety of civil appeals and writs throughout California, and consults with trial counsel in cases that present potential appellate issues. He can be contacted at hfox@foxappeals.com.

Test No. 53

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. Only 10% of civil appeals result in a reversal.
   ❑ True ❑ False

2. All interlocutory rulings are preserved for appeal from the final judgment.
   ❑ True ❑ False

3. Orders granting a motion to compel arbitration are immediately appealable.
   ❑ True ❑ False

4. Even where a writ petition is the only possible avenue of appellate review, the Court of Appeal has discretion to summarily deny the petition.
   ❑ True ❑ False

5. A state court order denying a motion to disqualify a judge for cause can be immediately appealed.
   ❑ True ❑ False

6. In order to obtain writ review, a petitioner should attempt to convince the appellate court that the order is clearly erroneous and that it is so prejudicial that relief by a later appeal is illusory.
   ❑ True ❑ False

7. California recognizes the right of parties to an arbitration to submit the award to a full judicial review on the merits.
   ❑ True ❑ False

8. An arbitrator's improper refusal to consider evidence material to the case is grounds for a state court to vacate the arbitration award.
   ❑ True ❑ False

9. Whether a judge or jury awarded inadequate or excessive damages can always be raised on appeal.
   ❑ True ❑ False

10. A motion-in-limine that seeks to exclude certain evidence will always preserve that evidentiary issue for appeal.
    ❑ True ❑ False

11. Jury instruction error is always preserved for appeal regardless of who proposed the instruction.
    ❑ True ❑ False

12. A legally erroneous ruling that was invited by the prevailing party cannot be asserted as error in an appeal by the losing party.
    ❑ True ❑ False

13. A primary purpose of a Statement of Decision is to help the appellate court understand the legal and factual basis for the trial court's ruling.
    ❑ True ❑ False

14. A request for a Statement of Decision must specifically identify all of the contested issues for which findings are requested.
    ❑ True ❑ False

15. The time period for filing a Notice of Appeal from a limited jurisdiction state court and from a federal district court is the same.
    ❑ True ❑ False

16. In both state and federal courts, service of Notice of Entry of the judgment is required to trigger the running of time to file a Notice of Appeal.
    ❑ True ❑ False

17. In state courts, non-statutory writ petitions should be filed as soon as possible after entry of the order.
    ❑ True ❑ False

18. In state courts, all statutory writ petitions must be filed within twenty days of notice of entry of the order.
    ❑ True ❑ False

19. In an appeal challenging the judgment for lack of substantial evidence, the reviewing court will accept the facts as found by the trier of fact but can substitute its own inferences from those facts.
    ❑ True ❑ False

20. In an appeal challenging the discretion of the trial judge, the Court of Appeal will find an abuse of discretion if it concludes that the judge reached the wrong result.
    ❑ True ❑ False

MCLE Answer Sheet No. 53

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

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

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

_____
Credit Card Number Exp. Date

_____
Authorized Signature

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

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

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

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

The iPad for Litigators: Storming the Courtrooms

By Sharon D. Nelson and John W. Simek

ONLY RARELY DOES ONE see a new technology truly "storm" the courtroom, but the eagerness with which litigators are embracing the iPad is extraordinary. At a recent CLE program, a litigator proudly held up his new iPad and pronounced: "This is a game changer."

For those who have not yet converted to the new technology, consider this: an ALI-ABA webinar on the iPad sponsored by the ABA's Law Practice Management Section attracted so many lawyers (nearly 1,000) that it had to be broken into three sessions so as not to overload the technology. A similar CLE program in Fairfax Circuit Court maxed out the space in the largest courtroom. Four more such CLEs have been scheduled.

Tom Mighell deserves a hat tip for the knowledge he has so generously shared. He has become one of the most sought after speakers on the legal tech circuit because of his proficiency with the iPad and because he is the author of two best-selling books, *iPad in One Hour for Lawyers* and *iPad Apps in One Hour for Lawyers*. The first one is commendable for its concise description of the basic functions of the iPad, which seem foreign to many lawyers, and for its section on using the iPad in litigation. The second book has a good chunk of litigation-specific apps, along with productivity and utility apps that all lawyers are bound to find useful.

What is so great about the iPad is that it is so slender—it can be carried around rather discreetly, displaying exhibits, doing call-outs, making annotations, etc. The device is so portable that one can walk and talk while using it. Rather than overwhelm a jury with technology, it seems to allow an attorney's inner Abraham Lincoln to shine as he performs his magic as a litigator. It enhances rather than encumbers.

Before going to trial, an attorney can use the iPad to perform research, organize exhibits, compose deposition questions, prepare jury voir dire questions, manage deposition transcripts, and more. In court, the iPad can be used for presentations, to communicate with colleagues without ever having to say a word, record the reactions of the jurors or do research on the fly (assuming the court will allow one to connect to the internet during trial).

Attorneys who already own the iPad2 have no reason, from a

Sharon D. Nelson and **John W. Simek** are the President and Vice President of Sensei Enterprises, Inc., a legal technology, information security and computer forensics firm based in Fairfax, VA. They can be reached at snelson@senseient.com and jsimek@senseient.com.

litigator's standpoint, to upgrade to the new iPad. But those who are purchasing an iPad for the first time should make sure to get enough storage space for videos or deposition testimony for use in court. The 64 GB model is recommended as the 16GB model will quickly max out.

As for accessories, an iPad cover is essential and there are scads of them—check out the product reviews at ilounge.com. If planning to use the iPad for hand note-taking, a great stylus would be required. Blogger Jeff Richardson of iphonejd.com is fond of the Kensington Virtuoso or BoxWave Styra. Tom Mighell's favorite is the Adonit Jot Pro.

For the fast typist, the standard issue Apple wireless keyboard which uses Bluetooth technology is highly recommended. The keyboard and iPad with cover fit easily in suitcases and handbags.

To connect the iPad to a projector in the courtroom, it is necessary to get Apple's VGA adapter. An HDMI adapter will be required to connect the iPad to a high-definition television.

Attorneys must be aware of the fact that the iPad does have some security issues. These are a few remedial steps to manage basic concerns. First, ensure that the lock code is enabled. Passphrases for locking the iPad are preferred over four-digit PINs. Configuring a lock code automatically enables encryption on the iPad. It is fairly weak encryption, but it is better than no encryption at all. Next, the iPad should be configured to automatically wipe itself if there are 10 incorrect attempts to enter the unlock code. One should also configure the "Find My iPad" feature so that it can be located if it is ever lost. This also enables the owner to remotely wipe the contents of the iPad. These are just some of the simple steps to improve the security of the iPad. The most important thing is not to lose it!

The iPad has been criticized for not being an optimal productivity device. While it is a wonderful device for consuming content, producing content on it has been more problematic. It is slowly getting better but so many solutions are kludge solutions. For example, printing is a headache. There are solutions to using the AirPrint function, but they aren't "native" to the printing device. Most users will configure a computer with AirPrint software support, which routes the print request to an attached USB printer. Unfortunately, the computer has to be on to enable printing, but this tends to be a more desirable solution than throwing away a current printer in favor of one of the AirPrint models. The iPad also lacks a native folder structure as one is used to seeing on a Mac or Windows computer, so folder structures exist only within apps. There is no easy way to get files on and off the device since there is no USB connection, so folks use email to transfer documents or sync their Dropbox accounts. It can all be done, but it isn't elegant.

What are the favorite productivity apps for lawyers? **Penultimate** (99¢) is great for taking handwritten notes with a stylus. **Evernote** (free) can be used with a Bluetooth wireless keyboard to create documents which can easily be synced to **Dropbox** (free), a cloud storage provider. If working on Microsoft Office files, **Documents To Go Premium** ($16.99) is a favorite choice and it also integrates to Dropbox. This is the only app where one can see the "track changes" and comments features of Microsoft Word—and one can also work on Excel or PowerPoint files. **GoodReader** ($4.99) makes reading and annotating documents a breeze and supports a wide range of file types. This app will also allow organizing files into folders within its own structure.

There is no way to list here all the possible apps that can be used by lawyers. A more extensive resource is Mighell's book *iPad Apps in One Hour for Lawyers*. The following is a concise list of apps favored by litigators.

Court Days Pro ($2.99)
This app allows the user to set a case calendar with deadlines.

idocument REVIEW (Free)
Allows the user to review documents in the case and mark them as relevant, privileged or a "hot document." The volume of documents that one can work with is limited and one has to send the data to the vendor in order to convert it to a proprietary load file. It isn't favorable to send potential evidence to a third party, but it is what it is.

The Deponent ($9.99)
This app was designed by a friend of the authors and an e-discovery expert (and attorney), Josh Gilliland, and it allows the user to prepare deposition questions in various practice areas. Some questions are suggested, but it can be customized with the user's preferred questions.

TranscriptPad ($49.99)
With this app, the user can work with all of his deposition transcripts, search through the whole case, color code certain case issues and send out summary reports. Currently the app only reads text files for the transcripts.

iJuror ($19.99)
This is a juror selection app, which many colleagues regard favorably. It, allows the user to enter information about each potential juror and then "seat them" in the juror box once the selection and strike process is over.

TrialPad ($89.99)
This is the big kahuna, hence the heftier price, but this is the app about which litigators are most excited. It allows the user to load documents, photos and videos from a Dropbox account into this app for use in hearings and in trial. It is a lot cheaper than Trial Director and its comrades, but it does many of the same things from the very slender and unobtrusive iPad. Once a document or image is displayed, the user can annotate it, perform call-outs or redact portions of the file. This is one app that is regarded as a must-have for litigators.

ExhibitView ($49.99)
This is a relative newcomer, but worth mentioning. It does basically what TrialPad does but also has a desktop companion tool so it has the definite advantage of allowing the user to transfer the case file between the office computer and the iPad. It also has a feature called "Witness Mode" which lets the user give the iPad to a witness so they can view and annotate an exhibit—but without seeing any other documents in the case file.

BT Chat HD (Free)
This nifty little app allows litigation team members to privately "chat" electronically—which is preferable to whispering or passing notes to one another in court.

Are there tons of other possible apps? Yes. This is part of the danger. One doesn't want to download all sorts of unvetted apps without really knowing their security features and their capabilities. The wealth of apps available from Apple is striking—and dangerous.

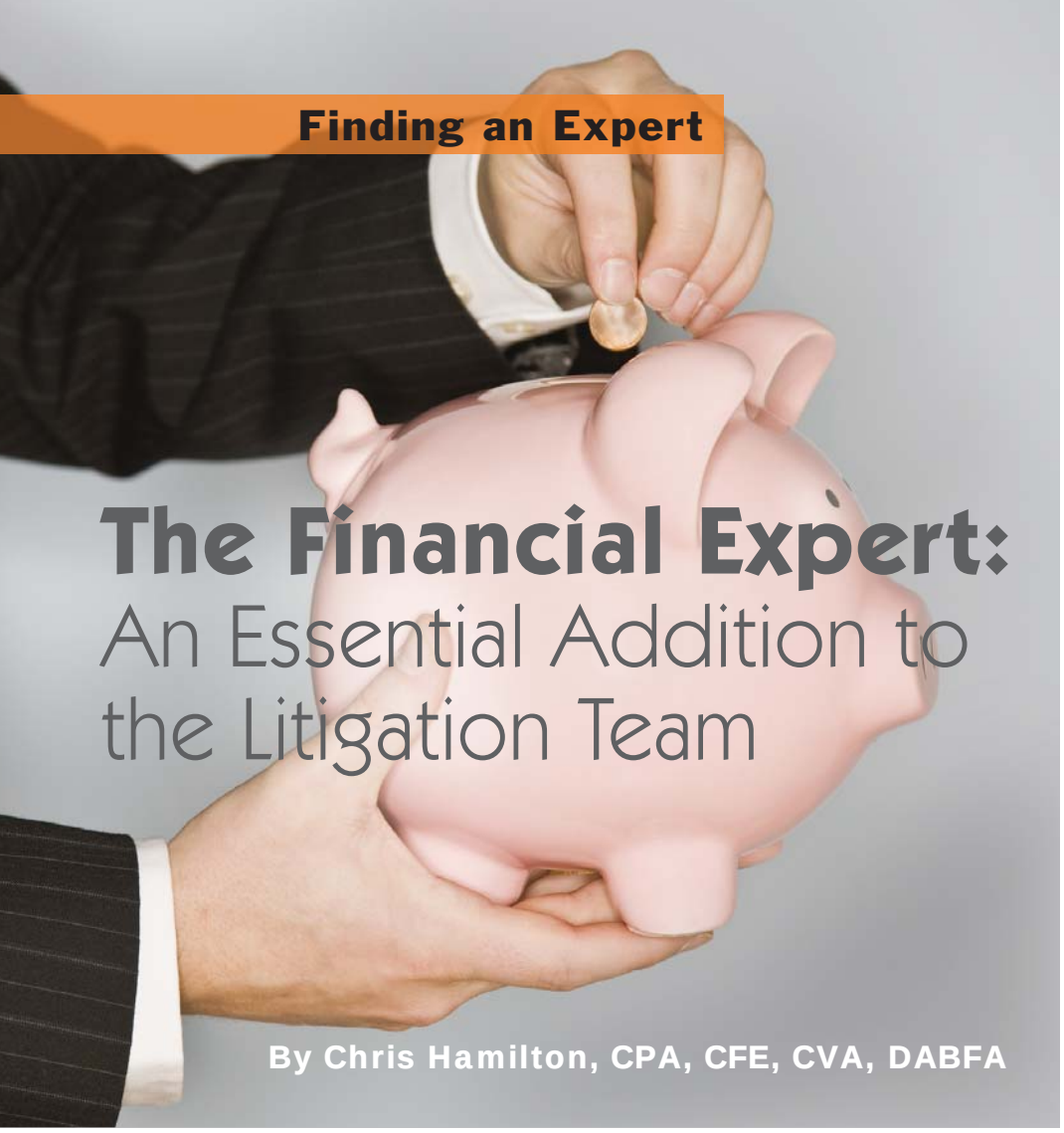
So what's a busy lawyer to do? For the moment, listen to experts like Tom Mighell—he'll be updating his written materials and will continue to host webcasts, which are greatly in demand. Also, get references from colleagues.

Finally, a great resource is **AppAdvice** ($1.99). For that paltry price, the user gets a program that provides helpful app reviews and a sense of whether the app under consideration is worth buying.

Litigators can now let their inner Abe Lincoln loose in the courtroom with the elegant and inconspicuous iPad. Their advocacy can soar without being overshadowed by technology. For those who are not tech-savvy, let a colleague run the technology. But after practice, many lawyers are comfortable enough to manage the technology on their own. The key is to practice—again and again. As Lincoln himself was accustomed to say, "Give me six hours to chop down a tree and I will spend the first four sharpening the axe."

CRIMINAL LAW SECTION AND BUSINESS LAW SECTION MEETING

Judge Melvin Sandvig and attorneys Ariel Clark and Eric Shevin updated an audience of business and criminal law attorneys on the latest laws regarding the marijuana industry. It was a successful kickoff for the return of the Criminal Law Section, which has more captivating programs planned for the year.



The Financial Expert: An Essential Addition to the Litigation Team

By Chris Hamilton, CPA, CFE, CVA, DABFA

TO BOTH ACTIVE participants and observers of litigation, it is always impressive when a lawyer is able to orchestrate a sound case and deliver an excellent product. The most effective lawyers are typically those who somehow find a way to assemble, coordinate and execute a unified strategy using disparate persons and skills throughout the process. It is impressive because it is difficult to do.

One of the most versatile tools available to the litigating attorney is an experienced financial expert. A few hours with a financial expert often saves hours of work and assists the lawyer in either settling the case or setting a more efficient and direct course towards trial. In those few complex cases that are destined to go to trial, a financial expert is imperative and can make or break a case when presented to the trier of fact.

Quite often, lawyers would rather settle a case than see it go to trial due to the large attendant costs and hours of preparation required. An experienced competent financial expert often presents such a compelling case that, with the use of tangible data, both sides are motivated to settle rather than take a chance on an unpredictable jury. Therefore, the selection of the expert is very important both as a resource value to the lawyer and as a formidable force to contend with for the opposing side. The success of the expert over time is not measured by how many trials he or she has been on the stand to offer expert opinions. The real success in a case is to present such a persuasive opinion and support for that opinion, that there is a settlement and the dispute is resolved.

Most cases involving damages, breach of contract, fraud and other financial matters involve economists and accountants (CPAs). Depending on the circumstances of the case, the specialization may be narrower. Financial experts include forensic accountants, tax experts, fraud examiners, business appraisers and financial accountants. An emerging area of financial experts, to be discussed later, is one who understands information technology while using computers to aid in discovery and analysis of financial evidence.

First, the definition of a financial expert should be clarified. A financial expert is a professional who is diversely experienced in financial analysis and specializes in areas that are relevant to the case at hand. The expert usually has professional designations and licenses to accompany relevant experience. The sidebar on page 39 presents a more specific description of financial experts.

Financial experts can provide a valuable, if not critical, service to the lawyer in the following ways:

- Providing assistance with evaluating a potential client and case
- Giving direction and assistance in the discovery process
- Consulting during trial, as well as providing expert testimony
- Consulting during post-trial and settlement negotiation

Valuation of Potential Clients and Cases

A standing relationship with a financial expert is valuable to a law firm since it allows easy access to consultation before accepting a client or case. With this association, a relationship of professional courtesy and friendship ought to develop as a matter of course. For example, after the lawyer's initial interview with a prospective client, the financial expert should be available to then meet with the law firm to evaluate the case.

The purpose of such meetings is for the financial expert to assist the law firm in determining the following:

- How difficult/easy will discovery of financial evidence be?
- What documents and electronic files are essential to the case?
- What is the real potential for winning the case?
- How complex will the case be? Is it conducive to settlement rather than pressing for trial?
- What are the weaknesses in the case? Do inconsistencies exist in the case?
- What will it cost to present the case? What will the financial expert cost?
- Do potential surprises and blind spots exist?

A good financial expert will not overstep their boundaries, thus confining his or her advice to their area of expertise rather than attempting to "play lawyer." An expert who has a significant history of case involvement can share the benefit of that experience with you. For example, if the expert was involved in a similar case before, he or she may be able to share valuable insight on mistakes to avoid and strengths of the case to emphasize.

Assistance with Discovery

A financial expert can assist in areas such as the development of a list of relevant witnesses, determination of the expected testimony of those individuals, and assistance with the development of complete interrogatories. The expert should also be utilized in educating the lawyer in the financial concepts needed to perform a complete and efficient deposition.

For example, in a case where there are significant differences between the financial statements and tax returns, an experienced CPA can assist the lawyer in understanding what the differences represent. This allows the lawyer to spend time in deposition discovering evidence rather

There are several types of experts and even more expert designations and licenses. The following will assist attorneys in navigating the world of alphabet soup and identify those professionals who are skilled in the required areas. Included is the location to contact to confirm an expert's membership and to obtain more information about the designation.

Business Valuation
Professionals with this expertise are also called business appraisers. There is a danger in confusing the meaning of the terms, however. Business appraisers are generally not qualified or skilled in appraising real estate. Most designations require proof of extensive experience in valuation work, passing a comprehensive uniform exam, and continuing professional education on an annual basis. Some of the designations are: Certified Valuation Analyst (CVA), certified by National Association of Certified Valuation Analysts (www.nacva.com); Certified Business Appraiser (CBA), certified by The Institute of Business Appraisers (www.go-iba.org/); Accredited Senior Appraiser (ASA), certified by American Society of Appraisers (www.appraisers.org).

Forensic Accounting
Professionals with this skill are more difficult to locate, although this situation is changing. Certified Public Accountants (CPAs) are licensed by each state and must have extensive audit experience to be certified. While this does not assure the specialized skills needed to complete a forensic engagement, it is a necessary foundation. A relatively new designation, DABFA (Diplomate of the American Board of Forensic Accounting), is conferred by the American College of Forensic Examiners (www.acfe.com) and may make the task of finding a qualified forensic accountant much easier in the future.

Fraud Examination
The professionals in this area range from current and retired law enforcement, internal auditors and private investigators. The Certified Fraud Examiner designation includes accountants, lawyers, auditors, law enforcement and private investigators. The designation is relatively difficult to obtain from the Association of Certified Fraud Examiners (www.acfe.org). The association requires proof of experience in fraud investigation, education and a passing grade on an extensive examination covering procedure, law, accounting and report writing.

than trying to understand the financial information presented. This is advantageous to waiting for deposition since, in deposition, the "teaching" comes from a hostile witness.

Another valuable skill of the financial expert is the ability to assist the lawyer with the compiling a list of financial documents to be requested in the discovery process. In unusual cases, the expert is used to assist with seizing records. The expert should be able to suggest a course of documentation strategy that satisfies the lawyer's overall intent. For example, if the intent is to shut down a case or force a quick settlement, an experienced financial expert will be able to propose a course of discovery and inquiry that will yield the data relevant to that goal.

In a recent family law case, a financial expert was retained by counsel to assist the "non-moneyed" spouse. The goal was to avoid trial if possible. The expert obtained evidence that the "moneyed" spouse had filed various documents (tax returns, loan applications and income and expense declarations) disclosing a wide variance in income levels. When confronted by the prospect of loan fraud, tax fraud and perjury, the spouse was highly motivated to settle quickly—which he did. The strategy and procedures will be significantly different if the expert is informed that the case is going to trial.

The courts are increasingly cognizant of the fact that relevant financial evidence includes a back-up of the computerized accounting system. A financial expert can many times be used to go into a business and identify which records (hard copy and electronic media) are relevant and assist with the acquisition of this evidence. Using such expertise saves time in sorting through and sifting down volumes of information—often confusing and conflicting information—to arrive at the relevant facts of a case.

Finally, once the requested documents have been received, the adept financial expert can review and analyze the data. Ultimately, the goal of a financial expert is to convert boxes full of evidence into a solid opinion backed up by relevant evidence and a presentation of that evidence that is clear, concise and understandable. To bring the expert into the process after discovery is inefficient and handicaps the expert's utility.

Trial Assistance

The financial expert should obviously be able to provide expert testimony. The expert should have the ability to teach the trier of fact the terms and concepts needed to understand the evidence as well as present the opinion and support for the opinion. However, the experienced litigating lawyer knows that the utility of the expert does not end there.

The expert should also be used to analyze the testimony of opposing experts, for example, in developing the line of questioning for the cross-examination of the opposing expert. In a complex financial case, the person who is most likely to pick up on the holes and problems in the opposition's case would be your own expert. For example, in a recent complex fraud trial, opposing experts introduced a PowerPoint presentation they intended to use the next day during their direct testimony. The presentation included nearly 100 slides. The following morning, prior to the commencement of testimony, the financial expert provided analysis of the slides and an outline for effective cross-examination.

In many cases, the financial component is an important piece but not the central theme of the case. It is imperative that the expert be utilized in such cases to limit the scope of testimony to the appropriate breadth and depth while still communicating the necessary elements. The expert should provide guidance to the lawyer on the use of exhibits and schedules. The experienced expert knows that a simple exhibit is a much more effective communication tool rather than one which only another expert can understand. With that in mind, the expert should know the best way to present visual aids.

In cases where the central theme is financial, experts are often consulted to assist with developing the theme or story structure of the entire case. A lawyer should not be afraid to ask for the assistance of the expert. The expert knows that their ideas on such matters are only suggestions, and the ultimate course will be directed by the lawyer. Certainly, the lawyer should be concerned that there not be any holes or weaknesses in that structure before beginning trial.

Post Trial and Settlement

A financial expert experienced in tax consulting is a valuable tool when negotiating settlements. While tax is always a secondary concern (at least until the tax rate approaches 100%), it can be an important consideration. In some cases, a wording change in the settlement agreement can completely alter the taxability of settlement proceeds.

The impact is sometimes most pronounced in family court. Decisions made regarding the nature of alimony/support payments can have significant long lasting impact on the parties. For example, in a recent family law case, the language in the settlement agreement inadvertently referred to monthly payments as child support payments. It was the intention of the parties for the payments to be taxable and the financial expert caught the error, recommending a change of the wording to family support (alimony).

In addition, planning the cash flow of a proposed settlement is an important consideration that may require consultation with a financial expert. Many times the economic value of a proposed award or settlement is materially altered when the impact of delayed payment is considered.

Conclusion

The use of a financial expert can produce many added benefits such as increased litigation efficiency, effectiveness and higher success rate, while often making the lawyer look good. Used properly, a financial expert is an integral part of the litigation team, particularly in cases involving complex financial concepts. A relationship with a financial expert should be cultivated and maintained as preparation for the day when a trusted consultant is necessary.

Chris Hamilton is a partner with the CPA firm of Arxis Financial, Inc., in Simi Valley. He can be reached at chamilton@arxisgroup.com.

The Courts and Other Aspects of Dispute Resolution Counseling

By Phillip Feldman

"The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past….It is commonly known that the early forms of legal procedure were grounded in vengeance…Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done."—*The Common Law, Oliver Wendell Holmes*

AN OVERVIEW OF CENTURIES' WORTH OF combat, physical violence and the survival laws of the jungle explain why the "rule of law" was inevitable. Justice Holmes' insight, candor and knowledge inform readers: "The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received." (Supra)

All with a sense of fairness agree that objective adjudicators were needed to apply these rules to the pragmatic resolution of disputes between persons and entities with differing perspectives of the outcome. Without the neutral decision maker, "might makes right" would still be the law. In some societies and in many fields of modern law, neutral decision makers are still bureaucrats whose governmental charter authorizes them as exclusive disputant problem solvers. For the most part, attorneys looked to courts to fulfill this role.

A court is "a tribunal presided over by one or more judges for the exercise of such judicial power as has been conferred upon it by law." *Von Schmidt v. Widber* (1893) 99 Cal. 511, 512. 2 Witkin. California Procedure 46 reminds us that matters are jurisdictionally before "the court and not a particular judge" citing *People v. Osslo* (1958) 50 Cal 2d 75, 103.

Disputing parties, whether individuals, entities or groups, seldom have identical values. "One man's meat is another man's poison" goes deeper than menu preferences. In criminal law, the values are pretty easy to understand. The defendant's primary goal is usually more than reputation maintenance and primarily continuance of personal freedom. The state's values are traditionally to protect the public by punishing miscreants in part to avoid repetition of their offenses and to exemplify to others what not to do.

In family law, the competing values are sometimes not very far removed from the original vengeance Justice Holmes wrote about. Those values are often emotionally rather than logically based but still have economic overtones. Civil law, on the other hand, can run a gamut of all societal values. Because the courts cannot give folks what they may really want as such omnipotence cannot be bestowed upon the decision makers, for the most part all the values are dealt with symbolically. The symbol is primarily money or money's worth. Since most attorneys value material goods and ideas differently, inter-personal civil dispute resolutions never quite give everything craved but the receiving or losing money is the best the system can usually do.

A jury of peers is constitutionally protected in the criminal justice system. In the civil justice system in this

country, attorneys still like it. In family law, since courts dispense equity which juries are not empowered to do, "the court" means bench trials. The need for equity or fair outcomes is another reason why the rule of law isn't programmed into algorithms for mechanical adjudication without judges.

Many laypersons are well suited to negotiate transactional dealings. Few laypersons ever approach the qualifications needed to litigate their own disputes. Laypersons who can afford it will usually opt for having an advocate as their "mouthpiece" before the courts.

Alternative dispute resolution covers all extra court means of resolving disputes. A layperson that can negotiate his or her own transaction ought to have the skill and knowledge to negotiate disputes arising therefrom. But like the lawyer who self-represents, when having a "fool for a client" the subjective/emotional overrides still generally require a trained advocate in one's corner. In some areas of law, the advocate is replaced by an attorney advisor who does not wield a sword or wear a shield. Collaborative law is a more united, often conciliatory and compromising approach to resolve disputes by stipulations to the court.

From more than thirty years ago when the late Orange County Judge Warren Knight urged lawyers and retired judges to hop on board to adjudicate matters outside of the courtroom, his JAMS innovation has usurped a great deal of the dispute resolution field from the courts. As public provided courts bend to the budgetary crisis of recession, the second look process is ongoing.

Because attorneys advise as well as advocate on behalf of their clients, their counsel on jury vs. bench trial, ADR vs. court, arbitration vs. mediation and compromise vs. millions for defense, is often the reality of today. The tools for assisting clients in such critical decisions are still on the drawing board, but there are some simple truisms that can jump start the analysis. Physicians have long used a risk-benefit test to determine whether to undertake any particular course of action. Wikipedia tells us that a risk-benefit analysis is the comparison of the risk of a situation to its related benefits.

In addition to the win/loss aspect of deciding the best way to approach resolving a dispute, counselor's advice must be cost effective. Wikipedia tells us that a cost-benefit analysis "is a systemic process for calculating and comparing benefits and costs of a decision." This brings attorneys full circle into using money as the universal value symbol, just as civil courts do, not knowing all the values at stake on either side of a dispute needing resolution. In "Pricing the Priceless," Georgetown University Law Center's Heinzerling and Ackerman tell us that's not the way to produce more efficient decisions "because the process of reducing life, health and the natural world to monetary values is inherently flawed."

Phillip Feldman, BS, MBA, JD, AV (Preeminent) defends lawyers before the State Bar of California, testifies as a board certified expert witness in legal professional negligence and has long counseled in preventative law.

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(818) 990-6660
ronaraklaw@aol.com
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Henry Azizyan Esq.
Burbank
(818) 825-7188
henryazizyan@gmail.com

Alicia B. Bartley
Gaines & Stacey, LLP
Encino
(818) 933-0200
abartley@gaineslaw.com
Land Use, Real Property

Mr. Aaron Berger
Studio City
(818) 942-0228
airberger@gmail.com
Estate Planning, Wills and Trusts

Christopher W. Blaylock
Westlake Village
(951) 255-4480
ChrisWBlaylock@gmail.com

Mr. Natalya Byzova Esq.
Rudoy Fleck, APLC
Sherman Oaks
natalya@rudoyfleck.com
Civil Litigation

Beatriz Chen
Canoga Park
(818) 716-6689
BettyVChen@gmail.com
Bankruptcy

William A. Daniels
Bill Daniels | Law Offices
Encino
(818) 907-8073 156
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Litigation

Seymour S. Goldberg
Marina del Rey
(310) 823-9606
sygoldberg@ca.rr.com
Real Property

Jennifer A. Jasgur
Rosengarten & Associates
Calabasas
(818) 225-5070
jen.jasgur@gmail.com
Civil

Hratch J. Karakachian
Glendale
(360) 272-8462
hkarakachian@yahoo.com

Shant A. Karnikian
North Hollywood
(818) 439-3898
skarnikian@gmail.com
Litigation

Jon-Patrick M. Lopez
Granada Hills
(818) 470-6204
jplopez01@gmail.com
Real Property

Carlos F. Mendoza
Van Nuys
(818) 267-0100
cfmesq10@hotmail.com
Civil Litigation

Thomas M. Morrow
Yetter Coleman LLP
Newbury Park
(805) 499-4746
tmorrow@yettercoleman.com
Intellectual Property

Evgenia Terehova
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(818) 424-8475
evtlaw@yahoo.com
Civil Litigation

Michelle A. Wedderburn
Los Angeles
(310) 497-2672
michellea.wedderburn@gmail.com
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Stephen Wolfson
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