VALLEY LAWYER

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A Publication of the San Fernando Valley Bar Association

Avoiding Common Malpractice Risks Associated with Legal Calendaring

Earn MCLE Credit

Difficult People in the Practice of Law

Los Angeles Superior Court's ADR Program

MCLE Marathon
Page 26

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Contents

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FEATURES

DEPARTMENTS

Why Should Attorneys Care About Public Education?

SEYMOUR I. AMSTER
SFVBA President

AS I SIT HERE AND WRITE THIS ARTICLE I look around the room. I find myself sitting in a public school, surrounded by students of every race from vastly different socio-economic conditions. They are laughing and enjoying each other's company as they participate in a pot luck breakfast, celebrating their recent achievements.

I beam with pride as an attorney, knowing that one of us started this all, for it is an attorney who is known as the father of the public school system. As a result of his vision and insight, our country has an educational system dedicated to providing an opportunity to learn to every child in America regardless of his or her race or socio-economic conditions.

Horace Mann was a graduate of Brown University. When he graduated, he studied law and was admitted to the Bar in 1823. In 1837, he accepted the position as the first Secretary of the State Board of Education for the state of Massachusetts. This was the first position of its kind in the United States. He abandoned a promising career in politics in favor of education. Prior to accepting this position, he had a brilliant career as a representative in the state legislature. He had been earmarked by his party as a future candidate for national office. But, once he became involved with his duties as educational secretary, he withdrew from all other professional as well as business engagements and from politics.

Why would a lawyer, a rising politician, abandon the chance of being in the national spotlight for a position that would bring him little fanfare or attention? Because Horace Mann knew that in order for our country to become a true democracy, all children needed a common learning experience. He believed that by bringing children of all classes together, the less fortunate in society would have an opportunity to advance in the social scale. This would result in equal opportunity for all and equalize the conditions of men.

It was not just men that Horace Mann's beliefs influenced. As a result of his endeavors, women were given the opportunity to become the primary teachers in the classroom. His foresight gave many women their first real opportunity for independence. With adequate wages to support themselves, a female teacher was no longer forced to marry because of financial needs. Instead, they had the opportunity to choose their own destiny, and make choices due to desire and not because of economic necessity.

Horace Mann worked with remarkable intensity in his position as Secretary of Education. He identified the problems with the state's school system. He recognized that the school system he inherited had problems with poor teaching, substandard materials, inferior school committees and pupil absences.

In order to address these issues, he held countless teachers' conventions and introduced numerous reforms. In addition, he established the first school for teachers. He also improved education by successfully advocating the establishment of free libraries. To make sure he was personally aware of the condition of the schools in his state, he traveled to each and every school in Massachusetts.

Horace Mann also realized the need for public support and public awareness of the deficiencies in the schools. Thus, he campaigned throughout the state, enlightening the public on the value of a proper public educational system. As a result of his actions, he reformed the entire public school system in Massachusetts. Through his efforts, the wages of teachers more than doubled. The supervision of teaching was improved with compensated school committees. He caused 50 new secondary schools to be built. State aid to education doubled, resulting in improved textbooks and improved educational equipment.

Horace Mann had six main principles concerning education: 1) the public should no longer remain ignorant; 2) that such education should be paid for, controlled and sustained by an interested public; 3) that this education will be best provided in schools that embrace children from a variety of backgrounds; 4) that this education must be non-sectarian; 5) that this education must be taught by the spirit, methods and discipline of a free society; and 6) that education should be provided by well-trained, professional teachers.

It was Horace Mann's philosophy that education was a natural right for every child. Furthermore, it was the necessary responsibility of the state to insure that education was provided for every child. This philosophy led to the first state law requiring compulsory school attendance.

As a result of Horace Mann's beliefs and endeavors, other states reformed their own school systems to emulate the schools in Massachusetts. One man's convictions led to children of all socio-economic backgrounds being given the opportunity to achieve their goals through education.

Why would a man sacrifice so much for the pursuit of allowing the children of less fortunate to be able to compete on an equal footing with the children of those more fortunate? For it was not a question in the 19th Century of there being any opportunity for children to be educated. Instead, a proper education was confined to those who could afford to pay for it. Only the fortunate were able to provide their children with a proper education whereas the parents of the less fortunate had no means to do so. Of course there were exceptions, as there always are, but on a large scale the fortunate were being educated and the less fortunate were not.

Horace Mann recognized that in a true democracy opportunity must be provided to the less fortunate as well as to the fortunate. Because only if this is done can there be mobility among the classes. For a democracy becomes a democracy and ceases to be an oligarchy, on a grand or small scale, when the opportunities of a society are available to all and not just a few.

As a bar association, we strive to help achieve diversity among the Bar. But this diversity must not be confined to those who are fortunate, but must also be available to those who are less fortunate. Diversity is not achieved by merely being composed of those who have a socio-economic background of privilege. True diversity is achieved by having a bar composed of individuals of all different races and who have come from all different socio-economic backgrounds.

We must always remember this as we create and support programs related to obtaining diversity among the Bar. If we examine one of those programs and realize, if it was structured differently it would have a better chance of creating true diversity of the Bar, we must not hesitate to sanction the change.

It will be hard at times to change these programs to achieve this goal. There will be those at times, who will not understand why change is necessary. There will be those at times who will even criticize the change or feel the concept behind the change, is noble but to difficult to obtain.

How do we answer these people? What do we say? We remind them of the story of one of us. We remind them of the teachings, the sacrifice and self commitment of Horace Mann. He constantly heard that what he was trying to achieve was noble but a task too immense to bring to fruition, that he was tearing apart a system that had been just fine in educating some but not all, and that he risked destroying what was, for what might be.

None of this prevented him from marching forward. None of this prevented him from understanding what he needed to do. So he did, so he achieved. A great man became a footnote in history in order to set up a means for all to achieve, if they are willing to try and to take advantage of the opportunity. There are those today who are born in the less fortunate areas of our community, who have an opportunity to achieve through education, when this opportunity would never have been present if it had not been for one of us.

Horace Mann's sacrifice and self commitment of providing for all, allowed him as the sunset occurred in his life, to look back on what he had achieved with pride and a sense of accomplishment. This enabled him to proclaim, shortly before his death, to one and all, "Be ashamed to die before you have won some battle for humanity."

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

From the Executive Director

New Beginnings

ELIZABETH POST
Executive Director

THE SAN FERNANDO VALLEY BAR ASSOCIATION is pleased to announce our newest member of our team, Irma Mejia. As our Member Services Coordinator, Irma will administer the SFVBA's fee arbitration program, manage our membership database and otherwise be the first point of contact for many of our members.

Irma is fluent in both Spanish and Portuguese. Originally from Los Angeles, Irma attended Bishop Conaty – Our Lady of Loretto High School in Los Angeles. She went on to study at Yale University (JE '08). At Yale, she pursued a double major in Latin American Studies and Archaeology. Her senior research focused on the intersection between state building, nationalism and archaeology.

As an undergrad, Irma studied abroad in Honduras, El Salvador and Brazil. She was also involved in several campus grassroots organizations including MEChA, the undergraduate Chicano organization.

In addition to the skills necessary to carry out the responsibilities of the position, Irma brings to the SFVBA experience working for nonprofit and membership organizations and a stated passion for bridging the gap between the community and the Bar. Before joining the San Fernando Valley Bar Association, Irma interned in the Membership Department of the Skirball Cultural Center in Los Angeles.

Mejia's long-term career interests include non-profit development and management. "When I'm not at SFVBA, I'm watching classic movies and playing with my energetic kitten Yeya," says Irma.

We would like extend a toast and our heartfelt congratulations to Rosie Soto, the SFVBA's Director of Public Services, on her recent nuptials to attorney (and SFVBA Member) Michel Cohen. Rosie and Mike, may your joy in the years ahead be as great as the love in your hearts today.

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

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Lawyers Professional Liability Insurance Program Available to SFVBA Members

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Terri Peckinpaugh
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Los Angeles Superior Court's ADR Program

By Judge Elizabeth Allen White

ALTERNATIVE DISPUTE Resolution (ADR) has become de rigueur in litigation. In order to participate in ADR, parties are "referred" by the court to either private or court sponsored mediation, arbitration, neutral case evaluation or voluntary settlement conference in a personal injury case. The ADR office also offers referrals to settlement conferences before volunteer retired judges.

While the parties can agree to private mediation at any time, the court offers participation in any of the above options by referring the parties to the court's ADR office at the time of the Case Management Conference (CMC). Prior to the CMC, the parties must meet and confer to discuss settlement and file a Case Management Statement in which they advise the court of their willingness to participate in any of the above programs. CRC Rule 3.724, 3.725.

The parties, together with the court, "shall determine on a case-by case basis the suitability of a particular case for mediation or arbitration." Los Angeles Superior Court Rule 1.2.

Counsel should be familiar with the following ADR options offered by the Los Angeles Superior Court's ADR office as, dependent upon the type of case and the temperament of the parties, one form may be more beneficial than another.

Mediation

Random Select

The Random Select Panel consists of trained mediators, neutral evaluators and arbitrators who may not have gained the experience to qualify for the Party Select Panel, as well as experienced neutrals available pro bono to support the judicial system. They must provide three hours hearing time per case. Thereafter, the parties may be charged for additional time at an hourly rate established by the neutral with the parties' consent.

Party Select

The Party Select Panel consists of mediators, neutral evaluators and arbitrators with a specified level of experience. The parties (collectively) may be charged $150 per hour for the first three hours of hearing time. Thereafter, the parties may be charged for additional hearing time on an hourly basis at rates established by the neutral if the parties consent in writing.

Cases for Which Mediation May be Appropriate

Mediation may be particularly useful in a dispute between or among family member, neighbors or business partners or when emotions are getting in the way of resolution. An effective mediator can listen and help the parties communicate in an effective and nondestructive manner.

Cases for Which Mediation May Not Be Appropriate

Mediation may not be effective if a party is unwilling to cooperate or compromise or if a party has a significant advantage in power over the other (e.g., a history of abuse or victimization).

Arbitration

The following must be arbitrated: (1) unlimited civil cases where the amount in controversy does not exceed $50,000 as to any plaintiff; (2) upon stipulation regardless of the amount in controversy; and (3) upon filing of an election by all plaintiffs when each plaintiff agrees that the arbitration award will not exceed $40,000 as to that plaintiff. CRC Rule 3.811(a).

The following are exempt from arbitration: (1) any case requesting equitable relief that is not frivolous or insubstantial; (2) class action; (3) small claims cases; (4) unlawful detainer proceedings; and (5) family law proceedings. CRC Rule 3.811(b).

In arbitration, a neutral person called an arbitrator hears arguments and evidence from each side and then decides the outcome. Arbitration may be either binding or nonbinding.

Cases for Which Arbitration May Be Appropriate

Arbitration is best where the parties want another person to decide the outcome but want to avoid the formality, time and expense of trial. It may also be

appropriate for complex matters where the parties want a decision-maker who has training or experience in the subject matter of the dispute.

Cases for Which Arbitration May Not Be Appropriate
If parties want to retain control of resolution, arbitration, particularly binding arbitration, is not appropriate. In binding arbitration, the parties generally cannot appeal the arbitrator's award, even if it is not supported by evidence or law. Even in nonbinding arbitration, if a party requests a trial and does not receive a more favorable result than in arbitration, there may be penalties.

Neutral Evaluation
In neutral evaluation, each party presents the case to a neutral evaluator. The evaluator then gives an opinion on the strengths and weaknesses of each party's evidence and arguments and suggests how the dispute could be resolved. The evaluator is often an expert in the subject matter of the dispute. Although the evaluator's opinion is not binding, the parties typically use it as a basis to negotiate a resolution.

Cases for Which Neutral Evaluation May Be Appropriate
Neutral evaluation may be most appropriate in cases with technical issues requiring special expertise to resolve, or when the only significant issue is the amount of damages.

Cases for Which Neutral Evaluation May Not Be Appropriate
Neutral evaluation may not be appropriate when there are significant personal or emotional barriers to resolving the dispute.

Settlement Conferences
Settlement conferences may be either mandatory or voluntary. In both types, the parties and counsel meet with a judge or neutral person called a settlement officer to discuss settlement. The judge or settlement officer does not make a decision but assists in evaluating the strengths and weaknesses of the case and negotiating settlement. Mandatory settlement conferences are often held close to the date of trial. The ADR office has a panel of retired judges who volunteer to assist the parties in resolving cases through a voluntary settlement conference.

Voluntary Settlement Conferences for Personal Injury Cases
The Voluntary Settlement Conference program for personal injury cases allows the parties to appear before an experienced plaintiff and defense personal injury attorney who volunteer to assist in valuing and settling cases. Because the volunteers are personal injury specialists, they have greater credibility.

Based upon the parties' selection, the court issues a Case Management Order "referring" the parties to the ADR method selected. The word "refer" is important since the parties may perceive they are being "ordered" to ADR, despite the judge's use of the term "referred." The notion of referral sets the tone for future success of the selected method of ADR. If the parties perceive they are being ordered to mediation, they participate simply to comply with the perceived order and put little effort into the process. This causes mediators to believe their time is not valued.

The parties must be encouraged to use the ADR method which is most appropriate. Additionally, when the parties can afford to pay (e.g., large corporate entities or individuals with significant claims), they should be encouraged to use the Party Select Panel or private mediation to not only get a more experienced mediator, but to insure they are invested in the process.

ADR is a beneficial and economical experience for the litigants. Counsel and the court should invest time to examine the different ADR methods to insure that each case has the maximum potential for settlement.

Judge Elizabeth Allen White *sits in Department 48 of the Stanley Mosk Courthouse where she handles general jurisdiction trial matters. She was appointed to the Los Angeles Municipal Court in 1997 and elevated upon unification to the Los Angeles Superior Court where she's served since 2000. She is the author of the Rutter Group's California Paralegal Manual on Civil Procedure and a co-author of the California Paralegal Manual on Civil Trials and Evidence. She is Chair of the Subcommittee on Education for the Los Angeles Superior Court's ADR Committee.*

San Fernando Valley Bar Association

Annual Judges' Night Dinner

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2011 SFVBA Judge of the Year

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Los Angeles Superior Court Juvenile Court
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Wiggle Room:

How to Help Franchising Clients Survive the Recession

By Barry Kurtz

FRANCHISORS AND franchisees have a better chance at weathering the current economic turmoil than plenty of other entrepreneurs, given the organizing principle of the franchising industry, namely that in war as in commerce, there is strength in numbers. But they aren't immune to trouble, and if franchisors or franchisees are among an attorney's clients, they may soon come for help in surviving the ongoing downturn in the economy.

The good news is that the legal ties that bind franchisors and franchisees – along with the ties that bind franchisees to landlords, lenders and vendors – contain enough wiggle room to give all of these parties a chance to come away from hard times still doing business with one another. This is true even though franchising agreements typically give the upper hand to the franchisor, just as leases and loan documents typically give the upper hand to landlords and lenders.

The bad news is that, for franchisors, making use of that wiggle room is the last thing they want to do, since it involves violating the sanctity of two items at the heart of franchising – royalties and fees for advertising and marketing. Specifically, it means taking a cut in these revenue streams, either by reducing them temporarily or by deferring payments for a struggling franchisee.

Royalties and ad fees commonly vary with the franchisee's revenues, and in any economic downturn they can constitute a substantial drag on the working capital of a struggling franchisee. In a worst-case scenario, they can threaten the franchisee's enterprise, not to mention the franchisor's business. Franchisors, however, do not readily agree to accommodate struggling franchisees with reductions in these revenue sources even in hard times, in part because royalties and ad fees are the lifeblood of their own enterprises, and in part because, if a particular franchisee gets a cut in royalties or ad fees, others will want the same. Clearly, for the franchisor, taking a cut in royalties or ad fees is a last resort, to be undertaken only under extraordinary circumstances, and only for as long as it takes to get things back to normal.

The lawyer who negotiates such an accommodation thus faces no easy task. The first step is to inspect the franchise or other agreements covering royalties and fees for advertising and marketing, looking for wiggle room around which to build an argument that these sources of revenue are powerful tools in the hands of a franchisor determined to survive the current economic downturn with as many franchisees in tow as possible.

The worst that can befall a franchisor is to lose good franchisees, whether in good times or bad, and the cost of a temporary cut in royalties or ad fees may well pencil out as less painful than the cost of recruiting new franchisees in a recession like the current one, marked as it is by a massive loss of personal wealth, usually the source of a franchisee's initial investment and startup costs, plus a severe contraction in the credit markets.

The lawyer may find more wiggle room in fees for advertising and marketing than in royalties. Only the shortsighted entrepreneur eliminates advertising and marketing when times get tough. On the other hand, only the foolish franchisor continues to support a particular advertising and marketing program if deteriorating economic conditions make it ineffective. The better idea is to funnel money into advertising and marketing strategies best suited to such circumstances, eliminating those showing poor results and possibly putting the savings into the hands of good franchisees to fashion advertising and marketing campaigns reflecting conditions in their own areas.

As an alternative, the franchisor could offer a temporary reduction in ad fees in an amount reflecting the franchisor's position, the product or service, the franchisee's marketplace and possibly dozens of other factors. The franchisor who takes 2% gross sales for advertising and marketing fees, for example, might consider a reduction of .5 % But an analysis of the franchisor's advertising and marketing programs shows that the old 80-20 rule applies; 20% of the money this franchisor spends on advertising and marketing brings in 80% of revenues. Hence it might be possible for this franchisor to reduce ad fees by as much as 1.5 %.

A third alternative is to allow a struggling franchisee to defer payment on royalties and ad fees, in part or in whole, for a specified period in the expectation that the franchisee will use the savings to get back on track. This alternative is often the choice for franchisees that have already fallen behind on royalty and ad fee payments, and in exchange for the concession, franchisors typically insist that the franchisee keep up with current payments so as not to fall farther behind.

Whatever the concessions, the workout agreement should emphasize that the goal is to get through hard times, not to institute permanent changes in the financial relationship between franchisor and franchisee.

No franchisor can be expected to countenance a permanent reduction in

royalties or ad fees, in other words. This means franchisees must come to the negotiating table armed with detailed plans showing how they plan to use the savings as working capital to get their businesses back to normal. They should also be prepared to file regular, preferably quarterly reports on their progress toward normal operations, and to sign promissory notes for any royalties or ad fees in default.

Any workout agreement must put clear time limits on the new arrangement. It should also contain a general release of claims in favor of the franchisor covering all matters arising before the date of the workout agreement. Such clauses may be a hard pill for franchisees to swallow, but they commonly agree because they have no choice.

The workout agreement should specify that, should the franchisee default, the franchisor may terminate the agreement with notice, usually five to 30 days. Last, but not least, the workout agreement should contain a cross-default clause specifying that any default by the franchisee on any of the terms of the agreement constitutes a default on the original franchise agreement.

It should go without saying that franchisors should waste no time offering to negotiate workout agreements with troubled franchisees whose operations have proven profitable in the past, resulting in regular payments of royalties and ad fees. It should also go without saying that no workout agreement should put the franchisee under such pressure as to make failure a certainty. Indeed, the agreement should enable the franchisee, given a reduction in royalties or ad fees, to generate enough new cash flow to meet current obligations and eliminate any arrears in a reasonable period of time. On the other hand, with franchisees already in shaky condition, the better idea may be to let them fail.

Lawyers who represent franchisees play the negotiating game with fewer cards in their hands and more people to negotiate with – not just franchisors but also landlords, lenders, vendors and possibly others. But they are not without options. Job one for this lawyer, as for the lawyer representing franchisors, is to find wiggle room in the franchise agreement and in any agreements between the franchisee and landlords, lenders, vendors and others.

The franchisee's lawyer must also persuade the client to waste no time in approaching these stakeholder parties when trouble arises, and the good news here is that landlords, lenders and vendors have an interest in keeping the franchisee's doors open, just as franchisors do. Given the rise in vacancy rates in commercial real estate nationwide, landlords are already showing themselves willing to make concessions on rent and other terms to good tenants, usually minor concessions, to be sure, but concessions nonetheless.

Similarly, although banks have greatly tightened lending standards for new borrowers, and many are lowering, sometimes even eliminating existing lines of credit for business and personal borrowers alike, they hesitate to cut off good customers altogether. As for vendors, if they must choose between closing the door on a known customer and finding a new, unknown one, the choice is usually clear.

To take advantage of these factors, the franchisee's lawyer must come to the negotiating table well armed with financial statements and evidence showing that the franchisee has made good efforts to do business in the face of troubles beyond the control of any individual.

Overall, the goal is to maintain the viability of the franchisee's business no matter what happens to the economy. This means negotiating for concessions that will put the franchisee in position to generate new business. Above all, it means insisting on reasonable terms that will enable the franchisee to discharge any new obligations to the stakeholders, and the sooner the better.

In short, the lawyer should put the franchisee client in position to under-promise and over-perform. Given the pressures exerted on all business enterprises by the ongoing economic downturn, the lawyer who represents such a client must keep in mind that all of the stakeholders in a franchisee's business venture need one another – and that each must give a little that all may find satisfaction in the end.

Barry Kurtz *is a Certified Specialist in Franchise & Distribution Law by The State Bar of California Board of Legal Specialization. He maintains his practice in Encino and can be reached at (818) 728-9979 or bkurtz@barrykurtzpc.com.*

MCLE ARTICLE AND SELF-ASSESSMENT TEST
By reading this article and answering the accompanying test questions, you can earn one MCLE credit in Legal Ethics. To apply for the credit, please follow the instructions on the test answer form on page 17.

Avoiding Common Malpractice Risks Associated with Legal Calendaring

By Joseph C. Scott, J.D.

IT MAY COME AS NO SURPRISE THAT MANY LAW firms, from solos to mega firms, are anxious when it comes to managing their court calendars and calendar-related deadlines, and are often caught crossing fingers and holding their breath when it comes to avoiding costly mistakes. Fortunately, technology is now available that can make their job much more efficient and less error prone.

With the advent of legal-specific court date calculation and rules-based calendaring technologies, firms of all sizes and budgets can tap into resources that can assist with the calendaring process, improve efficiencies and minimize the risk of missing a deadline that could eventually lead to a malpractice lawsuit. With this said, it is worth taking a closer look at the industry's collective calendaring challenge and what firms can proactively do to avoid future risk and maximize calendaring compliance.

Numbers Don't Lie

According to the American Bar Association's *Profile of Legal Malpractice Claims*, calendar related errors are the leading cause of malpractice actions against lawyers and account for over 34% of all malpractice claims. Based on the ABA's study, this includes failure to file documents – no deadline (10.7 percent); improper calendaring (7.4 percent); failure to know or ascertain deadlines (6.4 percent); procrastination with follow-up (4.2 percent); failure to react to the court calendar (3.6 percent); and clerical errors (2 percent).

The same study clearly revealed that small firms account for a majority of all claims with 70 percent of claims filed against firms with five or fewer attorneys, a 5 percent increase since the previous study in 2003.

Economic stability also plays a factor in malpractice frequency. According to a 2008 *Trends in Risk Management* survey conducted by the International Legal Technology Association (ILTA), malpractice claims rose 60% during the previous economic downturn (2000-2003) compared to more stable economic times.

While malpractice represents a firm's worst-case, end-of-days, scenario, there are still far too many calendar and rules related errors making headlines. In *Fiorentino v. City of Fresno*, the plaintiff's attorney missed a 90-day deadline to request a hearing by one day because the person calendaring the deadline forgot that October has 31 days, not 30.

In the case *Pincay v. Andrews*, the nightmare began when a filing clerk missed a deadline. Specifically, the firm missed an appeal filing deadline because the firm's paralegal miscalculated the due date. In this case, the appeals court panel found the mistake to be "excusable neglect." In the dissent, it was rebuked that "if it is inexcusable for a competent lawyer to misread the rule, it can't become excusable because the lawyer turned the task over to a non-lawyer."

In a bankruptcy case of *New World Pasta Company*, representatives at a top bankruptcy firm lost exclusivity for their clients by failing to request an extension before exclusivity expired.

With these cases as proof, it is understood that court calendaring, particularly in California, is a tricky proposition. While the court may set some of the deadlines in a given case, many must still be calculated based on a multitude of different rules.

Rules-based Calendaring: Where to Begin?

While accurate statistics regarding rules-based or automated calendaring/docketing use among all law firms is not available, ILTA's 2010 Technology Survey provides a useful snapshot of such technologies within law firms with more than 20 attorneys. Among this group, 17% indicated not having any technologies to automate the calendaring process and 19% use Outlook to manually keep track of court deadlines and dates. Of course, as with other legal technologies, these statistics

would look a lot different if available for solos and small firms, where a majority of practitioners are relying on manual techniques at best.

Given that every step of the calendaring process represents a potential disaster waiting to happen, it is no wonder that calendar related errors are the leading cause of malpractice claims. To minimize human errors which may cause miscalculations at any step during the process, law firms of any size should consider using rules-based calendaring programs which follow a well-defined and proven process:

- **Select the jurisdiction and the event**. An event, something like the entry of judgment or the date of trial, triggers the date calculation timetable. Rules-based calendaring programs will include jurisdiction and trigger event lists that reduce research time to nearly nothing.
- **Identifying and applying codes and rules**. Rules-based calendaring systems are updated whenever codes and rules change, and can even include email alerts with relevant changes. These programs consider all of the rules and codes to generate critical deadlines in just seconds, minimizing staff time spent on this time intensive task.
- **Generate deadlines.** Based on the applicable codes and rules, accurate deadlines are generated. These systems can even account for holidays and specific judges rules that might affect the calculation.
- **Ready for Calendaring.** Rules-

Top 10 Ways to Reduce Calendar Related Risks

1) **Development of a risk management program.** Designed to clearly define loss prevention policies and articulate how the firm will manage risk through people, processes and technology.
2) **Establishment of a risk task force.** Comprised of docketing, IT, risk management and administration, this group will champion and oversee all aspects of the risk management program including evaluation and selection of appropriate systems and services.
3) **Review and analysis of malpractice carrier mandates.** Understanding carriers' automation requirements and disaster recovery plans can streamline compliance and result in insurance discounts.
4) **Establishment of disaster recovery/business continuity procedures.** Get lawyers' calendars in as many places as possible without duplicate entry and advocate the establishment of firm-wide, rules-based, centralized calendaring.
5) **Establishment and documentation of calendaring practices and procedures.** Includes analyzing flow of pleadings and documents; auditing users to verify firm compliance; and reviewing firm culture to determine fit for automated calendaring systems.
6) **Maximizing calendar exposure.** The more end-users that can view firm calendars and deadlines, in a controlled, secure, non-redundant setting, the better off the firm. Maximizing calendar exposure firm-wide, encouraging integration with other desktop calendars and establishing one cohesive, central and easy to access calendaring system, will minimize calendar related errors and reduce billable time spent on researching rules and calculating deadlines.
7) **Desktop calendar integration.** Integrating calendaring systems with existing platforms such as Outlook, GroupWise and Lotus Notes adds to the cohesiveness and integrity of the firm-wide, centralized calendar.
8) **Establishment of a calendaring portal.** Provides anytime, anywhere access to critical dates and deadlines via a web portal, including mobile lawyers as well as clients.
9) **Dedicated calendaring administrator.** A central manager is designated to oversee the firm-wide calendaring system providing one consistent point of contact and responsibility.
10) **Test drive technology.** Automation, powered by intelligent technologies, is ready and proven to streamline existing calendaring methods and can be utilized on a pay-as-you-go or pay-per-use basis.

based systems populate web-based docket calendars or produce date calculations that can be integrated with Outlook or other non-legal specific calendaring programs.

Making the Case for Calendaring Alternatives

While non-legal-specific, computerized calendaring systems rely too much on human interaction and in-depth knowledge of specific court rules and dates, manual calendaring, even on a computer via popular applications such as Microsoft Outlook Calendar, will equally not protect a firm as well as a system that utilizes an accurate, automated legal rules-based date calculation service.

Rules-based computerized date calculations services are no longer limited to large law firms with extensive IT support, or to firms whose attorneys only concentrate on litigation. Recent advances have made such technologies not only affordable, but also manageable for firms of all sizes, including sole practitioners. Various services available online do not even require law firms to purchase and learn new software programs, but operate via a software-as-a-service web model.

This new way of delivering on-demand deadlines and calendaring is also very conducive to a mobile workforce. Web portals, for example, can provide mobile lawyers, as well as clients, anytime, anywhere access to critical dates and deadlines.

Being proactive when it comes to automatic calendaring systems and deadline technologies is critical, especially during economic downturns. It is a fact that malpractice claims rise during an economic crisis. While insurance companies prepare for these tougher times by tightening rules and increasing rates, firms of all sizes need to shore up calendaring policies and proactively review systems and processes.

Rules-based computerized date calculation technologies enable firms of all sizes and complexities to: automate date scheduling by entering key dates – the service calculates all related dates and deadlines; reduce human errors since any calendaring system is only as good as the information entered; schedule local court and holiday rules – services should account for local rules and also keep track of courts' varying holiday schedules; and schedule and update groups for complex litigation – dates sync with their Outlook calendar.

If changes occur, the "smart" calculation service will send an automated message in order to alert the user. Automation leads to less time spent on manual calendaring and deadline scheduling, saving money on precious administrative time (and potential missed deadlines and malpractice claims).

Even with such automation by the firm's side, it is critical to proceed methodologically and responsibly; while some of today's date calculation technologies make the task of calendaring more simplified and easier to manage, it is strongly recommended to have a licensed attorney supervise the process.

Although it is common and often recommended to delegate certain aspects of calendaring to an experienced and trained administrator or paralegal, based on the severity and frequency of calendar-related malpractice claims, the attorney should be the one to control the process and take ultimate responsibility for the outcome.

In this technology age where there is often a struggle to truly benefit from the latest and greatest new gadget or tech tool, legal date calculation services have come of age and are at law firms' disposal when it comes to automating court calendar rules and deadlines.

Beyond automation, modern calendar technology is increasingly being utilized as a risk management tool designed to minimize calendar related malpractice risks. As evidenced by a burgeoning legal user base, calendaring systems can play a supporting role in firm risk management or act as the driving force behind an integrated firm-wide risk management initiative.

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MCLE Test No. 29

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 in Legal Ethics. 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. Larger firms face an increased risk of malpractice claims.
   True
   False
2. Malpractice claims rise during tough economic times.
   True
   False
3. A calendaring system should be centralized and used firm-wide.
   True
   False
4. Maintaining a back-up calendar is important for disaster recovery procedures.
   True
   False
5. The task of calendaring can be delegated to an experienced non-attorney, but not the responsibility.
   True
   False
6. According to the ABA, calendar-related errors are the leading cause of malpractice actions against lawyers.
   True
   False
7. Some malpractice insurance carriers will offer discounts to law firms that utilize rules-based automated calendaring programs.
   True
   False
8. In a recent case, the plaintiff's attorney missed a 90-day deadline to request a hearing by one day.
   True
   False
9. Non-legal-specific computerized calendaring systems such as Microsoft Outlook® should be relied upon for legal calendaring.
   True
   False
10. A triggering event is anything which starts the running of one or more deadlines.
    True
    False
11. To minimize human errors which may cause miscalculation, law firms should consider using rules-based calendaring technologies which follow a well-defined and proven process.
    True
    False
12. Attorneys and staff should assume that any service of documents or any court filing will trigger another date that should appear on the court calendar.
    True
    False
13. Smart rules-based calendaring systems are updated whenever codes and rules change.
    True
    False
14. Mobile lawyers and law firm clients can access firm calendaring software.
    True
    False
15. Attorneys interested in automating their deadline process have to invest in desktop software and related hardware.
    True
    False
16. Establishing a risk management policy should be a priority for every law firm, regardless of size or complexity.
    True
    False
17. A risk management task force is only necessary during disaster scenarios.
    True
    False
18. Malpractice insurance carriers have requirements and expectations when it comes to firm calendaring policies.
    True
    False
19. Firms should designate a central calendaring administrator.
    True
    False
20. Some web-based calendaring systems allow firms to choose and download court deadlines on a 'pay-per-use' basis.
    True
    False

MCLE Answer Sheet No. 29

INSTRUCTIONS:

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

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

METHOD OF PAYMENT:

Check or money order payable to "SFVBA"

❒ Please charge my credit card for
❒ $_____.

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Credit Card Number Exp. Date

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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

Subrogating Insurer Must Show Superior Equities

Gregg S. Garfinkel

SUBROGATION IS DEFINED AS the substitution of another person in place of the creditor or claimant to whose rights he or she succeeds in relation to the debt or claim.[1] It provides a "method of compelling the ultimate payment by one who in justice and good conscience ought to make it – of putting the charge where it justly belongs."[2]

In the insurance context, subrogation takes the form of an insurer's right to be put in the position of the insured for a loss that the insurer has both insured and paid.[3] While it is often said that subrogation places the insurer in the shoes of its insureds, this general rule is qualified by a number of equitable principles. For example, an insurer cannot bring a subrogation action against its own insured.[4] An insurer also cannot seek subrogation of personal injury claims in the absence of a statutory authority.[5] Additionally, before asserting a subrogation right, an insurer usually must pay the insured, who must have recovered from the loss in full.[6]

The most restrictive principle on subrogation is the Doctrine of Superior Equities, which prevents an insurer from recovering against a party whose equities are equal or superior to those of the party against whom subrogation is sought. The Doctrine of Superior Equities was adopted by the California Supreme Court in California in 1938 in *Meyers v. Bank of America, et al.*, which held that a surety on a fidelity bond could not recover from a bank the amount paid to an employer as reimbursement for forged checks written by a bonded employee, where the bank had not participated in the wrongdoing.[7]

In so holding, the court reasoned: "[T]he right to maintain an action of this kind and to a recovery thereunder involves a consideration of, and must necessarily depend upon, the respective equities of the parties. Here, the indemnitor [the surety] has discharged its primary contract liability. It has paid what it contracted to pay, and has retained to its own use the premiums and benefits of such contract. It now seeks to recover from the bank the amount thus paid. It must be conceded that the bank is an innocent third party, whose duty to the employer was based upon an entirely different theory of contract, with which the indemnitor was not in privity. Neither the indemnitor nor the bank was the wrongdoer, but by independent contract obligation each was liable to the employer. In equity, it cannot be said that the satisfaction by the bonding company of its primary liability should entitle it to recover against the bank upon a totally different liability. The bank, not being a wrongdoer, but in the ordinary course of banking business, paid money upon these checks, the genuineness of which it had no reason to doubt, and from which it received no benefits. The primary cause of the loss was the forgeries committed by the employee, whose integrity was at least impliedly vouched for by his employer to the bank. We cannot say that as between the bank and the paid indemnitor [the surety], the bank should stand the loss. Under the facts of this case, as is stated in *Northern Trust Co. v. Consolidated Elevator Co.*, 142 Minn. 132 [171 N.W. 265, 4 A.L.R. 510]: 'The right to recover from a third person [the bank] does not stand on the same footing as the right to recover from the principal [dishonest employee].'(Italics added.)"[8]

One explanation for the reluctance to place an insurer's rights against third

parties on equal footing with those of an insured lies in the fact that an insurer has been paid a premium to assume the risk of loss. This concept is known as the "compensated surety" defense.

The compensated surety defense is embodied in the superior equities rule, and is invoked to preclude a compensated surety or insurer from recovering against a third party, who would be liable in a suit directly by the insured, unless the surety or insurer can show superior equities to the third party.[9]

California recognizes the compensated surety defense.[10] While the continued vitality of the superior equities rule and the compensated surety defense has been questioned, it remains the law of the land.[11]

The essential elements of an insurer's cause of action for subrogation are as follows: "(a) the insured suffered a loss for which the defendant is liable, either as the wrongdoer whose act or omission caused the loss or because the defendant is legally responsible to the insured for the loss caused by the wrongdoer; (b) the claimed loss was one for which the insurer was not primarily liable; (c) the insurer has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable; (d) the insurer has paid the claim of its insured to protect its own interest and not as a volunteer; (e) the insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer; (f) the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends; (g) justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer; and (h) the insurer's damages are in a liquidated sum, generally the amount paid to the insured."[12]

California courts have applied the Doctrine of Superior Equities so as to bar subrogation actions even where the defendant had engaged in conduct which contributed to, or permitted, the loss. For example, in *Meyers*, an insurer was not permitted to maintain a subrogation action against the bank that had accepted forged checks.[13] There, the insured's manager forged checks payable to the insured and the bank honored the checks in the ordinary course of business.[14] The court held the bank was an "innocent" third party and even though the bank breached its agreement with the depositor, the breach did not cause the loss. Rather, the forger was the primary cause of the loss.[15]

Similarly, in *Patent Scaffolding Co. v. William Simpson Construction. Co.* (1967) 256 Cal.App.2d 506, 507-09, 515-16, the court held that an insurer that paid a fire loss of a subcontractor was not entitled to subrogation against the general contractor who had agreed to obtain fire insurance and indemnify the subcontractor against fire loss, but failed to obtain the insurance. The court held that although the general contractor failed to obtain fire insurance as agreed and failed to comply with its indemnity obligations, it did not cause the fire and therefore had no equitable obligation to bear the entire loss as against the subcontractor's insurers.

The Doctrine of Superior Equities requires subrogating insurers, to establish a superior equitable position than that against whom subrogation is sought. California practitioners are advised to familiarize themselves with this well established, yet little known, doctrine that could provide a client with a defense to a subrogation matter even where the client was a contributed to, or permitted, a particular loss to occur.

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[1] *Fireman's Fund Ins. Co. v. Md. Cas. Co.* (1998) 65 Cal.App.4th 1279, 1291.
[2] *Meyers v. Bank of Am., et al.*, (1938) 11 Cal.2d 92, 101.
[3] *Fireman's Fund*, 65 Cal.App.4th at 1291-92.
[4] *Truck Ins. Exch. v. County of L.A.* (2002) 95 Cal.App.4th 13, 21 [an insurer that has also issued a liability policy to the tortfeasor responsible for causing the insured's loss cannot enforce subrogation rights].
[5] *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 639-640; see also Lab. Code, §3852; Ins. Code, §11580.2, subd. (g).
[6] *Sapiano v. Williamsburg Nat. Ins. Co.* (1994) 28 Cal.App.4th 533, 536-37.
[7] 11 Cal.2d at 102-03.
[8] Id.
[9] *State Farm Gen. Ins. Co. v. Wells Fargo Bank*, N.A., 143 Cal. App. 4th 1098, 1110 (2007).
[10] *Meyers*, 11 Cal.2d at 102-03.
[11] *Morrow v. Hood Commcn's., Inc.*, (1997) 59 Cal.App.4th 924, 926.
[12] *Fireman's Fund Ins. Co.*, 65 Cal.App.4th at 1292.
[13] *Meyers,* 11 Cal.2d at 103.
[14] *Id.* at 93, 102-03.
[15] *Id.* at 103.

Criminal Law Update

By David D. Diamond

THIS PAST YEAR HAS BEEN VERY INTERESTING as it relates to criminal law, considering the court rulings on evidence and constitutional rights.

Evidence

For those that wonder how to deal with red light camera cases, the court provided some answers. In *People v. Khaled*, (2010) 186 Cal.App.4th Supp, 1, 2010 WL 2381959, the court focused on the legal foundation needed to admit the photographs from the red light intersections. There must be a showing of each foundational requirement and here, the court found the pictures to be hearsay. A record may not qualify as a business record if it is made in anticipation of litigation.

In today's technology age, attorneys are using social networking websites, such as Facebook and MySpace, for evidence. In a recent case, the admission of a picture from MySpace was found to be in error. Authentication was lacking and there were many foundation blunders. *People v. Beckley* (2010) 185 Cal.App.4th 509.

Constitutional Rights

In criminal cases, hearsay runs wild, particularly in drug cases. The United States Supreme Court held that reports and affidavits submitted by criminalists to prove the nature and content of controlled substances violate the Confrontation Clause. *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527.

As it relates to gun rights, the Second Amendment is now incorporated by the due process clause so that it can apply to all fifty states. Justice Alito also wrote a concurring opinion that implemented the right of self-defense. *McDonald v. City of Chicago* (2010) 130 S.Ct. 3020.

The foundation of the criminal justice system is the right to counsel. Recent questions forced the court to determine how this right applies to discovery. A non-indigent defendant does not have a right to free copies of prosecution discovery, although it appears to suggest that an indigent defendant may have such a right. *Schaffer v. Superior Court* (2010) 185 Cal. App.4th 1235.

Immigration Law

Criminal defense attorneys are always fearful of accepting a plea bargain that is an aggravated felony or a crime of moral turpitude as it will almost certainly result in deportation. The prosecution has never been concerned with such a collateral consequence. The U.S. Supreme Court found that a criminal defendant in state court must be advised of the federal immigration consequences. If his lawyer fails to do so, it constitutes ineffective assistance of counsel. *Padilla v. Kentucky* (2010) 130 S.Ct. 1473.

Search and Seizure

Most lawyers remember *New York v. Belton* as it relates to the search of a vehicle. That case is no longer good law. *Arizona v. Gant* (2009) 129 S.Ct 1710 overruled the *Belton* case. The law now allows police and law enforcement to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. As such, the mere fact of an arrest in or near a car does not give law enforcement the right to search the interior of the vehicle.

Miranda

The erosion of the "Miranda" progeny continues as two recent cases injected great confusion as to the reasoning and rationale used by the Court. In *Maryland v. Shatzer* (2010) 130 S.Ct. 1213, the Court held that once a defendant asserted his right to counsel, the police must stop questioning the defendant. However, if there is a break in the defendant's custody, the police may reinstate the questioning after fourteen days. As such, if a suspect is arrested, invokes his right to counsel, and gets released from custody, the police may re-interview the defendant.

The second, and perhaps most intriguing of all criminal cases in 2010, was in the matter of *People v Williams* (2010) 49 Cal.4th 405. The following is a direct transcript of the police encounter:

Police: Do you want an attorney here while you talk to us?
Defendant: Yeah.

Police: You do?
Defendant: Uh huh.

Police: You sure?
Defendant: Yes.

The court found that this first interaction did not invoke Miranda. The defendant later said the following: "I want to see my attorney cause you are all bullshitting now." He then added, "I don't want to talk about it." The court found that the two later statements were just expressions of frustration and not an invocation of Miranda.

Overall, 2010 was an interesting year in criminal law. There will be some very important cases that will be decided in 2011 that pertain to gun rights, defendant's rights and evidence.

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Difficult People in the Practice of Law

By Steven G. Mehta

THERE SEEMS TO BE NO SHORTAGE OF difficult people in the practice of law. Perhaps there is something in the water, or perhaps it is the economy. Difficult clients or opposing counsel seem to be popping up out of nowhere. Indeed, take the case of the hypothetical mediator who had a recent encounter with an extremely difficult party who wanted to sabotage the mediation from the very beginning.

The client insulted her own attorney, wouldn't let the other parties speak, accused her attorneys and every attorney in the world of having no heart or emotions and being liars and accused the mediator of lying about the merits of the case. To top off her venom, she had already reported her attorneys to the State Bar and at every turn was trying to avoid resolving the case. At one point, one of her attorneys walked out of the mediation. In short, she was the mother of all nightmare parties.

Unfortunately, for most attorneys and mediators, they have met this type of client/party at some point in their career. Therefore, it is critical to understand how to deal with such difficult clients and opposing counsel.

This article will first identify some of the different types of difficult clients. It will then discuss general strategies on how to deal with difficult people. Finally, it will provide specific tools on how to deal with difficult clients or opposing counsel.

Types of Difficult Clients

The angry or hostile client. Usually, this angry client will be very hostile towards their attorney and others. Staff may dread dealing with this person. Sometimes, it is unclear why the person is so angry. Be assured that this person's anger will only get worse during litigation. Moreover, some or all of that anger will spill over to the attorney and their staff.

The vengeful or zealous client. Typically a vengeful or zealous client will be vengeful about many things and not accept what the attorney is being hired to do. This person will usually make it known that they are bringing "the fight" based on principle. Many times this desire for vengeance will overcome any sense of rationality.

The obsessed client. This client cannot stop thinking about the case, the injury, the wrong and what can be done to address this problem. This client could easily call their attorney several times a day to make sure that you are on top of the case. The attorney could likely get too much information rather than too little.

The emotionally needy client. This client is often emotionally fragile and insecure. Many times this person will be in a co-dependent relationship and is seeking to embroil attorney in another co-dependent relationship. This person may find it very difficult to make decisions.

The dishonest or deceitful client. Often this client will not tell their attorney all the information they know to be relevant or will tell their attorney the wrong information.

The unresponsive client. This client often wants the appearance of an attorney who is providing independent advice, but in reality, doesn't want an attorney's advice. This client simply wants their attorney to rubber stamp his or her actions. Often, this client will reject advice because it is contrary to her own. As stated by Sheila Blackford, author of *Recognizing Difficult Client Types*, "Clients often come to lawyers to determine the consequences of actions they have already taken or have decided to take." Often these clients don't want a lawyer, but are "forced" by others or circumstance to hire a lawyer. Beware that just as they are unwilling to accept their attorney's advice, they may also be unwilling to pay the bill for advice they do not want.

Finally, there may be a combination of these types of clients. An attorney could end up with an angry, vengeful client that is obsessed. If that is a client, turn in the other direction and run. If this ends up being an attorney's opposing counsel, then in the famous words of the Robot in Lost in Space, "Danger, Will Robinson, Danger!"

Strategies to Deal with Difficult People

Now that difficult clients have been identified, it is helpful to look at some strategies that attorneys can use to combat both difficult or nightmare clients and opposing counsel. First, start out by examining oneself. Everyone can be difficult to deal with at times.

Before determining whether the other person is the problem, make sure that the attorney isn't the problem. Is the attorney overreacting? Having a bad day? Why is this person affecting the attorney? What buttons are being pushed, and why? After examining whether the attorney may be part

of the communication problem or that the attorney has misinterpreted the comments made towards them, then the attorney will have a better idea as to whether this person is being offensive or difficult or whether it is the attorney.

In examining oneself as an attorney, it is important to understand that everybody has an instinctual reaction to act when attacked. This is hardwired in one's brain from the stone age days where one has to either react to a threat (fight) or flee from the threat (flight). In modern days, the threat is usually not physical, yet the body still gives issues the same fight or flight reaction. People end up having an immediate need to affirmatively right a wrong or injustice against them. More likely, a person can end up wanting to immediately defend his or her actions or position. This is partially because the attack against a person is affecting his or her internal observation of self worth that person's standing in the community or amongst his peers.

Often people feel the need to show that they are correct and that the other person is wrong. This knee jerk reaction, however, can do more damage than good. Indeed, when having such a reaction, most people perceive that it makes them feel good; but shortly thereafter, they regret having said and done what they did in the heat of the moment.

The strategies listed hereafter are not in chronological order; but instead are different strategies that can be employed depending on the situation.

First, press the pause button. In sports, after a particularly difficult call by the referee, the commentators will press the pause button on the action and show an instant replay at a slower pace. This tool is not just beneficial in sports. The pause button can be very powerful in helping to deal with difficult people.

The length of the pause can depend on the situation. In the case of a minor issue, an attorney might treat the matter with a small pause, giving oneself just enough time to think. Indeed, this is exactly what attorneys tell their clients in preparation for deposition. After the question is asked, wait for a brief second before answering. That pause can help to avoid making a huge blunder by saying the wrong thing.

In other cases, a longer pause might be needed. An attorney could simply ask for a five-minute break or ask to use the restroom, whatever excuse is needed to give to allow the attorney a moment to think. Once the pause button has been hit, an attorney can then consider the comment or action, its impact on the scheme of things, and what to do or say in response.

Take for example, the case of one mediator. In one particularly, nasty mediation, when a party insulted the mediator's integrity to its foundation, the mediator simply took a moment to pause in the mediation to let the sting of the initial insult pass. Then he asked to take a 5-minute break while he digested the information just conveyed. Then when he returned, he simply moved the mediation forward as if the comment had never been made. Once the party realized that she couldn't get a reaction to her insulting comments, she was forced to stop making them.

Another rule to consider is that every argument does not have to be won. As noted above, often the reason a person jumps into the fray is because she wants to prove that she is right. This is difficult for lawyers because they are trained to advocate their position. However, proving to be right with a difficult person can simply entrench that person even further, and even though an attorney may feel right, the other person will never agree. Sometimes the best response is to let it go.

Another important strategy is to employ active listening skills. An important sign of respect for another person is to actually listen to what that other person has to say. How many times have you been in a situation where someone has said, "You aren't listening to me." One of the most powerful tools in addressing difficult people is using active listening skills. Active listening skills include avoiding any distractions, such as that pesky Blackberry, and really trying to understand the other person's positions and concerns. All too often attorneys are already working on their response while the other person speaks.

Another aspect of active listening is to ask open-ended questions that clarify what you understand about the other person's statements. Ask if the restatement is an accurate version of what the other person feels. Sometimes, an attorney might mirror some of the nonverbal cues the person displays. Studies show that by mirroring non-verbal gestures, the other person will feel more connected.

Ask questions that elicit more information from the other person. Depending on the person, an attorney may have to spend a considerable amount of time using active listening skills. However, at the end of such a process an attorney might find that the difficult person is much less difficult.

It is also important when dealing with difficult people that the attorney try not to give that person an excuse to be even more difficult. As such, when an attorney communicates their concerns or feelings, terms that target the other person, such as "you" phrases should be avoided. Instead, the attorney should talk about experiences using "I" phrases, such as "I was upset when I heard the comments." This approach helps to avoid attacking the other person or accusing the other person of something.

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Match communication styles. Generally, people fall into three categories: audio learners, visual learners or kinesthetic (or touch) learners. A person's style can be determined by the language she uses. Think about whether the other person is using visual language such as color, seeing and pictures or whether the person is using audio language such as hearing, sounds, vibrations, etc. Then try to match their language by using words that relate to those styles in responses. For example, with a visual person, an attorney might comment, "I see your position," but with an audio person an attorney might say, "I hear what you are saying."

If the difficult person puts an attorney in a position where they are required to respond, the person should be asked what he is upset about. This will help to demonstrate that the attorney is interested in solutions rather than arguing. This strategy then can allow the attorney to incorporate active listening once the person explains their concern (irrational or otherwise).

Finally, if after an unreasonable attack, consider agreeing with a small portion of the statement. This can accomplish several things. First, it can help an attorney avoid jumping in to defend themselves and continuing the unhealthy communication. More importantly, however, it can allow the attorney to create something in common with the angry person and may appease their irrational anger.

Working with Difficult Clients and Opposing Counsel

These general strategies can be very useful in dealing with all types of difficult people. But what about the difficult client or lawyer? There are several specific strategies to work with these individuals.

First, there is a saying that the best client is the one that an attorney doesn't take. In other words, sometimes it is far better to not take a client than to take a client and have nightmares of being served with an unjustified malpractice suit. This lesson is an important one because some clients, no matter how lucrative, are just not worth the risk and the stress. Many times if the client is difficult as a prospective client, that person will only get worse during the representation.

If an attorney doesn't have the luxury of refusing to represent a certain person, establish boundaries. An attorney can limit involvement to specific interactions. Boundaries can also be established for when and how many calls an attorney might take on a particular topic. One lawyer has a written guideline for all of his clients, which establishes what the lawyer will and won't do in the legal process, including responding to calls on the weekend.

Third, an attorney can establish specific requirements for clients in the very first meeting and before signing the retainer. Along those same lines, one of the major frustrations for attorneys is clients that have unreasonable expectations of the result and process. By providing the clients with a detailed explanation of what they can expect, and what the attorney expects, difficult communications can be minimized.

This principle can also work very effectively with opposing counsel. If counsel is abusive to an attorney or their staff, ground rules should be set for future communications. If those ground rules are not honored, then the attorney can limit communications. For example, one lawyer lets the opposing counsel know that if there are any further abusive phone calls, then all further interactions will have to be in writing. Moreover, if the opposing counsel persists in his or her actions, then all writings will not be by fax or email, and will only be accepted and given in the mail. One lawyer has gone so far as to require that all conferences be videotaped.

Unfortunately, due to the nature of the practice of law which involves conflict scenarios, there will continue to be difficult people in the practice of law. There are many way to deal with difficult clients. Armed with these strategies, it is possible to substantially decrease the number of difficult interactions and the stress related to those interactions.

Steven G. Mehta *is a full-time mediator, with offices in Downtown Los Angeles and Valencia. He specializes in emotionally complex cases involving elder law, injury case and employment disputes. He can be reached at steve@mehtamann.com.*

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Friday January 14, 2011

9:30 a.m.
Nuts and Bolts of Estate Planning
Alice Salvo, Esq.
Law Offices of Alice Salvo
1.5 Hours MCLE

11:00 a.m.
Real Estate Dispute Resolution in Trying Times
Judge Michael Hoff, Ret. and
Judge Bruce Sottile, Ret.
ARC
1 Hour MCLE

12:00 Noon
Lunch

1:00 p.m.
Is That Considered Malpractice?
Terri Peckinpaugh and William Holden
Wells Fargo Insurance Services
1 Hour MCLE (Legal Ethics)

2:00 p.m.
Employment Mediation: Who's Steering the Boat? When Should a Mediator Inject Valuation and Fact?
Max Factor, Esq. Steven Paul, Esq.
and John Weiss, Esq.
ARC
1 Hour MCLE

3:00 p.m.
The End of the Attorney-Client Relationship
Stephen Strauss, Esq.
1 Hour MCLE (Legal Ethics)

4:00 p.m.
Bias in the Legal Profession
Myer Sankary, Esq.
1 Hour MCLE (Elimination of Bias)

Saturday January 15, 2011

9:30 a.m.
Workflow Efficiency
Edward Scott
WestlawNext
1 Hour MCLE

10:30 a.m.
Private Morality and Public Consequences: The Genesis of Corporate Fraud
Chris Hamilton, CPA, CFE, CVA
Arxis Financial, Inc.
1 Hour MCLE

11:30 a.m.
Mortgage Crisis
Mark Blackman, Esq.
1 Hour MCLE

12:30 p.m.
Lunch

1:30 p.m.
The Danger Zone: Escaping Bar Discipline
Professor Robert Barrett
2 Hours MCLE (Legal Ethics)

3:30 p.m.
Dealing with Stress: How to Prevent Substance Abuse
David Mann, The Other Bar
1 Hour MCLE (Prevention of Substance Abuse)

Registration Form and Membership Application

(Pre-Registration Deadline is January 7)

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or		
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✔ Class Attending		
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If paying by credit card:
Credit Card # _____ - _____ - _____ - _____
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Signature _____

Santa Clarita Valley Bar Association

Holiday Recap

PAULETTE GHARIBIAN
SCVBA President

THE SANTA CLARITA VALLEY Bar Association enjoyed a wonderful evening on November 18, 2010, when the board for 2011 was installed at the Annual Installation Dinner. The event took place at the beautiful Tournament Players' Club in Valencia. The evening started with an hour long wine tasting session, when guests enjoyed the opportunity to participate in wine tasting, while mingling with their colleagues and enjoying live jazz music.

The new board was introduced and sworn in by Santa Clarita Judge Graciela Freixas. The new board consists of president Paulette Gharibian, past president Brian Koegle, president elect Barry Edzant, secretary Amy Cohen, treasurer Samuel Price and members at-large, April Oliver, Jim Lewis, Mark Young and liaison to the San Fernando Valley Bar Association, Caryn Sanders.

The evening was attended by San Fernando Valley Bar Association current president Seymour Amster and past president Robert Flagg. The Santa Clarita Valley Bar Association would like to formally thank them for their support and participation at our function.

Robert Mansour, former president of the Santa Clarita Valley Bar Association, and Jane McNamara ended their terms of service and were honored for their outstanding contribution to the association. Mansour and McNamara both played very important roles in the founding and formation of the Santa Clarita Valley Bar Association and have dedicated tireless hours to the growth of this organization.

Brian Koegle, former president, received awards from various offices of elected officials, including Congressman Buck McKeon, Senator Tony Strickland, Supervisor Michael Antonovich and the City of Santa Clarita. A sincere thank you goes out Koegle for his unparalleled dedication towards the positive successes our association witnessed during his tenure. Koegle set out and was successful in obtaining sponsorships for each of the events hosted by the SCVBA throughout the year. This resulted in the bar association starting the 2011 term with a positive cash flow. Koegle was also successful in increasing membership. His tireless efforts and diligent determination set the bar high for those to follow.

As the SCVBA looks ahead to the new year, president Paulette Gharibian has set goals to continue to build on the momentum set by Koegle. The board was set to meet in December, to commence budget planning as well as to form the subcommittees for the 2011 term. The board is continually reaching to the membership, soliciting participation in the various subcommittees, such as, for example, the courthouse planning committee, the special events committee, the membership committee and the community outreach committee.

At the installation dinner, Gharibian reminded everyone that the bar association was the members' association, giving the membership a voice and inviting all those interested to participate in the planning of the upcoming year.

The Santa Clarita Valley Bar Association is looking forward to continuing to nurture its strong ties to the San Fernando Valley Bar Association and thanks *Valley Lawyer* for the opportunity to contribute monthly columns for publication.

For more information, please visit www.scvbar.org.

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Calendar

Probate & Estate Planning Section
Don't Get Thrown Out of the Game: How to Play Ball After McCourt

JANUARY 11
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorney Stacy D. Phillips will discuss how the McCourt case is changing the game for both probate and family law attorneys.

MEMBERS
$35 prepaid
$45 at the door
1 MCLE HOUR

NON-MEMBERS
$45 prepaid
$55 at the door

Santa Clarita Valley Bar Association
Networking Mixer

JANUARY 20
6:00 PM
SALT CREEK GRILLE
VALENCIA

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

Intellectual Property, Entertainment & Internet Law Section
I.P. Year in Review

JANUARY 21
12:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Attorneys John Stephens and Mishawn Nolan will review the year's most important cases.

MEMBERS
$30 prepaid
$40 at the door
1 MCLE HOUR

NON-MEMBERS
$40 prepaid
$50 at the door

Family Law Section
New Laws: What's the Latest in LASC

JANUARY 24
5:30 P.M.
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorneys Barry Harlan and Michelle Robins, along with Judges Mike Convey and Mark Juhas, take the stage to discuss the latest laws.

MEMBERS
$45 prepaid
$55 at the door
1 MCLE HOUR

NON-MEMBERS
$55 prepaid
$65 at the door

Business Law, Real Property & Bankruptcy Section
Joint Meeting with Small Firm & Sole Practitioner Section
Is There a Right Way to Fire Employees?

JANUARY 26
12:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Speaker John Marcin of Marcin Lambirth will give insight into the legalities regarding common workplace situations.

MEMBERS
$30 prepaid
$35 at the door
1 MCLE HOUR

NON-MEMBERS
$40 prepaid
$50 at the door

Litigation Section
Effective Use of Technology at Trial

JANUARY 27
6:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Attorney Michael Kline of Wasserman Comden et al. discusses the critical role technology played in a recent win and gives tips on how best to utilize a few basic tricks of the trade.

MEMBERS
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$45 at the door
1 MCLE HOUR

NON-MEMBERS
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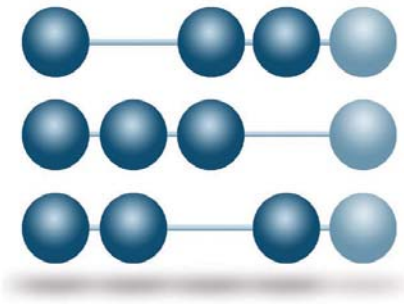

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