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JULY 2013 • $4

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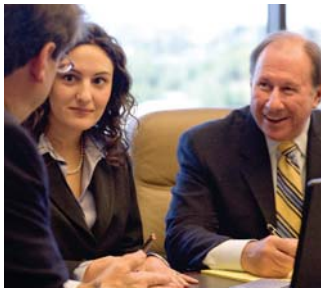

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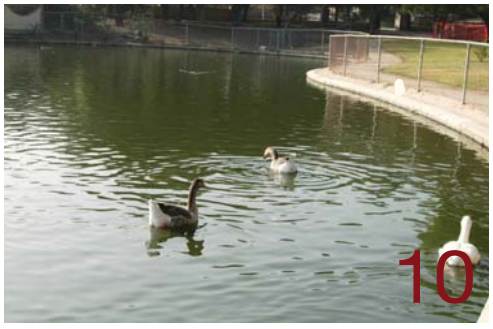

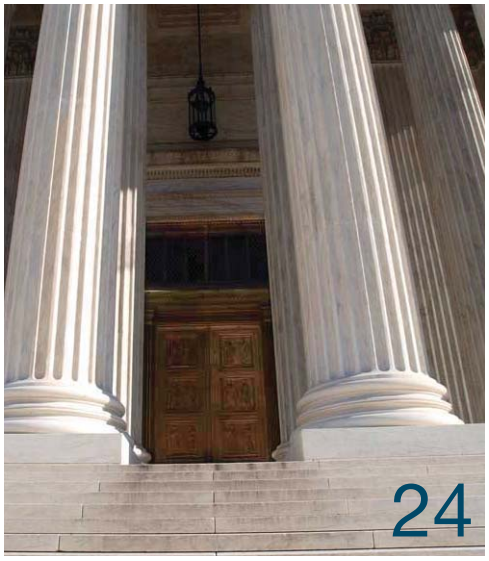

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VALLEY LAWYER

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President's Message

Gideon's Fiftieth and July Fourth

DAVID GURNICK
SFVBA President
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MAX WAS CAUGHT RED-handed burglarizing a store and quickly brought to trial. "How do you plead?" asked the Judge. "Your Honor," replied Max, "before I plead guilty or not guilty, I ask the court to appoint a lawyer to defend me." "Max," said the Judge, "you were caught committing the crime. What could any lawyer possibly say in your defense?" "That's why I asked," Max replied. "I wonder, too, what the lawyer will say."

Besides hopefully eliciting a chuckle, there is a real point to this yarn. The defendant must have a lawyer. The lawyer will have something to say.

This year is the fiftieth anniversary of *Gideon v Wainright* (1963) 372 U.S. 335. Defendant Clarence Gideon asked for a lawyer but was denied. He defended himself at trial, but was convicted and sentenced to five years. From prison he handwrote a petition to the Supreme Court, which appointed appellate counsel, heard the case, reversed his conviction and ruled that all criminal defendants are entitled to counsel, even if they cannot afford one.

The Boston Marathon bombers, the Aurora, Colorado and Tucson, Arizona shooters, the Cleveland, Ohio kidnapper and here in Los Angeles, the so-called Grim Sleeper—these defendants seem to be as guilty as Max. More guilty, as the crimes are worse. Many people are offended that lawyers defend them or other suspects of heinous crimes.

There is something to the objection. If no lawyer would represent such defendants, convicting them would be easier. Sending them to prison or executing them would be faster and cheaper. Long trials and risks of acquittal would be avoided. How wonderful would that be?

But who would decide which defendants are not entitled to a lawyer. And by what criteria? In the 1980s McMartin preschool molestation trials, media reports made the defendants seem guilty. But with assistance of counsel, all were acquitted. In 1924, Leopold and Loeb pled guilty to one of history's most horrible murders and the public clamored for the death penalty. Defense counsel Clarence Darrow is credited with persuading the court to spare their lives.

Without defense counsel, little would stop some officials and prosecutors from charging and neutralizing political opponents or disfavored groups. Some officials, if they could, would arrest and convict opponents on trumped charges. There are authorities and fellow citizens who would clean our streets of huddled masses and wretched refuse—the same masses and refuse beckoned by our Statue of Liberty—not to mention mere noisy neighbors and folks whose pets soil our lawns and disturb our peace.

Efficiency in securing convictions is a hallmark of oppressive societies, not free ones. Our founders preferred balance and the contest of logic over efficiency. Here, the prosecutor's knowledge that every defendant is entitled to a lawyer helps achieve something closer to fairness for a defendant, and security for all the rest. The government's awareness that it must prove the case keeps the system somewhat closer to being honest. Like Max, everyone knows the lawyer will have something to say. So the lawyer who defends a criminal suspect serves our system and us all. And in a sense, the more horrible the facts, the more zealous the defense, the greater the service that lawyer performs.

So on *Gideon v Wainright's* anniversary, let's be thankful for and celebrate criminal defense lawyers. Every day, they defend us all.

Now we are in the midst of summer. Folks, including lawyers, take things a

little easier this time of year. There is hot weather, vacations—if not your own, then someone else's—and celebrations, like the Fourth of July, a grand birthday, with fireworks like so many candles on a cake.

Independence Day is a holiday for lawyers because it celebrates a legal document. The Declaration of Independence is a birth certificate. Indeed, the Fourth of July has been called a day of "political nativity."[1] The Declaration is also a petition stating grievances to an indifferent world. It is a plea for support. And it is a contract in which the signers made a legalistic pledge to each other of what they valued most: their lives, fortunes and honor.

Aside from birthing our nation 237 years ago, our Declaration inspired others. According to one scholar, over half the members of the United Nations have founding declarations of independence.[2] And it continues to inspire through the present. In May, I gazed at the original at the National Archives. The ink is faded but its message is alive.

With its logic and force, the Declaration could be written only by lawyers. The main author, Thomas Jefferson, and 24 other signers were lawyers. It is legalistic and persuasive. It is also a creative document, nothing like it had been written before. As legal document writers, lawyers may also like knowing that the Declaration is ever-so-slightly imperfect. About three quarters into the text, a word was left out. In those days of inkwells and goose quills, rather than start over, the word was added between lines with a carat. The next time anyone points out a typo in your work, take solace in knowing that even Jefferson had to fix one in the Declaration of Independence.

Lawyers devised the legal form to create our nation. Through force of logic and persuasion, we hold back the awesome forces of government, assuring something like fairer treatment for all by giving everyone a champion to argue their case as best they can. And in case after case, folks are curious to hear what the lawyer will say. We can be proud to be part of this profession.

[1] *Rhode Island v. Massachusetts* (1840) 39 U.S. 210, 218.
[2] Armitage, David, "The Declaration of Independence in Global Perspective," http://www.gilderlehrman.org/history-by-era/road-revolution/essays/declaration-independence-global-perspective; also Armitage, "The Declaration of Independence in World Context," http://apcentral.collegeboard.com/apc/members/courses/teachers_corner/34411.html (both accessed May 10, 2013).

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Calendar

Business Law Section

Small Businesses' Do's and Don'ts Re: IRS

JULY 10
12:00 NOON
SFVBA CONFERENCE ROOM

Attorney Ron Hughes will discuss tax controversies and how best to deal with the Internal Revenue Service. (1 MCLE Hour)

Litigation Section

Avoiding Malpractice Claims

JULY 10
6:00 PM
SFVBA CONFERENCE ROOM

So you think you've never had a malpractice complaint. You owe it to yourself to listen to what a pro has to say about avoiding such claims. Attorney Jonathan Cole has been defending attorneys for years and has great suggestions and insight for all. Join us to hear effective ways to avoid legal malpractice claims and manage potential problems. (1 MCLE Hour Legal Ethics)

Bankruptcy Section

Bankruptcy and Tax Implications

JULY 24
12:00 NOON
SFVBA CONFERENCE ROOM

Certified Public Accountant Peter Stephan and attorney David Tilem will discuss tax resolutions and bankruptcy. Includes a substantial handout! (1 MCLE Hour)

Litigation Section

Practical Tips for Securing Preliminary Relief

AUGUST 28
6:00 PM
SFVBA CONFERENCE ROOM

Attorney Thomas Morrow discusses applications for preliminary relief in various contexts and will provide practice pointers to smooth what can sometimes be a bumpy ride. (1 MCLE Hour)

The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. Visit www.sfvba.org for seminar pricing and to register online, or contact Linda Temkin at (818) 227-0490, ext. 105 or events@sfvba.org. Pricing discounted for active SFVBA members and early registration.

Member Appreciation and Summer Deals!

NOEMI VARGAS
Member Services Coordinator
noemi@sfvba.org

THE BRIGHT BLUE SKIES AND WARM DAYS ARE CLEAR indications that summer is finally here! Summer is the perfect time to unwind and bask in the California sunshine. Traffic is lighter without school buses and folks are enjoying family vacations. Summer is also the perfect time for our annual Member Appreciation Month, a month devoted to promoting the value of membership and to celebrating you—our esteemed members.

To help enhance your summer fun, the SFVBA makes available exclusive deals and discounts to local parks and attractions. With these benefits, members can spend a day at Pacific Park on the Santa Monica Pier with the purchase of discounted unlimited ride passes; take the family to visit sea animals at the Aquarium of the Pacific in Long Beach; or even get away from the fast-paced city life and reconnect with nature through the Palm Springs Aerial Tramway. Below are just some of the companies and organizations we have partnered with to bring you special discounts to help you enjoy your summer to the fullest!

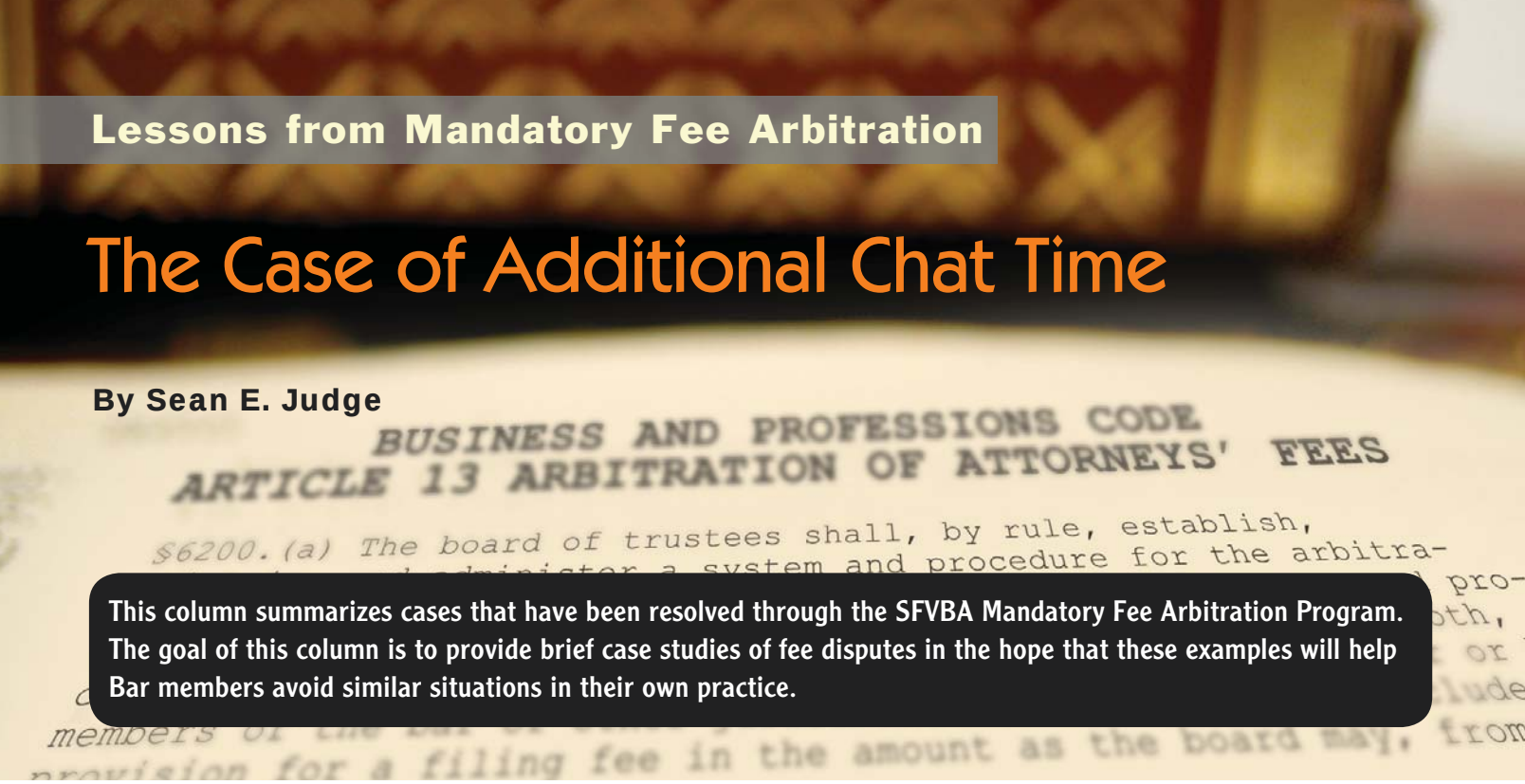
To take advantage of these and other great offers, log into your member account at www.sfvba.org or call me at the Bar office at (818) 227-0490, ext. 107.

This publication, which is one of our most popular member benefits, will be upgraded this summer. Traditionally, the summer issue of *Valley Lawyer* is combined for the months of July and August. However, this year the *Valley Lawyer* team will expand the publication to include an additional issue to serve as a member directory. As an additional benefit of membership, members will receive a free listing in the new annual directory. Look for more details in your inbox soon.

Finally, to show our appreciation for our members and all the great work you do to help make this one of the leading Bar associations in the state, we are hosting our annual Member Appreciation Summer Reception on July 19 at Los Encinos State Historic Park in Encino. The event will be a casual, family friendly celebration with games, hot dogs and, of course, ice cream! Our Member Benefits Providers will be on hand to share information about their services and discounts for SFVBA members. They will also provide valuable prizes for our annual members-only drawing! Be sure to RSVP for the event at events@sfvba.org.

The Case of Additional Chat Time

By Sean E. Judge



This column summarizes 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.

THIS MONTH'S ARTICLE DEALS WITH A dispute in which a client challenged excessive fees that were charged against a criminal retainer.

The Facts

The client's father retained an attorney to represent his son who was facing a felony charge of drug possession. The retainer provided for work "up to and through a preliminary hearing, if necessary." Based on the attorney's work, it was undisputed that $2,500 of the $5,000 retainer was earned. However, according to the fee agreement, any work above and beyond the undisputed $2,500 fee would be billed at $500 per hour. At the conclusion of the attorney's representation, the attorney returned $750 of the $5,000 retainer, having billed $1,750 for 3.5 hours of additional time.

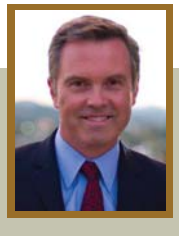
The client disputed the $1,750 charges, contending that the additional time did little or nothing to actually advance the client's representation. For example, the client was charged 1.25 hours for a telephone call that consisted mostly of family discussions and did not involve (as was stated on the bill) "suppression issues" that might have been pertinent to the defense. Further, the attorney received this information only from the client's father and never interviewed the client himself. There were also additional charges arising from the attorney's discussion of issues related to the preliminary hearing, though the attorney did not ultimately appear (and never informed the client that he would not appear).

The arbitrator found that the fee agreement was valid and enforceable and that the attorney's hourly rate of $500 was not unconscionable. However, the arbitrator found that very little of the work that was subject to the 3.5 hour surcharge of $1,750 was actually productive time that provided meaningful services to the client. The arbitrator found the "implied covenant of good faith and fair dealing" was substantially breached by the unproductive time that was charged. The arbitrator did find, however, that less than an hour of the time charged (a discussion with the court clerk about actual issues that did affect the case) was related to client's defense. Thus, the attorney was ordered to refund $1,275 and retain $475.

The Takeaway

In this case, though the fee agreement and the hourly rate were both found to be enforceable, the arbitrator still found that the client properly contested paying for work that did not advance the defense. There are times in all billable cases that discussions are held with clients that are tangential or informal. And while they may help to solidify the relationship between attorney and client, caution should be used in charging full rates and time for these incidental discussions.

One way to address this is to note the actual time spent while noting "time reduced" and only bill for the time that was productive. Billing full freight for chat time is not only questionable ethically and poor practice, but, as seen here, the bill made the client feel ripped off to such a degree that the fee was disputed. The problem was obviously compounded by the attorney's failure to negotiate the fee down and return an additional amount. This situation can be avoided by using common sense, good ethics and intelligent practice in the first place.



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.

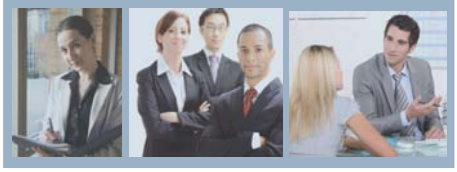
Bulletin Board

The Bulletin Board is a free forum for members to share trial victories, firm updates and other professional accomplishments. Email your 30-word announcement to editor@sfvba.org by the fifth of every month for inclusion in the following month's issue. Late submissions will be printed in the subsequent issue. Limit one announcement per firm per month.

John S. Cha and **Robyn M. McKibbin** of **Stone Cha & Dean LLP** recently settled a wage & hour, discrimination, and wrongful termination matter for a fraction of the initial $1.5 million demand.

Networking, Mentoring, Bar Committee Opportunity for New Lawyers

Wanted: New Admitees to work with Bar Leaders on a one-year Centennial Committee assignment to video interview long-time and present members, including judges, attorneys and Bar staff, documenting the history of the Bar, including cases, courthouses, legal issues and the changing courseof legal careers. Contact lisa@lmillerconsulting.com.



Criminal Convictions and Non-Citizens' Eligibility for DACA

By Braden Cancilla

RECENTLY, PRESIDENT OBAMA'S administration has worked to improve the immigration enforcement system by, among other things, strengthening public safety and border security. As part of this effort, the Department of Homeland Security (DHS), the agency in charge of the removal of non-citizens from the United States, has begun to focus its enforcement resources on the removal of individuals who pose a threat to national security or public safety. This includes individuals convicted of crimes, with an emphasis on violent criminals, felons and repeat offenders. Likewise, DHS has begun to exercise prosecutorial discretion to ensure that its enforcement resources are not depleted on low priority cases, such as individuals who came to the United States as children.

As part of its discretionary authority, on June 15, 2012, DHS announced a program, Deferred Action for Childhood Arrivals (DACA), to permit certain non-citizens[1] who came to the United States before the age of 16 to receive employment authorization and deferred action[2] for two years.[3] In the event that DACA is extended beyond two years, DACA and employment authorization will be issued in two year increments. Non-citizens, unless DHS finds exceptional circumstances, will be ineligible for DACA if they have certain criminal convictions.

DACA is a relatively new program and it is important for criminal defense attorneys who represent non-citizens to understand DACA eligibility requirements so that they may protect their non-citizen clients' interests throughout criminal proceedings.

This article explains DACA eligibility requirements and focuses on the effect that criminal convictions have on non-citizens' eligibility for DACA. This article also suggests strategies to minimize the adverse impact of criminal conviction(s) on non-citizens' DACA eligibility.

DACA Eligibility Requirements[4]

Non-citizens are eligible for DACA if they meet all of the following requirements:

- Were under the age of 31 as of June 15, 2012
- Came to the United States before reaching their sixteenth birthday and are at least fifteen years old[5]
- Have continuously resided in the United States since June 15, 2007, up to the present time
- Were physically present in the United States on June 15, 2012, and at the time of making their DACA request with U.S. Citizenship and Immigration Services (USCIS)
- Entered without inspection before June 15, 2012, or their lawful immigration status expired as of June 15, 2012
- Are currently in school, have graduated or obtained a certificate of completion from high school, have

obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States

- Have not been convicted of a felony, significant misdemeanor or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety[6]

Criminal Issues that Affect DACA Eligibility

Non-citizens, unless they can show exceptional circumstances, will be ineligible for DACA if they have been convicted of a felony, significant misdemeanor or three or more other misdemeanors.[7] The definitions of each appear below.

Felonies

A felony, for DACA purposes, is defined as a federal, state or local criminal offense punishable by imprisonment for a term exceeding one year. Under this definition, crimes that are punishable by imprisonment for one year, 365 days or less, do not constitute felonies.

Significant Misdemeanors

A "significant misdemeanor," for DACA purposes, is a misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) and regardless of the sentence imposed, is an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, driving under the influence, or if not an offense listed above, is one for which the individual was sentenced to time in custody of more than 90 days.

The sentence must involve time to be served in custody, and therefore does not include a suspended sentence. The time in custody does not include any time served beyond the sentence for the criminal offense based on a state or local law enforcement agency honoring a detainer issued by U.S. Immigration and Customs Enforcement (ICE).

There are two broad categories of significant misdemeanors. Under the first category, domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, and driving under the influence are significant misdemeanors if the maximum term of imprisonment authorized is one year or less but greater than five days. Whether the non-citizen actually spends time in custody is not relevant if the conviction is for one of the offenses listed in this category.

The second category of significant misdemeanors involves conviction for a crime not listed in the first category if the maximum term of imprisonment authorized is one year or less but greater than five days, and the individual was sentenced to time in custody of more than ninety days. Importantly, the sentence must be to time served in custody and therefore suspended sentences do not count.

Non-Significant Misdemeanors

For DACA purposes, a "non-significant misdemeanor" is any misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) if it is not an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence and is one for which the individual was sentenced to time in custody of ninety days or less. The time in custody does not include any time served beyond the sentence for the criminal offense based on a state or local law enforcement agency honoring a detainer issued by ICE.

A minor traffic violation, including driving without a license, is not considered a misdemeanor.

Threats to National Security and Public Security

Non-citizens who pose a threat to national security and public security may be ineligible for DACA even if they have not been convicted of associated crimes. Examples that fall into this category are gang membership, participation in criminal activities or participation in activities that threaten the United States.

Exceptional Circumstances and DACA Eligibility

As shown above, generally, a non-citizen who has been convicted of a felony, a significant misdemeanor, three or more other misdemeanors or who otherwise poses a threat to national security or public safety will be precluded from DACA eligibility. However, despite this general preclusion, in the event that DHS determines there are exceptional circumstances, the non-citizen may still be granted DACA relief.

The term "exceptional circumstances" is not clearly defined. Presumably, DHS will balance the equities in favor of the non-citizen against the severity of the non-citizen's criminal convictions.

Despite the exceptional circumstances exception, individuals with criminal convictions should proceed with caution before applying for DACA. DHS has indicated that:

> Information provided in this request is protected from disclosure to U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection (CBP), for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of Notice to Appear or a referral to U.S. Immigration and Customs Enforcement under the criteria set forth in USCIS's Notice to Appear guidance.[8] Individuals whose cases are deferred pursuant to the consideration of deferred action for childhood arrivals process will not be referred to ICE. The information may be shared with national security and law enforcement agencies, including ICE and CBP for purposes other than removal, including for assistance in the consideration of deferred action for childhood arrivals, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense. The above information sharing policy covers family members and guardians, in addition to the requestor.

Thus, individuals with criminal convictions should carefully review the DACA requirements and USCIS's guidance regarding referral to removal proceedings to determine whether applying for DACA is appropriate for them.

Criminal Defense of Non-Citizen Clients

DACA provides a valuable form of protection from removal for eligible non-citizens. When representing non-citizens, criminal defense attorneys should advise potentially eligible non-citizens about the DACA program and its eligibility requirements. Likewise, they should develop strategies, to the extent possible, to protect their clients' DACA eligibility.[9]

To protect DACA eligibility, criminal defense attorneys may consider, among other strategies:

- Seeking to substitute charges, or plead to crimes other than domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence, and obtaining time in custody of 90 days or less. In exchange for a substitute charge, it may be possible to offer such things as a more severe non-jail sentence, counseling, additional community service or work release as long as the jail sentence is 90 days or less.
- Informally deferring a plea by, for example, asking the prosecution to defer a plea hearing while the defendant voluntarily pursues certain goals, such as community service. Once the goals are met, it may then be possible to make no plea at all or an alternative plea to something that will not prejudice a DACA case.
- Pleading to an infraction instead of a misdemeanor. Likewise, it may be possible to plead to a non-significant misdemeanor in the event that a non-citizen does not already have two other non-significant misdemeanor convictions.
- Taking an appropriate case to trial. This may help to avoid a plea or conviction that will preclude DACA eligibility.
- Post-conviction, it may be possible to vacate a plea on the basis of legal error or expunge convictions. Likewise, it may be possible to work with a prosecutor to withdraw a plea and replace it with one that will not preclude DACA eligibility.

[1] As used in this article, the term "non-citizen" refers to individuals who are not U.S. citizens or nationals of the United States and whose immigration status does not preclude them from applying for DACA.

[2] Deferred Action is the exercise of prosecutorial discretion whereby DHS chooses not to remove individuals from the United States while in Deferred Action status.

[3] Memorandum from Janet Napolitano, Secretary of Homeland Security to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, et al., re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, (June 15, 2012).

[4] The DACA-related information in this article is derived from information provided to the public on USCIS's website, wwww.USCIS.gov. You may access DACA information by going to the Forms section on the home page and clicking the highlighted term, "Consideration of Deferred Action for Childhood Arrivals," which is next to Form I-821D, the DACA application form. DACA-related links will lead to information on the website upon which this article is based.

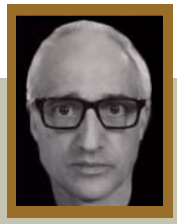
[5] Non-citizens who are in removal proceedings or have a final removal or voluntary departure order may apply for DACA even if they are under 15 years old.

[6] DACA is ultimately a discretionary form of relief from removal. As such, even non-citizens who meet each of the minimal requirements to qualify for DACA may be denied DACA in the exercise of discretion, under the totality of the circumstances, if enough negative factors surface to outweigh a grant of DACA.

[7] The date of conviction is not relevant. Thus, even convictions that pre-date the existence of the DACA program may preclude a non-citizen from DACA. For DACA purposes, juvenile adjudications are not considered disqualifying misdemeanors or felonies. Likewise, expunged convictions are not considered disqualifying misdemeanors or felonies. Despite this, since DACA is a discretionary form of relief, DACA requests will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of discretion is warranted.

[8] See www.uscis.gov/NTA

[9] DACA is only one program. It is important, apart from DACA issues, for defense attorneys to also be aware of, and advise their clients about, the effect that criminal convictions have on a non-citizen's inadmissibility and/or deportability and eligibility for non-DACA relief. See *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), (holding that the Sixth Amendment requires criminal defense counsel to affirmatively and competently advise their clients of the immigration/deportation consequences of criminal charges and criminal pleas. Failure to do so constitutes ineffective assistance of counsel).



Braden Cancilla is a member of the SFVBA Attorney Referral Service. Cancilla has practiced since 1989 and his practice areas include U.S. immigration law and immigrants' civil rights. Cancilla may be reached at bradencancilla@aol.com.

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Nancy Rheinhardt

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Meet the SFVBA Board of Trustees Candidates

By Irma Mejia

The SFVBA's Nominating Committee recently announced its slate of candidates for the 2013-2014 Board of Trustees. Before casting a vote, get to know the candidates!

THE SAN FERNANDO VALLEY BAR ASSOCIATION'S election season is now underway. Each year, SFVBA attorney members have the opportunity to elect new colleagues to serve on the Association's 20-member Board of Trustees. Trustees are charged with the duty of overseeing the Bar's budget and development of programs and services as well as setting policy for the Association. Trustees also serve as ambassadors of the Association, welcoming new members and promoting the Bar wherever possible.

The SFVBA bylaws require the formation of a Nominating Committee to select qualified candidates for the Board. The Nominating Committee consists of the current SFVBA President, Immediate Past President, current President Elect and five SFVBA members selected by the Board of Trustees. Per the Association's bylaws, the Nominating Committee must also automatically nominate the current President Elect to the office of President and may select up to two candidates for the offices of President Elect, Secretary and Treasurer. It may then select between nine and twelve members in good standing as candidates for the available positions of Trustees.

The Nominating Committee met on June 4 to select this year's candidates to the Board of Trustees. The candidates were chosen for their experience, good standing in the legal community and demonstrated commitment to the Bar and its programs. The following candidates were selected:

President
Adam D.H. Grant (automatic)

President Elect
Caryn Brottman Sanders

Secretary
Carol L. Newman

Treasurer
Kira S. Masteller

Trustees
Anie N. Akbarian (Incumbent)
Michelle E. Diaz
Hon. Michael R. Hoff, Ret (Incumbent)
Alan E. Kassan (Incumbent)
David S. Kestenbaum (Incumbent)
Yi Sun Kim
Nancy A. Reinhardt
Marlene Seltzer
Michelle Short-Nagel (Incumbent)
Louis A. Wharton (Incumbent)

While the candidate selection by Committee has concluded, the Association bylaws permit additional nominations for any office (except President and President Elect) by filing a written nomination signed by 20 active members with the SFVBA Secretary by July 25. The Association bylaws may be viewed at www.sfvba.org.

Ballots and an election pamphlet will be mailed to active attorney members in early August. All ballots must be submitted to the Bar office on or before September 10. The new Board will be sworn in at the Bar's annual Installation Gala on September 28 at the Warner Center Marriott in Woodland Hills.

As a mid-sized, metropolitan bar association, the SFVBA provides its members many opportunities to rise as leaders of the Valley's legal community.

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.

This year's candidates are a diverse cross-section of attorneys, representing various practice areas and experiences. Members are encouraged to review the following candidate profiles in preparation for the upcoming election.

Officers Candidates

Adam D.H. Grant is the current President Elect of the SFVBA and will be sworn in as President on September 28, 2013. Grant is a partner at Alpert, Barr & Grant LLP in Encino where his practice focuses on privacy and data security and business litigation. He is a past Chair of the Business Law Section. Grant volunteers for various legal aid and Jewish organizations. When not practicing law or giving back to the community, Grant regularly competes in marathons and Ironman distance triathlons. As President, a primary goal of his term will be to fill the void created by the dismantling of the Superior Court's ADR program through a Valley Bar ADR Center.

Caryn Brottman Sanders is the current SFVBA Secretary and has been nominated for the position of President Elect. Sanders has been practicing law for 19 years and is a senior associate at Tharpe & Howell in Sherman Oaks where her practice focuses on personal injury, liability, business and employment litigation. She is a Past President of the Santa Clarita Valley Bar Association and is a current member of the Bench Bar Committee and the Attorney Referral Service Standing Committee. Sanders plans to continue the SFVBA's tradition of being an outstanding resource for Valley attorneys and hopes to help the Attorney Referral Service expand and increase its visibility in the community.

Carol L. Newman is the current SFVBA Treasurer and is running unopposed for the position of Secretary. Newman has been practicing law for 34 years. She is a partner in the law firm of Newman & Alleguez in Woodland Hills. Her practice focuses on business and real estate litigation. She is the co-chair of the Business Law Section and is an active member of the Membership & Marketing Committee and Diversity Committee. She is also the SFVBA's representative to the Multicultural Bar Alliance, of which the SFVBA has been a longtime member. Newman hopes to create more networking opportunities for SFVBA members and develop closer relationships with other bars to increase the SFVBA's visibility and influence.

Kira S. Masteller is a current Trustee and has been nominated to serve as SFVBA Treasurer. She is a shareholder at Lewitt Hackman in Encino. Masteller has been practicing in the area of probate, trusts and estates for ten years. Prior to practicing law as an attorney, Masteller worked as a paralegal for fifteen years. Masteller is an active member of the SFVBA Diversity Committee. As part of the Committee, she has directed the SFVBA Diversity Committee's Essay Writing Contest at Maurice Sendak Elementary School. Masteller has also volunteered at the Bar's Blanket the Homeless event. She is a strong supporter of medical research organizations, Habitat for Humanity and Operation Gratitude. If elected, Masteller will focus her efforts on increasing the Bar's membership and revenue, enhancing its educational programming to include more practical legal training and increasing awareness of the Attorney Referral Service throughout the Valley community.

Trustees Candidates

Anie N. Akbarian has been practicing law for the past 16 years, litigating complex personal injury, medical malpractice and family law cases. She has offices in Glendale and Encino. Akbarian is a panel attorney for the Los Angeles Police Protective League, a member of the Los Angeles Police Community Policing Advisory Board for Devonshire Division and a temporary Judge for the Los Angeles Superior Court. Akbarian is also Co-Chair of the Horace Mann Project, working with students who have interests in careers in the legal field.

Michelle E. Diaz has been practicing law for 15 years. Her practice, based in Northridge, focuses on family law and personal injury matters. Diaz serves as a volunteer arbitrator for the SFVBA Mandatory Fee Arbitration Program and is an active member of the SFVBA Family Law Section. Diaz is also a member of the Attorney Referral Service and its Modest Means and Senior Referral Programs. In her spare time, Diaz has volunteered with the San Fernando Valley Mothers of Multiples Club, her homeowners association and served as Treasurer of her local Parent-Teacher-Student Organization. If elected to serve on the Board, Diaz will work to improve the educational seminars for small firms and sole practitioners. She would like to see more offerings in business basics, law practice management and billing and contracts. Diaz is also interested in finding creative ways to help reduce the court's backlog of cases.

Hon. Michael R. Hoff, Ret. is a current Trustee and has been an active member and supporter of the Bar's programs. He serves as a volunteer arbitrator in the SFVBA's Mandatory Fee Arbitration Program. He is also Past President of the Valley Community Legal Foundation. Prior to volunteering for the Bar, Judge Hoff served as a Superior Court Judge for 21 years. If re-elected to the Board, Judge Hoff will work to further the Bar's mission of being a strong voice for the Valley's legal community.

Alan E. Kassan has been practicing law for 29 years. Through his firm Kantor & Kantor LLP in Northridge, he has focused his practice on health, long term care, disability and life insurance litigation and ERISA and bad faith actions. He is a current SFVBA Trustee, an active member of the Membership & Marketing Committee and is a panel member of the Attorney Referral Service. In his spare time, Kassan has served on the Board of Directors of the Southland Regional Association of Realtors and served on its Professional Responsibility & Ethics Review Panel. Kassan also volunteers on various committees at his local temple. If reelected to the Board, Kassan will work to improve outreach to attorneys in niche practice areas, will work to enhance member benefits and will improve the Bar's web presence and marketing.

David S. Kestenbaum has been a criminal defense attorney for 34 years. He is a partner at Kestenbaum Eisner & Gorin in Van Nuys. He is an active Bar member and supporter of Bar events, including Judges' Night. Kestenbaum is also Chair of the SFVBA Criminal Law Section. As part of his community service, he has served as past President of the local San Fernando Valley chapter of B'nai B'rith International. If reelected to the Board, Kestenbaum plans to work on reviving the mentoring program and will continue to work on enhancing the programming of the Criminal Law Section.

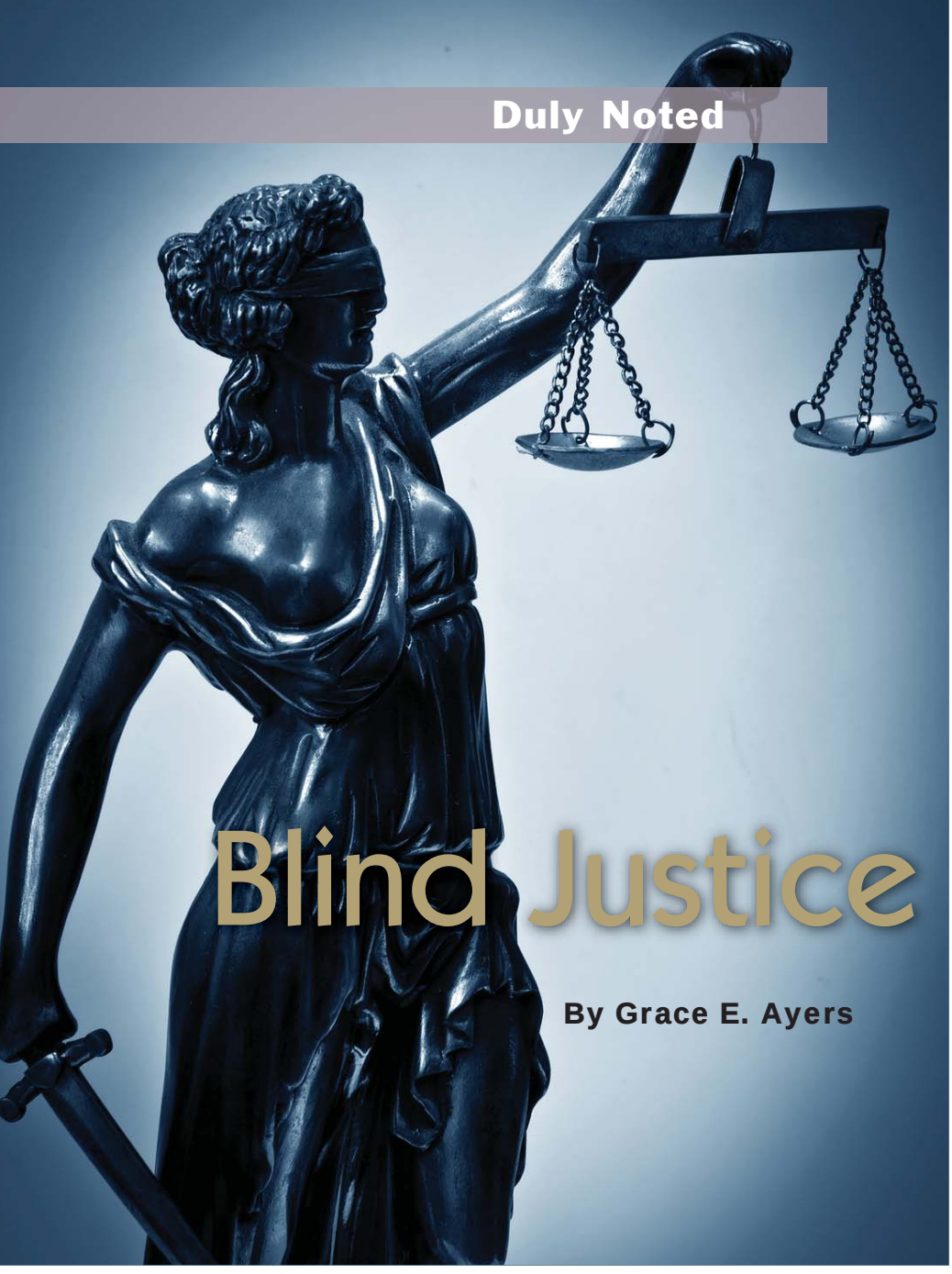
Yi Sun Kim is an associate at Greenberg & Bass in Encino. She has been practicing law since 2007, focusing primarily in bankruptcy law and business litigation. Kim has helped raise money for medical research through Team Parkinson at the L.A. Marathon 5K Race and the Great Strides 5K walk for cystic fibrosis. She is also training to serve as a volunteer with Public Counsel Law Center's Self Help Desk at the U.S. Bankruptcy Court. If elected to the serve on the Board, Kim will focus on working with the New Lawyers Section to enhance programming and attract more new attorneys.

Nancy Reinhardt focuses her practice on probate, estate planning, trusts administration and tax law and has been practicing law for 23 years. She maintains her own firm in Woodland Hills. She is Chair of the SFVBA Probate & Estate Planning Section and has been an MCLE speaker at past section events. As part of her community service, Reinhardt organizes law day activities at local schools and is a Sunday school teacher. If elected to serve on the Board, Reinhardt will focus her efforts on increasing volunteer opportunities for SFVBA members to get involved with local community projects. She is also interested in organizing new fundraising projects in partnership with the VCLF.

Marlene S. Seltzer has been practicing law for 17 years and is a senior associate at Wasserman Comden Casselman & Esensten. Her practice focuses on estate planning, probate, trusts and elder law. She currently serves as Chair of the Women Lawyers Section and has been a past Co-Chair of the Probate & Estate Planning Section. Seltzer volunteers her free time to presenting educational seminars and volunteering at senior centers, assisted living facilities, churches and hospitals. If elected to the Board, Seltzer would focus her efforts on establishing a mediation program and offering training for new attorneys.

Michelle Short-Nagel has been a family law practitioner for 15 years. Her firm is based in Woodland Hills and her practice includes children's advocacy. Short-Nagel currently serves as Co-Chair of the Family Law Section and has been a past Program Chair for the Family Law Section. She also coordinated the 2012 Settlement Week in family law at the Van Nuys courthouse and the 2012 Settlement Day at the San Fernando courthouse. Short-Nagel has served as Minor's Counsel and has spoken at Minor's Counsel annual training programs. She is also a volunteer at a local elementary school. If re-elected to serve on the Board, Short-Nagel will focus her efforts on expanding programs for new attorneys and improving outreach to increase the Bar's overall membership.

Louis Wharton is a partner at Stubbs, Alderton & Markiles, LLP and has been practicing law for 12 years. His practice focuses on advising startup, emerging growth and middle market companies across a spectrum of industries in securities compliance, corporate finance, mergers and acquisitions and general corporate matters. Wharton is a current Trustee and a Co-Chair of the Business Law Section. He is also a prior contributor to *Valley Lawyer*. If re-elected, one of his goals as a Board member would be to increase the SFVBA's outreach to transactional attorneys and other members of the Valley legal community who have not traditionally been involved in the Association.



Blind Justice

By Grace E. Ayers

ABOUT A MONTH AGO, I walked into a San Fernando Valley criminal court with what seemed to be an insurmountable task. I had prepared to the best of my ability, but I knew it would be an uphill battle. Nonetheless, I put on my best lawyer face and set out to be the advocate I had trained so hard to become.

Not surprisingly, my request was met by staunch opposition by the prosecutor. What did surprise me was the reaction I got from other defense lawyers, who too scoffed at the likelihood of getting my motion granted, then essentially started talking trash about my client. One such female defense lawyer even took it upon herself to dog-ear the pages of the police report she felt were relevant to the prosecutor's case. "The nerve!" I thought.

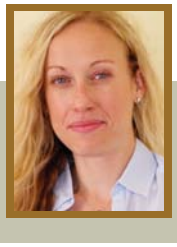
So, I fetched my client, we went in front of the judge, and eureka! Much to everyone's chagrin, my request was granted in full. I walked out of that courtroom with a Cheshire grin from ear to ear. I felt like I was on top of the world; I was extremely proud of my lawyering skills, especially in the face of such annoying opposition. In fact, I was so excited, I wanted to share this victory with everyone I encountered the rest of the day. Unfortunately, I quickly learned to keep the details of my success to myself since even the most basic facts of my case were enough to turn people against me.

My client was the defendant in two domestic violence cases against the same woman. My request was to modify the domestic violence restraining order from a protective stay-away order to allow peaceful contact between my client and his girlfriend. He had been arrested for violation of that order only weeks before when the two were at a sporting event together.

Now, in my defense, there had not been any incidents between the two young lovers in many months. My client continued to do well in his domestic violence classes and was learning to cope with his anger, all facts to which his girlfriend testified in open court that day. She also testified that she had seen a true change in my client's behavior and that she wanted nothing more than to be with him. So in fact, what the court's decision to grant my request really meant was that my client and his girlfriend could (continue to) live together and work together, as they had been doing all along.

So, am I really the bad guy?

When I was in that courtroom, I felt that even my peers, fellow members of the criminal justice system, were casting their judgment on my client– and, by virtue of my representation, on me. Then the few members of the general public with whom I shared the anonymous details of my triumph looked at me with disdain and disgust in their eyes, no doubt wondering how I could possibly celebrate such a thing.



Grace E. Ayers, a graduate of Pepperdine University School of Law, has been a criminal defense attorney since 2009. She is also the founder of Grace's Cases which provides special appearances throughout the state. Ayers can be reached at grace.ayers@gmail.com.

They saw me as defending a "wife-beater", end of story. My actions, my success, meant that a battered woman would be put back in harm's way. And I would be lying to say that I did not feel a tinge of guilt over that possibility. As a woman, as a human, as a lawyer, I would hate to think I contributed to someone being hurt or abused.

Since that case, I have spent quite a bit of time pondering the subject and coming to terms with what it means as a woman to represent those facing domestic violence allegations. My conclusion is two-fold: justice is blind, but I am not. On the one hand, it is my sworn duty as an attorney to represent my clients to the absolute best of my ability. Oftentimes that means advocating for someone who did something illegal and/or morally wrong.

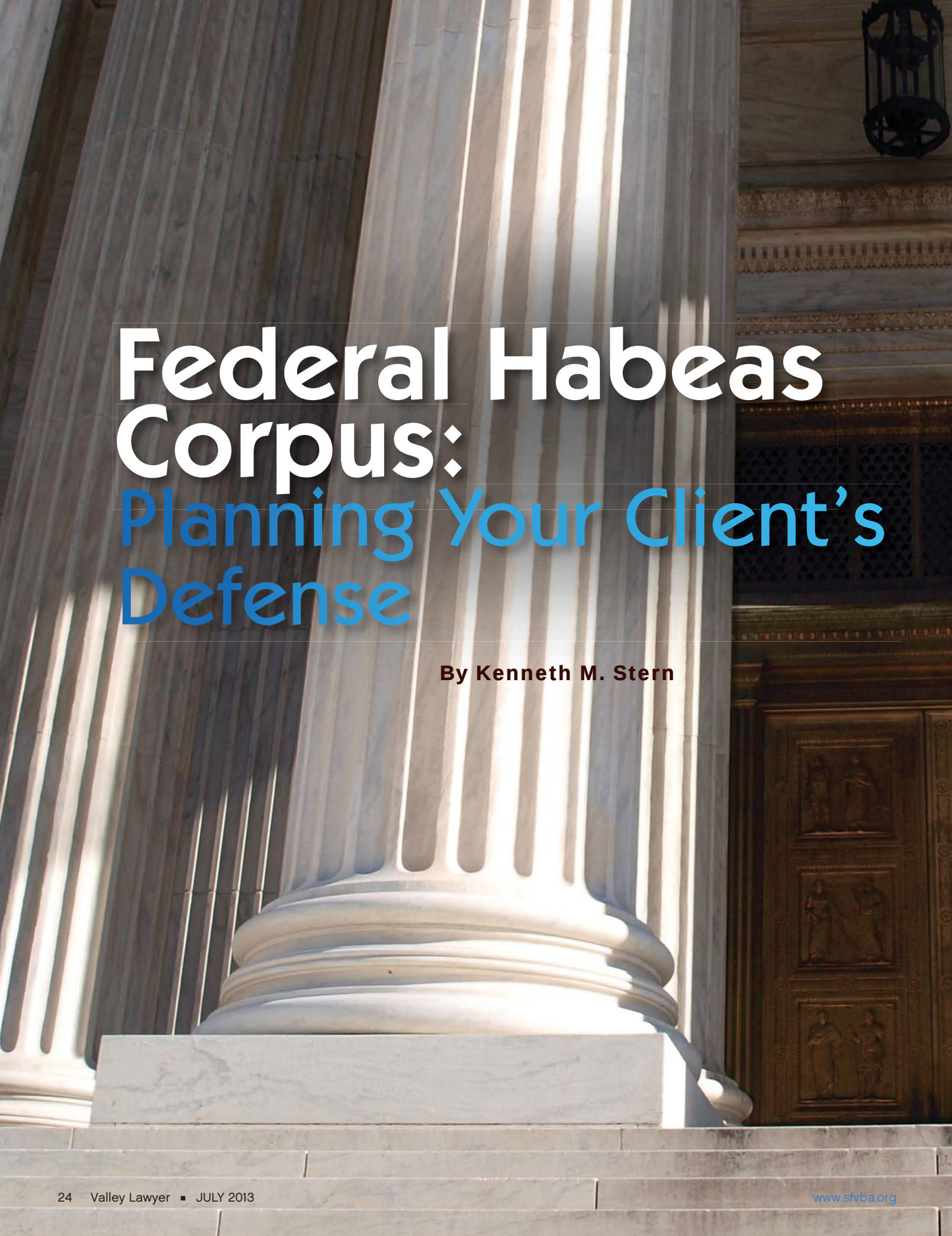
On the other hand, I have the luxury of being able to choose my clients and more importantly, my own actions. Part of my job will always be judging the credibility of every person who walks into my office or takes the stand. My charge is not to impose any moral judgment on them; it is to act as my own jury in evaluating and executing my case.

For example, in this particular domestic violence matter, I gathered facts from the police reports, from my client's statements and from what his girlfriend told me. There were no serious injuries and my client was really getting his life under control.

They both wanted to continue their lives together as a couple in love and they needed my help in order to do so without being in violation of the law. So I made a judgment call and decided to try and modify the stay-away order. I did what I thought was best under the circumstances and I believed in the righteousness of my actions all the way. When the judge said my request was granted, I really wanted to reply: "Of course it is."

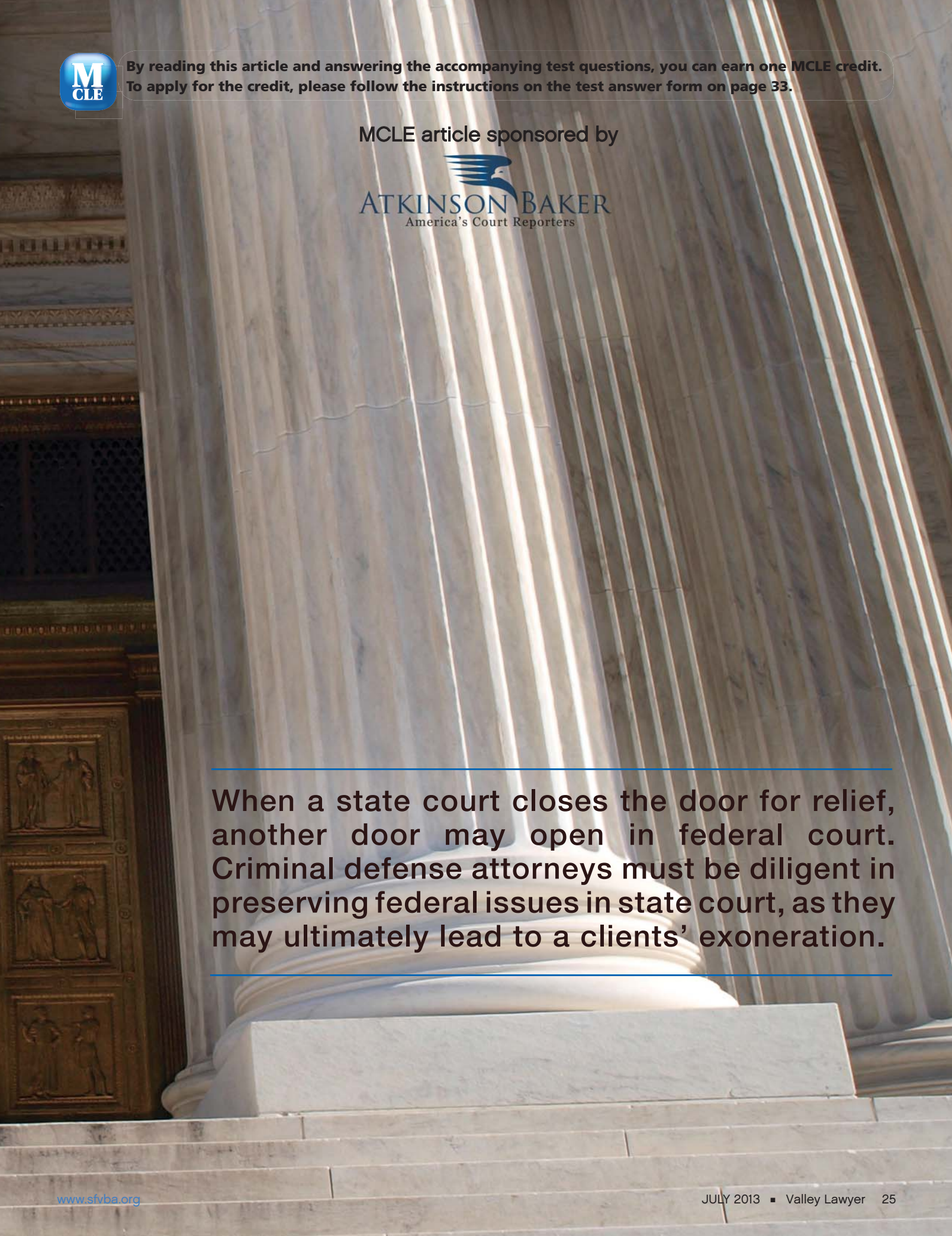
Working on domestic violence cases is certainly not for the timid. There will always be the critics who see us only as defenders of abusers. But a true advocate will represent any client to the fullest of his or her abilities, in spite of, but in light of, all the surrounding circumstances.

Justice is blind, but we are not. Lawyer accordingly.



Federal Habeas Corpus: Planning Your Client's Defense

By Kenneth M. Stern



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When a state court closes the door for relief, another door may open in federal court. Criminal defense attorneys must be diligent in preserving federal issues in state court, as they may ultimately lead to a clients' exoneration.

HABEAS CORPUS, THE "GREAT WRIT," HAS no explicit definition in its authorizing statute.[1] The Great Writ's purpose was to look into the detention of a prisoner and command release, if imprisonment was contrary to law.[2] A person convicted of a crime in state court, or given an illegal sentence, may find relief with a federal habeas corpus petition, showing the state violated one's right(s) under federal law.

For success with a federal habeas corpus petition, it is necessary to start laying the foundation in state court, before conviction or sentencing. It is important for both trial and appellate counsel to keep the federal habeas corpus requirements in mind. One must cite federal law (federalize) on all potential factual and legal issues. If an issue is not raised at the trial level, it may not be permitted at the appellate level. If it is not raised at the appellate level, it may not be permitted in a federal habeas corpus proceeding. If an issue is not raised, at the trial or appellate level, it may still be included in a federal habeas corpus petition, though it would make the matter more difficult. If the law or factual predicate of the issue were available during state court proceedings, it would likely require state habeas corpus proceedings based upon ineffective assistance of counsel to successfully proceed on a state based federal habeas corpus petition. Actual innocence may allow a court to excuse a procedural bar but one should not rely upon a court doing so.[3]

Factual Determination in State Court

The federal court does not write on a clean slate; it is bound by certain matters determined in state court. There is a presumption, which may be rebutted, that factual determinations made by the state court are correct. Rebuttal, however, has a high burden, requiring clear and convincing evidence.[4]

Generally, a petitioner must develop facts to be relied upon in state court. For a factual claim to be fairly presented in state court, *Dickens v. Ryan*[5] held that newly presented facts must not fundamentally alter the legal claim in the state court, or significantly put the case in a stronger and different evidentiary position than considered by the state court.[6] Thus, the federal court will, generally, not hold a factual hearing.

There are certain circumstances wherein a petitioner may be entitled to a factual hearing. Exception to the general rule barring factual hearings may be made by showing that the claim relies upon a new constitutional law ruling by the Supreme Court, made retroactive to collateral proceedings, which had not been available prior to the state court proceedings. Another exception can be made by demonstrating that facts could not have been developed using due diligence. For either exception to apply, the petitioner must meet a high burden of proof with clear and convincing evidence, to show that, but for the constitutional error, no reasonable jury would have found the petitioner guilty.[7]

Grounds for Federal Habeas Corpus

To bring a federal habeas corpus action, based upon a state court conviction, the petitioner must be in custody and the ground(s) relied upon for custody must be a violation of the United States Constitution, federal law or a federal treaty.[8]

There are two bases upon which a petition may be granted. The first is that the state court decision was contrary to or involved an unreasonable application of clearly established federal law. It is not sufficient that the law be clearly established by federal circuit courts; it must be clearly established by the U.S. Supreme Court. Thus, to obtain relief, one must show that the Supreme Court has clearly ruled, in accordance with the petitioner's theory, prior to the petitioner's case.[9] To determine clearly established law, the Court may look to other decisions besides those issued by the Supreme Court.[10] A state court decision is not contrary to, or an unreasonable application of, clearly established federal law, if the Supreme Court has not created precedent upon the issue.[11]

Marshall v. Rodgers ruled that while a federal circuit court may look to circuit precedent to determine whether it has previously held that a rule in issue has been clearly established by the Supreme Court, the federal circuit court may not review circuit precedent to determine whether a rule which has not yet been decided by the Supreme Court is so widely accepted that it would be taken as correct if presented to the Supreme Court.[12]

It is not enough grounds that the state court be incorrect. That state court's decision must have been unreasonable[13] as opposed to merely "incorrect or erroneous."[14] If fair minded jurists could disagree, it is not unreasonable.[15] *Metrish v. Lancaster* noted that this is a difficult standard to meet.[16] *Metrish* described the standard as being "an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement."[17]

A decision is contrary to clearly established federal law if it applies a rule contradicting Supreme Court law, or reaches a result differing from that which the Supreme Court reached on "materially indistinguishable" facts.[18]

Williams v. Taylor ruled the Court must decide which arguments or theories could have supported the state decision.[19] The Court must then determine whether it is possible for fair minded judicial officers to be in disagreement concerning whether the arguments or theories are inconsistent with previous Supreme Court holdings.[20]

If the state court adjudicated the claim on the merits, no new evidence may be presented in the federal habeas proceeding. It must be adjudicated solely upon the record made in state court.[21] However, if the state court did not determine the issue on the merits, new evidence may be presented in the federal proceedings. For example, this may occur when the federal court has authority to rule upon an issue not previously presented in the state court. This can occur when new facts are discovered, which could not have been discovered, with diligence, during state court proceeding, after the state court ruled.[22]

The second basis for entitlement to the grant of habeas corpus is the fact that initial conviction was based upon an unreasonable determination of facts in light of the evidence presented at trial.[23] So, if a state court correctly identifies

the controlling legal rule, but unreasonably applies it to the case facts, an unreasonable determination exists.[24]

New Rule of Law

Teague v. Lane ruled that in some circumstances, a rule of law that was not established when the petitioner's conviction became final cannot benefit the petitioner.[25] A new rule is one not dictated by precedent when defendant's conviction became final. One must determine if a state court, considering the claim, at said finality, would be compelled to conclude that the rule sought was required by established precedent. Per the *Teague* ruling, if the rule is based upon existing, or well settled authority, the rule is not new.[26] *Schriro v. Summerlin* noted a new rule will apply to all cases still directly on appeal when a Supreme Court decision is made.[27] The *Teague* analysis must be applied by the Court before it determines the case on the merits.[28]

Ayala v. Wong noted, under *Teague*, that a new constitutional procedural rule, promulgated after the conviction became final, cannot be applied retroactively in a habeas corpus proceeding.[29] *Ayala* noted a new rule is one that breaks new ground; imposes a new obligation on the state or federal government; or was not dictated by precedent at the time the conviction became final.[30]

To determine whether *Teague* applies, the court determines the date a conviction became final; the legal landscape concerning the issues; when the appeal became final; and if any *Teague* exceptions apply.[31] Exceptions can be made if private conduct is involved which is beyond the pale for the government to punish or if it is a watershed rule of procedure involving fundamental issues of fairness.[32]

However, *Greene v. Fisher* held that, for the purposes of determining whether a state court ruling was an unreasonable application of, or contrary to, clearly established law, a conviction is analyzed as the law existed when the final state court adjudication on the merits was made, not when the conviction became final.[33] That is because the analysis for whether a state court ruling was an unreasonable application of, or contrary to, clearly established law involves a different analysis than the newly promulgated law analysis required by *Teague*.[34]

Stringer v. Black held even with conflicting authority that the rule is not necessarily new, for *Teague* purposes, as the "new rule" doctrine's purpose is to "validate reasonable interpretations of existing precedent" which is based upon an "objective standard."[35] Justice David Souter's dissent in *Graham v. Collins* noted *Stringer* in writing that "existence of conflicting authority does not alone imply any rule resolving the conflict is a new one."[36]

A new rule, for *Teague* purposes, is one which breaks new ground.[37] If the rule sought by a petitioner breaks no new ground but is based upon a reasonable good faith interpretation of existing, well-settled authority, there has been compliance with *Teague*.

The Court must determine whether the new rule is substantive or procedural. New substantive rules apply retroactively, as there is a significant risk the person was convicted of an act which is not unlawful or is punished in an unlawful manner.[38]

New procedural rules do not apply retroactively as there is no class of persons convicted of conduct the law does not make criminal. There is only a possibility someone may have been convicted of the procedure deemed incorrect.[39]

Even when a new rule is promulgated, if it is a watershed rule of criminal procedure, *Teague* does not apply. *Schriro v. Summerlin* notes watershed rules are those that effect fundamental fairness and accuracy of criminal proceedings: "[T]he rule must be one without which the likelihood of an accurate conviction is seriously diminished."[40] Being fundamental, in the abstract, is not sufficient.

Henry v. Estelle held a new rule could be applied retroactively if the accused was similarly situated.[41] *Henry* noted, in accord with *Teague*, that generally a new constitutional rule of criminal procedure may not be applied retroactively. But if the rule is applied to the defendant in the case announcing the rule, it must be applied.

Custody Requirement

To be entitled to federal habeas corpus relief, one must be in custody.[42] This does not require physical restraint. Custody includes various severe restraints on liberty, not generally shared by the public. Custody includes persons on parole or persons released on personal recognizance or bail.[43]

Exhaustion Requirement

For a federal court to consider an issue for habeas corpus, the issue must first be exhausted, or fairly presented, in state court.[44] Exhaustion also takes place wherein there is no corrective state process or the corrective process is inadequate.[45] Exhaustion, lack of which is not an affirmative defense, must be proven by the petitioner.[46]

Exhaustion's purpose is to give the state the opportunity to correct the error, to obviate the need for federal judicial intervention.[47] If the petitioner, at time of filing the habeas corpus petition in the federal court, still has the right in state court to an available procedure for having the issue determined, exhaustion has not taken place.[48]

To satisfy the exhaustion requirement, the petitioner must in state court proceedings identify the federal right invoked and the factual basis upon which the claim is made.[49] If a state court addresses some but not all issues on the merits, a rebuttable presumption exists that the state court considered the merits of claims it did not discuss.[50]

Pinkston v. Foster ruled that a claim defaulted in state court because it was not raised is a claim for which there is no corrective state process.[51] Thus, it was exhausted because no state procedure remained available. That required the Court to decide whether the claim was procedurally defaulted for habeas review. *Pinkston* noted, citing *Coleman v. Thompson*, even if a claim is defaulted in state court, the federal court may decide the claim if it is shown there was good cause for default and prejudice

would occur if failure to consider the claim would constitute a fundamental miscarriage of justice.[52]

Coleman had ruled an attorney's negligence, in post conviction proceedings, was not good cause. *Martinez v. Ryan* found an exception to such a rule; wherein, the claim was that both trial counsel and post conviction habeas counsel provided ineffective assistance of counsel.[53] T*revino v. Thaler* found an exception when the state's direct appeal procedures make it highly unlikely that a defendant, in a typical case, will not have the opportunity to raise the ineffective assistance of trial counsel on appeal.[54]

Even if exhaustion requirements, including its exceptions, are not met, a federal court may, in its discretion, deny the petition on its merits.[55] *Granberry v. Greer*,[56] citing *Strickland v. Washington*,[57] held that because exhaustion is not jurisdictional, a federal court has authority to grant a habeas corpus petition, even if exhaustion was not accomplished. The respondent state may waive exhaustion, which must be expressly made by the state's attorney.[58]

A mixed petition is one which contains exhausted and unexhausted claims. Federal courts are not allowed to rule upon mixed petitions.[59] When a mixed petition is filed, the Court must give petitioner an opportunity to dismiss the unexhausted claims. The Court has authority to stay proceedings on the petition while petitioner exhausts unexhausted claims in state court.[60]

Statute of Limitations

The statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act (AEDPA) is one of the most complicated aspects of federal habeas corpus proceedings. It is also a procedural aspect which commonly results in the habeas corpus petition being barred.[61] However, there is no bar regarding a claim of actual innocence based upon newly discovered evidence.[62] The petitioner must show it is more likely than not that no reasonable juror would have voted for conviction in light of the new evidence. A delay in filing, while not a bar to relief, can be considered regarding the credibility of the actual innocence claim. Generally, AEDPA states the habeas corpus petition shall be brought within one year of the time the conviction becomes final. However, not all time is counted in that year.

Statutory Gap Tolling

Although AEDPA imposes a one year statute of limitations from the date the state conviction becomes final, the time during which a properly filed post conviction application for relief, that is, appeals, or habeas corpus petitions, does not count as part of that one year. This is called statutory gap tolling.[63]

The state court conviction is deemed final when the time for seeking direct review expires, even if direct review was not sought.[64] However, there are other triggering events which can start the statute of limitations running.[65] These include: removal of an unlawful state impediment to filing; the retroactivity of a new constitutional right; or the ability to discover that the factual basis of the claim could have, with due diligence, been discovered. The statute of

limitations begins to run from the latest of these triggering events.[66]

Post conviction applications for relief are deemed pending even during those periods between the denial of relief at one level and application for relief at the next level. This is because application to each level of courts is considered one round of relief.[67]

There is a two part analysis to determine whether gap tolling will apply. First, the successive petition, to the next highest state court, must rely upon the same facts as the petition in which the denial in the lower court took place. If the new petition adds additional facts, it is considered a new round and gap tolling will not apply. However, if petitioner merely seeks to correct deficiencies relating to the facts contained in first petition, the petition is not considered to contain new facts. Gap tolling will apply.[68]

The Court then looks to whether the petition was denied on the merits, as opposed to being denied as untimely. If denied on the merits, gap tolling applies. If denied as untimely, gap tolling does not apply. That is because if the state court habeas proceeding is not timely filed, it is not properly filed.[69] However, tolling does occur while under review by the state court.

In California appellate proceedings, whether something is timely filed is clear, as statutory filing times are prescribed. However, in California habeas corpus proceedings, no specific time limits are prescribed; the time limits are whatever is considered reasonable. The federal habeas corpus decisions look to what is considered reasonable within state courts.[70]

Carey v. Saffold (2002) held California's reasonableness standard is the equivalent of limitations of other states, typically 30 or 45 days.[71] If the California Supreme Court is not clear about the timeliness of a petition, the federal court is required to determine if the delay between petitions was reasonable.[72]

Equitable Tolling

Equitable tolling extends the statute of limitations beyond that which would otherwise terminate the ability to prevail on the petition. Many have wondered if it is a theory which can, under AEDPA, extend the limitations period. *Holland v. Florida* formally ruled for the first time by the Supreme Court that equitable tolling applies to AEDPA.[73] While at the time of the *Holland* ruling, eleven circuits had ruled equitable tolling was proper under the appropriate circumstances, though the Supreme Court had not yet so ruled.

Holland held equitable tolling may exist, contrary to the Eleventh Circuit's ruling, where there is attorney negligence. To be entitled to equitable tolling, the petitioner must show that he or she has been pursuing the involved rights diligently and that extraordinary circumstances were in the way which prevented timely filing. The extraordinary circumstances, *Holland* ruled, could be an attorney's failure to comply with professional standards of care. This would occur when the attorney's conduct was serious or egregious. Garden variety excusable neglect does not qualify. This includes miscalculation of the filing deadline.

Stancle v. Clay held that equitable tolling might be based upon mental impairment.[74] To base equitable tolling upon such, the petitioner must meet a two-part test. The first requirement is to show that mental impairment was an extraordinary circumstance, beyond the petitioner's control, which was so severe it resulted in either of the following situations: the petitioner was rationally or factually unable to understand the need for timely filing; or the impairment rendered the petitioner unable to personally prepare and file the habeas corpus petition. The second requirement is to show diligence in pursuing the claim which was made reasonably impossible, under the totality of the circumstances. This may include a lack of access to assistance to timely file the petition.

Stancle went on to rule that the second prong is a "but for" requirement. That is, even if there was impairment, if petitioner could still, by seeking proper assistance, file the petition timely, equitable tolling is not available.

The statute of limitations defense can be waived. If waived, the Court may not raise such, sua sponte.[75]

Stay of Proceedings Due to Mental Incompetence

It was, at one time, Ninth Circuit law that federal habeas corpus proceedings must be stayed while petitioner is incompetent. This was because effective right to counsel would require a mentally competent client.[76] However, in January of this year, the Supreme Court, in *Ryan v.*

Gonzales, held, inconsistent with the Ninth and Sixth Circuits, habeas corpus proceedings are not mandatorily stayed while petitioner is mentally incompetent.[77]

Justice Clarence Thomas wrote, as to the Ninth Circuit determination, that because a habeas corpus petition is based upon a previous record, an attorney could provide effective representation, even if the petitioner was mentally incompetent. As to the Sixth Circuit's position that there was a statutory right to competence, Justice Thomas wrote that no such right existed.

While such a stay is not mandatory, district courts have discretion to issue such a stay. This is because district courts have the inherent authority to manage their own dockets.

Right to Counsel

There is no constitutional right to appointment of counsel in federal habeas corpus cases.[78] There is a right to appointment of counsel in capital cases.[79] In non-capital cases, the Court may, in its discretion, appoint counsel for petitioner.[80] The petitioner must show that absent appointment of counsel, a due process violation will occur.[81]

Successive Petitions

Under AEDPA, for a successive federal habeas corpus petition to be granted, it must show a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, which was previously unavailable. Alternatively, it can be shown that the factual predicate of the new petition could not previously have been discovered with diligence. For either strategy to prevail, the petition must show that the underlying facts, if proven in light of the evidence as a whole, establishes by clear and convincing evidence that but for the constitutional error, no reasonable jury would have voted for guilt.[82]

If a habeas petition is dismissed for lack of exhaustion, and a new petition is filed, such is not a successive petition.[83]

The judicial relationship between the states and federal government include a check and balance of power to safeguard the rights of the criminally prosecuted. The process by which the federal courts oversee federal issues raised in state courts can provide justice, even if delayed, for one who has been misjudged, in a state court.

[1] 28 U.S.C. 2241.
[2] *Fain v. Duff,* 488 F.2d 218, 221 (5th Cir. 1973).
[3] *McQuiggin v. Perkins*, 12-126 (U.S. 05/28/2013).
[4] 28 U.S.C. 2254 (e)(1).
[5] *Dickens v. Ryan* 688 F.3d 1054, 1068 (9th Cir., 2012).
[6] *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).
[7] 28 U.S.C. 2254 (e)(2)(a)(ii)(B).
[8] 28 U.S.C. 2241(c); 28 U.S.C. 2254(a).
[9] 28 U.S.C. 2254 (d)(1).
[10] *LaJoie v. Thompson*, 217 F.3d 663, 669 n.6 (9th Cir. 2000).
[11] *Brewer v. Hall,* 378 F.3d 952, 955 (9th Cir. 2004); *Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 654, 166 L. Ed. 2d 482 (2006).
[12] *Marshall v. Rodgers, 133 S.Ct. 1446 (U.S. 04/01/2013).*
[13] *Gulbrandson v. Ryan* (9th Cir., Nos. 07-99012, 09-72779, filed March 18, 2013).
[14] *Lockyer v. Andrade,* 538 U.S. 63, 75 (2003).
[15] *Harrington v. Richter, 562 U.S. ___,131 S. Ct. 770, 786 (2011).*
[16] *Metrish v. Lancaster*, No. 12-547 (U.S. 05/20/2013).
[17] *Harrington v. Richter,* 562 U. S. ___, ___ (2011) (slip op., at 12--13).
[18] *Early v. Packer*, 537 U.S. 3, (2002); *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000).
[19] *Williams v. Taylor,* supra, 410.

[20] Accord, *Harrington v. Richter*, supra, 786.
[21] *Cullen v. Pinholster,* 563 US ___, 131 S. Ct. 1388, 1398-1399 (2011).
[22] *Gentry v. Sinclair*, 693 F.3d 867, 881 (9th Cir. 2012).
[23] 28 U.S.C. 2254(d)(2).
[24] *Williams v. Taylor*, supra, 406-410.
[25] *Teague v. Lane*, 489 U.S. 288 (1989).
[26] *Goeke v. Branch* 514 U.S. 115 (1995).
[27] *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004); *Griffith v. Kentucky*, 479 U. S. 314, 328 (1987).
[28] *Rhoades v. Henry*, 638 F.3d 1027, 1044 (9th Cir. 2011).
[29] *Ayala v. Wong*, 693 F.3d 945, 951 (9th Cir., 2012).
[30] *Ibid.*
[31] *Caspari v. Bohlen*, 510 U.S. 383, 389-390 (1994).
[32] *Ibid.*, 397.
[33] *Greene v. Fisher*, 565 US __, 132 S. Ct. 38 (2011).
[34] *Thompson v. Runnels* No. 08-16186 (9th Cir. January 24, 2013).
[35] *Stringer v. Black,* 503 U.S. 222, 237 (1992).
[36] *Graham v. Collins* 506 US 461, 506 (1993).
[37] *Butler v. McKellar*, 494 U.S. 407, 412 (1990).
[38] *Reina–Rodriguez v. U.S.*, 655 F.3d 1182, 1188 (9th Cir., 2011).
[39] *Schriro v. Summerlin,* supra, 352.
[40] *Ibid.*
[41] *Henry v. Estelle* 993 F.2d 1423, 1427 fn. 2 (9th Cir. 1993).
[42] 28 U.S.C. 2241(c); 28 U.S.C. 2254(a).
[43] *Wilson v. Belleque*, 554 F.3d 816, 822 (9th Cir. 2009).
[44] *Picard v. Connor,* 404 U.S. 270, 275 (1971).
[45] 28 U.S.C. 2254(b)(1)(A)(B)(i) or (ii); *Duckworth v. Serrano*, 454 U.S. 1, 3, (1981).
[46] *Thompson v. Runnels* No. 08-16186 (9th Cir., January 24, 2013).
[47] *Scott v. Schriro*, 567 F.3d 573, 583 (9th Cir. 2009).
[48] 28 U.S.C. 2254(c).
[49] *Gentry v. Sinclair*, supra, 867, 880, 883.
[50] *Johnson v. Williams* No. 11-15993, U.S. Supreme Court, filed February 2013.
[51] *Martinez v. Ryan*, 566 U.S. 1 (2012); *Pinkston v. Foster*, No. 11-15993 (9th Cir. Filed January 23, 2013)(unpublished).
[52] *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).
[53] *Martinez v. Ryan*, supra.
[54] *Trevino v. Thaler,* 11-10189 (U.S. 05/28/2013)
[55] 28 U.S.C. 2254 (b)(2).
[56] *Granberry v. Greer*, 481 U.S. 129 (1987).
[57] *Strickland v. Washington*, 466 U.S. 668, 684 (1984).
[58] 28 U.S.C. 2254 (b)(3).
[59] *Rose v. Lundy,* 455 U.S. 509, 518-19 (1982).
[60] *Henderson v. Johnson*, No. 11-55249 (9th Cir. filed January 3, 2013).
[61] 28 U.S.C. 2244 (d)(1)(A)(B)(C)(D).
[62] *McQuiggin v. Perkins*, supra.
[63] *Stancle v. Clay,* 692 F.3d 948, 953 (9th Cir. 2012).
[64] *Gonzalez v. Thaler* , 565 US __, 132 S.Ct. 641 (2012).
[65] Ibid., 652-654.
[66] 28 U.S.C. § 2244(d)(1); *Ford v. Gonzalez*, 683 F.3d 1230, 1234 (9th Cir., 2012).
[67] *Carey v. Saffold,* 536 U.S. 214, 223–25 (2002); *Stancle v. Clay*, supra, 953-954.
[68] *Ibid.*
[69] *Ibid.*
[70] *Cross v. Sisto*, 676 F.3d 1172, 1176 (9th Cir. 2012).
[71] *Carey v. Saffold,* 536 U.S. 214, 222 (2002); Accord *Cross v. Sisto*, supra, 676 F.3d at p. 1176.
[72] Ibid.; *Evans v. Chavis*, 546 U.S. 189, 198, (2006).
[73] *Holland v. Florida, 1*30 S. Ct. 2549 (2010).
[74] *Stancle v. Clay*, supra, 958-959.
[75] *Wood v. Milyard*, 566 US __, 132 S. Ct. 1826 (2012).
[76] *In re Gonzales*, 623 F.3d 1242 (2010).
[77] *Ryan v. Gonzales* 133 S.Ct. 696 (2013).
[78] *Anderson v. Heinze,* 258 F.2d 479, 481 (9th Cir. 1958).
[79] 18 U.S.C. §3599.
[80] 18 U.S.C. §3006A(a)(2).
[81] 28 U.S. 2254(h); *Chaney v. Lewis,* 801 F.2d 1191, 1196 (9th Cir. 1986).
[82] 28 U.S.C. (b)(1)(2)(A)(B)(i)(ii)(3)(A)(B)(C)(D)(E)(4).
[83] *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

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Test No. 58

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. State law violations can support a federal habeas corpus petition.
   ❑ True ❑ False
2. It is important for attorneys to lay the groundwork for state based federal habeas corpus relief before conviction and sentencing.
   ❑ True ❑ False
3. Jurisdiction for state based federal habeas corpus is 28 U.S.C. 2255.
   ❑ True ❑ False
4. In federal habeas corpus proceedings, a federal court is never bound by state court factual findings.
   ❑ True ❑ False
5. Federal habeas corpus relief is available only to persons who are incarcerated.
   ❑ True ❑ False
6. A federal habeas corpus petition can be granted if the state court decision was contrary to or involved an unreasonable application of clearly established federal law.
   ❑ True ❑ False
7. A federal habeas corpus petition can be granted if the state court decision was based upon an unreasonable determination of facts in light of the evidence presented at trial.
   ❑ True ❑ False
8. The burden is on the government to show exhaustion of a claim has not occurred.
   ❑ True ❑ False
9. Failure of a habeas corpus petitioner to exhaust issues in state court does not deprive the federal court of determining the habeas corpus petition on the merits.
   ❑ True ❑ False
10. The government's waiver of the exhaustion requirement may be implied.
    ❑ True ❑ False
11. A federal court may not consider mixed petitions which contain exhausted and unexhausted claims.
    ❑ True ❑ False
12. Pursuant to *Teague*, one generally may not be granted federal habeas corpus relief if such an action would require a new law to be made.
    ❑ True ❑ False
13. A new watershed rule of procedure involving fundamental issues of fairness cannot be the basis for federal habeas corpus relief.
    ❑ True ❑ False
14. *Teague* does not apply to new rules of substantive law because there could be significant risk the petitioner was convicted of an act which is not unlawful or is punished in an unlawful manner.
    ❑ True ❑ False
15. Gap tolling never applies to time periods between successive state habeas corpus petitions, from one state court to the next highest state court.
    ❑ True ❑ False
16. Gap tolling does not apply to an interval between a lower and higher state court habeas corpus petition filing when the higher court denies the petition as untimely.
    ❑ True ❑ False
17. Failure of an attorney to meet the requisite standard of care in representing a client can never be a basis for equitable tolling of the AEDPA statute of limitations.
    ❑ True ❑ False
18. While a stay of habeas corpus proceedings due to mental incompetence is not mandatory, the district court may issue such a stay at its own discretion.
    ❑ True ❑ False
19. There is never a right to appointed counsel in a federal habeas corpus proceeding.
    ❑ True ❑ False
20. One ground upon which a federal court may consider a successive habeas corpus petition is if it is based upon a new rule of constitutional law by the Supreme Court made retroactive to cases on collateral review which was previously unavailable.
    ❑ True ❑ False

MCLE Answer Sheet No. 58

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 $_____.

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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
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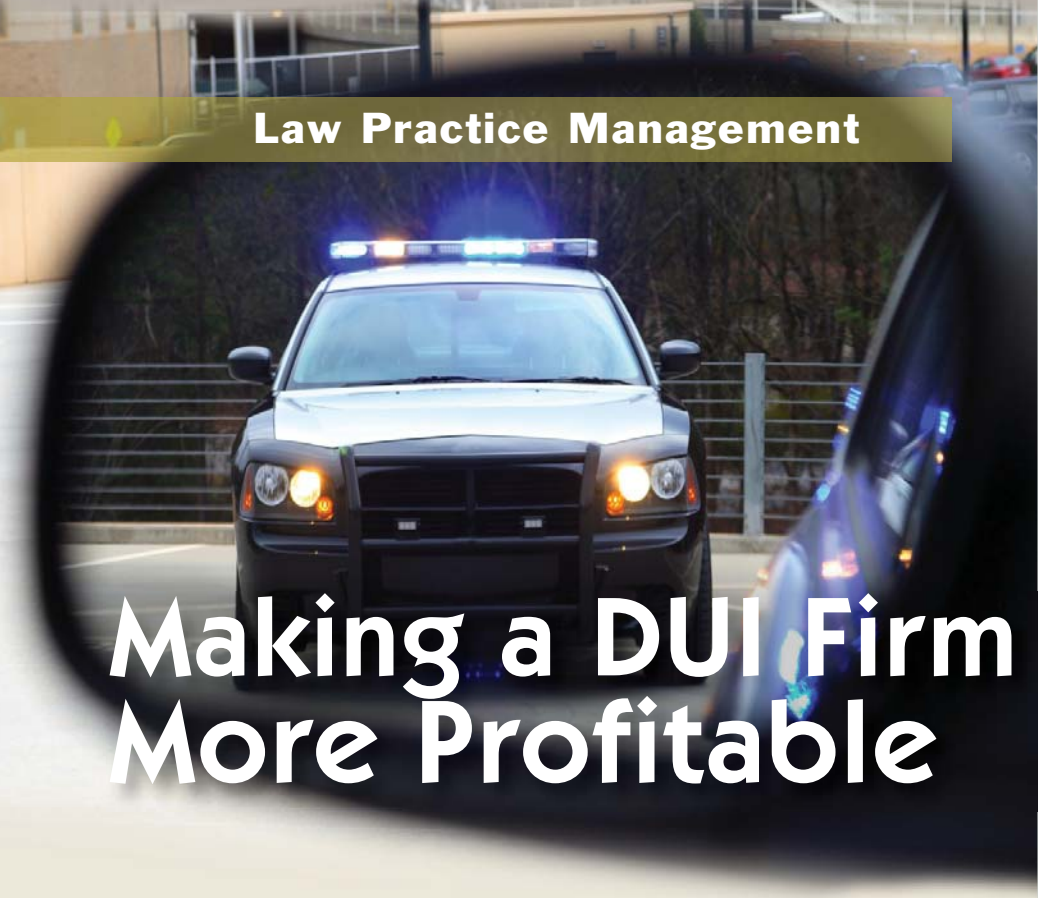
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False



Making a DUI Firm More Profitable

By Angie Rupert

ATTORNEYS WHO DEFEND DUI cases have noticed a considerable boom in competition in the last five years. DUI defense is attractive to lawyers for a variety of different reasons, including quick resolution times, substantial retainer fees and (seemingly) easy defense strategies. Of course, nothing is as easy or as profitable as it seems.

In addition to the intense competition to gain clients, DUI attorneys now face the ever-changing expectations of their new clientele. In the "old days" (2006 or so), potential clients who found attorneys online had few expectations. When they received a call from the online attorneys they had emailed, they were somewhat surprised that their information traveled through the internet so quickly and that a lawyer actually called them.

Today, these same potential clients expect to find their attorney online; expect several attorneys to call within minutes of being emailed; and expect to be able to negotiate pricing. They are more educated consumers and have no qualms about gathering as much free legal advice as possible without signing a retainer agreement. Clients nowadays are seemingly more interested in the cost rather than the quality of their legal representation.

While the competitive landscape and the expectations of clients have made profitability tougher for DUI firms, there are still many firms experiencing some of the most profitable years now. How is this possible? Creating a profitable DUI defense firm is hard work and takes some effort, but it is attainable. This article outlines a few suggestions lawyers may follow to create a profitable DUI firm in the face of obstacles.

Pricing

Setting the pricing for your firm is possibly the most important thing a lawyer can do to turn a DUI firm into a *profitable* DUI firm. Although it sounds simple, it can be difficult. Attorneys must accept that some potential clients won't be able to afford their services while some may not want to pay their rates and will seek a cheaper lawyer instead. This is part of the profitable firm's business model.

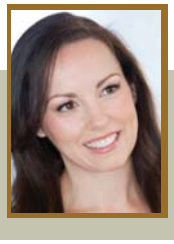
Setting prices should be based on experience, target clients, location, current pricing, competitors' pricing and overhead. In order to set pricing appropriately, lawyers should carefully think about each of these factors.

Experience

What is the experience level of the lawyers within the firm? If an attorney has practiced within the DUI area (either defense or prosecution) for more than ten years, he or she should consider themselves highly experienced. The attorney can command higher pricing based on the experience level and should feel confident that their experience is worth a higher price tag. For less experienced attorneys, pricing should be set accordingly; however, never underestimate the value of even a couple of years of experience. Pricing should reflect what the attorney knows is the value of their experience level.

Target Clients

Each law firm should have a set of target clients. This target may include clients within a certain geographical area, socio-economic status, age, legal issue or any other number of factors. When determining pricing, a lawyer should seriously consider all of the elements of the target client and set prices accordingly.



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Location
Geography is probably one of the most important factors in the pricing algorithm. Location within the Los Angeles area will certainly be different than pricing for a very similar firm in the Riverside area. The most profitable firms will set pricing to conform to the expectations of the geographic area of the firm.

Current Pricing
Every lawyer should look at the current pricing and profitability before changing pricing. That is not to say the pricing will always increase. In some instances, it may be wise to decrease the price. Whatever the current pricing of the firm, the lawyer should consider whether it would be more profitable to implement an increase in pricing (at the risk of losing potential clients) or a decrease in pricing (with the potential gain of clients who were unable or unwilling to pay higher prices).

Competitors' Pricing
Lawyers must be mindful of the intense competition in the marketplace. If a law firm wants to stay competitive, the price of services should be at least loosely based on the nearest competitors' pricing. A firm is not confined to offering services at the exact same pricing as, or lower pricing than, a competitor. However, the closest competing firm's pricing is a good place to begin when determining pricing.

Overhead
Each firm has overhead costs which ought to be reflected in the pricing of services. Whether the firm simply has a phone line and an internet connection or multiple offices with several attorneys, overhead must be covered in order to be profitable. It is important for each firm to accurately determine the overhead each month in order to accurately set pricing. Regardless of the amount of overhead, it is worth a review to determine if any of those costs can be trimmed in order to increase profitability.

Flexibility
Firms should be flexible with clients, both in the "courtroom-side manner" and with the handling of client payments. This type of flexibility makes clients feel good about the relationship and the process, which results in more signed retainers and higher profitability. Understand that each client needs a different level of attention: some need intense details about DUI defense and the facts of the case and some would rather have simply a big picture idea of what they are facing. The sooner a lawyer can hone in on the level of attention the potential client needs, the better chance the potential client will become a retained client.

Likewise, when accepting payment from a client, options not only make the client feel better about the relationship with the firm but also make the client feel better about paying the legal fees. This results in a positive start to the attorney-client relationship and a quickly-signed retainer agreement. To that end, all firms should accept cash, checks and credit cards at a minimum.

If the firm does not accept credit cards, the firm will leave clients on the table. Setting up a merchant account is very simple and should be a priority in all DUI firms. Beyond the usual payment options, highly-profitable firms use creativity to come up with even more payment choices that could allow more clients to pay the retainer fee, possibly setting the firm apart from the competition. Working with a legal financing company, accepting wire transfers and taking credit card payments over the phone are just a few examples of how lawyers can help clients pay quickly. Creativity aside, lawyers should avoid getting trapped in the "endless payment plan" option at all costs.

Organization
Staying organized when attempting to retain clients and when handling accounting and operations is crucial and may, in fact, be the easiest way to increase profitability. When a potential client calls and is interested in hiring the firm but does not sign a retainer because he needs to check with the wife, talk to a few more attorneys or other such excuses, it's crucial to stay organized and follow up with that client. Lawyers should contact the client soon after the initial consultation to show concern and interest and ultimately to retain the client.

Organization is vital to this process, as a lawyer must know when the initial conversation took place, what concerns the potential client had and when to follow up again. In addition, organization within the firm, particularly within accounting, will help with efficiency and trimming costs. Every law firm should have an accounting department that stays on top of payments (both accounts payable and accounts receivable) to avoid late or missing payments.

Finally, organization within the case itself is imperative to trim additional overhead and streamline the defense process. Each case should have a capped number of attorney hours in order to be as streamlined as possible. Of course, a lawyer will want to aggressively defend each client, but it is crucial not to waste time or resources on parts of the case that will have very little or no effect on the defense.

Ease of the Deal
Some law firms unwittingly construct hurdles that prevent potential clients from becoming paying clients. This is, unfortunately, fairly easy to do, and lawyers must be mindful to avoid this practice in order to increase the number of clients and profitability.

The most common way lawyers create obstacles is through the intake process. Many times, law firms will set up more than one meeting with a client before a retainer has been signed, which is often frustrating to a client. In addition, multiple meetings create multiple chances for the potential client to skip the meeting, which wastes the attorney's time and gives the potential client plenty of opportunity to continue shopping for a different attorney. The result, many times, is a lost client.

Keeping the shortest distance between a potential client and a signed retainer agreement is imperative when attempting to increase profitability.

With these tips, DUI firms will find it easier to meet their ultimate goals of defending clients as aggressively as possible while increasing profitability.

The Law Governing Condominiums Has Been Rewritten

By J. Anthony Marino and Carol L. Newman

THE CALIFORNIA LAW WHICH for many years has governed the management and operation of common interest developments (CIDs), including condominiums, known as the Davis-Stirling Common Interest Development Act (the Act) (Civil Code §1350 et seq.) is being repealed in its entirety effective January 1, 2014. It will be replaced by a new statutory scheme, AB 805 (the new Act), which will probably continue to be referred to as Davis-Stirling. All of the existing code numbers will be changed to commence with Civil Code §4000.

A CID is a housing or commercial development characterized by separate ownership of dwelling space or a right of exclusive occupancy, together with an undivided interest in a common area; covenants, conditions and restrictions (CC&Rs) that limit use of both the common area and the separate ownership interests; and management of the common area and enforcement of the CC&Rs by an owner's association. CIDs include condominiums, community apartment projects, stock cooperatives and planned unit developments. (See current Civil Code §1351.)[1]

The new law is mostly a rewritten, recodified and reorganized version of the Act as it currently exists. However, some provisions have been substantively revised. The Legislative Counsel's Digest regarding the passage of AB 805 summarizes the changes as follows:

> "This bill would…. revise and recast provisions regarding notices and their delivery, standardize terminology, establish guidelines on the relative authority of governing documents, and establish a single procedure for amendment of a common interest declaration. The bill would guarantee the right of an owner of a separate interest to make changes in that separate interest, as specified, in a common interest development other than a condominium project… The bill would establish an express list of conflicts of interest that may disqualify members of a board of directors of an association that manages a common interest development from voting on certain matters. The bill would also, among other things, revise provisions related to elections and voting, establish standards for the retention of records, and broaden the requirement that liens recorded by the association in error be released."

Reorganization and Restatement of the Law

The new Act attempts to comprehensively reorganize the old Act. One of the criticisms of the old Act was that it seemed to be, at least in part, a somewhat disjointed series of statutes which were not well organized unless one knew where to look for a particular statute governing a particular topic. The new law is designed to be easier to navigate, more logical in its groupings of provisions, more concise and simply more user-friendly and easier to understand.

Additionally, the terminology used in the old Act was not consistent or comprehensive because in many cases two or more different terms were used to describe the same thing, and definition sections did not necessarily apply to all uses of the defined terms in the Act or include definitions of terms located elsewhere in the Act. The new law standardizes some terminology to attempt to eliminate ambiguity and inconsistency.

These changes were deemed necessary because most CIDs are small and may not be able to afford a general counsel or overall professional management. In fact, more than half of all CIDs in California consist

of 25 or fewer separate interests.[2] The new law was designed, at least conceptually, to be understandable by non-attorney board members of smaller CIDs. Whether this goal has been accomplished remains to be seen.

The new law adds a new Part 5 to Division 4 of the Civil Code, beginning with Section 4000, and restates the law in eleven chapters designed to group provisions by subject matter in a coherent and logical order: General Provisions, Application of Act, Governing Documents, Ownership and Transfer of Interests, Property Use and Maintenance, Association Governance, Finances, Assessments and Assessment Collection, Insurance and Liability, Dispute Resolution and Enforcement, and Construction Defect Litigation.

The new law is structurally more logical. It begins with provisions governing the application of the new law itself. Then it addresses the creation of CIDs and the nature of what a CID is (a form of property ownership). It concludes with provisions governing the operation of the CID association as among the property owners themselves and between the CID and third parties.

The new law will be given a one-year deferred operation date to allow affected persons to adjust to the new law and will provide that any substantive changes will not retroactively invalidate actions and documents which were completed before the effective date of the new law which were proper under the current law.[3] The new law provides a simplified procedure for updating references in the governing documents to the new Act by board resolution.[4]

For the most part, the changes were intended to be non-substantive and non-controversial, but proposed substantive changes which were not adopted in this enactment were noted by the California Law Revision Commission for future study.[5]

Substantive Improvements

Supremacy of the Act. A frequently encountered issue not resolved in the current Act is whether the governing documents, to the extent they are inconsistent with the Act, supersede the Act, or vice versa. The new Act makes it clear, for the first time, that in the event of inconsistency, the Act prevails over the governing documents.[6]

Relative Priority of the Governing Documents. Similarly, the revised Act for the first time expressly declares the relative priority/authority of the most common governing documents in the event of inconsistencies among them. New §4205(b)-(d) provides that that the CC&Rs supersede the articles of incorporation; the articles and CC&Rs control the bylaws; and all of the above control the operating rules.

Members Must Receive Text of Proposed Amendment. The new Act adds a new requirement that an association must provide members with the text of any proposed amendment of the governing documents when holding a member election to approve the proposed amendment.[7] The Act previously did not require written notice of the text of a proposed amendment.

Contents of CC&Rs. Existing law specifies what information must be included in a CID's recorded declaration, i.e., the CC&Rs, and allows the "original signator of the declaration" to include any other information that the "original signator" deems appropriate.[8] The new Act replaces the phrase "original signator" with the defined term "declarant," which permits a successor-in-interest to the original signator to add provisions to the CC&Rs, using proper procedures for amending the CC&Rs.[9]

Amendment of the CC&Rs. Existing law is not consistent with regard to the procedures for amending the CC&Rs, depending on the purpose of the amendment.[10] The new Act establishes a single exclusive procedure for amendment of the CC&Rs.[11] That procedure also expressly recognizes that some CC&Rs may require that a person other than a member (owner) approve an amendment and makes clear that a governing document lower in priority than the CC&Rs cannot govern the procedure for amendment of the CC&Rs.

Court-Authorized Amendment of CC&Rs. Under the existing law, the Superior Court may approve an amendment to the CC&Rs, even if the required

member approval was not obtained.[12] Before making such a decision, the court must find, among other things, that an election which complied with the governing documents was held to approve the amendment. The revised Act also requires the court to find that the election was conducted in accordance with the election provisions of the Act and any other applicable law.[13]

Amendment or Revocation of Condominium Plan. Existing law specifies that a condominium plan may be amended or revoked by recording an instrument executed by all of the persons whose signatures were required to establish the plan.[14] It is unclear whether an amendment or revocation of the condominium plan must be signed by the original signators, or whether their successors-in-interest may sign. The new Act clarifies that the amendment or revocation must be signed by those persons who are current holders of the specified interests.[15]

Reversals of Operating Rule Changes. Current law allows members of an association to vote on whether to reverse a recent change to an operating rule pursuant to election procedures set forth in the Corporations Code.[16] The new Act instead cites to equivalent provisions of the new Act.[17]

Right of Access to Separate Interest. The new Act clarifies that both owners and occupants (e.g., renters) are entitled to physical access to the owner's separate interest.[18]

Property Use. The new Act provides property owners with a more complete summary of their property use rights.[19]

Modification of Separate Interest. The new Act broadens the owner's right to make changes to his/her separate interest in any type of CID, not just a condominium project.[20]

Grant of Exclusive Use of Common Area. The existing provisions are broadened to include, among other things, accommodating a disability.[21]

Board Meetings. All associations will be required to provide advance notice of a board meeting, including an agenda, regardless of whether the time and place of the meetings is fixed in the governing documents.[22] Further, the requirement that notices of a board meeting be "posted" in a prominent place in the common area will be deleted, in favor of "general delivery" of board meeting notices, pursuant to New §§4045, 4920. Lastly, a board meeting is no longer defined as a gathering of the majority of directors, but instead as the number of directors sufficient to constitute a quorum.[23]

Disqualification of Interested Directors. Existing law provides that a director is subject to the rules governing self-interested contracting in for-profit corporations.[24] The new law replaces the reference to for-profit corporations with a reference to the equivalent provisions of non-profit corporation law, and expressly prohibits a self-interested director from voting on specified types of matters.[25]

Elections. Under current law, the elections procedure applies only to certain types of elections. The new law allows an association to use the statutory procedure for any type of member election, so long as a decision to use the statutory procedure in other types of elections is authorized in an operating rule.[26] The new law also requires that "general notice" of election results be provided to all members, replacing the existing, more ambiguous requirement that the results be "publicized."[27] While the current law appears to allow the destruction of ballots nine months after an election (which is three months before the end of the period in which an election can be challenged),[28] the new Act requires that the ballots be retained for the full twelve-month period in which elections can be challenged.[29] The final change regarding elections allows an exception to the current restriction of the use of association funds for campaign communications (anything that features the name or photograph of a candidate) in connection with a pending board election.[30] The exception is for communications required by law.[31]

Records and Notices. Under existing law, members may inspect and copy "association records," as defined in Civil Code §1365.2. The new law broadens the scope of association records to include the governing documents, and to include those records already defined as "enhanced association records."[32] The new law also reorganizes the information which an association must distribute to its members on an annual basis into three annual reports, based on subject matter: an annual budget report including the budget and related financial disclosures, an annual financial statement review, if required, and an annual policy statement, including all other annual informational disclosures that an association must make.[33] The new Act preserves the option for an association to send members a summary and notice of the availability at no cost of the full budget, as opposed to the budget itself, and extends that option to the annual policy statement.[34] All annual reporting requirements will now be located in

one place in the Code, and greater flexibility as to how they are distributed will be permitted.

Commercial and Industrial CIDs. The new law continues the existing exemptions for commercial and industrial CIDs from certain provisions of the Act (see Civil Code §1373).[35]

Assessments. Under existing law, an association may not increase regular assessments unless it has either distributed a pro forma budget in compliance with Civil Code §1365(a) or obtained the approval of the members in a member election. In addition, the association must obtain the approval of the members before increasing regular assessments by more than 20% or imposing a special assessment that is more than 5% of the association's budgeted gross expenses for the fiscal year. The proposed law continues these provisions (New §§5600-5740) with a minor change to remove the superseded reference to the Corporations Code election procedure.

Existing law also provides that a member's payment for assessments should be applied first to the assessments owed, before being applied to any collection costs, interest or penalties. The Commission concluded that, under the existing provision, it is not entirely clear whether the payment priority rule is conditioned on the association having provided the member with a written notice of delinquency.[36] New §5655 makes clear that the payment priority rule applies in all cases, regardless of whether or when the member has received a notice of delinquency.

Under existing law, if it is discovered through ADR that the association had recorded an assessment lien in error, the association is required to release the lien and reverse all costs, fees and interest associated with the error. New §5685 would continue the rule, but expand its application so that it applies whenever the association has recorded an assessment lien in error, without regard for how the error is discovered.

Enforcement. If an association policy authorizes the imposition of a monetary penalty for a violation of the governing documents, §1369(g) requires that the association adopt a schedule of monetary penalties and deliver it to the members. If the penalty schedule is later amended, the amended penalty schedule must be delivered to the members. New §5310(a)(8) requires that the schedule be included in the policy statement that is delivered to the members annually. New §5850 also makes clear that penalties may apply to guest or tenant activities, that the penalty imposed for a violation of the governing documents is limited to the penalty in effect at the time of the violation, and that new or revised penalty schedules may be delivered by a supplement.

Before disciplining a member for a violation of the governing documents, the association must provide the member with notice of the alleged violation and an opportunity to be heard by the board.[37] New §5855 broadens that notice and hearing requirement to also apply when an association attempts to impose a monetary charge as a means of reimbursing the association for costs incurred by the association in the repair of damage to common area and facilities caused by a member or the member's guest or tenant.

Alternative Dispute Resolution. §1369.510 et seq. requires that ADR be offered before a civil action is filed by or against an association to enforce a provision of the governing documents, the Davis-Stirling Common Interest Development Act or a provision of the Corporations Code. The non-filing party is not required to accept the offer. However, in an action in which fees and costs may be awarded, the court may consider whether the refusal of ADR was reasonable when determining the amount of the award. Under existing law, that rule only applies in an action to enforce the association's governing documents. New §5960 would broaden the rule to apply in any action in which fees and costs may be awarded.

In summary, numerous changes to the existing law governing common interest developments, some major and some minor, have been made. All CID's and their property managers and attorneys need to be made aware of the new law so that they continue to operate within its requirements.

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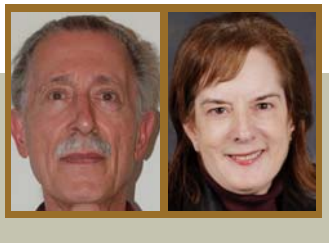
[1] The California Law Revision Commission is poised to recommend that the law governing commercial and industrial CID's be separated from the law governing residential CID's. See California Law Revision Commission Pre-Print Recommendation #H-856, Aug. 2012.
[2] Levy & Erlanger, *2010 California Community Association Statistics* (2010).
[3] New Civil Code §4010 (hereafter all sections of the new statute are referred to as "New §").
[4] New §4235.
[5] See Endnote 1.
[6] New §4205(a).
[7] New §5115(e).
[8] Civil Code §1353.
[9] New §§4130 and 4250(b).
[10] Civil Code §§1355(a), 1357.
[11] New §4270.
[12] Civil Code §1356.
[13] New §4275(c)(2).
[14] Civil Code §1351(c).
[15] New §4295.
[16] Civil Code §1357.140.
[17] New §4365.
[18] New §4510.
[19] New §4730.
[20] New §4760.
[21] New §4600.
[22] New §4920.
[23] New §4090.
[24] Civil Code §1365.6.
[25] New §§5350(a), (b).
[26] New §5100(b).
[27] New §§4045, 5120(b); compare Civil Code §1363.03(g).
[28] Civil Code §§1363.03(h), 1363.09.
[29] New §5125.
[30] Civil Code §1363.04.
[31] New §5135(b)(2).
[32] New §§5200(a)(11), 5200(a)(13).
[33] New §§5300, 5305, 5310; see Civil Code §§1365(a), (c), (d), (e), 1365.1, 1365.2.5, 1363.850, 1369.490, 1378.
[34] New §§5310(b), 5320.
[35] See Endnote 1 above.
[36] *Statutory Clarification and Simplification of CID Law*, 40 Cal. L. Revision Comm'n Reports 235 (2010) p. 262.
[37] See §1363(h).



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Workers' Compensation: Representing Medical Providers Post-SB 863

By Reid L. Steinfeld

SB 863 BECAME LAW ON January 1, 2013, marking the most comprehensive overhaul of California's workers' compensation laws in decades. One of the purposes of SB 863 was to take medical necessity and reasonable reimbursement away from the Workers' Compensation Appeals Board (WCAB) and allow those areas to be determined by experts.

SB 863 was originally introduced in the California Senate in February 2011 but was later dropped when it failed to garner strong support. There were public rumblings in the summer of 2012 that SB 863 was coming back in a different form but at that time it was deemed "dead on arrival" with what was perceived as little chance of passage. It was eventually reintroduced as an amendment in August 2012, weeks before the legislative session was to close. Most in the hospital industry and medical provider community did not expect much from its reintroduction but SB 863 sailed through the legislature.

The following is an overview of the new areas created by SB 863.

Independent Bill Review

Independent Bill Review (IBR) is an efficient, non-judicial process for resolving medical billing disputes that arise when a medical provider disagrees with the amount paid by an insurance claims administrator. The process is also available for resolving disputes over a properly documented bill following a second review. IBR is limited to determining reasonable reimbursement and/or fee schedule issues.

Once billed, the payor and/or insurance company has 45 calendar days to respond by payment, denial or adjustment. Under the previous law, the payor had 45 business days to make the payment. A medical provider who believes a payment is incorrect is able to request a second review within 90 days of payment (i.e., Explanation of Review (EOR) or Explanation of Benefits (EOB)). Failure to seek a second review will result in no additional monies due from the payor.

The second review is not a "re-bill" or rubber stamp type of appeal. Providers must diligently prepare the appropriate paperwork and submit supporting documents explaining why there is an entitlement to additional money. A provider may also seek a second review for specific line items as opposed to the entire bill. However, by doing so, the provider waives any rights to contest the rest of the bill.

If the provider believes there exists a legal issue (including, but not limited to, claims upon which the employer denies liability, alleging the injury did not occur in the course and scope of employment), the provider may seek relief before the WCAB through what is known as a "deferred issue."

Other circumstances in which relief before the WCAB may be sought may include cases in which a fee schedule does not exist; when there are no comparable billing codes

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for the services; or when the provider asserts that the PPO discount does not apply. In these situations, it may be possible to seek a judicial determination before the WCAB; however, in order to preserve its rights, it is recommended that the provider go through the second review process first.

If a medical provider elects to go before the Board, a lien must be filed and the fee of $150 must be paid. Depending upon the circumstances, the 90 day deadline for seeking a second review is stayed pending the outcome of the judicial determination of the deferred issue by the WCAB. Timing is everything and communication is crucial. The provider may win the battle before the WCAB but lose the war.

Once a judicial determination of a deferred issue is made, the provider must act within 90 days after the judicial determination to attain a second review through IBR or the insurance company will not have to pay the provider. Of course, one would think that with a court order the insurance company would automatically pay. However, your client would not want to be that test case under SB 863.

What if the provider seeks a second review and still the provider is not satisfied? If there is a legal and/or deferred issue, the provider may seek court intervention. However, timing once again changes at this point because once the court has made a judicial determination as to the issue, the provider only has 30 days to seek a decision through the Independent Bill Review Organization (IBRO) currently being monitored through Maximus Federal Services. In order to go through the IBRO, the provider must pay $335 and file the appropriate Department of Worker's Compensation (DWC) form and may not add material not previously submitted at the second review stage. If the provider is successful in the IBRO, the provider will receive an award that will include the reimbursement of the $335.

To summarize, when it comes to an issue related to fee schedules and/or reasonableness of charges, the provider must submit a bill to the insurance company and the insurance company has 45 calendar days to respond. After the response, if the provider is unsatisfied, he or she has 90 days to seek a second review, to which the insurance company has 14 days to file a response.

If still unsatisfied, the provider then has 30 days to seek a review before the IBRO, for which the provider must pay $335.The IBRO has 60 days to act. If the IBRO's decision is unsatisfactory to the provider, he or she may seek a review before the Administrative Director. In this review, the provider must demonstrate that there was some fraudulent conduct that occurred during the IBRO process, such as a conflict-of-interest by the bill reviewer. A successful review would result in the matter being sent back to the IBRO for review by another bill review expert.

Liens

For dates of service prior to January 1, 2013, a provider has three years from the date of service to file a lien. But on July 1, 2013, the statute changes to 18 months to file a lien for services dated after July 1, 2013. With this change, claims that are more than three years old for which liens have not been filed are dead files. For services performed within the last three years but for which no liens have been filed, the provider must act to preserve its rights. Although SB 863 is not retroactive, this is one area that one could argue has retroactive applicability.

Another major change brought on by SB 863 is the addition of lien filing fees and lien activation fees. All liens filed prior to January 1, 2013 were subject to a lien activation fee of $100. Failure to pay the fee prior to appearing before the WCAB for a lien conference would result in the lien being dismissed with prejudice.

A lien filed prior to January 1, 2013 that is not activated prior to January 1, 2014 will be dismissed by the court by "operation of law," which represents a significant change in the law. In the past, a lien claimant could not proceed with their claim until the case-in-chief was resolved and any attempt to do so would result in sanctions. Now it will not matter. If a lien was filed prior to January 1, 2013, the lien claimant must pay the $100 activation fee prior to January 1, 2014 or the lien is thrown out, irrespective of the status of the case.

All new liens filed after January 1, 2013 will be subject to a $150 lien filing fee. This includes all liens going back three years prior to January 1, 2013. However, under the lien activation statute, labor code §4903.07, a provider may have the opportunity to be reimbursed his or her fee. There are specific procedures to be followed, with the main requirement being that a provider must send a written demand for settlement of a clearly stated sum which shall be inclusive of all claims of debt, interest, penalty or other claims no less than 30 days prior to filing the lien and or Declaration of Readiness to Proceed.

If the defendant fails to accept the settlement demand in writing within 20 days of receipt of the demand and if the awarded amount is the same or exceeds the amount of the demand, the provider will then have a right to request the return of the filing fee.

One of SB 863's goals is to do away with liens and specifically zombie liens, which were first addressed in 2012 by California Code of Regulations §10770–10770.1. Zombie liens are claims

resulting from medical treatment from several years ago. They are claims that come back to life after what insurance companies believed were resolved matters. Under the previous set of laws, the statute of limitations for claims to be brought was five years from the date of injury, one year from the date of service, or six months from the date of resolution of the underlying claim.

When a medical provider was not given notice of resolution of a claim, case law held that there was a tolling of the statute of limitations allowing the provider to pursue the claim. Often, the providers with older liens simply sold them for pennies on the dollar and therefore the true party or real party in interest was not before the WCAB, creating a problem with the court and filling the court with old files.

It is important to note that a medical provider lien claimant can no longer present a prima facie case merely by demonstrating that the treatment giving rise to the lien claim was for an alleged industrial injury. The present rule of law is that lien claimants have the burden of proof on their lien claims, including the burden to demonstrate every element necessary for recovery unless that element was previously adjudicated or admitted by the employer (several cases so now hold). WCAB is taking lien trials more seriously. The medical provider must be prepared when going to court.

Independent Medical Review

Independent Medical Review (IMR) is a quick, non-judicial method of resolving disputes about the medical treatment of injured employees. If a request by a treating physician for specific course of medical treatment is delayed, denied or modified by an insurance claims administrator for the reason that the treatment is not considered medically necessary, the injured employee can ask for a review of that decision by a physician-conducted IMR.

Hospitals performing authorized or emergency treatment generally do not require an IMR. The IMR process relates to medical necessity and is triggered by the patient and the insurance company.

Before the IMR stage, there is the authorization stage. Under the law, a utilization review decision to modify, delay or deny a request for authorization of medical treatment shall remain effective for twelve months from the date of the decision. No further action by the claims administrator is required with regard to any further recommendation by the same physician for the same treatment unless such recommendation is supported by a documented change in the facts material to the basis of the utilization review decision.

The IMR process starts with a request for authorization by filing a DWC-RFA (Request for Authorization) form. After July 1, 2013, regardless of the date of injury, all requests for treatment will be made by RFA form. If utilization review is being deferred because of contested liability issues, the provider has to request a retrospective review of the treatment performed.

If the claims adjuster does not defer utilization review but rather sends it through utilization review and the treatment is found reasonable and necessary, the provider may perform the services. If the insurance company, through the utilization review process, denies, modifies or delays the request for authorization, then the injured employee or his or her attorney has 30 days to submit their request through the IMR process with the fees to be paid by the adjuster/insurance company. After a decision is issued, the provider has 20 days to appeal the decision before the WCAB.

With SB 863, the state legislature has divided the worker's compensation claims process into three parts: issues of causation/legal issues to be heard before the WCAB; reasonable reimbursement through the IBR process; and determination of medical necessity through the IMR process.

This article is not an exhaustive review but rather an overview of the major changes in worker's compensation law. The California Labor Code and the California Code of Regulations should be carefully reviewed to further understand the process. Attorneys representing medical providers must remember that timing is the key to surviving the SB 863 maze.

Law Day Gala

Saturday, June 1, 2013

The Valley Community Legal Foundation (VCLF) celebrated its annual Law Day Gala on June 1, 2013 at the Autry National Center; 250 guests dressed in their finest Western attire came together to raise funds to support the VCLF's grant and scholarship programs. Guests participated in a 50/50 raffle and in live and silent auctions. In addition to fundraising, the VCLF gathered to recognize and honor the achievements of Sandi Gibbons, Los Angeles County District Attorney Jackie Lacey and Honorable Aviva K. Bobb (Ret.). The Gala was a great success and guests had a lot fun dancing to the tunes of the Hollywood Hillbillies. The VCLF is happy to be "Back in the Saddle Again" and looks forward to continuing its charitable mission of supporting law-related programs that assist children and victims of domestic violence; enhancing community access to the courts; supporting students interested in law-related careers; and honoring the achievements of law enforcement and firefighters.

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