# VALLEY LAWYER

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A Publication of the San Fernando Valley Bar Association


## Litigating Transportation and Warehouse Claims

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## Applying the Cat's Paw Liability to Discrimination Cases

## SFVBA Board of Trustees Election in Review

## Effective Written Advocacy Before Generalist Judges


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# Contents

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**SAN FERNANDO VALLEY BAR ASSOCIATION**

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## FEATURES



## DEPARTMENTS



# Emergency Travel Guide for Active SFVBA Members

**SEYMOUR I. AMSTER**
SFVBA President

LOS ANGELES EXISTS AS A LARGE AND VAST city with a complex freeway system. At times, navigating the freeway system is simple and direct. Other times, usually most of the times, the navigation becomes an exercise in futility and frustration, requiring the critical decision to continue on the route normally taken and endure the hardships of bumper to bumper traffic, or seek out an alternative route.

In this day of readily accessible electronic media, maps of alternate routes are often available while traveling or attempting to travel the congested routes of Los Angeles. But which alternate route does one utilize; will it be better or worse? The answers to these questions are not available on the electronic media devices. Although there are numerous travel books available in print and on the internet, none of them address these subjects. Instead they deal with more exotic topics, such as the most scenic route, or the best restaurants, but not the hands-on necessary information of the best routes to utilize when the freeway system has become the most expensive parking lot in the world.

Therefore, as a public service to the members of the SFVBA, as a lifelong resident of the City of Los Angeles, as one who has had to maneuver the quagmire they call a freeway system since becoming 16 years of age, I shall endeavor to give suggestions of some routes one might consider when faced with the enormous task of arriving on time to the intended destination without breaking the law. The location of the office of the San Fernando Valley Bar Association, the Mecca of legal activity in the Valley (LOL), shall be utilized at times in this article as the focal point.

***Situation #1:*** It is 4:15 p.m. on a Tuesday afternoon; you have just completed an exhaustive ex parte hearing at the Stanley Musk Courthouse. You need to be at the bar office by 6:00 p.m. for the all important Board of Trustees meeting. The direct route of course is to take a freeway that connects to the Ventura Freeway. But this is at the heart of traffic time. If you arrive, by chance on time, you will be stressed out, and will not be able to focus on the pearls of wisdom annunciated by your fellow board members.

So what do you do? You utilize the Dodger Stadium/118 traffic saving maneuver. (Do not use this when a Dodger Game is scheduled to start.) You walk across the street to where your car is parked. You proceed north on Hill Street to College Street, turn left onto College Street, turn right onto Chavez Ravine Place, turn left onto Stadium Way, turn right onto Academy Road, make the first left onto Stadium Way, turn left onto Riverside Drive, turn right on Newell Street, and turn left to merge onto the Glendale Freeway (2) going east (actually northeast).

Proceed to the 210 Freeway, take the 210 Freeway west to the 118 Freeway, and take the 118 Freeway to the De Soto off ramp. Get off at De Soto, make a left (south) on De Soto Avenue. Proceed on De Soto Avenue to Nordhoff Street. Then make a right on Nordhoff Street, and then make a left onto Canoga Avenue. Take Canoga Avenue to Califa Street. Make a left onto Califa Street. Make a right into the parking lot, park your car, walk into the bar office, chat with the other board members, because you have arrived early.

***Situation #2:*** It is 4:30 in the afternoon, you have just completed an important committee meeting chaired by the President of the Bar. He has no life, so he was rather long winded, bored everyone, and kept the meeting going longer then it should have. You need to be in Glendale by 6:00 p.m. for your anniversary dinner with your wife at her favorite restaurant. What do you do? First thing is you wait until the President is distracted and get out of the building before he corners you with some meaningless conversation on some issue with the high schools.

You utilize a variation of Situation #1. You get in your car, turn on the all important traffic report, confirm your route is clear, and then proceed to Canoga Avenue, and turn right so you are traveling north on Canoga Avenue. At Nordhoff Street you turn right, then at De Soto Street you turn left. You proceed to the 118 Freeway on ramp, taking it east towards the 210 Freeway. You then proceed to the Glendale Freeway (2) and take it south, getting off at the off ramp that is most convenient

for your wife's favorite restaurant. Since you have plenty of time, you utilize your electronic media device to find the nearest flower shop; you proceed there, buy flowers, and arrive on time ready for a romantic evening.

***Situation #3:*** You need to be in court in downtown Los Angeles by 9:00 a.m. You were a little delayed in the morning, because your fifteen-year-old daughter who you have to drop off at school took a little extra time getting ready, due to some text message she got from a friend of a friend of a friend, who said one of the hottest guys at school happened to mention her name at a party a week ago. You are in the northern San Fernando Valley; your normal route is the 118 Freeway. But that intersection from the 118 Freeway to the 5 Freeway can be slower than some clients deciding to pay an attorney fee bill.

So what do you? You get yourself to Chatsworth Street, you proceed east on Chatsworth Street, you go under the 5 Freeway, you then turn left onto Laurel Canyon Boulevard, then left onto San Fernando Mission Boulevaed, then right onto the 5 Freeway towards downtown. You then get off at Riverside Drive. You make a left onto Riverside Drive, when it intersects with Stadium Way you bear to your right and merge onto Stadium Way, you then take Stadium Way, you make a right onto Academy Road, left onto Stadium Way, right onto Chavez Ravine Place, left onto College Street, right onto Hill Street, and proceed to your favorite parking lot.

You then park your car, get out of the car, and hope that your daughter does not get another text tomorrow morning, or you will have to come up with a good excuse for your wife to drop her off in the morning.

***Situation #4:*** You're in trial in Alhambra, you had to listen to a rather long winded closing argument by opposing counsel. By the time you get to your car it is 5:00 p.m. So what do you do?

The 10 Freeway is a nightmare. You do not want to go west towards Fremont Street because that is a zoo. So you get in your car, you take a left out of the parking lot to Commonwealth Avenue. You then take a left onto Garfield Avenue; you then proceed north to Mission Street. You make a right onto Mission Street. You then make a left onto Los Robles Avenue. You then take Los Robles north into Pasadena. You either stop for dinner once you are in Pasadena, because in my opinion the best restaurants in this town are in Pasadena, or you proceed on Los Robles to the signs that direct you to the on ramp for the 210 Freeway, allowing you to get on the 210 Freeway taking the now familiar route to the 118 Freeway.

I hope these ideas are helpful to you. Some ideas I strongly do not recommend, picking up a hitchhiker so you can travel in the car pool lane. Bad idea ... could be a former client of mine. Utilizing Laurel Canyon or Coldwater Canyon to get over the hill from the Valley in the morning, it is really tough traffic. Using Hayvenhurst from Encino to Mulholland Drive in the morning used to be great, but too many people know this shortcut now.

But always remember to keep your cell phone with you properly connected to your car with your blue tooth device. Because if you find yourself in a traffic predicament you can always use the time to call clients, family or friends. Or do what the President of the Bar does; call people who are busy so he can chat with them about meaningless topics further proving he has no life!

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

# From the Executive Director

*Deep summer is when laziness finds respectability.*
~Sam Keen

**ELIZABETH POST**
Executive Director

SUMMER IS OFTEN THE TIME FOR MANY FAMILIES, and some businesses, to relax and recharge for a busier time of the year.

As mom to my 5-year-old daughter Hannah, who is about to graduate from kindergarten, I now know firsthand how exhausting the school year is for children and parents, and will appreciate the summer break even more. In spite of the country's budget crisis and economic difficulties, Congress and most state and local legislators still have summer recesses to take advantage of free junkets or to connect with their constituents. Best of all, traffic tends to be little lighter without school buses on the road and families out of town on their vacations.

As the San Fernando Valley Bar Association wraps up another bar year and prepares for the new one just around the corner, summer tends to be the busiest time of the year for the SFVBA's team of staff and leadership. While I encourage the Bar's staff to take a week, or two, vacation during the hot, summer months, there is plenty to keep us busy: dues statements are prepared and mailed to members in mid-July and processed throughout the summer; budgets are drafted and modified numerous times before being adopted by the Board of Trustees at their last board meeting in September; ballots and election pamphlets are produced and mailed for the September 9 election; the Autumn Gala is planned and promoted; and new section leaders and committee chairs take advantage of downtime to put together programs for the bar year commencing October 1.

Ballots and the election pamphlet for the 2011 Board of Trustees Election will be mailed to attorney members the second week of August. Ballots must be returned by Election Day, September 9, 2011. With four seasoned members of the board termed out or declining to seek reelection, the 19-member governing body is guaranteed a new look. Seven newcomers and four incumbents are vying for six open trustee seats on the Board. In addition, incoming president Alan J. Sedley will appoint two trustees to the board.

New officers and trustees will be sworn in at the SFVBA's Autumn Gala on Saturday, September 24, 2011 at the Warner Center Marriott. The officers and directors of the Valley Community Legal Foundation of the SFVBA will also be installed that evening. For information on sponsorship opportunities or to purchase tickets, please contact SFVBA Director of Education & Events Linda Temkin at events@sfvba.org or (818) 227-0490, ext. 101.

*Valley Lawyer* will be taking a summer vacation – the magazine is not published in August. Enjoy your time away, and I wish all our *Valley Lawyer* readers a cool and lazy summer!

# SFVBA Golf Tournament a Great Success!

**LINDA TEMKIN**
Director of Education & Events

ON MAY 16, THE SUN AND dozens of golfers came out for the SFVBA Golf Tournament. Held at the new and improved Braemar Country Club, Tarzana, golfers enjoyed a day out on the greens and were later rewarded with a relaxing dinner and cocktails in the clubhouse. It was a great way to start the week and spend time with colleagues, clients and peers.

The SFVBA Golf Committee would like to extend a special thank you to Nemecek & Cole's Ivette Fernandez and Barbara Cole, whose hard work helped make the event such a success, and express its gratitude to the event's many sponsors:

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Wasserman Comden Casselman & Esensten team

Executive Director Liz Post and Len Comden (Wasserman Comden Casselman & Esensten), Eagle Sponsor and Golf Committee Chair

(L-R): Ivettee Fernandez and Barbara Cole of Nemecek & Cole, Terri Peckinpaugh of Tee Sponsor Narver Insurance, Liz Post, Beverage Sponsors Patti McCabe and Larry Dunn of Wells Fargo Insurance Services

Lewitt Hackman team — Kevin Rex, Michael Hackman, Sue Bendavid and Andy Shapiro — takes a break from the game to pose.

Eagle Sponsors Nemecek & Cole

Len Comden shines at the putting contest.

Birdie Sponsors Merrill Corporation

# APPLYING THE CAT'S PAW LIABILITY TO DISCRIMINATION CASES

By Roman Otkupman

CAN EMPLOYERS REALLY BE HELD responsible for a discriminatory motive of an employee, who influenced but did not make the ultimate adverse employment decision? The short answer is maybe (as is almost always the case with any complicated legal question). However, recently the U.S. Supreme Court in *Staub v. Proctor Hospital* ruled that the so-called cat's paw liability[1] theory should be imposed in USERRA, the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §4301.

Furthermore, and perhaps more importantly, the Court did not rule out the possibility of applying the cat's paw liability to Title VII cases, which are cases that deal with discrimination based on race, national origin, gender and other protected categories.

The circumstances of *Staub* were the following: Staub, who was a member of the United States Army Reserve, and was employed by Proctor Hospital, had an obligation to attend army drills one weekend per month. Staub also had the obligation to train full time for two to three weeks per year.

At the time of his employment, Staub had one immediate supervisor, Ms. Mulally, and Ms. Mulally's supervisor was Mr. Korenchuk. Both supervisors were not impressed with Staub's military obligations and made it very well known of their feelings towards Staub and his military duties. In fact, there was plenty of evidence to support the supervisors' hostility towards Staub's military obligation such as 1) scheduling Staub for additional shifts without notice so that he would "pay back the department for everyone else having to bend over backwards to cover his schedule for Reserves;" and 2) telling Staub's co-worker that his military duty had been a strain on the department and asking the coworker to "get rid of him."

Korenchuk, who, as mentioned above, was Mulally's supervisor, referred to Staub's military obligations as "a bunch of smoking and joking and a waste of taxpayers' money." Korenchuk was also aware that Mulally was "out to get Staub."

After Mulally and Korenchuk found a number of reasons to fire Staub (reasons that Staub claimed to be unworthy of credence), Staub brought an action against Proctor Hospital asserting, among other causes of action, violation of Staub's rights under USERRA. The jury found in Staub's favor, reasoning that Staub's military status was a motivating factor in Proctor's decision to discharge him." The jury awarded Staub $57,640 worth of damages.

The Seventh Circuit reversed the jury decision, holding that Proctor Hospital (hereinafter referred to as "Proctor") was entitled to judgment as a matter of law. Specifically, the Seventh Circuit held that Staub brought a cat's paw case, which meant that Staub sought to hold the employer liable for the discriminatory animus of a supervisor who did not make the ultimate adverse employment decision. The Seventh Circuit specifically stated that unless a non-decision maker exercised "singular influence" over the employment decision, the employer cannot be held liable for the illegal conduct as described above. Here, the Seventh Circuit held that Buck, who was the ultimate decision maker, performed his own independent investigation of Staub's actions and made the decision to terminate Staub's employment.

The United States Supreme Court granted certiorari. The decision of the Court was delivered by Justice Scalia and it was unanimous. The Court stated that the law of USERRA provides that "A person who is a member of or has an obligation to perform military service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, or obligation."

The Court specifically noted that this statute is very similar to Title VII which prohibits employment discrimination because of race, color, religion, sex or national origin. Furthermore, the Court drew a parallel between a USERRA cause of action and a Title VII cause of action in that the latter requests that plaintiff prove that his/her protected characteristic was a motivating factor in the employer's decision to terminate plaintiff's employment. Title VII also states that the discrimination is established when one of the factors was a motivating factor for any employment practice, even though other factors also motivated the practice. 42 U.S.C §§200e-2(a), (m).

The Supreme Court stated, in relevant part, that it did not think that "the ultimate decisionmaker's exercise of judgment automatically rendered the link to the supervisor's bias remote or purely contingent. The decision maker's exercise of judgment is also a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes. See *Sosa v. Alvarez Machain 542 U.S. 692 704 (2004)*. Nor can the ultimate decisionmaker's judgment be deemed a superseding cause of the harm. A cause can be thought superseding only if it is a cause of independent origin that was not foreseeable. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U. S. 830, 837 (1996)."

The Court further reasoned that following the Seventh Circuit's rationale gives an unlikely meaning to a provision designed to protect discrimination in the workplace. Specifically, the Court stated that a simple solution to every employer is ensuring that the supervisor who makes the decision to take the adverse action against the employee is to completely isolate himself from that employee's supervisor. Thus, the employer will be completely shielded from liability when such discrimination occurs.

The Court stated that it seems like an "implausible meaning of the text, and one that is not compelled by its words." The Court further reasoned that the "mere conduct of independent investigation does not have a claim-preclusive effect. Nor did the Court think that the independent investigation relieves the employer of fault."

Thus, the Court held that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."

This case will certainly have an effect on future litigation in the Title VII arena. Whereas before if the supervisors conducted their own independent investigation and did not blindly rely on the decisions of the supervisors who had the discriminatory motives, the employer had legal grounds to dismiss the employee, even though the decision making process was tainted by the improper motive of the employee not making the final termination decision. However, *Staub v. Proctor Hospital* specifically held that discriminatory motives of the supervisors, even though they are not the decision makers, can certainly greatly contribute to the decision to wrongfully terminate the employee, thus possibly holding the employer liable for wrongfully terminating an employee based on the unlawful discriminatory motives of the non-decision makers.

***Roman Otkupman*** *is the founding attorney of Precision Legal Center, ALC with offices in Woodland Hills and Beverly Hill. Mr. Otkupman specializes in employment law litigation, landlord/tenant matters and bankruptcy law. Otkupman can be reached at roman@precisionlegalcenter.com.*

[1] Cat's paw liability refers to a fable by a French poet called "The Monkey and the Cat" by Jean de La Fontaine (1621-1695). In this tale, a monkey, who is intelligent, persuades a rather unintelligent cat to grab chestnuts from a fire. The cat burns its paws while fulfilling the monkey's wishes. The tale goes on to describe the monkey enjoying the chestnuts at the cat's expense. As understood today, a cat's paw is a "tool" or "one used by another to accomplish his purposes." Webster's Third New International Dictionary (1976).

# SFVBA Board of Trustees Election in Review

By Angela M. Hutchinson

ON JUNE 1, 2011, THE SAN FERNANDO Valley Bar Association Nominating Committee announced its slate of candidates for the 2011-2012 Board of Trustees. The committee needed to nominate 9 to 12 members for Trustee positions. After thoroughly reviewing the participation and experiences of the applicants, four sitting trustees and seven new applicants were nominated.

The committee unanimously nominated eleven candidates for trustee: Anie Akbarian, Howard W. Dicker, incumbent Michael Hoff, Sean E. Judge, David Kestenbaum, incumbent Kira Masteller, Richard T. Miller, incumbent Carol Newman, Charles Shultz, incumbent John Yates and John Ybarra.

"The SFVBA continues to aspire to become a "must have" organization to its growing membership," declares President-Elect Alan Sedley. "Many of our candidates represent new blood, undoubtedly anxious to join ranks with our experienced Board and help achieve the goals and forward the mission of our Association."

"The Nominating Committee chose good candidates. This year's slate assures our Bar of good leadership now, and well into the future," added SFVBA Secretary David Gurnick.

Applicants who applied for a trustee position, but were not nominated, are encouraged to serve on SFVBA committees and increase their participation in Bar activities. Over the years, nominees have actively served the Bar in various capacities, including chairing committees and sections, coordinating Bar-sponsored programs and participating in the SFVBA's public service programs.

"For those who did get nominated and for those who do not win the election, I hope you stay involved with our bar organization and feel the enrichment that occurs as you help us serve our community," says SFVBA President Seymour Amster.

According to the SFVBA by-laws, although the nomination process by the Committee has concluded, members who are interested in having their name added to the ballot can do so by submitting an alternative nomination to be a trustee or for any officer position (except President or President-Elect). Prospective candidates must file a written nomination that has been signed by at least 25 active members of the Association. The nomination packet must be filed with the Bar Association's secretary no later than July 25, 2011.

While nominees may practice different areas of law, they typically have a shared vision of ensuring that the San Fernando Valley Bar Association continues to serves its members and the legal community with excellence. The new Board of Trustees will be sworn in at the Installation Gala on Saturday, September 24, 2011 at the Warner Center Marriott.

> "I was pleased to see the number of individuals wishing to serve on the Board of Trustees. Becoming involved with our organization is a wonderful way of becoming involved with our community." – *SFVBA President Seymour I. Amster*

## Board of Trustees' Nominees

| | |
|---|---|
| **President:** | Alan J. Sedley |
| **President-Elect:** | David Gurnick |
| **Secretary:** | Adam D.H. Grant |
| **Treasurer:** | Caryn Brottman Sanders |
| **Trustees:** | Anie N. Akbarian |
| | Howard W. Dicker |
| | Michael R. Hoff (Incumbent) |
| | Sean E. Judge |
| | David Kestenbaum |
| | Kira S. Masteller (Incumbent) |
| | Richard T. Miller |
| | Carol L. Newman (Incumbent) |
| | Charles A. Shultz |
| | John R. Yates (Incumbent) |
| | John Ybarra |

## Meet the Nominees

**Alan J. Sedley** is the President-Elect and will automatically ascend to the SFVBA's presidency. He has in the past served in a variety of leadership positions, including Chair of the Membership & Marketing Committee, Finance Committee and Health Law Section. Sedley serves as Vice President and General Counsel of Hollywood Presbyterian Medical Center.

**David Gurnick** is SFVBA Secretary and Chair of the SFVBA Litigation Section. He is also active in the Bar's Diversity Committee. Nominated for President-Elect, Gurnick served as President of the SFVBA from 1993 to1994. He is a partner with Lewitt Hackman Shapiro Marshall & Harlan, a firm that is home to past presidents Sue Bendavid and Steve Holzer.

**Adam D.H. Grant** is SFVBA Treasurer and has served as Chair of the SFVBA Programs Committee and as a director of the Valley Community Legal Foundation. Nominated for Secretary, Grant is an experienced trial lawyer with Alpert, Barr & Grant, a firm that has produced three past presidents: Lee Alpert, Gary Barr and Mark Blackman.

**Caryn Brottman Sanders** has served as a trustee on the SFVBA Board of Trustees since 2006, initially as the representative of the Santa Clarita Valley Bar Association during her presidency with the SFVBA affiliate. Nominated for Treasurer, she is past chair of the Programs Committee and current chair of the SFVBA Bench-Bar Committee, ARS Committee and the General Law Post. Sanders practices business litigation and personal injury defense with Tharpe & Howell.

**Anie N. Akbarian** has been active with the Attorney Referral Service since 2004 and volunteers for the VAST Program. She is an experienced trial attorney and has been litigating personal injury and family law cases for thirteen years.

**Howard W. Dicker** has been a member of the SFVBA since 1995. He is the founding partner of Dicker & Dicker, LLP, specializing in the areas of litigation, estate planning, construction, labor and employment, real estate and business law.

**Michael R. Hoff** was a judge on the Los Angeles Superior Court from 1987 to 2008, former SFVBA Judge of the Year and is President of the Valley Community Legal Foundation of the SFVBA. He is a volunteer fee arbitrator for the Bar's MFA Program. He is a neutral with Alternative Resolution Centers (ARC).

**Sean E. Judge** has served as VAST settlement officer, belongs to the SFVBA's online Mediator Directory and has authored several articles for *Valley Lawyer* magazine on mediation.

**David S. Kestenbaum** is involved with the SFVBA Attorney Referral Service and a long-time supporter of SFVBA's events. An SFVBA member since 1993, Kestenbaum practices criminal law exclusively with Kestenbaum, Eisner & Gorin in Van Nuys.

**Kira S. Masteller** is a current trustee of the SFVBA, Chair of the Diversity Committee and Co-Chair of the SFVBA Probate & Estate Planning Section. She is a partner at Lewitt Hackman Shapiro Marshall & Harlan, where she practices estate planning, estate and gift tax planning and trust administration.

**Richard T. Miller** has been a volunteer at the One Generation Senior Center for the Senior Citizen Legal Program since 1996. He is an active member of the Attorney Referral Service and Probate and Small Firm Sections. Miller has a general civil practice in Van Nuys.

**Carol L. Newman** is a current trustee and Chair of the SFVBA Business Law, Real Property & Bankruptcy Section. Her solo practice is focused on business and real estate litigation, civil appeals, disputes regarding competition and palimony cases.

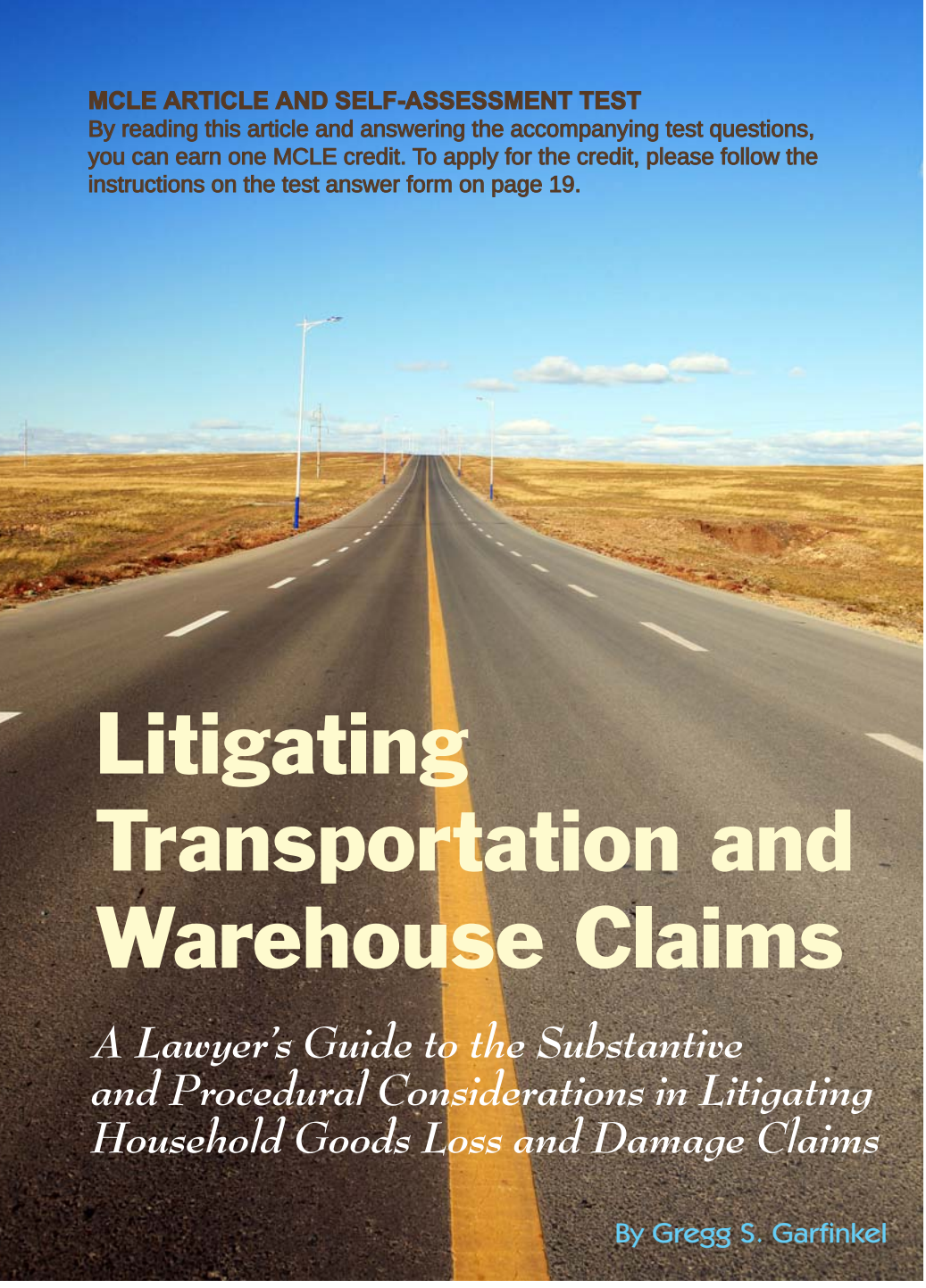
**Charles A. Shultz** is Co-Chair of the SFVBA Probate & Estate Planning Section. He practices trusts and estates as a partner with Wasserman Comden Casselman & Esensten. He and his firm supports the SFVBA's many events, including the Golf Tournament and Judges' Night.

**John R. Yates** is an incumbent nominee to the Board of Trustees and serves on numerous committees. He is a litigator and trial lawyer with Greenberg & Bass and has tried over thirty civil cases to verdict or judgment in state trial courts and federal district courts.

**John R. Ybarra** is a member of the SFVBA New Lawyer Section and has been active with the SFVBA by attending monthly seminars and events. He is a litigator, electronic discovery expert and the founding partner of Blomquist & Ybarra Law Firm in Tarzana.

***Angela M. Hutchinson*** *is the Editor of Valley Lawyer magazine and has served the SFVBA in this capacity for the past 3 years. She also works as a communications consultant, helping businesses and non-profit organizations develop and execute various media and marketing initiatives. She can be reached at editor@sfvba.org.*

**MCLE ARTICLE AND SELF-ASSESSMENT TEST**
**By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 19.**



# Litigating Transportation and Warehouse Claims

## *A Lawyer's Guide to the Substantive and Procedural Considerations in Litigating Household Goods Loss and Damage Claims*

By Gregg S. Garfinkel

LITIGATING HOUSEHOLD goods loss and damage claims is not as simple as logging onto eBay and finding out the last sale price of a particular antique, appliance or other item of personal property and offering said amount to the shipper, the person whose goods are being transported. There are a variety of substantive and procedural considerations attorneys must address to ensure that his/her client, whether it is a household good carrier or warehouseman, is taking advance of the protections afforded by federal and state law.

### What Law Governs?

Federal law and procedure are applicable in actions when a shipper seeks recovery against a motor common carrier for damages sustained to cargo incident the interstate transportation of a shipper's household goods and effects. Interstate moves are those which cross state lines. It is important to note that it is the shipper's intent which determines which law applies, not the actual transport of the shipper's goods. In other words, a motor common carrier cannot avail itself of the protections afforded by federal law by simply moving a shipper's goods in interstate commerce where the shipper only intended a cross-town transaction.

It is equally important to note that federal law would apply to govern the rights and obligations of the parties even where a shipment was intended to move in interstate commerce, but had not yet crossed state lines.

Conversely, state law governs the respective obligations of household goods carriers and warehouseman on purely intrastate transactions. Intrastate transactions are those where the goods are not intended to be shipped across state lines, or where the goods are being warehoused.

### *Federal Law*

Since 1906, the Carmack Amendment to the Interstate Commerce Act (49 USC 14706) ("Carmack") has governed the liability of motor carriers operating in interstate commerce. While the Congressional purpose in enacting Carmack was to establish a uniform liability scheme which "creates uniformity out of disparity," most practitioners (and even some judges) have had little exposure to Carmack and, thus, are unaware of its vast preemptive ambit.

The interstate transport of cargo by a motor common carrier triggers the application of the Carmack Amendment to the Interstate Commerce Act.49 U.S.C. Section 14706 et seq. The Carmack Amendment addresses the subject of a motor carrier's liability for goods lost or damaged during the course of an interstate move. Congress enacted the Carmack Amendment to provide uniformity and predictability to a common carrier's liability for an interstate property loss.

From a common carrier's perspective, the most important aspect of the Carmack Amendment is that it limits a shipper's recovery to the actual loss or injury caused by any of the carriers involved in the shipment. The actual-loss language of the statute is the source of the statute's vast preemptive effect, and provides:

> (1) Motor carriers and freight forwarders: a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105 are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier; (B) the

delivering carrier; or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and, except in the case of a freight forwarder, applies to property reconsigned or diverted under a tariff under section 13702. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the linehaul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

Shortly after its enactment in 1906, the Supreme Court stated that the subject of a carrier's liability is "covered so completely [by the Carmack Amendment] that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it." *Adams Express Co. v. Crominger*, 226 U.S. 491 (1913).

All federal circuit courts addressing the issue have held that the Carmack Amendment preempts a shipper's state law claims seeking recovery for damages sustained during the course of an interstate shipment. *Lloyds of London v. North American Van Lines, Inc.*, 890 F.2d 112 (10th Cir. 1989). In addition, the actual-loss language of Carmack has been held to preempt a shipper's state law claims involving conduct occurring before and after the actual interstate transport of the shipper's property. *Hall v. North American Van Lines, Inc.*, 476 F.3d 683 (9th Cir. 2007).

Various circuits have held that the Carmack Amendment preempts state law claims for negligence, fraud, gross negligence and tortuous interference with economic advantage premised upon pre-shipment conduct. *Cleveland v. Beltman North American Co.*, 30 F.3d 373 (2d Cir. 1994). Similarly, a majority of circuit courts have held that a request for tort damages premised upon a carrier's post-transport conduct to handling a shipper's damage claim does not escape the vast preemptive effect of the *Carmack Amendment. Rini v. United Van Lines, Inc.*, 104 F.3d 502 (1st Cir. 1997).

Carmack also provides a carrier with two other mechanisms to potentially eliminate, or reduce, its liability for damages. The first is 49 U.S.C. Section 14706(e) which provides:

> A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice.

This section authorizes a carrier to preclude a shipper's recovery where either the shipper fails to provide a written claim within nine months from the date the damaged property is delivered or, in the case of a common carrier's failure to deliver, within nine months after a reasonable time for delivery has elapsed. Where a shipper fails to initiate a civil action against the carrier within two years after written notice is given that the carrier has disallowed any portion of the claim.

Like most other claim filing statutes, the purpose of Section 14706(e) is to avoid stale claims and to provide the carrier with an opportunity to investigate a claim while witnesses and the damaged property are still available. Furthermore, a shipper's claim that he or she did not have knowledge of the limitations provision is of no legal import, as the shipper is chargeable with knowledge of the law. See *Aero Trucking, Inc. v. Regal Tube Co.*, 594, F.2d 619 (7th Cir. 1979).

The second mechanism is the "declared value" limitation. Prior to the disbanding of the Interstate Commerce Commission (effective Jan. 1, 1996), the statutory provision entitling a carrier to limit its liability to a declared value was found at 49 U.S.C. Section 10730, which provided that "the Interstate Commerce Commission may require or authorize a carrier ... to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by a written agreement, when that value would be reasonable under the circumstances surrounding the transportation." The post-1996 version of this statute is found at 49 U.S.C. Section 14706(f) and provides:

> A carrier or group of carriers subject to jurisdiction under subchapter I or III of chapter 135 may petition the Board to modify, eliminate or establish rates for the

transportation of household goods under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper or by a written agreement.

Before a carrier's attempt to limit its liability will be effective, the household goods carrier must maintain a tariff in compliance with the requirements of the Interstate Commerce Commission (now the Surface Transportation Board): give the shipper a reasonable opportunity to choose between two or more levels of liability; obtain the shipper's agreement as to his or her choice of carrier liability; and issue a bill of lading reflecting such agreement prior to moving the shipment. The absence of any one of these factors will deprive the carrier of this useful defense. See *Hughes v. North American Van Lines, Inc.*, 970 F.2d 609 (9th Cir. 1992). Practitioners must note that the tariff publishing requirement is only applicable to household goods carriers, not to motor carriers of other commodities.

## Litigating Loss and Damage Claims in Federal Court

Typically, an aggrieved shipper files an action in state court, asserting various state law causes of action in order to expand the shipper's potential recovery. Often, a shipper will supplement its breach of contract action with tort theories, such as conversion, negligent infliction of emotional distress and breach of the implied covenant of good faith and fair dealing. The latter are usually asserted where the claims handling process has taken longer than the shipper believes was warranted.

As a general rule, federal courts are more apt than state courts to apply the provisions of the Carmack Amendment to limit a shipper's recovery. Thus, the first step upon receipt of a cargo claim is to determine whether the matter is removable to federal court. There are three primary considerations: Does the complaint seek recovery for goods damaged during the course of interstate transport? Does the dollar amount of property damage sought meet the $10,000 jurisdictional minimum of 28 U.S.C. Section 1445(b)? Is removal time-barred?

The first question is usually straight forward. More often than not, the complaint alleges, for example, that "shippers' goods were damaged while being transported from New York, New York, to Los Angeles, California." This allegation alone, assuming the existence of the other considerations, triggers the application of the Carmack Amendment.

However, even if the goods were damaged while still in the state of the origin, this does not defeat removal jurisdiction. In fact, all that is required is that the goods be damaged incident to their interstate transport. *New York N.H.H.R.Co. v. Nothnagel*, 346 U.S. 128 (1952). Thus, for example, federal jurisdiction would still lie over a shipment originating in New York State and destined for North Carolina, where the carrier's vehicle overturned in New York prior to even crossing the New York state line. This is because the shipper's intent was to ship the goods in interstate commerce. Likewise, in *Hall*, the 9th Circuit Court of Appeal held Carmack to be applicable even though no physical transportation of the subject goods had occurred.

The second consideration is readily addressed in 28 U.S.C. Section 1445(b), which provides that a cargo claim of less than $10,000 is not removable. However, the fact that a shipper requests damages of more than $10,000 is not determinative. For example, the 9th Circuit has held that the property damage component of the claim must alone surpass the $10,000 minimum to render a claim removable. A carrier cannot bootstrap federal jurisdiction over the other components of a claim (i.e., bad faith, emotional distress, fraud) by asserting that the total amount sought is in excess of $10,000. See *Hunter v. United Van Lines*, 746 F.2d 635 (9th Cir. 1984).

The last preliminary consideration is addressed by 28 U.S.C. Section 1446(b), which provides that an action must be removed within 30 days after service of the first pleading that sets forth a removable claim. This procedural consideration was recently addressed in *Steiner v. Horizon Moving Systems Inc.*, 568 F.Supp.2d 1084, (C.D.Cal. Jul 25, 2008), which held that a Notice of Removal filed well into the litigation is appropriate where discovery reveals the federal question basis of same. Thus, a practitioner must remain vigilant as to her/his ability to remove a matter even after the initial pleading stage.

Upon removing the action to federal court, a carrier should attempt to "clean up" the shipper's complaint in order to eliminate all of the state law claims contained therein. This cleansing can be accomplished by filing a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure Section 12(b)(6).

At this stage, counsel for the shipper will usually attempt to challenge the extent of the Carmack Amendment's preemptive effect. However, the following authorities can be cited to demonstrate the breadth of the Carmack Amendment's preemptive effect over claims involving pre-shipment conduct (*Pietro Culotta Grapes v. Southern Pacific Transport*, 917 F. Supp. 713 (E.D. Cal. 1996)); post-shipment conduct (*Cleveland v. Beltman North American Co.*, 30 F.3d 373 (2d Cir. 1994)); negligence (*Hughes v. North American Van Lines, Inc.*, 970 F.2d 609 (9th Cir. 1992)); negligent misrepresentation (*Hughes v. United Van Lines, Inc.* 829 F.2d 1407 (7th Cir. 1987)); conversion (*Schultz v. Mayflower Transit*, 848 F. Supp. 1497 (D. Idaho 1993); breach of the implied covenant of good faith (*Pietro Culotta* and *Cleveland*); fraud (*Moffit v. Bekins Van Lines Co.*, 6 F.3d 305 (5th Cir. 1993)); and consumer-protection statutes (*Margetson v. United Van Lines*, Inc. 785 F.Supp. 917 (D. New Mexico 1991).

Once a loss and damage claim is appropriately venued, and appropriately plead, a practitioner should review the many defenses – statutory and/or common law – that may exist to defeat or reduce a shipper's claim.

## Litigating State Law Loss and Damage Claims

There are many substantive similarities between California law and federal law as it pertains to the liability of common carrier of household goods carriers. Like federal law, California law expressly allows a motor carrier of household goods to (1) limit its liability to a value established by written declaration of the shipper, and (2) require a shipper to file a written claim within 9 months (and file a lawsuit within 2 years of the date that any such claim is denied) as a condition precedent to recovery.

These enabling provisions are found at California Commercial Code Sections 7309 (b) and (c) which provide, respectively, as follows:

> (b) Damages may be limited by a term in the bill of lading or in a transportation agreement that the carrier's liability may not exceed a value stated in the bill or transportation agreement if the carrier's rates are dependent upon

value and the consignor is afforded an opportunity to declare a higher value and the consignor is advised of the opportunity. However, such a limitation is not effective with respect to the carrier's liability for conversion to its own use.

(c) Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the shipment may be included in a bill of lading or a transportation agreement.

Further support for these carrier defenses are found in Items 92 and 132 of the California Public Utilities Max 4 Tariff, which have the force and effect of law. (*Dyke v. Public Utilities Commission*, 56 Cal.2d 105 (1961)).

Most California courts apply a similar analysis to that provided by the 9th Circuit in *Hughes v. North American Van Lines, Inc., supra*. Specifically, before a common carrier of household goods can avail itself of a limitation of liability provision, it must establish that the shipper was given a reasonable opportunity to choose between two or more levels of liability; that the shipper agreed to limit the carrier's liability and; that a bill of lading reflecting such agreement prior to moving the shipment. Once again, the absence of any one of these factors will deprive the carrier of this important defense.

Unlike federal law, California law does not preclude a shipper from alleging a panoply of state law claims (i.e., fraud, conversion, negligence, breach of contract, etc.) for a household goods loss and damage claim arising in intrastate commerce. While existing California law may preclude a shipper from prevailing on such claims, a common carrier of household goods cannot assert preemption as a defense.

Finally, like common carriers of household goods, warehousemen are also provided with strong statutory defenses to household goods loss and damage claims. California Commercial Code Sections 7204 (2) and (3) provide:

(2) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouseman shall not be liable; provided, however, that such liability may on written request of the bailor at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt be increased on part or all of the goods thereunder, in which event increased rates may be charged based on such increased valuation, but that no such increase shall be permitted contrary to a lawful limitation of liability contained in the warehouseman's tariff, if any. No such limitation is effective with respect to the warehouseman's liability for conversion to his own use.

(3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the bailment may be included in the warehouse receipt or tariff.

Once again, the key to enforcing such limitation of liability provisions and claims presentation requirements is the ability of the bailee (i.e., the warehouseman) to demonstrate that the bailor (i.e., the person depositing the goods for storage) was notified of the existence of the limitation of liability provision and of the claims presentation requirements. Such provisions are routinely enforced by California courts via motions for summary adjudication, since the issue of the enforceability of a contractual limitation of liability is one which the Court may address as a matter of law. (*Markborough Cal., Inc. v. Super. Ct.*, 227 Cal.App.3d 705 (1991).)

The first step in analyzing any household goods loss and damage claim is to determine the applicable law. Only then, can a practitioner determine the available statutory, contractual and tariff based defenses which may apply. The breadth of defenses available to a common carrier of household goods and warehouseman far exceed the scope of this article. However, knowing where to look, and why, should provide attorneys with a good start.

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# MCLE Test No. 36

**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. A shipper is the person or party whose goods are being transported. A carrier is the party who is transporting the shipper's goods.
   True
   False

2. Federal law applies when a shipper seeks recovery against a motor common carrier for damages sustained to cargo incident the interstate transportation of a shipper's household goods and effects.
   True
   False

3. The shipper's intent is irrelevant when determining what law applies.
   True
   False

4. A shipment must cross state lines for federal law to apply.
   True
   False

5. State law governs the respective obligations of common carriers of household goods and warehouseman on purely intrastate transactions.
   True
   False

6. The Carmack Amendment to the Interstate Commerce Act, which is found at 49 USC 14706, governs the liability of motor carriers operating in interstate commerce.
   True
   False

7. All federal circuit courts addressing the issue have held that the Carmack Amendment preempts a shipper's state law claims seeking recovery for damages sustained during the course of an interstate shipment.
   True
   False

8. A majority of circuit courts have held that a request for tort damages premised upon a carrier's post-transport conduct to handling a shipper's damage claim does not escape the vast preemptive effect of the Carmack Amendment.
   True
   False

9. A common carrier of household goods can require a shipper to file a written claim for damages within 3 months of the date that damaged property is delivered.
   True
   False

10. A shipper's failure to initiate a civil action against the carrier within two years after written notice is given that the carrier has disallowed any portion of the claim is fatal to a shipper's loss and/or damage claim.
    True
    False

11. A common carrier of household goods can limit its liability to the shipper's declared value of the goods shipped.
    True
    False

12. Since the abolition of the Interstate Commerce Commission, a household goods carrier is no longer required to publish its tariff.
    True
    False

13. A common carrier of household goods must provide a shipper with two or more levels of liability before a limitation of liability provision will be enforceable.
    True
    False

14. A common carrier of household goods must issue a bill of lading reflecting a shipper's agreement to limit the carrier's liability prior to moving the shipment before a limitation of liability provision will be enforced.
    True
    False

15. A shipper suing a common carrier of household goods in federal court must assert a claim in excess of $10,000.
    True
    False

16. A lawsuit alleging a $50,000 loss and damage to household goods filed in state court may be removed to federal court if the loss incident occurred in the interstate shipment of the subject goods.
    True
    False

17. A Notice of Removal filed well into the litigation is appropriate where discovery reveals the federal question basis of same.
    True
    False

18. There are many substantive similarities between California law and federal law as it pertains to the liability of common carrier of household goods carriers.
    True
    False

19. Unlike federal law, a common carrier of household goods operating sole in intrastate commerce cannot limit its liability to a shipper for loss or damage to a shipper's goods.
    True
    False

20. Like federal law, a common carrier of household goods operating solely in intrastate commerce can provide reasonable written claim filing requirements.
    True
    False

## MCLE Answer Sheet No. 36

INSTRUCTIONS:

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

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

METHOD OF PAYMENT:

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

_____
Credit Card Number Exp. Date

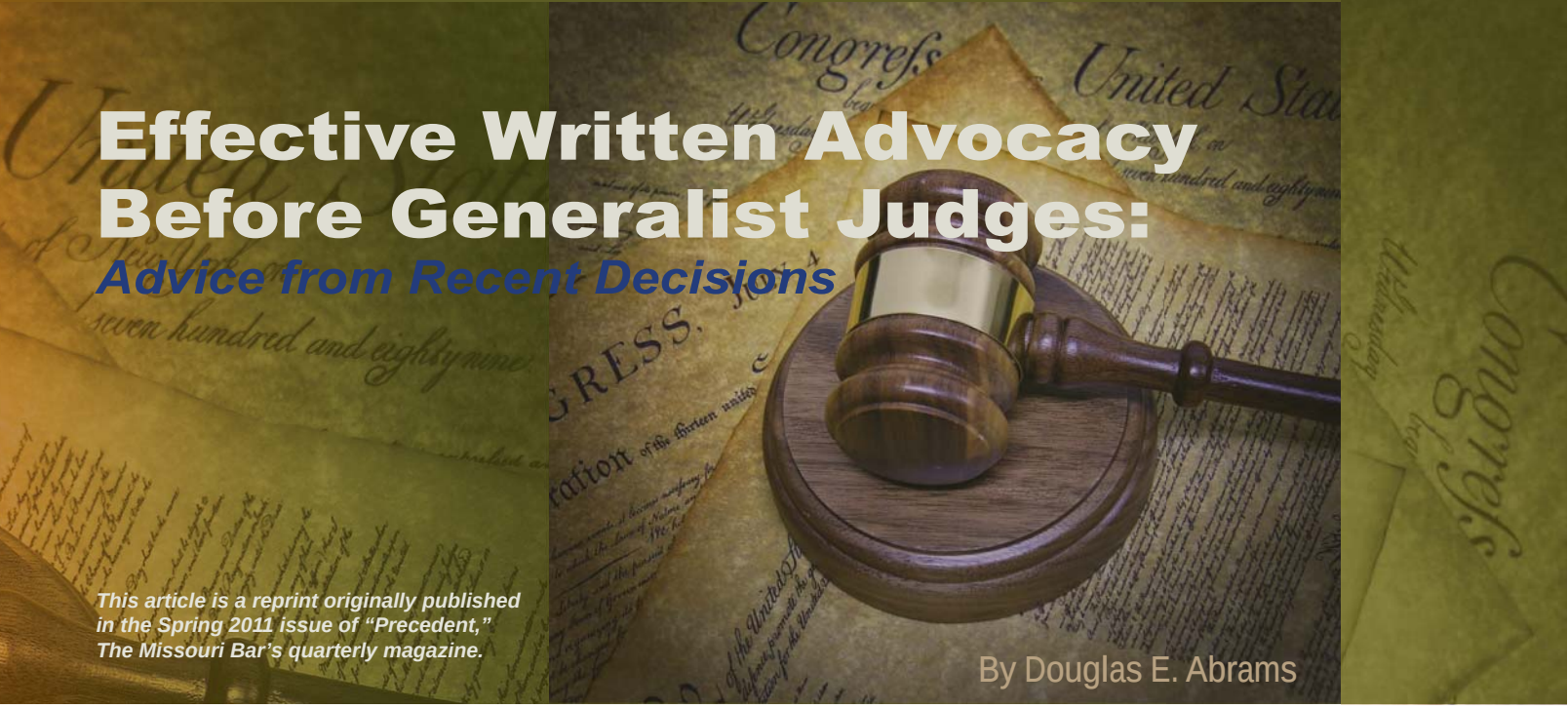
_____
Authorized Signature

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

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

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

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



# Effective Written Advocacy Before Generalist Judges:

## *Advice from Recent Decisions*

*This article is a reprint originally published in the Spring 2011 issue of "Precedent," The Missouri Bar's quarterly magazine.*

By Douglas E. Abrams

### "THE LAW IS MADE BY THE BAR"

"The best job I ever had."[1] That is how retired Congress member, federal Circuit Judge, and White House Counsel Abner J. Mikva remembers the judicial clerkship that began his career 60 years ago.

Fresh out of law school and eager to make their mark, clerks are fortunate indeed for the opportunity to learn from a judge with knowledge drawn from years of experience. But clerks are equally fortunate to learn how much judges in our adversary system of justice do *not* know. Recognizing the limits of one's knowledge is key to success in any professional pursuit, so lessons in these limits are perhaps the most valuable mentoring of all for clerks destined to spend their careers at the Bar.

From the commencement of a civil or criminal case, the limits of the judge's knowledge reach both facts and law. Judges receiving papers typically lack the familiarity with the case that the lawyers may enjoy from having lived with it before filing. Time spent interviewing clients and witnesses, researching and writing the pleadings, and engaging on other pretrial give-and-take provides counsel a head start on factfinding before the judge enters the picture.

Judges in general jurisdiction courts also may not initially be as familiar as counsel with the substantive law that will decide the case. As American law has grown increasingly intricate and diverse in recent decades, more and more lawyers have opted for specialty practices.[2] Specialization means that judges may come from private or public sector careers that exposed them regularly to only some of the substantive law that now fills their dockets. Relatively few lawyers practice civil and criminal law simultaneously, and intricate administrative rules and regulations often create doctrine most familiar to specialists.

With these institutional constraints grounded in experience and the complex legal fabric, says the U.S. Court of Appeals for the Seventh Circuit, "courts rely on lawyers to identify the pertinent facts and law."[3] Because trial and appellate courts often severely limit oral argument or eliminate it altogether, identification and persuasion may depend heavily or entirely on counsel's written submissions.

The reliance cited by the Seventh Circuit is a national tradition that actually predates the recent trend toward specialized practice. Trial and appellate judges have long maintained a" symbiotic"[4] relationship with counsel who "educate the Court"[5] with argument tailored to the judge's circumstances, needs and expectations. "The law is made by the Bar, even more than by the Bench," said then-Judge Oliver Wendell Holmes in 1885.[6] Justice Louis D. Brandeis concurred as he ascended to the Supreme Court bench in 1916: "A judge rarely performs his functions adequately unless the case before him is adequately presented."[7] Justice Felix Frankfurter wrote later that "the judicial process [is] at its best" when courts receive "comprehensive briefs and powerful arguments on both sides."[8]

### Two Strategies for Effective Written Advocacy

Treatises capably explore written trial and appellate advocacy, and this article makes no effort to duplicate their depth.[9] In recent reported trial and appellate decisions, however, judges themselves highlight two core strategies of written advocacy that bear discussion here. First, advocates should orient the judge who is a newcomer to the case's facts, and perhaps also its relevant law; and second, advocates should avoid jargon best understood by specialists, which may initially confound the court and frustrate the bond of communication between writer and reader.

#### *Orienting the Court*

The judge may not initially be as conversant in the applicable law as lawyers who have specialized in the field for years. "It is unhelpful," says one district court, "when attorneys write briefs that presuppose specialized knowledge on the part of their readers."[10]

The facts too may initially disorient the trial judge who did not pore over drafts of preliminary papers or attend the depositions, and the appellate judges who did not preside at the trial or create and assemble the record step by step. Discussion of the facts – the bedrock of most cases, even before application of the law – should not assume the judge's familiarity with the case. When a brief or other written submission cites to depositions, the trial transcript, or other papers in the record, advocates serve their cause best by explaining the point they mean to explain or support.

Unless the court does its own independent review of the facts and the law, counsel who fail to provide a comprehensible pathway risk forfeiting the opportunity to persuade, and may also risk forfeiting valuable time during oral argument with avoidable questions from the bench. "Dropping a judge in the middle of

an alien landscape without a map and expecting him to get his bearings from fragments of testimony couched in occupational jargon to which he has not previously been exposed," explained one federal district court, "is not conducive to informed decisionmaking."[11]

### *Avoiding Jargon*

"[T]he realm of the conflicts of laws," wrote Dean William J. Prosser in 1953, "is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in strange and incomprehensible jargon. The ordinary court . . . is quite lost when engulfed and entangled in it."[12] Reminders like these about the law's frequent complexity remain valuable for 21st-century advocates.

Unadorned jargon may serve a legal writer's purpose, or at least may not detract much from it, when the audience consists solely of lawyers trained in the writer's specialty. But without this foundation of common understanding, warns Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit, "much legal jargon can obscure rather than illuminate a particular case."[13]

In 2008, in *Indiana Lumbermens Mutual Insurance Co. v. Reinsurance Results, Inc.*, the Seventh Circuit held that the parties' contract did not require the plaintiff insurer to pay commissions to the company it had retained to review the insurer's reinsurance claims.[14] Writing for the panel, Judge Posner reported that the parties' briefs "were difficult for us judges to understand because of the density of the reinsurance jargon in them."[15]

"There is nothing wrong with a specialized vocabulary – for use by specialists," Judge Posner explained. "Federal district and circuit judges, however, . . . are generalists. We hear very few cases involving reinsurance, and cannot possibly achieve expertise in reinsurance practices except by the happenstance of having practiced in that area before becoming a judge, as none of us has. Lawyers should understand the judges' limited knowledge of specialized fields and choose their vocabulary accordingly. Every esoteric term used by the reinsurance industry has a counterpart in ordinary English."[16]

Judge Posner's commonsense advice – to write with an eye for the judges' needs and expectations – is not judicial pettiness. In trial and appellate courts alike, the advice relates directly to the client's best interests, but also to the sound administration of justice. In an age of swelled dockets and often-intricate law, counsel's unnecessary reliance on jargon forces the court to waste valuable time demystifying avoidable obscurity. By enhancing the risk that the court will misapprehend counsel's key points, jargon also enhances the risk that the court will "get it wrong."

Counsel in *Indiana Lumbermens Mutual Insurance Co.*, Judge Posner concluded, "could have saved us some work and presented their positions more effectively had they done the translations from reinsurancese into everyday English themselves."[17]

In *New Medium LLC v. Barco N.V.*, Judge Posner again urged counsel to consider the needs of their audience before writing.[18] Sitting by designation as a trial judge, he instructed the parties that "[a]ll submissions must be brief and non-technical and eschew patent-law jargon. Since I am neither an electrical engineer nor a patent lawyer, . . . the parties' lawyers must translate technical and legal jargon into ordinary language."[19]

Plain English may warrant counsel's particular attention when the court reviews an agency decision because, according to the U.S. Court of Appeals for the Fifth Circuit, veteran agency personnel may acquire "insights and experience denied judges. The subtleties . . . encased in jargon and tucked into interstices of the administrative scheme, may escape us."[20] "It is the responsibilities of the parties to properly educate the court," explain a federal district judge, "not of the court to improperly defer to an agency decision."[21]

## Persuading and Assisting the Court

The Fifth Circuit may have exaggerated when it likened judges sometimes to "sophisticated uninitiates" when they read or hear adversary argument.[22] Advocates convey no condescension, however, when they write in a respectful professional tone using, as one federal district court recommends, language "intelligible to everyday speakers of English."[23]

As "a representative of clients [and] an officer of the legal system" under the ABA Model Code of Professional Conduct,[24] advocates write with dual goals. "First," said Judge Hugh R. Jones of the New York Court of Appeals, "you seek to persuade the court of the merit of the client's case, to create an emotional empathy for your position. Then you assist the court to reach a conclusion favorable to the client's interest in terms of the analysis of the law and the procedural posture of the case."[25]

Advocates persuade and assist most effectively with the familiar quartet that marks any legal writing that strives to connect with the anticipated audience – precision, conciseness, simplicity and clarity.[26]

***Douglas E. Abrams**, a law professor at the University of Missouri, has written or co-authored five books. Four U.S. Supreme Court decisions have cited his law review articles. Professor Abrams can be contacted at AbramsD@missouri.edu.*

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2. Sol Linowitz, The Betrayed Profession, ch. 5 (1994).
3. *In re* Cont'l Cas. Co., 29 F.3d 292, 295 (7th Cir. 1994).
4. Walter Oil & Gas Corp. v. Teekay Shipping, 270 F. Supp.2d 855, 865 (S.D. Tex. 2003).
5. Shoshone-Bannock Tribes v. Shalala, 988 F. Supp. 1306, 1318 (D. Or. 1997), on reconsideration, 999 F. Supp. 1395 (D. Or. 1998); Rabin v. Concord Assets Group, Inc., No. 89 Civ. 6130, 1995 WL 645441 *6 (S.D.N.Y. Nov. 2, 1995).
6. Oliver Wendell Holmes, The Law, in Speeches by Oliver Wendell Holmes 16, 16 (1934) (speech delivered Feb. 5, 1885).
7. Louis D. Brandeis, The Living Law, 10 Ill. L. Rev. 461, 470 (1916).
8. Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring).
9. *See, e.g.*, Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges (2008); Edward D. Re, Brief Writing and Oral Argument (7th ed. 1993); Bryan A. Garner, The Winning Brief (2d ed. 2004); Girvan Peck, Writing Persuasive Briefs (1984).
10. Waddy v. Globus Medical, Inc., No. 407CV075, 2008 WL 3861994 *2 n.4 (S.D. Ga. Aug. 18, 2008).
11. Langston v. Illinois Bell Telep. Co., No. 88 C 3578, 1990 WL 129567 * 6 n.8 (N.D. Ill. Sept. 3, 1990) (magistrate judge's opinion).
12. William J. Prosser, Interstate Publication, 51 Mich. L. Rev. 959, 971 (1953).
13. Miller v. Illinois Cent. R.R. Co., 474 F.3d 951, 955 (7th Cir. 2007).
14. 513 F.3d 652 (7th Cir. 2008).
15. *Id.* at 658.
16. *Id.*
17. *Id.*
18. No. 05 C 5620, 2009 WL 1098864 (N.D. Ill. Apr. 15, 2009).
19. *Id.* * 1.
20. Watts v. Missouri-Kan.-Tex. R.R. Co., 383 F.2d 571, 583 (5th Cir. 1967).
21. Shoshone-Bannock Tribes v. Shalala, 988 F. Supp. 1306, 1318 (D. Or. 1997).
22. Dallas Typographical Union v. A.H. Belo Corp., 372 F.2d 577, 579 (5th Cir. 1967).
23. Silicon Graphics, Inc. v. ATI Technologies, Inc., No. 3:06-cv-00611-bbc, 2008 WL 4200359 (W.D. Wis. Jan. 30, 2008).
24. ABA Model Rules of Professional Conduct, Preamble [1].
25. Judge Hugh R. Jones, Appellate Advocacy, Written and Oral, 47 J. Mo. Bar. 297, 298 (June 1991).
26. Henry Weihofen, Legal Writing Style 8-104 (2d ed. 1980) (discussing the four fundamentals).

# How to Streamline & Grow a Law Firm


**By Deborah S. Sweeney**

"ONCE UPON THE TIME, THERE WAS A shepherd who was taking care of his flock. One day, he saw a wolf come out of the woods and approach his sheep. Surprisingly, the wolf did not attack them and, as the days passed, actually helped the shepherd in corralling the flock. Eventually, the shepherd grew to like the wolf, as the wolf made the shepherd's life easier. After a while, he decided to take a few hours off, and left the flock to be cared for by the wolf. When he returned, half of the sheep were missing, carried off by the wolf, and the shepherd realized how foolish he was to trust a wolf among sheep."

So, what does that have to do with practicing law? Believe it or not, this is not only a good story, but it has a relevant message; relegate tasks well, and do not over-rely on others. While shepherding isn't currently the hottest profession, there are plenty of people who can learn something from the story, and from shepherds in general.

It is all too true that, in an effort to cut corners, too many companies feed their clients to the wolves, hoping to save just a bit of time. Lawyers, however, find themselves on the opposite spectrum, and tend to rely too heavily on themselves while working. If a client comes in and asks a question about incorporating or taxation, they often take it upon themselves to do the research and answer the question. Hard work comes with working in law; fifty to sixty hour workweeks are nothing new to the profession.

But no one should be too averse to finding some outside help. While it may seem like attorneys who do so are leading their clients into a wolf den, third-party affiliates can be extremely useful when trying to do accomplish tasks that make a small part of overall work. Incorporation, for example, is likely a very small part of the services that most business lawyers offer. Yet filling out and filing corporate paperwork takes up quite a bit of time, and that could be worth more than the fee being charged. After all, a bit more time can mean a few more clients, and growing a client list is vital for growing a firm.

Clients, in this shaky economy, are moving to try and combine the services of various professions into one. Lawyers are suddenly becoming business advisors as well, but and if a client is on a budget and wants to save money, someone who can both act as a lawyer and give business advice will be their hero. Recommending third-party affiliates, with that aim in mind, makes sense. Even though, at first, it may seem like anyone who does this is sending money out of the door, it is likely that a client will return after an initial rapport is created.

Lawyers cannot possibly know every possible answer to the questions their clients approach them with. Luckily, third-party companies can act as a research agent along with a filing tool. These companies have grown and gained business by being willing to fill out paperwork, and developing an understanding of exactly what goes in to the service many lawyers are trying to provide for their clients. If they do not have an answer directly off the cuff, they likely are not averse to researching the answer. After all, they are going to treat anyone who contracts them as a client, and thus will try to make the entire experience as seamless as possible.

Outside companies also have access to office databases that most attorneys may not.

The United States Patent and Trademark Office, for example, does have a search page, but the results can be difficult to interpret and confusing. Third parties that deal with the USPTO on a daily basis, however, have had the incentive to invest in understanding what the search page pops up. This saves time, helps eliminate confusion, and means that past work won't come back to haunt anyone. If nothing else, most lawyers who decide to work with another company in this capacity say it means one less thing to weigh on their mind, and one less thing to research.

Nearly everyone reading this has heard their own fair share of crooked lawyer jokes, which means potential clients have all heard them as well. This can make finding new clients a bit difficult, as most potential customers are not going to trust whatever hype is created around a firm. Advertisements already have a difficult time breaking through the noise and reaching people, and a lack of trust between advertiser and consumer only stands to make the process that much harder. A good alternative, then, are third-party tools.

It is entirely possible to handle this in office. Google is an amazing tool, and there are hundreds of review sites out there. While attorneys cannot control how clients talk about their firms and services, if they work well together, the client is happy, and if someone asks, a few clients will likely leave a review about the firm they worked with. After that, it is a matter of finding and posting it. Having a working knowledge of review sites is a must, and firms interested in using client reviews should track them as much as they can.

Avvo, as just an example, is a great place to start. Any attorney wishing to do this, though, must remember to remind clients to write these recommendations or give these referrals. This opens up an entire can of worms in regards to how pushy they should be, how often they remind people and how to even bring it up.

Luckily, there are plenty of companies out there who are willing to do this instead. Experience, as in most cases, should be the attorney's closest friend; they want to go with a company

that is well established and has seen results. Timing is extremely important when it comes to testimonials, as the best reviews come directly after a service has been used.

At the same time, it would be counterproductive to hire a company that is going to hassle clients so much that they end up writing a bad review as revenge for their full inbox and all of the calls during dinner. Anyone looking to contract a company for this should shop around and ask other lawyers for their own recommendations.

These companies can also help firms in their effort to create an online presence. Again, consumers are initially hesitant to believe things posted online; if an attorney has a website with a bunch of gaudy ribbons and fake testimonials, they are probably going to scare away anyone who clicks on their page. But finding the proper channels via the internet to get a firm's name known is becoming more necessary by the day. Using an outside company to do this is a great middle ground between handling everything within the company and hiring a PR firm. A small investment now can yield great results in the future, as long as everything is implemented wisely.

Lawyers know how to work hard, and are used to doing everything themselves, but that means a ridiculous amount of time ends up being invested in non-law related aspects of their practice. There is no reason to sacrifice efficiency to be involved with every little thing.

The parable of the Wolf and the Shepherd may warn about relying on unknown, outside help, but if the shepherd had relegated the work properly, he would have a sheepdog helping him protect his flock, rather than have seen half of his sheep dragged into the woods. Lawyers protect their clients in a very similar way; but affiliating themselves with outside, third-party companies can help them streamline and grow their firm.

***Deborah S. Sweeney**, Esq. is CEO and owner of MyCorporation.com, an online document filing service working with attorneys and entrepreneurs to file and maintain corporations and LLCs. She can be reached at dsweeney@mycorporation.com.*

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# Santa Clarita Valley Bar Association

## Half-Time Report

**PAULETTE GHARIBIAN**
SCVBA President

THIS YEAR HAS BEEN exciting for the Santa Clarita Valley Bar Association. There are a number of members responsible for the success of the organization. This article is dedicated to thanking those who have dedicated countless hours to the growth and success of our association.

This year's Board of Trustees include Past President Brian Koegle, President Elect Barry Edzant, Treasurer Samuel Price, Secretary Amy Cohen, Members at Large Jim Lewis, April Oliver and Mark Young, and San Fernando Valley Bar Association Liaison Caryn Sanders. The members of the Board have been instrumental with the planning and continuous development of this organization.

A big thanks is owed to the dedicated service of the Board for their consistent support and their unmatched leadership skills. The year kicked off with an exciting networking mixer at Sabor restaurant in January. Members enjoyed mingling, mixing and networking with other attorneys while enjoying a free beverage and endless appetizers. In the months following, the Board focused on answering to the needs expressed by the membership by providing continuing legal education credits in the hard to obtain topics of substance abuse and ethics. May and June hosted more networking opportunities, including an evening mixer, as well as a networking breakfast.

Substantial efforts go into planning monthly events and it is through the hard work of the Board that the membership can reap these benefits. There will never be enough words to tell each volunteer how grateful the association is for their help. Halfway through the year means there are many more exciting months ahead.

In August, the Santa Clarita Valley Bar Association will join hands with the San Fernando Valley Bar Association to host a joint networking mixer at Gordon Biersch restaurant in Burbank.

Upcoming events also include the SCVBA's September presentation on the topic of employment law. This event qualifies for one hour of Mandatory Continuing Legal Education credit and will be a dinner event at the beautiful Tournament Player's Club in Valencia.

October will host our annual Law Appreciation Day. The event has been calendared for October 7, 2011 at 12:00 noon. For information regarding tickets, event pricing and sponsorship information, contact info@scvba.org.

For details about the above referenced events and additional information regarding sponsorship opportunities, log onto the SCVBA Calendar of Events at www.scvbar.org.

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

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*We welcome the following new members who joined the SFVBA in May 2011:*

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**Hunt C. Braly**
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Santa Clarita
(661) 259-6800 • huntb@hackerbraly.com
*Civil Litigation, Real Property*

**Patricia I. Forman**
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**Marine Grigorian**
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Reseda
(818) 654-2920 • mgrigorian@sparagnalaw.com
*Workers' Compensation*

**Killain R. Jones**
Law Office of Killain R. Jones
Reseda
818-399-5562 • killainlaw@lexmail.com
*Criminal*

**Kelly A. Keeley-Frost**
Law Offices of Brent Edward Vallens
Chatsworth
(818) 717-1885 • kfrostlaw@aol.com
*Paralegal, Alternative Dispute Resolution*

**Linda A. Luke**
Luke & Barron
Visalia (559) 733-9505 • ll-lb@pacbell.net
*State Bar Certified Specialist: Family Law*

**Michael J. Perry**
Michael J. Perry, Esq., PLC
Marina del Rey
(310) 496-5710 • mjperrylaw@gmail.com
*Civil Litigation*

**Honey Shahnematollahi**
Law Office of Honey Shahnematollahi
Woodland Hills
(818) 293-7529 • hanieh.shahnematollahi@gmail.com
*Criminal*

**Brian H. Standing**
Tisser Law Group
Woodland Hills
(818) 226-9125 • brian@tisserlaw.com
*Estate Planning, Wills and Trusts*

**Sanford M. Wall**
Hollenbeck & Cardoso, LLP
Long Beach
(562) 733-3160 • swall@hollenbecklaw.com
*Landlord/Tenant*

# Calendar

**SAVE THE DATE**

San Fernando Valley Bar Association

## 2011 Autumn Gala

Installation of SFVBA and VCLF Officers and Trustees

**Saturday, September 24, 2011**

Warner Center Marriott

6:00 p.m. Cocktail Reception

7:00 p.m. Dinner and Installation Ceremony

$95 Individual Tickets • $950 Table of Ten

Sponsorship and advertising opportunities are available.
Call (818) 227-0490, ext. 105 for further information.


### Joint Meeting with CALCPAs
## What You Must Know About Elder Care Issues

JULY 12
12:00 NOON
MONTEREY CLUBHOUSE AT ENCINO
ENCINO

Attorney Caren Nielsen outlines what you need to know about elder care law, including relevant new laws for CPAs and attorneys, what to say to avoid malpractice and instances to be aware of regarding property transfer and Medicare qualifications. RSVP at www.calcpa.org (select promo code SFV_BAR) or call (800) 922-5272.

**MEMBERS**
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**NON-MEMBERS**
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### Litigation Section
## 638 Judicial References

JULY 21
6:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Judge Bert Glennon will give an update on 638 Judicial References and discuss the best times to seek this alternative.

**MEMBERS**
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**NON-MEMBERS**
**$45 prepaid**
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### Litigation Section
## Litigation Tools: CaseMap Suite

AUGUST 18
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Join us for this free luncheon sponsored by LexisNexis and learn the latest on CaseMap Suite, which will help you organize your case and create the very best polished work. Space is Limited.

**FREE for SFVBA Members**
**1 MCLE HOUR**

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


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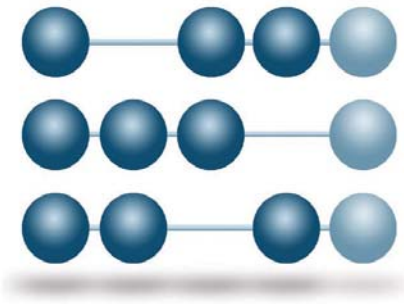

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