

# VALLEY LAWYER

JUNE 2011 • \$4

A Publication of the San Fernando Valley Bar Association

## Ethics Basic Refresher

Earn MCLE Credit

## Long-Term Care Planning for an Aging Population

## Maximize Savings with Member Benefits

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# VALLEY LAWYER

A Publication of the San Fernando Valley Bar Association

## VALLEY LAWYER

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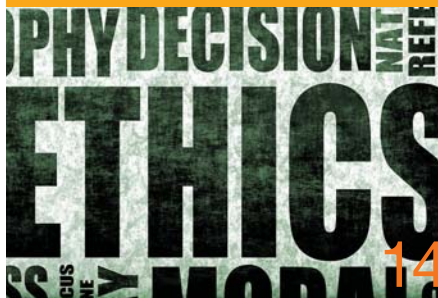
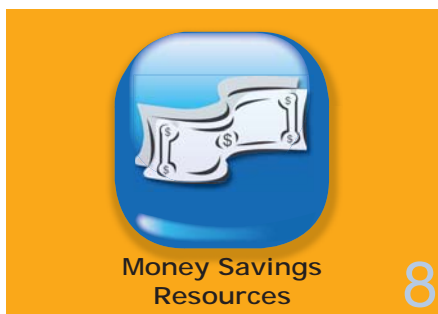
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A close-up portrait of a woman with long brown hair and blue eyes, smiling. She is wearing a grey blazer over a teal collared shirt. The background is a soft, out-of-focus brown.

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## The Audience Was Listening Survey Results of the "What If?" Program



**SEYMOUR I. AMSTER**  
SFVBA President

**A**S I MENTIONED LAST MONTH IN MY COLUMN, the "What If?" program was launched on March 8 and 9 when lawyers from the San Fernando Valley Bar Association visited the classrooms of ninth graders at Northridge Academy High School (NAHS).

The primary purpose of the program is to provide information to high school students concerning drugs, alcohol and sex. The program is designed to present the information in a receptive manner for the students. The goal is to not only inform, but also to give students the tools they need to consider their options when being placed in difficult situations.

The program is divided into three parts: 1) a presentation by a judge, followed by a question and answer session with the bench officer; 2) a presentation by lawyers informing students about their careers and other relevant life stories; and 3) skits and group discussions of real life situations for students to consider their options.

NAHS conducted a survey to determine if the students who participated in the program felt it was worthwhile, with 229 ninth grade students who participated in the program completing a survey about the program.

The results were overwhelmingly positive and supportive of the program. Below you will find a sample of quotes from the students about the judges, the lawyers and the overall program. The results of the survey are as follows:

- 78.1% of the students surveyed enjoyed talking to the judge
- 87.3% of the students liked the topics that were discussed
- 77.7% of the students stated they felt better prepared for the situations that might happen to them as a result of the program
- 66.3% of the students felt that the program helped them know more about options about their education or career

### Quotes about the Judges

- I enjoyed talking to the judge because she was very open and thought of us as equals.
- She was really friendly and she had a lot of information for us.
- She was very warm hearted, very friendly, and a wise judge. Doesn't abuse her power.
- I've never met a judge before. She was very comforting

“

**I really liked and enjoyed the "What If?" Program. They really opened up my eyes to stupid mistakes people have made and now I know better for the future." – NAHS Ninth Grader**

and she didn't seem cold like other judges I've seen on TV.

- I used to think of judges as cold and hard. She changed my view on judges with her openness.
- I thought they were really mean people but they're really nice people.
- Before I thought the judge was someone who listens to both sides of the story and decides if the person is guilty or not but the jury also decides besides the judge.
- The judge said cool things about herself and what she does.
- I got to see her points of view and what motivated her to become a lawyer.
- I think the judge that presented for us was different then most judges I've met. She was very kind and you can see how much she had gone through.
- They have more drama

then I thought.

- I do think differently of a judge then before because now I know they're not all mean and some have really good reasons for doing that job and I know why they like it.

### Quotes about the Lawyers

- I liked how they were open about several cases they had to deal with and how they talked a lot about the laws and how not to be disrespectful to police officers.
- I liked the law stories and what someone does to help people.
- I really enjoyed all the stories that the lawyers talked about.
- I liked them talking about their jobs and the cases they had.
- I liked how they related the situation to real life situations instead of just getting the situations out of nowhere. I learned a lot of things from both the judge and lawyers.
- I liked how you had different lawyers that do different things and what to do and what not to do.
- I liked that they shared personal stories and examples.
- I liked that they were sharing what really happens or goes through their mind.
- The lawyers explained to us some situation/cases they've done and what we could do to get out of it or get help.

### Quotes about the Program

- Now I know what are the consequences.
- I did not know you have to wait to have sex until you are 18.
- [I learned] to never trust anyone at a party and never leave your cup alone because it could get spiked.

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- I've seen these situations happen and never knew the consequences.
- I got to know what to do and how to react during or after the situation.
- It further informed me on dangers I could get into in the future.
- Now, I know the disadvantages of the situations and I don't want to go through that.
- Now, I know if I get pulled over I shouldn't reach down to tie my shoe for example.
- It was a very informative and mature discussion that informed us about our choices and our consequences. I believe at this age we should have these discussions.

### Overall Program Comments

- I think it was a great activity for all kids.
- I liked it because it gave tons of information and gave me some help about how to move up in life.
- It told me if I have sex under 18 it is illegal even if the other person says yes. Also told us what happens to people who take drugs.
- The class seemed very interested, cooperative. Saw the illegal terms and consequences of those terms. I'm more aware of the law. It was educating.
- I liked it because I learned how drugs work. I still want to learn more of how drugs affect you.
- I learned a lot from it, on how people aren't aware of when their doing drugs, and how they are changed.
- Yes, this activity helped me become better prepared for situations.
- I really liked and enjoyed the "What If?" Program. They really opened up my eyes to stupid mistakes people have made and now I know better for the future.
- I learned that I have to relax and be safe when it comes to the police and I liked it.
- The class participation was very good because everyone was involved. What I liked about it was that they talked about things that we would be interested in. I learned a lot about drugs and other topics.
- I liked the presentations very much. It told me that your life and body are precious things and you shouldn't throw it away for liquor drugs or guys. I really liked the natural high part because it reminds me of how I'm happy and that I don't need drugs/alcohol to feel good about myself.
- I think it was very fun because I learned about sexting, drinking laws and rules about having sex.
- What I learned from it is sometimes people do those kinds of things all the time and some people don't get the picture of how much danger they are in at all.
- I liked it because it was a very true "What If?"

On March 8<sup>th</sup> and 9<sup>th</sup> lawyers from the San Fernando Valley Bar Association visited the classrooms of ninth graders at one of our local high schools. On that day lawyers from our organization helped young adults consider the consequences of making bad decisions. On that day we provided teenagers in our community the opportunity to realize judges are not mean and are real people. On March 8<sup>th</sup> and 9<sup>th</sup> our organization made a difference.

As we continue to expand this program in the coming years we will continue to make a difference. Because of the commitment of all involved our message was received and we accomplished our task, we gave young minds the knowledge to make the right decisions. 🐾

*Seymour I. Amster can be contacted at [Attyamster@aol.com](mailto:Attyamster@aol.com).*



## Celebrating Our Members



**ELIZABETH POST**  
Executive Director

**JUNE IS THE SAN FERNANDO VALLEY BAR ASSOCIATION'S INAUGURAL MEMBER APPRECIATION MONTH.** Our month-long celebration will recognize members and volunteers for their support and participation. The highlight of the month is our **Member Appreciation Ice Cream Social & 85th Birthday Party** on June 14 from 5:00 to 6:30 p.m. at our Woodland Hills offices. All members are invited to enjoy ice cream sundaes and cupcakes, network, win great prizes, as well as learn more about the many great benefits SFVBA membership offers. The event will give special recognition to the following members who volunteer for the SFVBA's more than two dozen sections, committees and programs, and to our large law firm members for their support. 🍦

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# Maximize Savings with Member Benefits

By Angela M. Hutchinson

**T**HE SAN FERNANDO VALLEY Bar Association strives to play an important role in its members' professional development and daily practice of law, and provide the community with easy access to legal resources and support. An array of benefits are offered to SFVBA members to assist them with the various aspects of practicing law in the San Fernando Valley, as well as to encourage them to live a balanced life of work and leisure.

This month, the Member Benefits page of the SFVBA website will undergo a redesign to help members better understand the value of each discount. Member benefits are categorized into two main areas: 1) Discounts and Savings and 2) Educational and Professional resources.

Many member benefits providers will be on hand at the SFVBA Member Appreciation Ice Cream Social & 85<sup>th</sup> Birthday Party on June 14 at the Bar's offices from 5:00 to 6:30 p.m. It is an opportunity for members to learn firsthand about the perks of membership, as well as enjoy an afternoon of ice cream sundaes and cupcakes, receive recognition for their volunteerism, and participate in raffles for an iPad and other sought after prizes.

There are over thirty benefits for SFVBA members to maximize savings, but below are a few highlights.



## Amusement Parks

This summer, be sure to take advantage of the SFVBA member discounts with Six Flags Magic Mountain and Hurricane Harbor, Universal

Studios Hollywood, San Diego Zoo, Sea World, Knott's Berry Farm, Raging Waters San Dimas, Discover Science Center in Orange County and several other entertainment attractions!

Discounts may apply to regular admissions as well as season passes. Contact the Bar offices to receive a package of discount coupons and membership cards for Southern California's major theme parks and attractions. Most of the discounts are available online through the parks' websites; otherwise, you can also receive the discount at the door with the appropriate promotional code.



## Auto Club

Members can save \$10 on new AAA Membership. There are also discounts with new insurance. Contact Hazel Sheldon at (818) 615-2289 and

mention campaign code 39727.

The SFVBA has also negotiated discounts of 10-15% for daily and weekly car rentals from Avis and Hertz.



## Conference Rooms Rental

The SFVBA offers its conference facilities to members for depositions and hearings at very competitive prices. The 600 square foot executive boardroom comfortably seats 20. An adjoining conference room is perfect for breakout sessions and private meetings. Amenities include wireless internet access, beverage service, free parking, table data/electrical jacks and retractable overhead screen.

The fee to reserve the conference room is \$150 for SFVBA members and \$200 for non-members. Daily rates apply for use during normal business hours from 9:00 a.m. to 6:00 p.m., Monday to Thursday, and 9:00 a.m. to 5:00 p.m. on Friday. There is a \$25/

hour surcharge for rentals outside of normal business hours.



## Pet Insurance

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members can save hundreds of dollars in premiums over the life of their pet with the 5% group discount. For more information, call (877) PETS-VPI or visit [www.petinsurance.com/affiliates/sfvba](http://www.petinsurance.com/affiliates/sfvba).



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**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](mailto:editor@sfvba.org).



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# Long-Term Care Planning for an Aging Population

By Barry L. Pinsky, CFP®, ChFC, CLU

**R**EGARDLESS OF ONE'S AGE OR STATION IN life, an individual likely has a relative or close friend of the family who is currently facing the challenges associated with the infirmities of life as an aging senior citizen. While the remarkable progress of modern medical science has raised the average life expectancy in this country to almost 80 years of age, the attendant risk is the onset of illness or infirmity limiting the mobility and independence of many of the elderly.

According to the American Society on Aging, Americans aged 65 and older have a 70% chance of requiring long-term care assistance some time during their lifetimes.<sup>1</sup> For those family members or close friends involved in the care of a loved one facing incapacity, especially in cases of limited financial means or severe dysfunction, the decisions can be extraordinarily painful.

Long-term care (LTC) differs from traditional health care. While most health care plans and insurance coverage revolve around treatment by a physician or hospital for some acute medical malady, LTC generally involves personal care or custodial care required as a result of general physical or mental limitations.

## What is LTC?

According to the U. S. government, "Long term care is a variety of services that includes medical and non-medical care to people who have a chronic illness or disability. Long-term care helps meet health or personal needs. Most long-term care is to assist people with support services such as activities of daily living like dressing, bathing and using the bathroom. Long-term care can be provided at home, in the community, in assisted living or in nursing homes. It is important to remember that you may need long-term care at any age."<sup>2</sup>

LTC can range from minimal assistance with personal hygiene and mobility within the home to residential assisted living to full high-skilled nursing care within a residential nursing facility. The need for LTC may arise from an inherited or acquired disabling condition, from a condition present at birth, from accident or injury, from chronic physical deterioration as in normal aging, or from degenerative disease such as arthritis, Parkinson's disease or Alzheimer's disease.

## Who Utilizes LTC?

Illness or disability may strike at any age. In fact, 40% of those individuals currently receiving LTC services are between the ages of 18 and 64.<sup>3</sup> Nonetheless, the necessity for long-term care occurs predominately among the elderly. It has been estimated that by 2020, 12 million older Americans will need some form of long-term care assistance, that people who reach age 65 will likely have a 40 percent chance of entering a nursing home at some time, and that about 10 percent of

the people who enter a nursing home will stay there five years or more. LTC is generally considered to be indicated when an individual requires substantial assistance with at least two of the common Activities of Daily Living (ADLs): bathing, dressing, transferring, eating, toileting and continence, or when an individual suffers an impairment of cognitive ability, requiring substantial supervision due to mental impairment.<sup>4</sup>

## What Services are Offered by LTC Providers?

Most individuals needing assistance which would qualify as LTC are cared for at home, most frequently by unpaid family members or friends. Family assistance is certainly admirable and may be an economic necessity in early stages of incapacity. However, in cases where familial assistance cannot adequately accommodate the needs of the patient, professional intervention may be needed.

Formal, paid LTC may include home care, or care in a residential care facility or a nursing facility. Home care may include home health care by a skilled nurse or professional, personal care assistance with ADLs, homemaker services, hospice services for the terminally ill, and respite care, which is designed to relieve a primary caregiver at home. Facility care refers to a range of services including adult day care for daytime supervision, assisted living facilities, convalescent hospitals, board and care facilities, or institutional settings such as intermediate care facilities and skilled nursing homes.<sup>5</sup>

## What are the Costs Associated with LTC?

As fraught with anxiety as the progressively severe physical limitations may be for one gradually slipping into incapacity, the financial burdens introduced by the necessity for LTC may be almost as daunting. Genworth Life Insurance has surveyed the costs of various levels of LTC. For California in 2010, the average annual cost for a semi-private room in a skilled nursing home was \$73,000, or slightly over \$6,000 per month. A private one-bedroom unit at an assisted living facility ran approximately \$42,000 per year. A home health care aide averaged approximately \$46,000 per year, depending upon the services required. Keep in mind that these expenses are exclusive of costs of medical care and medications. Genworth found costs for assisted living and skilled nursing facilities to be increasing at a compound annual rate of approximately 4.5%.<sup>6</sup>

The considerable and escalating costs of LTC services represent a major risk to the financial well-being of clients. Patients utilizing LTC services require an average of 3 years of care.<sup>7</sup> Financial plans and projections can easily unravel under the unanticipated burden of annual expenses necessitated by the incapacity of a beloved family member. The lives and fortunes of others may be directly and severely impacted by



the unexpected needs of a victim of infirmity. Lives of family care-givers may be put on hold and rearranged. Budgets must be reviewed and revised. Savings and investment accounts are analyzed for income options. Yet family members may be expected to believe that "Failure is not an option." So, the obvious question becomes...

### Who Pays for LTC Services?

As expected, the preponderance of the burden for providing care to those suffering from some degree of incapacity falls upon family and friends. AARP has estimated that the value of unpaid services provided by caregivers approaches \$375 billion.<sup>8</sup> When the needs exceed the capacity of unpaid assistants, the lion's share of the financial burden falls to the government. Medicare, the federal health plan for those over 65 years of age, covers approximately 20% of LTC cash payments. However, Medicare only covers a limited period of time in a certified skilled nursing or rehabilitation facility, and only after a qualifying hospital stay. Beyond these post-acute limitations, Medicare only covers costs which require professional medical attention.

Medicaid (in California, Medi-Cal) represents the largest contribution to LTC cash payments, covering approximately 40% of all cash outlays.<sup>9</sup> However, Medicaid was established to cover health services for low-income individuals and families, not as a national program for underwriting long-term care services. Those who qualify for Medicaid must have low incomes and minimal individual financial assets. While some families have made a conscious effort to artificially impoverish an incapacitated member in order to allow him to qualify for Medicaid assistance, severe negative consequences may result from such manipulation.


After governmental options are exhausted, the financial obligations fall to the families. 29% of all LTC expenditures are covered out-of-pocket from the resources of family members. Another 7% of cash outlays are covered by private insurance plans held by individuals.<sup>9</sup>

As the average population of our nation ages, with life expectancies rising and with the members of the Baby-Boom generation beginning to reach retirement age, the demands for care for the infirm can be expected to increase dramatically, with attendant pressures on all resources, public and private.

In the current climate of shrinking government budgets at all levels, expenditures from private accounts for LTC services will inevitably increase. While many family financial plans are beginning to consider setting aside reserves for eventual LTC needs, there is increasing interest in utilizing long-term care insurance as a potential vehicle for mitigating risk to client savings in the event of unforeseen long-term incapacity.

### Long-Term Care Insurance





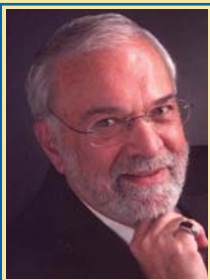







Long-term care insurance covers costs related to providing various forms of assistance to an individual who has been certified as "chronically ill." Generally, the individual requires substantial supervision or assistance to protect him or herself from threats to health and safety resulting from cognitive impairment, or is unable to perform two or more activities of daily living (ADLs) as defined above.<sup>10</sup> The range of covered services is generally very specifically defined in the policy, and may include nursing and residential care facility coverage only; home care only (including home health care, adult day care, personal care, homemaker services, hospice services and respite care); or comprehensive long-term care covering both types of assistance.<sup>4</sup>



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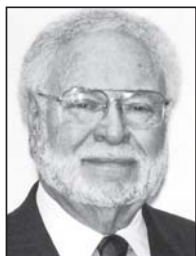
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The payment of LTC benefits is triggered in most policies by one of two determinations: a physician's finding that a patient is impaired in at least two of the six ADLs (bathing, dressing, transferring, eating, toileting or continence) or a finding that a patient requires "substantial supervision due to severe cognitive impairment."<sup>4</sup>

Policies may vary significantly with regard to contract terms and conditions. The first factor to weigh when evaluating a LTC policy is the benefit amount, that is, the maximum amount that the policy will pay on a daily or monthly basis during the incapacity of the policy holder. Related to the daily or monthly benefit amount is the lifetime benefit, the maximum amount of coverage which the policy will provide over the lifetime of the patient. The coverage may indicate a maximum dollar amount or a specific period of time during which benefits will be paid.

Policies clearly state the types of LTC benefits which are covered: nursing and residential care facility only; home care only; or comprehensive. The specific services are also indicated. Most policies exclude payments to family members.

LTC policies generally require a waiting period (known as the "elimination period") of typically 60 or 90 days during which the policy holder is ineligible for benefits. This period serves as a type of deductible on insurance company payments during which the patient must cover his own expenses. An additional important consideration in evaluating policies is the inflation protection option available. Since LTC insurance is purchased in order to provide potential benefits in the relatively distant future, the costs of care may be expected to escalate significantly from the time the policy is first written to the time that benefits are actually triggered. Inflation protection clauses may help to insulate the policy from the ravages of relentlessly rising costs of care.

Of course, as with any insurance product, the policy premium costs, the tax ramifications, guarantees of premium stability and/or benefits, and the strength of the underwriting insurance company are all important considerations. LTC insurance is a complicated product, and must be evaluated carefully prior to any purchase decisions. As with many other insurance services, the earlier a policy is purchased, the annual premiums will typically be lower.

Long-term care and insurance are complex issues. The future needs may be uncertain individually, but are indisputable societal. Individuals need to assume greater responsibility for the care of oneself and loved ones. 🏠

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<sup>1</sup> American Society on Aging, "Americans Fail to Act on Long-Term Care Protection," May 2003.

<sup>2</sup> [www.medicare.gov](http://www.medicare.gov), March 2011.

<sup>3</sup> "A Federal Case for LTC," *Employee Benefit News*, 02/01/2003

<sup>4</sup> California Insurance Commissioner 2008 Guide to Long Term Care Insurance

<sup>5</sup> The Scan Foundation, "Long-Term Care Fundamentals," November 2010.

<sup>6</sup> Genworth Financial, "Genworth 2010 Cost of Care Survey," April 2010.

<sup>7</sup> Kemper, P., Komisar, H.L., Alecxih, L., "Long-Term Care Over an Uncertain Future," Inquiry, 2005.

<sup>8</sup> AARP Public Policy Institute, "Valuing the Invaluable," 2008.

<sup>9</sup> Avalere Health LLC, Avalere analysis of 2008 CMS National Health Expenditures data, cited in reference (5).

<sup>10</sup> New York Life, Long-Term Care Insurance, "What Does Long-Term Care Insurance Cover? - CA."





## SFVBA Member Bernard Grossman Going Strong and Leading the Way

The Story of an Outlaw, the Governor and Elizabeth Taylor

By Lisa Miller

**A**TTORNEY BERNARD GROSSMAN HAS BEEN a guiding light of the San Fernando Valley Bar Association for more than 50 years, focusing on raising the profile of the Valley's practice community, meeting the needs of its residents and protecting the rights of the vulnerable and the disenfranchised.

Grossman has been involved in SFVBA's leadership, special projects and committee work. As a result of his foresight and leadership as a past president, the Bar has realized the long-term support of both the bench and the bar. And he has had a lot of fun doing it.

Born in 1926, Grossman grew up in Quakertown, New Jersey. Expecting to be drafted into the Army to serve in World War II, he attended a special program at Temple University in order to earn a high school diploma ahead of schedule. Although he served in the armed forces, he did so performing on the clarinet in an army band based in New Jersey.

Grossman earned multiple degrees and teaching credentials at UCLA by 1951. He taught grade school, junior high and high school. His most famous student was the young screen star Elizabeth Taylor.

After graduating from Loyola Law School in 1955, he entered what has to be one of the most interesting law practices ever. He partnered with James R. Ross, the grandson of Jesse James, the celebrated American outlaw. As a result of the connection, Grossman led the way on a notorious appellate case in which he represented Jesse James, Jr., the son of Jesse James, in a defamation matter against Screen Gems.

No matter a case's particular details, Grossman was always focused on representation. In the mid-1960's, he was co-counsel with Jerry Brown, now the Governor of California, in a civil rights matter. The case went to the Supreme Court, where he secured a victory, albeit a partial one. His case established that when a defendant is in custody, silence is not a confession. The joint representation relationship was extremely meaningful to Grossman on many levels. "We must preserve civil rights at all costs and at all times," Grossman says.

He practiced for many years on Ventura Boulevard in the San Fernando Valley. "The Valley needs lawyers," he says. "You can't escape growth."

He practiced on his own but also in partnership with Past President Tamila Jensen. He maintained a busy litigation practice. "Lawyers should serve together in groups," he says. "They should get to know each other." "Litigators spend half their lives in the hall drinking coffee waiting for something to happen," he says. "It's a pain in the butt."

In his years in practice, he has been in many courthouses and before many bench officers. "Overall, the bench officers are very good, whether appointed by a Republican or a Democrat" he says. "But they should never be elected."

Grossman went on to a position as a trusted neutral. He was a busy personal injury arbitrator for many years. "I enjoyed being an arbitrator," he says. "Most lawyers are competent, but lack the language skills to communicate their cases."

Active in the intellectual community, Grossman wrote a well-respected text "Don't Let the Bastards Get You Down: The Odyssey of a Suburban Lawyer." He is preparing to teach courses on the Korean War, President Abraham Lincoln and jurist Oliver Wendell Holmes, Jr.

When asked for his thoughts regarding his exemplary career, he responded in classic feisty Bernard Grossman fashion, "I'm still here!" 🐘



Bernard Grossman's star student, Elizabeth Taylor.

*Lisa Miller is a Trustee of the San Fernando Valley Bar Association. She can be reached at (818) 802-1709 or Lisa@LMillerconsulting.com.*



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## MCLE ARTICLE AND SELF-ASSESSMENT TEST

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

# Ethics Basics Refresher

By David Gurnick

**T**HE PRACTICE OF LAW IS A Profession. In *Saunders v. Weissburg & Aronson*, the court of appeal noted that the practice of law remains a profession, rather than a business. (74 C.A.4th 869, 874 (1999)). Lawyers are officers of the court. As professionals, and officers of the court, lawyers are bound to act ethically. As also stated by the court of appeal, the legal system depends on the public's trust in the integrity of lawyers. (*Styles v. Mumbert* (2008) 164 C.A.4th 1163, 1169).

The rules governing lawyer professional conduct are embodied largely in the State Bar Act, Rules of Professional Conduct and court decisions. The Professional Conduct Rules are formulated by the State Bar Board of Governors, subject to approval of the Supreme Court. (Cal. Bus. & Profs. Code Sec. 6076).

## Six Basic Ethical Principles that Apply to California Lawyers

**1. Compliance with the Rules of Professional Conduct.** The Rules of Professional Conduct govern the conduct of all members of the State Bar. (Rule 1-100(A)). Members are subject to the rules when practicing in or outside the state. (Rule 1-100(D)(1)). Federal law requires federal government attorneys to comply with the Rules of Professional Conduct when performing duties in the state, even if they are not State Bar members. (28 U.S.C. Sec. 530B). Likewise, lawyers from other jurisdictions, who engage in lawyer functions in this state, are subject to the Rules. (Rule 1-100(D)(2)). But the Rule's coverage of such out-of-state lawyers does

not authorize them to practice law in the State. (Rule 1-100(D)(2)).

**2. Admission Pro Hac Vice.** A person who is not a State Bar member, but who is a member in good standing and eligible to practice in any United States court, or the highest court in a state, territory or possession of the United States, who was retained to appear in a particular pending action, may be permitted by the court to appear pro hac vice. A State Bar member must be associated as attorney of record. The pro hac vice attorney cannot be a California resident, or regularly employed in California or regularly engaged in substantial business, professional or other activities in California. Repeated pro hac vice appearances in California is grounds for the court to deny a pro hac vice application. (Cal. Rules of Court Rule 9.40(a); (b)).

A pro hac vice appearance requires submission of a verified application attesting to the applicant's residence and office address, courts in which the applicant is admitted and dates of admission; the applicant's good standing in those courts and absence of suspension or disbarment; information on prior pro hac vice applications in the prior two years; and the name, address and phone number of the State Bar member who is associated as attorney-of-record in the case. There is also a filing fee (currently \$50). (Cal. Rules of Court Rule 9.40(c) - (e)).

A member in good standing, eligible to practice before any United States court or highest court in any state, territory or possession, but who is not a State Bar member, may represent a client in an

arbitration in California. The attorney must serve a certificate on the arbitrator(s) or arbitral forum, the State Bar, and all parties and counsel, and the appearance must be approved by the arbitrator(s) or arbitral forum. (Cal. Rules of Court Rule 9.43). The certificate contains information similar to that required for a pro hac vice application. (Code of Civ. Proc. Sec. 1282.4). This authorization for out-of-state attorneys to appear in California arbitrations expired January 1, 2011 (unless extended by a new law).

An attorney who is an active member in good standing of another state, jurisdiction, possession, territory or dependency, but is not a State Bar member, may register with the State Bar as a "Registered In House Counsel." The attorney must file an application to determine his or her moral character, and meet other eligibility requirements, but need not take the Bar Exam. The attorney must live in California, may practice law only for the entity for which he or she registers, (and, if he or she wishes, as a registered legal services attorney), and must comply with all Rules of Professional Conduct and MCLE rules. (California Rules of Court, Rule 9.46).

The attorney cannot make court appearances in California state courts, or engage in activity for which pro hac vice admission is required when performed in California. He or she cannot provide representation to the employer's customers, shareholders, owners, partners, officers, employees, servants or agents. Registration as Registered In-House Counsel must be renewed annually. (California Rules of Court, Rule 9.46).



### 3. When is a Written Fee Agreement

**Required.** The attorney-client relationship is usually contractual in nature. It is established based on an oral or written agreement. In most circumstances, the State Bar Act requires a written agreement.

An attorney who contracts to represent a client for a contingency fee must, when the contract is entered into, provide a duplicate copy, signed by the attorney and client, or the client's guardian or representative, to the client, or to the client's guardian or representative. (Bus. & Profs. Code Sec. 6147(a)). In most other matters, if it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed \$1,000, the agreement must be in writing. (Bus. & Profs. Code Sec. 6148(a)).

There are some exceptions. A written agreement is not required: (1) for services in an emergency, to avoid foreseeable prejudice to the client; (2) where a writing is impractical; (3) for a fee arrangement implied by the fact that the attorney's services are generally the same kind as previously provided to and paid for by the client; (4) if the client provides informed written consent, after full disclosure of the rule requiring a written agreement, stating that a written fee agreement is not needed; or (5) for a corporate client. (Cal. Bus. & Profs. Code Sec. 6148(d)).

One more exception applies to contingency fee contracts in collection matters between merchants for the sale or lease of goods or services or money loaned in conducting a business or profession, if the merchant client has at least 10 employees. (Bus. & Profs. Code Sec. 6147.5(a)). But in such a case between merchants, where there is no written agreement, the State Bar Act sets limits on the amount of the contingency fee. (Bus. & Profs. Code Sec. 6147.5(b)).

In a contingency fee matter, the written agreement must contain at least the following:

- (1) A statement of the agreed contingency fee rate
- (2) How disbursements and costs incurred will affect the contingency fee and client's recovery
- (3) The extent that the client could be required to pay the attorney for related matters arising from the relationship, not covered by the contingency fee contract, for example, amounts collected for the client by the attorney

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- (4) A statement that the fee is not set by law but is negotiable between attorney and client, unless the fee is set by law, provided for in Business & Professions Code §6146, and then a statement that rates in that section are maximum limits, and the attorney and client may negotiate a lower rate

For non-contingency matters, the written agreement must state at least (1) the basis of compensation (hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case); (2) the general nature of the legal services to be provided to the client; and (3) the responsibilities of the attorney and client as to performance of the contract.

**4. Basic Duties of the Lawyer.** Having been engaged to provide legal services, the lawyer is obligated to perform some basic duties for the client. This includes the lawyer's obligations stated in the parties' agreement. In addition, the State Bar Act sets forth some basic obligations to or relating to the client. The Act requires the lawyer to:

- Maintain respect due to courts and judicial officers
- Counsel or maintain only actions, proceedings, or defenses that appear to the lawyer to be just (but this restriction does not apply in defending someone charged with a public offense)
- Use only means in the representation that are consistent with truth
- Never seek to mislead a judicial officer by artifice or a false statement of fact or law
- At every peril to him or herself, preserve the client's secrets (but an exception allows revealing information when the lawyer reasonably believes it necessary to prevent a crime the lawyer reasonably believes is likely to result in death or substantial bodily harm to someone)
- Not advance a fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause the attorney is engaged in
- Not encourage starting or continuing an action from a

corrupt motive of passion or interest

- Cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against the lawyer
- Respond promptly to the client's reasonable status inquiries, and keep the client informed of developments.

(Cal. Bus. & Profs. Code Sec. 6068).

The lawyer must perform competently, to the best of his or her knowledge and ability. (Cal. Bus. & Profs. Code Sec. 6067; Cal. Rules of Prof. Conduct Rule 3-110(A)). Competence in this context has various elements, including diligence, learning and skill, and mental, emotional and physical ability. (Cal. Rules of Prof. Conduct Rule 3-110(B)).

**5. Communicating with a Represented Party.** The Professional Conduct Rules prohibit a lawyer, while representing a client, from communicating about the subject of the representation with a party the lawyer knows to be represented by another lawyer, unless that other party's lawyer has consented. (Rules of Professional Conduct Rule 2-100(A)). This prohibition is often straightforward, such as when other parties are opponents who are individuals. One party's lawyer cannot communicate on the subject of the representation, with the other party, unless the other party's lawyer has consented.

Complexities can arise, such as when there is alignment between different parties, or when another party is a business entity. The court of appeal has held that the rule applies whether the other party is an opponent or not. *Hernandez v. Vitamin Shoppe Industries, Inc.* (2009) 174 C.A.4th 1441, 1460. With regard to an entity, the Rule defines a "party" to include officers, directors and managing agents of a corporate party, and a partner or managing agent of a partnership. (Rules of Professional Conduct Rule 2-100(B)(1)). The Rule defines an entity to also include its employees if the subject of the communication is an act or omission of that individual, connected with the matter, which may bind or be imputed to the entity for liability purposes, or if that individual's statement may be

an admission by the entity. (Rules of Professional Conduct Rule 2-100(B)(2)).

The court of appeal, discussing this rule, quoted the Drafter's Note, which states that the portion defining entity parties "is intended to apply only to persons employed at the time of the communication." Thus, the rule allows opposing counsel to communicate with unrepresented former employees, and present employees, other than officers, directors or managing agents who are not separately represented, so long as the communication does not involve the employee's act or failure to act in connection with the matter which may bind the corporation, be imputed to it, or constitute an admission of the corporation for purposes of establishing liability. *Triple A Machine Shop, Inc. v State of Calif.* (1989) 213 C.A.3d 131, 140.

**6. Providing Client Files at End of Engagement.** Sometimes disputes arise at the end of an attorney-client relationship, over the delivery or return of client papers and unused retainers or fee advances. The Rules of Professional Conduct address these circumstances. When the engagement has ended, the lawyer must "promptly release to the client, at the request of the client, all client papers and property." (Rules of Professional Conduct Rule 3-700(D)(1)). The rule defines "client papers and property" to include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports and other items reasonably necessary to the client's representation," and then adds that such items are client property "whether the client has paid for them or not." (Id.). The Rule also requires the prompt refund of any part of a fee paid in advance that was not earned. (Rules of Professional Conduct Rule 3-700(D)(2)).

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# MCLE Test No. 35

**This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour in Legal Ethics. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.**

1. The attorney client relationship is usually contractual in nature, typically established based on an oral or written agreement.  
True  
False
2. Where a contingency fee rate is set by law, the agreement must tell the client that a lower rate can be negotiated.  
True  
False
3. There is no charge to be admitted pro hac vice for a particular matter.  
True  
False
4. Because arbitration does not involve a court appearance, out of state lawyers may freely represent clients in California arbitrations without making any form of application.  
True  
False
5. A person, who is a member in good standing and eligible to practice in the highest court of his or her home state and is retained to appear in a particular pending action in California, may apply to the court to be admitted temporarily, or "pro hac vice."  
True  
False
6. A non-lawyer engaged in a course of study to become a lawyer, may register with the State Bar as a "Registered In House Counsel."  
True  
False
7. "Registered In House Counsel" may reside anywhere, so long as the employer is based in California.  
True  
False
8. Because attorney-client communications are only words, a lawyer is not expected to place him or herself in unreasonable peril to protect the privilege.  
True  
False
9. An attorney who contracts to represent a client for a contingency fee must, within 30 days after accepting the engagement, provide a copy of the fee agreement to the client.  
True  
False
10. A California resident is ineligible to be admitted pro hac vice, even if he is not a member of the State Bar of California.  
True  
False
11. If the client has been fully informed of the rule requiring a written fee agreement, and signs a written statement that a written fee agreement is not needed then no written fee agreement is needed.  
True  
False
12. The Rules of Professional Conduct do not require a written fee agreement with a corporate client.  
True  
False
13. Because disciplinary matters are adversarial, a lawyer is not required to cooperate, but may use every lawful means to resist.  
True  
False
14. A lawyer cannot communicate with a current or former officer of an opposing party.  
True  
False
15. A lawyer may freely communicate with a represented party that is not an opponent in the matter in which the communication takes place.  
True  
False
16. When an engagement ends, the lawyer must promptly provide the client's papers and property to the client at his or her request.  
True  
False
17. When the engagement ends, the lawyer must return any unused portion of the fee.  
True  
False
18. The court has recognized that the practice of law is no longer a profession, but now has the characteristics primarily of a business.  
True  
False
19. Federal government lawyers practicing in California are subject to federal law, and therefore pursuant to the Supremacy Clause of the U.S. Constitution, are not bound by the California Rules of Professional Conduct.  
True  
False
20. Lawyers from other jurisdictions, who engage in lawyer functions in California, must comply with the California Rules of Professional Conduct even if they are not members of the State Bar of California.  
True  
False

## MCLE Answer Sheet No. 35

### 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:

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Woodland Hills, CA 91367

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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.

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### ANSWERS:

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

- |     |                               |                                |
|-----|-------------------------------|--------------------------------|
| 1.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 2.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 3.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
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# CHOOSING THE RIGHT CONTRACTOR FOR HOME IMPROVEMENT

By James S. Cooper



**M**OST ATTORNEYS HAVE learned, either first hand or by hearing stories from others, that choosing the right contractor to remodel one's home or build an addition can be fraught with peril. Choose the wrong contractor, and the project can be delayed, abandoned, suffer from poor workmanship and possibly leave behind a lot of red tape and obligations to pay subcontractors who may have placed liens on the home.

It's for these reasons that making the ultimate choice as to who will perform the work on the home is extremely critical. Once undertaken, it is difficult to switch contractors mid-project or get out from under a project once it's discovered to be over-budget or otherwise unsatisfactory. Therefore, in choosing a contractor, there are a number of rules of thumb which should be followed.

## BEWARE OF THE CHEAPEST PRICE

The cheapest price is not always the best choice. The well-worn adage that "you get what you pay for" frequently applies when hiring a contractor. Often times, the cheapest contractors are only cheap in their opening price before one learns of details that weren't originally negotiated or discussed. In addition, cost cutting with such contractors is often most apparent in the crews hired to perform the work, the adequacy of the contractor's insurance and the manpower available to handle problems.

To keep prices low, a cut rate contractor may use crews with little or no experience based upon the premise that an experienced supervisor or job foreman can rein in such workers, keep them on schedule, and maintain quality of work. The problem is such contractors are often chasing new dollars in the form of other jobs. It is commonplace for this business model to fail as the supervisor for the unskilled employees is often called upon to bid and supervise other jobs the contractor is desperately trying to obtain while the current job is still in progress. The result is often shoddy workmanship, lack of communication and poor sequencing between various trades who are required to work in a specified order.

This is why sometimes paying more can yield benefits, especially if the more

expensive contractor has a crew that has worked together for a significant period of time and contains more skilled employees who can generally be counted on to be capable of solving issues as they arise at the worksite. Of course, the mere fact that a contractor charges more is no guarantee that any of these positive attributes discussed will be found to exist. For this reason, it is important to thoroughly discuss these issues with any prospective contractor before deciding to retain them.

## VERIFICATION OF LICENSE

Naturally, it is critical to insure that the contractor hired for the job is licensed. Usually a licensed contractor will be eager to provide his or her licensing information. At that point, simply go on the Contractors State License Board website at [www.cslb.ca.gov](http://www.cslb.ca.gov) to confirm that the license is valid and in good standing. In addition, be sure to confirm that the license is in the name of the entity on any contract signed; the "sharing" of licenses is fairly commonplace in the industry.

If it is discovered that the contractor who performed the work is unlicensed, there may be no requirement to pay him or her any money despite the fact that he or she may have performed substantial work on the home. (Bus. & Prof. Code, §7031(a); See *Hydrotech Sys., Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 997.) In addition, if it is discovered they have worked without a license at any time during the project, recovery of some or all of the monies paid during the unlicensed period is possible, even if they performed work in exchange for that payment. (Bus. & Prof. Code, §7031(b); See *Ghomeshi v. Sabban*, U.S. App. Lexis 7538 (9th Cir. April 2010).) Finally, be certain that the contractor bidding the job has the proper type of license. Only a general contractor's license allows a contractor to retain other subcontractors to perform work.

## SCOPE OF INSURANCE

In addition to licensing, it is also important to verify the existence and scope of insurance. All licensed contractors are required to maintain a bond. However, this bond has very limited protection for the homeowner and typically only

allows payment of \$7,500 under limited circumstances such as abandonment of the job. Critically, the bond does not cover poor workmanship or other ordinary breaches of contract by the contractor. Consequently, the bond affords very little protection for the homeowner.

All contractors are also required to have workers' compensation insurance. (Bus. & Prof. Code, §7125.) The only exception is when a contractor claims to have no employees. In that instance, the contractor is not required to carry workers' compensation for himself. However, it is commonplace for contractors to claim that they have no employees in order to avoid the high expense of workers' compensation insurance.

If a prospective contractor claims he is not required to have workers' compensation insurance, one may rightly wonder where the protection is in the event that their employees are injured while working on a homeowners' property. Undoubtedly, the licensed contractor will argue that these are independent contractors for whom he is not required to obtain such insurance. In California, this claim is generally untrue for workers who obtain wages from the contractor. (*Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341.) Only independent subcontractors, who also should be required to maintain their own license and insurance, are properly characterized as truly independent from the general contractor. Accordingly, always seek verification of such insurance from the general contractor, if possible.

Although not required, also ask any candidate whether they carry commercial general liability insurance. Commercial general liability insurance contains broader protections for the homeowner, especially in the event that a dispute arises between the contractor and the homeowner concerning damages caused by contractor negligence. Although no insurance policy covers bad workmanship per se, damage caused by such bad workmanship such as water intrusion entering through a poorly constructed roof is covered under such policies. (*Monticello Ins. Co. v. Essex Ins. Co.* (2008) 162 Cal.App.4th 1376, 1379.) Typically, the contractor who comes in with



a higher bid should be expected to carry such insurance.

If not, it would be advisable to look elsewhere if the contemplated work is substantial. Additionally, it is always critical to request that the contractor name the homeowner as an additional insured on their commercial general liability policy. Typically, the insurance company will do so at no, or minimal, cost. As a result of being named as an additional insured on the contractor's insurance policy, the homeowner will enjoy all the same benefits as if personally purchasing the policy and becomes what amounts to a "named insured" on that policy.

### HOME IMPROVEMENT CONTRACTS

As a result of some fairly recent state laws, contracts for home improvements have now become highly regulated and contractors who perform such work are now required to adhere to a strict set of requirements in providing such contracts. (Bus. & Prof. Code, §7159.) For example, all such contracts must be in writing (§7159(8)(d)) and must include the price that was agreed upon for the work. Any job costing over \$500 requires a written home improvement contract. If the contract calls for a down payment before work starts, the payment cannot exceed \$1,000 or ten percent of the contract price, whichever is less.

The contract must also include a payment schedule and explain what services and materials are to be provided in exchange for the payment. In most cases, the contractor is required to provide a three-day right to cancel (§7159(5)(c)(3)A; See Civ. Code, §§1689.5 to 1689.14) the contract and must also include starting and completion dates.

Under California law, the contractor must also provide a document entitled Mechanics' Lien Warning, which describes mechanic's liens and ways to prevent them. Liens can be placed on one's home by unpaid laborers, subcontractors or those who provide and deliver materials even if it was the general contractor's duty to pay them. (§7159.14(4).)

Home improvement contracts also require that any modifications or changes to the contract must be in writing. This is always a good practice. It is also important that both the contractor and the owner be required to sign on any work orders, changes or modifications to make sure the work is authorized and the price for such additional work is agreed to in advance. Change order work is one of the chief areas leading to disputes between parties to home improvement contracts.

Although not required by law, it is a good idea to strongly consider the insertion of an attorney's fees provision in a home improvement contract. If a dispute arises between the homeowner

and the contractor, the prevailing party, in addition to obtaining their damages, may also receive attorney's fees. This is especially important for homeowners who might otherwise be discouraged from pursuing claims against their contractors for shoddy work out of concern that the cost for doing so might equal or exceed their damages suffered, thus rendering recovery impractical.

### REVIEW OF CONTRACT BY ATTORNEY

It's always a good practice to first review a contract before signing it and have

an attorney, familiar with contracts and construction law, also give the contract the once over. Experienced attorneys can help a consumer consider aspects of proposed work which may not have been considered or discussed and concerning which the contract may be silent or deficient. A little review can save a mountain of grief after the fact.

### MONITORING THE WORK

One of the single biggest problems in home improvement work is lack of adequate supervision. Typically in the early phases of the contract, often during

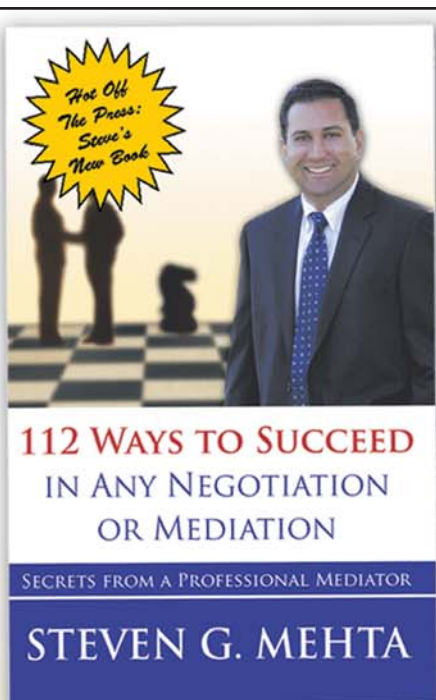
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framing and the pouring of concrete, a supervisor will be present. However, once the initial structural work is performed, it is not uncommon for those who are actually running the job to become less involved and provide less interaction with the owner to monitor the progress. This usually results in a lack of quality control and coordination which is essential to the timely and proper performance of construction work.

The project manager, general contractor or supervisor is essential to insure that each trade shows up to work in a timely fashion, completes their job in a proper manner and allows the next tradesman to come on to the job with the jobsite ready for him or her to complete their work. For example, if an electrician is called to the jobsite to perform finished electrical work and the appliances have not yet been delivered to the jobsite, then the work cannot be performed. This can result in additional costs. Similarly, if a contractor does not perform or complete his work, when the next person, such as a painter, comes on the jobsite, he will be unable to properly perform his or her work because of, for example, failure of other contractors to have properly followed the plans and specifications.

Quality supervision is imperative to insure that each tradesman is not only responsible for the work they perform when they're on the jobsite, but that they can be called back if necessary to timely repair or perform additional or corrective work which can become necessary as a result of a number of circumstances during the building process. As long as there is an orchestra leader, if there is a problem, it can usually be quickly resolved without substantial delay.

Having proper supervision is also critical in insuring that the job is being performed in accordance with the plans prepared by the architect. When a crew is sent without a proper understanding of the architectural plans, mistakes are made and those mistakes can have repercussions for other workers who later come onto the site to perform their operations. Accordingly, when considering a contractor, obtain adequate assurances that the project manager or supervisor will be visiting the jobsite multiple times a week, or daily, not just at the inception of the work but throughout the project until completion. This should be written in the contract itself. It is also helpful in this regard to have weekly meetings with such supervisory personnel to keep abreast of what's going on with the work.

When all of the above steps are followed, there is a much greater likelihood of timely and proper building practices. Good and experienced contractors are not afraid of adhering to the above-outlined requirements. It is only those contractors who are reluctant to do so that can give the entire industry a bad name. Those contractors may bid their jobs for less money, but can cost a homeowner a substantially greater amount of frustration and costs in the long run. ▲

**James S. Cooper** is a construction attorney who represents both contractors and homeowners in construction disputes. He is a partner with the law firm of Levinson, Arshonsky & Kurtz, LLP. He can be reached at (818) 382-3434.



## New Members

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

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# Google Potential Jurors and Witnesses

By Mark Sweet



**W**ITH THE EMERGENCE OF JUROR MISUSE social media cases (e.g., jurors posting polls on a Facebook and Twitter about jury deliberations), punishment was inevitable. Juror Hadley Jons was fined \$250 and ordered to write a five-page essay on the constitutional right to a fair trial after she posted a Facebook comment about “how fun it will be to tell the defendant they’re guilty.” Still, information from the internet can win cases if used properly by attorneys.

## Impact for Trial Lawyers in Jury Selection

A successful trial lawyer knows more about potential jurors than their adversary. In high profile cases, attorneys have been known to hire investigators, and to leave no stone unturned in their jury research efforts. Today, information gathering must include internet searches.

In an initial setback to research efforts, a New Jersey court forbade plaintiff’s counsel from “googling” the jurors. This decision was later overturned on appeal because “[Plaintiff’s Attorney]...had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of “fairness” or maintaining “a level playing field.” The “playing field” was, in

fact, already “level” because “Internet access was open to both counsel, even if only one of them chose to utilize it” *Carino v. Muensen*, 2010 WL 3448071.

Information obtained regarding activities, tastes and preferences of jurors can lead to restructuring of oral arguments or even a revision of case strategy. Outside of finding out that potential juror #28 likes kittens, Lindsay Lohan and knitting, an attorney might find out about a potential bias because #28’s sister was killed by a drunk driver. Attorneys look to psychological studies in order to discover potential biases; internet information merely supplements this type of information.

Simply googling a potential juror is not enough; an attorney would be wise to look into a juror’s social media presence. This includes Facebook, Twitter accounts and personal blogs. Given that Facebook has over 500 million users, there is a good chance that a potential juror already has a profile. For a few dollars, an attorney can even do an instantaneous background or credit check on a potential juror. In 2006, the Chicago Tribune reported that during the trial of former Illinois Governor George Ryan, two jurors provided false answers on the jury questionnaire and were actually convicted felons (felons cannot serve on federal juries). This

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was only brought to light after over five months of testimony and eight days of jury deliberations. Imagine how easily this mistake could have been avoided with a quick background search.

Is it ethical to google potential jurors? While there is no clear-cut rule in the ABA Model Code of Ethics, the New York Bar Association has said it is ethical for lawyers to use social networking sites to collect damaging information.

### **Impact on Juries, Attorneys and the Judicial System**

Technology can be both a blessing and a curse for our profession. What would attorneys do without Westlaw or LexisNexis? The same tools, however, that allow us to have almost any relevant case at our fingertips comes with its own curse; potential jurors have many of the same tools available by utilizing internet search engines. If unsure what "chattel" is, just look it up on Google or Wikipedia.

In March 2009, a juror in a federal drug trial in Florida admitted to the judge that he had been doing research on the case on the internet. When the judge asked if any other jurors were also doing their own research, eight other jurors admitted that they had also done research on the internet. The judge had no choice but to declare a mistrial. (*New York Times*) This trend of jurors going to the internet to do their own research is unlikely to stop until there are stronger guidelines and better jury instructions.

By allowing jurors to seek outside information, our detailed craftsmanship of certain facts quickly loses its luster. Think about a patent case and its complexities. However if a juror were to go on a website like Wikipedia they would be able to research different (and sometimes false) details.

Attorneys and judges spend many hours developing jury instructions. Internet savvy jurors can and will "interpret" these instructions with the use of the web. Thus, an attorney should take the time to see what an internet search reveals about the details of each case. It's a good chance the jury will.

Finally, it's important to consider that an attorney's online profile, firm website and maybe even Facebook page could be searched by a juror. A juror who is on the fence about a case might look to see what other cases an attorney has been involved in and try to connect the attorney's previous experience to the current trial. For this reason alone, it is important that attorneys monitor their online reputation. This can usually be achieved by setting up Google Alerts for one's name or by hiring a firm or buying a product to help manage one's online profile.

### **A Boon to Divorce Attorneys**

While trying to piece together the perfect jury can be made a bit easier with the internet, perhaps no profession has had more success with technology than divorce attorneys. Ken Altshuler, an attorney in Maine, told CNN that "Facebook is a great source of evidence. It's absolutely solid evidence because he's the author of it. How do deny that you put that on?"

For example, a picture showing a lothario in the embraces of another posted on his Facebook account creates a presumption of cheating that is nearly impossible to overcome. Attorneys surveyed by the American Academy of Matrimonial Lawyers said that at least 80% of them had a case that involved social media over the last five years. Many times these attorneys will also look to "mutual friends" of the couple in order to gain a bit more access into the opposition's life.

### **Spokeo.com: Quick, Cheap and Immense Information**

Google is just the beginning. The internet contains massive amounts of information about virtually everyone. Commercial parties are often able to assemble quite a profile about potential



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customers through “data mining” software. Even without the expense and trouble of data mining, information can be found from free data mining sites such as Spokeo. Spokeo is a “social network aggregator” (meaning it takes data from online and offline resources like phone directories, Facebook, MySpace, real estate listings, business websites and marketing surveys) that literally includes almost every person in the country except those who have opted out of spokeo.com.

What this means is that in a matter of seconds, anyone can have access to a person’s bio, photographs, phone numbers, email addresses, a “wealth indicator,” a person’s hobbies, relationships and the social networks they belong to. Any attorney who has never accessed Spokeo should try searching for their name. Attorneys might be surprised at how much information Spokeo has gathered. For example, the names and ages of one’s spouse and children are listed right on the free page. For a nominal fee, one can find out even more information.

Applying this to a trial, this information may be of significant use in picking a jury. Spokeo provides information regarding potential jurors’ hobbies, which organizations they belong to and even a link to their Facebook page. Creative attorneys could use this information throughout the trial.

### Jury Tampering and the Internet

Technology can also serve to frustrate the barriers preventing contact between attorneys and jurors. Recently, a juror repeatedly tried to get in contact with a member of the prosecution because she thought he was attractive. She tried to establish contact by email. In a more serious case, a battered woman used MySpace to try to track down a juror and plead for the acquittal of her batterer.

In high profile cases, judges may now take steps to prevent internet contact by third parties. In the case of former Illinois Governor Blagojevich, the judge was so concerned about the potential abuse of email, Facebook and Twitter that he restricted the public’s right to information about the jurors’ names and identities. (law.com) It is unknown if courts will be more apt to keep juror names a secret, but the 7th Circuit court has pushed for more open access to information about ongoing trials. Additionally, in *U.S. v. Wecht*, a federal appellate court described the right to know the identity of jurors as one derived from the First Amendment. (id) This is why it is important to monitor jurors, witnesses or the parties involved for potential misconduct.

Attorneys (and their agents) should be sure not to make any contact with parties involved in a case, or potential case. While there is usually a strong desire to access what might be on a private profile, the act of actually sending an email to attempt to gain access would clearly overstep ethical boundaries. However, just viewing a person’s profile would likely be acceptable while still providing an attorney an advantage.

All of these examples have a common theme. It is acceptable to use the internet and social media for research. However, it is no more acceptable, or ethical, to establish contact with a juror, whether by email, chat or other means, than it is to do so by telephone. ⚡

*Mark Sweet is of counsel at the Law Offices of Joseph P. Foley and former Director of Content Development and Legal Marketing at Lawinfo.com. He can be reached at msweet@foleyestateplanning.com.*



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**PAULETTE GHARIBIAN**  
SCVBA President

## Member Benefits

**I**N THE LAST TWO MONTHS, the Santa Clarita Valley Bar Association has dedicated itself to providing opportunities for its membership to earn live mandatory continuing legal education credits in the hard-to-find topics of ethics and substance abuse.

In March, the SCVBA welcomed Steve Mehta to speak. He is the author of *112 Ways to Succeed in any Negotiation or Mediation*. Mehta is a frequent lecturer and successful 69-63 mediator. On Saint Patrick's Day, the membership gathered at Tournament Player's Club for an enlightening, educational and eye-opening presentation by Mehta on the topic of ethics in the arena of social networking. The presentation focused on the traps to avoid while advancing with technology and online networking. Members enjoyed a fabulous dinner at the beautiful country club, while listening to Mehta's interactive presentation about the ethical rules pertaining to attorneys and application of these duties to social networking.

In April, the bar association invited its members to earn their credits on the topic of substance abuse. The Santa Clarita Valley Bar Association invited ACTION family counseling to present on the topic. This lunch event was very well attended and allowed members to enjoy some networking, followed by a tasty lunch, and a presentation focused on addiction in the work force.

ACTION Family is a Drug and Alcohol Treatment and Rehabilitation Program that provides a multi-disciplinary approach for all aspects of individuals, teens and adults. ACTION Family Counseling has drug and alcohol treatment centers with 12 locations and 16 programs in the Southern California area that specializes in alcohol and substance abuse intensive outpatient, residential treatment programs for teens and adults, and sober living facilities in Bakersfield and Santa Clarita Valley.

The Santa Clarita Valley Bar Association sincerely thanks Mehta and the ACTION Family Counseling team for their attendance at the events, and for their exceptional presentations.

Upcoming events include a networking breakfast in June. This

event will allow members to establish, or further foster, referral relationships with attorneys of varying practice areas. August will allow for an evening networking mixer, followed by the annual Law Appreciation Day.

Save the date for the Santa Clarita Valley Bar Association's annual Law Day

luncheon on October 7, 2011, at the Valencia Hyatt. For more information about this and upcoming events, visit [www.scbvar.org](http://www.scbvar.org) or call (661) 287-3260. 🐾

For more information, please visit [www.scvbar.org](http://www.scvbar.org).



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# Calendar

## San Fernando Valley Bar Association

### Member Appreciation Ice Cream Social

### 85<sup>th</sup> Birthday Party

**Tuesday, June 14, 2011**

**5:00 PM TO 6:30 PM**

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- ✳ Raffle for iPad and Other Great Prizes
- ✳ Special Recognition for SFVBA Volunteers and Senior Members
- ✳ Member Benefits Providers' Booths



### Business Law, Real Property & Bankruptcy Section Update on Selected BAPCPA Issues

**JUNE 8**  
**12:00 PM**  
SFVBA CONFERENCE ROOM  
WOODLAND HILLS

Attorneys Louis Esbin and Steven Fox will discuss how to work the means test, how to obtain an individual Chapter 11 discharge before completion of plan payments, and whether and when attorneys can be held liable for false statements on the bankruptcy petition and proper exemption planning.

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### All-Section Meeting Get Found on Google: Making Sure Your Website Tops the List!

**JUNE 9**  
**12:00 NOON**  
SFVBA CONFERENCE ROOM  
WOODLAND HILLS

Renowned web marketing specialist Dave Hendricks – always one of our most popular speakers – returns. RSVP now, space is limited!

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### Probate & Estate Planning Section Overview of the Assessor's Office: How Best to Handle Problems

**JUNE 14**  
**12:00 NOON**  
MONTEREY CLUBHOUSE AT ENCINO  
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Los Angeles County Assessor John Noguez offers suggestions on who to contact and how to best handle any problems that might arise in dealing with the assessor's office.

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### Workers' Compensation Section

**JUNE 15**  
**12:00 NOON**  
MONTEREY CLUBHOUSE AT ENCINO  
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### Santa Clarita Valley Bar Association Networking Breakfast

**JUNE 22**  
**7:30 AM**  
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### Litigation Section Tax Litigation

**JUNE 23**  
**6:00 PM**  
SFVBA CONFERENCE ROOM  
WOODLAND HILLS

Attorney Ronald Hughes will address what happens in tax court and how to deal with the IRS before you get to tax court.

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### Family Law Section Cultural Complexities in Family Law

**JUNE 27**  
**5:30 PM**  
MONTEREY CLUBHOUSE AT ENCINO  
ENCINO

Hon. Susan Weiss, Hon. Gretchen Taylor, Ret., Gitu Bhatia, Psy.D., and attorneys Diana Martinez and Abbas Hadjian, C.F.L.S. will share their knowledge on how cultural influences can impact the no-frill, no-fault California family law system. After this program, representing a culturally sensitive client will never be the same.

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### Criminal Law Section LA County Jail Inmate Reception Center (I.R.C.): Protocols from A to Z

**JUNE 28**  
**6:00 PM**  
MONTEREY CLUBHOUSE AT ENCINO  
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Commander Gerald Cooper of the Los Angeles County Sheriff's Department will discuss everything you need to know regarding what happens when your client enters the county jail.

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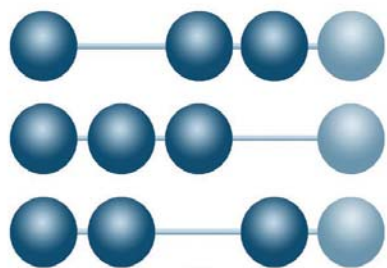


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