VALLEY LAWYER

JUNE 2012 • $4

A Publication of the San Fernando Valley Bar Association

Pros and Cons of Mediation Confidentiality

Earn MCLE Credit

Exploration of Mandatory Fee Arbitration

Monetary Cutbacks to Court System Increases Need for Mediation

ADR in the Employment Arena

Alternative Dispute Resolution

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VALLEY LAWYER

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Beyond the Pale of Negative Politicking

ALAN J. SEDLEY
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AS I ALLUDED TO IN A PAST column, the current political arena can and often is a hostile, blistery and acerbic playground for candidates. Too often, the attacks fired at a candidate are exaggerations of the truth at best, and outright lies at its worst. Such rhetoric is frequently designed solely as a tool to distract the voter from an otherwise genuine and noble message of a candidate. The candidate's spouse might also be the target (she is active in Planned Parenthood?), and the adult children of a candidate also seem to be fair game (just what were the circumstances of the son's arrest for possession of marijuana?).

Negative campaigning is not merely a product of the 24-hour news cycle, or the overabundance of daily entries on the internet. Those of us old enough to remember the days before the computer and cable TV will fondly recall the black and white television ad of 1964. Indeed, one of the most famous such negative ads was entitled "Daisy Girl" by the campaign of Lyndon B. Johnson that successfully portrayed Republican Barry Goldwater as threatening nuclear war. In that ad, a beautiful little girl was holding a daisy, gently pulling off the pedals, one by one (a reference to the uncontrollable fate of the game, "she loves me, she loves me not") as a mushroom cloud rises in the sky behind her.

A visit to the American History Museum in Washington will greet the visitor with wall displays of political cartoons going back to the 1800's, quite effectively lampooning a candidate, oftentimes attaching an animal body to the head the political hopeful. Common negative campaign techniques include painting an opponent as soft on criminals, dishonest, corrupt or a danger to the nation. One common negative campaigning tactic is attacking the other side for running a negative campaign.

So it should come as no shock to anyone that early on, the Obama and Romney presidential camps are already heavy into rhetoric and negative campaigning. Perhaps the silliest example of such negativism revolves around America's favorite domestic animal, the pooch; Mitt Romney continues to be hounded for strapping his dog Seamus on the roof of his station wagon for a 12-hour trip three decades ago, and now President Obama's penchant for eating dog meat as a child is a campaign issue.

As to the latter, the GOP took quick advantage of the Democrats' ongoing depiction of Romney as a villain to animal lovers everywhere by pulling a quote from the President's memoir; "With Lobo (his stepfather), I learned how to eat small green chill peppers raw with dinner (plenty of rice), and, away from the dinner table, I was introduced to dog meat (tough), snake meat (tougher), and roasted grasshopper (crunchy)."

The moral of the story would end with a question: Is there anything that must reasonably be deemed off limits when it comes to the campaign efforts of one candidate to undermine and fling negative dispersions upon his/her opponent? Sad to report, and based upon a current state judgeship election, the answer is most assuredly no.

It was reported in the *Metropolitan News* on February 29, 2012 that a Los Angeles Superior Court judicial seat currently occupied by Judge Sanjay Kumar was being challenged in an upcoming election by a candidate whose chief campaign strategy for victory was to highlight Judge Kumar's foreign-sounding name.

When asked to characterize the motives of the candidate, his former close colleague, District Attorney Steve Cooley, familiar with the candidate's strategy, remarked that the individual's candidacy was "deplorable and despicable," and that when the public catches on to his motivation, "...he will be vilified and denigrated—and properly so."

Cooley told the *Met* that he spoke with his former colleague, who "did not deny" that he was

running against Judge Kumar because the judge's name renders him vulnerable at the polls. He recalled an earlier judicial race in which an unqualified candidate played upon the electorate's prejudices in targeting and defeating an able incumbent—the defeated judge's name was the foreign-sounding Dizntra Janavs.

Is it possible that the current contest to unseat Judge Kumar is being waged for a legitimate purpose, perhaps judicial incompetence (most seated judges are often unopposed or if opposed, easily win a contested election because of the overwhelming presumption that they were initially selected to serve based upon a sound reputation and resume)? One would have to conclude that it is not plausible, given Judge Kumar's reputation. The presiding justice of Division Five of our district's Court of Appeal, where Judge Kumar has sat for the past year, Justice Paul Arthur Turner, stated on the record that, "The work he has done on the Court of Appeal is exceptional..." and is, "a preeminent jurist."

The serious implications arising from the purported strategy of the opposing candidate seeking to unseat the seated judge by merely targeting the judge's foreign last name cannot be overlooked nor tolerated. We as members of this Bar Association must voice our sound disapproval of any display of election campaign tactics that seize upon a sitting judge's foreign-sounding name as the sole reason to remove that jurist from the bench. Specifically, the sole intent of such rhetoric is to play upon the presumed fears of the electorate towards "foreign influence" in places of power such as the bench, has no place in our goal to advance and not defeat diversity, and frankly incites bigotry and hatred.

In response, on April 10, 2012, the Board of Trustees of the SFVBA approved the following resolution:

> "In order to promote diversity on the bench, we must protect diversity on the bench. The [SFVBA] denounces any individual who chooses to run against a sitting judge seeking re-election for the sole reason that the judge has a name reflective of the judge's diverse background and believe that they can defeat the judge by taking advantage of racism and sexism in our society."

I am proud of our Board's prompt response to the news of this disturbing judicial election development. Our resolution has received the appreciation and support of several Los Angeles Superior Court judges and bar groups, many of whom are making their objection to such election tactics known to the public through resolutions, articles and discussions.

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Calendar

San Fernando Valley Bar Association

Member Appreciation Ice Cream Social

Tuesday, June 12, 2012

5:30 PM TO 7:00 PM

SFVBA Offices, Woodland Hills

- Ice Cream Sundaes and Milkshakes
- Raffle for Great Prizes
- Special Recognition for SFVBA Volunteers
- Member Benefits Providers' Booths

Small Firm & Sole Practitioner Section

Tools for Persuasive Writing

JUNE 5
12:00 NOON
SFVBA CONFERENCE ROOM

Certified Appellate Law Specialist Honey Kessler Amado will walk attendees through the critical steps.

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

All Section Meeting

Building Your Practice via the Web

JUNE 7
12:00 NOON
SFVBA CONFERENCE ROOM

Dave Hendricks is back again with critical tips and suggestions on how to market yourself and your firm via the Web. RSVP SOON, this luncheon always sells out!

FREE TO CURRENT MEMBERS!

Probate & Estate Planning Section

Estate Planning and Retirement: What You and Your Client Need to Know

JUNE 12
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorney Alex Brucker gives a pension update that will reflect on the latest in the retirement area, including death benefits, illiquid plan investments, Department of Labor and IRS investigations and uses of life insurance in plans for retirement and estate purposes.

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

Business Law, Real Property & Bankruptcy Section

Important Developments in Employment Law

JUNE 13
12:00 NOON
SFVBA CONFERENCE ROOM

Robin McKibbin of Stone, Rosenblatt & Cha will discuss new developments in employment law and best practices to avoid common pitfalls. This presentation should be of interest to any lawyer who has employees or has clients who have employees.

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

Family Law Section

Hearsay in Family Law

JUNE 25
5:30 PM
MONTEREY AT ENCINO RESTAURANT
ENCINO

Judge Mary Nelson discuss the latest on the Rules of Evidence and how it affects your family law practice.

MEMBERS	NON-MEMBERS
$45 prepaid	$55 prepaid
$55 at the door	$65 at the door
1 MCLE HOUR	

Litigation Section and Criminal Law Section

Overcoming Critical Issues in Your Civil and Criminal Practice

JUNE 26
6:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Judge Bert Glennon and Retired Judges Michael Hoff and Alice Altoon discuss how to best achieve resolution in your cases.

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

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

Every Member Benefits

ELIZABETH POST
Executive Director
epost@sfvba.org

JUNE IS THE SAN FERNANDO Valley Bar Association's Member Appreciation Month. Our month-long celebration recognizes members and volunteers for their support and participation.

All members are invited to attend the SFVBA's Second Annual Member Appreciation Ice Cream Social on June 12 from 5:30 to 7:00 p.m. in the back parking lot of the Bar's Woodland Hills office. Enjoy an ice cream sundae or milkshake, network, win great prizes and learn more about the great benefits of SFVBA membership. About 200 members attended last year's inaugural event. Contact Linda Temkin at events@sfvba.org or (818) 227-0490, ext. 105 to make your reservation today.

We have invited the SFVBA's member benefit providers to be on hand to connect with our members. Each provider will raffle a door prize or gift basket. Last year, our raffle included restaurant gift cards, amusement park tickets, gas cards, free mobile websites, an Amazon Kindle and iPad!

Stop by and meet the following providers and learn about the services and programs available only to SFVBA members:

- Just in time for summer vacations, the SFVBA provides members a package of discount coupons and membership cards for Southern California's favorite **amusement park**s and attractions.
- The **ABA Retirement Program** is designed to provide unique, full service 401(k) plans to the legal community. By leveraging the size of nearly 4,000 participating firms, the Program offers a fund lineup and services traditionally available only to the largest corporate plans. These services are offered at no out-of-pocket expense to law firms of all sizes with institutionally priced funds for their participants.
- **The Matloff Company** has been providing life, disability, long term care and health insurance to attorneys, their families and staff for over 32 years, with a special emphasis on tailoring a program that meets members' needs and budget, while utilizing over 100 high quality insurance companies.
- **Narver Insurance** offers an exclusive lawyer's professional liability insurance program, with coverage enhancement designed specifically for SFVBA members.
- **Now Messenger Service** offers members who open new accounts a 5% discount off their current rates.
- Members receive a $20 **Costco** cash card when you join as a new Executive Member or a $10 cash card when you join as a new Gold Star or Business Member.
- **Process Service Network** offers members a 30% discount on any international service of process.
- The SFVBA offers **Fastcase**, a comprehensive online law library, as a free service to all members. Click on the Fastcase logo on our homepage to enjoy unlimited usage, unlimited customer service and unlimited printing, all at no cost.
- Save $10 on new **AAA membership**.
- The **Dell EPP Program** is an exclusive discount program providing up to 12% off select desktop and notebook computers. The discount is on top of generally advertised sale prices and promotions.

By Client Communications Committee

Communications DOs and DON'Ts

The SFVBA established the Client Communications Committee to address the number one reason for client discontent—need for better communication—and reduce negative interactions with the State Bar. The Committee, a volunteer group of a dozen veteran practitioners in wide-ranging fields of law, answers written questions from attorney members regarding problems they observed or dealt with that may have been avoided by better attorney-client communication. Responses are published anonymously in *Valley Lawyer*.

THE SFVBA'S CLIENT COMMUNICATION Committee cannot eliminate the communication problems introduced by the proverbial problem client. Neither the Committee nor any association member has the tools to compel a client to become better, brighter or fairer. How an experienced lawyer reacts to a particular problem client communication issue is, and will always be, sui generis. Since the public does not receive *Valley Lawyer*, the Committee's primary role is to help educate and assist attorney members.

As past responses to member inquiries have hinted, attorneys need to accept that many communication issues are caused, or at least aggravated, by the problem lawyer. That does not mean that a particular segment of the legal population is problematic and the balance have achieved some nirvana of perfection. It does mean that all of us, under the strains and stresses of the practice of law, from time to time, become part of the problem.

In yesteryears, lawyers were divided into two different schools of thoughts regarding client communication. One school believed there was no such thing as telling a client too much. The other school believed that over-communicating to a client was just as bad as under-communicating, since it raised doubt in client's minds and reduced client confidence in counsel.

That philosophical debate is just that—philosophy, not an answer to bread and butter DOs or DON'Ts. Previous responses have pointed out that even though California's lawyer discipline rules only requires attorneys to keep a client "reasonably informed about significant developments relating to the employment or representation," the rest of the country has moved with the times and adopted the same rule applicable to an attorney's legal duties to the client to avoid professional negligence.

The rule of law starts by abandoning the notion that because the attorney went to law school, "lawyer knows best." Objectively, an experienced and educated counsel has the skill and knowledge most clients lack and for that reason, it is often true that the optimum objective decisions must be made by counsel. The argument in the old days was: "Isn't that why the client hired the lawyer in the first place?"

In today's legal environment, counsel's superior skill and knowledge will usually protect California lawyers from discipline. It will not, however, carry much weight with a legal malpractice jury once the lawyer needs to defend the unilateral decision made. There are many on-the-spot decisions that lawyers need to make which cannot invite client participation as a practical matter. Almost all of them take place while an attorney is on his or her feet at trial—making or declining to make legal objections, asking or not asking a particular question of a particular witness, etc.

As a generalization, however, whether lawyers know best or not, outside of the courtroom, the client has the absolute right to be fully and fairly informed of all reasonable alternative courses of action, their risks and benefits. Only in that way can the client make an intelligent decision. This puts a mandatory burden and duty on counsel to deal with material matters in a highly communicative

way. Following are a few DOs and DON'Ts to assist member attorneys:

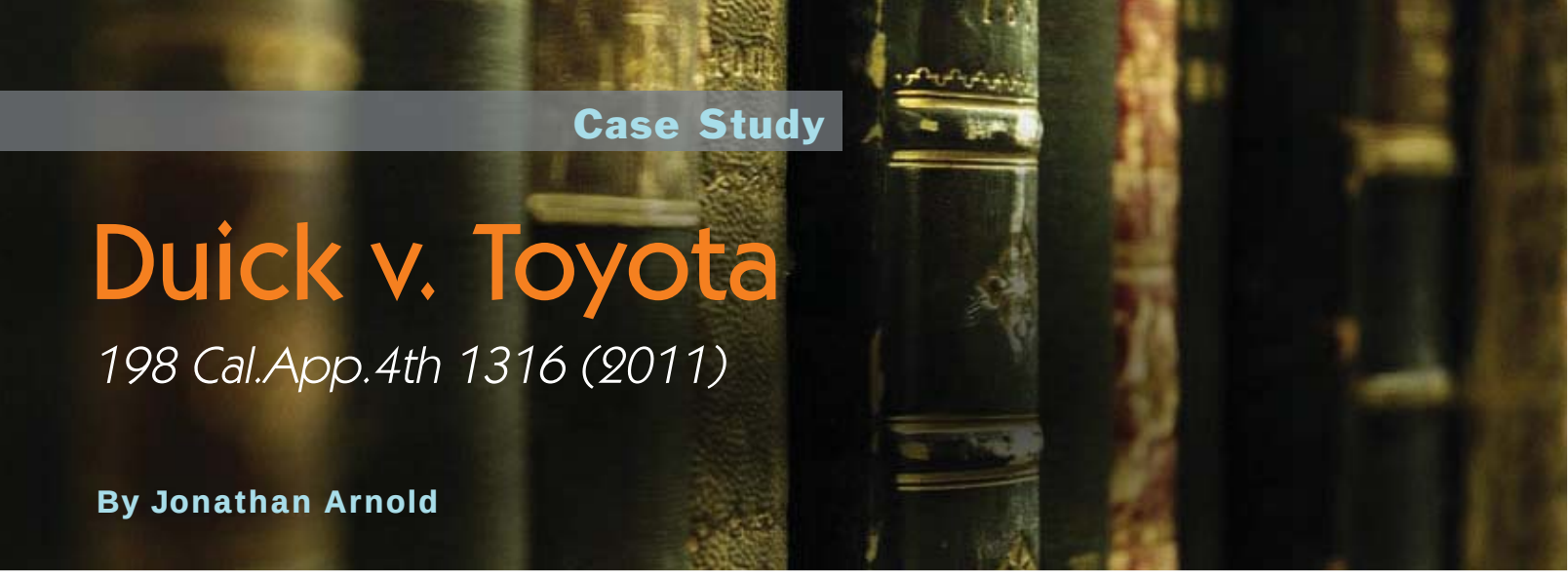
- DO it in Writing! The corollary is that the spoken word is not worth the air it's printed on. In other words, "Do it Yourself!" or delegate it to an attorney personally supervised.
- DON'T assume that clients know about an attorney's specialty. Client's movie and TV experiences are limited to lawyers as adversarial advocates. DO assume that no matter what field of law an attorney practices in, lawyers are expected to be problem solvers.
- DON'T assume all clients know how to communicate with an attorney. DO assume that once the client communicates their objectives, perceived issues, wants and needs, that the burden of mutual communication is primarily an attorney's burden.
- DON'T be afraid of the old fashioned Socratic approach—asking enough of the right questions will usually end up effectively communicating more than dogmatic statements imparting scholarly wisdom. An attorney should DO his/her best to answer all client questions, openly, candidly and in plain talk.

> "There are many on-the-spot decisions that lawyers need to make which cannot invite client participation as a practical matter."

- DON'T beat around the bush if one does not know the answer or there is no answer. DO be straight forward and honest at all times.
- DON'T be inaccurate, ambiguous, erroneous, misinformed or incomplete and DON'T give a message with two inapposite meanings.
- DON'T confuse communicating with a trier of fact or a lawyer representing a party with similar, but not identical goals and interests with communicating with a client.

Perhaps the easiest protocol transcends communications and reaches out to all attorney-client interactions. DO be as prepared as possible and DO be one's self!

SFVBA Client Communications Committee accepts written questions, which may be submitted to epost@sfvba.org or SFVBA Client Communications Committee, 21250 Califa Street, Suite 113, Woodland Hills, CA 91367. The opinions of the Committee are those of its members and not those of the Association.



Case Study

Duick v. Toyota

198 Cal.App.4th 1316 (2011)

By Jonathan Arnold

A VOID CONTRACT IS VOID IN ITS ENTIRETY, including an otherwise applicable arbitration provision. That's the holding from the Court of Appeal in *Duick v. Toyota*, by Justice Rotschild, writing for the 2d District, 1st Division.

This case had its origins in Amber Duick's participation in an ad campaign for Toyota's Matrix automobile. This campaign was entitled "Your Other You" and "consisted of sending an unwitting recipient emails from an unknown individual." Amber Duick ended up being this "unwitting recipient" by way of logging into the Toyota Matrix website. At some point when she was navigating this website, she clicked on a digital door, and was directed to a second web page entitled "Personality Evaluation Terms and Conditions."

In order to continue beyond that page, she was required to scroll through certain text (the so-called "terms and conditions") and to click a box next to the following sentence: "I have read and agree to the terms and conditions." The first paragraph of the terms and conditions states, "You have been invited by someone who has indicated that he/she knows you to participate in Your Other You. Your Other You is a website provided by [Toyota] that offers you... an interactive experience."

The second paragraph further states, "If you review and agree to the Terms and Conditions detailed below ...you may participate in a 5 day digital experience through Your Other You...You may receive email messages, phone calls and/or text messages during the 5-day experience."

A subsequent paragraph also states, "You understand that by agreeing to these Terms, you are agreeing to receive emails, phone calls and text messages from Toyota during the 5-day experience of Your Other You." Importantly, these terms and conditions contain the following arbitration provision: "You agree that ...any and all disputes, claims, and causes of action arising out of, or connected with, Your Other You ...shall be resolved individually, without resort to any form of class action, and exclusively by arbitration to be held solely in Los Angeles, California under the auspices of the American Arbitration Association and pursuant to its Commercial Dispute Resolution Rules and Procedures."

Shortly thereafter, the plaintiff received "an unsolicited email asking [her] to take a personality test." Following that, the plaintiff began to receive emails from an individual identifying himself as "Sebastian Bowler." Suffice it to say that this digital character was cast in the role of a British hooligan who ensnared the plaintiff in a (and do please forgive this pun) web of activity that played out like a prank, culminating in the plaintiff receiving what appeared to be a real bill from a motel billing her for this digital character's trashing of the place.

Clearly, not what the plaintiff had signed up to do and, accordingly, she filed suit against Toyota and Saatchi, alleging eight causes of action, including intentional infliction of emotional distress, negligence and false advertising, and seeking "compensatory damages of not less than $10,000,000" as well as other forms of relief. After

defendants demurred and Duick voluntarily filed a first amended complaint, defendants moved to compel arbitration on the basis of the arbitration provision in the terms and conditions.

The Court of Appeal found that the Motion to Compel Arbitration was not well taken, for the simple reason that the entire agreement was defective, due to fraud in the inception or execution.

California law distinguishes between fraud in the execution or inception of a contract and fraud in the "inducement" of a contract. The former goes to the inception or execution of the agreement, so that the promisor is deceived as to the nature of the promisor's act, and actually does not know what is being signed—the essential terms of the agreement, or does not intend to enter into a contract at all, mutual assent is lacking, and [the contract] is void. In such a case it may be disregarded without the necessity of rescission."

Fraud in the inducement, by contrast, occurs when the promisor knows what the promisor is signing but the promisor's consent is induced by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is voidable. And because the contract is void because of fraud in the inception, every part of it is therefore unenforceable, including the arbitration provision. Accordingly, defendants deprived Duick of a reasonable opportunity to know the character of the proposed contract. The contract is consequently void because of fraud in the inception, and every part of it is therefore unenforceable, including the arbitration provision.

Now, there are some suggestions for creating enforceable contracts on the internet. In reading not only Corpus Juris Secundum, but also Corpus Juris Civils, it should be noted that the old, writ based pleading for fraud in the inducement is also know as fraud in factum; the aggrieved party's plea was non es factum. More modernly stated: "What I agreed to what was not what I thought I agreed to." Legal historians like to say that there was a lack of ad idem, a meeting of the minds.

Okay, enough of the Latin, but a practical point, especially for those who counsel clients who work online. This agreement was what is known as a click through or click free or browse wrap agreement and, when properly drafted, are now fully enforceable. If an attorney needs to obtain assent from an online user, the terms and conditions must be clear.

Jonathan Arnold is a research attorney and the voice of the Finz Advance Series on "California Evidence, Civil Procedure & Discovery." He can be reached at arnoldandassocs@gmail.com.

ADR in the Employment Arena

By Roman Otkupman

ALTERNATIVE DISPUTE Resolution ("ADR") has become a vital external dispute resolution technique widely utilized by parties to resolve their claims with a help of a third party (usually a person familiar with the specific topics that are being litigated) short of pursuing the parties' remedies in the court of law. These techniques include, but not are limited, to mediation, arbitration and negotiation. While there are numerous advantages to utilizing ADR to resolve one's claim, some forms of ADR, such as arbitration, have been closely scrutinized by California courts and recently, by the United States Supreme Court in *AT&T Mobility, LLC v. Concepcion* 131 S. Ct. 1740 (2011).

Some of the advantages of ADR include lower fees and costs, expeditious final decisions and the fact that parties are free to choose individuals familiar with the law to resolve their claims (as opposed to spending valuable time and resources explaining the law to the jury or the judge so that an informed resolution can be achieved). Furthermore, most of the ADR forums are kept strictly confidential and are thus believed by some to promote preservations of reputations and relationships in complicated and simplistic legal battles.

On the other hand, some of the disadvantages include the fact that the ADR forums are sometimes incapable of ordering injunctive compliance and, in the case of arbitration, the fact that both parties usually agree that the arbitration of the claims becomes the final, binding and non-appealable order. Thus, if there is an error made on the part of the arbitrator or in the process of arbitrating the parties' claims, that error becomes irreversible. In very rare circumstances, the court of law can actually overturn an arbitrator's decision if it determines that the issues resolved in arbitration were not within the scope of the arbitration agreement.

Employment Arena

The two most popular ADR tools in the employment arena are mediation and arbitration. Mediation generally takes place during the course of a lawsuit when both parties are interested in settling their claims by using the skills and knowledge of a third party that has proven to be knowledgeable in the employment law field. Generally, both parties agree to one mediator and spend one (sometimes even two or three) days resolving their issues. This process has proven to be extremely effective once the discovery is completed and most of the material issues are out in the open.

Pre-litigation mediation has also proven to be a very effective tool in resolving cases prior to them being filed. The benefit to pre-litigation mediation is that both parties have not expanded much of their time and money litigating the issues and are therefore likely to have an incentive to settle the claims. The disadvantage,

obviously, is that the two parties have not conducted discovery and simply are in the dark about the documents that will be produced and the testimony the parties will provide in the case.

Arbitration is a different form of ADR. It generally involves both parties voluntarily (although this portion has been subject to major scrutiny) agreeing to have their conflicts resolved by a private judge. Usually, it is the party that seeks to enforce arbitration of claims that is obligated to pay for it.

Arbitration Agreements and Class Action Litigation

The most recent issue pertaining to arbitration agreements surfaced when the U.S. Supreme Court granted certiorari to review a case which dealt with class action arbitration. The vital issue in front of the U.S. Supreme Court was whether the ruling by the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal.4th 148 should stand.

In *Discover Bank*, the California Supreme Court held "[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then ... the waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another. Under these circumstances, such waivers are unconscionable under California law and should not be enforced." Id., at 162, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110 (quoting Cal. Civ. Code Ann. §1668).

The U.S. Supreme Court ruled in *AT&T Mobility, LLC v. Concepcion* that classifying most collective arbitration waivers in consumer contracts as unconscionable is clearly a contradiction to the purpose of Section 2 of the Federal Arbitration Act ("FAA"). In *Concepcion*, Vincent and Liza Concepcion decided to purchase a contact with AT&T, and were promised a free phone. While the phone was free, Concepcions were charged a sales tax on the phone, which amounted to $30.22. As a result, the Concepcions brought a lawsuit claiming false advertising and fraud.

This lawsuit was filed in United States District Court. Shortly thereafter, AT&T sought to enforce their rights to arbitrate this matter pursuant to the arbitration agreement which was signed by the Concepcions at the time of purchase. Some highlights of the arbitration agreement included

> The switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to delay the final judgment."
>
> *—Justice Antonin Scalia*

AT&T's ability to unilaterally make amendments to the agreement, customer's ability to initiate dispute proceedings by completing the form which AT&T had on its website and, if the claim was not resolved within thirty (30) days, the customer's ability to invoke arbitration by filing a separate demand for arbitration, which was also available on AT&T's website.

Furthermore, the arbitration was to take place in the county where the customer was billed if the claims were $10,000 or less and gave the customer a choice to attend the arbitration in person, by telephone, or have it decided based on documentary submissions. This agreement denied AT&T's ability to seek reimbursement of its attorneys' fees and, in the event that a customer received an arbitration award greater than AT&T's latest written offer, it required AT&T to pay $7,500 minimum recovery and twice the amount of the claimant's attorneys' fees.

At issue was the clause which required that claims be brought in the parties' individual capacity and not as a plaintiff or class member in any purported class or representative proceedings.

The Court's Analysis: Interpreting §2 of Federal Arbitration Act

In its reasoning, the Court cited the following FAA quote: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2.

In its further interpretation, Justice Scalia, who delivered the opinion for the Court, stated that the final phrase of §2, however, permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."

The Court further held that this saving clause permits agreements to arbitrate "to be invalidated by 'generally applicable contract defenses' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); see also *Perry v. Thomas*, 482 U.S. 483, 492-493, n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987).

Furthermore, the Court stated that when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008).

The Supreme Court's Reasoning of the Class Waiver in the Arbitration Agreements

The Supreme Court delineated three

reasons why the class action waiver is valid in consumer agreements: First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality— and makes the process slower, more costly, and more likely to delay the final judgment. *AT&T Mobility, LLC v. Concepcion* 131 S. Ct. 1740 (2011). Emphasis added.

Second, class arbitration requires procedural formality. And it is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied. Id.

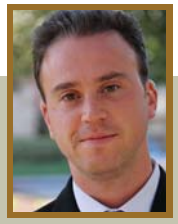
Third, class arbitration greatly increases risks to defendants. When damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Id.

Justice Scalia concluded his analysis by reiterating that arbitration is poorly suited to the higher stakes of class litigation. Moreover, Concepcion's claim was most unlikely to go unresolved. The arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer.

Effect on Employment Class Action Litigation

Many employers require that their employees sign an employment agreement which commonly has a provision for arbitrating claims. In employment litigation, many of the class action claims are based on similarly situated groups of employees who were either deprived of meal breaks, overtime pay, rest breaks, or all of the above. Such claims generally have low individual values but as a class can result in substantial monetary awards.

Undoubtedly, this decision will have a major impact on employers' right to enforce the arbitration agreements which the employees sign. Arguably, this decision gives employers a stronger argument for validating their class action waiver in their arbitration agreements and including a provision that prevents a class of employees to arbitrate their claims as a class as opposed to filing individual lawsuits. However, it is important to note that this particular case pertained to consumer litigation, not employment litigation, which is readily distinguishable due the differing surrounding circumstances in signing an employment agreement as opposed to signing an agreement when purchasing consumer goods.



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Technology Efficiencies Require Billing Alternatives

By Edward Poll

IN A PREVIOUS COLUMN, IT WAS DISCUSSED HOW leveraging the efficiencies of technology can be a vital survival strategy for small firm practitioners in the "new normal" turmoil that law firms must deal with—but only if technology leverage is combined with innovative approaches to billing. This point is crucial, because technology efficiencies without billing innovation will keep the firm from realizing technology's financial benefit. In fact it could be the road to financial ruin if combined with a rigid billable hour approach.

Automation Principles

The Industrial Revolution demonstrated that that the more equipment used to make a product, less labor was required, and the lower the price. With a lower price, volume increased, and profits likewise could rise. Automation produced the same result but with a different name. The more product or service a machine could produce, the less expensive the product. The result would be a lower price with higher volume, with efficiency producing higher profits.

These principles are the same for law firms. More machine power, whether through eDiscovery software, knowledge management systems or other innovations, reduces labor, which tends to reduce cost, which tends to reduce price, which increases volume and profits.

Fee Transformation

The key to higher volume is partnering with clients, understanding what they need, listening to what they want and bridging the gap between the two by providing value. Value is defined as listening to the client to understand what they want and showing them how lawyers can provide value by delivering what clients need to address their challenges. This requires a transformation on both sides of the fee equation.

Clients must accept the kind of billing arrangements that would allow the lawyer to make more money while being more efficient. This does not mean regarding legal services as a commodity. It means rewarding lawyers with more work for eliminating inefficiencies, duplications and unnecessary services.

By the same token, on the law firm side, maintaining profits while becoming more efficient requires changing the billing system to embrace alternative fee arrangements. Using contingent, fixed, capped, value fee approaches where time does not determine the fee is essential to make the most of the leverage from technology.

Increased profit by increased efficiency through the use of technology under a fixed fee or alternative fee engagement

agreement is a definite contrast to the traditional American law firm model, where profit is increased by raising the hourly billing rate. But change is inevitable.

The Great Recession caused corporate and small clients alike to revolt against that model with its opaque standards and seemingly arbitrary price increases. The premise of any alternative billing system is that time is not the relevant issue to determine the fee. Value to the client sets the fee. However, in case the firm and the client do not agree on the value provided, the rules of professional conduct must be altered to permit billings without reference to time, particularly in determining appropriateness of fees where there is a dispute.

Client Acceptance

The question becomes, then, will clients accept billing arrangements that allow the lawyer to make more money while being more efficient? The Association of Corporate Counsel's ACC Value Challenge, which aims to integrate law firm billings with corporate clients' perceptions of value, suggests that they are. Some corporate clients view certain legal services as a commodity, and want to apply standardized rates or flat fees where appropriate. However, most clients are willing to pay a fair fee for value. What they do not want is to pay too much—to pay for inefficiencies, duplications, or unnecessary services. And this is where the leverage from technology is the lawyer's advantage.

When hand-built horseless carriages gave way to the Model T, millions bought cars, and lots of skilled carriage builders went out of business. Some analysts, like British technology consultant Richard Susskind, contend that the legal profession is headed down the same path. In his book titled "The End of Lawyers?," Susskind claimed that the legal profession would be driven by a market pull towards the commoditization of legal services, and the development of new legal technologies to handle those services.

Lawyers will find their roles eroded or even displaced, he said, in a future where "conventional legal advisers will be much less prominent in society than today and, in some walks of life, will have no visibility at all."

This goes too far. The time savings, efficiency and commoditization of routine tasks and services afforded by computers and other electronic technology will, as we have seen, free the legal practitioner to better meet the demands of a challenging new era—provided that that lawyers alter their fee and cost structures in the new world created by changes in technology.

Edward Poll, J.D., M.B.A., CMC. has extensive background in business and law and is one of the nation's most sought-after experts in law practice management issues. Starting, operating and exiting the law practice are issues of keen interest and focus of Ed's writings and presentations. Poll can be reached at edpoll@lawbiz.com.

Designing the Mediation Process for Optimal Results

Have It Your Way!

By Floyd J. Siegal

NEARLY FORTY YEARS AGO, Burger King first launched its memorable "Have It Your Way" advertising campaign, in which an employee, responding to a customer's special request—is heard singing "Hold the pickles, hold the lettuce. Special orders don't upset us. All we ask is that you let us serve it your way."

That once popular jingle almost certainly came to mind for many of those who attended a program titled "Attorneys' Pet Peeves About Mediation," which was presented several months ago by the Southern California Mediation Association ("SCMA").

The SCMA program featured several prominent litigators, who shared their personal likes and dislikes about the mediation process. Not surprisingly, their individual preferences frequently differed from one another. Some preferred to exchange mediation briefs, while others preferred to keep them confidential; some loathed the concept of a joint session, while others enthusiastically embraced the idea; some wanted the mediator to provide his or her personal evaluation of the dispute, while others wanted the mediator to do nothing of the kind; some wanted their clients to participate in each and every discussion with the mediator, while others preferred to engage in discussions with the mediator outside the presence of their client and then relay information separately and privately to their clients.

Mediation, of course, is a voluntary and consensual process. For that reason, the likelihood of success can be, and often is, dependant upon whether the process meets the expectations of those in attendance. In order to maximize the likelihood of success, the mediation process should be carefully tailored to suit the needs and preferences of the participants.

Most mediators won't insist on conducting mediations the way they want—most agree that the participants should have it their way. Of course, that requires that the attorneys representing the various parties inform the mediator in advance exactly what they like and what they don't like. While many mediators will inquire in advance of the mediation, some may not. If a mediator neglects to ask for an attorney's input in advance of the mediation, it is important for each attorney to assume responsibility for contacting the mediator to share his or her own list of pet peeves. Here's a short list of items to consider:

Legal Briefs

These days, most attorneys prefer to submit briefs to the mediator on a confidential basis. Many attorneys find that a confidential brief affords greater leeway to be candid with the mediator. Moreover, many attorneys assume, often correctly, that sharing briefs with opposing parties merely results in posturing by everyone involved.

With that said, many other attorneys believe that the mediation process will be more productive if the parties exchange briefs, fully disclosing to one another the factual and legal underpinnings of their respective positions. Moreover, many attorneys find tremendous value in sharing the opposing party's brief with their client and/or insurance carrier representative.

In order to assure that the mediation process meets everyone's expectations, it is best for each attorney to discuss his or her personal preferences with the mediator well in advance of the mediation. If the attorneys are in agreement, most mediators will defer to their decision. If one attorney prefers to exchange briefs and another prefers to keep them confidential, perhaps the mediator can assist in fashioning a compromise that serves everyone's needs, such as exchanging briefs while submitting separate additional briefs

to the mediator with information that the parties prefer to keep confidential.

Joint Sessions

Nothing seems to evoke a more passionate response these days than asking whether an attorney would like to begin the mediation with a joint session. Today, the overwhelming preference of counsel is to dispense with a joint session and commence the mediation with private caucuses.

With that said, some attorneys strongly believe there is tremendous value in a full-blown joint session, with each party presenting an opening statement setting forth their view of the dispute. Still others believe that all mediations should begin with a brief joint session, limited to introductions and the exchange of pleasantries, without any discussion of the facts or parties' contentions.

Regardless of one's personal view, it is critical to let the mediator know well in advance of the mediation so the mediator can do his or her best to meet everyone's needs. If one's personal preference is to begin the mediation with each side presenting a detailed opening statement, let the mediator know. If one's personal preference is to get together briefly at the outset of the mediation, just to exchange greetings, let the mediator know. If one's personal preference is to assure that the parties never ever share the same room or encounter one another during the entire mediation process, let the mediator know.

Nothing is gained, and much can be lost, if one simply defers to the mediator's usual and customary style, especially if it conflicts with a strongly held preference. If the mediator knows in advance what the parties prefer, he or she can address any differences or concerns and help fashion a process that will be acceptable to everyone.

Mediator's Style

Few things are worse than having a mediator volunteer an unsolicited and unwelcome evaluation of the facts, the credibility of the parties or the value of a claim. On the other hand, some attorneys look to the mediator for his or her opinion and seek the assistance of the mediator in persuading their clients of the probable outcome at trial.

Counsel should always let the mediator know in advance whether they and their clients are more partial to an evaluative style or a facilitative style. Good mediators are skilled at both, and can adapt accordingly—employing one style with one party, and another with another party, if necessary.

Who Should Attend

The absence of an essential decision-maker can often be the difference between impasse and resolution. Attorneys should let the mediator know, in advance, who will be attending the mediation and should discuss with the mediator whether someone's absence—be it a spouse, a business partner or an insurance company representative—might adversely impact the process.

Scheduling Issues

Frequently, the complexity of the dispute, the relationship between counsel and his or her client, or the mere number of parties, dictate that the mediation process will be more effective if the parties arrive at staggered times. When an attorney and his or her client dutifully arrive on time for a 10:00 a.m. mediation, only to find that the mediator proceeds to spend the first two or more hours with the other side, frustration and growing impatience become additional obstacles to resolution. If counsel believes that staggered arrival times will make the process more efficient, it's best to make that suggestion to the mediator well before the mediation so that appropriate arrangements can be made.

While staggered arrival times can make for a more productive mediation process, it is equally important to let the mediator know in advance if anyone will need to leave early. The sudden announcement that a party needs to leave in thirty minutes because of a doctor's appointment or to pick up the kids is virtually certain to hamper efforts to resolve the dispute. If the mediator knows in advance of any potential scheduling problems, he or she can do a much better job of managing everyone's expectations.

Attorney-Client Relationships

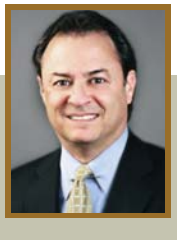
Some attorneys strongly prefer to engage in all discussions about the case and all settlement negotiations privately with the mediator, outside the presence of their client, believing it will allow them to speak more candidly with the mediator. Others prefer to have their client present for all communications with the mediator. Either way, it's essential to let the mediator know in advance. Similarly, if counsel anticipates he or she might have any "client control" problems, it's best to let the mediator know the nature, and extent, in advance of the mediation.

Location of Mediation

In some situations, especially real property disputes and certain personal injury matters, there can often be a benefit to having the mediator physically visit the location in advance of the mediation. With real property disputes in particular, the parties may even want to consider conducting the mediation at, or in close proximity to, the real property in question.

Sometimes, creative solutions become more apparent when everyone is able to take advantage of the opportunity to observe the property during the mediation, and unexpected issues that may arise during the mediation can be more quickly and fully addressed if everyone is at or near the property in question.

When counsel and their clients assume responsibility for designing the mediation process, they become more invested, which, in turn, enhances the odds of resolving the underlying dispute. So when it's time to schedule the next mediation, be sure to keep the Burger King jingle in mind.



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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 30.

Pros and Cons of Mediation Confidentiality

California Courts and Legislature Work To Solve the Puzzle

By Sean E. Judge

Confidentiality is fundamental to the free exchange of positions and arguments in mediation.There is a long stated public policy in California toward resolving disputes between parties out of court. The government provides strict confidentiality of mediation writings and communications, unless certain enumerated statutory exceptions are satisfied to waive confidentiality and inadmissibility.

MEDIATION CONFIDENTIALITY IS NOT WITHOUT its problems. The courts have consistently held that absent express waivers, "confidential" means "confidential" under Evidence Code 1119. They have held that absent express agreements that satisfy the statutory requirements for admissibility, evidence of conduct, communications or agreements made during mediation, even those alleged to be in bad faith, coercive or impulsive, are inadmissible to assist an aggrieved party in subsequent proceedings in which evidence of what happened during mediation is sought to be admitted.

In *Fair v. Bakhtiari*, 40 Cal. 4th 189 (2006), the court stated, "a writing [expressly waiving confidentiality] must directly express the parties' agreement to be bound by the document they sign… Durable settlements are more likely to result if the statute is applied to require language directly reflecting the parties' awareness that they are executing an 'enforceable or binding' agreement."

And therein lays the rub. Absent a statutorily compliant agreement, adhering to strict confidentiality has, at times, produced results with which the courts have become increasingly uncomfortable. This article provides a brief overview of some of the more important cases and the proposed legislative response to the Supreme Court's recent decision in *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011).

Reaffirmed Confidentiality

As a preliminary but important aside, in civil cases, mandatory settlement conferences are not subject to the mediation confidentiality statutes, pursuant to Evidence Code section 1117. This includes mandatory settlement conferences where a settlement officer is appointed to preside over the conference. CRC Rule 3.1380 (d) (providing for appointments at settlement conferences).

Court-ordered mediations, however, that are ordered pursuant to CCP section 1775 are subject to the confidentiality provisions set forth in Evidence Code sections 1115-1128, section 1152, and Evidence Code section 703.5. (CCP section 1775.10) Section 703.5 provides that a mediator is incompetent to testify in subsequent proceedings, except in cases of conduct resulting in civil or criminal contempt, crime or State Bar disciplinary proceedings.

Foxgate Homeowners Assn. v. Bramalea Calif. Inc., 26 Cal.4th 1 (2001)

Foxgate involved claims of bad faith conduct by one of the parties to a mediation. The California Supreme Court, in reversing the Court of Appeal, held that the mediator, in a report to the trial court concerning the bad faith conduct of one of the participants, or any other mediation participant, could not disclose that bad faith conduct to the trial judge. Since the legislative intent is to promote a free and open exchange of positions and interests, the Supreme Court stated, "This frank exchange is achieved only if the participants know that what is said in mediation will not be used to their detriment through later court proceedings…" (Id. at 14)

The "takeaway" from *Foxgate*: *The Foxgate* decision affirmed mediation confidentiality, even in the face of a mediator's report detailing the bad faith conduct by one of the participants. While mandatory settlement conferences have a statutory "good faith" component (CRC Rule 3.1380(c)), mediations do not. Thus, after *Foxgate*, a party may attend mediation and act mischievously or unreasonably act in "bad faith" without the court ever knowing about it, or being able to do anything about it. In so ruling, the California Supreme Court came down squarely on the side of preserving mediation confidentiality in virtually all circumstances.

> "This frank exchange is achieved only if the participants know that what is said in mediation will not be used to their detriment through later court proceedings…"
> —*California Supreme Court*

Simmons v. Ghaderi, 44 Cal. 4th 189 (2008)

Simmons involved a medical malpractice case. Since this was a medical malpractice case, the physician's insurer needed consent from the physician to settle the case. An oral agreement was reached at mediation, and was subsequently reduced to writing and signed by the plaintiff. However, before signing, the defendant physician verbally stated that consent was revoked and left the mediation. Plaintiff contended that there was a valid, enforceable agreement, notwithstanding the absence of the defendant's signature (thus making the agreement arguably unenforceable under CCP 664.6 and inadmissible under Evidence Code 1118).

Plaintiff then amended her complaint to allege breach of contract and proceeded to trial on that cause of action. It was only during trial (and not before) that the issue of confidentiality was raised. The trial court entered judgment for plaintiff on the breach of contract action.

In reversing the trial and appellate courts, the California Supreme Court held that while an oral agreement may have been reached in principal before the defendant revoked consent, there was no enforceable statutorily compliant agreement for the admissibility of any such agreement, assuming it was valid to begin with.

The court pointed out the myriad statutory requirements that the parties must strictly comply with for admissibility. After mentioning Evidence Code section 1119 (the blanket mediation confidentiality statute, unless the other waiver/admissibility statutes are complied with), the court undertook a systematic analysis of the Evidence Code exceptions. Evidence Code 1122 allows for admissibility

of "…a communication or a writing" if "all persons who conduct or otherwise participate in the mediation expressly agree in writing or orally in accordance with section 1118 to the disclosure of the communication, document or writing." Section 1123 allows for the disclosure of a written settlement agreement if the agreement is signed by the parties and either (a) the agreement provides that it is admissible or words to that effect, (b) the agreement provides that it is binding or enforceable, or words to that effect, (c) all parties agree to its disclosure either in writing or orally in accordance with Section 1118 or (d) the agreement is used to show fraud, duress or illegality relevant to the issue in dispute.

The court further stated "Section 1124 specifies that an oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, if certain conditions involving section 1118 are satisfied. Oral agreements in accordance with section 1118 occur when: (a) the oral agreement is recorded by a court reporter, tape recorder or other reliable means of sound recording; (b) the terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited; (c) the parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect; and (d) the recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded."

The court also mentioned Section 1126, which provides that statements made during the mediation remain confidential during the mediation, but also after the mediation ends. The court then rejected the application of any judicial exceptions, including estoppel and waiver, to the confidentiality statutes, citing the absence of due process in the case before them.

The "takeaway" from *Simmons*: Absent an agreement signed by all parties that complies with Sections 1122, 1123, 1124 or 1118 (if it is an oral agreement and complies with the statutory scheme set forth above), mediation confidentiality remains sacrosanct. The court came down strongly in favor of confidentiality and notwithstanding any claims of waiver or estoppel by failure to object to the admissibility of mediation-based evidence before the subsequent trial.

Cassel v. Superior Court, 51 Cal. 4th 113 (2011)

This case has been the subject of considerable comment within the mediation community. In a nutshell, *Cassel* arises from a legal malpractice case where plaintiff's counsel advised plaintiff to accept just over $1 million during mediation (an amount which plaintiff contended was far less than his case was worth) and were alleged to have engaged in tactics against him in order to intimidate him into accepting the settlement. The plaintiff had sought to admit not only evidence of what occurred at the mediation, but also evidence of his mediation prep meeting with his counsel two days earlier. The Supreme Court held that neither the evidence from the pre-mediation meeting nor the evidence of the tactics employed at the mediation to obtain the settlement were admissible.

The court, in declining to disrupt the statutory scheme of mediation confidentiality, stated: "…[t]he Legislature

might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either."

The legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.

There is no view expressed about whether the statutory language, thus applied, ideally balances the competing concerns or represents the soundest public policy. Such is not the attorney's responsibility or his/her province. It is simply concluded, as a matter of statutory construction, that application of the statutes' plain terms to the circumstances of this case does not produce absurd results that are clearly contrary to the legislature's intent. Of course, the legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys.

Justice Chin quite pointedly expressed great reservations about the result in his concurring opinion as follows at p. 138: "[t]his holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a criminal prosecution against the attorney. This is a high price to pay to preserve total confidentiality in the mediation process." *Cassel*, 51 Cal. 4th at 138 (J. Chin, concurring in the result) (emphasis added)

The takeaway from *Cassel*: The court reaffirmed the virtually absolute protection afforded by the mediation statutes. However, the court also expressed some discomfort in finding a more arguably just result, and instead being relegated to applying the statute's plain terms. Justice Chin stated that mediation confidentiality exacted a high price from clients who may have been the victims of legal malpractice during mediation.

Proposed Response Court's Reservations

The *Cassel* court concluded that creating judicial exceptions was unwarranted since upholding confidentiality did not produce an "absurd" result (though Justice Chin was clearly troubled by the result). Noting the court's concerns, the Conference of California Bar Associations adopted a resolution to amend Evidence Code section 1120.

At present, Evidence Code 1120 does not preclude the admission of otherwise admissible evidence solely

because of its use at mediation or a mediation consultation. Additionally, Evidence Code 1120 provides that (1) an agreement to mediate a dispute or (2) to extend the time within which to act or refrain from acting in a civil action is admissible, as is the fact that a mediator served, is serving, will serve, or was contacted about serving as a mediator in the dispute.

The proposed amendment to Evidence Code 1120, which is now before the California Assembly as AB 2025, provides that "communications between a client and his or her attorney during mediation are admissible in an action for legal malpractice or breach of fiduciary duty, or both, and in a State Bar disciplinary action, if the attorney's professional negligence or misconduct forms the basis of the client's allegations against the attorney".

Without question, AB 2025 is a specific attempt to enact a legislative exception in response to *Cassel*. But will it work, and if so, how? A few questions come to mind:

How would the evidence come in?

If these are purely communications between a client and his or her counsel during a mediation, then assuming there is no writing memorializing pure attorney client communications, the lawsuit might be based primarily upon "he said/she said" evidence. This would discourage any attorney from giving frank and honest advice during mediation for fear of litigation later.

It cannot be over-emphasized that mediations are unique in that things happen much more quickly than they do in the discovery process. Lawyering during the course of mediation often requires a series of frank and honest re-evaluations of previously held positions and the risks and uncertainties of taking them to trial.

Unlike a trial, concessions are continuously made (as they must be) if the parties are to come to an agreement. Some are hard fought, while others occur more smoothly. The chilling effect that this exception would have on mediation and negotiation conduct or advice cannot be overstated.

What role if any would a mediator play in such litigation?

What if one of the allegations concerned communications that came up in caucus with the mediator? Or, if the mediator stepped out of the room to allow the attorney and client to discuss an offer from the other side, and returned to hear the client say something to the effect of "yes, that's a great offer that's acceptable to me" or "my attorney is pressuring me to take this. I don't want to but he says I have to take it."

Evidence Code section 703.5 provides: No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could: (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.

Since AB 2025 includes State Bar proceedings, mediators may already be competent to testify in those proceedings, notwithstanding any other confidentiality issues that may preclude their testimony. But they are decidedly not competent to testify in subsequent civil proceedings.

Mediation Confidentiality Evolves

The California Supreme Court adopted judicial restraint in construing the mediation confidentiality statutory scheme. In the cases that have come before them, including the three mentioned above, the court has come down squarely on the side of preserving virtually full confidentiality not only in mediations, but also in pre-mediation discussions between an attorney and client, unless the exceptions spelled out in the statutes are strictly complied with.

Cassel showed that the court is becoming uncomfortable with some of the results at which they have arrived in interpreting these statutes. *Cassel* can certainly be read as a call for some legislative help to allow for more arguably just results.

Nevertheless, AB 2025 creates a number of pitfalls and practical problems. The proposed statutory amendment is directed squarely at *Cassel*, but in so doing, it creates a situation where frank and honest advice cannot be given as it has been in the past. One can only imagine that if AB 2025 were adopted, less candid advice would be given, and potentially, fewer cases will resolve.

Mediation is a unique proceeding in which information is exchanged far more quickly than in discovery, and positions and ideas are constantly evolving. To second guess those decisions, in addition to creating a stalemate over whether the mediator may be called to testify, creates more problems than it solves.

Settling cases has long been encouraged by the legislature and the courts. Confidentiality is an indispensable component to settlement. Even if bad faith, mercurial or coercive conduct is protected, chipping away at mediation confidentiality is not the answer. Often, but not always, such conduct can be addressed or controlled within the mediation process, and whenever possible, it should be. It should not be subject to legislative exceptions that disturb confidentiality by attempting to create "perfection" to the detriment of the good.

Sean E. Judge is a civil case mediator in Woodland Hills who was a practicing litigator for 23 years. He can be reached at sean@judgemediation.com.

Test No. 46

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. The courts have been increasingly open to reading common law exceptions into the mediation confidentiality statutes.
   ❑ True ❑ False

2. If the parties wish to have communications, writings or evidence of conduct non-confidential and admissible, they may agree to do so orally.
   ❑ True ❑ False

3. Mediation confidentiality applies to court ordered settlement conferences conducted by settlement officers.
   ❑ True ❑ False

4. Mediation confidentiality applies to court ordered mediations where the parties request a mediator to resolve their dispute.
   ❑ True ❑ False

5. A mediator's report to a judge concerning the mediation is not confidential and may be freely disclosed.
   ❑ True ❑ False

6. For an agreement to be enforced under CCP 664.6, the parties need only provide that it is to be enforceable under that section.
   ❑ True ❑ False

7. The terms of an oral agreement reached at mediation may be admissible.
   ❑ True ❑ False

8. Statements made during mediation remain confidential after mediation.
   ❑ True ❑ False

9. The confidentiality statutes apply to writings and agreements and not conduct during mediation.
   ❑ True ❑ False

10. Attorney-client meetings in contemplation of mediation can be non-confidential if the client waives confidentiality.
    ❑ True ❑ False

11. The *Cassel* court took into account equitable and common law principles in reaching its decision.
    ❑ True ❑ False

12. Unless statutory exceptions are strictly complied with, communications, writings and conduct during mediation are confidential.
    ❑ True ❑ False

13. Mediators may be compelled to testify at State Bar proceedings.
    ❑ True ❑ False

14. The proposed legislative response to *Cassel* creates an independent and distinct exception to mediation confidentiality.
    ❑ True ❑ False

15. The proposed legislative response to *Cassel* also requires compliance with the statues that allow for exceptions to mediation confidentiality.
    ❑ True ❑ False

16. Evidence Code 1120 currently excepts certain communications made during mediations.
    ❑ True ❑ False

17. Attorney client communications that involve settlement discussions may be made non-confidential by the client.
    ❑ True ❑ False

18. Mediators may be compelled to testify in some civil proceedings.
    ❑ True ❑ False

19. An oral agreement arrived at in principle during the mediation may be enforceable during subsequent civil actions.
    ❑ True ❑ False

20. Mediations must be conducted in good faith.
    ❑ True ❑ False

MCLE Answer Sheet No. 46

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

Valley Community Legal Foundation
of the San Fernando Valley Bar Association

VETERANS DAY GOLF TOURNAMENT

Proceeds fund grant and scholarship programs of the VCLF of the SFVBA

MONDAY, NOVEMBER 12, 2012

PORTER VALLEY COUNTRY CLUB • NORTHRIDGE

10:00 A.M. CHECK-IN | 10:30 A.M. PUTTING CONTEST | 11:30 A.M. SHOTGUN START
5:00 P.M. AWARDS RECEPTION AND DINNER

GOLFER'S PLAYER PACKAGE

- **$150 "Early Birdie Special"**
  (Purchase by October 1)
- **$175 (Purchase after October 1)**
- **$560 "Early Birdie Foursome Special"**
  (Purchase by October 1)
- **$150 Sitting/Retired Judges**
  Includes green fees, cart, tee gifts, beverages, luncheon and awards reception and dinner.

SPONSORSHIP OPPORTUNITIES*

Eagle Sponsor $5,000
Includes two golf foursome packages, two additional tickets for awards dinner, on-course beverage station with sign, sign at tee, name/logo prominently displayed in promotional material and banner.

Birdie Sponsor $2,500
Includes one golf foursome package, one additional ticket for awards dinner, name/logo included in promotional material and sign at tee.

Hole-in-One Sponsor $1,500
Hit a Hole-In-One on a par 3 hole and win a vacation. We will place sponsorship signs on every par 3 hole on course. Includes two tickets to luncheon and awards dinner.

Tee Sponsor $250
By sponsoring a tee/green sign on the course your firm or company can show your support for the VCLF's good works. You may hand out gifts and information to the golfers at your sponsored hole. Includes two tickets to luncheon.

OTHER SPONSORSHIP OPPORTUNITIES*

Cocktail Reception Sponsor $2,000
The awards reception will be a fun filled event! We will place sponsorship signs on the bar. Includes two tickets to the awards dinner.

Lunch Sponsor $1,500
Let us announce your generosity in "picking up the tab" for lunch. We will place sponsorship signs at the lunch site and give you a table for you to hand out gifts and information to the golfers. Includes two tickets to the luncheon and awards dinner.

Photo Sponsor $1,000
Every golfer will receive a framed photo with a picture of their foursome and an individual shot of each golfer. Your logo will be included on the frame. Includes two tickets to the luncheon and dinner.

Putting Contest Sponsor $1,000
We'll display a sign at the putting contest showing your support. We'll mention your sponsorship when we announce the winner of the putting contest. Includes two tickets to the luncheon.

Beverage Station Sponsor $750
Sponsor a favorite golfer spot! We will acknowledge your sponsorship by placing a sign at one beverage station and you may hand out gifts to the golfers at your sponsored hole. Includes two tickets to luncheon.

Contact (818) 227-0490, ext. 105 or events@sfvba.org for player and sponsorship information.

*** All sponsors receive recognition on the VCLF website, in *Valley Lawyer* magazine and acknowledgment at awards dinner.**

Exploration of Mandatory Fee Arbitration

Ending the Attorney-Client Tug of War

By Angela M. Hutchinson

When attorneys or clients have fee disputes, there is an informal, confidential and low cost method to resolve such matters. Most disputes are handled through a local bar such as the San Fernando Valley Bar Association. The State Bar handles fee arbitration only when there is no local bar program.

MANDATORY FEE ARBITRATION ("MFA") IS A PROCEDURE USED TO RESOLVE DISPUTES WITH attorneys and their clients. Lawyers based or working in the San Fernando Valley, or clients residing in the Valley are highly encouraged to utilize the MFA Program of the San Fernando Valley Bar Association. The State Bar of California recommends that attorneys and clients use a local bar association to handle fee disputes.

In general, a MFA program provides an opportunity for a neutral and trained arbitrator to determine whether the attorney's fees were reasonable for the legal services provided to the client. Fee arbitration is mandatory for the lawyer if the client elects to have the dispute resolved through an MFA program. Once a client receives the written notice from his/her attorney to their right to arbitrate, the client has 30 days to file a request for arbitration.

The SFVBA takes pride in the administration of their program. Since their program is smaller than some bar associations, they are able to pay closer attention to each case filed explains Irma Mejia, who administers the SFVBA's MFA program. Mejia says, "On average, our cases are closed within 5 months of having been filed. We have a great panel of volunteer arbitrators comprised of 70 attorneys and 16 lay arbitrators."

While the SFVBA program may be small, it is indeed growing fast. In 2010, the SFVBA had a total of 54 MFA cases filed, up from 30 in its inaugural year of 2007. Not only have the number of cases increased, so have the disputed amounts and the complexity of the disputes. "While it may be a symptom of the recession, with more individuals not being able to pay attorney fees, I think it also is a result of expanding awareness among the legal community that this type of program exists locally here in the Valley," says Mejia. "The clients who are Valley residents are relieved to discover that they don't need to travel all the way to downtown or over the hill to Santa Monica or Beverly Hills to have their fee dispute resolved."

The SFVBA's MFA Program Chair Myer Sankary is experienced and always available to discuss the arbitrator advisories, Business & Professions Code §6200 and other issues relating to fee arbitrations. "It makes our program very unique, and for the most part, the parties walk away feeling as if all of their issues were addressed," says Mejia.

In an effort to further explore the SFVBA's MFA program, *Valley Lawyer* interviews the program chair, staff administrator and two volunteer arbitrators. These professionals share their perspectives on the program—its history, purpose and benefits.

Administration of the Program

For the past year and a half, Irma Mejia has served as the Program Administrator. She is responsible for managing the cases from intake to final service of the arbitrators' decision. "I ensure that the cases adhere to the deadlines imposed by our Rules of Procedure. Since communication between the parties and arbitrators is prohibited, with few exceptions, I function as liason between the parties and arbitrators," says Mejia. She also ensures that all parties participate, that a date has been submitted for a hearing, and that awards are well-written and enforceable.

In addition, Mejia manages the SFVBA's pool of volunteers, which includes recruitment of new arbitrators, scheduling of training programs and working with them to ensure that their written decisions meet the Program's standards. Mejia shares more in-depth details about the SFVBA's MFA program in the following interview.

VL: Do you ever receive complaints from either party regarding unfair treatment of the arbitration? If so, how are they resolved?

IM: I have received very few complaints. I think it is because our arbitrators do an excellent job of writing decisions that clearly explain the rationale for an award, so someone who may not have received a decision in their favor can at least better understand the reasons for their loss. When the parties have serious complaints, they are asked to submit those in writing and they are reviewed by the MFA Program Committee Chair. Complaints are very rare and they are addressed on an individual basis, so there really is no "one size fits all" solution to them.

VL: Are there any forthcoming enhancements to the program?

IM: We have updated our Fee Waiver Request Form to make it easier for the Program to evaluate these types of requests. I will be uploading it to our website soon. In fact, I hope to revamp the Fee Arbitration page of our website to make the instructions for filing much easier to understand. The MFA Program Committee is also in the process of revising our Rules of Procedure, creating a handbook for our arbitrators and codifying the rules of procedure for attorney-to-attorney fee arbitrations.

VL: With our technically advancing society, do you think there will ever be virtual arbitration sessions via Skype? Would that be useful for the program?

IM: We do have cases now in which individuals are unable to appear in person, either because they live in another county, are incarcerated or handicapped. These individuals may request to appear by teleconference so I definitely can envision videoconferencing being an option for the future. Still, it's like Skyping a court trial, those things are handled best when all the parties are present. If the parties live in the same city and are able to freely travel, they should make it a point to appear in person.

Technology will certainly make training for new arbitrators much more accessible. In fact, the Beverly Hills Bar Association in conjunction with the State Bar Committee on Mandatory Fee Arbitration recently hosted a webcast of a fee arbitrator training program. Potential volunteers were able to access the training program for 24 hours after the live webcast. It was very convenient.

VL: How does one become a volunteer arbitrator?

IM: Fee arbitrators are required to participate in a 2.75 hour long Fee Arbitrator Training Program. These are usually hosted by the State Bar Committee on Mandatory

Fee Arbitration in conjunction with a local bar association. Attorney arbitrators must have been practicing for at least five years. Non-attorney arbitrators must never have attended law school or worked in a law office. Non-attorney arbitrators are vital for the success of our Program because they bring the layperson's perspective to the arbitration.

For individuals who are interested in joining our MFA panel, the SFVBA has recordings of our most recent Fee Arbitrator Training Program. The Program is in need of more criminal law attorneys and lay arbitrators.

Chairing the Program

Myer Sankary has been practicing law since graduating Harvard Law School in 1965. He enjoyed a long career as a general practitioner in business transactions, probate and estates, business litigation, personal injury, family law and real estate. He has been mediating disputes since 1996 after receiving extensive training at the Straus Institute at Pepperdine. Since 2008, he has been a full-time mediator with ADR Services, Inc. He specializes in mediating elder issues, probate, wills and trusts.

Sankary is also a regular lecturer on negotiations and mediation at the graduate program at USC's Marshall School of Business. He has served as the chair of the State Bar's Solo and Small Firm Section, as well as the president of the Southern California Mediation Association. Sankary is a former member of the SFVBA Board of Trustees and the State Bar Committee on Mandatory Fee Arbitration. He has been married for 43 years, has two adult children and has traveled extensively to over 85 countries.

VL: What aspect do you enjoy most about chairing the Fee Arb program?

MS: As I was retiring from my years on the SFVBA Board in 2006, then President Richard Lewis asked me if I would take on the project as chair of the new SFVBA Mandatory Fee Arbitration Program. The job required heading up an organizing committee and working with Liz Post to establish the governing rules and getting approval from the State Bar MFA Committee. It took considerable effort for our staff to work with our committee to develop all of the rules and forms required to implement this new program. We were hoping that we would obtain enough cases to finance the cost of operations. The program was an immediate success.

There are actually three things that I enjoyed most about chairing the MFA program:. First, working with the committee and staff to organize and implement a very important public service that the SFVBA had abandoned years earlier because lack of staff and leadership. It was very exciting to see the program develop at each stage, including training arbitrators, and marketing the service to the community of lawyers and clients. I underestimated the time and effort the project would require, but I don't regret it. It has been a very fulfilling and meaningful contribution.

Second, I personally enjoyed immersing myself into an area of law and regulations that was new to me. Although there are many technical aspects about the arbitration process that involve statutory analysis, case law, and regulatory interpretation, I have found it challenging to review all the decisions to make sure that they comply with all these governing principles while providing a hearing and outcome that is fair to both clients and their lawyers. I have enjoyed working with many volunteer arbitrators as well as presenting training programs for beginners and advanced practitioners.

Finally, I have also enjoyed my work on the State Bar MFA committee where I met many bright and dedicated volunteers throughout California. We were led for many years by Jill Sperber, a capable State Bar director of the committee. Our job was to review the rules of all the local bar association programs and make sure they complied with the State MFA standards and rules.

Also, whenever new issues arose due to court decisions in this field such as the interplay between contractual arbitration of fee provisions and the MFA program, we developed numerous advisories to assist arbitrators and their program chairs to understand how the rules should be interpreted. We were acting in a legislative and policy making position as well as executive capacity in carrying out the duties of the MFA Committee.

VL: In your opinion, what is the proudest accomplishment of the program?

MS: Our most proud accomplishment is the ongoing success of the program that provides a fair and low cost forum to hear disputes between attorneys and their clients over fees. The fact that our program has been financially successful due the number of cases we have administered is proof that the community acknowledges that our program is the place to resolve these types of disputes. This could not have

happened without outstanding staff administration. Without their high level of competency in dealing with clients, attorneys and the many issues that need attention to detail and good decision making, this program could not have succeeded. It has been a real pleasure for me to work with such fine and competent staff.

VL: Why should attorneys participate as volunteer arbitrators?

MS: There are many reasons why attorneys should participate as volunteer arbitrators. Not only are they doing an important public service for the bar and the public, but in their own self interest, they will gain an intimate familiarity of all the interrelated statutes, cases, rules and regulations that govern attorney fee disputes. If an attorney has experience as an arbitrator, they will have first hand knowledge what it takes to document their own claim and present appropriate evidence to collect their fees.

At the same time they will avoid many of the pitfalls that can result in loss of their legal fees. Finally, the experience of arbitrating a fee dispute has its own internal rewards of satisfaction notwithstanding the many volunteer hours of effort it takes to do the job well. I want to congratulate our volunteer arbitrators for their dedication and many many hours of devotion to do a job well done.

VL: How effective is the arbitration process? Is it more beneficial for lawyers or clients?

MS: The MFA program is designed to be beneficial to both attorneys and their clients. It is a low cost, confidential and expeditious proceeding. In every fee dispute, the client is unhappy with their attorney for some reason (justified or not) or they would not object to the fees charged by their attorney. Even though many of the arbitrations are non-binding, the hearing is an opportunity for the client to air their grievances before a neutral panel, and the attorney can explain why his fees are fair, reasonable and should be paid.

If the arbitrators do their job well by being courteous and listening to the evidence at the hearing, and then by writing an award that gives a rational basis for their decision, there is often a strong likelihood the parties will accept the award and the dispute is resolved without litigation.

VL: What are some of the goals of the Fee Arbitration Program?

MS: Lawyers are the gatekeepers to the judicial system for the members of the public. Without trust and confidence in their lawyers, clients will not feel the judicial system is fair. The MFA program plays a key role in maintaining public trust with lawyers. It is the stated purpose of the MFA system to provide clients with a low cost access to a forum where their disputes over legal fees can be fairly determined. This program is designed to be fair both to clients and attorneys. It is important for arbitrators to be well trained in the arbitration process so that both parties feel that the process has been a fair process for resolving attorney client fee disputes.

Some lawyers may not like the idea that they must spend the time to go to a non-binding arbitration before they can collect their fees. However, if attorneys learn the rules concerning their obligations to enter into appropriate written fee agreements with their clients, and provide appropriate billing for their services, and the fees they charge are reasonable and not unconscionable, the arbitrators will generally write opinions that will explain to the client why the fee is fair and earned, and should be paid. This should be of great assistance to lawyers who are trying to collect their fees and will provide an informal method to end the dispute, expeditiously, inexpensively and fairly. This will enhance the trust of the public in their relations to lawyers and the legal system.

The Lay Arbitrator, Since 2007

Tricia West is the CEO of PJ West and Associates. She manages medical legal cases from all over the United States and works with a consulting staff of over 200 nurses and paramedical professionals in identifying breaches in the standards of care. She works with both defense and plaintiff counsel to analyze and strategize cases to optimize outcomes. In doing so, she is actively involved with causation, damage issues, life care planning, client interviews and medical research and summarizing medical documentation and literature.

West is a pioneer in the field of legal nurse consulting where she consulted prior to legal nurse consulting being a recognized subspecialty of nursing. Along with her clinical work, she has worked in the medical legal arena since 1980. She has experience as a registered nurse and administrator, having worked in intensive care, quality care, acute and chronic dialysis. In addition to having her BSN in Critical Care, and her PHN, she holds an MBA in Healthcare Management. She has participated as a lay arbitrator for SFVBA's MFA program for five years.

VL: What is the most rewarding part of the arbitration process, and most challenging?

TW: The most rewarding part of being a volunteer arbitrator includes using my critical analysis skills that are so important in my day-to-day work in dealing with legal cases that have a medical component. It is interesting to see how that same skill set so perfectly intertwines with the complexities of arbitration.

It is also rewarding to be involved in the post hearing process, discussing the merits of both sides of the cases with counsel. The most challenging part is helping the client to understand the process and guidelines under which the process functions.

VL: As a lay arbitrator, has participating in the process been useful for your career?

TW: Since my career deals with medical legal cases, I believe all additional experience and knowledge is to my benefit, which then allows me to use that knowledge to benefit others.

VL: Are there any common mistakes or pet peeves that either the attorney or clients do during the arbitration?

TW: I have found some clients have their story and find it difficult to understand the process we must follow in making a decision. There are some attorneys who appear to be on the side of the attorney in the arbitration and discount or under weigh the lay client's fact pattern.

VL: If you could change an aspect of the arbitration process what would it be?
TW: Have an affiliation with a law schools, giving law students the experience of helping the client to both understand the process and assist them in preparing their case in a clear and concise manner. I believe this would serve both the student with gaining understanding and experience as well as help the client, even one who does not receive a favorable award, to feel they were heard and got a fair "day in court." It would also serve the arbitration process and specifically the volunteer arbitrators from having hearings that go for many hours.

The Attorney Arbitrator, Since 2010

John P. Goffin has been practicing law since 1996 with emphasis on family law. He also serves as an arbitrator on the commercial dispute panel for the American Arbitration Association. He has been volunteering with the SFVBA for almost three years.

VL: What is the most challenging aspect of arbitration?
JG: When you, as the arbitrator, have determined fees for services performed by fellow counsel to be unreasonable and it becomes incumbent upon you to award a reasonable amount for the services set forth on a billing statement in connection with work product that you have not been a part of or may not have even seen. Although the guidelines set forth in Arbitration Advisory 98-03 (Determination of a "Reasonable Fee") is helpful, it is often the case that arbitrary standards must be utilized by the arbitrator in determining the reasonableness of the fee. These would include, but not be limited to:

- Whether the services provided by the attorney were necessary, reasonable and efficient?
- Did the attorney competently achieve client's goals?
- Did client receive a benefit from the services commensurate to the amount of compensation sought by the attorney?
- Did the client have an understanding as to the approximate amount of time which would be incurred?
- Was an estimate provided?
- Is there any reason to believe that the attorney's services required extraordinary effort or talent to justify a fee in excess of the rates customarily charged by other similar attorneys in the community?

VL: What advice can you offer to attorneys that are involved in an arbitration matter?
JG: The advice I would have for attorneys is not so much with the process itself but rather with "preventive measures" and to be prepared in the event you become a participant in the process. I would make sure to review your retainer agreements to make sure that they are detailed and specific. I would

further advise attorneys to make it a habit to send letters to clients explaining what you are doing for them and why.

Finally, prior to sending out your invoices, review each of the description of services provided and make sure that, in your mind, you are not only comfortable with the charge but can substantiate and validate the time should the client raise an issue in such regard.

VL: Are there any commons mistakes or pet peeves that either the attorney or clients do during the arbitration?
JG: It is often misunderstood by the client that the arbitration of an attorney/client fee dispute is only a determination of the reasonableness of the fees charged. Clients often fail to understand that the arbitrator cannot award damages or offset in an arbitration (but may consider whether fees should be disallowed or reduced for services performed by attorneys to correct his or her own errors). Thus, you have many clients erroneously believing that they are entitled to damages for negligence or emotional distress during the fee arbitration process.

VL: If you could change an aspect of the arbitration process what would it be?
JG: It is not so much the arbitration process that I would change. The procedures are a less structured version of a civil trial. Thus, I believe that the process and procedures should remain as close to the civil trial process as possible.

However, with the recent closures of courtrooms in California and the inevitable closures of more in the future, what needs to change is the acceptance among litigants of the arbitration process as a final solution to civil disputes. With the increased court costs and the lack of administrative court resources in LA County, there is going to have to be a wider reaching acceptance of the arbitration process as a final resolution of disputes.

To submit a request for arbitration to the SFVBA, an attorney or client can access the appropriate forms from SFVBA's website. All forms submitted to the SFVBA must be completely filled out and include any filing fee. Failure to properly file may constitute a waiver of a client's right to request or maintain arbitration. For more information on the MFA program, please visit www.sfvba.org and select the "Fee Arbitration" menu option. If interested in participating as an arbitrator, contact Irma Mejia at (818) 227-0490, ext. 100.

The MFA program is a fair and useful procedure but perhaps arbitrator Goffin defines it best: "I suppose that the inherent arbitrariness of determining the reasonableness of the fees is why the system is called arbitration."

Angela M. Hutchinson serves as the Managing Editor of *Valley Lawyer* magazine, and she was recently accepted to law school. Hutchinson is also a published author and entrepreneur within the entertainment field. She and her husband of eight years have two young children. Hutchinson can be reached at editor@sfvba.org.

Fee Arb Hot Topics

By Irma Mejia

MOST ATTORNEYS WHO PARTICIPATE IN the SFVBA's Mandatory Fee Arbitration Program have never before been involved in this type of arbitration. They typically welcome the opportunity to have their dispute heard before a neutral panel of arbitrators. However, some attorneys are irked that the client requested arbitration. Others are annoyed that the client did not file with the attorney's preferred bar association (which should of course be the San Fernando Valley Bar Association). And there are those attorneys who are just plain confused.

No matter the attorney's feelings, one thing is for sure: he or she should not panic. There is a standard procedure in place for handling fee disputes and full cooperation of all the parties will enable a quick resolution. The attorney should feel free to contact the SFVBA's MFA Program if he or she has any questions.

Below are a few hot topics with which attorneys new to fee arbitration should familiarize themselves:

1. The SFVBA Mandatory Fee Arbitration Program has jurisdiction over a fee dispute if at least one attorney involved in the dispute has an office in Los Angeles County or Ventura County or maintained an office in these counties at the times the services were rendered. The person initiating arbitration in these counties has a variety of local programs to choose from. Attorneys must understand that the local programs are independent of one another so cases cannot be transferred to another program. Ultimately, the person filing for arbitration decides which program to use.

2. An attorney is required to provide a client with a written notice of his or her right to arbitration prior to or at the time of filing a lawsuit to collect fees. A client may stay any court proceedings if the attorney has not served them with a notice of their right to arbitration. A State Bar approved Notice of Client's Right to Arbitration form is available for download from our website, www.sfvba.org.

3. The Mandatory Fee Arbitration Program is mandated by Article 13 of the Business and Professions Code. It is this statute and not the Code of Civil Procedure that governs the State Bar approved Mandatory Fee Arbitration programs. The Code of Civil Procedure, however, does apply to the post-fee arbitration process of confirming, correcting and vacating an award in a court of law. Both B&P Code §§6200-6206 and CCP §§1285-1288.8 are available for download from the SFVBA website.

4. Section 6200(c) of the Business and Professions Code states that arbitration is mandatory for an attorney if it is

initiated by a client. An attorney who receives a Notice of Attorney Responsibility from our Program is required to respond within thirty days to the Client Request for Arbitration. Failure to respond will not stall the arbitration. In fact, the arbitration will continue with or without the attorney's participation. If an attorney is found to have willfully failed to appear at arbitration, he or she may waive his or her right to a trial de novo.

5. Attorneys may initiate fee arbitration but in those cases client participation is voluntary.

6. Individual attorneys, not firms, must be named as the responsible attorneys in fee arbitrations. Section 6203(d) states that if an attorney has not complied with an arbitration award requiring him or her to refund unearned fees, the State Bar has the authority to place the attorney on involuntary inactive status until the refund has been paid. Individual attorneys must be named for enforcement purposes.

Arbitration Advisory 1994-04 issued by the State Bar Committee on Mandatory Fee Arbitration offers more information on this issue. This and other arbitration advisories can be downloaded from the State Bar's website at www.calbar.ca.gov.

7. Fee disputes are considered contract disputes, not malpractice claims. Therefore, the one year statute of limitations that applies to claims for malpractice does not apply to the request for arbitration filed with our Mandatory Fee Arbitration Program. Arbitration Advisory 2011-02 discusses this topic in depth and can be found on the State Bar's website.

8. Section 6204 dictates that arbitration of a fee dispute may be binding only if both parties agree in writing to binding arbitration after the dispute over fees and costs has arisen. Retainer agreements may include binding arbitration clauses but these do not apply in the Mandatory Fee Arbitration Program because they were signed prior to the fee dispute. Arbitration Advisory 2004-01 discusses this topic in depth and may be downloaded from the Stat Bar's website.

9. Non-refundable retainers are only valid if they are paid for the sole purpose of securing an attorney's availability. Any retainer that has been and is being used to cover attorney costs and hourly fees is not a true non-refundable retainer. More information on this topic can be found in Arbitration Advisory 2011-01, also available on the State Bar's website. See also "Enforcement of 'Non-Refundable' Retainer Provisions" by Michael J. Fish in the March 2011 issue of *Valley Lawyer*.

With courtroom closures, the Mandatory Fee Arbitration Program is an increasingly more popular alternative for resolving fee disputes. Consequently, attorneys should familiarize themselves with the MFA program and guidelines because they may need to use it in the future. Prior knowledge of the MFA program and advisories will help an attorney undertake those "preventive measures" mentioned by SFVBA arbitrators in the previous article.

Opposing Attorneys Working Together

BARRY EDZANT
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THE COURTS ARE INUNDATED with cases, and there are not enough resources to insure that every case is given full attention by the courts. And it is getting worse. Last month, attorneys were given notice that 56 courtrooms are being closed throughout Los Angeles County, with the unfortunate reality that cases will take longer to get to trial, and many court employees are becoming unemployed. As such, it is critical to utilize the court provided ADR services, which have been offered to litigants for many years.

Some attorneys have had the privilege of serving as a court settlement officer for several years now in the "two lawyer" program, whereby two attorneys sit as settlement officers to try to settle cases. This program is unique in several aspects, and has substantial benefits for the parties. However, it can also be challenging.

In this program, which is mainly designed for personal injury cases, one settlement officer is typically a plaintiff attorney, the other officer from the defense bar. The cases are allotted only an hour and a half of time, so the familiar negotiation process of give and take over several hours dramatically changes. If the usual negotiation "dance" is a methodic waltz, this program is a frenzied tango.

Surprisingly, despite the program's rapid pace, at least half of all of the cases brought into this program settle. Whether or not the settlements would be more favorable to one side or the other if the pace was more relaxed is hard to say, and would make for an interesting study.

The great benefit of the program is that the litigating parties hear about the strengths and weaknesses of their case from the settlement officer, who is generally aligned with their position. (This of course is usually an insurance adjuster on the defense side.) So if a plaintiff's attorney is having difficulty with their client's unrealistic view of their case potential, the plaintiff will now be given a dose of reality from the plaintiff settlement officer, who has no stake in the outcome. Likewise, the defense settlement officer can open the eyes of the insurance adjuster, who may be convinced to write a larger check to the plaintiff.

> "If the usual negotiation "dance" is a methodic waltz, this [two lawyer settlement] program is a frenzied tango."

Interestingly, despite the settlement officers' potential bias in favor of their plaintiff or defense orientation, the settlement officers usually agree with the settlement value of a case. This reality is very important to the settlement process since both settlement officers are working together toward a fair resolution for the parties. Often times, the litigating attorney over or under values their case, and the settlement officers' agreement over the case's true value will be the key to a settlement.

However, when the settlement officers disagree over a case value, the process can be predictably strained. In these unusual cases, the officers must keep their personal bias at bay, and focus on the purpose of the process, which of course is to reach an amicable settlement for the parties.

Without a doubt, the most difficult scenario with this program is when the settlement officers differ greatly on not the value of the case, but in their approach to how to conduct the proceeding. Due to time constraints, some settlement officers want to know the bottom line of the parties from the outset, essentially eliminating the negotiation process. But while time is very limited, time is also one of the most important facets of a successful negotiation. Both parties must feel and believe they had their opportunity to get the best deal they could have received. As such, the officers must still allow the process to naturally unfold.

In instances when the settlement officers' personalities or approach to the case clash dramatically, the process can fail. In this rare event, it is best for one of the officers to just excuse him or herself from the proceeding altogether and let one officer conduct the proceeding solo. The last thing the parties should ever witness is discord among the settlement officers.

The courts need attorneys to help now more than ever. The Santa Clarita Valley Bar Association encourages attorneys to donate time to the courts and give back to the justice system in this time of need.

Monetary Cutbacks to Court System Increases Need for Mediation

By Diana B. Sparagna

AMONG THE CASUALTIES OF the recession, aside from those who lost their jobs, is the severe shortage of tax revenues available for state government. Governor Brown and the California Legislature have rationed the revenues across all state agencies, and the courts were not exempted. The Chief Justice addressed a lawyer's group last summer, informing them that after she submitted a budget that reflected millions of dollars of cuts to the court system, the Governor's office informed her that her budget would be subjected to another $200 million in reductions. As a result of the disastrous cutbacks to the court system, the counties are closing courthouses and courtrooms. For example, the courthouse in Simi Valley has been budgeted out of existence.

These cutbacks translate into fewer judges who must administer an explosive increase in their caseload. A judge revealed in open court during a morning session that he had been assigned 400 additional files and warned everyone who was listening that his larger caseload will delay the scheduling of trials for up to a year. If that is not bad enough, a criminal case takes precedence over a civil case. If there are not sufficient criminal courts to handle a criminal trial, it may be transferred to a civil courtroom, which will cause additional delays. Today's practitioner faces fewer courthouses, courtrooms, judges and hours system-wide.

What do these delays mean to the average practitioner who represents clients in family law, personal injury or business related matters? They mean there is an ever increasing likelihood that a lawyer will be looking to resolve his or her cases through mediation. With few exceptions, mediation has already been incorporated into the litigation process. The judges are literally ordering all of the cases to mediation, sometimes, multiple times. In Van Nuys, every family law matter that comes up for hearing automatically gets sent to a mediator before the judge will hear it.

Evaluating Court Mediators

It is time to start treating the selection of mediators and the attendance at settlement conferences just as carefully as if answering interrogatories or taking a deposition. Attorneys should start thinking about accumulating a database of the style and performance of the mediators before whom they will appear. Attorneys know very little about the mediators when choosing them from a court panel.

The Los Angeles Superior Court requires that in order for a mediator to appear on its paid panel or party select, the panelists must have successfully concluded 25 family

law and 25 civil law cases. Attorneys then know they have a track record of some success. Of course, this does not mean that someone who is not on the paid panel yet, will not work hard to settle the case. At the mediation, an attorney should ask the mediator where they received his/her training. They are usually willing to provide this information. If an attorney likes working with one or more mediators on the court panel, the attorney should keep a list.

Of course, nothing stops an attorney from proposing someone not on the court panel. How much an attorney is willing to spend on a mediation may depend on how much is at stake on his/her case. Lastly, in evaluating a mediator, an attorney should remember one thing: a good mediator considers the session a success only if the matter settles or if the parties close the gap in a particularly contentious case. The good ones are not thinking that their conference is simply one of several procedures in someone's overall litigation strategy. They refuse to consider a case unsettleable unless their parties walk out the door and do not return.

Preparing Client for Settlement Conference

Assuming an attorney has prepared his/her case and has sent the mediator a comprehensive brief that highlights the points of contention, the attorney's job before the mediation is not quite finished. The attorney should prepare his/her client for the settlement conference as well. The purpose of the conference is to settle the case in a sense of collaboration and not crush the opponent. That may indeed occur but it must happen without acrimony. Sometimes, the client must understand that a win is simply saving money and shutting down the case while saving face. An attorney is charged with vigorously advocating the rights of his/her client, but often shutting down the endless spending of fees and costs producing little return is a better result.

An attorney should have a serious discussion with the client prior to the mediation about how the law and facts impact his/her case and what the reasonable expectations should be. A client must be disabused of any unrealistic expectations of the outcome and have a sense of the range of results that the attorney thinks come within a successful category. Even if the client has a difficulty accepting reality the first time it is broached, when he/she hears a similar evaluation come up during the mediation, the shock of having it heard for the first time may result in confirming that the attorney was spot on with the evaluation prior to the mediation.

In order to temporize the mindset of a client prior to a mediation, the attorney should explain that the mediator is trying to be fair and impartial to both sides. The discussions the client hears even in private caucus may have the mediator highlighting the points of weakness in a client's case to assist the parties in coming to a settlement. Some clients might hear the negative aspects of the case and automatically assume the neutral is against them.

Many times mediations are a grind. The client should know in advance that their price may not be met in the first thirty minutes of the session and that the process should not frustrate them. The client should be prepared to hang in there as long as it takes to arrive at a settlement.

In addition, if the client has a disagreement with his lawyer during the mediation, they should have a signal between themselves indicating that they need to speak in private to work out any bone of contention. It is unwise to demonstrate in front of the mediator or the other party that the lawyer and client are fighting between themselves. A client should be instructed that he/she with their lawyer should mount a united front at all times during the mediation.

The client should be the model of reasonableness and his/her emotions should always be kept under control. If the lawyer knows that the presence of the opposing party upsets his client, then the parties should be separated as much as possible and not forced to be in the same room during the mediation. This situation comes up frequently in family law matters.

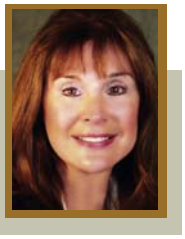
Closing the Deal

In the event the parties agree on a deal after hours of hard work on everyone's part, an attorney should make sure that all clients finalize the deal by signing an enforceable agreement at the time and place of the mediation. The last thing anyone wants is for one or both of the clients to speak to a friend or family member who convinces the client that his attorney did not fight for him and caved in to the opposing party. Nothing is more demoralizing in one's practice than to have an agreement go up in smoke because the client went home and talked to lay people who know more than his lawyer.

The thorough attorney takes good notes and brings a laptop with settlement forms ready to be filled in and signed. Once an agreement is reached, the material provisions of the deal should be recited out loud to ascertain that all parties are on the same page. Good practice in this technical age is to email the settlement documents to the office where the mediation is taking place. They can be downloaded in legal format for everyone's signature so that all parties can go back to the office with an enforceable agreement. Alternatively, an attorney can bring forms which can be filled in with spaces for the negotiated essential provisions then and there. In any event, this process is simply too arduous to allow an agreement to fall through because someone failed to finalize the deal on the day of the mediation.

Due to the voluntary nature of mediation, a cessation to litigate is never assured. However, the mediation process has evolved into more than a rest stop on the way to trial. For most cases, it has become the sole procedure during which the merits of the case are sorted through and evaluated. It is a disservice to the client if it is treated as anything than one of the most important procedures during the pendency of the case. Therefore, it behooves an attorney to prepare their case and client for the mediation to achieve a successful result.

Diana B. Sparagna devotes one day per month to assist the Los Angeles County Superior Family Court to settle family law matters. She also has a private mediation practice in Reseda and Monrovia where she has successfully assisted in hundreds of family law, employment, personal injury and business matters. She can be reached at dbsesquire@aol.com.



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The VCLF of the SFVBA has provided over $100,000 in grants over the past five years to the following organizations to promote community access to justice:

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- Northridge Hospital Center for Healthier Communities
- SFVBA Attorney Referral Service and Mandatory Fee Arbitration Program
- The K.E.N. Project
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Since 2007, the VCLF of the SFVBA has given $60,000 in scholarships to provide educational opportunities to students who have demonstrated an interest in law-related careers at:

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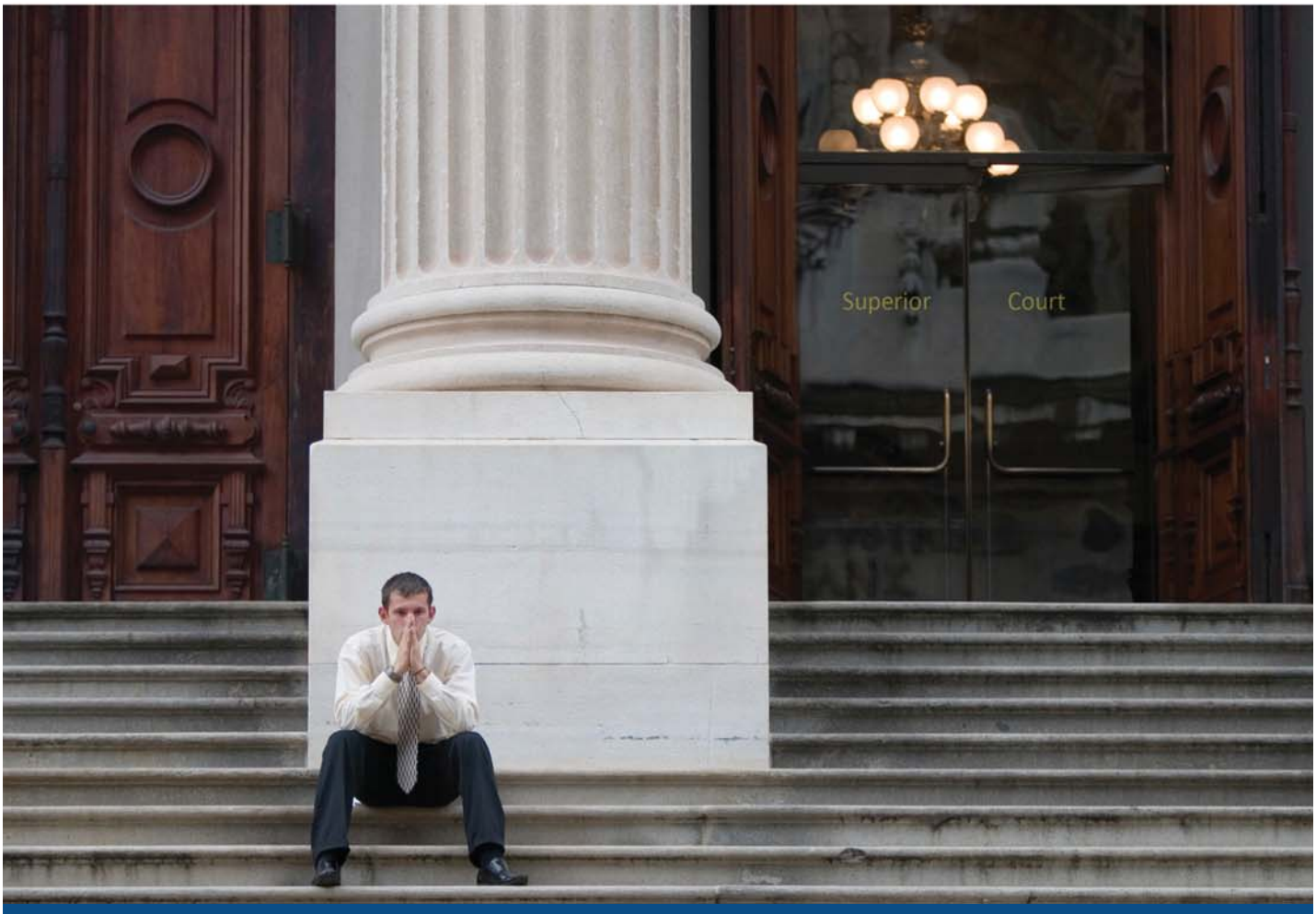

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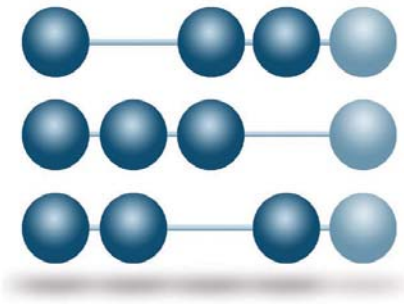

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