VALLEY LAWYER

MARCH 2013 • $4

A Publication of the San Fernando Valley Bar Association

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Securities Laws Fundamentals

SFVBA Honors Judge Mary Thornton House and Judge Jerold Cohn

Attorneys' Guide to H-1B Visas

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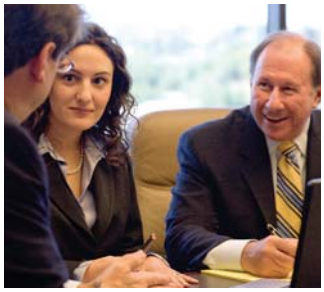
The Power You Need The Personal Attention You Deserve

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- Personal Injury/Products Liability
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- Probate Litigation/Will Contests

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VALLEY LAWYER

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Praise and Thanks to Valley Judges

DAVID GURNICK
SFVBA President
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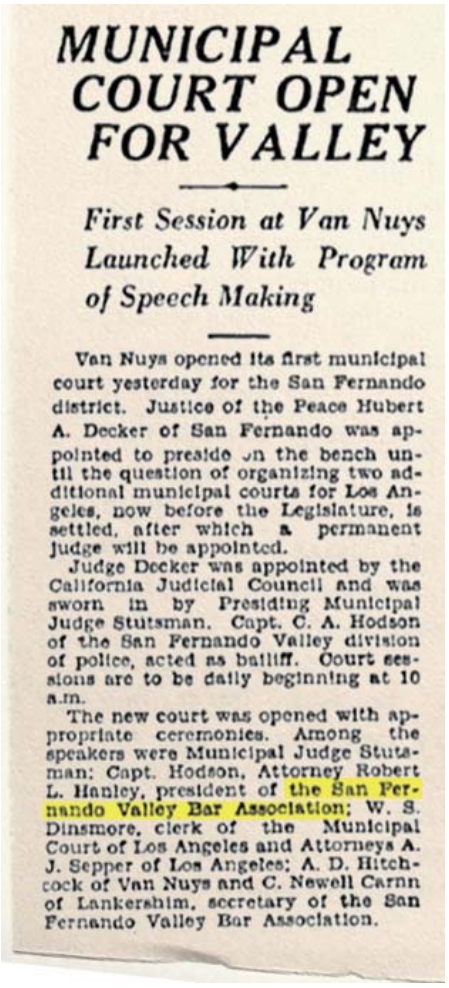
"Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. . . .[J]udges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system."—*Preamble, California Code of Judicial Ethics*

THIS MONTH WE WILL recognize, celebrate and honor Valley judges at the SFVBA's annual Judges' Night on Thursday, March 7. Valley courts have a special tie to our Association. The SFVBA was founded by lawyers to bring a courthouse and judges to the Valley. Today, Valley residents can receive justice in the Woodland Hills Bankruptcy Court, and in Superior Courts in Van Nuys, Chatsworth, San Fernando, as well as Burbank, Glendale, Lancaster, Pasadena and Santa Clarita. With budget cuts forcing closures, our community is fortunate that Valley courts will stay open.

Our Valley judges work hard to make thoughtful, legally correct and practical decisions. As far as we know, Valley courts have remained free from scandal, lapses in ethical conduct and other disreputable events. Under tough conditions, our courts operate relatively efficiently. Court staffs, often a reflection of the judges, are even-tempered. And let's not forget that when the budget crisis forced monthly furloughs, Valley judges joined in voting for a voluntary pay cut to share and ease the pain.

We don't hear from our judges much in the news. This is to their credit. I cringe when judges feel they must speak to the press. Our judges work in sometimes exasperating conditions in what Justice Armand Arabian aptly calls "the crucible of justice." In addition to budget cuts, our judges must contend with large caseloads, aging facilities and zealous lawyers. And as Judge Michael Harwin can tell us from life-threatening experience, some litigants can be violent.

California's Chief Justice said recently that the economic forces spurring lawmakers to cut spending for courts have driven more Californians into courts for help with evictions, debt collection and changes to child support agreements. "As Californians lose their livelihood and as part of the dream slips away, they rightly come to courts seeking justice, protection and dignity," The courts are "struggling to provide that." (Chief Justice's 2012 State of the Judiciary address)



MUNICIPAL COURT OPEN FOR VALLEY

First Session at Van Nuys Launched With Program of Speech Making

Van Nuys opened its first municipal court yesterday for the San Fernando district. Justice of the Peace Hubert A. Decker of San Fernando was appointed to preside on the bench until the question of organizing two additional municipal courts for Los Angeles, now before the Legislature, is settled, after which a permanent judge will be appointed.

Judge Decker was appointed by the California Judicial Council and was sworn in by Presiding Municipal Judge Stutsman. Capt. C. A. Hodson of the San Fernando Valley division of police, acted as bailiff. Court sessions are to be daily beginning at 10 a.m.

The new court was opened with appropriate ceremonies. Among the speakers were Municipal Judge Stutsman; Capt. Hodson, Attorney Robert L. Hanley, president of the San Fernando Valley Bar Association; W. S. Dinsmore, clerk of the Municipal Court of Los Angeles and Attorneys A. J. Sepper of Los Angeles; A. D. Hitchcock of Van Nuys and C. Newell Carnn of Lankershim, secretary of the San Fernando Valley Bar Association.

L.A. Times, March 16, 1927

I will mention one (retired) judge as an example of laudable service. In a long career as a police officer, lawyer, judge, mediator and arbitrator, Michael Hoff exemplifies the best of the judiciary. At LAPD in the 1970s, Judge Hoff served on a board that ruled an amputee officer was qualified to keep his job. After law school, Judge Hoff devoted several years to private practice. He then served with honor on the bench from 1987 to 2008. A review of Judge Hoff's cases shows a history of thoughtful and careful decision-making which was, almost without exception, affirmed on appeal. In *People v. Fitzpatrick*, Judge Hoff patiently indulged a defendant's desire to represent himself, revoking that election only after it was clear the intent was delay. *Affirmed*. 66 C.A.4th 86 (1998).

After retiring, Judge Hoff has advanced the cause of justice, serving in alternative dispute resolution and volunteering as an SFVBA trustee and a board member of the Valley Community Legal Foundation, of which he is past-president.

On behalf of Valley lawyers and the community, thank you to the judges of the Valley, for diligent, faithful, honest and capable service. Lawyers can learn more about the ethical canons that guide our judges by visiting www.courts.ca.gov.

Calendar

Small Firm & Sole Practitioner Section

Techniques of Written Persuasion

MARCH 6
12:00 NOON
SFVBA CONFERENCE ROOM

Certified Appellate Law Specialist Honey Kessler Amado will discuss techniques of written persuasion, a valuable addition to any attorney's intellectual arsenal.

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

Probate & Estate Planning Section

The View from the Bench

MARCH 12
12:00 NOON
MONTEREY AT ENCINO RESTAURANT

The downtown Probate Court judges will give the ins and outs of their courtrooms.

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

Business Law Section and Employment Law Section

Health Care Reform for Employers

MARCH 13
12:00 NOON
SFVBA CONFERENCE ROOM

The Affordable Care Act will have an impact on nearly every segment of the U.S. economy. Insurance and employee benefit professionals Barbara Oberman and Matthew Taylor will provide an overview of the health care reform law and discuss how the regulations will impact businesses: What strategies must business adopt to comply with the new regulations? What penalties will a business face if their insurance doesn't meet the minimum requirements? What businesses are required to offer employees insurance?

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

Taxation Law Section

Tax Ramifications of Identity Theft

MARCH 19
12:00 NOON
SFVBA CONFERENCE ROOM

Certified Taxation Law Specialist Sharyn M. Fisk of Hochman, Salkin, Rettig, Toscher & Perez will discuss the impact of identity theft on business as well as the individual consumer.

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

Workers' Compensation Section

Two Bits of Tidbits on Managing Pre and Post 1/1/13 Workers' Comp Cases

MARCH 20
12:00 NOON
MONTEREY AT ENCINO RESTAURANT

Popular author and attorney Robert Rassp will review the ins and outs of pre and post 2013 cases.

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

Family Law Section

Dependency and Family Law

MARCH 18
(ONE WEEK EARLY DUE TO PASSOVER)
5:30 PM
MONTEREY AT ENCINO RESTAURANT

Judge Amy Pellman, Elise Greenberg and John Carlson will address the latest regarding dependency.

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

Real Property & Land Use Section

California's Foreclosure Law

MARCH 21
12:00 NOON
SFVBA CONFERENCE ROOM

Mark Blackman of Alpert, Barr & Grant will kick off the first meeting of the Section with an important update on California's foreclosure laws. Includes substantial handout.

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

Elder Law Section

Elder Abuse

MARCH 27
6:00 PM
SFVBA CONFERENCE ROOM

Attorney Cecille Hester from Fonda & Fraser will discuss the defense perspective regarding elder abuse and neglect claims against long term care facilities. Come hear the defense side of this complex area.

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 Temkin at (818) 227-0490, ext. 105 or events@sfvba.org.

Atticus Finch in Our Community

IRMA MEJIA
Publications & Social Media Manager
editor@sfvba.org

LAST MONTH, *VALLEY LAWYER* posed a question to readers: What is the all-time greatest legal film? More than 160 members cast their votes, which included several write-in candidates. A clear winner emerged early on, netting nearly 30% of the votes: *To Kill a Mockingbird*.

It's no surprise the film topped our poll. Harper Lee's story of justice, racism and coming of age in Depression-era Alabama has touched readers worldwide for over 50 years. The 1962 film adaptation of the novel quickly became a classic of American cinema. Gregory Peck's portrayal of Atticus Finch, the single father and righteous lawyer, has inspired generations of viewers worldwide. For his work, Peck was awarded the Academy Award for Best Actor.

Atticus Finch, a compassionate small town lawyer, is appointed to defend a man in a case which would have seemed a lost cause in the Jim Crow-era South. His client, Tom Robinson, is a black man accused of raping a white woman. In spite of seemingly insurmountable tension and bias, Atticus' duty to his client is unwavering. So steadfast is his commitment that he stands guard by his client's jail cell before a vigilante mob. In court, Atticus is calm and studious yet genuinely impassioned. Before a mocking prosecutor, a hateful witness and a pitiable but dishonest victim, Atticus methodically breaks down the State's argument against his client. Yet the jury still finds Robinson guilty.

Atticus' faith in the judicial system never wavers. He implores Robinson to remain hopeful for the appeal. But his client, having lost all hope, attempts to flee and is killed. The news greatly affects Atticus. He truly believes in the courts as our country's "great levelers" where "all men are created equal." Undoubtedly, Atticus would have taken his appeal to the highest court in the land.

The idealism of Atticus Finch is alive and well in our legal community. It is seen daily in the impassioned advocacy delivered by attorneys in our county's courtrooms and in the sage administration of the judges on the bench. These ideals are especially evident in the work conducted by the honorees of this month's Judges' Night: Judge House's dedicated efforts to increase access to legalistic forms and courtrooms are in line with Atticus' belief that everyone deserves a fair day in court. As she states, "there are no small cases in our justice system. Every case has value to the parties, the lawyer and the community."

Judge Cohn's own career trajectory parallels Atticus' strong commitment to the courts. From a very young age, Judge Cohn embraced the rule of law and has devoted the past 50 years to upholding it. It's a successful career which could not have been possible without what he describes as "a lust for the law." These individuals prove on a daily basis what Atticus states in his closing arguments, that "the integrity of our courts and of our jury system" is not an ideal but "a living, working reality."

Atticus has come to symbolize in our national psyche the archetypal lawyer: honest, righteous and passionate about the law. Indeed, many who have dreamed of entering the practice of law have dreamed of being like Atticus. Perhaps it's that sense of inspiration that propelled *To Kill a Mockingbird* to the top of our poll. How could we not have voted for a film, for a character, that reflects so much of what we believe as a community? The film, and Atticus, will likely continue to strike a chord in us for generations to come.

Correction: The February issue of *Valley Lawyer* incorrectly listed 1955 as the year *To Kill a Mockingbird* was released. The novel was first published in 1960 and the film was released in 1962.

Bulletin Board

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

Tina Alleguez and **Carol Newman** announce the opening of Alleguez & Newman, LLP, a business, real estate and palimony litigation firm. 21860 Burbank Blvd., Suite 360, Woodland Hills, (818) 225-0056, tina@anlawllp.com, carol@anlawllp.com.

Real estate and business mediator **David I. Karp** continues in 2013 to enjoy his "AV-Preeminent" rating which he first achieved in 1991.

Adam D.H. Grant, shareholder in Alpert, Barr & Grant, prevailed on appeal against plaintiff's attack of a jury's defense verdict in favor of Mr. Grant's client and received affirmation of the $750,000 judgment against plaintiff for all fees and costs.

Longtime member **Stephanie Simpson** passed away on November 18, 2012 at age 95. Simpson had been active in the Attorney Referral Service since 1985. Through the ARS, she assisted more than 300 elderly, indigent and disabled clients. Her work focused on administrative appeals of denials of public benefits and appeals to the U.S. District Court.

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Lessons from Mandatory Fee Arbitration

The Case of Unreasonable Client Expectations

By Sean E. Judge

This column summarizes recent cases that have been resolved through the SFVBA Mandatory Fee Arbitration Program. The goal of this column is to provide brief case studies of fee disputes in the hope that these examples will help Bar members avoid similar situations in their own practice.

Factual Summary

A client retained an attorney to represent her in a dissolution matter. As is typical in most hourly fee agreements, the agreement required a $5,000 payment upon retention to be deposited in attorney's trust account. The attorney's work and related expenses was to be charged against the trust account deposit until it was exhausted and the client was to be billed monthly thereafter.

In the dissolution matter, the client and her (soon-to-be) ex-husband had initially stipulated to a monthly amount as spousal support. At the time of the stipulation, the ex-husband had an annual income of nearly $100,000. A few months thereafter, the ex-husband petitioned the court to have the spousal support reduced drastically, contending that his only income was a small amount in unemployment benefits. Later, the husband landed some independent contractor work, but his income that did not approach what he had made previously.

The client didn't believe it. She requested and authorized the attorney to investigate and serve subpoenas to show that he was actually making more than he claimed. After extensive work, the attorney verified that the ex-husband was in fact truthful in his declaration and that he was not making more than he claimed.

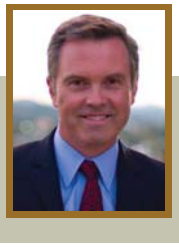
After the attorney's work was completed, the spousal support reduction was confirmed, and the client convinced herself that she had "lost the case." The client testified that she had been advised to reject a higher amount of support previously offered and was now stuck with something much less. In addition to the investigative fees and costs, the attorney had filed a motion objecting to the proposed judgment reducing the amount of spousal support, which the court ultimately signed.

When the amount above the initial retainer was billed but remained outstanding for a considerable amount of time, the attorney provided the client with a *Notice of Client's Right to Arbitration*. The client thereafter submitted the matter to the SFVBA's Mandatory Fee Arbitration Program. The arbitrator found in favor of the attorney as to the reasonableness of the fees and costs incurred, and ordered the client to pay the balance.

The Takeaway

This dispute highlights a difficult issue that faces attorneys with billable hour fee agreements: when the client does not obtain the results that are hoped for, the bill remains unpaid. In some situations, the client simply will not accept the "loss" or anything less than full-fledged "victory." However, many clients are reasonable and realistic and understand the adversarial process. Either way, when additional work is billed or when it might be expensive, one way to minimize the possibility of fee disputes is to clearly spell out a range of the expected costs and fees and a range of the chances of success.

Having the client come in to the office, if possible, to meet with you and ask questions about the work going forward is also a good idea. These types of fee disputes will never be eliminated. However, the chances of staying out of the fee arbitration process and assuring payment should be greatly increased with a few of these simple steps. Communicate, and then communicate more!



Sean E. Judge is the principal of Judge Mediation in Woodland Hills and a Trustee of the SFVBA. He is currently Co-chair of the Mandatory Fee Arbitration Committee. Judge can be reached at sean@judgemediation.com.

TimeandDate.com

By Michael Kline

R2T2 provides readers with a review of software and cloud-based services from the practical vantage point of an attorney. If you would like to see a specific software product or online service reviewed in a future column, email r2t2@sfvba.org.

This Month's Product: *www.timeanddate.com*
Provider: Time and Date AS
Cost: Free

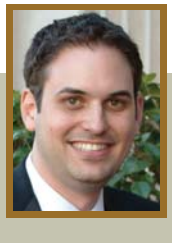
What They Say It Does: "*Time and Date AS* (The AS stands for "Aksjeselskap") is a private, limited liability company owned by Steffen Thorsen. The company is based near Stavanger, Norway….The company gives people free time and date related information and services via timeanddate.com."[1]

What It Actually Does: At its most fundamentally basic level, the practice of law is about one group of things: the details. Of course, it is in said details that the devil has taken up his primary residence. While you won't find anything close to the Second Coming by pointing your web browser to www.timeanddate.com, what you will find is a nifty little weapon that every lawyer could use in his or her daily battle against the forces of evil … or, as they're better known in the legal profession, deadlines.

Timeanddate.com is very much as advertised—if there's anything you care to know about times or dates (whether past, present or future), it is likely there. Nearly everyone with a smartphone has a timer, alarm clock and stopwatch in their pocket these days. But how many of you can figure out the best time to schedule a telephone conference with attendees scattered across international time zones? Timeanddate.com does it in a few easy clicks through its "Meeting Planner" page. And just in case you needed them, one more click gets you a list of those hard-to-find international calling codes as well.

If you're more of a blue-collar litigator than an international attorney of mystery, timeanddate.com offers two special features you are sure to find useful. Want to figure out the month and day that is X amount of days before or after the date a pleading was served or filed? What about the number of days you need to use in your prejudgment interest calculations? Just click "Date Calculator," fill in the blanks and press Enter. Does it seem like you were waiting a little too long for the motion to compel you just received? Click "Date to Date Calculator" and exchange a few keystrokes for an answer to the question, "How many days from X to Y?"

What It Doesn't Do: Timeanddate.com fails to do a lot of things most litigators would deem crucial components of their time-based tasks. The biggest limitation for litigators



Michael Kline is an attorney who specializes in assisting solo practitioners and small-to-medium size firms with the creation of persuasive electronic presentations of arguments and evidence at trials, mediations and arbitrations. Mr. Kline can be reached at r2t2@sfvba.org.

is the website's inability to account for weekends and/or holidays when calculating dates. Simply stated, if you want to know which date is 16 court days from today, you'll need to look elsewhere. In addition, even though a handful of the website's features have been incorporated into standalone applications for Apple and Android mobile devices, the only one that litigators might find useful is the aforementioned Meeting Planner. While all you global jet-setters probably won't scoff at the $2.99 asking price, it may not please you to learn that it's only available for the iPhone or iPad.

The Verdict: Timeanddate.com is what it is—a non-legal website with some functions that may be useful for those involved in the legal profession. It would be foolish to recommend using it on a daily basis to calculate deadlines, but if you're caught in a pinch or still counting calendar days on a wall calendar, the website will save you precious seconds while reducing the ever-present risk of losing count because you were distracted by that secretary down the hall who decided to shout out random numbers at the exact moment you were using your desk calendar to manually count 110 days prior to your trial date.

Timeanddate.com is an average, middle of the road fix that gets an extra half-gavel for the international "Meeting Planner" cherry-on-top functionality.

Final Rating: ⚖⚖⚖ out of ⚖⚖⚖⚖⚖

[1] See http://www.timeanddate.com/company

SFVBA Honors Judge Mary Thornton House and Judge Jerold Cohn at Annual Judges' Night

By Irma Mejia

Q&A

The San Fernando Valley Bar association will honor two of the Valley's outstanding judicial officers at its annual Judges' Night on March 7, 2013. Judge Mary Thornton House and Judge Jerold S. Cohn are this year's recipients of the "Judge of the Year" and "Stanley Mosk Legacy of Justice" awards, respectively. *Valley Lawyer* spoke with the honorees about their careers on the bench.

Irma Mejia is Editor of Valley Lawyer and serves as Publications and Social Media Manager at the San Fernando Valley Bar Association. She also administers the Bar's Mandatory Fee Arbitration Program. She can be reached at editor@sfvba.org.

Judge of the Year Mary Thornton House

For the past 17 years, Judge Mary Thornton House has served as an exemplary judicial officer committed to improving the efficiency and accessibility of the state's court system. Judge House was first appointed to serve on the bench in 1996 in what was then known as the Pasadena Municipal Court. Soon after, she was elevated to the Los Angeles Superior Court (LASC), presiding over cases at Stanley Mosk Courthouse. She is now serving a second term as Supervising Judge of the Northeast and North Central Districts of LASC. Prior to her initial appointment, Judge House was an Assistant City Attorney for the City of Los Angeles and general counsel for the Los Angeles Police and Fire Departments.

Q: How do you feel about being named Judge of the Year by the San Fernando Valley Bar Association?

A: I have a range of emotions: honored, surprised, humbled, grateful, unworthy—you name it! I actually feel these emotions relative to the immense depth of esteem in which I hold the San Fernando Valley Bar Association. The SFVBA, as a service organization, is phenomenal in caring about justice in the Valley through their committees, outreach, publications and educational opportunities. To have such a great organization recognize you, well, that makes the recognition extremely special.

Q: What motivated you to go into law? Did you always want to be a judge?

A: My motivation to go into the law arose out of good advice and the knowledge that I could never play well enough to make a living as a professional viola player. As an English major and debater, a career as a lawyer seemed natural. I didn't think about being a judge until later in my career as an attorney. It was my husband who urged me to fill out the application and send it in—truly, no one was more surprised than I was to get an appointment. After 17 years on the bench, I still feel the same sense of responsibility and awe of my first day.

Q: Diversity on the bench is certainly increasing but when you first went into law, there were fewer female judges. When you first started practicing, how did you feel about diversity in the field?

A: I was one of nine women in my law school class. When I started looking for a job, I did encounter comments like "Oh, you'd be our first girl lawyer." I think that's why the Los Angeles City Attorney's office held the most attraction for me. Then City Attorney, now retired Judge Burt Pines, did conscious outreach in all areas to assure a diverse office. This diversity enabled me to concentrate on just being a good lawyer. When I became a judge, there were about 150 women judges statewide. This figure has dramatically increased in the last 17 years as more women entered the field, gained experience and qualified for judicial appointments. In terms of encouraging greater diversity on the bench, it's really our profession's duty to do so through recruitment and support—something I know the SFVBA has accomplished.

Q: Valley Lawyer spoke to Presiding Judge Wesley last month about the upcoming changes to LASC. How much of an impact will these changes have in the Valley?

A: The Valley will feel this because its probate and limited jurisdiction personal injury cases are moving to Downtown Los Angeles, while its landlord-tenant cases will go to Pasadena or Santa Monica. These moves impact a vulnerable population but are unavoidable because of the massive budget cut our court must absorb. Lawyers in the Valley who will have their personal injury matters master-calendared out of Mosk will not know where they will land for trial. This uncertainty will impact all involved. Unfortunately, with less staff and less courtrooms, it's going to take longer for civil cases to get to trial.

Q: Do you think there is anything positive that can come from these changes?

A: They will force us to think "outside the box" and implement new innovations. Maybe as a result of these drastic cuts, the stakeholders will see the true value of their courts.

Q: How can the bar help alleviate the effects of these changes?

A: Globally, lawyers and bar associations such as the SFVBA are in an excellent position to educate the public about our court system and how vital it is to a community. They are also great ambassadors to our legislators who must understand the need to adequately fund the courts. Locally, assisting in settlement programs helps to clear out backlogs. Simply getting the paperwork right the first time will go a long way to eliminate unnecessary staff time.

Q: You were instrumental in the passing of Expedited Jury Trials (EJT) legislation in 2010. Have EJTs been successfully implemented? Can their use be expanded?

A: I am most happy to report that Expedited Jury Trials (EJT) are on the rise countywide. In the first year following the legislation's enactment, 20% of all limited jurisdiction trials were EJTs; this figure rose to 28% in 2012. There's also greater usage in general jurisdiction matters from 2011 to 2012. These percentages are in sync with other jurisdictions that began these programs and now have numbers in the high 80% following six to eight years of usage. With trial dates getting set further and further out, an EJT or some form of it may jumpstart this rise and place it mainstream into our system. Years ago, mediation was considered too "outside the box" and it was predicted that it would never surpass arbitrations as a method of case resolution. It just took some time and a track record to overcome the fear of the novelty. I predict this will hold true for the use of the Expedited Jury Trial.

Q: You presided over cases downtown at Stanley Mosk. How different is managing the

courts in the Valley compared to Los Angeles?

A: There is really no basic difference between downtown and a district court, because the goals for judges and lawyers are all the same: get cases decided and record the results. But just like every car has its own feel, so do courthouses throughout our county, despite being members of the same justice community. Valley courts, albeit the largest grouping of courthouses outside of downtown, still have a hometown feel to them. This is likely fostered by the SFVBA through their Bench-Bar Committee, but also due to size of the courthouses.

Q: You worked on the Civil and Small Claims Advisory Committee and supervised the statewide conversion of judicial council forms in small claims cases into a plain language format. What drove you to work on such a project?

A: I believe there are no "small" cases in our justice system. Every case has value to the parties, the lawyer and the community. Because lawyers are not permitted in small claims matters and the goal is to have matters resolved quickly and fairly, legalistic forms were an anathema to that goal. It was just the right thing to improve. Small claims advisors across the state wrote to thank our committee for taking the mysticism out of the small claims court by making the paperwork more user-friendly.

Q: Do you have other projects in mind for streamlining litigation and making court proceedings accessible to all?

A: Yes, I do. Some of these projects are being considered with the downsizing of our court system. They include how we process collection cases and limited jurisdiction matters overall. Some of my ideas involve using simple emails to provide notice (if consented to by the parties), looking into remote video conferencing, and much more.

Q: Do you have any advice for law students or new attorneys?

A: Well, two things jump out at me. First, your reputation is key and it is only as good as your last bad act. If you develop credibility with your colleagues and judicial officers, you not only become a zealous advocate for your clients but also for our system of justice. Second, try the case, not opposing counsel.

Q: How are you able to balance your responsibilities in court with your family life and your interest in music?

A: Part of my balancing act is playing with the Pasadena Community Orchestra—after rehearsing, I'm invigorated enough to do more than if I hadn't played at all. As for my family life, well, I'm lucky that my husband of twenty years learned early in our relationship to accept that I was not the neatest.

Q: Will you ever give a concert for our Bar?

A: This gets us back to why I became a lawyer in the first place—my talent for solo violist performances is very, very limited. However, it's always been difficult to say no to the SFVBA.

A Legacy of Justice: Judge Jerold S. Cohn

Judge Jerold S. Cohn has been an outstanding figure in Southern California's legal community for 50 years. A lifelong Angeleno, Judge Cohn was educated in the city's top universities and went on to become a successful trial lawyer, handling cases in all areas of law. He was first appointed to the bench in 1986 in Long Beach as a workers' compensation judge and soon after was relocated to the San Fernando Valley. He was appointed Presiding Judge of the Workers' Compensation Appeals Board at its former location in Agoura Hills.

For the past 20 years, Judge Cohn has been sitting on the Workers' Compensation Appeals Board in Van Nuys. Throughout his career as a bench officer, Judge Cohn has maintained a close connection to Valley attorneys, most notably in his active support of the SFVBA Workers' Compensation Section. Judge Cohn's continued passion for the law has been an inspiration to fellow judges and Valley attorneys.

Q: How does it feel to have your work recognized with the Stanley Mosk Legacy of Justice Award?

A: I'm both honored and humbled. When one hears about a legacy of justice award recipient, one thinks about someone who has passed on. But I'm happy to still be here, alive and kicking, 50 years since I first started practicing.

Q: What initially motivated you to go into law?

A: My interest in the law started when I was a very young man in high school. I became very interested in student government procedures. I went on to study political science at UCLA and law at USC.

Q: What made you focus your practice on workers' compensation?

A: I didn't originally start off in workers' compensation. I was a trial lawyer basically from my first day practicing. I established a general practice but it was with an emphasis on trial work. However, it finally reached a point where things were getting very complex, in terms of trying to follow all the laws in all the areas. I remember trying a real estate case in front of a Superior Court judge who also taught real property law. For every case I cited, he cited two back. I decided to specialize more and more and finally got into workers' compensation as it is the sole area that I am in now.

Q: Do you believe the upcoming changes in the local courts will have an impact on workers' compensation cases?

A: While I don't speak on behalf of the California Department of Industrial Relations or other judges, I must say that, as someone who grew up in Southern California, I feel really bad about the end of the neighborliness of our courts. I know how the judiciary feels but more importantly I know how the lawyers and the litigants feel. I'm just very sorry we have that problem coming up.

The LASC courthouse closures may impact workers' compensation filings when it comes to the choice of venue. Perhaps one attorney will choose to file a workers' compensation matter in a particular district office because if he must try a criminal case in a courthouse far away. It may be that these closures will have a rippling effect on all of us.

Q: You have been a great proponent of alternative dispute resolution (ADR) programs. Why do you think they're so important?

A: Very early on in my career, I tried cases if you blinked at me. Somebody once whispered to me, "You can settle some of these cases." And the truth is that you can settle a lot of cases. Sometimes these dispute resolution programs are the best thing for all of us because they get people together, they allow the parties to discuss arguments from both sides, and sometimes, with the help of an arbitrator or mediator, the parties come to consider a completely different point of view. While the legal code establishes immunity for mediators, generally that does not apply to workers compensation cases. In the workers' compensation community, there isn't so much use of ADR programs but I am strong supporter of discussing settlement. In LASC, it is much more important because of the courthouse closures and the length and cost of trials. I'm very much a believer that arbitration and mediation programs help settle many cases.

Q: Do you see some hesitation on the part of attorneys in adopting ADR programs?

A: Quite often lawyers will assert a particular position and maybe make a demand for settlement but won't come off a particular figure because they perceive that as a weakness. In reality, arbitration and mediation allows them to come before a third party that will allow them to realize that the other side may have a good argument which will allow them to concede something they might not otherwise have conceded. One argument I quite often hear is, "I don't want to bargain against myself." I don't believe in that. Sometimes it's entirely appropriate to bargain against yourself if it's going to lead to the right resolution on behalf of your client.

Q: You are very involved in the SFVBA Workers' Compensation Section. Why do you think it is so important for attorneys to become involved in those types of groups?

A: I have emceed the Workers' Compensation Section meetings for about 20 years. I think it's just marvelous when I go in to say hello to people and I see them interact with one another. I see them talking back and forth and exchanging tips and ideas. Lawyers have very useful wisdom to share with one another. I encourage attorneys to attend not just the section meetings in which I'm active but all section meetings. If nothing else, the interchange of ideas at these meetings is incredibly valuable.

Q: You have also been very active in moot court competitions. Why do you think these programs are so valuable?

A: Indeed, I've participated in moot court programs with people from age 11 to age 50 and older. I used to do a series of moot court programs for 5th to 8th graders in which I would wear an English barristers' wig and try cases such as Little Red Riding Hood vs. The Big Bad Wolf. And I've also participated in moot court competitions alongside a Supreme Court justice who doesn't ask questions very often—though he was talkative in that particular competition.

I've found that in discussing trial procedures in school and trying moot court cases, people start to become more interested in the rule of law and start readying themselves to become lawyers. You never know when you'll have to be prepared. That's why I think those programs are so important.

In fact, moot court competitions were a great help to me when I first started off as a lawyer. On January 10, 1963, I was sworn in as an attorney in California. On January 11, 1963, I tried my first criminal jury trial. It came about in a funny way. I was asked by the lawyer I worked for to get a continuance on a criminal matter on the basis that he was engaged in trial in Superior Court. Since the matter at hand was a Municipal Court action, it had lesser priority. What I didn't know was that the City Attorney was his opposition. I was sitting there with two of the most famous lawyers sitting next to me waiting for their cases to be heard. One of them was A.L. Wirin, who went on to become the Chief Counsel for the ACLU of Southern California for four decades. The other was Gladys Towles Root, who was the leading criminal lawyer in Southern California. Both were legends in their own time.

I said, "Your Honor, motion to continue on the grounds that counsel is engaged elsewhere." The judge said, "No. Young man, do you want to call your office and ask them what to say next?" I turned red, blue, green, and purple, which happened to be the color of the hat that Towles Root was wearing that day. And I said with a gulp, "No, we're ready your Honor." So he sent us off for trial. And I went and tried my first case at that time. Fortunately, I won it. I can't say anything but that it's good to prepare things ahead of time. Fortunately I was prepared. I knew my way around the courthouse, having clerked for a large firm. I believe in preparation and I was prepared no matter what that judge was going to say.

Ironically that particular judge became a great help to me in the future. He was one of the greatest Superior Court settlement judges at that time. I still use the techniques he taught me as I sit as a judge at the Workers' Compensation Appeals Board.

Q: Do you have any idea why denied your motion to continue?

A: Well, it was meant to be a joke on Little Jerry Cohn. I didn't quite get it at the time. I didn't have a sense of it. It took me several years of trying cases until someone said "Psst, kid, you can settle some of these cases!" I learned a lot from that. I learned things I know to this day about settlement from what that judge taught me in subsequent cases.

Q: Do you have any advice for current law students and new attorneys?

A: One bit of advice I would have to give young lawyers and law students is: Don't try your first criminal jury trial on the first day you're licensed to practice law. I would also say that it would be wise to do what I did and find out as much as you can about what's going on in your various areas of law. As you take your specialty courses in law school, learn in depth about the various subjects. If you can't get a job during the summer, hang out in the courts. Sit in on trials. Go to bar meetings. Find out what you can in the community. If you can't get a paid internship, offer your services to organizations such as Bet Tzedek. Most of all, have a lust for the law.

New California Supreme Court Decision May Undermine Enforceability of Contracts

By Carol L. Newman

IMAGINE THAT YOUR CLIENT PRESENTS YOU with the following set of facts: The client sold its existing business, a motel chain, to a competitor. Both the client and the competitor were represented by major law firms in the transaction. The client, through its counsel, clearly disclosed as a condition of the sale that it intended to open a new chain of motels, which would compete directly with the buyer of its existing business. Accordingly, the purchase agreement provided in precise language that the seller-client could not compete with the buyer for two years within one mile of an existing motel that was part of the sale.

The purchase agreement was heavily negotiated by top lawyers at these major law firms, went through several drafts (all of which contained the above language regarding competition) and cost a great deal of money (hundreds of thousands of dollars) to perfect. The purchase agreement not only contained an integration clause but was a model of completeness and thorough lawyering. Nevertheless, after the sale closed, the buyer claimed that the seller had fraudulently promised before the transaction closed that the seller would never compete with the buyer, effectively negating the "2-years-within-one-mile" limitation on the non-competition provision in the purchase agreement. The buyer then sued the seller-client to put its new motel chain out of business.

At the time this case was decided 20 years ago, the arbitrator ultimately awarded summary judgment to the seller on the grounds that the claim of promissory fraud could not succeed as a matter of law because the alleged fraudulent promise contradicted the express and precise language of the purchase agreement, relying on the California Supreme Court's decision in *Bank of America v. Pendergrass* (1935) 4 Cal.2d 258.

That same result might not be possible today. In *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association* (Jan. 14, 2013) 55 Cal.4th 1169, 151 Cal.Rptr.3d 93, the Supreme Court expressly overruled *Pendergrass* and its progeny as having been "poorly reasoned" (151 Cal.Rptr.3d at 101) and "an aberration" (151 Cal.Rptr.3d at 103), and held that the parol evidence rule does not bar evidence of alleged fraudulent promises even if they are clearly inconsistent with the express terms of a written agreement.

This decision represents a fundamental change in California law which threatens the certainty of contracts and has the potential of allowing contracting parties to successfully challenge contracts which they did not read or did not bother to try to understand—or which they did understand and simply wish to avoid. Indeed, it eviscerates the parol evidence rule and offers little guidance to businesses as to how to assure that their contracts are respected.

The Parol Evidence Rule

An understanding of the basic principles of the parol evidence rule is necessary in order to understand the impact of the *Riverisland* case. Despite the fact that the rule is called the "parol evidence rule," it is a rule of substantive law. *Riverisland*, 151 Cal.Rptr.3d at 96. Code of Civil Procedure Section 1856(a)[1] states:

> Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.

However, there are several exceptions to this rule, including subsection (f), which permits evidence to be introduced "[w]here the validity of the agreement is the fact in dispute," and subsection (g), which states:

> This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates…or to explain an extrinsic

ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud.

As the Supreme Court states in *Riverisland*, California always recognized a fraud exception to the parol evidence rule. 151 Cal.Rptr.3d at 101. However, this exception was never consistently applied, nor should it have been.

The *Pendergrass* Case

Pendergrass was a lawsuit by a lender to collect on a promissory note executed by its borrowers. In that case, after the borrowers fell behind on their loan payments, they entered into a new promissory note which was secured by additional collateral and payable on demand. Shortly thereafter, the lender seized the collateral and sued on the note. The borrowers raised the defense, among others, that the new note had been obtained by fraud because the lender had promised to postpone all payments for a year.[2]

The Supreme Court held that "[o]ur conception of the rule which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and *not a promise directly at variance with the promise of the writing*." 4 Cal.2d at 263 (emphasis added). The alleged evidence that the lender had promised to postpone all payments for a year directly contradicted the unconditional promise in the new note to pay the money on demand. Therefore, the court held that the parol evidence rule barred the admission of such evidence. 4 Cal.2d at 263-264.

The *Pendergrass* case was an effort to harmonize the fraud exception with the parol evidence rule—to avoid having the exception swallow the rule. If contracting parties are allowed to make claims that false promises were made to them which contradict explicit terms of the contract, they will have little incentive to read the contract. It is good policy to encourage contracting parties to read what they are agreeing to, and to require them to seek advice if they do not understand it.

It is also good policy that if the written agreement in fact contradicts what was allegedly promised, the contracting parties should be encouraged to discuss the contradictions before either side relies on the contract. If a party signs a contract knowing that it says something different than what was promised, that party may not be able to prove that it reasonably relied upon what was allegedly promised.

The *Pendergrass* rule was criticized by some courts and commentators for allegedly providing a shield for fraudulent conduct. Nevertheless, it was the law in California for nearly 80 years.

The *Riverisland* Case

Like *Pendergrass*, *Riverisland* involved loan borrowers who fell behind in their payments and restructured their debt to the lender in a written agreement. The written agreement provided that the lender would take no enforcement action for three months if the borrowers made their payments. Additionally, in the written restructuring agreement, the borrowers pledged additional collateral, eight separate parcels of real property and initialed pages of the agreement containing the legal descriptions of those parcels.

The borrowers failed to make the required payments, and the lender began foreclosure proceedings. The borrowers repaid the loan and sued the lender for damages, claiming that two weeks before the new written agreement was signed, the lender's vice president had told them the lender would extend the loan for two years in exchange for additional collateral consisting of two parcels. They further claimed that when they signed the new agreement the vice president assured them that its term was two years and the two parcels were the only additional security. Significantly, the plaintiffs admitted that they had not read the new agreement when they signed it.

The lender moved for summary judgment, and the trial court granted the motion, relying on *Pendergrass*. The Court of Appeal reversed, holding that *Pendergrass* is limited to cases of promissory fraud, but false statements as to the contents of the agreement were not false promises, but rather factual misrepresentations, and therefore actionable. 151 Cal.App.3d at 95-96. The Supreme Court granted the lender's petition for review.

The Supreme Court discussed at length, among other things, the parol evidence rule, the *Pendergrass* case, prior decisions of the Supreme Court, subsequent cases' treatment of *Pendergrass*, criticism of *Pendergrass*, defenders of *Pendergrass* and the revisions to Section 1856 in 1978 which omitted any mention of *Pendergrass*.[3] The Court stated:

> Accordingly, we conclude that *Pendergrass* was an aberration. It purported to follow section 1856…but its restriction on the fraud exception was inconsistent with the terms of the statute, and with settled case law as well. *Pendergrass* failed to account for the fundamental principle that fraud undermines the essential validity of the parties' agreement. When fraud is proven, it cannot be maintained that the parties freely entered into an agreement reflecting a meeting of the minds. Moreover, *Pendergrass* has led to instability in the law, as courts have strained to avoid abuses of the parol evidence rule. The *Pendergrass* court sought to "prevent frauds and perjuries"…but ignored California law protecting against promissory fraud. The fraud exception has been part of the parol evidence rule since the earliest days of our jurisprudence, and the *Pendergrass* opinion did not justify the abridgment it imposed. For these reasons, we overrule *Pendergrass* and its progeny, and reaffirm the venerable maxim stated in *Ferguson v. Koch*, supra, 204 Cal. At page 347, 268 P. 342: "[I]t was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud." 151 Cal.Rptr.3d at 103.

Parol Evidence Rule v. the Statute of Frauds

Nearly 30 years ago, the Supreme Court had taken what it called "a similar action" (151 Cal.Rptr.3d at 103) in *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, in which the court overruled *Kroger v. Baur* (1941) 46 Cal.App.2d 801, and held that a fraud action is not barred by the statute of frauds. The Supreme Court addresses that decision briefly in *Riverisland*, stating that "[c]onsiderations that were persuasive in *Tenzer* also support our conclusion here…The *Tenzer* court noted the principle that a rule intended to prevent fraud, in that case the statute of frauds, should not be applied so as to facilitate fraud." (Id., citing 39 Cal.3d at 29.)

Since then, some commentators have predicted that the Supreme Court might eventually apply the same reasoning to the parol evidence rule. However, in *Riverisland*, the court has not limited its ruling to cases in which damages are sought, but has established a much broader principle.

Moreover, the policy considerations between the statute of frauds and the parol evidence rule are very different. The statute of frauds merely seeks to assure that competent evidence of certain discrete types of agreements will be presented to the court and the trier of fact. The parol evidence rule, on the other hand, applies to *all* integrated written agreements. *Riverisland* affects many more agreements than does the statute of frauds. Now any allegation that any written agreement, no matter how expertly negotiated, was induced by fraudulent promises or representations will be admissible. *Riverisland* is potentially a much more far-reaching decision than *Tenzer* ever was or will be.

Suggestions for Counsel Negotiating Contracts

As indicated above, *Riverisland* makes it more difficult to determine whether a written contract will be enforceable in the face of an allegation that it was procured by a false promise. As the Supreme Court recognized in *Riverisland*, it makes no real difference whether the allegation is that the contract was procured by a false promise or that the contents of the contract were factually misrepresented. That is a false distinction without a difference. 151 Cal.Rptr.3d at fn 7. *Riverisland* expands exponentially the evidence a breaching party may introduce to try to invalidate a contract.

The Supreme Court's decision gives cold comfort to counsel seeking some certainty in this regard:

> Here, as in *Tenzer*, we stress that the intent element of promissory fraud entails more than proof of an unkept promise or mere failure of performance. We note also that promissory fraud, like all forms of fraud, requires a showing of justifiable reliance on the defendant's misrepresentation. (*Lazar v. Superior Court, supr*a, 12 Cal.4th at p. 638…) The [defendant] contends the [plaintiffs] failed to present evidence sufficient to raise a triable issue on the element of reliance, given their admitted failure to read the contract. However, we decline to decide this question in the first instance. The trial court did not reach the issue of reliance in the summary judgment proceedings below, nor did the Court of Appeal address it. 151 Cal.Rptr.3d at 104.

As experienced business lawyers know, allegations that a contract was obtained by fraud are fairly common in business cases. This decision renders it more likely that parties seeking to enforce contracts will be put on the defensive. Breach of contract cases are more likely to turn into tort cases in which tort damages are recoverable—against the plaintiff rather than the defendant. Additionally,

trial courts may be less willing to award summary judgment to plaintiffs, as the question of whether or not reliance is justifiable is ordinarily a question of fact. *OCM Principal Opportunities Fund v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864.

It is disappointing that the Supreme Court expressed no opinion that a party, especially a sophisticated party, should at least read the contracts it signs.[4] While the court may have wished to overrule *Pendergrass*, it picked an unfortunate case in which to do so. Moreover, the court neglected to address Civil Code Section 1625, which unequivocally provides that "[t]he execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

Business lawyers will be assessing the effect of *Riverisland* going forward. Counsel should take any actions they can take to establish, at the very least, that the promisor cannot claim it reasonably and justifiably relied on anything claimed to have been said outside the four corners of the contract. At the very least, before the contract is signed, counsel should assign a competent witness to explain the material terms of the contract to the opposing party either in person or in writing, and the opposing party should acknowledge in writing in some fashion that the material terms of the contract were explained before the contract is signed.

The opinions stated are the author's only and do not purport to represent opinions of the SFVBA. Alternative views and comments are also welcome and will be considered for publishing in Valley Lawyer.

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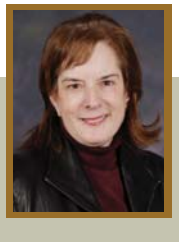
[1] Hereafter all references are to the Code of Civil Procedure unless otherwise stated.
[2] Another defense raised, not relevant here, was violation of the one-action rule, Section 726.
[3] The modified statutory formulation adopted the Supreme Court's liberalization of the rule as set forth in such cases as *Masterson v. Sine* (1968) 68 Cal.2d 222 and *Pacific Gas & Electric Co. v. G.W. Thomas Drayage Co*. (1968) 69 Cal.2d 33.
[4] In footnote 11, the court addresses its own opinion in *Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, in which the court ruled that negligent failure to read a written agreement precludes a finding that the contract is void for fraud *in the execution*. (14 Cal.4th at 423.) "Fraud in the execution" means that the party does not know what it is signing, or does not intend to enter into a contract at all. *Rosenthal*, 14 Cal.4th at 415. Generally, in contract litigation the party alleging fraud is not alleging fraud in the execution, but rather fraud in the inducement, in which the signing party knows what it is signing but its consent is induced by fraud. Id. The Supreme Court said in footnote 11 of *Riverisland* that "[w]e expressed no view in *Rosenthal* on the 'validity' and 'exact parameters' of a more lenient rule that has been applied when equitable relief is sought for fraud in the inducement of a contract…Here as well we need not explore the degree to which failure to read the contract affects the viability of a claim of fraud in the inducement."



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Mobile Applications: Are You Giving More than You Get?

By Adam D.H. Grant

With mobile application privacy concerns on the rise, enforcement of existing online privacy protection laws is increasing. Businesses and organizations developing mobile applications should ensure their programs are in compliance with CalOPPA and COPPA legislation.


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EVERYONE WITH A SMARTPHONE HAS downloaded a mobile application and marveled at the information available after a few taps of the fingers, but do smartphone users ever wonder about the information they give to the mobile application? Users store pictures, phone numbers, "to do" lists, access social media accounts, find the best places to shop, buy movie tickets, check currency rates and even conduct banking transactions through their phones.

The list of what is done through mobile technology is endless and growing every day. According to an August 19, 2012 report in *Conceivably Tech*, a technology news website, Apple's App Store is adding 746 new apps per day while Google Play is adding 665.[1] What most people do not know, because they have not been told, is that the app they just downloaded to get more information, is giving a great deal of information about the user to someone else!

Who Is Telling You What You Need to Know?

The Wall Street Journal recently conducted an examination of 101 popular smartphone apps.[2] Forty-five of the 101 apps did not offer any form of the most basic consumer protection—a written privacy policy. According to the California Attorney General's February 22, 2012 press release, one recent study actually found that only five percent of all mobile apps have a privacy policy.

According to the *Journal*'s research, 56 apps transmitted the phone's unique device ID to other companies without the users' awareness or consent. Google was the largest data recipient in the tests. Google received information from 38 of the 101 apps. Forty-seven apps transmitted the phone's location. Five apps went as far as to send age, gender and other personal details to third parties. Among all the apps tested, the *Journal* found the most widely shared details was the unique ID number assigned to phone. According to Vishal Gurbuxani, co-founder of Mobclix, Inc., an exchange for mobile advertisers, this unique ID is effectively, "a supercookie." The *Journal* interviewed Michael Becker of the Mobile Marketing Association who stated, "in the world of mobile, there is no anonymity."

Just how prolific is the use of apps you ask? According to the technology blog *Tech Crunch*, on December 25, 2012, a San Francisco Bay Area game maker's app was downloaded 2 million times in a single day![3] Christmas is not surprisingly the biggest day of the year for apps, as people receive new phones as gifts and rush to download all the apps they heard about over the past year.

According to privacy solutions provider, Truste, its latest Consumer Confidence Index indicates that consumer concerns over companies adequately protecting their privacy on mobile networks and in apps are increasing.[4] The Index found that 43% of U.S. consumers do not trust companies with their personal information. According to Chris Babel, CEO of Truste, "it's clear that mobile privacy is the latest hot button issue for consumers and legislators alike." Both the federal government and California generally addressed the issue of online privacy some years ago.

Federal Trade Commission Addresses Online Privacy

In 1998, Congress enacted The Children's Online Privacy Protection Act, (COPPA) 15 U.S.C. §§6501-6508. COPPA contains a requirement that the operators issue and enforce a rule concerning children's online privacy. The Children's Online Privacy Protection Rule, 16 C.F.R. Part 312, became effective on April 21, 2000. The purpose of COPPA and the Rule is to place parents in control over what information is collected from their children online.

The Rule protects children under age 13, but is still flexible enough to address the ever-changing nature of the internet. The Rule applies to operators of commercial websites and online services that are directed to children under 13 which collect, use or disclose personal information from children, and to operators of general audience websites or online services with actual knowledge that they are collecting, using or disclosing personal information from children under 13.

Operators covered by the Rule must: (1) post a clear and comprehensive privacy policy on their website describing their information practices for children's personal information; (2) provide direct notice to parents and obtain verifiable parental consent, with limited exceptions, before collecting personal information from children; (3) give parents the choice of consenting to the operator's collection and internal use of a child's information, but prohibiting the operator from disclosing that information to third parties; (4) provide parents access to their child's personal information to review and/or have the information deleted; (5) give parents the opportunity to prevent further use or online collection of a child's personal information; and (6) maintain the confidentiality, security and integrity of information they collect from children. The Rule also prevents operators from conditioning a child's participation in an online activity on the child's providing more information than is necessary to participate in the activity.

California Passes "CALOPPA"

In July 2004, California's Online Privacy Protection Act (CalOPPA) became operative. Found in California Business & Professional Code §§22575-22579, CalOPPA requires the operators of commercial web sites and online services "that collect personally identifiable information through the internet about individual consumers residing in California" to conspicuously post the website's privacy policy.

The statute defines personally identifiable information as: (1) first and last name; (2) home or other physical address, including street name and name of a city or town; (3) email address; (4) telephone number; (5) social security number; (6) any other identifier that permits the physical online contacting of a specific individual; and (7) information concerning a user that the website or online service collects online from the user and maintains in personally identifiable form in combination with an identifier mentioned above.

The policy must identify the categories of personally identifiable information that is collected about consumers who use or visit the website and the categories of third-party persons or entities with whom the operator shares the information.

The policy must also inform the consumer if it has a process to review and request changes to any of the personally identifiable information and describe the process. Finally, the policy must describe how it tells consumers of material changes to the privacy policy and the effective date of the policy.

California's Attorney General Partners with Leading Operators

While CalOPPA has been in effect since 2004, it was not until 2012 that California's Attorney General pushed it into the realm of mobile apps. Attorney General Kamala Harris reached out to the leading operators of mobile application platforms in an effort to improve privacy for Californians. In a February 22, 2012 press release, Attorney General Harris announced she forged an agreement with Amazon, Apple, Google, Hewlett-Packard, Research in Motion and, of course, Microsoft.[5] Facebook signed onto the agreement a short time later.

In the February 2012 press release, Attorney General Harris praised the agreement stating, "Your personal privacy should not be the cost of using mobile apps, but all too often it is." The agreement allows consumers the opportunity to review a privacy policy before downloading the app, rather than after. The agreement requires a consistent location for an app's privacy policy on the download screen. Most importantly, if the developers do not comply with their privacy policies, the developer can be found liable under California's Unfair Competition Law and/or False Advertising Law contained in Business & Professions Code, §17200, et seq.

According to the press release, "there are more than 50,000 individual developers who created the mobile apps currently available for download on leading platforms. There are nearly 600,000 applications for sale in the Apple App Store alone, and 400,000 for sale in Google's Android Market. These apps have been downloaded more than 35 billion times." The release also notes that an estimated 98 billion mobile applications will be downloaded by 2015 and that the market is expected to grow to $25 billion within four years.

California's Attorney General Files Complaint against Delta

In October 2012, armed with CalOPPA and with the seven leading mobile app platform developers' agreement, the Attorney General sent notices to approximately 100 mobile app developers giving them 30 days to conspicuously post a privacy policy within their mobile app that tells the users what personally identifiable information is being collected and what will be done with it. One can assume that many companies heeded the Attorney General's urging; evidently, at least one did not.

On October 30, 2012, Delta Air Lines issued a press release acknowledging receipt of the Attorney General's notice. According to media sources, the release stated, "[w]e have received the letter from the Attorney General and intend to provide the requested information."[6] Apparently, as far as the Attorney General was concerned, Delta did not make good on its promise.

On December 12, 2012, the Attorney General filed a complaint against Delta Air Lines, Inc in San Francisco County Superior Court, Case No. CGC-12-526741.[7] The complaint seeks civil penalties, a permanent injunction and other equitable relief for violation of Business & Professions Code §17200, et seq. The complaint alleges in material part:

> "Since at least 2010, Defendant Delta Air Lines, Inc., ("Delta") has operated a mobile application, called "Fly Delta," for use on smartphones and other electronic devices. Delta's mobile application may be used to check-in online for an airplane flight, view reservations

for air travel, rebook cancelled or missed flights, pay for checked baggage, track checked baggage, access a user's frequent flyer account, take photographs, and even save a user's geo-location. Despite collecting substantial personally identifiable information ("PII") such as a user's full name, telephone number, email address, frequent flyer account number and PIN code, photographs, and geo-location, the Fly Delta application does not have a privacy policy. It does not have a privacy policy in the application itself, in the platform stores from which the application may be downloaded, or on Delta's website. Users of the Fly Delta application do not know what personally identifiable information Delta collects about them, how Delta uses that information, or to whom that information is shared, disclosed, or sold. As demonstrated below, Delta's conduct violates CalOPPA and California's Unfair Competition Law" (Cal. Bus. & Prof. Code §17200 *et seq.*).

The complaint further alleges, "Although the Fly Delta app collects California consumers' PII, there is no privacy policy available to consumers within the app itself. In other words, the privacy policy required by CalOPPA to be conspicuously posted is not accessible to consumers of the Fly Delta app, so California consumers do not know how Delta is collecting, managing or sharing the PII collected by the Fly Delta app."

Notably, the complaint also alleges, "Delta's website… does contain a privacy policy about Delta's website (the 'Delta website'). But this privacy policy does not mention the Fly Delta app, and is not reasonably accessible to consumers of the Fly Delta app."[8] The complaint seeks $2,500 from Delta for each of the millions of downloads since 2010. As of the date of this article, Delta has not filed a responsive pleading, but on January 22, 2013, the Attorney General filed its proof of service.

Impact and Jurisdictional Reach

The impact of the application of CalOPPA on mobile apps cannot be understated. As applied by the California Attorney General, a $2,500 fine can be imposed against any mobile app developer no matter its location for each download by a California consumer. The amount and practical application of the fine is significant for two reasons. First, given the sheer number of downloads a single app developer can experience in a single day as demonstrated above, the potential total fines can be instantly crippling. For example, if the San Francisco Bay Area game maker's privacy policy did not comply with CalOPPA, California could have imposed a fine of $5 billion dollars for just one day's activity!

A second, and even more daunting effect of the Act's practical application, is that it functions as the ultimate long arm statute for personal jurisdiction. Pursuant to California Code of Civil Procedure §410.10, a court in California may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States. In 2002, the California Supreme Court in *Pavlovich vs. Superior Court* (2002) 29 Cal.4th 462, stated:

> "Although we have never considered the scope of personal jurisdiction based solely on Internet use, other courts have considered this issue, and most have adopted a sliding scale analysis. At one end of

the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." Id at 275

Consider a free mobile app that does little more than make information available to those interested, such as a navigation mobile app. In 2002, the California Supreme Court, relying on *Pavlovich*, would likely have not found personal jurisdiction. However, in 2012, a court, relying on CalOPPA, could find personal jurisdiction over a mobile app developer that provides a free app which merely offers the user information, if the app fails conspicuously include a proper privacy policy.

Attorney General Takes Additional Steps to Protect Privacy

In what appears to be an all-out campaign to reign in the perceived proliferation of privacy abuses by mobile app developers, California's Attorney General issued a report on January 10, 2013 entitled, "Privacy on the Go: Recommendations for the Mobile Ecosystem."[9] When commenting on the report and Californian's desire to know what information is being collected about them by mobile apps, Attorney General Harris stated, "[t]o meet this need and keep pace with rapidly changing technology, these recommendations strike a responsible balance between protecting consumers' personal information and fostering the continued growth of the innovative app economy."[10]

The Attorney General published the report to provide a template for mobile-friendly privacy policies which addresses the consumer's concerns over privacy, while at the same time not smothering the innovative energy seething through this ever changing market.

The report is comprehensive, yet very specific with its recommendations. The report suggests that the reader review examples of privacy icons proposed by the Association for Competitive Technology and Mozilla's privacy icons in beta release.[11] The report takes a multi-level approach and even provides graphics as examples. For the app developer, it recommends the use of "special notices—or the combination of a short privacy statement and privacy controls—to draw users' attention to data practices that may be unexpected and to enable them to make meaningful choices."

For app platform providers, the report recommends they "[m]ake app privacy policies accessible from the app platform so that they may be reviewed before a user downloads an app." For mobile ad networks, the report recommends they "[a]void using out-of-app ads that are delivered by modifying browser settings or placing icons on the mobile desktop.

For operating system developers, the report recommends they "[d]evelop global privacy settings that allow users to control the data and device features accessible to apps." Whether representing a mobile app developer or a business which utilizes a mobile app, attorneys are strongly urged to review this report; it is likely a road map for the next lawsuit brought by Attorney General Harris.

Looking to the Future

Just as email and texting have become the primary form of written communication, mobile apps are emerging as a ubiquitous part of our daily interaction with technology. Our increasing reliance on such technology comes with a cost. We continuously pour highly confidential information into our smartphones with little understanding as to where it goes, how it is used, who uses it and for what purpose. Such consumer apprehension can be expected to give way to regulatory scrutiny.

In August 2012, the Federal Trade Commission provided guidance to mobile app developers to "get privacy right from the start."[12] As discussed in this article, in 2012, the California Attorney General brought its first privacy complaint against Delta Air Lines alleging its mobile app "Fly Delta" did not comply with CalOPPA. Even Patrick, the overly friendly starfish, could not keep his best friend, SpongeBob Square Pants, from being the subject of a complaint filed at the FTC by a privacy advocacy group alleging that the mobile game SpongeBob Diner Dash collected personal information about children without obtaining parental consent.[13]

Additional investigative forays into privacy practices of mobile apps should be expected in 2013. Remember, Delta was just one of 100 mobile app developers who received notices of non-compliance. Undoubtedly, as the Attorney General receives, responds and analyzes what can only be a plethora of arguments as to why the apps are compliant, we will see more lawsuits. Additionally, the FTC will likely join the fray and file enforcement actions against recalcitrant offenders.

Attorneys should help their business clients determine if their mobile application privacy policy complies with CalOPPA. It is important to not just import website privacy policy to a mobile app platform. The policy must be conspicuous, and what is conspicuous on a laptop or tablet is not necessarily conspicuous on a smartphone. The California consumer should be informed of the benefits of the app and the scope of information they are giving to the app developer.

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[1] Gruener, Wolfgang. "Apple App Store to Reach 1M Apps this Year, Sort Of." *Conceivably Tech.* Accessed February 5, 2013. http://www.conceivablytech.com/10283/business/apple-app-store-to-reach-1m-apps-this-year-sort-of.

[2] Scott Thrum and Yukari Iwatani Kane, "Your Apps are Watching You," Wall Street Journal, December 17, 2010, accessed Febraury 5, 2013, http://online.wsj.com/article/SB10001424052748704694004576020083703574602.html.

[3] Kim-Mai Cutler, "Storm8 Grabs 2M Downloads in One Day on Christmas," Tech Crunch, December 31, 2012, accessed February 5, 2013, http://techcrunch.com/2012/12/31/storm8-christma/.

[4] TRUSTe, "On Data Privacy Day 2013, TRUSTe Research Reveals Increase in Mobile Privacy Concerns," January 29, 2013, accessed February 5, 2013, http://www.truste.com/about-TRUSTe/press-room/news_truste_US_increase_in_mobile_privacy_concerns

[5] State of California Department of Justice, Office of the Attorney General, "Attorney General Kamala D. Harris Secures Global Agreement to Strengthen Privacy Protections for Users of Mobile Applications," February 22, 2012, accessed February 5, 2013, http://www.oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-secures-global-agreement-strengthen-privacy.

[6] Jessica Guynn, "Atty. Gen. Kamala Harris puts mobile apps on notice about privacy [Updated]", *Los Angeles Times*, October 30, 2012, accessed February 5, 2013, http://articles.latimes.com/2012/oct/30/business/la-fi-tn-atty-gen-kamala-harris-puts-mobile-apps-on-notice-about-privacy-20121030.

[7] See http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-files-suit-against-delta-airlines-failure.

[8] The privacy policy on the Delta website is located at http://www.delta.com/content/www/en US/privacy-and-security.html.

[9] See http://oag.ca.gov/sites/all/files/pdfs/privacy/privacy_on_the_go.pdf.

[10] State of California Department of Justice, Office of the Attorney General, "Attorney General Kamala D. Harris Issues Guidance on How Mobile Apps Can Better protect Consumer Privacy," January 10, 2013, accessed February 5, 2013, http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-issues-guidance-how-mobile-apps-can-better.

[11] See http://apptrustproject.com and https://wiki.mozilla.org/Privacy_Icons.

[12] Federal Trade Commission Bureau of Consumer Protection Business Center, "Marketing Your Mobile App: Get It Right From the Start," August 2012, Accessed February 5, 2013, http://business.ftc.gov/documents/bus81-marketing-your-mobile-app.

[13] Natasha Singer, "SpongeBob Game Removed from App Store After Complaints," New York Times, December 17, 2012, accessed February 5, 2013, http://bits.blogs.nytimes.com/2012/12/17/spongebob-game-removed-from-app-store-after-complaints/.

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Test No. 54

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 Apple App Store introduces approximately 729 new mobile applications per day.
   ❑ True ❑ False
2. Of the 101 apps tested by the Wall Street Journal, 45 apps did not contain a privacy policy.
   ❑ True ❑ False
3. According to the California Attorney General's February 22, 2012 press release, 16% of all mobile apps have a privacy policy.
   ❑ True ❑ False
4. The Walls Street Journal found that the most widely shared detail from a smartphone was the name of the owner.
   ❑ True ❑ False
5. According to Truste's Insurance Confidence Index, 43% of U.S. consumers do not trust companies with their personal information.
   ❑ True ❑ False
6. The Federal Trade Commission passed the Children's Online Privacy Protection Act (COPPA) in 1998.
   ❑ True ❑ False
7. COPPA's statutory scheme is found at 15 U.S.C. §§6501-6508.
   ❑ True ❑ False
8. The Children's Online Privacy Protection Rule became effective on April 21, 2000.
   ❑ True ❑ False
9. The purpose of COPPA and the Rule is to allow children the opportunity to tell operators what they want to view online.
   ❑ True ❑ False
10. The Rule seeks to protect adults over 65.
    ❑ True ❑ False
11. The Rule applies to operators of commercial websites and online services which are directed to children under 13.
    ❑ True ❑ False
12. Operators covered by the Rule must provide direct notice to parents and obtain verifiable parental consent, with limited exceptions, before collecting personal information from children.
    ❑ True ❑ False
13. The Rule prevents operators from conditioning a child's participation in an online activity on the child's providing more information than is necessary to participate in the activity.
    ❑ True ❑ False
14. California's Online Privacy Protection Act (CalOPPA) became effective in July 2005.
    ❑ True ❑ False
15. The statutory scheme for the CalOPPA is found at Business & Professions Code §17200, et seq.
    ❑ True ❑ False
16. CalOPPA requires operators of commercial websites and online services that collect personally identifiable information through the internet about individual consumers in California to conspicuously post the website's privacy policy.
    ❑ True ❑ False
17. Your hair color is included in CalOPPA's definition of personally identifiable information.
    ❑ True ❑ False
18. An operator who violates CalOPPA can be held liable under Business & Professions Code §17200.
    ❑ True ❑ False
19. An operator who violates CalOPPA can be held liable for $2,500 per download.
    ❑ True ❑ False
20. A Privacy advocacy group recently filed a complaint with the Federal Trade Commission action against the popular cartoon character Scooby Doo.
    ❑ True ❑ False

MCLE Answer Sheet No. 54

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

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   5567 Reseda Boulevard, Suite 200
   Tarzana, CA 91356

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

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Credit Card Number Exp. Date

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Authorized Signature

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

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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

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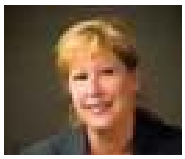

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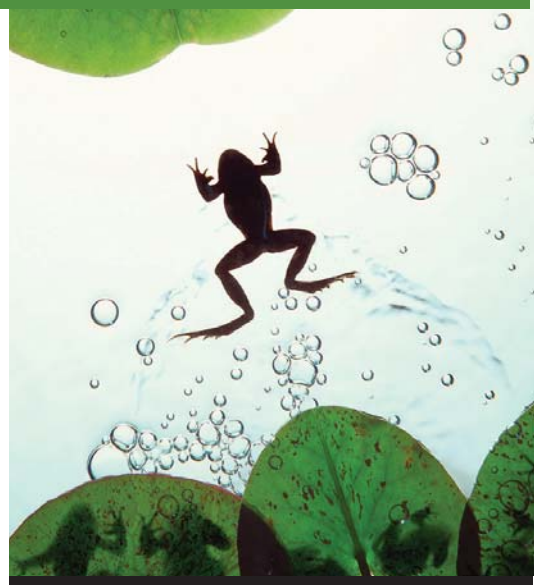

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Is Franchising the Right Model for Your Client's Business?

By Barry Kurtz and Bryan H. Clements

WHEN ONE THINKS OF FRANCHISING, what businesses come to mind? McDonalds, Burger King, Taco Bell or Dunkin' Donuts, maybe? Everyone knows that fast food restaurant concepts are well suited for franchising. If one thinks about it a bit more, one might think of favorite casual dining chains—such as Denny's, Red Lobster or Applebee's. Why not? Casual dining restaurant concepts are also well suited for franchising. What about fine dining restaurants? Many enjoy dining at Benihana and Ruth's Chris Steakhouse, but not everyone recognizes that these, too, are successful franchises.

Franchising is a flexible, tried and true method of distributing products and services. It offers business owners an alternative avenue to expand their already successful businesses. While most people have a general sense of the structure of a franchise, particularly because of their first-hand experience dining at a fast food restaurant, few realize the breadth of businesses that successfully employ the model, despite their interaction with these businesses on a daily basis.

Some businesses that are commonly franchised include accounting businesses, insurance and tax preparation businesses, frozen yogurt businesses, children's clothing store businesses, flower shop chains, gasoline stations and weight loss clinics. Some less common, yet innovative examples, include custom closet design businesses, plumbing related businesses, pool cleaning businesses, pet supply and pet grooming businesses, beer and wine distributorships, golf and tennis training programs, health care clinics and senior care facilities, art stores, pest control businesses and janitorial businesses. The possibilities are endless!

Business lawyers must keep in mind, however, that franchising is not right for all businesses, nor is it right for all of their business-owner clients. Franchises are highly regulated, and starting a franchise requires the investment of a lot of heart and soul, as well as a lot of time and money. Keep in mind, too, selling franchises is a totally new and separate line of business. For example, after selling her first franchise, the owner of a bedbug remediation service is no longer solely in the business of pest control; she is now in the business of selling and servicing franchises.

To be successful, she will not only need to be able to sell the concept, but she will need to comply with all applicable laws and regulations relating to the sale of this type of investment, which is likely to be something that is outside of her, and frankly her business attorney's, wheelhouse. For these reasons, attorneys advising business owners must help their clients do their homework before deciding to franchise. This starts with helping them understand what by law constitutes a franchise and what steps must be taken before a business owner may offer the concept for sale. After that, the attorney and business owner should evaluate whether the business owner's particular business would be right for franchising.

Franchising is regulated at the federal level by the Federal Trade Commission (FTC). In addition, many states have enacted franchise specific laws, and thirteen states require franchisors to register before offering franchises within their states to provide additional protections to potential franchisees. These registration states have taken the position that franchise arrangements provide a greater potential for fraud, noting that franchise agreements are typically drafted by the franchisor's attorneys and usually favor the franchisor substantially. It is true that franchisees usually have little power to negotiate the terms of their franchise agreements.

What is a Franchise?

Franchises are broadly defined. Many unsuspecting businesses that have licensed their trademarks and marketing plans to others without providing the required disclosures, or registering as a franchise in one of the registration states, have been found to be franchisors in violation of federal and state law.

Under California law, a business relationship is a franchise if the business will be substantially associated with the franchisor's trademark; the franchisee will pay a fee, directly or indirectly, to the franchisor for the right to engage in the business and use the franchisor's trademark; and the franchisee will operate the business under a marketing plan or system prescribed in substantial part by the franchisor.

Before offering franchises, the franchisor will have to work with his or her attorney to prepare a franchise disclosure document (FDD) that complies with the FTC's Franchise Rule. An FDD is an offering prospectus, written in plain English, which provides prospective franchisees with information pertaining to 23 specific items about the franchisor and the proposed franchise.

The FDD must include, among other things, background information about the franchisor and its executives, fee and cost information, samples of the contracts franchisees will sign and information about the franchisor's trademarks and patents. Franchisors will also need audited financial statements to include in its FDD. The FDD will have to comply with the laws of any of the registration states in which the franchisor intends to sell, as well, and the franchisor must register in those states before selling.

In addition to preparing an FDD, the franchisor will have to prepare operations manuals and establish an initial training program before it can offer its franchises for sale. The operations manual is a detailed reference tool designed to guide franchisees in implementing the franchisor's "system" on a day-to-day basis. The manuals typically provide the franchisor's trade secrets, such as recipes, operating procedures and marketing information. The franchisor must also set up an initial training program to train new franchisees before they can open their doors. The franchisor's system, as laid out in its manuals, the initial training and the right to use the franchisor's trademark are the "meat and potatoes" of what the franchisee is paying for.

Preparing an FDD and registering to sell franchises in the various registration states can be a costly and time consuming process. Because of this, attorneys advising business clients interested in licensing and selling their business concepts should be aware that a few alternatives exist. For example, some businesses may qualify for one of a few franchise exemptions, but the availability of any particular exemption varies widely among jurisdictions. Keep in mind, though, that some exemptions relieve the franchisor of both registration and presale disclosure requirements. Others merely relieve the franchisor of registration. Further, many require the franchisor make a notice filing with the state before the franchisor makes an offer or sale. Therefore, exemptions are only useful occasionally.

Biz Opps

If your client's business qualifies as a "business opportunity" (Biz Opp(s)), this business model may be another alternative to the burdensome registration and disclosure requirements

involved in franchising. A commercial arrangement is a Biz Opp under the FTC's Business Opportunity Rule if the seller solicits a purchaser to enter into a new business; the purchaser makes a required payment; and the seller states or implies that the seller or another will provide locations for the use or operation of equipment, displays, vending machines, or similar devices, owned, leased, controlled, or paid for by the purchaser; or provide outlets, accounts, or customers (i.e., internet outlets, accounts or customers) for the purchaser's goods or services; or buy back goods or services the purchaser makes, produces, fabricates, grows, breeds, modifies or provides.

However, like franchise exemptions, Biz Opps are limited in their usefulness. Many states require Biz Opp sellers to register in advance of offering or selling Biz Opps within their states, and the FTC, as well as certain states, including California, requires Biz Opp sellers to provide prospective purchasers with a one page disclosure document and various attachments to give them the information necessary to make an informed purchase decision.

In the past, though, Biz Opps were viewed by many regulators as scams, or fraudulent envelope stuffing schemes. But the Biz Opp model is growing in popularity and is now being used by many reputable and profitable companies as an efficient means of expanding their businesses.

Once your client is familiar with the legal requirements of, and alternatives to, starting a franchise, he or she should take a good, hard look at his or her business to decide whether it is right for franchising. Franchisors must be able to sell franchises, so their franchises must be attractive to prospective franchisees. A franchise is attractive if it is based on a concept that is sustainable in the marketplace.

Franchises based on fad products or services rarely survive. To be sustainable, the concept must be unique enough to withstand competition and must be one that potential franchisees are willing to pay to learn. Explore with your client whether his or her concept can easily be taught to others. Ask whether the concept is adaptable to varying markets. A chain of exotic dance clubs may struggle due to fierce resistance in many communities and trouble with local zoning laws, whereas a restaurant concept like Hooters may experience greater acceptability from more communities.

Other factors you should discuss include laws and regulations that are applicable to your client's particular type of business; whether it is clear the concept will be profitable for both the franchisor and its franchisees; the initial cost of creating the franchise; the length of time it will take to achieve success; the rate at which your client can reasonably expect to expand as a franchisor; and your client's ongoing ability to ensure its franchisees will be supplied with the inventory, supplies and equipment they require to operate.

Pumping Iron

Consider presenting your client with an example of success, such as Gold's Gym, which started as a local gym catering to bodybuilders in Venice, California and grew to be a fitness-franchise giant with over 700 locations worldwide.[1] Gold's Gym's founder saw that bodybuilders in Los Angeles needed a place to work out with advanced, specialized equipment and opened a no-frills gymnasium for these serious athletes. He filled his gym with heavy weights and specialized machines that he designed and built himself.[2]

Many movie stars, rock stars and other famous Angelinos, including Mr. Universe, Arnold Schwarzenegger, joined the gym, and the company adopted a memorable logo—an image of a baldheaded bodybuilder grasping a heavy looking barbell—which became its registered trademark.[3] After several years, and several lucky breaks, including having Gold's Gym featured in a famous movie about bodybuilding, Gold's Gym successfully began expanding as a franchise.

The Gold's Gym business model works for franchising because it caters to a wealthier clientele and its name and trademark are universally recognized and associated with fitness. The concept has been able to grow and change—capturing the latest in fitness trends for over 45 years without impairing its original model. Moreover, its franchise startup costs, operational overhead and inventory costs are likely reasonable so that franchisees, as well as the franchisor, can make money.

Franchising is a proven means for successful businesses to expand, but choosing to franchise one's business is a decision that must be well considered. When your business client seeks your advice regarding franchising, take the time to explain what constitutes a franchise in the various jurisdictions in which he or she may be interested in offering franchises. Review the costs involved and the steps he or she must take before offering franchises. Help your client consider whether his or her business model will be attractive to potential franchisees and sustainable in the face of competition.

As a friendly reminder, though, weekend carpenters should not attempt to build skyscrapers. Just the same, business lawyers unfamiliar with the ins and outs of franchising should not try to go it alone when drafting and registering FDDs and franchise agreements. Consider checking with an experienced franchise attorney to help you through the process.

[1] http://www.goldsgym.com/golds/
[2] See http://www.livestrong.com/article/361399-the-history-of-golds-gym/
[3] See id.

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Securities Laws Fundamentals:

What Your Clients Need To Know About Raising Capital

By Louis A. Wharton

HAVING REMAINED ON THE sidelines through the great recession, investors are now eager to deploy funds to innovative disruptive companies. The proliferation of capital sources, from accelerators to angels and venture capitalists, and the coming advent of securities crowdfunding, make this an opportune time to once again focus on the issues your clients should bear in mind when raising capital.

Determination of Exemptions

Companies should refrain from issuing securities unless those securities are exempt from registration under federal and state securities laws, or an exemption from such registration is available.

Both federal and state regimes govern the issuance of securities in the capital raising process. Section 5 of the Securities Act of 1933 (Securities Act) makes it unlawful for any person to make use of interstate commerce or the mails to sell securities unless the sale is registered. State securities laws, or Blue Sky laws, include similar prohibitions on the sale of securities to state residents unless the sale is registered or qualified with applicable state securities authorities. Section 25110 of the California Corporate Securities Law of 1968 (California Securities Law), for example, provides that it is unlawful for any person to offer or sell in California any security in an issuer transaction unless such sale has been qualified under applicable provisions of the California Securities Law.

Notwithstanding the default registration and qualification requirements, both federal and state securities laws provide exemptions from registration for certain securities and transactions. The transactional exemptions are most relevant in the current context. Section 4(2) of the Securities Act provides that Section 5 shall not apply to transactions by an issuer not involving any public offering. The exemption provided under Section 4(2) permits companies to sell securities in private offerings (or private placements), which the United States Supreme Court interpreted in *SEC v. Ralston Purina Co.*, 346 U.S. 119, to denote offerings to those who are shown to be able to fend for themselves, including offerings to parties that are in such a position with respect to the issuer that they either actually have such information as a registration would have disclosed or have access to such information.

While the exemptions provided under state law vary from state to state, they generally contain a limited offering exemption. Section 25102(f) of the California Securities Law exempts from qualification any offer or sale of any security in a transaction that meets each of the following criteria:

- Sales are not made to more than 35 persons (exclusive of any officer, director or affiliate of the company, or any accredited investor–defined

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substantially in the same manner as Regulation D discussed below).

- All purchasers have a preexisting personal or business relationship with the company or any of its partners, officers, directors or controlling persons, or by reason of their business or financial experience or the business or financial experience of their professional advisers who are unaffiliated with and who are not compensated by the company, could be reasonably assumed to have the capacity to protect their own interests in connection with the transaction.
- Each purchaser represents that it is purchasing for its own account and not with a view to or for sale in connection with any distribution of the security. The offer and sale of the security is not accomplished by the publication of any advertisement.

The company bears the onus of proving its eligibility to rely on a federal or state transactional exemption, and substantially all inquiries into the availability of such exemption will involve a facts-and-circumstances review by the applicable regulatory authority.

Safe Harbor Exemptions

Companies may rely on the safe harbor provided under Regulation D of the Securities Act to avoid federal registration and state qualification (through pre-emption for covered securities).

In addition to the general private placement exemption under Section 4(2) of the Securities Act, the U.S. Securities and Exchange Commission (SEC) has promulgated a safe harbor under Regulation D of the Securities Act (Rules 501 through 508) for offers and sales not involving a public offering. By relying on the Regulation D safe harbor, companies can avoid the uncertainty inherent in the facts-and-circumstances analysis associated with the general private placement exemption. While Regulation D provides three transactional exemptions, the exemption provided under Rule 506 is most commonly utilized by companies raising capital.

Rule 506 provides an exemption for offers and sales of securities without regard to dollar amount. Offers and sales in reliance on Rule 506 must comply with the information and other requirements of Rules 501 and 502;

must not be conducted through general solicitation or advertising; and must not involve more than 35 purchasers of securities, excluding accredited investors. Accredited investors are natural persons whose net worth exceed $1 million or who have annual incomes above $200,000 ($300,000 jointly with spouse) over the preceding two years with a reasonable expectation of reaching the same income level in the current year, or certain entities specified in Rule 501. Each purchaser who is not an accredited investor must fall, or the company must reasonably believe immediately prior to making any sale that such purchaser falls, within the following description: such purchaser, either alone or with its purchaser representative, has such knowledge and experience in financial and business matters that such purchaser is capable of evaluating the merits and risks of the prospective investment.

Congress, in the Jumpstart Our Business Startups Act (JOBS Act), directed the SEC to amend Rule 506 to eliminate the prohibition against general solicitation or advertising for offers and sales of securities made solely to accredited investors. The issuer must take reasonable steps, in accordance with the framework identified by the SEC, to verify that purchasers of the securities are accredited investors.

While the SEC has proposed rules to implement the removal of the prohibition on general solicitation and advertising for offers and sales solely to accredited investors under Rule 506, those rules have yet to be finalized. Consequently, the prohibition on general solicitation and advertising remains applicable for Rule 506 offerings until the new regulations are final. Once final, issuers may choose either path under Rule 506–namely, offers and sales involving general solicitation and advertising solely to accredited investors, or offers and sales not involving general solicitation to accredited and/or a limited number of unaccredited investors.

Companies should note that the federal securities laws will preempt state securities laws in particular circumstances. Section 18(a) of the Securities Act provides that except as otherwise provided therein, no law, rule, regulation or order, or other administrative action of any state or any political subdivision thereof requiring, or with respect to, registration or qualification of securities or securities transactions, shall directly or indirectly apply to a security that is a covered security or will be a covered security upon completion of the transaction.

Section 18(b)(4)(D) of the Securities Act includes in the definition of a covered security, a security that is exempt from registration under the Securities Act pursuant to SEC rules or regulations issued under Section 4(2). Consequently, securities issued in compliance with Rule 506 will constitute covered securities that are exempt from state registration and qualification requirements. Notwithstanding federal preemption, companies should bear in mind that Section 18 does not prohibit a state from imposing certain notice filing requirements. Companies may still, therefore, have filing obligations with state securities authorities when issuing covered securities.

Crowdfunding Exemptions: The New Frontier

The JOBS Act also amended Section 4 of the Securities Act to add new subsection (6), the crowdfunding exemption. Section 4(6) provides that transactions involving the offer or sale of securities by a company will be exempt from the requirements of Section 5 provided that:

- The aggregate amount sold to all investors by the issuer in reliance on the exemption during the preceding 12 months is not more than $1,000,000.
- The aggregate amount sold to any investor during the preceding 12 months does not exceed the greater of $2,000 or 5% of the annual income or net worth of such investor, if either the annual income or net worth is less than $100,000; or 10% of the annual income or net worth of such investor not to exceed a maximum aggregate of $100,000, if either the annual income or net worth of the investor is equal to or more than $100,000.
- The transaction is conducted through a complying broker or funding portal.
- The issuer complies with the requirements of new Section 4A(b).

Section 4A(b) will require issuers to comply with specific conditions. Issuers must file with the SEC and provide to investors and the relevant broker or funding portal, and make available to potential investors the following information:

- Issuer's name, legal status, physical address and website
- Names of the directors and officers and holders of more than 20% of the issuer's shares
- Description of the business and the anticipated business plan
- Description of the financial condition of the issuer, including, for offerings that, together with all other offerings of the issuer under this exemption within the preceding 12 months have, in the aggregate, target offering amounts of $100,000 or less, the income tax returns filed by the issuer for the most recently completed year (if any), and financial statements of the issuer, which shall be certified by the principal executive officer of the issuer to be true and complete in all material respects; more than $100,000 but no more than $500,000, financial statements reviewed by a public accountant who is independent of the issuer, using professional standards and procedures for such review or standards and procedures established by the SEC; and more than $500,000, audited financial statements
- Description of the stated purpose and intended use of the proceeds of the offering
- Target offering amount, the deadline to reach the target offering amount and regular updates regarding the progress of the issuer in meeting the target offering amount
- Price to the public of the securities or the method for determining the price, provided that prior to the sale each investor shall be provided in writing the final price and all required disclosures, with a reasonable opportunity to rescind the commitment to purchase the securities
- Description of the ownership and capital structure of the issuer
- Such other information as the SEC may, by rule, prescribe, for the protection of investors and in the public interest

Additionally, issuers may not advertise the terms of the offering except for notices which direct investors to the funding portal or broker, nor may they compensate or commit to compensate, directly or indirectly, any person to promote the offerings through communication channels provided by a broker or funding portal, without taking such steps as the SEC shall, by rule, require to ensure that such person clearly discloses receipt of such compensation, upon each instance of such promotional communication. Issuers must also file with the SEC and provide to investors, at least annually, reports of the results of operations and financial statements of the issuer. Finally, they must also comply with such other requirements as the SEC may, by rule, prescribe, for the protection of investors and in the public interest.

The crowdfunding exemption will not take effect until the SEC adopts new regulations governing its operation. The SEC has yet to propose such regulations. Securities crowdfunding, once effective, may offer a new source of capital.

Provided that it meets the applicable requirements, a company relying on the crowdfunding exemption would be permitted to offer and sell securities to unaccredited investors using general solicitation and advertising (as permitted by the exemption), potentially giving the company access to millions of new investors. The requirements listed above make it fairly evident that companies relying on the crowdfunding exemption will need to provide robust and substantial disclosure, including audited financial statements for offerings exceeding $500,000, to the SEC and potential investors.

The securities crowdfunding space continues to evolve and will remain in flux until the SEC adopts final rules governing the exemption. Attorneys advising companies who are considering securities crowdfunding transactions should carefully weigh the merits and risks of this new securities law frontier.

Attorneys' Guide to H-1B Visas

By Alice M. Yardum-Hunter

THIS IS THE TIME OF THE YEAR WHEN applicants for nonimmigrant (temporary) employment status prepare applications for filing at the U.S. Citizenship and Immigration Services (CIS). H-1B status is available typically to college graduates who secure three-year offers of employment in the United States after studying as foreign students. They have attained higher education degrees in areas such as computer science and engineering. They usually lack close family petitioners to keep them in the United States Therefore, the H-1B, relatively easy for a foreign student to qualify for, is coveted in the job market. Employers of H-1B workers are motivated too. They bemoan the lack of sufficiently educated U.S. workers and must pay required filing fees, if not all fees and costs.[1]

Since the tech boom in the 1990s, H-1B has gained much media attention. There was demand for high tech workers necessary to develop the hardware and software found everywhere today, while universities in the United States were not able to (and continue to fail to) graduate sufficient number of American students in the sciences. As a result of the lack of qualified U.S. specialists, Congress increased the number of H-1B visas available for a few short years gradually from 65,000 to 195,000 annually until the quota returned to 65,000.[2] Today, there are an additional 20,000 H-1Bs for foreign nationals with Master Degrees issued by U.S. universities.[3]

The increase in H-1B foreign nationals threatened the U.S. engineering community and the tug of war in the media and in Congress has kept the H-1B quota low despite economic growth since 1990 when the quota went into effect.[4] When the economy is poor, the incentive to allow greater numbers of foreign workers is politically impossible. As the economy improves, the political incentive returns. The improving economy today, plus increased attention on immigration reform, may result in a larger H-1B quota again.

The procedure for filing an H-1 petition includes several steps: verification of the employer's tax ID number, certification of a Labor Condition Application (LCA) through the U.S. Department of Labor (DOL) and approval of an I-129 Petition for a Nonimmigrant Worker filed with the CIS.[5] Aliens in the United States change and extend their status; those abroad apply for visas with the Department of State (DOS) at an embassy or consulate. The visa is the passport stamp that permits entry under a particular status.

Petitions for H-1B status are filed annually as early as April 1 for employment to begin October 1.[6] Feverishly, in the weeks before April 1, employers and applicants prepare their cases hoping for earlier approval by CIS without dreaded Requests for Evidence (RFE). RFEs were rare pre-9/11, but have now become common. Some RFEs are simple; some are complex substantive challenges. Eighty-seven days are provided for response. Without a response, the petition is denied. If a petition clearly doesn't qualify for H-1B status, the petition will be denied without an RFE. The best practice is to avoid RFEs.

Filing on April 1 becomes more important during times of economic strength. When more than the quota of petitions is received on April 1, CIS creates a random lottery to decide which petitions to accept for processing. When the numerical cap is reached after April 1, subsequent petitions are rejected. Applicants have to wait in a different, authorized status (almost always not authorized for employment) and try again the following year, or depart when they don't qualify to stay and wait. Some of them never return due to problematic timing issues. Concomitantly, the United States loses that specialist worker.

Under the Immigration and Nationality Act, H-1B status is accorded to specialists who hold a baccalaureate degree or the equivalent in a field of "specialized knowledge" petitioned by an employer to occupy a "specialty occupation."[7] The use of "special" and its variants to describe the foreign national, their field of study, the job offered, and what's required of the job all seem the same, but they are not.

The Code of Federal Regulations defines specialty occupation as:

> …. an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in the specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.[8]

More specifically, a position can be a specialty occupation by meeting one or more of four requirements:

- A minimum baccalaureate degree is normally required to enter the particular position.

- The degree requirement is common to the industry in parallel positions or, an employer may show that a particular position is particularly complex or unique.

- The employer normally requires a degree for the position.

- The nature of the specific duties is particularly specialized and complex.[9]

From a practical perspective, though the regulations require one of the above, the best practice is to include as many as possible.

Recent interpretations by CIS of the above two sets of requirements are that they must both be met, rather than the second set defining the first. The result has been more H-1B denials and federal court litigation.

In addition to the position qualifying as a specialty occupation, the alien too must be a specialist through one of the following: possession of a bachelor's degree (U.S. or foreign); unrestricted license to practice in the field; or the equivalency of a bachelor's degree through education short of a degree, training or progressively complex experience and recognition[10]

A common problem area is when an alien does not possess the minimal degree and must rely on a combination of education, training and/or progressive experience. Under those circumstances, equivalence is possible by one or more of the following:

- An evaluation from a college official with authority to grant college-level credit in the field

- Positive results of recognized college-level equivalency examinations or special credit programs

- An evaluation of education by a reliable credentials evaluation service[11]

- Certification from or registration in a nationally-recognized professional association

- A determination by the CIS that the equivalence has been acquired through a combination of education, specialized training, and/or work experience and that the alien has achieved recognition of expertise in the specialty occupation. Recognition of expertise can be in the form of recognition by at least two recognized authorities in the field; membership in a recognized foreign or United States association; published material by or about the alien in mass media or field literature; licensure or registration; or achievements a recognized authority has determined to be significant.[12]

Three years of training and/or work experience must be demonstrated for each year of education lacking. Alien's training and/or work experience includes the theoretical and practical application of specialized knowledge gained while working with peers, supervisors, or subordinates, who have a degree or its equivalent in the specialty occupation.

A bachelor's degree does not alone qualify an individual for H-1B classification. The education must be in a "specialty" which would qualify an applicant to enter a specialty occupation. General baccalaureate degrees are not specialized enough. General liberal arts and business degrees without specialization are not H-1B caliber.

Similarly, for occupations requiring more than a bachelor's degree to enter the field, a bachelor's would not suffice. An obvious example is a pre-med Bachelor of Science degree in Biology which would not qualify one to be a physician absent the M.D. degree. Similarly, psychology bachelor-level graduates cannot provide psychological services without a minimum of a Master's degree and for those positions would not be H-1B caliber.[13] However, in limited circumstances, depending on the duties of a particular position, such a bachelor's degree might be sufficient.[14] For example, a job involving quantitative psychological analysis might be a specialty occupation and an applicant with a bachelor's in psychology, including course work in research and its quantitative aspects, could suffice.

Another area where issues arise is in fields in transition. When graphic design, purchasing management and computer analysis were not part of college curricula, no job could require a degree. However, as fields evolve and college level programs become common, ground breaking studies become mainstream, resulting in those jobs requiring degrees in time.

Over the decades, this simple immigration status has evolved to an ever more complex set of interpretations which change seemingly at whim and then become government policy. Today, RFEs are common in regard to meeting the above regulatory requirements. Common too are RFEs issued more frequently to small companies and start-ups which are viewed as more likely to be engaged in fraud. Depending on the needs of the economy and the political climate, the government's approach to H-1B adjudications might return to less restrictive times and with a larger quota.

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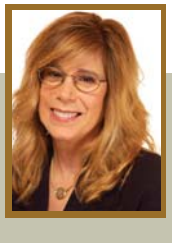
[1] A U.S. worker training fee of $750 or $1,500 must be paid by the employer, depending on number of employees. An employer must pay all fees (including attorney fees) and costs when deducted from the wage paid to the employee the remainder would fall below the required wage.
[2] American Competitiveness in the Twenty-First Century Act of 2000 (S. 2045), October 3, 2000 was too little too late.
[3] Title IV of P.L. 108-447 (H.R. 4818), the Consolidated Appropriations Act for FY2005
[4] The Immigration Act of 1990 (P.L. 101-649), November 29, 1990 5 The LCA contains employer attestations for protection of U.S. worker wages and working conditions.
[6] Six months before the start of the government's fiscal year on October 1
[7] Immigration and Nationality Act Section §214(i)(1), 8 USC §1184(i)(1)
[8] 8 Code of Federal Regulations §214.2(h)(4)(ii)
[9] Paraphrasing 8 Code of Federal Regulations §214.2(h)(4)(iii)(A)
[10] Paraphrasing 8 Code of Federal Regulations §214.2(h)(4)iii)(C)
[11] Of note is that reliable credentials evaluation services are not authorized by regulation to evaluate experience or training in lieu of education.
[12] 8 CFR 214.2(h)(4)(iii)(D)
[13] Dictated by state standards of professions involving patient care
[14] The O*NET program is the nation's primary source of occupational information, including all occupational job titles and duties recognized by the DOL for immigration purposes. See www.onetonline.org/



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Back in the Saddle Again

ETAN LORANT
VCLF President
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THE VALLEY COMMUNITY Legal Foundation (VCLF) is the charitable arm of the San Fernando Valley Bar Association. As the newly installed President of VCLF, I would like to thank the Board of Directors, which is comprised of attorneys, judicial officers and members of the community at large, for their hard work and dedication to the Foundation and its various committees.

The mission of the VCLF is to support law-related programs that assist children, families and domestic violence victims; to enhance community access to the courts; to provide educational opportunities and scholarships to students who demonstrate an interest in law-related careers; and to recognize and honor the achievements of law enforcement and firefighters. The values of the VCLF include promoting respect for the law and encouraging responsible leadership.

The Foundation's immediate goal is to increase awareness of its programs throughout the San Fernando Valley, particularly of our major fundraising event, the Law Day Gala. VCLF prides itself in hosting a variety of fun events throughout the year to raise money for its causes.

Last year, the VCLF Board took a year off from hosting our annual Law Day Gala. However, a year off from the gala did not mean we sat idle. Instead, we held our First Annual Veterans Day Golf Tournament. The tournament was held at the Porter Valley Country Club. Participants enjoyed a great day of golfing, delicious food and the chance to win several prize drawings. It was an exciting day to honor our veterans and helped to raise money for the Foundation. The Veterans Day Golf Tournament was a big success and was the first of many more golf tournaments to come.

The biggest event of the year for the VCLF is our annual gala. This year's Gala and Silent Auction will take place on June 1, 2013 at the world renowned Autry National Center in Griffith Park. To celebrate our return from the one year gala-planning hiatus, this year's event theme is "Back in the Saddle Again." In attendance will be many prominent elected government officials and members of the judiciary. We will celebrate with great food, wine and music.

I would like to encourage fellow SFVBA members to join a VCLF committee or volunteer at our fun events. Of course, donations are always appreciated. As a reminder, the VCLF is a 501(c)(3) organization and your donations are tax deductible. I look forward to seeing you at future VCLF events!

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