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A Publication of the San Fernando Valley Bar Association

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Advances in Application of SLAPP Analysis

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A Publication of the San Fernando Valley Bar Association
MARCH 2014

FEATURES

COLUMN

On the cover *(L-R)*: *Michael Bilson, Howard Bodenheimer, Lucia Senda and Robin Paley. Photo by Robert Reiter.*

DEPARTMENTS

VALLEY LAWYER

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Remembering to "Pay it Forward"

ADAM D.H. GRANT
SFVBA President

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PART OF THE PRIVILEGE OF WRITING THIS COLUMN is the opportunity it provides me to share with fellow members of the bar association my thoughts on current topics which should encourage us to remember to "pay it forward." This past month as your President, I had several opportunities to observe community leaders in action as they paid it forward.

Our San Fernando Valley bench officers, including retired Justice Armand Arabian, reminded each of us of our obligation when they held a luncheon to honor retired Judge Michael Luros. Judge Luros, at age 33, was appointed to the Los Angeles Municipal Court by California Governor Edmund G. Brown, Jr. in 1981. Judge Luros was rated "well qualified" by the Los Angeles County Bar Association and was elected to the Los Angeles Superior Court in 1996 with more than 73 percent of the votes. He devoted most of his 27 years of judicial service in the Van Nuys and San Fernando courthouses.

In 1989, Judge Luros was named the San Fernando Valley Criminal Bar Association's Municipal Court Judge of the Year. In 1992, the SFVBA recognized Judge Luros with the President's Award. In addition to his service on the bench, Judge Luros was a long-time volunteer member of the Board of Directors of the SFVBA's Valley Community Legal Foundation. After an esteemed career, Judge Luros retired in 2008. The SFVBA took the opportunity to further honor Judge Luros by presenting him with a resolution recognizing his achievements and thanking him for his lifelong commitment to the San Fernando Valley.

While one might not think that an open house for a business is an opportunity to recognize community involvement, such was not the case when I attended the SFVBA's Silver Sponsor Hutchinson and Bloodgood LLP's open house this past month. While I listened to the managing partner speak about the new office and how it came to pass, I realized the level of commitment this accountancy firm had to its surrounding community. The sincerity with which the partner shared his involvement in the process and his appreciation for all who helped was very genuine. Local politicians provided the firm with resolutions of appreciation. The Chamber of Commerce spoke about the firm's multi-decade involvement in the community. Cleary, Hutchinson and Bloodgood LLP has made its mark as a fixture in its community.

I have even witnessed one of my clients pay it forward in different parts of the world. As part of my practice, I regularly speak at conferences on mobile app and online privacy law. As I write this article, I am speaking at a conference in Las Vegas on the use of mobile apps in the workplace. My client invited me to speak on the topic to their customers (about 100 HR and payroll executives from Fortune 500 companies) and address their concerns about privacy and security.

All discussions of privacy and security took a back seat in my mind after I talked with the CFO for my client. I learned that the company, in addition to putting out cutting-edge wage and hour tracking software, recognizes that giving back to communities worldwide, particularly those that have suffered from extreme natural disasters, is part of its mission.

I talked with the CFO about trips to Haiti to rebuild a school devastated by the 2010 earthquake, a school that, at the time of the earthquake, housed over 100 elementary school children. Unfortunately, none of the children survived. In honor of the children, the client helped engineer and physically build a school that should withstand a 9.0 earthquake. The CFO also spoke about trips to tsunami ravaged cities at which the client's executives gave out food and water and helped with the rebuilding process.

The company sent many employees to the Northeast to help with the aftermath of Hurricane Sandy. It even implemented an incentive program for their sales force; if they hit certain goals, the company shared a portion of the profits with charities selected by the employees.

Finally, I observed in pictures and listened to detailed descriptions about how my eldest daughter is running a program at an orphanage in Gabarone, Botswana where she is currently studying abroad. They were pictures of very young children with smiles in the midst of conditions the likes of which many of us have never seen and pictures of college-aged men and women working together to help paint a portion of a dilapidated building to brighten the days for the children. It is hard to imagine the level of need in such a place; even harder at times to imagine my daughter is in the midst of all of it.

These are only a few examples of how people and companies remembered to pay it forward. As 2014 marches forward, I encourage each member to look for opportunities in the community to give back. Look to the people and businesses I mentioned in this article as examples of the many ways we can contribute. Everyone, in their own way, should take such an opportunity.

SUN	MON	TUE	WED	THU	FRI	SAT
WOMEN'S HISTORY MONTH						1
2	3	4	**5** Employment Law Section **Persuasive Legal Writing for the Attorney at the Trial Level and on Appeal** 12:00 NOON SFVBA OFFICE ***Valley Lawyer* Member Bulletin** Deadline to submit announcements to editor@sfvba.org for April issue.	**6** Membership & Marketing Committee 6:00 PM SFVBA OFFICE	7	**8** Mardi Gras 6:30 PM MONTEREY AT ENCINO RESTAURANT Sponsored by NARVER INSURANCE  See page 25
9	**10** Tarzana Networking Meeting 5:00 PM SFVBA OFFICE TEN The Esquire Network	**11** Probate & Estate Planning Section **A View From the Bench** 12:00 NOON MONTEREY AT ENCINO RESTAURANT Judge Levanas and other probate judges discuss the latest court changes. **Board of Trustees** 6:00 PM SFVBA OFFICE	**12** Business Law Section **Recent Changes in California LLC Law** 12:00 NOON SFVBA OFFICE Attorney Gregory Akselrud will give the latest updates regarding California LLCs. (1 MCLE Hour)	13	14	15
16	**17**  **Family Law Section 24** **Trial Tech Five: Examination of Child Custody Evaluator** 5:30 PM SPORTSMEN'S LODGE Judge Harvey Silberman and attorneys Diane Goodman and Glen Schwartz address child custody and move away issues. (1.5 MCLE Hours)	18	**19** Editorial Committee 12:00 NOON SFVBA OFFICE **Workers' Compensation Section** **Psychiatric Disability** 12:00 NOON MONTEREY AT ENCINO RESTAURANT Dr. Manual St. Martin will discuss psychiatric disability in light of the latest changes regarding SB 863.	20	**21** All Section Meeting **Advising Your Client on Retirement Plans and Finances** 12:00 NOON SFVBA OFFICE Join us for this informative seminar led by John Laudemann on how best to advise your clients on building a healthy retirement plan, distribution essentials and busting stock market myths! Lunch sponsored by Berson Money Management. Free to Current Members! (1 MCLE Hour)	22
23	25	**26** Bankruptcy Law Section **Ninth Circuit Bankruptcy Appellate Panel Review** 12:00 NOON SFVBA OFFICE Jonathan Hayes, Raymond Aver and Matthew Resnik will offer the year in review. (1 MCLE Hour)	27	**28** Diversity Committee 8:15 AM SFVBA OFFICE	29	
30	**31**  					

CALENDAR

APRIL 2014

SUN	MON	TUE	WED	THU	FRI	SAT
		1 **Southern California Mediation Association and SFVBA** **Mediating Cases without the Court's ADR Program—What Do Lawyers Do Now?** See page 14	**2** ***Valley Lawyer* Member Bulletin** Deadline to submit announcements to editor@sfvba.org for May issue.	**3** **Membership & Marketing Committee** 6:00 PM SFVBA OFFICE **All Section Meeting** **Google Hummingbird** 12:00 NOON SFVBA OFFICE Dave Hendricks returns with the latest info on Google's recent Algorithm change and will discuss how this impacts your practice.	4	5
6	7	**8** **Probate & Estate Planning Section** 12:00 NOON MONTEREY AT ENCINO RESTAURANT **Board of Trustees** 6:00 PM SFVBA OFFICE	**9** **Business Law Section** 12:00 NOON SFVBA OFFICE	**10** **Employment Law Section** 12:00 NOON SFVBA OFFICE	11	12
13	**14** **Tarzana Networking Meeting** 5:00 PM SFVBA OFFICE THE ESQUIRE NETWORK	15	**16** **Editorial Committee** 12:00 NOON SFVBA OFFICE **Workers' Compensation Section** 12:00 NOON MONTEREY AT ENCINO RESTAURANT	17	18	19
20	21	**22** **Taxation Law Section** **Estate and Gift Taxation Update** 12:00 NOON SFVBA OFFICE Attorney Kira Masteller will address the Section. (1 MCLE Hour)	**23** *Administrative Professionals Day* Visit www. sfvba.org for details on Administrative Professionals' Day Luncheon!	24	25	26
26	**28** **Family Law Section** **Trial Tech Module Six: Examination of a Forensic Accountant** 5:30 PM SPORTSMEN'S LODGE Our outstanding Trial Tech series continues with a distinguished panel of speakers. You are welcome to attend the individual seminar; it is not necessary to have attended the previous trial tech offerings. (1.5 MCLE Hours)	**29** **Bankruptcy Law Section** **Update on Breach of Fiduciary Duties** 12:00 NOON SFVBA OFFICE Mark Blackman and Chris Todd will discuss the latest on breach of fiduciary duties, with an emphasis on the Bullock case. (1 MCLE Hour)	30	**SAVE THE DATE** **University of West Los Angeles and American Arbitration Association** **The New AAA Arbitration Rules** MAY 15 6:00 PM UWLA, CHATSWORTH CAMPUS This two hour MCLE seminar is free to current SFVBA members. UWLA University of West Los Angeles		

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

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It's Time to Talk Business

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THE ARTICLES SELECTED FOR THIS ISSUE ARE all about different aspects of business law. From recent decisions about employment discrimination and anti-SLAPP motions in California to the Supreme Court's ruling regarding the burden of proof in patent infringement defense suits, recent developments in business law are indicative of the increasingly complex business environment in which attorneys operate.

That complexity is well illustrated by David Gurnick's MCLE article on the enforcement of non-compete clauses in California. Such restrictions are not easily enforced in this state but Gurnick points out the few instances in which these covenants can be fulfilled.

Hannah Sweiss provides an update on the state's new Uniform Limited Liability Company Act. Business law attorneys would be wise to read her practice tips. Lisa Miller and Taylor Chase-Wagniere's feature on the closely watched case of *Hunter v. CBS Broadcasting* highlights the controversial issues that have made companies throughout the broadcasting industry take notice. And Greg Lampert's assessment of a recent Supreme Court case clarifies the issue of burden shifting in patent litigation.

Ron Tasoff's immigration law update is a simple primer for business attorneys whose clients may have immigration issues to address, particularly employers interested in H-1B visas. Finally, Josh Auriemma lets us know how electronic legal research is evolving to better benefit law practices and their client's businesses.

While all these articles focus on aspects of law that affect the bottom line, our cover story focuses on one that affects the heart: public service to Valley seniors. While volunteer attorneys do generate fees through the Attorney Referral Service's Senior Citizens Legal Services Program, it's only a small portion of their practice. As they describe it, the true reward is in the satisfaction of helping a low-income senior citizen.

BULLETIN BOARD

The Bulletin Board is a free forum for members to share trial victories, firm updates, professional and personal accomplishments.

Attorney **Mark Shipow** succeeded in obtaining a Writ of Mandate on behalf of homeowners in the Walnut Acres community in Woodland Hills. The court directed the City of Los Angeles to withdraw its approval of an oversized eldercare facility in the residential neighborhood, based on the city's failure to make the findings required under its eldercare ordinance.

Criminal defense attorneys **Dmitry Gorin** and **Alan Eisner** announce their selection into 2014 Super Lawyers for the fourth consecutive year. Eisner Gorin LLP is an AV-rated criminal defense boutique. **Meryl Chambers** and **Brad Kaiserman** are also associates at the firm.

The Kurtz Law Group has joined the Lewitt Hackman firm in Encino. **Barry Kurtz** brings 40 years of experience to the firm as a California State Bar Certified Specialist in Franchise and Distribution Law. He joins the firm as Chair of the Franchise Practice Group. **Candice Lee** and **Bryan Clements** have also joined the firm as Associates. Lee is an Associate in the Franchise Practice Group where she is represents clients in all aspects of registration, ownership, operation, transfers, purchases and sales of franchises—domestically and globally. Clements is a transactional attorney in the Corporate and Franchise Practice Groups who represents franchisors, as well as franchisees, at every phase of the business relationship.

Email your announcement to editor@sfvba.org. Announcements are due on the fifth of every month for inclusion in the upcoming issue. Late submissions will be printed in the subsequent issue. Limit one announcement per firm per month.

Advances in Application of SLAPP Analysis: *Hunter v. CBS Broadcasting*

By Lisa Miller and Taylor Chase-Wagniere

IN LATE 2013, THE CALIFORNIA Court of Appeal considered whether California's anti-SLAPP statute applies when a broadcast company allegedly discriminates on the basis of age, gender and physical appearance when hiring news anchors.[1]

Kyle Hunter, an experienced weatherman, filed a discrimination complaint against CBS television network after it refused to hire him to fill either of two open weatherman positions on local television stations. Hunter alleged that CBS intentionally sought to hire only young and attractive females to fill weathercaster positions, even though he was significantly more qualified and had repeatedly expressed his interest in the positions. In response, CBS filed a motion to strike on anti-SLAPP (strategic lawsuit against public participation) grounds[2], arguing that its hiring decisions for newscasters qualifies as First Amendment-protected free speech.

California Anti-SLAPP Motions

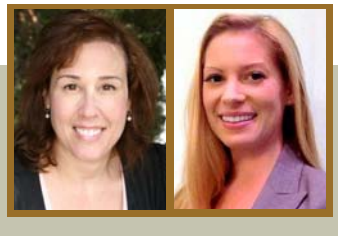
Most SLAPP suits involve claims for defamation, intentional infliction of emotional distress, invasion of privacy, or tortious interference with contract. Usually, they are filed against a party who has criticized or spoken out against the plaintiff in some public context.

For example, a publicly held company will file a defamation or tortious interference suit against an individual who has publicly shared negative reviews about its stock value, leadership, valuation, etc. No matter how weak its claim might actually be, the plaintiff's lawsuit forces the speaker to expend money responding to the claim. As a result, the speaker will think twice about speaking out publicly in the future.

California's legislature enacted anti-SLAPP measures for the first time in 1992. The goal was to encourage individuals to feel free to participate in matters of public significance without fear of prosecution by private parties. To achieve these aims, anti-SLAPP legislation provides a mechanism to terminate a lawsuit at the earliest stages of litigation when it has been brought for the purposes of chilling speech. The legislature reasoned that a new and independent mechanism was necessary for this kind of meritless suit because the usual judicial safeguards only prevented a meritless claim from ultimately prevailing.

In anti-SLAPP suits, plaintiffs sue because the institution of litigation will chill the unwanted speech; although plaintiffs know they will likely lose eventually, they are willing to finance lengthy litigation or write it off as the cost of doing business to achieve the desired chilling effect in the process. As a result, the anti-SLAPP legislation has the effect of protecting the defendant at an early stage in litigation, before that party is forced to expend substantial costs in defense.

Although lay people often use terms like "free speech" and "petition the government" loosely in popular speech, the anti-SLAPP law assigns this phrase a specific legal meaning. This includes four categories of activities:



Lisa Miller is a trial lawyer at Marcin Lambirth, LLP. She is the Chair of the Bar's Small Firm & Sole Practitioner Section and can be reached at llm@marcin.com. **Taylor Chase-Wagniere** is an associate at Marcin Lambirth. She can be reached at tcw@marcin.**com.**

- Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law
- Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law
- Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest
- Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest[3]

Under California's anti-SLAPP statute, a defendant first must show that the challenged activity is "an act in furtherance of . . . free speech . . . in connection with a public issue."[4] Even if the defendant is able to meet this burden, the SLAPP motion plaintiff may still defeat defendant's SLAPP motion by establishing a reasonable probability of prevailing on the merits. If the defendant does not meet its burden on the first step, the court will deny the motion without addressing the second step.

In *Hunter*, this meant that CBS had to first demonstrate that its hiring decisions were an integral part of its free speech activity involved in delivering the news. In response, Hunter could demonstrate that he had a good chance of prevailing on the merits by showing that CBS's decision to hire other weather anchors was discriminatory.

Trial Court Determination

The network reasoned that because the conduct at issue revolved around CBS's decisions as to whom to select to represent it during on-air broadcast, that this on-air broadcast was an act in furtherance of free speech.

In response, Hunter argued that the "act" underlying his claims was CBS's adoption of a hiring policy that discriminated against males in the hiring process for certain select and vacant positions. Hunter asserted that CBS had failed to identify case law that allowed a hiring decision in this context to be protected as First Amendment free speech activity.

The trial court, however, denied CBS's anti-SLAPP motion. The trial court concluded that Hunter's claims arose from CBS's discriminatory employment practices, and not from CBS's hiring decisions. As a result, the trial court did not consider whether Hunter could prevail on the merits, as it never reached this issue.

Appellate Determination

The Court of Appeal reversed and remanded. The Appellate Court directed the trial court to consider whether Hunter demonstrated a reasonable probability of prevailing on the merits under the anti-SLAPP statute. Additionally, the Court of Appeal held that CBS's selection of news anchors "qualifies as a form of protected activity" under the anti-SLAPP statute because it assisted or advanced CBS's speech, which is categorized as protected under the First Amendment.

In rendering this decision, the court reviewed previous cases in which it had held that news reporting and the creation of new television shows constituted exercises of free speech. The court reasoned that the selection of news anchors was a logical corollary to these past cases because anti-SLAPP motions apply to conduct undertaken "in furtherance" of constitutionally-protected activities. It held that anti-SLAPP motions are not limited solely to claims based on constitutionally-

CNN, ONLINE VIDEOS AND SLAPP SUITS

Recently, the Ninth Circuit Court of Appeals dismissed part of a lawsuit brought by the Greater Los Angeles Agency on Deafness (GLAD) against Cable News Network CNN. GLAD filed suit under California's Unruh Civil Rights Act and Disabled Persons Act (DPA) for CNN's failure to caption hundreds of videos uploaded daily to its website.

In its application of the anti-SLAPP statute, the Ninth Circuit found that CNN's online videos constituted an exercise of free speech under the First Amendment. It specifically noted that uploading videos was conduct in furtherance of the cable network's protected right to free speech, especially given CNN's concerns about the costs, delay, and the potential for errors if CNN was forced to caption immediately.

As result, the burden shifted to GLAD to show a probability that it would prevail on its claims, including the intentional discrimination element required by the Unruh Act. Ultimately, the court held that GLAD could not meet its burden; CNN's blanket policy of posting online videos without closed-captioning crawl lines applied equally to everyone.

The court, however, declined to rule on the issues brought under the Disabled Persons Act and certified the issue to the California Supreme Court. As a result, the question of whether CNN's website constitutes "a place of public accommodation" under the DPA will remain an open question until decided by the Supreme Court. A ruling that places of public accommodation, as defined under the DPA, applies to non-physical places like websites could have a huge impact on internet usage, including postings for news organizations and businesses.

protected free speech. This is considered a significant enlargement of the analysis.

The court reasoned that even if the act of hiring a news anchor did not, alone, qualify as an exercise of free speech rights, Hunter failed to demonstrate why such conduct would not qualify as an act in furtherance of the exercise of such free speech rights. Therefore, the court concluded that CBS's hiring decisions qualified as protected activity because these hiring decisions advanced its First Amendment-protected speech.

Establishing Precedent

This decision establishes a substantial and new precedent for broadcasting companies: free speech protections may extend to hiring or administrative decisions that go far beyond what is expressed on camera. Because of its potentially sweeping implications, several media entities requested that the Court of Appeal publish the originally un-published November 2013 decision. The court did so less than a month later.

Accordingly, broadcasting companies—and employers in general—may rely on *Hunter* to force plaintiffs to bear the burden of demonstrating a reasonable likelihood of success on the merits at the very beginning of the litigation. This has the obvious potential of discouraging potential plaintiffs from filing employment-related lawsuits given the increased risk, length, and cost of litigation for the plaintiff.

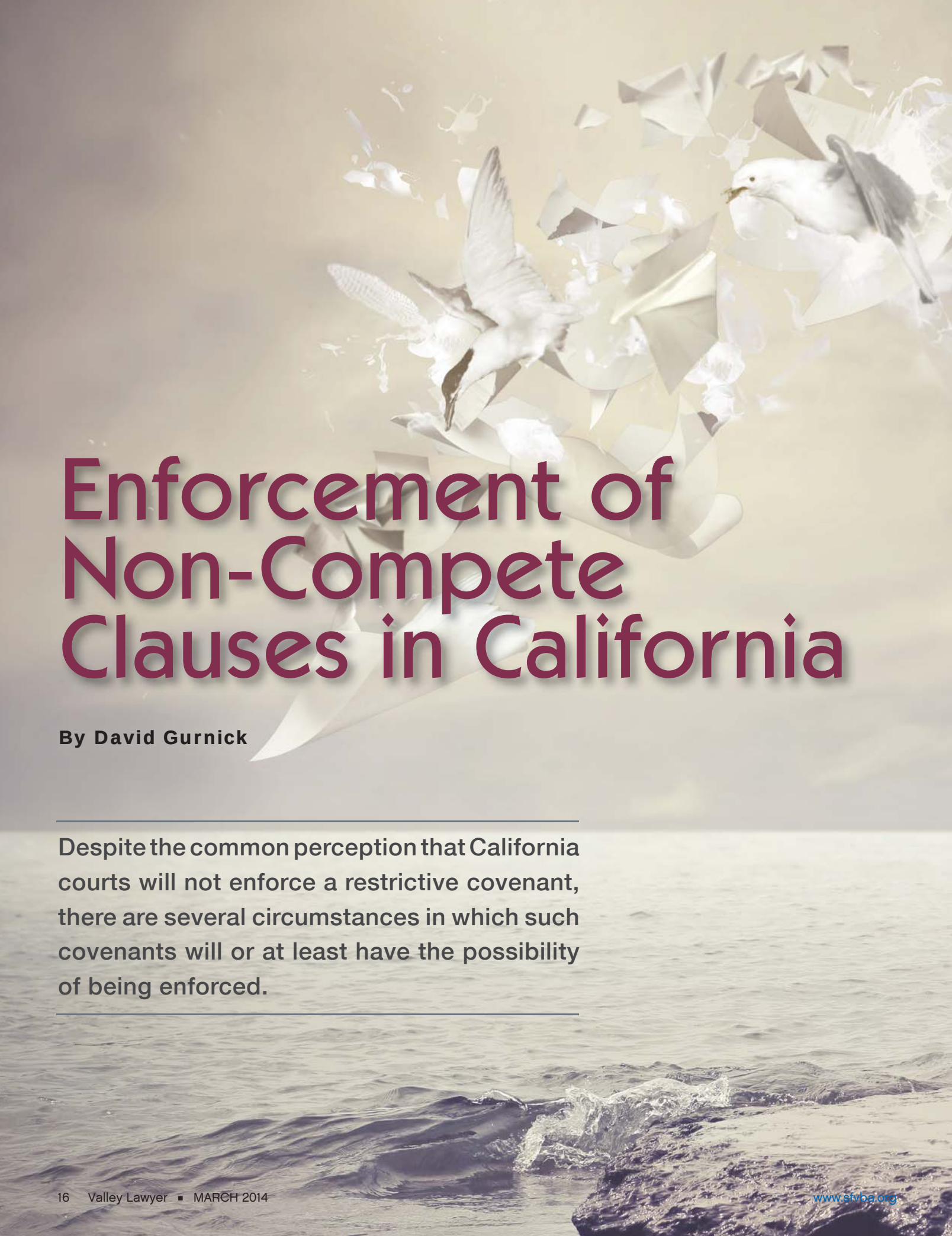
Many lawyers and law commentators disagree with the appellate outcome in *Hunter*. These dissenters argue that the decision is bad public policy because it essentially allows broadcasting companies to shield their potentially pretextual and discriminatory practices under the guise of free speech.

Additionally, they argue that just because a news station is in the business of public speech does not mean that its every decision, including administrative and hiring decisions, should be protected by the First Amendment. Those who disagree with the Court of Appeal argue that the *Hunter* decision is especially dangerous because there is no real connection between the quality of weather reporting and the age or gender of the person delivering it.

The court, however, did consider, and ultimately rejected, this argument by finding that weather reporting was a matter of public interest and, therefore, CBS's decisions about who would report the weather were necessarily "in connection" with this.

Regardless of the widely differing opinions on *Hunter*, the decision underscores the trend toward an increasingly broad scope of application of California's anti-SLAPP statute and how it may be applied in the employment context. Based on the potential implications of *Hunter*, it seems likely that the decision will be reviewed by the California Supreme Court.

[1] *Hunter v. CBS Broadcasting* (2013) 221 Cal.App.4th 1510.
[2] Code Civ. Proc. § 425.16.
[3] Cal. Civ. Proc. Code §425.16(e)(1-4).
[4] Code Civ. Proc. § 425.16. /aboutmission.aspx.



Enforcement of Non-Compete Clauses in California

By David Gurnick

Despite the common perception that California courts will not enforce a restrictive covenant, there are several circumstances in which such covenants will or at least have the possibility of being enforced.

By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 24.

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MANY LAWYERS AND OTHERS THINK CALIFORNIA courts will not enforce a covenant restricting a person or entity from competing. Often, they are right. This is because the Business and Professions Code establishes a rule that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[1] California courts have declared this represents a strong, fundamental policy against the enforcement of noncompetition restrictions.[2] But there are some circumstances when a restrictive covenant may be enforced in California.

First, the statute that makes noncompetition restrictions unenforceable has exceptions. One who sells their interest in a business and its goodwill, or a business that sells substantially all its operating assets or sells a division or subsidiary, along with its goodwill, may agree with the buyer to not carry on a similar business in a specified area where the sold business operated, so long as the buyer or successor carries on a like business.[3] In these circumstances, which also apply to a partner in a partnership, a limited liability company member, or a corporate shareholder,[4] a noncompetition restriction is enforceable.

Similarly, a member of a limited liability company may, in anticipation of terminating his or her interest in the entity, or dissolution of the entity, agree not to compete in a specified area, so long as the company or any other member carries on a like business.[5]

Noncompetition Restrictions in Employer-Employee Relationships

A California court will enforce a restrictive covenant during the term of a contractual relationship. Recently, this was reaffirmed by the Court of Appeal. In *Angelica Textile Services, Inc. v. Park*,[6] an employee promised "to give his best endeavors, skill and attention to the discharge of his duties with the Company" and promised "he would not, during his employment, become interested, directly or indirectly, as a partner, officer, director, stockholder, advisor, employee, independent contractor or in any other form or capacity, in any other business similar to Company's business."[7] Despite this promise, while employed, the individual became part of a group that formed a competing company. The new company then solicited away clients of the former employer.

The ex-employee claimed the restrictive covenant was unenforceable under Business and Professions Code Section 16600. The Court of Appeal rejected this argument. The court agreed "section 16600 has consistently been interpreted as invalidating any employment agreement that unreasonably interferes with an employee's ability to compete with an employer after his or her employment ends." But, the court noted, it "does not affect limitations on an employee's conduct or duties while employed. . . . During the term of employment, an employer is entitled to its employees' undivided loyalty."[8] Because the employee owed his employer a "broad duty of loyalty," and the claims were based on "conduct during his employment," the court ruled "they are in no sense barred by Business and Professions Code Section 16600."[9]

Noncompetition Restrictions in Franchise Relationships

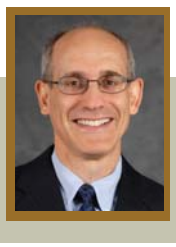
The *Angelica* case was in the employer-employee context. A similar principle applies in other business contexts. In *Dayton Time Lock Service, Inc. v. Silent Watchman Corp.*,[10] a covenant restricting competition in a business franchise relationship was enforced during the term of the franchise.

Silent Watchman Corporation manufactured a recording time lock system, a lock that keeps track of when it is opened and closed. Dayton Time Lock was a franchisee for several states under an exclusive ten-year franchise agreement. Dayton Time Lock agreed not to compete with its franchisor during the term of the franchise.[11] The agreement stated:

> [Franchisee] agrees that, during the life of this contract, and any renewal or extension thereof, except as herein provided, it will not sell or lease any locks, devices or service of any kind in competition with the business of [Franchisor] or use any time recording lock not supplied by [Franchisor] under this agreement. . . .[12]

The Court of Appeal viewed this as an "exclusive-dealing contract" and noted such contracts "are not necessarily invalid. They may provide an incentive for the marketing of new products and a guarantee of quality-control distribution. They are proscribed when it is probable that performance of the contract will foreclose competition in a substantial share of the affected line of commerce. A determination of illegality requires knowledge and analysis of the line of commerce, the market area, and the affected share of the relevant market."[13] The court ruled that without evidence in these areas, it could not be said "that the challenged provision is invalid as a matter of law."[14]

Dayton Time Lock remains good law, although later decisions limit its holding to the field of business franchises.[15] And within franchising, the *Dayton* decision has been limited



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further. In *Comedy Club, Inc. v. Improv West Associates*,[16] the Ninth Circuit Court of Appeals ruled that an in-term restrictive covenant in a franchise relationship "will be void if it forecloses competition in a substantial share of a business, trade or market."[17]

Improv West created and owned trademarks for operating restaurants and comedy clubs. It granted a license to Comedy Club, Inc.; Comedy Club, Inc. agreed to open four new clubs per year, and not to open non-Improv clubs during the agreement's term. When Comedy Club failed to meet the development schedule, Improv West terminated the right to open more locations. The agreement remained in effect for locations that were in existence. This had the effect of foreclosing Comedy Club from opening more locations throughout the United States.

The Ninth Circuit ruled that "to comply with §16600, the covenant not to compete must be more narrowly tailored to relate to the areas in which CCI is operating Improv clubs under the license agreement."[18] The court weighed Comedy Club, Inc.'s right to operate its business against Improv West's interest in protecting its trademark, trade name and goodwill. The balance favored Improv West in counties where Comedy Club operated Improv clubs. Therefore, the restrictive covenant was enforceable in those counties. But the court said Business and Professions Code Section 16600 did not permit foreclosing Comedy Club, Inc. from competing in the rest of the United States.[19]

The Route Cases

The Route Cases present another context in which California precedents indicate that restrictive covenants may be enforced. These are exemplified by a trio of decisions from the 1950s, *Gordon v. Landau,*[20] *Gordon v. Schwartz,*[21] *and Gordon v. Wasserman*.[22] These cases involved salesmen who quit a house-to-house installment sales business. The salesmen visited each home weekly on a scheduled day, collected payments, and sold merchandise to regular customers who could be counted on to buy month after month, year after year. The salesmen knew each customer's identity, the balance due, products purchased in the past, previous payments, and the source of the referral.[23]

The *Gordon* trio held that a covenant which barred salesmen from soliciting business from customers for one year after termination of employment passed muster under Business & Professions Code Section 16600. The courts reasoned that the information about customers could be protected because it was confidential, proprietary, and/or trade secret.[24] A principle of the Route Cases is that "the identity of the customer is not generally known and the employee has become familiar with special information regarding customer lists, quantities, price lists, discounts, etc."[25] Though the Route Cases are more than 50 years old, the decisions, and their principles, remain good law.[26]

While the origin of the Route Cases is in employer-employee relationships, the principles also apply to independent contractors.[27] Nor is a "delivery route" essential to the application of these principles.[28]

Choice of Law in Application of Restrictive Covenants

Though California has a fundamental policy against noncompetition restrictions,[29] some agreements that include such restrictions provide for the application of another state's law. Applying choice of law principles, it is possible in some circumstances for a California court to enforce a restrictive covenant in an agreement that applies the law of another state. The other state's law must enforce restrictive covenants. And the facts must be such that California does not have a materially greater interest than the other state in applying California's policy against such covenants. Generally, this requires that the agreement be in a context and concern activity that has little or no contact with California.

Say two parties entered into an agreement with a restrictive covenant. If the agreement provides for application of the other state's law, that state's law enforces a noncompetition covenant, and the other party is outside California with little or no contact with California, then a California court could potentially enforce the restriction. In *Application Group v. Hunter Group*,[30] the Court of Appeal set forth the analytical framework to be undertaken when a party seeks to enforce in California an agreement with a noncompetition restriction that applies another state's law.

Application Group concerned a California company that hired employees in Maryland. The employment agreements included a noncompetition restriction and provided they would be governed by Maryland law. There was no dispute that under Maryland law the restrictions were enforceable, but under California law they were not.[31] A competitor located in California sought to hire away an employee which would result in the employee being in breach of the noncompetition restrictions. Therefore, the court had to address choice-of-law principles.

The court made it clear that "California strongly favors enforcement of choice-of-law provisions."[32] This is "consistent with the modern approach of section 187 of the Restatement Second of Conflict of Laws" which "reflect[s] a strong policy favoring enforcement of such provisions."[33] Thus, California will apply the parties' chosen law, unless the chosen state has no substantial relationship to the parties or the transaction, or application of the chosen law would be contrary to a fundamental policy of the state.[34] Under the second exception, where application of the chosen law would violate California's public policy, the provision will be disregarded to the extent necessary to preserve California public policy.[35]

Therefore, in evaluating a restrictive covenant where the parties' agreement applies the law of another state, the

court first determines if the chosen state has a substantial relationship to the parties or their transaction, or if there is another reasonable basis for the parties' choice of law. If neither of these tests is met, the inquiry ends, and the court need not enforce the parties' choice of law. If either test is met, the court determines if the chosen state's law is contrary to a fundamental California policy. If there is no conflict, the court enforces the parties' choice of law.

If there is a fundamental conflict with California law, the court determines if California has a materially greater interest than the chosen state in the determination of the particular issue. If California has a materially greater interest, the parties' choice of law is not enforced because doing so would violate a fundamental policy of this state."[36] Because the formulation is "whether California has a materially greater interest than the chosen state in the determination of the particular issue,"[37] the other state's law (the law chosen by the parties' agreement) applies if the other state has a greater interest; or if the question of which state has a greater interest in its policy being applied is a close call; or if the states' respective interests are equal; or if California has only a slightly greater interest but not "materially" greater interest in deciding the particular issue.[38]

In various other states, the law permits reasonable restrictive covenants. Maryland and New Jersey are examples. With many corporations, drug manufacturers and other technology companies based in those states, their courts have analyzed their interests in enforcing noncompetition restrictions. Maryland will enforce a reasonable restrictive covenant.[39] Decisions in New Jersey "recognize as legitimate the employer's interest in protecting trade secrets, confidential information and customer relations."[40] The New Jersey Supreme Court has stated:

> [T]he public has an enormously strong interest in both fostering ingenuity and innovation of the inventor and maintaining adequate protection and incentives to corporations to undertake long-range and extremely costly research and development programs. We have held such contracts to be enforceable when reasonable.[41]

In the context of franchising, New Jersey courts have stated: "Because covenants not to compete in Franchise Agreements are similar to those that are ancillary to the sale of a business, they must be freely enforced and afforded additional latitude."[42]

In *Application Group*, the California court analyzed whether to apply California's law prohibiting noncompetition restrictions, or Maryland's law which allows them.[43] The court had to determine which state's law would apply to a covenant not to compete. The covenant was in an employment agreement between an employee who resided in Maryland and had never been to California, and her employer whose business was based in Maryland. The business had a

small number of California employees. A California-based employer sought to recruit or hire the nonresident individual to work in California.[44]

The Court of Appeal considered that California's policy affords every citizen the right to pursue employment of their choice; employees' interest in mobility and betterment are paramount to the competitive business interests of employers; and that the state has a strong interest in protecting freedom of movement of persons whom California-based employers wish to hire to work in California. The court added that California policy seeks to ensure that "California employers will be able to compete effectively for the most talented, skilled employees in their industries, wherever they may reside."[45] These considerations outweighed Maryland's interest in using restrictive covenants to prevent recruitment of employees who provide unique services, and misuse of trade secrets, routes, client lists or solicitation of customers.[46] Therefore, the court applied California law and refused to enforce the noncompetition restriction.

Given that the employer and employee in *Application Group* were both nonresidents of California, the decision must be seen as stretching the limit of California's ability to apply its policy against a noncompetition restriction. Another scenario is also possible. A franchise agreement, for example, involving a California-based franchisor and a franchisee operating in New Jersey, might contain an in-term and post-term restriction and provide that the relationship is governed by New Jersey law. During and after the end of the term, a question might arise whether the franchisee is permitted to ignore the noncompetition restriction and engage in a competitive business.

In such a case, arguably the other state (in this example, New Jersey) has an interest that is materially greater than California's interest in its rules on restrictive covenants being enforced. The franchisee and franchised business are located there. The New Jersey Supreme Court has stated that the public in that state "has an enormously strong interest" in fostering ingenuity and innovation of the inventor and protecting and incentivizing long-range and costly research and development.[47]

Arguably, California has little or no interest in applying its rule or policy on restrictive covenants in New Jersey. California's interest is to protect California residents or persons working in this state. The only California resident affected is the franchisor, and that party wants its agreement to be enforced. An argument could be made that California would be hurt by applying its policy against enforcement. This is because doing so would allow post-term competitive activity, to the injury of the California-based company without any countervailing benefit. Arguably, even if the question were a close call, it might not be possible to conclude that California has a materially greater interest in not enforcing the restrictive covenant. The interest-based analysis provides a cogent argument that the franchisee's home state law, including enforceability of the restrictive covenant, would prevail.[48]

At least one other circumstance presents the possibility of a noncompetition restriction being enforced despite the Business and Professions Code restriction. For many years California courts considered that there was a "trade secrets" exception to Section 16600.[49] A noncompetition restriction could be enforced if the reason for doing so was to protect an employer's trade secrets.[50]

The trade secret exception was brought into doubt by the California Supreme Court in *Edwards v. Arthur Anderson*.[51] The Court stated that "California courts have been clear in their expression that section 16600 represents a strong public policy of the state which should not be diluted by judicial fiat."[52] The Court of Appeal also expressed doubt about "the continued viability of the common law trade secret exception to covenants not to compete."[53] However, in *Edwards*, the Supreme Court reserved the question whether there is a trade secret exception to enforceability of noncompete restrictions.[54] Subsequently, a federal court has suggested the exception still exists.[55] The answer to this question awaits an appropriate case.

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[1] Cal. Bus. & Profs. Code Sec. 16600. All further code references are to this code.
[2] See *Edwards v. Arthur Andersen LLP* 44 Cal.4th 937, 949 (2008) ("we are of the view that California courts have been clear in their expression that section 16600 represents a strong public policy of the state which should not be diluted by judicial fiat."); see also, Silguero v. Creteguard, Inc. 187 Cal.App.4th 60, 67 (2010); *D'sa v. Playhut, Inc*. 85 Cal.App.4th 927, 933 (2000) (Bus. & Profs. Code Sec. 16600 "represents a strong public policy of this state.").
[3] Bus. & Profs. Code Secs. 16601-16602.
[4] Bus. & Profs. Code Sec. 16601.
[5] Bus. & Profs. Code Sec. 16602.5.
[6] Angelica Textile Services, Inc. v. Park, 220 Cal.App.4th 495 (2013).
[7] Id. at 500.
[8] Id. at 509.
[9] Id.
[10] Dayton Time Lock Service, Inc. v. Silent Watchman Corp., 52 C.A.3d 1 (1975).
[11] Id. at 4-5.
[12] Id. at 6.
[13] Id. at 6-7 (internal citation omitted).
[14] Id. at 7.
[15] See e.g., Kelton v. Stravinski, 138 C.A.4th 941, 948 (2006) (stating that the Dayton Time Lock reasoning "is tied to the franchise context.").
[16] Comedy Club, Inc. v. Improv West Associates, 553 F.3d 1277 (9th Cir. 2009).
[17] Id. at 1292. See also, Schwartz v. Rent A Wreck America, 468 Fed. Appx. 238, 250-251 (4th Cir. 2012) ("an in-term exclusive dealing agreement in the context of a franchising agreement does not run afoul of §16600, provided that it does not foreclose competition in a substantial share of the market.").
[18] Comedy Club, Inc., supra, at 1293.
[19] Id.
[20] Gordon v. Landau, 49 Cal.2d 690 (1958).
[21] Gordon v. Schwartz, 147 Cal.App.2d 213 (1956).
[22] Gordon v. Wasserman, 153 Cal.App.2d 328 (1957).
[23] Landau, supra, at 690, 691.
[24] Landau, supra at 694 (noting that the customers "are a real asset" and "the foundation upon which" the business's success "and indeed its survival, rests. It thus logically follows that a list of such customers is a valuable trade secret. . . ."); Schwartz, supra, at 217 ('the list of customers, not ordinarily entitled to judicial protection, may become a trade secret, if there is confidential information concerning the value of these customers.").
[25] Metro Traffic Control, Inc. v. Shadow Traffic Network 22 Cal.App.4th 853, 862 (1994).
[26] See e.g., Rusnak Auto Group v. McTaggart 2011 WL 4825895 at *6 (Cal.App. 2011) (citing Gordon v. Landau for the proposition that "if an employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit former employees from using this information to capture a share of the market."); Klamath-Orleans Lumber, Inc. v. Miller 87 Cal.App.3d 458, 465 (1978) ("Equitable protection may be invoked against the subsequent use by a former employee of knowledge of the 'peculiar likes and fancies and other characteristics' of the former employer's customers where such knowledge will aid him in securing and retaining their business. This rule applies generally to trade route

cases as well as others involving a knowledge of the customers desired . . . their preferences for certain products, and their buying habits."); Peerless Oakland Laundry Co. v. Hickman 205 Cal. App.2d 556 (1962).

[27] Ingrassia v. Bailey 172 Cal.App.2d 117, 122 (1959) ("While it is obvious that the instant case does not involve an employer-employee relationship, we believe the principles enunciated in the route cases are here fully applicable."); Alex Foods, Inc. v. Metcalfe 137 Cal.App.2d 415, 427 (1956) ("Equitable protection may be invoked against the subsequent use by a former employee of knowledge of the 'peculiar likes and fancies and other characteristics' of the former employer's customers where such knowledge will aid him in securing and retaining their business. This rule applies generally to trade route cases as well as others involving a knowledge of the customers desired for specialized information, their preferences for certain products, and their buying habits.").

[28] Reid v. Mass Co. 155 Cal.App.2d 293, 301(1958)("While it is obvious that the case at bar does not involve a retail delivery route, we believe that the principles laid down in the 'route cases' are here applicable."). In California Intelligence Bureau v. Cunningham 83 Cal.App.2d 197, 202-203 (1948) the Court of Appeal summarized two lines of Route Cases, listing factors that resulted in granting of injunctions enforcing restrictions in one line of cases, and factors that led to courts' refusal to enjoin former employees in the other line.

[29] See e.g., Application Group, Inc. v. Hunter Group, Inc. 61 Cal.App.4th 881, 900 (1998).

[30] Application Group, Inc. v. Hunter Group, Inc. 61 Cal.App.4th 881 (1998).

[31] Application Group, Inc., supra, at 881 ("we must decide whether California or Maryland law applies to a dispute over the enforceability of Hunter's noncompetition clause").

[32] Harris v. McCutchen __ C.A.4th __ 2013 Daily Journal D.A.R. 4165 (Mar. 29, 2013).

[33] Nedlloyd Lines v. Superior Court 3 Cal.4th 459, 464-465 (2002).

[34] Application Group, Inc. supra, at 881, 896. 35 Restatement Second of Conflicts of Law, section 187, subdivision (2), provides that the law of the chosen state will be applied unless: "(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which ... would be the state of applicable law in the absence of an effective choice of law by the parties."

[35] Restatement Second of Conflicts of Law, section 187, subdivision (2), provides that the law of the chosen state will be applied unless: "(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which ... would be the state of applicable law in the absence of an effective choice of law by the parties."

[36] Nedlloyd, supra, at 466.

[37] Discover Bank v. Superior Court 134 C.A.4th 886, 891 (2005).

[38] The case of Guardian Savings & Loan v. MD Assoc. 64 C.A.4th 309 (1998) presents an example of this principle. The Court of Appeal recognized California's antideficiency legislation was a fundamental policy, but gave way where California's interest in enforcing policies underlying the antideficiency statute was "not materially greater than Texas's policy of assuring the justified expectations of the parties." Therefore the California court applied the parties' Texas choice-of-law law. The court recognized "that the issue is close." But because California did not have a materially greater interest, the court enforced the parties' choice of another state's law.

[39] See e.g., Holloway v. Faw, Casson & Co. (1990) 319 Md. 324, 572 A.2d 510, 515 (noncompetition agreements are enforceable so long as they are reasonable in scope and duration); Ruhl v. F.A. Bartlett Tree Expert Co. (1967) 245 Md. 118, 225 A.2d 288, 291 (same).

[40] Ingersoll-Rand v. Ciavatta 542 A.2d 879, 888 (N.J. 1988). New Jersey Supreme Court's established a three-part test for validity of a noncompetition agreement under New Jersey law. "[A] court will find a noncompetition covenant reasonable if it "simply protects the legitimate interests of the employer, imposes no undue hardship on the employee and is not injurious to the public."

[41] Id. at 634.

[42] Jackson Hewitt, Inc. v. Childress (D.N.J. 2008) 2008 WL 834386 *6-7 (citing Jiffy Lube Int'l. v. Weiss Bros. 834 F.Supp. 683, 691 (D.N.J. 1993)).

[43] Application Group, Inc., supra, at 881, 899 (noting California and Maryland have "diametrically opposed laws regarding the enforceability" of a noncompetition clause).

[44] Id. at 892.

[45] Id. at 901.

[46] Id.

[47] Ingersoll-Rand, supra, at 634.

[48] See, for example, Actega Kelstar, Inc. v. Musselwhite (D.N.J. 2010) 2010 WL 744126 at *3. A federal court in New Jersey evaluated whether to apply New Jersey or Georgia law. The court noted "New Jersey has an interest in ensuring that contracts entered into by its citizens are "fully complied with and enforced." The court concluded: "While no doubt Georgia also has an interest in protecting its citizens from oppressive [noncompetition agreements] New Jersey has a similar policy. Therefore, on the whole, although Georgia may have perhaps some greater interest in resolving this dispute, it cannot be said to have a materially greater interest

[49] See e.g., Muggill v. Reuben H. Donnelley Corp. 62 Cal.2d 239, 242 (1965); Metro Traffic Control, Inc. v. Shadow Traffic Network 22 Cal.App.4th 853, 860 (1994).

[50] See e.g., Thompson v. Impaxx, Inc. 113 Cal.App.4th 1425 (2003) ("Antisolicitation covenants are void as unlawful business restraints except where their enforcement is necessary to protect trade secrets;" quoting Moss, Adams & Co. v. Shilling 179 Cal.App.3d 124, 129 (1986)).

[51] Edwards v. Arthur Anderson, 44 Cal.4th 937 (2008).

[52] Id. at 949.

[53] Dowell v. Biosense Webster, Inc. 179 Cal.App.4th 564, 577 (2009).

[54] Edwards v. Arthur Anderson, supra, 44 Cal.4th at 946 n.4.

[55] Juarez v. Jani-King of California, Inc., 2012 WL 177564 (N.D.Cal.,2012) ("The California Supreme Court has recognized an exception to Section 16600 where a noncompetition clause is necessary to protect a franchisor's trade secrets or proprietary information." citing, Muggill v. Reuben H. Donnelley Corp., 62 Cal.2d 239, 242 (1965)).

Test No. 65

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. California law states that every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.
   ❑ True ❑ False

2. A California statute that makes noncompetition restrictions unenforceable has several exceptions.
   ❑ True ❑ False

3. It is settled that a trade secrets exception permits covenants not to compete to be enforced when a trade secret is involved.
   ❑ True ❑ False

4. Like California, Maryland, New Jersey and almost every other state also discourage and will not enforce restrictive covenants.
   ❑ True ❑ False

5. The "Route Driver" cases apply only to employer-employee relationships.
   ❑ True ❑ False

6. Generally, one who sells their interest in a business and its goodwill, or a business that sells substantially all its operating assets together with its goodwill, may agree with the buyer to not carry on a similar business in a specified area where the sold business operated, so long as the buyer or successor carries on a like business.
   ❑ True ❑ False

7. In the *Improv West v. Comedy Club* case, the comics' routines and jokes were considered trade secrets until the routines were made public; therefore, the covenant not to compete was enforced in its entirety.
   ❑ True ❑ False

8. Where salespersons made weekly house-to-house sales calls, collected payments, sold merchandise, knew customer identities, knew the amounts of money due, they had become so familiar with their customers that the court ruled they must be allowed to continue to service the customers despite terminating their employment.
   ❑ True ❑ False

9. The principle of the *Dayton Time Lock Service* case is that a restrictive covenant can be enforced during the term of an agreement.
   ❑ True ❑ False

10. California's policy against enforcement of noncompetition restrictions is a strong, fundamental policy of the state.
    ❑ True ❑ False

11. The "Route Driver" cases established exceptions to the rule against noncompetition restrictions, but these cases are 50 years old so their principles are no longer good law.
    ❑ True ❑ False

12. California gives preference to applying its own law, and discourages choice-of-law provisions in agreements.
    ❑ True ❑ False

13. The Restatement Second of Conflicts of Law reflects a policy favoring enforcement of choice-of-law provisions.
    ❑ True ❑ False

14. An agreed choice of law provision will be respected, and the choice will be enforced, unless the chosen state law has no substantial relationship to the parties or transaction, or application of the chosen law would be contrary to a fundamental policy of the state.
    ❑ True ❑ False

15. Though the application of an agreed choice of law would violate California public policy, such agreed choice will still be applied as the courts and Restatement respect the parties' choice of law.
    ❑ True ❑ False

16. Despite California public policy, if certain conditions are met, the court will apply the rule of the state that has a materially greater interest in its law applying.
    ❑ True ❑ False

17. Though a covenant not to compete may sometimes be enforced against an individual who agrees not to compete as part of the sale of a business, a covenant can never be enforced against a member of a limited liability company.
    ❑ True ❑ False

18. A restrictive covenant, no matter how reasonable, generally will not be enforced during the term of an employment agreement.
    ❑ True ❑ False

19. The *Dayton Time Lock Service* decision was overruled by the Supreme Court in *Edwards v. Arthur Anderson*.
    ❑ True ❑ False

20. Whether or not a trade secret exception to enforcement of noncompetition restrictions will be fully recognized awaits a proper case.
    ❑ True ❑ False

MCLE Answer Sheet No. 65

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

   San Fernando Valley Bar Association
   5567 Reseda Boulevard, Suite 200
   Tarzana, CA 91356

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

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

1.	❑ 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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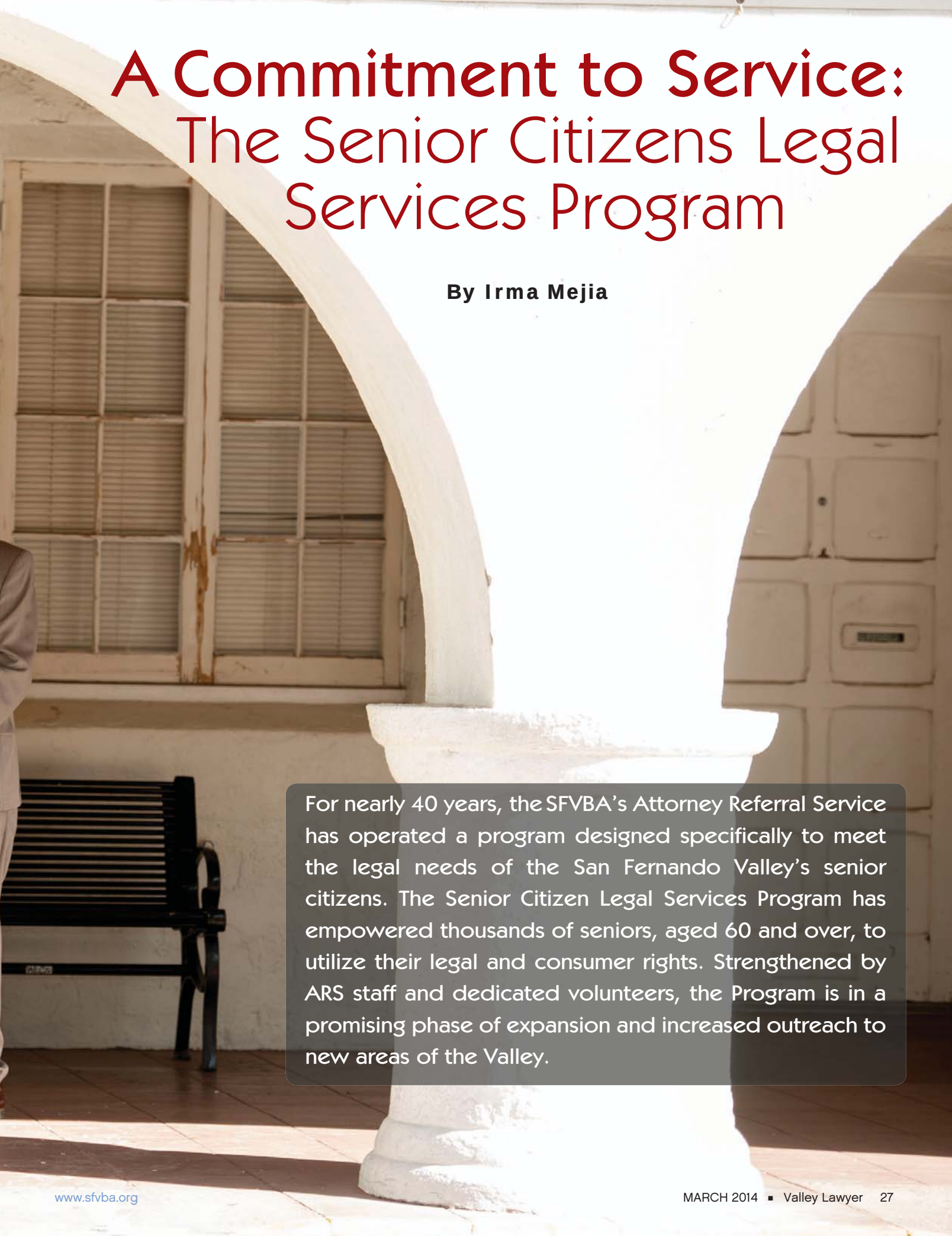
(L-R): Lucia Senda, Robin Paley, Michael Bilson and Howard Bodenheimer. Photo by Robert Reiter.

A Commitment to Service: The Senior Citizens Legal Services Program

By Irma Mejia



For nearly 40 years, the SFVBA's Attorney Referral Service has operated a program designed specifically to meet the legal needs of the San Fernando Valley's senior citizens. The Senior Citizen Legal Services Program has empowered thousands of seniors, aged 60 and over, to utilize their legal and consumer rights. Strengthened by ARS staff and dedicated volunteers, the Program is in a promising phase of expansion and increased outreach to new areas of the Valley.

THE ATTORNEY REFERRAL Service of the San Fernando Valley Bar Association has for many years served the legal needs of the Valley's senior citizens. Since June 1977, volunteer attorneys from the ARS have partnered with local senior citizen centers to provide low-cost consultations and legal services at reduced rates. The Program, originally launched at the former Van Nuys Senior Citizens Multipurpose Center, has since expanded to three locations with increased outreach efforts to other parts of the Valley.

Program Operations

Senior citizens in need of legal assistance are able to schedule appointments at three local senior centers by contacting the Program directly. Program Coordinator Lucia Senda fields all calls to the Senior Referral Line, recruits and schedules volunteers, and works with the directors at local centers to continually improve the Program. "The Program is a reputable service offering a viable alternative to the fraudulent scams that often target local seniors," says Senda.

Volunteer attorneys must meet the same qualifications as those met by other ARS attorneys, including a minimum number of years of experience; professional liability insurance; and good standing with the State Bar of California.

Seniors often learn of the Program through flyers posted at local senior centers or are referred to the ARS by the staff at affiliated centers. Senda collects general information from

callers about their legal matters, matches the senior callers to the appropriate attorney, and schedules their appointments at one of three local senior centers: Bernardi Multipurpose Community Center in Van Nuys (formerly the Van Nuys Senior Citizens Multipurpose Center), ONEgeneration Senior Enrichment Center in Reseda, and the Alicia Broadus-Duncan Multipurpose Center in Pacoima.

Attorneys sign up for specific time slots at local centers, with some accommodating senior clients at their offices for urgent matters. Seniors pay a reduced consultation fee of $10, which is waived in certain types of matters, including personal injury cases. Seniors are then also able to retain the volunteer attorneys at a 20% discount. "It's an important service to seniors because it keeps them well-versed in their legal rights and provides seniors a sense of hope and greater confidence that their rights can be protected," says Senda.

The Volunteers

The Program currently has 20 dedicated volunteers, one of whom is Howard Bodenheimer, who has volunteered for 13 years. With a general practice based in Encino, Bodenheimer meets with senior clients at ONEgeneration in Reseda where he helps them with wills and trusts, landlord/tenant issues, and more. His initial interest in volunteering for the Program stemmed from a combined desire to help people and to generate business for his practice. "I volunteer to provide guidance to people in the community who may not otherwise know where to turn for an attorney," says Bodenheimer. "The Program provides a lot of clients who have limited funds the opportunity to meet with a lawyer. They know that someone is there to help them."

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Bodenheimer's most memorable case involves an elderly lady seeking guardianship over a niece who wasn't being properly cared for. He describes it as a challenging but thoroughly rewarding case. As for drumming up business, Bodenheimer admits that the Program only supplements his practice. Ultimately, the overwhelming reason for participating is the personal fulfillment he receives from his work. "It's professionally satisfying to help people—even more so when the results of my work satisfy the clients' expectations," he says.

Robin Paley, whose practice is also based in Encino, has volunteered with the Program for ten years. "It's a great program for low-income senior citizens who need legal advice but can't afford regular attorney fees," says Paley. Like most volunteers, Paley enjoys helping people, while also bringing in supplemental business to his own practice. He helps senior clients at the three affiliated centers with various issues, including evictions, wills, and personal injury cases, often accommodating their needs by providing payment plans for the already reduced legal services.

"It matters to me that low-income senior citizens are represented by a lawyer so that they have a voice in the matter. That's very fulfilling to me," says Paley. He is happy when clients call back after their initial case is over for assistance with new matters or to refer family and friends. "Then I know I did a good job," he says.

Of all the senior clients Paley has helped, the one case that has left the strongest impact has been that of an

SENIOR PROGRAM EXPANDS TO PACOIMA

ON FEBRUARY 13, THE ARS SENIOR PROGRAM celebrated the launch of its newest location, the Alicia Broadus-Duncan Multipurpose Senior Center in Pacoima. Attorney Richard T. Miller was on hand to help clients with various legal issues, from wills to landlord/tenant disputes. Senior Program Coordinator Lucia Senda distributed materials and collaborated with Center staff to improve outreach and establish a strong presence at the facility.

elderly woman who was being taken advantage of by her caregiver of ten years. "It's a very common scheme. People get close to senior citizens and try to take their houses or other assets," explains Paley.

In this particular case, he helped the woman evict her caregiver, reclaim her home, and remove him from the will. He then continued to assist her in evicting another abusive tenant from a second property. "I think of my own mother who is 88-years-old and still dancing at her local senior center," he says. "It's satisfying to be able to help people like her."

Perhaps one of the longest-serving volunteers in the Program is Michael Bilson, whose practice is based in North Hollywood. Bilson has been volunteering his time for over 30 years. "I felt from the beginning that this was an important service to the community, as many senior citizens with limited resources are uncomfortable making appointments with attorneys in their offices," says Bilson. "However, these seniors have important legal problems and issues that need to be handled and resolved."

Bilson's practice now focuses on estate planning, including the preparation of wills and trusts. "Many seniors who avail themselves of the Program, even those who are homeowners, do not have wills and trusts," says Bilson. He finds that seniors are unprepared either from a lack of awareness of the importance of a will or from failing to complete the process. The informal consultations help answer their questions and provide them with a better idea of how to proceed.

Bilson admits that the Program hasn't been particularly lucrative for his practice, as all the fees are discounted. "The joy for me and the reason I keep volunteering for the Program is the people," he says. "They are always very appreciative of meeting with an attorney, knowing they won't have to pay an expensive consultation fee. And they usually have fascinating stories to tell."

Over the years Bilson has met many wonderful people who became clients and friends. His favorite client is a widow he has known for 20 years. Despite losing her husband and dog, and with no children or close relatives, Bilson describes her as one of the sweetest people he has ever met. "She has knitted socks and bonnets for my grandchildren," he says. He sends her flowers on her birthday every year. This year she turned 90. "I hope she can remain healthy and continue to live in her own home for many years to come," says Bilson.

Looking Ahead

The Program is designed to meet the mission of the ARS: to promote meaningful access to legal representation and the justice system for all persons, regardless of their economic or social condition, and to preserve and enhance the idea of the legal profession as a service profession. After decades of assisting seniors in the Valley, the Program has garnered a solid reputation averaging more than 200 referrals per year and nearly 100 telephone inquiries every month.

As with most public service programs, the ARS's Program was affected heavily by the economic recession of recent years. For the past couple of years, the Program has operated with only two affiliated local senior centers and saw a decrease in appointments as staff at the senior centers was reduced. The slowest year for senior referrals was in 2013 when only 150 referrals were made.

The ARS's own staff is smaller than it used to be but has found ways to adapt and strengthen the program with a goal of bringing the number of referrals back to the high of over 300 achieved in 2004. Senda, who transitioned into her position late last year, suspected there was a need to expand the Program to new centers.

She identified certain trends in the calls that were coming in. "Many callers lived in the Northeast Valley area and had to travel to either Van Nuys or Reseda to meet with our attorneys," explains Senda.

Recognizing the need for affordable legal services in this area, Senda reached out to the director of the Alicia Broadus-Duncan Multipurpose Center in Pacoima. The Center was eager to partner with the ARS to provide low-cost legal services to its seniors, a need that had never been properly addressed in that community. The new partnership calls for consultations to be held at the Center every other month, but Senda expects activity to quickly expand to monthly or even twice monthly.

Efforts are also being made to improve awareness of the Program among Spanish-speaking seniors with Senda translating program materials and serving as interpreter at Program events as needed. The need for bilingual volunteer attorneys remains high. "Senior clients whose native language is something other than English feel much more comfortable with someone, either an attorney or professional interpreter, who speaks their language," explains Senda. It is something she has experienced first-hand, when seniors who seemingly have a good grasp of the English language insist on having her sit-in on the consultations to interpret.

Plans are underway to expand the Program to two more centers this year, including one in the Santa Clarita Valley, and further increase the Program's exposure by offering educational seminars in retirement homes and senior apartment communities. "It's important to increase our presence and appear in person at the senior centers," says Senda. Her ultimate goal is make every senior center aware of the valuable resource that is the Senior Citizens Legal Services Program. Senda proudly states, "Organizations are now asking us to expand to help their constituents."

California's New Uniform Limited Liability Company Act

By Hannah Sweiss

EFFECTIVE JANUARY 1, 2014, CALIFORNIA'S Beverly-Killea Limited Liability Company Act (Beverly-Killea Act) was repealed and replaced by the California Revised Uniform Limited Liability Company Act (RULLCA). RULLCA is codified in Corporations Code Sections 17701.01-17713.13. Under RULLCA, much of California's LLC law remains the same. However, several substantive changes in the law will impact California LLCs.

What do these substantive changes mean for your LLC clients? Below is an overview of the noteworthy changes to California's LLC law and distinctions between the Beverly-Killea Act and RULLCA, as well as tips on contracting around some RULLCA default provisions that clients may prefer to avoid.

Management Structure

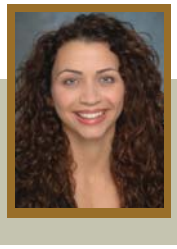
RULLCA retains the manager-managed and member-managed structures, but changes the governing document determining the management structure. Under the Beverly-Killea Act, the articles of organization determined whether an LLC was member-managed or manager-managed. Under RULLCA, the articles of organization no longer determine if the LLC is manager-managed or member-managed. Under the new law, this is governed by the operating agreement. If an LLC operating agreement is silent on the management structure, then pursuant to Section 17704.07(a) the default rule is that the LLC is member-managed.

Practice Tip: Review the articles of organization and operating agreement to determine if the management structure is consistent and clear in both documents. If the operating agreement is silent on management structure, consider modifying it to clarify the management structure.

Management Authority

RULLCA delineates more robust default rules pertaining to members' consent rights. The Beverly-Killea Act had only a handful of default rules on consent of members. Most operating agreements drafted prior to enactment of RULLCA likely set limitations on management authority by requiring a majority or supermajority vote by members.

RULLCA has more default rules establishing actions that require consent of all members. For example, RULLCA requires consent of all members for acts outside the ordinary course of business activities and to amend the operating agreement.



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Practice Tip: The default rules requiring consent of all members may be troublesome. Just one dissenting member could prevent action that the majority or supermajority want. Under the new LLC law, acts that are (or will be) outside the ordinary course of business are not specified. Without clarification, the broad language "outside the ordinary course" may lead to disputes between members and managers or in some instances, give a minority member veto power. To limit the ability of a small number of members to hold up important action, consider whether to have the operating agreement disclaim additional voting rights for members and clarify the scope and limitations on voting rights of members.

Fiduciary Duties

RULLCA delineates the extent to which the operating agreement can define, alter or even eliminate aspects of fiduciary duties. Previously, the Beverly- Killea Act had only a general reference to fiduciary duties. Now, under RULLCA, the fiduciary duties of loyalty, care, and any other fiduciary duty of members and managers are specified. Under RULLCA, members may modify (but cannot eliminate) fiduciary duties, so long as the modifications are not manifestly unreasonable. To contractually modify fiduciary duties, RULLCA requires informed consent by all members. Merely acknowledging and signing the operating agreement will not suffice as informed consent.

Practice Tip: RULLCA language likely sought to provide clarity, but the language may actually be troublesome, because it is not clear what modifications cross the "manifestly unreasonable" threshold. Parties seeking to modify fiduciary duties of members or managers should define those duties to limit ambiguity as to what constitutes a breach and prevent running afoul of the manifestly unreasonable standard.

Dissociation

RULLCA specifies when a member is dissociated from an LLC. Under the Beverly-Killea Act, events of dissociation of a member were not specified. The new LLC law specifies events of dissociation and effects of dissociation of a member in Section 17706.01.

Practice Tip: If parties do not want any of the default events to result in dissociation, then the operating agreement should specify events of dissociation. Similarly, the effects of dissociation should also be clarified in the operating agreement.

RULLCA makes significant substantive changes to California's LLC law that will impact existing as well as newly formed California LLCs. To avoid being subjected to possibly unwanted default provisions of the new LLC law, legal counsel should consult with clients, review their operating agreements and make revisions where necessary.

Can Watson Do Your Legal Research?

By Joshua Auriemma

ED WALTERS, CEO OF FASTCASE, RECENTLY prepared a talk for the chief information officers of quite a large number of Am Law 250 firms. Ed semi-jokingly refers to this talk as the "flying car" talk but it may be more appropriate to refer to it in this column as "the inevitable algorithmization of legal research."

Ed sets the stage for his talk by asking the audience to consider Deep Blue, the chess-playing computer developed by IBM specifically to beat World Chess Champion Garry Kasparov. On February 10, 1996, Kasparov sat down with Deep Blue for game one of a six game match that he would ultimately handily win. Chess Grand Masters would comment that Kasparov toyed with Deep Blue during this first series of games. Behind Deep Blue, a team of engineers, programmers, and chess experts struggled to adapt the artificial intelligence between matches, but it was ultimately to no avail. Although Deep Blue won the first game in the match, Kasparov seemingly used the first match to identify and exploit Deep Blue's weaknesses. Indeed, this game one was the last game Kasparov lost in the 1996 match.

Turning our attention back to the legal profession for a moment, we are currently, Ed proposes, at the stage in algorithmized legal research that Deep Blue found itself in 1996. We've had some great successes—we can, for instance, now visualize case data in incredibly novel and useful ways none of us could have foreseen when we began law school. But can we really compete with legal research companies that employ tens of thousands of people to editorialize the law? The answer to that question lies in Deep(er) Blue's 1997 rebound.

In 1997, a mere one year later after Kasparov's crushing defeat of Deep Blue, the world's greatest human chess player won a chess match against the world's greatest chess-playing computer for the very last time in the history of the world. Take a moment to reflect on that. Never again will the best chess-playing computer lose a game of chess to a man—it's now effectively impossible due to something known as Moore's Law.

Generally speaking, Moore's Law says that every two years, the number of transistors we can fit onto an integrated circuit doubles. That means things like storage space and processing power tend not to get better a little bit at a time, but they get better exponentially. Practically, this implies that when we arrive at a tipping point where a machine is equally matched with a human, in extremely short order, the pairing isn't even close.

In game two of the 1997 match, Kasparov lost so handily that he accused the computer of cheating. In this same match, deconstruction revealed that Kasparov made a crucial mistake and resigned when he could have forced a draw. This brings us to another logical point: even the best among us are fallible. Conversely, mistakes made by a computer are due either to limitations in processing power, or to mistakes propagated by human engineers.

The largest legal research companies employ thousands of people to read, annotate, summarize, and generally make judgment calls regarding the law. Overall, they do a good job. But one day soon, the job is going to be done automatically, and the job is going to be done better.

There are currently services available that can take an article and summarize the key points from it. Natural language processing can accurately identify and label the overall mood of a piece of writing. Moneyball-type algorithms can relatively accurately predict outcomes in otherwise unpredictable cases. Semantic analysis can connect the dots between cases that

to step in and take over editorialization of the law, but the day when that happens is substantially closer than most people think.

And if it seems like there's a giant leap from a limited decision-tree scenario like chess to the law, consider Deep Blue's successor, Watson. In 2011, IBM's Watson didn't just excel at a game that taps the vast ocean of human knowledge and requires advanced knowledge of semantics and puns to score points, it blew away the competition. And remember, we're not talking about two random humans here; we're talking about Ken Jennings and Brad Rutter, two of the best Jeopardy! players the world had ever seen.

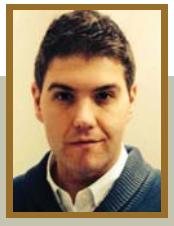
In less than 14 years, IBM's computer went from being great at chess to beating humans at an open-ended game requiring advanced knowledge of language and everything humans know about the universe. Fast forward three years later and the number of transistors that fit into that version of Watson has more than doubled, increasing its processing power substantially beyond what it was when it beat Jennings and Rutter.

IBM is now offering processing cycles from Watson for sale to anyone with the capability and desire to leverage its vast knowledge and processing power. Fastcase could do that right now. In a few years, we won't even have to pay much for the privilege—we'll be hosting the equivalent of Watson's processing power in our server rack.

Ed ended his talk with what really is an ultimatum—CIOs can choose to recognize that computer algorithms will change the way we practice law sooner than anyone imagines (and firms can choose to invest their resources accordingly), or they can ignore what's obvious to us and face the consequences.

For small firms and solo practitioners, the prognosis is similar: whether you're a seasoned veteran or a freshly-minted attorney, the kinds of technologies Fastcase is working on, and the kinds of technologies many enterprising legal technology companies are investing in, are likely to change much of what you know about the practice of law. Not in the distant future, but soon. And once we hit that tipping point, those who invest in preparing for the algorithmization of law won't be a little ahead. They'll blow the stragglers out of the water.

The SFVBA is proud to offer Fastcase as a free service to its members. Log in at www.sfvba.org and click the Fastcase logo.



Joshua Auriemma is a former particle physicist turned appellate attorney. He studied Human Computer Interaction at a doctoral program at Penn State before joining the outreach team at Fastcase this year. During law school he founded the successful blog and podcast Legal Geekery and served as a summer fellow at Stanford Law School's Center for Internet & Society. He can be reached at josh.a@fastcase.com.

Immigration Law Update: Spring 2014

By Ronald J. Tasoff

MORE THAN ONE OUT OF three people living in the San Fernando Valley (and Los Angeles County) were born abroad. So there is a pretty good chance that lawyers practicing in the Valley have clients, employees, friends and relatives who might have immigration questions about their status in the United States or how to help a friend or relative abroad come to the United States.

Even though immigration reform did not pass last year, and probably won't be on the legislative agenda this year, an election year, there have been several recent immigration developments that will surely benefit some of the many foreign born individuals that live in our Valley. The following are some significant updates in immigration law that all lawyers should be aware of.

H-1B Application April 1 Deadline

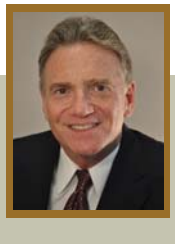
The H-1B Visa is a working visa for foreign-born people who have a bachelor's degree or U.S. equivalent (which might include progressive experience combined with college level classes) and have a sponsoring employer who has offered them a job in the United States that normally requires a bachelor's degree for entry level. Examples include IT professionals (programmers, designers, etc.) and other professional workers such as engineers, teachers, scientist, business and medical field professionals.

There is a quota that usually is exhausted in the first two days it is open. Any successful applications must be filed on April 1 or April 2. Since it can take several weeks to prepare an application, any employer or alien interested in applying for an H-1B visa, especially students and exchange visitors with limited practical training work permits, should start preparing their H-1B applications immediately.

Parole in Place

The Obama administration, through its executive authority, has extended the "parole in place" policy to any person who may have come to the United States illegally but has a parent, spouse or child who is in the U.S. military, Ready Reserves or is a U.S. veteran. Undocumented people who formally may not have been eligible to apply for a green card in the United States may now be able to do so if they are otherwise qualified. The largest beneficiaries of this new policy would be spouses of U.S. citizens who came to the United States without inspection.

Under current law, such individuals are not eligible to adjust their status in the United States because they were not inspected. Although they are eligible to apply



Ronald J. Tasoff is a Certified Specialist in Immigration Law (State Bar of California Board of Legal Specialization) since 1985 and has exclusively practiced immigration law for over 39 years. He is a partner with Tasoff and Tasoff, located in Encino, and can be reached at ron@tasoff.com.

for an immigrant visa abroad, most must first apply for and receive a provisional waiver, which is time consuming, expensive and by no means automatically granted. By being paroled in place, previously uninspected individuals are granted a humanitarian parole and are considered to now be legally in the United States and are eligible to adjust their status to permanent resident alien (green card status) without obtaining a waiver or leaving the United States.

Besides the obvious example of spouses of U.S. citizens in the military or who are veterans, the new policy could also benefit a person illegally in the United States who has a U.S. citizen child over 21 years old and that child or a different (and younger) child who is in the military or Ready Reserves. A side benefit of this policy might be an increase in enlistments by young people who want to help their parents who otherwise would not qualify for adjustment of status or qualify for a provisional waiver.

DACA Program

Although more than half a million young people have already applied for work permits under the Deferred Action for Childhood Arrivals (DACA) program, many eligible people have not yet done so or are just turning 16 years of age and are now becoming eligible to apply. To qualify for the program, a person had to come (legally or illegally) to the United States under age 16, lived here for five years and be under 31 years of age on June 15, 2012. Even people with immigration violations or misdemeanor convictions are eligible.

More People Eligible for Immigration Benefits under DOMA

Since last June, when the U.S. Supreme Court struck down the Defense of Marriage Act (DOMA) *(Windsor v. U.S.* 570 U.S.__ 2013), all marriages that are legal in the place in which they were celebrated, including same sex marriages, are recognized by the federal government. The main beneficiaries are same sex spouses of U.S. citizens who are now eligible to apply for lawful permanent resident status based on being an immediate relative of a U.S. citizen. Such individuals will also enjoy the privilege of being able to adjust their status in the United States if they last entered the United States legally, even though their legal status may have expired many years ago or they violated their status by working illegally. Once granted their green card, a spouse of a U.S. citizen can apply for naturalization after only three years instead of being required to wait for five years.

There are many other immigration benefits that flow from being a spouse of a U.S. citizen or a lawful permanent resident (LPR). These include eligibility to apply for hardship waivers for many of the grounds of inadmissibility or removal (e.g., criminal grounds, fraud, unlawful presence, etc.), and eligibility for cancellation of removal for aliens who entered without inspection, resided continuously in the United States for ten years and can show that their removal would result in extreme and unusual hardship to the U.S. citizen or LPR spouse, parent or child.

Additionally, same sex spouses will now qualify for derivative non-immigrant visas for spouses of student visa holders (F-1, J-1, M-1) or working visa holders (E-1/2/3, H-1/2/3, I, L-1, O-1/2/3, P-1/2, R-1), which will allow them to remain in the United States for the same period of time as their spouse and in certain cases, apply for work permits. Also, U.S. citizens are now able to apply for non-immigrant fiancé visas for their same sex boyfriends or girlfriends who they intend to marry within 90 days of arrival in the United States.

Shifting Burden of Proof:

Medtronic, Inc. v. Mirowski Family Ventures, LLC[1]

By Gregory S. Lampert

DOES THE BURDEN OF PROVING INFRINGEMENT ever shift from the patent owner? The short answer is "no" as recently espoused by the United States Supreme Court. Justice Breyer delivered the unanimous opinion of the Court in deciding the issue of whether the burden of proof shifts when the patentee is a defendant in a declaratory judgment action, and the plaintiff, the potential infringer, seeks a judgment that he does not infringe the patent. In reversing the Federal Circuit's determination to the contrary, the Supreme Court held that when a licensee seeks a declaratory judgment against a patentee to establish that there is no infringement, the burden of proving infringement remains with the patentee.

The parties to the action were Medtronic, Inc., a firm that designs, makes and sells medical devices, and Mirowski Family Ventures, LLC, a firm that owns patents relating to implantable heart stimulators. In 1991, Medtronic and Mirowski entered into an agreement permitting Medtronic to practice certain Mirowski patents in exchange for royalty payments. The agreement provided that if Mirowski gave notice to Medtronic that a new Medtronic product infringed a Mirowski patent, Medtronic had a choice, among others, to place the royalties in escrow and challenge the assertion of infringement through a declaratory judgment action. Indeed, this is what happened and the parties found themselves in the midst of an infringement dispute.

Mirowski gave Medtronic notice that it believed seven new Medtronic patents violated various claims contained in two of its patents and Medtronic disagreed, asserting that either the products fell outside the scope of the patent claims or the patents themselves were invalid.

Medtronic brought a declaratory judgment action in District Court which held that Mirowski, as the party asserting infringement, bore the burden of proving infringement.[2] After a bench trial, the District Court found against Mirowski as they had not proved infringement, and as the patentee, bore the burden of proof on the issue.

Mirowski appealed to the Court of Appeals for the Federal Circuit, which considered the issue of the burden of proof. The Federal Circuit came to the opposite conclusion and held that Medtronic, the declaratory judgment plaintiff, bore the burden of proof. The Federal Circuit acknowledged that normally the patentee, and not the accused infringer, bears the burden of proving infringement, and that the burden normally will not shift even when the patentee is a counterclaiming defendant in a Declaratory Judgment action.[3] Nevertheless, the Court of Appeals believed that a different rule applied where the patentee is a declaratory judgment defendant and was "foreclosed" from asserting an "infringement counterclaim" by the continued existence of a license.[4]

The Federal Circuit held that in this circumstance a narrow exception to the standard rule applied and therefore the party "seeking a declaratory judgment of non-infringement" namely, Medtronic, bore the burden of persuasion.

Medtronic sought certiorari, asking the Supreme Court to review the Federal Circuit's burden of proof rule which granted the petition in light of the importance of burdens of proof in patent litigation. The Supreme Court teed up the question presented as follows:

> A patent licensee paying royalties into an escrow account under a patent licensing agreement seeks a declaratory judgment that some of its products are not covered by or do not infringe the patent, and that it therefore does not owe royalties for products. In that suit, who bears the burden of proof, or to be more precise, the burden of persuasion? Must the patentee prove infringement or must the licensee prove non-infringement?

The Supreme Court emphatically held in their view that the burden of persuasion is with the patentee, just as it would be had the patentee brought an infringement suit. In reversing the Federal Circuit, the Supreme Court indicated that "[s]imple legal logic, resting upon settled case law, strongly supports our conclusion," citing the 1880 Supreme Court case *Imhaeuser v. Buerk*,[5] which held that it is well established that the burden of proving infringement generally rests upon the patentee.

Citing further U.S. Supreme Court precedent, the Supreme Court held that the operation of the Declaratory Judgment Act was only procedural and that the burden of proof is a substantive aspect of a claim. Taking together these legal propositions lead the Supreme Court to decide that the burden of proving infringement should remain with the patentee in a licensee's declaratory judgment action.

The Supreme Court further cited several practical considerations which led them to their conclusion, including the elimination of post-litigation uncertainty about the scope of the patent, which would be created if the burden was shifted depending upon the form of action being brought. Shifting the burden to the accused infringer to prove non-infringement could lead to uncertainty among the parties and others who seek to know just what products and processes they are free to use.

The Supreme Court cited the Restatement (Second) of Judgments, indicating that relitigation of an issue (infringement) decided in one suit is not precluded in a subsequent suit where the burden of persuasion has shifted from the party against whom preclusion is sought. Thus, the declaratory judgment suit, in this example, would fail to achieve its object of providing an immediate and definitive determination of the legal rights of the parties.

Another undesirable consequence of shifting the burden can create unnecessary complexity by making it difficult for the licensee to understand upon just what theory the patentee's infringement claim rests. The Court held that a patent holder is in a better position than an alleged infringer to know, and to be able to point out, just where, how, and why a product infringes a claim of that patent. Until a patentee does so, an alleged infringer may have to work in the dark, seeking in a declaratory judgment complaint, to negate every conceivable infringement theory.

The Supreme Court further indicated that burden shifting was difficult to reconcile with the basic purpose of the Declaratory Judgment Act. The very purpose of the Act is to ameliorate the dilemma posed by putting one who challenges a patent's scope the choice between abandoning his rights and risking suit. In the absence of the declaratory judgment procedure, Medtronic would face the dilemma of having to abandon its right to challenge the scope of Mirowski's patents, or it would have to stop paying royalties, risk losing an ordinary patent infringement lawsuit, and thereby risk liability for treble damages and attorney's fees as well as injunctive relief. The Court reversed the Federal Circuit's burden shifting rule because it created a significant obstacle to use the declaratory judgment procedure.

Finally, the Supreme Court addressed the Federal Circuit's reasons for shifting the burden as being as limited exception which applied only when an infringement counterclaim by a patentee was foreclosed by the continued existence of a license. The Supreme Court was not persuaded by the Federal Circuit's "limited exception" holding as not legally justified based upon long standing case law.

Another argument asserted in favor of burden shifting under these limited circumstances was the burden placed upon patent owners by permitting a licensee at its sole discretion to force the patentee into full-blown patent infringement litigation. The Supreme Court held that in this instance Mirowski set the present dispute in motion by accusing Medtronic of infringement and therefore there was no convincing reason why the burden of proof law should favor the patentee.

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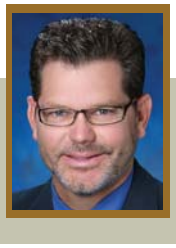
[1] *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. ___ (2014)
[2] *Medtronic, Inc. v. Boston Scientific Corp*., 777 F.Supp. 2d, 750, 766 (Del. 2011).
[3] *Medtronic, Inc. v. Boston Scientific Corp*., 695 F.3d, 1266, 1272 (2012).
[4] Id. at 1274.
[5] *Imhaeuser v. Buerk*, 101 U.S. 647.



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But You Owe Me!

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IT SEEMS THAT THESE DAYS WE live in a time of entitlement. Every few days it seems that I encounter people who believe that they are entitled to something—a job, a particular style or standard of living, a way of life. As someone who was raised with little and taught to appreciate all that I did have and understand that nothing comes for free, I have to stop and wonder how those people came to believe that they were owed anything.

Perhaps it started when they were children with parents who catered to their every whim. Or perhaps it was the opposite, they did not have anything as a child and believe that because of their humble origins, the world at large owes them more now. I sometimes see it even on Facebook, where friends (or friends of friends) post pictures and comments relating to politics, posing questions as to why things have happened to them or why their lives are in such a state and blaming it on the current administration or lawmakers.

Last week, I experienced this community sense of entitlement firsthand while registering for a marathon. A well-known company, let's call it Walt's World, puts on an event at its Anaheim location each year. The larger event itself (including multiple activities which take place over a 3-day period) is organized and run by a separate entity which has a name similar to Walt's World. The event is planned in advance (of course) and registration opens seven months before the big weekend. As a benefit, members of a select group of Walt's World customers have the opportunity to register one week early for the individual activities within the main event. Last year, I took advantage of that early registration and did not have to worry about getting shut out.

This year, I kept my eye on the event company's Facebook page, knowing that the dates were coming up. I was planning to participate in a particular activity during the event weekend and wanted to make sure I did not get shut out. I realized several days late that I had missed out on the early registration for one of the weekend's activities because it sold out very quickly.

I was surprised when reading the comments on both the event company's page and Walt World's select group page by how many people thought they were entitled to that early registration and missed out because it sold out so quickly. There were also complaints that people who were not members of that select group were able to register early because links were put out to the general public via social media and there were no requirements that individuals prove membership in that select group.

The event company set aside a small number of early registration spots for each activity. When those early spots were filled, the early registration closed and everyone then had to wait for regular registration to open. Although I was frustrated that I did not have the opportunity to register early for that particular activity in the weekend's festivities, I did not believe that I was entitled to that early

registration. Many did not agree with me and took to social media to decry the event company and Walt's World and to publicize their outrage.

Some even posted that they only joined Walt World's select group for this particular benefit (a claim I find hard to believe, given the yearly price of membership to Walt's select group and the fact that there is not a monetary discount for any of the event's festivities, just early registration). Others claimed that they were going to cancel their membership in this select group because they did not get early registration and believed others who did not deserve it did get it.

Really, has the world come to this? People are given the opportunity to register early for an activity and just because they miss out on that opportunity, they want to take their ball and go home? It is at this point that I have to tamp down my desire to tell these people to "grow up!" They are spending time and energy complaining about something that they were not promised (or entitled to) in the first place. (Yet, here I am a week later, still discussing it.)

Is this a situation where the event company could have handled things differently? Possibly. Could Walt's World have provided more information or handled things for their select group differently? Probably. Were people who did not belong to Walt's select group able to work the system and register early? In all likelihood, yes. But does that mean that a random individual can now stomp and scream and jump up and down because they were wronged? I do not believe so.

I choose to believe that it is an imperfect system and that Walt's World and the event company did (and do) the best that they can given the circumstances (tens of thousands of people clamoring to register for the same event, all at once.) Of course, I say that from the position of someone who was able to take advantage of the early registration for the remaining activities and was able to register for that last event just as regular registration opened. I know others were not as lucky.

In the grand scheme of things, we are paying to participate in this event. The company or companies who are putting it on do not owe us anything and if we do not like the way the event is run (or the way registration is handled), we are free to opt out, not participate and spend our money elsewhere—I'm pretty sure Walt will not miss it that much.

With so much else going on in the world on which to focus our energy, I feel that this is one thing people should relax about and let go. And if I am one of those who gets shut out of registration the next time around, I give readers permission to find this column and remind me of it when I want to stomp up and down and complain.

LEGAL TRIVIA

March is Women's History Month but how well do you know the history of women in the legal field? Test your knowledge with our quiz for a chance to win dinner and a movie!* Check your email for a link to the quiz. Not on our email list? Submit your answers to editor@sfvba.org.

*Only current members are eligible to win.

1. In what year was the first female attorney admitted to practice law in California?
a. 1992
b. 1937
c. 1878

2. Who was the first female attorney admitted to practice in California?
a. Gloria Allred
b. Clara Shortridge Foltz
c. Kamala Harris

3. In what year were women first allowed to serve on juries in California?
a. 1893
b. 1972
c. 1917

4. In 1914, who became the first female judge in Los Angeles?
a. Ruth Bader Ginsburg
b. Georgia Bullock
c. Jackie Lacey

5. In 1977, who was the first female justice appointed to the California Supreme Court?
a. Tani Cantil-Sakauye
b. Rose Elizabeth Bird
c. Sonia Sotomayor

6. In 1987, who became the first female President of the SFVBA?
a. Barbara Jean Penny
b. Elizabeth Post
c. Linda Temkin

7. In 2010, who was elected as California's first female Attorney General?
a. Kamala Harris
b. Elena Kagan
c. Barbara Boxer

8. In 2011, who was elected the first female Presiding Judge of the Los Angeles Superior Court?
a. Lee Smalley Edmon
b. Tani Cantil-Sakauye
c. Sandra Day O'Connor

9. In 2012, who became the first female Chief Justice of the California Supreme Court?
a. Clara Shortridge Foltz
b. Barbara Boxer
c. Tani Cantil-Sakauye

10 In 2012, who became the first female District Attorney of Los Angeles County?
a. Susan B. Anthony
b. Jackie Lacey
c. Dianne Feinstein

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