VALLEY LAWYER

MAY 2013 •$ 4

A Publication of the San Fernando Valley Bar Association

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Spring into Action: The Return of the Women Lawyers Section

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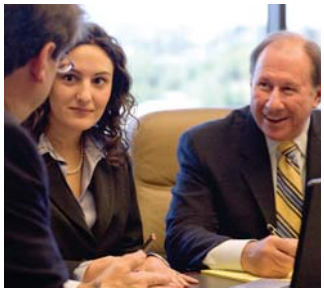

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VALLEY LAWYER

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Rule of Law

DAVID GURNICK
SFVBA President
dgurnick@lewitthackman.com

"May 1 is Law Day, a special day of celebration by the people of the United States in appreciation of their liberties and reaffirmation of their loyalty to the United States and their rededication to the ideals of equality and justice under law in their relations with each other and with other countries; and for the cultivation of the respect for law that is so vital to the democratic way of life."—*36 U.S.C. Sec. 113.*

May Day and Memorial Day

For us lawyers, May has two important observances: Law Day and Memorial Day. The month begins with Law Day, which was initiated during the Cold War. It is significant to lawyers as we enjoy freedom and equal justice under law and our daily work protects and advances these principals. Toward month's end is Memorial Day. This holiday started just after the Civil War and is dedicated to honoring all who fought and died to protect our freedoms.

In a way these commemorations are opposites. Soldiers gave their lives so we might enjoy freedom under law. In an ideal world of justice under law, all disputes—personal and public, domestic and international—which so often today devolve into violence and war would be resolved in peaceful civil proceedings. In courts, arbitrations, negotiations; in demand and breach notices, habeas and other petitions to government agencies; and in all the range of tasks lawyers perform, we advance the ideals of equality, justice and the peaceful resolution of disputes.

Compare the processes of law to those of war. Winning is sweet in any forum. Yet, clients and lawyers who lose their cases may still carry on. Not so for fallen heroes; their battles are sadly over. We owe great debts of gratitude to those who died for our freedoms. In their memory we must continue to seek and create a world that celebrates law.

Alternative Dispute Resolution

Due to severe budget cuts, the Los Angeles Superior Court has had to eliminate their ADR programs. The Bar recognizes the major effect this will have on the litigants and courthouses in our community. Myer Sankary, Chair of the SFVBA Mandatory Fee Arbitration (MFA) Committee, Milan Slama, Associate Member and MFA Arbitrator, and Adam Grant, SFVBA President-Elect, are leading an initiative to start an SFVBA-sponsored mediation program. This will be a service to the community by helping local residents resolve their disputes quickly and at lower costs. It will be a service to the courts by helping ease their caseloads. It will also be an opportunity for lawyers to serve as mediators and private judges. If you are interested in joining this effort please contact Adam, Myer, Milan or me.

Nominations and Future Leadership

Among the best functions of our Bar Association is providing opportunities for leadership and service. Serving as a trustee or officer distinguishes you and connects you with leaders of our legal community. In exchange, you contribute wisdom, experience and energy to our organization. Our Board of Trustees and officers are a diverse, cross-section of Valley lawyers, reflecting the variety of practice areas, ages, ranges of experience, geographies, ethnic and other diversities of our members.

This month, our board will elect five SFVBA members to serve on our eight-member Nominating Committee, whose mission will be to nominate candidates for trustee and officer positions. If you are interested in serving on the Nominating Committee, or being nominated for a leadership position in our Association, please contact me.

Promote Your Membership

Earlier this year the Board of Trustees took action to allow and encourage members to display the SFVBA logo and thus promote your membership in the San Fernando Valley Bar Association. Contact our Bar office or check our website (www.sfvba.org) for instructions on how to download the logo so that you can place it on your business cards, stationery and brochures.

We are fortunate to live in freedom under law. We are indebted to those who have sacrificed so much so that we might do so. As lawyers, we are professionals, devoting our professional lives to the preservation and advancement of these principals.

Calendar

Employment Law Section
View from the Plaintiff's Bar

MAY 1
12:00 NOON
SFVBA CONFERENCE ROOM

Tim Rhodes will address what plaintiff attorneys look for in taking employment cases. (1 MCLE Hour)

Criminal Law Section
DUIs

MAY 8, 2013
6:00 PM
SFVBA CONFERENCE ROOM

Free to Current Members!

Well known DUI attorney Mark Rafferty will discuss how to cross examine officers in DUI trials. Anthony Scott, an expert in DMV hearings, will also cover DUIs in regard to the DMV. (1 MCLE Hour)

Dinner sponsored by

Business Law Section
Solutions for Troubled Businesses

MAY 8
12:00 NOON
SFVBA CONFERENCE ROOM

What's the best advice to give your clients when their businesses enter troubled waters? When is bankruptcy the best solution? What are the alternatives? Attorney Steve Fox will discuss the various options and help chart the best course of action. (1 MCLE Hour)

Probate & Estate Planning Section
Business Law Issues that Estate Planners and Probate Attorneys Should Spot

MAY 14
12:00 NOON
MONTEREY AT ENCINO RESTAURANT

Attorney Bill Staley will address key business issues that probate attorneys need to know: dying with a sole proprietorship: family partnership vs. family LLC; decedents who owned stock in professional corporations; practical problems created by funding a foundation from the estate; and when to sell loss assets. (1 MCLE Hour)

Workers' Compensation Section
Compensable Consequences

MAY 15
12:00 NOON
MONTEREY AT ENCINO RESTAURANT

Attorney Charles Rondeau will discuss psychiatric injuries as well as independent medical reviews. (1 MCLE Hour)

Santa Clarita Valley Bar Association
Spring Mixer

MAY 16
6:00 PM
EL TORITO, VALENCIA

SCVBA Members are free; all others $20. Be sure to bring plenty of business cards!

Family Law Section
Alienation and/or Estrangement: Now What?

MAY 20 (ONE WEEK EARLY DUE TO MEMORIAL DAY HOLIDAY)
5:30 PM
MONTEREY AT ENCINO RESTAURANT

The topics of parental alienation and estrangement come up on a regular basis in family law, yet the terms may be unclear and unwelcome in court. What happens when we have a case involving these issues? What are the remedies we can request? Psychologist and forensic expert Dr. Leslie Drozd and a family law judge will answer these questions and give the bench's view on how to address this in court. (1 MCLE Hour)

Taxation Law Section
The Offshore Voluntary Compliance Initiative

MAY 21
12:00 NOON
SFVBA CONFERENCE ROOM

Former Department of Justice attorney Lydia B. Turanchik will give an update on the IRS's third installment of the Offshore Voluntary Disclosure Program. (1 MCLE Hour)

Small Firm & Sole Practitioner Section
Medical Testimony: How to Win at Trial

MAY 22
12:00 NOON
SFVBA CONFERENCE ROOM

Evidence-based medicine has been the standard in medical treatment for more than 30 years, but medical testimony has been slow to catch on. Lisa Miller and Jennifer Price will outline what evidence-based medicine is and how to use it to your best advantage in trial. (1 MCLE Hour)

Bankruptcy Law Section
Fraud Exception in Bankruptcy

MAY 30
12:00 NOON
SFVBA CONFERENCE ROOM

Mark Blackman and A. Hillary Grosberg will discuss how to successfully obtain a fraud judgment in an adversary action in the bankruptcy courts after obtaining a fraud judgment in state court. (1 MCLE Hour)

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.

Board of Trustees Seeking Nominations

ELIZABETH POST
Executive Director
epost@sfvba.org

ATTORNEY MEMBERS WHO ASPIRE TO LEAD the San Fernando Valley Bar Association are encouraged to submit your name for consideration to be nominated as a candidate for the Board of Trustees. The Nominating Committee is soliciting applications and recruiting candidates for the Bar's 20-member governing body. The deadline for submissions of applications is Friday, May 17, 2013.

The main roles of the SFVBA Board of Trustees are to set policy, establish programs and oversee the association's finances. Trustees have the opportunity to work closely with other Bar leaders and judges, develop new programs and design better benefits and services for members, all to enhance the practice of law and the community.

The Nominating Committee strives to select the most qualified leaders for office and seeks candidates who are committed to the growth of the SFVBA. Immediate Past President Alan J. Sedley, Chair of the Nominating Committee, wants our Board to "reflect the diversity of our membership, from areas of practice to members of law firms to sole practitioners."

The time commitment varies for each Board member. All trustees are expected to actively participate on committees and to support the SFVBA's activities, including attending the annual Installation Gala on September 28 and a board retreat in the fall. Trustees are required to attend a monthly board meeting at the Bar offices, held on the second Tuesday of each month at 6:00 p.m.

The Nominating Committee selects up to 12 candidates for six open trustee seats on the Board. Trustees are elected to two-year terms. Following the September 10 election, two additional members are appointed, each to a one-year term.

The *Application for Nomination to the San Fernando Valley Bar Association Board of Trustees* can be downloaded from the news scroll at www.sfvba.org. Have questions? Feel free to contact me at (818) 227-0490, ext. 101.

2013 TRUSTEE ELECTION DEADLINES

May 17	Nomination form must be received
June 10	Nominating Committee issues Report to Secretary
July 1	Nomination Committee Report sent to members
July 25	Additional nominations signed by 20 active members must be received by 5:00 p.m. by the Secretary.
August 12	Ballots mailed to members
Sept 10	Board of Trustees Election/Deadline to return ballots
Sept 28	Installation Gala

Bulletin Board

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

Real estate and business mediator **David I. Karp** is pleased to announce that he has been designated a "Principal Mediator" by The Mediator Registry.

Mark Shipow has become litigation Of Counsel to Michael H. Cohen Law Group, which focuses on the health care industry. Mark continues to have his own practice in West Hills.

Lewitt Hackman is pleased to announce that **Nicholas Kanter** is now a Shareholder in our Business Litigation Practice Group. Mr. Kanter graduated *Cum Laude* from Pepperdine University School of Law in 2005.

Woodland Hills based **Stone Cha & Dean** is pleased to name **Robyn M. McKibbin** as a partner in its Employment Law practice group.

The Case of Block Billing and the Voidable Contract

By Sean E. Judge

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

THIS MONTH WE TURN to a recent fee arbitration in which the arbitrator had to review and rule on unclear and inadequately described items in an attorney's bill, primarily those of block billing, unreasonable and excessive billing and inadequately described attorney and staff rates.

Factual Summary

In 2009, a client retained an attorney to represent the client in a dissolution of marriage. In doing so, the client paid the attorney's law firm a $38,000 retainer against which fees and expenses would be charged. After about nine months of representation, the client substituted out the attorney. During the nine month period, the attorney's law firm billed the client over $300,000. The client paid approximately $200,000.

The parties submitted the matter to the Mandatory Fee Arbitration Program for hearing. At issue was approximately $150,000, comprised of the attorney's unpaid balance of $100,000 and the client's claim that the client had overpaid the responsible attorney's law firm approximately $50,000.

The Law

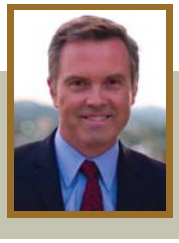
The dispute focused on three areas, but for the purpose of this article, only the issue of whether the agreement was valid or voidable at the client's request will be addressed.

In addressing this issue, the arbitrator found that the agreement must strictly comply with Business and Professions Code Section 6148. Section 6148 requires a written contract for services in cases where it is reasonably foreseeable that the total expenses to a client will exceed $1,000. Section 6148 further requires that the agreement must state the nature of services to be performed; the relative responsibilities of the attorney and client; and the basis of compensation including, but not limited to, whether billing is hourly (and the rate to be charged by each attorney) or by statute or flat fee.

Subsection (b) further requires that the bills shall clearly state the basis of compensation, including the time spent, the rate charged and how the charge for both fees and costs is determined. Subsection (c) provides that failure to comply with any provision of 6148 renders the agreement "voidable at the option of the client," leaving the attorney entitled to collect a reasonable fee.

In this case, the attorney's law firm had included language in the fee agreement indicating that it would represent the client "in connection with the client's divorce" and did not list the responsibilities of the firm and the client. Further, the agreement failed to clearly set forth the hourly rate of the attorneys who would be working on the case but instead included language that a certain level of attorney would charge "no more than" a certain hourly rate.

The billing invoices also failed to state the date of the services or the rate of compensation of a particular attorney or staff. The billing invoice simply included the initials of the attorneys performing the work (which was clearly described), but the client had no way of determining who did what (if multiple attorneys or staff performed the work) or their rate of compensation. Further, the invoices included time that was "block billed," meaning that a number of tasks were described as done within



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

a certain unspecified time period and a final sum was billed. The arbitrator found that this did not strictly and fully comply with Section 6148, and the value of the services was determined on the basis of quantum meruit.

The Takeaway

Fee agreements must fully and strictly comply with Business and Professions Code Section 6148. The fee arbitration program has had to address this issue many times. If the agreement is voidable at the client's option, then the arbitrator must go through all of the bills and billings to determine what is "reasonable." Once the agreement becomes voidable, the issue (in this case a dispute over a large amount of money) is out of the attorney's hands and left to the arbitrators to review in detail using his or her discretion to arrive at a number. Don't let this happen to you!

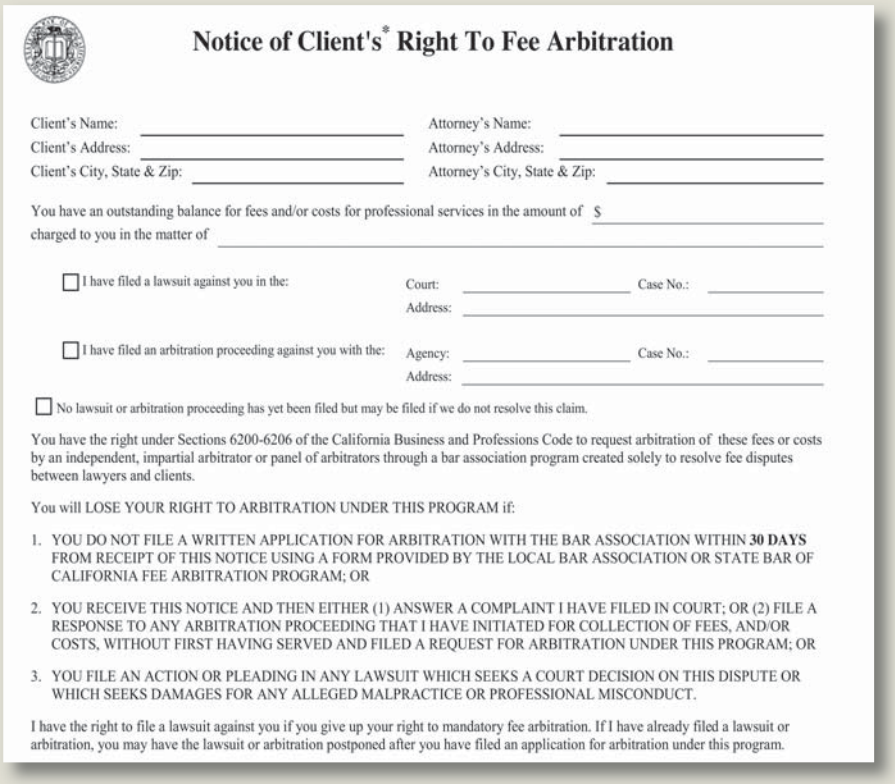
New Notice of Client's Right to Fee Arbitration Form

Mandatory Fee Arbitration PROGRAM
San Fernando Valley Bar Association

The State Bar has issued a new ***Notice of Client's Right to Fee Arbitration*** form. This is the form that attorneys must send to their clients prior to or at the time of initiating a lawsuit or other proceeding to collect fees (Business and Professions Code §6201(a)). Use of any other form, or incorporation of the same or similar language contained in the form on independent stationery or in the body of a letter,from the attorney to the client is not legally acceptable as a substitute.

The new form was approved by the State Bar Board of Governors and became effective March 7, 2013. However, the previously approved form may be used until July 1, 2013.

The new *Notice of Client's Right to Fee Arbitration* form may be downloaded from www.sfvba.org. Please replace previous versions of the form with this new *Notice of Client's Right to Fee Arbitration*.



Notice of Client's* Right To Fee Arbitration

Client's Name: _____ Attorney's Name: _____
Client's Address: _____ Attorney's Address: _____
Client's City, State & Zip: _____ Attorney's City, State & Zip: _____

You have an outstanding balance for fees and/or costs for professional services in the amount of $ _____
charged to you in the matter of _____

☐ I have filed a lawsuit against you in the: Court: _____ Case No.: _____
Address: _____

☐ I have filed an arbitration proceeding against you with the: Agency: _____ Case No.: _____
Address: _____

☐ No lawsuit or arbitration proceeding has yet been filed but may be filed if we do not resolve this claim.

You have the right under Sections 6200-6206 of the California Business and Professions Code to request arbitration of these fees or costs by an independent, impartial arbitrator or panel of arbitrators through a bar association program created solely to resolve fee disputes between lawyers and clients.

You will LOSE YOUR RIGHT TO ARBITRATION UNDER THIS PROGRAM if:

1. YOU DO NOT FILE A WRITTEN APPLICATION FOR ARBITRATION WITH THE BAR ASSOCIATION WITHIN **30 DAYS** FROM RECEIPT OF THIS NOTICE USING A FORM PROVIDED BY THE LOCAL BAR ASSOCIATION OR STATE BAR OF CALIFORNIA FEE ARBITRATION PROGRAM; OR
2. YOU RECEIVE THIS NOTICE AND THEN EITHER (1) ANSWER A COMPLAINT I HAVE FILED IN COURT; OR (2) FILE A RESPONSE TO ANY ARBITRATION PROCEEDING THAT I HAVE INITIATED FOR COLLECTION OF FEES, AND/OR COSTS, WITHOUT FIRST HAVING SERVED AND FILED A REQUEST FOR ARBITRATION UNDER THIS PROGRAM; OR
3. YOU FILE AN ACTION OR PLEADING IN ANY LAWSUIT WHICH SEEKS A COURT DECISION ON THIS DISPUTE OR WHICH SEEKS DAMAGES FOR ANY ALLEGED MALPRACTICE OR PROFESSIONAL MISCONDUCT.

I have the right to file a lawsuit against you if you give up your right to mandatory fee arbitration. If I have already filed a lawsuit or arbitration, you may have the lawsuit or arbitration postponed after you have filed an application for arbitration under this program.

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Adapting to Court Changes with Trial Techniques in Nine Modules FLAT!

By Cari M. Pines

WITH THE IMPLEMENTATION OF THE NEW Family Code §217 on January 1, 2011, the practice of family law in California has taken a dramatic turn. Hearings for child custody, support and other intimate family law matters that have historically been determined by judges ruling on pleadings without actual hearings are now being played out as full-length features in courtrooms across the state.

Family Code §217 is the result of the Elkins Family Law Task Force, a committee established by the Judicial Council of California under the recommendation of the California Supreme Court in the landmark case of *Elkins v. Superior Court*. In *Elkins*, the husband represented himself during a marital dissolution trial. A local court rule and a trial scheduling order in the family court provided that parties must present their cases and establish the admissibility of all the exhibits they sought to introduce at trial by declaration.

Mr. Elkins' pretrial declaration failed to establish the evidentiary foundation for all but two of his 36 exhibits. Thus, the court excluded them. Subsequently, the court divided the marital property substantially in the manner requested by Mr. Elkins' former spouse.

The local court rule, which had been adopted to promote efficiency in processing family law cases, had effectively barred Mr. Elkins from presenting his case in court. In response to this miscarriage of justice, the *Elkins* court held that the same judicial resources and safeguards of the usual adversarial proceedings governed by the rules of evidence found in civil cases should apply to family law cases, prompting the passage of Family Code §217.

As a result of this new legislation, family law attorneys are now faced with the task of dusting off their law school trial advocacy primers and "trying" cases just as civil and criminal lawyers do every day. The difference, however, between family law hearings and those heard in criminal and civil courtrooms is that family law subject matters tend to be picked from the tabloids. Just as reality television replaced situation comedy, Family Code §217 ushered in a new era of entertainment: family law hearings, live and unedited.

The sad reality, however, is that our courts are tasked with making extremely difficult rulings on critical issues that challenge the families before them, with children's safety and interests paralleled with the parents' extreme financial struggles. The courts are attempting to respond to this new legislation by streamlining the family law process in light of

crushing budgetary cuts and installing alternative dispute resolution (ADR) tactics to help ease the load on the already overburdened courts. Compounding this dilemma is the closure of the Los Angeles County Superior Court ADR office in April 2013.

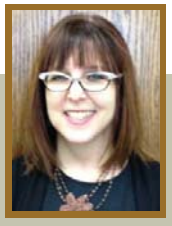
The San Fernando Valley Bar Association Family Law Section is responding to this evolution in the law in a similarly dramatic way by introducing the Family Law Advocacy Training (FLAT), a first-of-its-kind program offering MCLE credit that focuses on trial techniques for the family law attorney. The training will be presented in nine separate modules throughout the year.

FLAT will focus on the most common aspects of family law trials, while exploring the full range of trial procedure, from pre-trial motions and opening statements to closing arguments and appellate concerns. Topics will include direct and cross examination, admissibility of evidence and examination of expert witnesses including mental health professionals, vocational examiners and forensic accountants. FLAT will also focus on the application of the Rules of Evidence, the Code of Civil Procedure and the California Rules of Court to family law cases.

The FLAT program will feature actual demonstrations by experienced attorneys and family law bench officers, followed by interactive workshops where program participants will experience and practice the trial techniques themselves. To give practical context for family law practitioners, the course will use one fact pattern throughout the nine modules that portrays the most common issues faced by family law litigants, including domestic violence, child custody, child and spousal support, property division (including a family owned business) and attorney fee orders.

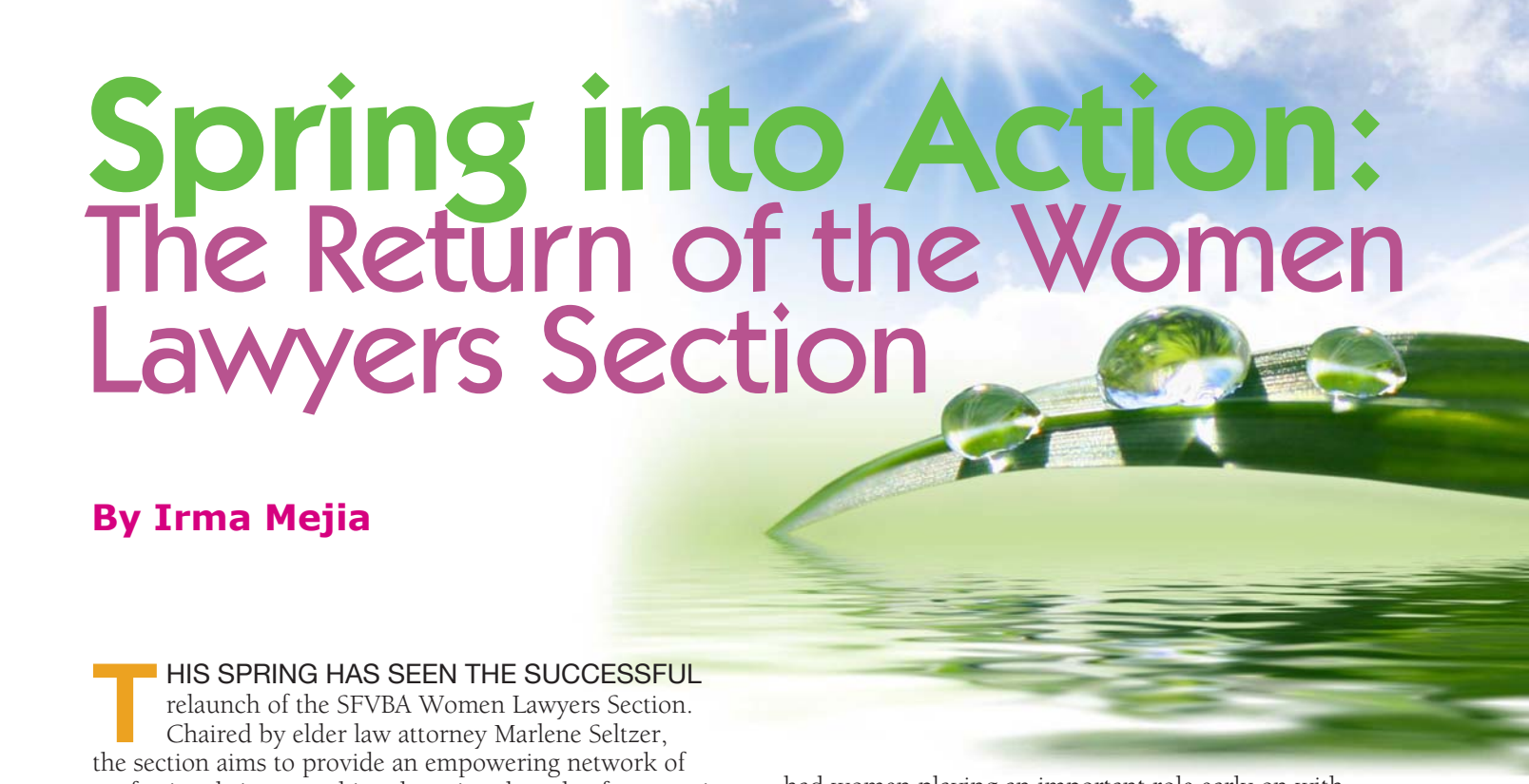
In addition to the FLAT program, the Family Law Section will continue to provide its annual Hot Tips program in November and the popular New Judges/New Laws program in January. The New Judges/New Laws program provides attorneys with input from family law bench officers and explores changes to the courts and the rules that affect the practice of family law.

More details about Family Law Section programming for 2013-2014 will soon be available on the SFVBA website.



Cari M. Pines is a Certified Family Law Specialist and partner at Pines Laurent, LLP. Pines has been elected as Chair of the Family Law Section for the upcoming term. Pines' practice consists of all aspects of family law, with a particular emphasis on issues concerning families of children with special needs. Pines can be contacted at cari@pineslaurent.com.

Spring into Action: The Return of the Women Lawyers Section



By Irma Mejia

THIS SPRING HAS SEEN THE SUCCESSFUL relaunch of the SFVBA Women Lawyers Section. Chaired by elder law attorney Marlene Seltzer, the section aims to provide an empowering network of professionals interested in advancing the role of women in the legal field. The section is designed to be a welcoming community for members to discuss the different areas of law, specific effects of the law on women and work-life balance, while earning MCLE credit.

The Women Lawyers Section was active and widely popular several years ago. For a variety of reasons, it went dormant. In reviving the section, Seltzer seeks to fill a need left in the Bar with the loss of the section. "We want to give people a comfortable environment to learn and ask questions, a forum in which women can help women."

As Seltzer describes it, when women first started practicing law, here in the Valley and elsewhere, they were "second class citizens." In fact, it wasn't until 1878 that Clara Shortridge Foltz—who would go on to become the state's first female attorney—helped pass "The Woman Lawyer Bill," legislation that allowed women to practice law in California.[1] Even with that triumph, women were denied entry to the state's only law school, Hastings College of Law. Foltz took her battle all the way to the state's highest court, which in 1879 granted women the right to attend law school.[2] However, obstacles to full participation in the legal system remained, including, until 1917, the prohibition of women serving on juries.[3]

Women groups were formed to continue to advocate for women's rights in the legal profession. The Women Lawyers Club, founded in 1918, and the Women Lawyers' Association of Southern California, founded in 1928, were two of the earliest local groups.[4] Our own bar association had women playing an important role early on with celebrated attorney (and later judge) Oda Faulconer serving as the SFVBA's first vice-president in 1926.[5] Faulconer also served as the first secretary-treasurer for the Women Lawyers' Association.[6]

While the number of female attorneys increased, women still encountered hurdles from sexual discrimination, wage gaps and low representation in executive roles. A need still existed for women attorneys to come together as a group to promote their interests in the profession. So it was in March 1980 that the Women Lawyers Section of the San Fernando Valley Bar Association was established.[7] Later, in 1987, the SFVBA elected Barbara Jean Penny as its first female president, who was succeeded by Terri G. Lynch in 1988.

Advocacy for women in the profession has certainly had a positive effect. The number of women enrolling in law

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

school has reached nearly fifty percent, with the number of female judicial officers steadily increasing.[8] "We're past most major barriers but people still need support to overcome the gaps that remain," explains Seltzer.

Seltzer envisions a new section that functions as a roundtable, with opportunities for attendants to discuss various areas of the law and profession. The section's initial meeting in February attracted several SFVBA members interested in shaping the group's goals and structure. Seltzer hopes to work with members to schedule meaningful programs that will generate valuable discussions in an attempt to avoid the assembly line feeling of many programs in which people "go in, get MCLE and leave without ever saying a word to one another."

Members at the initial meeting expressed enthusiasm about the section's relaunch. "I see this as an opportunity to exchange ideas and share resources, and to continue building strong connections in the legal community," explains civil litigator Kimberly Offenbacher.

"Everyone can benefit from some help or guidance at some point in their career and it's comforting to know that this section exists as a resource for me and other women."

As Offenbacher states, "the legal profession in general is served when its individual members are strengthened." Indeed, Seltzer's goal is to lead a section of professionals interested in learning about the law and building the necessary connections and resources for continued success. "The members of the Women Lawyers Section will help one another," says Seltzer.

While the goal of the section is to help women professionally, the interests of the initial participants are not wholly self-serving. During the section's first meeting, many expressed a desire to get involved in the community. Suggestions for a variety of projects were submitted, including a book drive for schoolchildren and panel presentations at local senior centers that are geared to the public. While everyone is invited to become involved in the new section, Seltzer anticipates the section will remain intimate, yet strong. "Small groups get things done," she says.

Some may wonder why, with all the advances women have made in the profession, a group of this nature would be necessary. Offenbacher balks at the suggestion. "That question actually punctuates the need for a women's section as it demonstrates a failure to perceive how, or even if, a woman lawyer might be experiencing the profession differently than a male lawyer." Seltzer agrees, "There's still much more to do to bridge the gender gap."

With meetings scheduled every fourth Tuesday of the month, the Women Lawyers Section is open to all SFVBA members with an interest in discussions about the law and a commitment to furthering women's achievements in the legal profession. Its first MCLE discussion, "Ethical Red Flags," in April was a success and provided members with an hour of educational credit in Legal Ethics.

Future programs will include educational presentations and discussions on technology, law practice marketing and more. Members interested in joining the section and its listserv should contact Member Services Coordinator Noemi Vargas at the Bar office.

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[1] Ricciardulli, Alex, "California's First Woman Lawyer and NAWL Member," *Women Lawyers Journal*, Vol. 87 No. 1 (2001):14 , accessed April 11, 2013, http://nawl.timberlakepublishing.com/files/vol87_1.pdf.

[2] Ibid.

[3] Hooley, Rebecca J, "California's Women Lawyers: 134 Years and Counting," *California Bar Journal*, March 2012, accessed April 11, 2013, http://www.calbarjournal.com/March2012/TopHeadlines/TH4.aspx.

[4] Smith, Selma Moidel, "NAWL's Southern California Council," *Women Lawyers Journal*, Vol. 87 No. 1 (2001):15, accessed April 11, 2013, http://nawl.timberlakepublishing.com/files/vol87_1.pdf.

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[6] Smith 15.

[7] *Serving the Community 35.*

[8] "Women in the Federal Judiciary: Still a Long Way to Go," National Women's Law Center, March 1, 2013, accessed April 11, 2013, http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1#_edn1.

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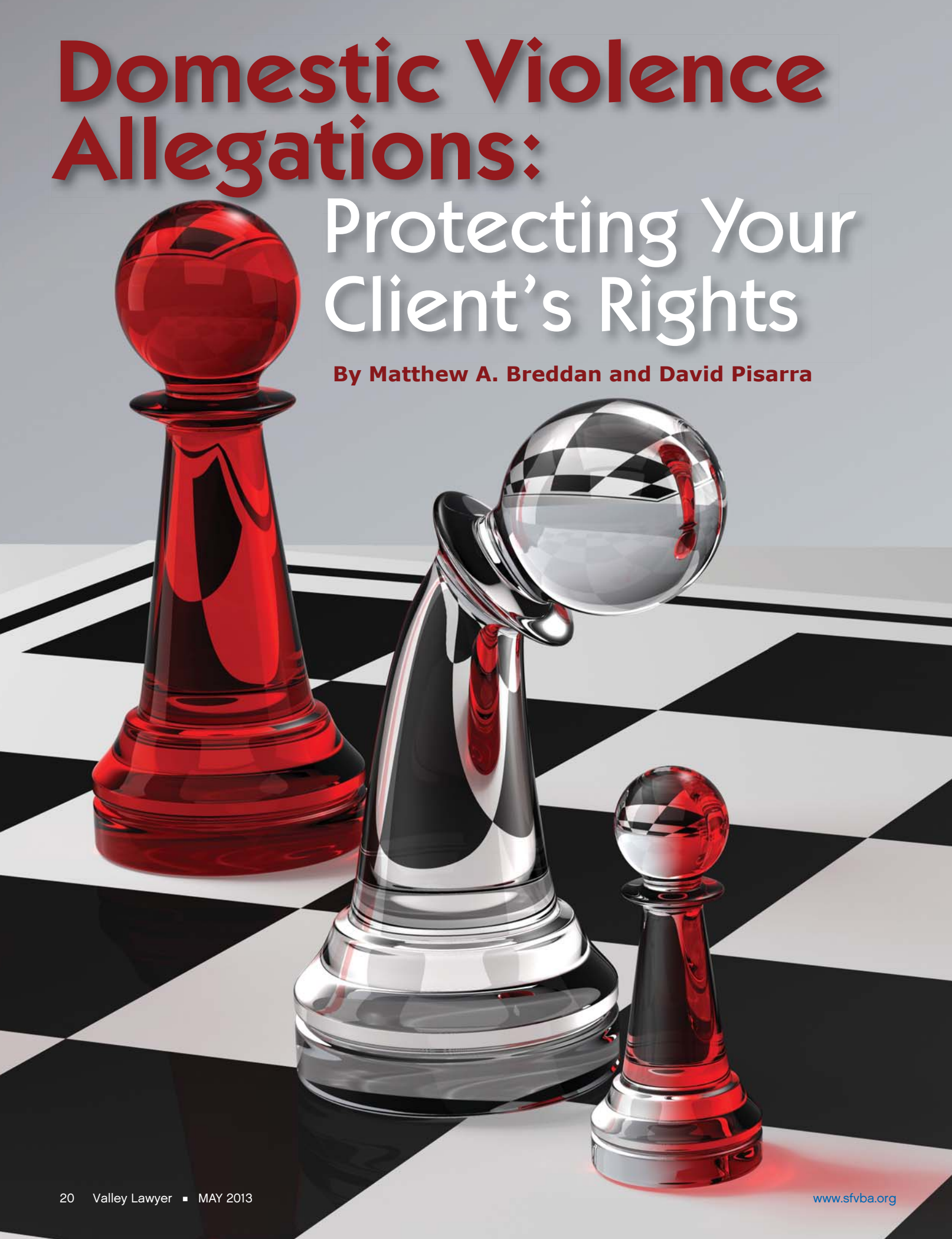
Domestic Violence Allegations: Protecting Your Client's Rights

By Matthew A. Breddan and David Pisarra



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 27.

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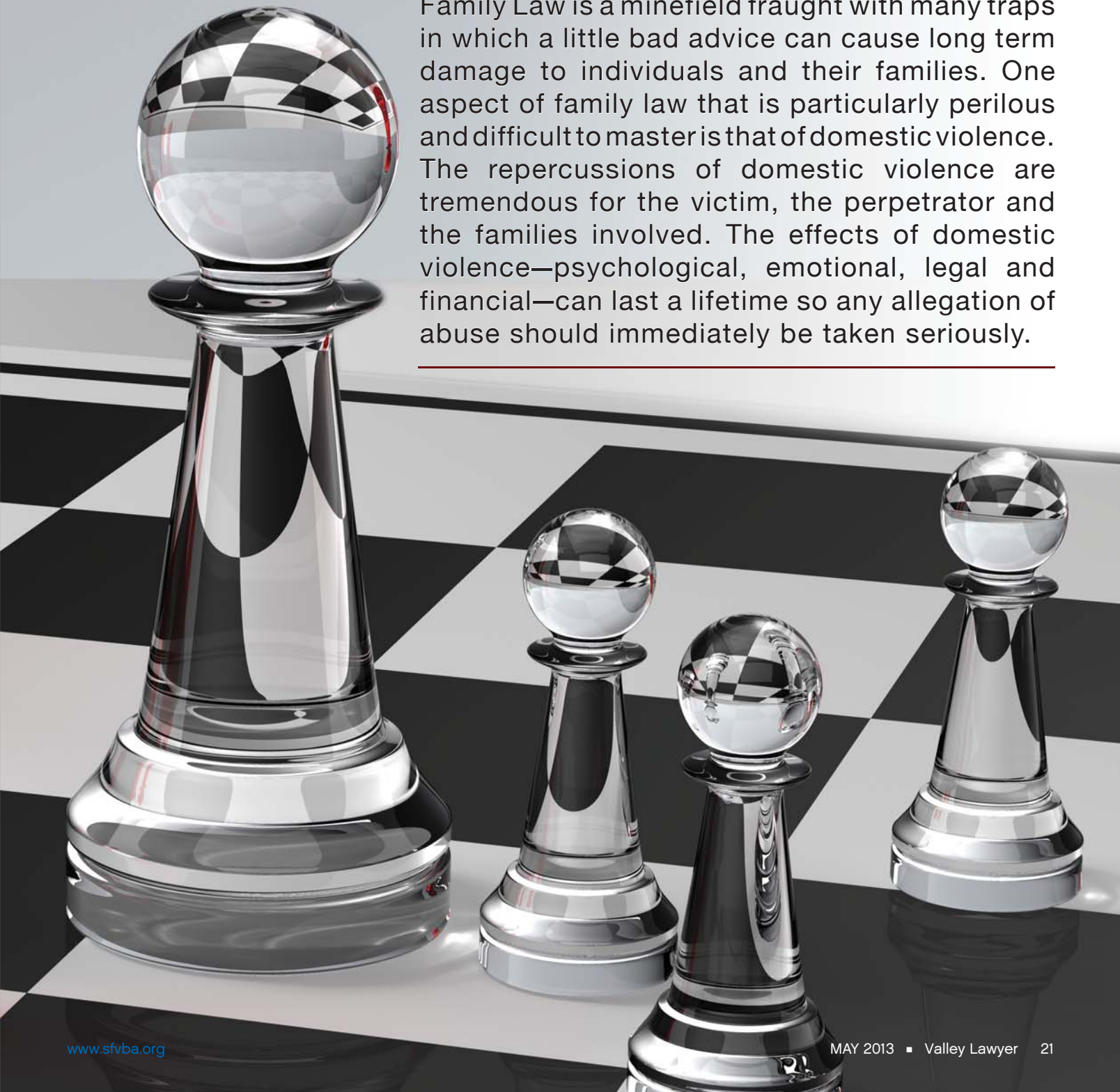
Family Law is a minefield fraught with many traps in which a little bad advice can cause long term damage to individuals and their families. One aspect of family law that is particularly perilous and difficult to master is that of domestic violence. The repercussions of domestic violence are tremendous for the victim, the perpetrator and the families involved. The effects of domestic violence—psychological, emotional, legal and financial—can last a lifetime so any allegation of abuse should immediately be taken seriously.



OFTEN THE CIRCUMSTANCES SURROUNDING allegations of domestic violence are not very clear. In the rough-and-tumble world of he said/she said, words uttered in anger, frustration or jest can be taken out of context and twisted into threats. As a result, careers can be ruined and lives can be destroyed. Much care should be taken to ensure that victims of actual abuse are protected and individuals affected by malicious accusations be properly defended.

The history of California's Domestic Violence Prevention Act (DVPA) begins with the enactment of Family Code §6200 et seq. in 1998. It has been expanded over the years as the awareness of the damaging effects of domestic violence on adults and children has grown, and eventually expanded to include domesticated animals in 2008.

The DVPA extends protections to a wide range of individuals such as those who are or were romantically involved or cohabitating, and people who share a familial relationship within the second degree of consanguinity. Individuals (or persons) who are having trouble detaching from a romantic relationship are a common source of DVPA cases.

Actual physical violence is not necessary for a court to issue a Domestic Violence Restraining Order (DVRO); the grounds can be emotional, psychological or financial abuse. Growing areas of DVPA work are inter-generational abuse such as a mother seeking protection from an abusive alcoholic daughter and intra-generational abuse such as brother on brother abuse. There is no fee for the filing of or service by the sheriff of an application for a Domestic Violence Temporary Restraining Order.

The DVPA complies with the Federal Violence Against Women Act (FVAWA). Once a permanent restraining order is issued under DVPA, it is enforceable throughout the United States, its territories and all tribal lands when it is registered with the local law enforcement office. It shall be treated as if it were issued in that jurisdiction.

Case Study: A Domestic Dispute

Steven and Wendy have been married for twenty years and share their home with their two children, Steven's mother and Wrinkles, Steven's prize winning Shar Pei. Steven is a sworn police officer with an annual income of $85,000 and Wendy is an emergency room doctor with an annual income of $200,000. They own their home and hold title as joint tenants.

Steven and Wendy are having marital problems. One night, Steven and Wendy have a verbal altercation, and, for the first time in their relationship, the argument turns violent when she throws a remote control at him. She misses him but shatters a television screen. There is no physical contact between them. The children hear the noise and run into the room crying.

The next day, Wendy files for a Domestic Violence Temporary Restraining Order (DVTRO or TRO), swearing that she is terrified of her husband and his violent temper. A picture of the broken television is produced as evidence of abuse. She states that the children were very upset and frightened.

Wendy asks for a "no-notice, kick-out" order, sole legal and physical custody of the children and Wrinkles, claiming that she fears Steven will kill the dog to terrorize her further. She states that Steven has guns, but does not mention his occupation. She requests that the mortgage on the home continues to be paid from a joint account. As a parent seeking to protect her children, Wendy is the primary protected party, and the children do not need a guardian ad litem to represent them in this matter.

The burden of proof applied by the judge is a preponderance of the evidence or "the satisfaction of the court." If the case meets the burden, a TRO will be issued. There is no requirement for a history of abuse before a TRO can be issued; one incident may be enough.

In the case of Wendy v. Steven, the judge reviews Wendy's declaration, the photos of the broken television and takes no testimony from witnesses or parties. There is no police report, and since none is required as a precursor, the judge grants the TRO protecting Wendy, the children and Wrinkles, but allows Steven visitation with the children and peaceful contact with Wendy. Steven is now removed from his house, even though he is a title holder to the home, and cannot legally be in possession of any firearm—which he must turn in or sell—and the mortgage must continue to be paid.

Permanent Domestic Violence Restraining Orders

Once a TRO is issued, a hearing date will be scheduled 21 days from the date of issuance. A TRO can be extended at the request of the protected party, or for good cause, up to 25 days.

At the hearing both parties will have the opportunity to present as evidence their side of the story. The commissioner or judge hearing the case will listen to the testimony of the parties and witnesses; review any documentary evidence; and apply the legal burden of proof for a Permanent Domestic Violence Restraining Order (PDVRO or PRO). There is no requirement that a PDVRO be granted solely because a TRO has been issued.

The PRO can initially be granted for any period of time, up to five years. If the protected person still feels at risk, they may apply for a renewal based on a genuine and reasonable fear of the restrained person before the expiration of the PRO. A renewed PRO can be issued only for either a five year period or a truly permanent basis.

PDVROs have become very comprehensive and powerful since 1998 and the breadth of topics they encompass has steadily grown. Currently, a properly drafted DVPA application will effectively handle all the substantive issues involved in a divorce but for the marital status of the parties.

The issuance of a PDVRO can prevent spousal support payable to the restrained person and limit their rights to joint physical custody, which in turn affects child support. Additionally, an individual's right to own firearms can be limited or suspended pursuant to the DVRO, as well as having all communications with the protected party recorded.

Spousal Support

California Family Code §4320 uses several factors to determine what the appropriate level of permanent spousal support shall be in a divorce. It mandates that a victim of domestic violence should not have to provide support to

a perpetrator of domestic violence. Historically, domestic violence has largely been perpetrated by men. As men have historically been the higher income earner in a marriage, this mandate regarding spousal support has not been a major issue until recently as men and women are earning more equal wages.

In the case of Wendy v. Steven, there is a large difference in the annual incomes of the parties. The difference is large enough to provide a possible motive on Wendy's part to have Steven be declared an abusive husband. The existence of a DVRO is not an absolute bar against spousal support under Family Code §4320, but it is a major contributing factor in the overall calculation of a support order.

The manufacture of domestic violence evidence could be a defense on Steven's part, even though it is certainly possible that he is an abusive husband. The courts are aware of and very vigilant about the manufacture of evidence in the pursuit of avoiding future financial obligations. Both men and women are guilty of this practice.

The long-term effects of a short-term DVRO can be catastrophic. The judicial application of this section of the law has been evenhanded and gender neutral. In one case, a judicial officer issued a six month DVRO in favor of the high earning wife against her lower earning husband, causing the husband to be denied spousal support all together based on a onetime event. In a similar case, a husband and wife had an argument where he was scratched, drawing blood. He filed a police report and she was arrested. A Criminal Protective Order (CPO) was issued, which takes precedence over any civil order of protection. She was barred from being awarded spousal support as a result of both the criminal and the civil restraining orders.

Child Custody

Domestic violence which involves children can have dramatic effects on the amount of and type of custody that an abusive parent can have. If the domestic violence is perpetrated against the child in some manner, whether verbal or physical, the Department of Child Protective Services can become involved and they can order the non-offending parent to seek a restraining order for the benefit of the child against the offending parent.

If a child is merely present during an occurrence of domestic violence, that incident can be used against the offending parent in a child custody case. For example, if a mother and father have an argument in the front seat of the car with a child strapped in the backseat and the argument escalates to the point where one parent slaps the other, that incident will be a factor in the determination of a visitation plan and eventually both legal and physical custody of the child.

The determination of sole physical custody, sole legal, joint legal and joint physical custody has many factors, beyond just the easy issues of the parties' place of residence and the location of the child's school. A history of domestic violence can play an important role in the determination of what is in the best interests of the child, and is a factor if one parent eventually decides to relocate to another county or state.

If a parent has been granted sole legal custody and sole physical custody as a result of domestic violence, he or she can act without input from the other parent. The power and the freedom that it provides the protected parent are significant.

Supervised Visitation

The abusive parent still has a legal right to maintain a relationship with their child. If the abuse has been perpetrated against the child, a court may order that visitation continue, but under tightly controlled circumstances. The court may order supervised visitation to protect the child from further abuse by implementing a monitor. Supervisors or monitors can be either non-professional or professional.

Non-professional monitors are frequently family members or trusted friends who will be the least disruptive to the child. The child will presumably have a pre-existing relationship with the monitor and may not even realize that their abusive parent is being supervised. Oftentimes, these supervised visits happen at a familiar setting to the child such as another family member's home or a familiar park. This is done to provide both a sense of security to the protected parent, and to minimize the discomfort for the child and the restrained party.

Professional monitors will also supervise a visit in a familiar setting or in a secure facility if court ordered. Professional monitors can charge anywhere from $30 to $150 per hour to supervise a visit, usually with minimum hourly fees and travel expenses included.

For the restrained party, this additional level of supervision can make visitation impossible for them to maintain due to the strained finances of a divorce or child custody battle. In cases where the violence has not involved the child, the request for supervised visitation may be a matter of control and recouping the power by the protected party. Courts usually recognize this and will take steps to assert protections for the child while at the same time try not to make it impossible for the restrained party to see their child.

In cases where the violence has been directed at the child, the courts are less likely to be flexible and demand a greater amount of security and protection for the child. If there is a case history with the Department of Child Protective Services, the safety of the child is paramount.

Child Support

In the tortuous calculus that is the determination of child support, a large factor taken into consideration is the custodial time of the child. While the state's aspiration is for each parent to have a strong bond with the child, it also wants to ensure that the child is financially supported by the parents and by public funds as a last recourse.

Because the state looks to the parties to provide for their children, the financial aspects of parenting time become a contentious issue in some cases. As a parent's custodial time increases, the child support payment from the non-custodial parent increases. There could be motivation for a parent to request as much court ordered custodial time as possible to maximize the support payable by the other party.

In the case of Wendy v. Steven, if Wendy has the children the majority of the time, even though she is the higher earner, Steven will have to pay her child support. Conversely, an increase in Steven's custodial time will result in a reduction of his child support payments to Wendy, so he has a motivation to secure as much time as he can with the children.

Domestic Violence Effect on Employment

When a DVRO is issued, the restrained person must sell any firearms they own within 24 hours and they must not attempt to procure any others either by purchase or gift. This is mandatory in the order form and the court has no discretion to limit or strike this portion.

For someone who carries a weapon as part of their job, this portion of the order can jeopardize their employment. In our case study, Steven is a sworn police officer and therefore must carry a weapon as part of his duties. In Los Angeles County, a police officer is supposed to have a weapon on them at all times in the event of civil unrest. A DVRO would prevent Steven from being able to perform his duties. He would have to report it to a supervisor who would likely either take possession of the weapon while Steven was not on actual duty or would have to reassign him to an unarmed position within the department. Should a permanent order be issued that bars him from owning a gun, it will likely have long term effects on his career as a police officer.

Defending Against a DVRO

Defending against a DVRO is not a simple task. Because the legal standards are a preponderance of the evidence or "to the court's satisfaction" for a temporary DVRO and clear and convincing evidence for a permanent order, for most cases it is not very difficult to convince a judicial officer that a DVRO is required. In essence, the restrained party needs to convince a judicial officer that they are not a threat. Proving a negative is never an easy process and in Family Court, where caution is the watchword, it becomes ever more difficult.

There are defenses available and a properly constructed argument with evidentiary support will convince a judicial officer that there is no pressing need for an order.

Arguing as Part of Normal Human Relations

Fear is subjective, what one person fears another may pursue. And in the world of human emotions, one family's communication is another's abusive behavior. Cultural awareness is a topic that judicial officers take training in, so that they can be alert to their own biases.

One of the most common defenses to a DVRO is that an argument, even with raised voices, is part of the range of human emotions. While a sustained pattern of yelling and harassment may become abusive, an occasional or infrequent raising of the voice is not enough to be considered abuse. Domestic abuse has no clear cut definitions and in the fog of a breakup it is easy for normative behavior to be misconstrued, misinterpreted and slanted in its presentation to a court officer.

Self-Defense

When two people are fighting, often times it is hard to tell who the first aggressor was and who was defending themselves. For the party who is being wrongfully accused, the first place to start is with self-defense. This is a hard defense to prove because the psychological presumption is that the party who rushes to the courthouse first is the victim and that no abuser would pursue a DVRO against their victim. But it does happen, especially with a strategic DVRO for either financial or custodial reasons.

The restrained party is left with having to defend themselves and again proving a negative, that they didn't start the fight. To do so usually requires independent third party verification, either a witness or a videotape to show the events as they unfolded.

Continued Relationship between the Parties

Once a DVRO has been issued, the protected party should not contact the restrained party except in the case where there is a provision for peaceful contact to arrange for child custody exchanges or visitation. Occasionally, a protected party will continue or resume a relationship with the restrained party. In the event that the relationship continues, the restrained party is at great risk every time the order is violated with either telephone, email or in person communication. The court order is enforceable against the restrained party, whether or not the protected person invited or seduced him or her into violating the order.

Many a client has been arrested and charged with violating a court order and they tell their criminal defense lawyer that the protected party "invited me over and promised me it would be okay," only to have to post bail and face a criminal conviction when the protected party changed their mind. A court order to stay away remains a court order to stay away, no matter what the protected party says until the court order is vacated, expires or is modified.

Domestic violence is a very complex area of law, with many competing factors in every case. The motivations that drive an abuser range from substance abuse, to psychological imbalance, to a family history of abuse. As a society we have become more aware of not only the full range of what is abusive but also its long term effects on children.

The legislature had the best of intentions in creating the Domestic Violence Prevention Act and it has proved to be a success in many ways. Unfortunately, in some cases it has become a tool for further abuse. It can be manipulated so that it becomes a tool for an abuser.

The DVPA has strong consequences in place to deter active abusers and to protect children, but those consequences can also be a motivation for others to manufacture false allegations.

Matthew A. Breddan is a family law attorney in Woodland Hills. He is a SuperLawyer and has been in practice since 1994. Breddan can be reached at mbreddan@gmail.com. **David Pisarra** is a family law attorney in Santa Monica. He is the author of three books for men on divorce and child custody issues, and one on pet custody. Pisarra can be contacted at david@pisarra.com.

Test No. 56

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. There must be physical violence for the matter to fall under the Domestic Violence Prevention Act.
   ❑ True ❑ False
2. The following people are offered protection under the DVPA: spouse or former spouse; cohabitant or former cohabitant; a person with whom the respondent is having or has had a dating relationship; and anyone connected by consanguinity within the second degree.
   ❑ True ❑ False
3. The burden of proof is much lower for a temporary restraining order than for a permanent restraining order.
   ❑ True ❑ False
4. A temporary restraining order can last for three years.
   ❑ True ❑ False
5. A permanent restraining order is permanent.
   ❑ True ❑ False
6. A restraining order can protect pets.
   ❑ True ❑ False
7. A restraining order may contain provisions for child custody and visitation.
   ❑ True ❑ False
8. Permanent restraining orders issued in California are not enforceable in other states.
   ❑ True ❑ False
9. A temporary restraining order can only be obtained by giving notice to the party to be restrained.
   ❑ True ❑ False
10. Children must have a guardian ad litem appointed before they can seek a restraining order.
    ❑ True ❑ False
11. You cannot be kicked out of the house or apartment if your name is on the title or lease.
    ❑ True ❑ False
12. It is ok to keep a small caliber weapon after a restraining order has been issued against you.
    ❑ True ❑ False
13. You have to show a documented history of abuse to obtain a restraining order.
    ❑ True ❑ False
14. The police must take a report before you can obtain a restraining order.
    ❑ True ❑ False
15. There must be eye-witnesses to support your case or you will not get the restraining order issued.
    ❑ True ❑ False
16. Spousal support may be affected by the granting of a restraining order.
    ❑ True ❑ False
17. If a temporary restraining order is granted, a permanent restraining order must be granted after a hearing is conducted.
    ❑ True ❑ False
18. A restraining order can protect other individuals besides the victim.
    ❑ True ❑ False
19. There is no filing fee for an application for a domestic violence temporary restraining order.
    ❑ True ❑ False
20. Contact between the restrained party and the protected party to facilitate a court ordered visitation is in violation of the restraining order.
    ❑ True ❑ False

MCLE Answer Sheet No. 56

INSTRUCTIONS:
1. Accurately complete this form.
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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

By Terri L. Asanovich, MFT

Visitation Reluctance in High Conflict Divorce

THE PHENOMENON OF visitation reluctance in children is being seen more often in high conflict custody cases. The degree of reluctance varies widely and depends on several factors, including the child's experiences with his separated or divorced parents.

Children experiencing their parent's divorce may resist seeing an individual parent for a variety of reasons, some of which may be due to normal developmental processes such as separation anxiety in very young children. Visitation reluctance can put a strain on divorce proceedings and attorneys should be able to identify the behavior in an effort to help the client's case proceed smoothly while helping to ensure the child's wellbeing.

Degrees of Resistance

Some children may also resist contact because of the disruption it may cause to their daily activities.[1] In a high conflict marriage and divorce, the child may feel fear or the inability to cope with a high conflict custody exchange and, therefore, may want to avoid it. There may be resistance in response to a rigid, angry or insensitive parenting style. Or the child may worry about a parent and be fearful to leave an emotionally fragile parent alone. A child may also have resistance issues from the remarriage of a parent or problems with a stepparent.[2] According to Kelly and Johnston, there are different categories along a continuum of children's relationships with their parents after separation and divorce.[3]

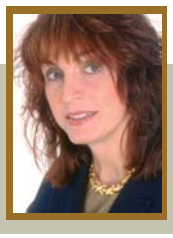
The healthiest type of relationship is when the child has a positive relationship with both parents and enjoys spending significant amounts of time with each parent. Then there is the type of relationship in which the child has an affinity for one parent. In this category, the child has a healthy relationship with both parents, but because of individual temperament, gender, age, etc., may feel closer to one parent. This type of child still wants to spend significant time with both parents.

The next category on the continuum is the allied child. These are children who have aligned with one parent. Often during the marriage and post-separation, they want limited contact with the other parent. Unlike the alienated child, allied children do not completely reject the other parent or seek to terminate all contact. Children in this category express some ambivalence towards the other parent, including feelings of anger, sadness, love and resistance to contact. These alliances may be the residual effects of involving the child in intense marital conflict and where the child was encouraged to take sides. In older school aged children, their perception of which parent caused the divorce or which one needs or deserves the child's allegiance or support comes into play. The child's strong alliance is often only temporary. However, this phase can become hardened and permanent if there is a bitter divorce with protracted litigation.

The next category is the estranged child. These children are realistically estranged from one of their parents as a consequence of actual parental behaviors. For example, children who have observed repeated violence or experienced outbursts by a parent during the marriage or after separation may become estranged. Children who have witnessed family violence, abuse or neglect, or they themselves may have also been the targets of violence or abusive behavior from that parent may also fall into this category.The child may be traumatized by these parental behaviors.

Other reasons for estrangement can stem from a child's reaction to severe parental deficiencies, such as immaturity or self-centered behaviors by the parent, chronic emotional abuse of the child, or the preferred parent, etc. Unlike the alienated child, research has shown estranged children do not harbor unrealistic anger and/or fear. The alienation is a realistic reaction to what they have experienced.

The alienated child as described by Kelly and Johnston is one who constantly rejects the parent without apparent guilt or ambivalence.[4] The parents who are rejected in this group have no history of physical or



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emotional abuse of the child. It is a severe pathological distortion on the child's part of the previous parent-child relationship. The children are reacting to the dynamics of the divorce which most often occurs in high conflict child custody disputes.

Court Intervention

In developing effective interventions with families whose children are exhibiting visitation reluctance, the court order for treatment is critically important. Ideally, the judge will instruct the parents on the record that it is important for the child to have a relationship with both parents. Further, if the child does not, it will be harmful to the child.

Both parents must focus on the mental health and wellbeing of the child and not their own agendas. Also, it is vital that the order contain language that permits the therapist or treatment team the discretion to involve any relevant family members in the treatment.

Usually, all effective interventions will involve both parents—the aligned parent and the parent who is rejected by the child. Typically, each parent will be seen individually and together with the child. The child will also have individual meetings with the therapist to help educate them and to allow them to process their feelings. One of the goals of this type of family therapy is to open communication and to share information so the aligned parent sees the child is safe with the rejected parent.

The work with the aligned parent focuses on the concerns about the rejected parent and the short and long term effects of the "loss" of a parent to the child. Contributing factors by the aligned parent to the child's reluctance involves the projection of their negative feelings onto the child, and seeing the other parent as toxic, dangerous or inept in caring for the child.

The work with the rejected parent focuses on helping them see what they have done or how they contributed to the child's resistance. Contributing factors by the rejected parent might include a harsh, rigid parenting style; anger towards the child for rejecting them; blaming the child; poor empathy; ineffective parenting style; critical intimidation of the child; and weak anger management skills or passivity when faced with high conflict.[5]

Another goal of this type of therapy is to help the child develop a more realistic view of each parent in order to enable him or her to realize or see that neither parent is all good or all evil. This is accomplished through fostering improvement in the child's reality testing and to help them more accurately perceive and interpret behaviors. The therapist provides a neutral sounding board to help the child through this process.

The re-education of behaviors and beliefs also applies to the parents and requires them to make behavioral modifications as well.[6] In these cases, the court order should mandate that the therapist is to report back to the court, minor's counsel or a parenting plan coordinator. This helps put pressure or creates a crisis on the family system to effect change. It is important that the family be given a specified timeframe to accomplish treatment goals, such as three, four or five months. When alienation is severe, useful interventions include: parenting classes, use of a case manager and a separate therapist for the child. This will help combat the alienating process.[7] Moreover, if there is non-compliance by either parent, the court must make clear that there will be a negative consequence to them, such as a reversal of custody or changing the custody schedule.

There are distinct groups within the visitation reluctance spectrum. It is important to remember that estranged children are reacting to the rejected parent from a realistic basis that may be rooted in a family history of violence, abuse and neglect directed at either the child or the other parent. The alienated child harbors unreasonable anger or fear of the rejected parent. The quality of parents from this group can range from marginal or good enough, to better parents with no history of physical or emotional abuse to the child.

The alienated child's reaction to the rejected parent is a pathological response and severe disturbance of the prior parent-child relationship. This sort of resistance often occurs due to the frightening dynamics of a high conflict divorce. Mental health professionals must realize their own limitations in working with this volatile population in determining who they can and cannot help.

[1] Deutsch and Pruett 2009.
[2] See Johnston, 1993; Johnston and Roseby 1997; Wallerstein and Kelly 1980.
[3] Family Court Review Vol. 39, #3, July 2001, pp. 249-266
[4] 2001.
[5] Deutsch, 2001; Johnston and Walters, et al., 2001; Ward and Deutsch, 2004.
[6] Johnston, et al., 2005.
[7] Stahl 1999.

Helping Clients When Parental Alienation Occurs

By Plinio J. Garcia, MBA, NACD

THE EXPRESSION PARENTAL alienation" triggers numerous emotions. Many in the psychological and legal communities absolutely reject the phrase. In some situations, judges who refuse to accept the terminology side with the parent who doesn't use it. Whether or not you believe in parental alienation, it is important to recognize that in many divorce cases involving children, there is some form of "alienating behavior" carried out by one parent toward the other—and the psychological consequences on the children are often irreparable if not addressed. Attorneys should be aware that they can help families avoid or minimize the effects of parental alienation. To do this, an attorney needs to understand what parental alienation is, what it does, who can be an alienator, what the consequences are, and what he or she can do to stop it.

What Is Parental Alienation?

According to the late Jayne Major, PhD, author of "Breakthrough Parenting," parental alienation occurs "any time one parent communicates in a derogatory way about the other parent in a manner that affects their child or children emotionally, psychologically or even physically."[1]

In the legal system, "parental alienation is a social dynamic, generally occurring due to divorce or separation, when a child expresses unjustified hatred or unreasonably strong dislike of one parent, making access by the rejected parent difficult or impossible."[2] Regardless of the definition, what is important to know as a lawyer is that if you or your client engages in any type of alienating behavior or if the other parent and his or her counsel does so, such behavior creates a conflict within the child and thus "removes" the child's voice to like or love the criticized parent.[3] The results are damaging and, many times, permanent.

Examples of Parental Alienation

Parental alienation can take the following forms:

- *Direct verbal communication between the parent and the child.* A mother might tell her toddler, "You are losing all your friends from school because your father is a bad man. He met another woman and now we have to move away from your friends." Such communication blames the other parent and makes the child hate that parent.
- *Indirect communication.* An example of indirect communication might be the following comment made by one parent to the other in a telephone conversation overheard by their children: "If you loved your children, you would not have left us." The children are led to believe that the other parent does not love them. Or one parent might say something like the following to the grandparents in front of the children: "I know he is a loser; I know I made a mistake."
- *Misleading communication.* One parent might show the children a text message written by the other without allowing them to see the entire thread. For example, let's say the alienating parent has been texting the other that he hates her, and she texts back, "I hate you. I wish I had never met you." The message being shown to the children is cruel, but the children are not seeing all the messages that led to this explosion. So the alienated parent looks mean while the alienating parent looks like the victim.
- *Malicious communication.* As an illustration of malicious communication, the father might use a computer program to alter an image on a porn site to look like the mother and present this to the children as the reason he had to ask her to leave the home.
- *Hidden and/or nuanced communication.* An instance of hidden or nuanced communication

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might be, "Don't tell Daddy that we bought the new toy because he will get mad. This is our little secret." Such a statement leads the child to believe that the other parent is not generous.

- *Social media communication.* One parent can use social media to coerce a child to alienate the other parent, through "likes" or negative comments on Facebook, disparaging "tweets" on Twitter, inappropriate photos posted on social networking sites, etc.

What Types of Parents Can Be Alienators?

Research and personal observations have revealed two kinds of alienating parents: narcissistic and rejecting/abusive.

Narcissistic personality disorder (NPD) is a mental disorder in which an individual is excessively preoccupied with issues of personal adequacy, power, prestige and vanity.[4] According to developmental psychologist Amy Baker, PhD, there are three observed types of parents who try to alienate their children from the other parent.[5] Two of these types of parents are narcissists. Baker identifies them according to two patterns. Pattern 1 is a narcissistic mother in a divorced family. Pattern 2 is a narcissistic mother in an intact family.[6] In these cases, the parent seduces, charms and/or persuades the child that the other parent is stupid, useless, bad or even evil.

Narcissistic fathers who have custody of their children and are divorced are equally capable of alienating behavior. With the rise in the numbers of stay-at-home dads and the growth of same-sex parenting, there is also an increase in the incidence of divorced male parents engaging in behavior that alienates the other parent so as to control the outcome of a divorce or separation. Alienation is gender neutral.

Regarding the third type of alienating parent, Baker explains that rather than portray or create a "close relationship" with the child as the narcissistic parent tries to do, the rejecting/abusive parent engages in a campaign of fear, pain and denigration that leads the child to reject the other parent.[7] Unlike the narcissist, this type of individual usually has a history of being sexually and/or physically abused by a parent or caretaker.

Attorneys can help break the cycle of alienation by simply discouraging their clients from engaging in alienating behavior. More importantly, an attorney should never encourage a client to find ways to alienate his or her children from the other parent in order to win full custody.

The Importance of Addressing Parental Alienation

Sixty-six percent of all divorces in the United States involve children.[8] Half of all divorces involve minor children.[9] Although children of all ages are affected by divorce, those under five are especially vulnerable. Infants cannot survive on their own and dependency on a caretaker, or parent, is crucial for toddlers. In these early years, trust and bonds are created. New studies show that if trust and bonding are lost during this period, they will most likely never occur—and the ramifications are sad and permanent.

Allowing parental alienation to occur can result in the following serious consequences:

- *Parental alienation can lead to trust issues in adulthood.* When a separated or divorced parent criticizes the other, he or she creates an image in the child's mind of danger or unhappiness.

Because the courts eventually want children to spend time with both parents, the alienating parent (the one that the child is supposed to trust) sends the child to spend time with the "dangerous" parent! He or she portrays the other parent as evil and then delivers the child to the monster. The message is, "Daddy is a monster but today I am letting you spend time with him."

- *Parental alienation can create poor self-esteem or even self-loathing in children and adults.* When one parent repeatedly criticizes the other biological parent, he or she unknowingly criticizes fifty percent of that child's genetic composition. Consciously or unconsciously, the child is getting the message, "Fifty percent of me is bad" or "Fifty percent of me is stupid." As adults, these individuals frequently have extreme personality disorders or issues with self-esteem or self-loathing when something goes wrong in their life. They come to think, "I am just like my stupid father."
- *Parental alienation creates a cycle of alienation.* Continuously criticizing or blaming the other parent for the problems in a child's life teaches the child to blame others for his or her shortcomings rather than take responsibility for his or her actions. While the behavior of one parent may have instigated the breakup of the family, how both parents handle this misfortune provides an important lesson for the children. If divorcing or separating parents treat each other with respect and civility, they will avoid raising their children in an environment of hatred and alienation.

How Attorneys Can Address Parental Alienation

Before discussing what attorneys can do to help, the function of attorney's fees should be considered. The family law court system is erroneously based on a "win or lose" platform. This is especially unfortunate when children are involved. The more contentious a divorce is, and the more the parents hate each other and fight over child custody, the more billable hours may exist for attorneys.

Because so many divorces today involve children, attorneys should help their clients prevent alienating behavior. Law firms should offer their partners a brief introduction to parental alienation and parental alienation syndrome.[10] Lawyers should refrain from encouraging parental alienation (at the cost of billable hours) and should even identify this behavior in their clients. If a client is engaging in alienating behavior, ask him or her to stop because it is causing harm to the child or children.

If lawyers see the other side engaging in alienating behavior, they should identify it and bring it to the attention of the judge. If the judge cannot see it or cannot believe it, the attorney should suggest requesting a psychological evaluation of the child by a psychiatrist or therapist who understands parental alienation and parental alienation syndrome. If the pattern continues, the attorney should request a 730 evaluation by an evaluator who believes in and understands parental alienation.

If an attorney does not recommend the proper evaluator, the damage to the child could be worse. In traditional therapy, the therapist is trained to be empathetic with the patient. Unfortunately, in parental alienation syndrome cases, the child is not speaking in his or her own voice. The experiences he or she describes to the therapist or evaluator may actually never have occurred. Therefore, the evaluation or the therapy cannot be properly carried out. Lawyers must obtain proper referrals every time they consider a psychological evaluation, especially a 730 evaluation.

Parental alienation is not a tool by which to win a custody battle. In custody cases, there usually are no winners or losers. Using a child's emotions to gain custody—and the money associated with that custody—is never a winning strategy. The children in a divorce just lost the family unit; they should not also lose a parent—or their self-esteem. Moreover, the alienating parent most likely requires therapy to stop the cycle of abuse, neglect or alienation.

If parents focus on what is best for the child—not what they think is best but what they know is best—everything else should fall into place. When children are involved in divorce, everyone, including the attorneys, should put the children's well-being first. In the end, the client will be grateful.

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

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[1] Jayne Major, "Parental Alienation (PA) & Parental Alienation Syndrome (PAS)" (Major Family Services, 2010).

[2] R. A. Warshak, "Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence," *Family Law Quarterly* 37 (2003), 273–301.

[3] Richard A. Gardner, S. Richard Sauber, and Demosthenes Lorandos, *The International Handbook of Parental Alienation Syndrome* (Springfield: Charles C. Thomas Publisher, Ltd., 2006).

[4] American Psychiatric Association, "Narcissistic Personality Disorder," in *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision* (DSM-IV-TR) (American Psychiatric Publishing 2000).

[5] Amy J. L. Baker, *Adult Children of Parental Alienation Syndrome: Breaking the Ties That Bind* (New York: W. W. Norton & Company, Inc., 2007).

[6] *Ibid.*

[7] *Ibid.*

[8] John E. Desrochers, "Divorce: A Parents' Guide for Supporting Children," National Association of School Psychologists, Bethesda, MD, 2004., accessed April 16, 2013, http://www.nasponline.org/resources/parenting/divorce_ho.aspx.

[9] Sanford M. Portnoy, "The Psychology of Divorce: A Lawyer's Primer, Part 2: The Effects of Divorce on Children," *American Journal of Family Law* 21(4), 2008:126-134.

[10] Parental alienation syndrome occurs when, through the efforts of one parent, children lose their own voice in how they view and love their other parent. According to Richard Gardner, parental alienation syndrome occurs when one parent in a post-custody arrangement successfully manipulates the child or children to turn against the other parent.

History, Public Policy and Plain Talk about California Family Law

By Phillip Feldman

THE LEGITIMATE STAKES OF SOME DIVORCES—bona fide, property, custody or support issues–mandate the same attention as high stakes civil advocacy. However, an overwhelming majority of divorces suffer from over-advocacy and a gratuitous need for armed-to-the-teeth combat. Collaborative law, common sense and the ability of both spouses to understand the issues are all tools to reduce time, expense and often heartache.

Most of the time, in a "two good parents, insufficient money and property" dissolution, it's difficult for two experienced counsel to see what the fuss is all about. Sometimes, the fuss is all about hidden agendas, hidden assets and hidden emotions, so tangled and deep, there's simply nothing in law or lawyering (other than referral to appropriate psychotherapists) for the court or counsel to be of much help. Fortunately, two hangovers from yesterday's bad habits are no longer with us (we hope): attorneys purporting to counsel, guide or represent both husband and wife in any stage of prenuptial preparation or dissolution[1]; and law firms running up bills by hand-holding clients needing professional psychotherapy and providing unlicensed amateurs on the law firm's payroll as counselors.[2]

Community Property

Although we may not think of family law as being dynamic, a bit of time and space travel will enlighten us about California's ever-evolving family law history. Going back to Old Testament scribes, different versions describe Adam as Eve's ruler or master. Women were chattels owned by their fathers and later husbands, who were bigamists if affordable.

Matrimonial law throughout the United States adhered to the common law of England, enabling male superiority to property acquired by married couples. Only 20% of the United States recognize the egalitarian philosophy of the marital partnership's property interests we call community property.

California's early Mexican landowners felt their civil influence throughout the future state before Chief Justice Stephen J. Field brought his common law based codes from New York to jump start California law. In 1849, California's Constitutional Convention decided our state would follow the common law but created an exception to follow Mexican civil law in recognition of community property.[3] All property produced through the efforts of either spouse belong to the couple as a two person community.[4]

Spousal Support

Only a bit more than half a century ago, for a divorcing wife to get any alimony, there had to be a showing that the husband was at fault. Fault went back to an 1872 law identifying adultery, desertion, extreme cruelty, wilful neglect, habitual intemperance, felony conviction and later insanity. Alimony substituted for the support she lost because of his fault.[5] Later, where both spouses were blameworthy, either could receive alimony.[6] Private detectives had a field day assisting affluent folks out of marriages with a support bonus.

Forty-three years ago, the California Family Law Act became law. Divorce became dissolution; annulment became voidable marriage; and California adopted "no fault" divorce. Family Code Section 4330 enunciated and re-affirmed the court's role as chancellor in equity:

> *…the court may order a party to pay for the support of the other party an amount for a period of time, that the court determines is just and reasonable, based on the standard of living established during the marriage taking into consideration the circumstances as provided in… Section 4320.*

Section 4320 lists thirteen circumstances to be considered in ordering spousal support: earnings, earning capacity, unemployment hiatus for house spouses, contributions to spouse's career, ability to pay, assets, income and marital living standards, marital duration, separate property and obligations, ability to work without depleting care of dependent children, age and health, tax consequences and a history of domestic violence or criminal conviction of spousal abuse. The goal is that the "supported party shall be self-supporting within a reasonable time," which is half the length of the marriage, except for marriages of at least ten years where the court can retain jurisdiction.[7] However, the court's discretion is not bound by those factors because the court can "balance the hardships to each party."

For a while, at least for low income dissolutions, courts and counsel became enamoured with a mechanical approach to calculate spousal support with the innovation of a computer program called DissoMaster. It was, after all, a lot easier than exercise of independent professional judgment and gave advocates one less thing to be contentious about. In *Marriage of Zwizel* (2000) 83 Cal. App. 4th 1078, all were reminded that reliance on DissoMaster is inadequate.

Support while dissolution is pending is treated differently than permanent support (alimony) based on temporary retention of the status quo and preservation of the assets of the spouse needing support.[8] Enabling equalization of funds for counsel is public policy.[9] Where there aren't enough funds to support full time counsel and the parties are unable to work things out, consideration of limited scope representation (Form FL 950) may be in order.

Phillip Feldman sat as a Judge Pro Tem in Van Nuys granting dissolutions and annulments inter alia for years, managed a firm handling hundreds of dissolutions, testified as an expert in California family law in other states and testifies as an expert in family law professional negligence in California and throughout the United States. He can be reached at statebardefense@aol.com.

The Marital Relationship

With the advent of no fault dissolutions, defenses to divorce went by the wayside as the catch-phrase "irreconcilable differences" alone entitled the testifying spouse to end the marriage. The proposition long accepted in partnership law that you can't force two people to be in business together became the philosophy guiding termination of the marital relationship, which had long forced two people to live together.[10] For the pious observers of papal dogma, legal separation enables stalwarts to satisfy the church without losing the benefits of no fault so long as subsequent marriage is not required.

Child Custody and Visitation

Long before we had a Family Code, (old) Civil Code 4600(a) provided that if the child had sufficient capacity and was old enough, the court had to give due weight to the child's wishes.[11] Parents are equally entitled to custody of their minor child.[12]

> *The health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making orders regarding physical or legal custody or visitation of children...*[In the absence of conflict*] it is the policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated.*[13]

In addition to health, safety and welfare, factors for consideration include child abuse by any caretaker, cohabitant or acquaintance of a parent and a parent's substance abuse. The court may require independent corroboration from Child Protective Services or other agencies. The parents, however, may stipulate around these factors.[14]

Federal Kidnapping Prevention Act[15] and the Uniform Child Custody Jurisdiction and Enforcement Act[16] discourage parental attempts to override court orders based on the best interests of the minor child and not the disgruntled parent. Best interests of the child trumps visitation or other parental equalization policies.[17] Sibling non-separation, on the other hand, is a factor to be considered.[18]

Family support and child support are beyond the confines of this history exercise but all parents generally have a duty of support.

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1 Rules of Professional Conduct 3-310.
2 Rules of Professional Conduct 3-110, 4-200.
3 See "The Origin and Civil Law Foundation of the Community Property System; Why California Adopted it; and Why Community Property Principles Benefit Women," *11 University of Maryland Law Journal Of Race, Religion Gender and Class 239* (June 2011).
4 The issues of "separate vs. community" property, *Pereira v. Van Camp*, "transmutation," rescission, etc. each have their own relevant history and public policy but require more than this brief history lesson.
5 *Miller v. Superior Court* (1937) 9 Cal. 2d 733.
6 *De Burgh v. De Burgh* (1952) 39 Cal. 2d 858.
7 Family Code §4336.
8 *Loeb v Loeb* (1948) 84 Cal App 2d 141.
9 *Marriage of Hatch* (1985) 169 Cal App 3d 1213.
10 *Packard v Arellanes* (1861) 17 Cal. 525; Corporations Code 16403, 16404 and 16503.
11 California Family Code §3042.
12 California Family Code §3010.
13 California Family Code §3020.
14 California Family Code §3011.
15 28 USCA §1738A.
16 Family Code §3400 et seq.
17 *Marriage of Stoker* (1977) 65 Cal App 3d 871.
18 *Marriage of Williams* (2001) 88 Cal App 4th 808.

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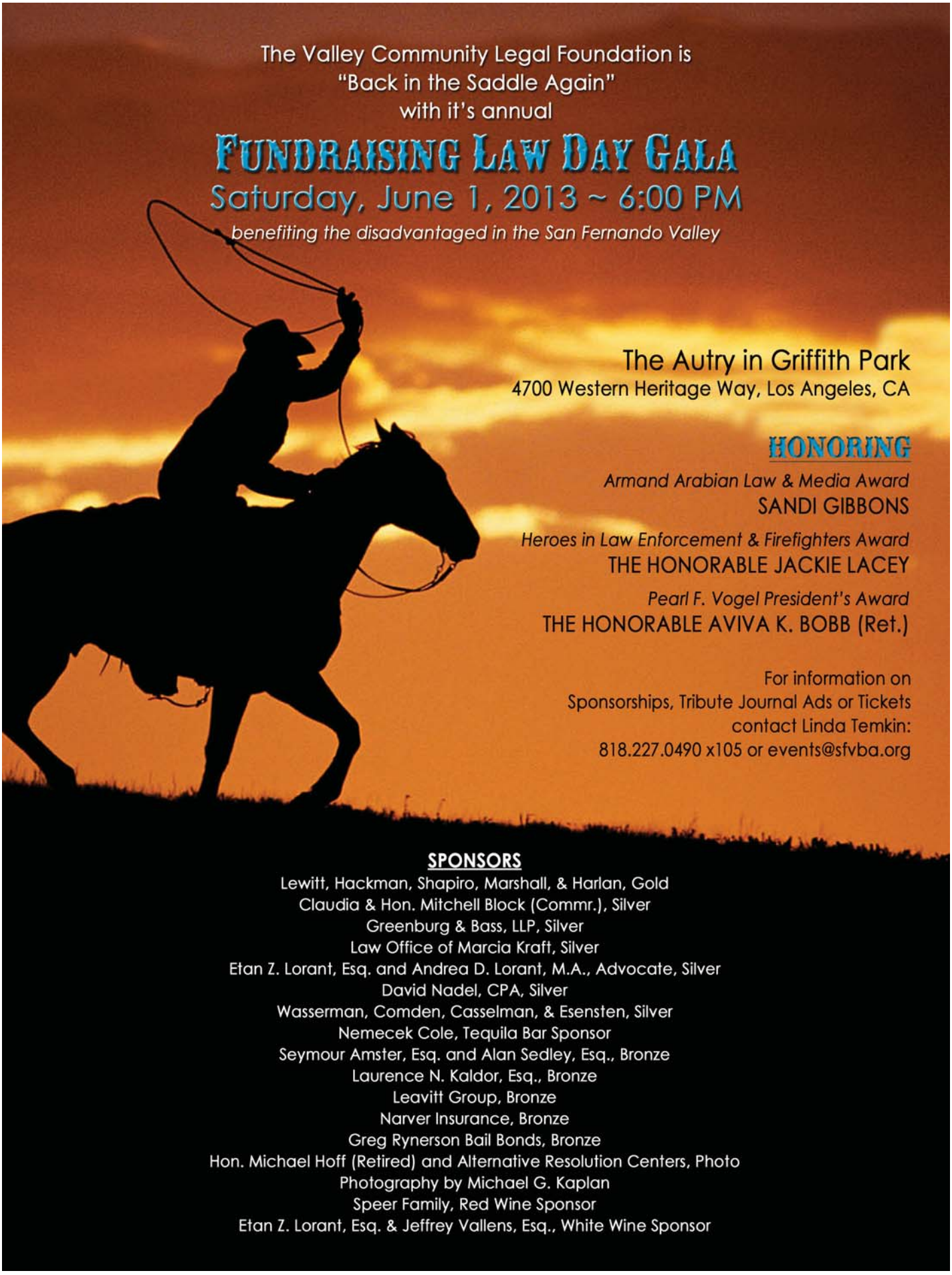
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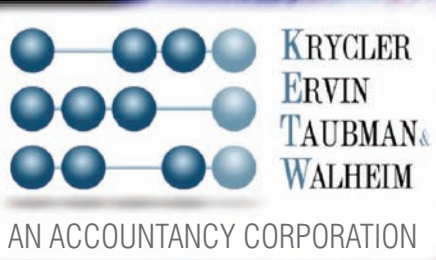

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