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MAY 2016

Winner of the 2014-2015 LA Press Club Award

On the cover: *Jeffrey I. Ehrlich, Gerald M. Serlin, Neal S. Dudovitz, James E. Blatt, and Douglas G. Benedon*
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FEATURES

COLUMNS

DEPARTMENTS

VALLEY LAWYER

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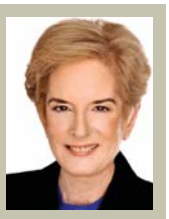
Time for Leaders to Lead

CAROL L. NEWMAN
SFVBA President



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RECENTLY I WAS PRIVILEGED to be among a sizeable group of bar leaders who met with the Presiding Judge of the Los Angeles Superior Court (LASC) downtown at the Stanley Mosk courthouse to listen to a presentation on court funding. Three of us from the SFVBA were present, and the group's organizer expressly acknowledged our Bar's participation in this process. Some of us from the Bar, including myself, our Immediate Past President Caryn Sanders, and Trustee Bill Daniels, are actively involved in meeting with legislators to increase court funding. Soon we hope to have an informal committee devoted to this effort.

The meeting downtown was intended to give us the tools to prepare us for the meetings with legislators as well as to advise us of the status of budget discussions. The governor proposes a budget to the legislature in January of each year, and then the budget is revised in May and approved in June. The spring of each year, therefore, is the window of time in which we can have some influence on the money which is allocated for the courts. Now is the time for leaders to lead.

The LASC is the largest trial court in the country and comprises more than a third of the California judiciary. It took a huge hit in the Great Recession, when 79 courtrooms just in Los Angeles County alone were closed and a quarter of the staff laid off because of budget cuts. The court has never been able to recover fully from those cuts but has made great strides in creatively dealing with changed circumstances. Somehow the court has kept most of the doors open, and must continue to adjust to doing more with less.

Since the Great Recession, Los Angeles has been able to reopen 22 courtrooms where caseloads are highest, including a much-needed unlawful detainer courtroom in Van Nuys. Before that courtroom was reopened, litigants in unlawful detainer cases in the Valley literally had to go to another city to have their cases resolved. Fortunately that is no longer true.

The proposed budget provides $146.3 million in new funding for the courts across the state, and includes several very positive structural elements, including much-needed funding of employee benefit costs increases; funding to "backfill" decreases in the Trial Court Trust Fund caused by reductions in fine and fee revenue; and elimination of the 2% holdback for trial court funds for an "emergency reserve," and funding of a $10 million branchwide reserve that will remain year-to-year if not used.

The proposed budget also includes one-time funding for building maintenance, language access, and one-time costs of continuing to implement Proposition 47. Further, it provides $30 million as a one-time grant program to stimulate innovations. All of these are welcome changes.

For the LASC, however, the budget as proposed will provide little

little ongoing funding for court operations. The courts statewide will receive only $20 million in ongoing funding, but that will likely cover nothing more in Los Angeles County than the projected revenue shortfall from the inability to collect civil assessments because of the traffic amnesty program. Ongoing funding is necessary to add more staff and open more courtrooms where the need is greatest, especially in family law, dependency, and civil cases. Additionally, there will not be enough funding to restore court reporters in civil cases. In short, our court will be funded at only 68% of what it needs.

An additional $30 million in ongoing funding would make a big difference. While technology (such as improvements in case management systems, including e-filing) can help, nothing will replace open courtrooms, particularly for litigants who will not benefit from improvements in technology. For instance, in Los Angeles County more than half of the litigants in collections and unlawful detainer cases, and approximately 80% in family law, are self-represented.

The Judicial Council estimates that $2.4 billion is needed for a fully functioning court system, leaving a current funding gap of more than $400 million across the state. Surprisingly, the judicial branch budget is only 1.4% of the total state general fund. By contrast, K-12 education comprises 41.8%, higher education 11.9%, and health and human services 27.5%. Judicial branch funding is a drop in the bucket.

By the time you read this, it may or may not be too late to affect this year's budget. However, the same issues are expected to recur next year and each succeeding year. If you want to make a difference either this year or in the coming years to advocate for greater financial support for the courts, please step forward and contact me. Your assistance will be much appreciated.

SFVBA Welcomes Silver Sponsor Rose, Snyder & Jacobs

ELIZABETH POST
Executive Director

epost@sfvba.org

THE SAN FERNANDO VALLEY BAR ASSOCIATION welcomes our latest Silver Sponsor, accounting firm Rose, Snyder & Jacobs LLP. The Encino firm was founded in 1976 and is a leading provider of accounting and business advisory services. As one of the largest accounting firms headquartered in the San Fernando Valley with 50 professionals to service clients' needs, Rose, Snyder & Jacobs offers a wealth of expertise and the highest level of support.

SFVBA President-Elect Kira Masteller knows firsthand what Rose, Snyder& Jacobs has to offer SFVBA members. "Rose, Snyder & Jacobs is a full-service accounting and business firm," Masteller says. "They work with large, mid-size and small businesses, closely held companies, and families of wealth, as well as individuals, executives, and non-profits. They do audit, SEC compliance, estate planning and trust work, and tax planning at all levels."

Masteller has engaged the accounting firm as a trusted advisor for her trusts and estate planning clients for many years, and was instrumental in connecting Rose, Snyder & Jacobs with the SFVBA. "The firm has something to offer our members and our members' clients. They are fantastically diverse and engaged in our community, and employ the caliber of professionals who our members can be proud to be affiliated with."

The firm's senior and founding partner, Tony Rose, is a noted author of two books, *Say Hello to the Elephants* and *Five Eyes on the Fence*, in which he writes about the five capitals: human, intellectual, social, structural, and of course, financial capital.

Professional service providers and other businesses looking to offer their products and services to SFVBA members can contact me to request a copy of our sponsorship brochure detailing marketing opportunities through the SFVBA.

May 26 Blood Drive

The San Fernando Valley Bar Association is teaming up with the American Red Cross to host a community blood drive on Thursday, May 26 at the Encino-Tarzana Library. The library is located on Ventura Boulevard, a few blocks east of Reseda Boulevard.

The blood drive is a convenient way to give back to the community. According to the American Red Cross website, "low blood supplies are typical from late May through September because regular donors and their families become busy with summer activities and may neglect to donate blood. At the same time, blood needs rise as increased roadway and travel-related accidents drain supplies—particularly during high travel weekends like Memorial Day."

Blood donors must be in good general health and feeling well, be at least 17-years-old or 16-years-old with parental consent, and weigh at least 110 pounds.

Invite your colleagues and family to participate. The blood drive will take place from noon until 6:00 p.m. To schedule your appointment today, visit www.redcrossblood.org and enter sponsor code SFVBA in the box at the top right-hand corner of the website. Or contact Member Services Coordinator Melissa Garcia at (818) 227-0490, ext. 107 or melissa@sfvba.org.

SUN	MON	TUE	WED	THU	FRI	SAT
1	**2** Valley Bar Network 5:30 PM BUCA DI BEPPO ENCINO VBN is dedicated to offering organized, high quality networking for SFVBA members.	3	**4** LinkedIn Networking for Attorneys Sponsored by FindLaw. 12:00 NOON SFVBA OFFICE	**5** Membership & Marketing Committee 6:00 PM SFVBA OFFICE	6	7
8 Happy Mother's Day	*Valley Lawyer* Member Bulletin Deadline to submit announcements to editor@sfvba.org for June issue. **9**	**10** Probate & Estate Planning Section California End of Life Option Act: Promoting Death with Dignity or Enabling Assisted Suicide? 12:00 NOON MONTEREY AT ENCINO RESTAURANT Healthcare Attorney Alan J. Sedley will discuss the California End-of-Life Option Act and its impact on you and your clients. (1 MCLE Hour) Board of Trustees 6:00 PM SFVBA OFFICE	**11** Business Law & Real Property Section Cybersecurity and Confidentiality: Attorneys' Ethical Obligations 12:00 NOON SFVBA OFFICE Many lawyers are unaware how easily their computer systems can be breached. Attorney Michael Rosenblum will address lawyers' ethical duties and responsibilities regarding keeping data confidential. (1 Hour Legal Ethics)	12	13 **20** Bankruptcy Law Section The Flawed Chapter 13 Plan 12:00 NOON SFVBA OFFICE R. Grace Rodriguez and Melissa Besecker will present the craziest Chapter 13 plan and attendees will break into small groups to determine if the plan and the case can be saved! (1.25 MCLE Hours)	14
15	16 **23** Family Law Section Family Law Appeals 5:30 PM MONTEREY AT ENCINO RESTAURANT The distinguished panel will include Judge Shirley Watkins, Leslie Ellen Shear, CFLS and Daniel Davisson, CFLS. Approved for Legal Specialization. (1.5 Hours MCLE)	**17** Taxation Law Section Estate and Gift Tax Update 12:00 NOON SFVBA OFFICE Kira S. Masteller will bring the group up to speed on the latest changes in the estate and gift tax rules and regulations. (1 MCLE Hour)	**18** Workers' Compensation Section 12:00 NOON MONTEREY AT ENCINO RESTAURANT	19	21	
22		**24** Editorial Committee 12:00 NOON SFVBA OFFICE	**25** Litigation Section and New Lawyers Section Judgment Enforcement for the Non-Collections Attorney 12:00 NOON SFVBA OFFICE Attorney Michael Raichelson will discuss how to evaluate potential adverse parties before litigation and how to create enforceable judgments; how to proceed with wage garnishments, including new limits effective this year; and the collections process. Worthwhile for litigators, family law and corporate attorneys. (1 MCLE Hour)	26	27	28
29	**30** Memorial Day	31				

CALENDAR

JUNE 2016

SUN	MON	TUE	WED	THU	FRI	SAT
			1 *Valley Lawyer* Member Bulletin Deadline to submit announcements to editor@sfvba.org for July issue.	2 Membership & Marketing Committee 6:00 PM SFVBA OFFICE	3	4
5	6	7	8	9	10	11
12	13	14 Probate & Estate Planning Section 12:00 NOON MONTEREY AT ENCINO RESTAURANT --- Board of Trustees 6:00 PM SFVBA OFFICE	15 Workers' Compensation Section 12:00 NOON MONTEREY AT ENCINO RESTAURANT	16	17 Member Appreciation Dinner 5:30 PM THE STAND ENCINO **See ad below**	18
19 HAPPY FATHER'S DAY	20	21 Taxation Law Section TEFRA 12:00 NOON SFVBA OFFICE Chad Nardiello will discuss the latest implication of the Tax Equity and Fiscal Responsibility Act. (1 MCLE Hour)	22	23	24 Bankruptcy Law Section Settling with the Trustees 12:00 NOON SFVBA OFFICE Attorney Stella Havkin leads this popular seminar. (1.25 MCLE Hours)	25
26	27	28	29	30		

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.

SCALIA'S LASTING LEGACY:

In February, Associate U.S. Supreme Court Justice Antonin Scalia died unexpectedly. As a jurist, Justice Scalia expressed strong judicial views with a candid, colorful, vocal style. Those who share Justice Scalia's perspective, and those who do not, can nearly all agree in one respect; the Justice's presence on the Court had an indelible and potentially lasting impact.

At the core of Justice Scalia's jurisprudence was the concept of originalism in the interpretation and application of constitutional law principals. Here, *Valley Lawyer* presents discussion and alternative views by three appellate lawyers concerning this approach to analyzing and applying the provisions of our Constitution. *Valley Lawyer* invites our readers to consider these views in relation to your own in reflecting on the legacy of Justice Scalia.

Living Constitution

By Tamila C. Jensen

THE SUPREME COURT MUST INTERPRET the Constitution to apply to the rights and duties of citizens in today's world.

The Constitution was drafted by men steeped in the liberal ideals of the Enlightenment.[1] While they were wealthy (and well educated) landowners, merchants, and professionals, and some were slave owners, what they wanted was freedom from England and a stable government that would endure. Familiar with Enlightenment theories of politics and government, they set out to craft a constitution based on those ideals. That in itself is enough to suggest the drafters intended the Constitution to accommodate changes that might come.

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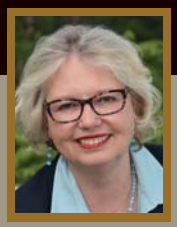

Tamila Jensen is a graduate of the University of California at Berkeley and the University of California at Davis School of Law. She recently earned an LLM in Transactional Commercial Practice, Lazerski University, Poland and is a past president of SFVBA. She can be reached at tamila@earthlink.net.

DEBATING THE CONSTITUTION

Constitutional Originalism

By Jessica M. Di Palma and David W. Moreshead

IN HIS NEARLY THIRTY YEARS ON THE United States Supreme Court, the late Justice Antonin Scalia consistently used an "originalist" approach to constitutional interpretation. Though he often polarized legal minds, he singlehandedly shaped the modern legal landscape.

Originalism as a Judicial Philosophy

Originalism is a form of interpretation that examines the Constitution through the objective meaning of its text as written in 1789. To properly understand originalism, one must "immers[e] oneself in the political and intellectual atmosphere of the [18th century]," rather than relying on the beliefs and attitudes of modern America.[1] Though many view this approach as outdated and impractical, Scalia believed that a true democracy did not require the judiciary to change with the times; instead, that was the role of elections, and constitutional guarantees were intended only to protect the Framers' "original values."[2]

Since originalism does not account for modern prejudices, in Scalia's view, it was as close to an objective form of constitutional interpretation as could be achieved.[3] He rarely strayed from this

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Jessica M. Di Palma and **David W. Moreshead** are Appellate Fellows at the civil appellate law firm of Horvitz & Levy LLP in Encino. They can be reached at jdipalma@horvitzlevy.com and dmoreshead@horvitzlevy.com, respectively.

Living Constitution

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Today we are a country of millions of people from all backgrounds, religions, economic classes and ethnicities, living in a high-tech interconnected world. To rely only on what the founding fathers knew, or even dreamed about, would leave us with a very thin (and less helpful) basic law.

The U.S. Constitution was the first of its kind and the model for many others worldwide. More than 200 years later, it continues as the basic statement of our social compact. Its strength is twofold. First, it does not change much. Some countries change their constitution capriciously, weakening it in the process. Second, it remains vital and relevant as a guide and fundamental law of the land pervading all levels of everyday life.

It is the work of the Supreme Court to keep the Constitution alive and make it work. To do that the Court must apply the words of a 227-year-old document, written by an elite few, to the needs of millions of people from all walks of life, living in a world of technological and social change far beyond anything the drafters could have imagined.

The goal of keeping the Constitution relevant could be met by frequent amendment. However, the drafters made it difficult to amend the Constitution. It has been amended only 27 times. The Constitution was drafted in secret when the Articles of Confederation failed and the Bill of Rights[2] was demanded by some states (principally New York) as a condition of ratification. A second set of amendments arose from the Civil War.[3] Both events involved the near collapse of government.

James Madison thought the Bill of Rights was unnecessary because the rights of man were implicit in the Constitution itself. Steeped in the Enlightenment, the founders believed one of the purposes of good government was to protect the rights of citizens and that these rights were implicit in limited (as opposed to autocratic) government. An implicit rule is opposed to an overtly stated one and requires the courts to interpret and apply overtly what is implicit in the text.

The Constitution inspired great passion from its inception because it was drafted in secret by men who were sent to a convention only to make adjustments to the Articles of Confederation under which the United States had operated since early in the revolutionary war. Therefore, the Constitution required explanation by its drafters in the process leading to ratification. Under the pseudonym Publius, James Madison, John Jay, and Alexander Hamilton wrote *The Federalist Papers* to counter the arguments against adoption of the new constitution.[4]

What does Publius (in this case, Hamilton) have to say about the powers of the judicial branch?

"The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority. . . . Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all

the reservations of particular rights or privileges would amount to nothing"[5]

Publius continues: "The interpretation of the laws is the proper and peculiar province of the courts."[6] Publius relies on the limiting force of precedent to avoid arbitrariness in the courts. "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. . . ."[7]

Two notable points arise from *The Federalist* argument above. Both support the authority of the Supreme Court as the final interpreter of the Constitution. First, the argument relies on the familiar rules of the common law as the limit on judicial authority. Our legal system is based largely on the English common law. The founders were familiar with the common law, as are we.

The common law proceeds by *stare decisis*, the idea that once a point of law has been decided it should not be reopened in a later case. This leads to the application of precedent to new facts. In its very core, this is a system of judge-made law. It depends on judges to create, apply, and follow the law and to apply the law to the particular case before the court. *Stare decisis* is one of the ways that ours is a self-regulating system. Judges are not free to do whatever they want. They must follow the law. It is a system that has mostly worked well for hundreds of years. It is the system we work in every day and it by and large does not inspire fear in any of us. Therefore, to apply this system of law to Constitutional issues is not radical. It is traditional, well established, and functional.[8] In the *Federalist Papers*, it is in this familiar territory that Publius finds the limits on the judicial branch.

Second, Publius speaks often of the "tenor" of the Constitution. Tenor means the "true intent and meaning" of the words,[9] leaving ample room for a court to find that "true intent and meaning."

The debate over the "tenor" of the Constitution and role of the Supreme Court has been going on since the Constitution was adopted. *Marbury v. Madison* (1803)[10] is the seminal case and established that the courts have the responsibility and duty to say what the Constitution means.

The Court in *Marbury v. Madison* struck down an act of Congress as unconstitutional and established the power of judicial review.[11] "It is emphatically the province and duty of the judicial department to say what the law is." The decision, written by John Marshall, concludes: "[A] law repugnant to the Constitution is void, and courts, as well as other departments, are bound by that instrument."

The tyranny of the majority has been a problem in democracies since antiquity.[12] From the beginning, rights of minorities had to be protected. The duty to do so ultimately resides in the Supreme Court. Not only is it the purview of the Supreme Court to "say what the law is," it also is the duty of the Court to foster "inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice. . . ."[13]

Applying constitutional principles has been essential to protecting rights of individuals, minorities, the disenfranchised and disabled, among many others. Without this process we would not have the cases that have shaped and defined modern *America. Brown v. Board of Education of Topeka*[14] set aside the separate but equal doctrine (itself a creature of the Supreme Court in *Plessy v. Ferguson*)[15]. *Gideon v.*

Wainwright held that a defendant in a criminal case has a right to an attorney for which the state must pay if the defendant is unable to afford an attorney.[16] *Miranda v. Arizona* assured that the accused are aware of their rights before they are interrogated by the police.[17] *Gitlow v. New York* extended the protections of free speech and freedom of the press to a state (New York) through the Fourteenth Amendment.[18]

The Supreme Court also has often acted to expand the role of the Constitution in commerce and finance. For example, in *Gibbons v Ogden*, the Court held the power to regulate under the Commerce Clause extended to the power to regulate navigation.[19] In *McCulloch v. Maryland*, the Supreme Court established that the Constitution impliedly granted to Congress powers to support the implementation of express powers and that state action cannot impede the constitutional exercise of power by the federal government.[20] The Supreme Court first held a state law unconstitutional in *Fletcher v. Peck*.[21]

All of these cases, and many more, have made the United States all that we are today. None of the critical issues decided in these cases is addressed explicitly in the Constitution. Had the Supreme Court not interpreted the Constitution to protect all manner of citizens and rights and shape our government, we would be a far different and far less free nation today. Because our Constitution provides a path forward, even if we don't' always get the result we want, we have a profound belief that there is hope for the future.

[1] About 1685 to 1815.
[2] The First through Tenth Amendments.
[3] The Thirteenth, Fourteenth and Fifteenth Amendments adopted between 1865 and 1870.
[4] It was common practice at the time to write political pamphlets, which were rife, under a pseudonym.
[5] *The Federalist* (1887-1888) Hamilton, Madison, Jay, Barnes & Noble Classics 2006, No. 78, p. 429. No. 78 was written by Alexander Hamilton. Madison is considered to be the chief drafter of the Constitution. *The Federalist* provides a window into what the drafters intended and expected when they wrote the Constitution.
[6] *The Federalist*, supra, p. 430.
[7] *The Federalist*, supra, a p. 434.
[8] A good general discussion of how the common law proceeds can be found in Burton, Law and Legal Reasoning (1995).
[9] Black's Law Dictionary, Fourth Edition, West Publishing Co. 1951.
[10] *Marbury v. Madison* 5 U.S. 137 (1803).
[11] Interestingly, James Madison was the defendant and had just been appointed Chief Justice and was still serving as Secretary of the Treasury.
[12] Thucydides, *History of the Peloponnesian War*. It could be very dangerous to be an aristocrat in Athens when the demos was in power and vice versa. Losing generals often faced death when they lost a battle in the long war between Athens and Sparta and its allies. [13] *The Federalist, supra*, No. 79, p. 439.
[14] 347 U.S. 483 (1954).
[15] 163 U.S. 537 (1896).
[16] 372 U.S. 335 (1963).
[17] 384 U.S. 436 (1966).
[18] 268 U.S. 652 (1925).
[19] 22 U.S. 1 (1824).
[20] 17 U.S. 316 (1819).
[21] 10 U.S. 87 (1810).

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method in his time on the Supreme Court, and, in different contexts, this objective approach led to varied results—several of which Scalia himself disagreed with as a political matter.

Freedom of Expression

Scalia believed the First Amendment was designed to provide strong protection for unpopular ideas and criticism of the government—even if he personally disagreed with those sentiments.[4] Reflecting on T*exas v. Johnson*,[5] in which he joined the majority's holding that burning the American flag is protected by the First Amendment, Scalia explained, "I detest the burning of the nation's flag, and if I were king, I would make it a crime. But as I understand the First Amendment, it guarantees the right to express contempt for the government, Congress, the Supreme Court, even the nation and the nation's flag."[6]

Right to Bear Arms

In *District of Columbia v. Heller*,[7] Scalia, writing for the Court, overturned a District of Columbia statute which effectively forbade private ownership of handguns. In a detailed opinion, Scalia explained that the text of the Second Amendment protected the "right of the people" (which included private individuals) to "keep and bear" (which Scalia concluded must have extended beyond militias) "arms" (which, when examined through an 18th century lens, included all weapons, not just those required for military use).[8] To support his conclusion, Scalia analyzed English law, legal commentaries, and the historical context surrounding the use and possession of weapons at the time of the Constitution's ratification.[9]

What is most interesting about the *Heller* decision, however, is Justice Stevens' dissent. Despite never having professed a belief in originalism, Stevens undertook his own extensive historical interpretation of the Second Amendment to arrive at a result contrary to Scalia's opinion.[10] Stevens' use of originalist methods is one of the most prominent examples of Scalia's enduring impact on the Court's jurisprudence.

Unlawful Searches and Seizures

As a justice, Scalia wrote over twenty majority opinions (along with numerous concurrences and dissents) addressing the Fourth Amendment. In *California v. Acevedo*,[11] the majority held there is a general presumption that law enforcement should secure a warrant for a search to be reasonable. Scalia disagreed. His concurrence explained that when the Constitution was drafted, criminal defendants' only recourse for unlawful searches was to sue the officer performing the search.[12] But officers acting with a warrant were immune, indicating to Scalia that warrants are not required to make a search lawful, but as in the 18th century, should operate as a defense mechanism and an indicator of reasonableness.[13]

Scalia also consistently argued that the Fourth Amendment and the common law of trespass go hand-in-hand because the Fourth Amendment maintains a "close connection to property," since it protects "persons, houses, papers, and effects."[14] Writing for the Court, Scalia used this trespass approach in *United States v. Jones*,[15] where the government attached a GPS tracking device to a criminal defendant's vehicle. Because the government physically invaded the vehicle, he found a trespass and a Fourth Amendment violation.[16]

In *Florida v. Jardines,*[17] Scalia again used a trespass analysis, explaining that the Framers intended to give an individual's property the utmost protection from governmental intrusion. Accordingly, the Court held that using a police dog to sniff a suspect's front porch for drug odors was a search under the Fourth Amendment.[18] Scalia's Fourth Amendment decisions often favored criminal defendants—a result surprising to many but consistent with his originalist philosophy.

The Confrontation Clause and Right to a Jury Trial

In *Crawford v. Washington,*[19] the Court overruled prior Supreme Court precedent and created a bright-line rule that to protect a defendant's Sixth Amendment right of confrontation, the defendant must have the opportunity to cross-examine any witness who provides testimonial evidence against him or her. Scalia, writing the majority opinion, relied heavily on legal history, examining the tradition of witness confrontation from Roman times through the settling of the American colonies.[20]

In *Blakely v. Washington*,[21] the Court examined a judge's determination that a criminal defendant guilty of kidnapping acted with "deliberate cruelty," resulting in a heightened sentence. Scalia, writing a majority opinion on behalf of a unique conglomeration of five traditionally conservative and liberal justices, noted that, historically, the right to a jury trial enshrined in the Sixth Amendment was intended to act as a restraint on judicial power.[22] This historical approach led the Court to hold that a jury, not a judge, must make all findings the law requires for imposition of an enhanced sentence beyond a reasonable doubt.[23]

Liberty Interests Under Substantive Due Process

Scalia believed that judges should refuse to enforce rights not explicitly included in the Constitution, unless they are rooted in long-standing tradition or specific historical practice. Though this argument often arose when the Court addressed high-profile social issues such as abortion,[24] familial association,[25] LGBT rights,[26] and the right to die,[27]

Scalia believed that the legislature, not the judiciary, is responsible for protecting these liberties.

In his dissent in *Planned Parenthood v. Casey*,[28] a decision in which the Court reaffirmed *Roe v. Wade*'s protection of a woman's right to an abortion, Scalia refused to acknowledge abortion as a constitutionally protected right "because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed."[29]

In *Cruzan by Cruzan v. Director, Missouri Department of Health,*[30] the majority held a state does not violate a patient's due process rights by requiring clear and convincing evidence of that patient's desire to have artificial life support withdrawn. In his concurrence, Scalia emphasized that, consistent with the principles of originalism, "[t]his Court need not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself."[31]

Most recently, in his dissent in *Obergefell v. Hodges*,[32] where the Court held same-sex couples have a constitutional right to marry, Scalia called the majority's holding "the furthest extension one can even imagine . . . of the Court's claimed power to create 'liberties' that the Constitution and its Amendments neglect to mention." He argued that the case should have been resolved on the premise that "[w]hen the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so," so that the decision whether to legalize same-sex marriage should be left to each state's democratic process.[33]

The Advantages of Originalism

Scalia's brand of originalism produced myriad results. Nevertheless, his adherence to originalism produced several consistent themes: (1) a limitation of judicial power by requiring that all decisions be based in the law's text, preventing judges from interpreting the Constitution according to their own subjective beliefs[34]; (2) predictability among federal courts, which, like his property-based approach to the Fourth Amendment, resulted in bright line or readily administrable tests[35]; and (3) "preserv[ation of] the separation of powers, by keeping courts from encroaching on the legislative role and democratic will," and also protecting juries from encroachment by judges, legislators, and prosecutors.[36] Whatever one thinks of his jurisprudence, Scalia's originalist legacy has changed the legal landscape forever.

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[1] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 856-57 (1989).
[2] *Id.* at 862.
[3] *Id.* at 863.
[4] Derigan Silver & Dan V. Kozlowski, *The First Amendment Originalism of Justices Brennan, Scalia and Thomas*, 17 Comm. L. & Pol'y 385, 403, 415-16 (2012).
[5] *Texas v. Johnson*, 491 U.S. 397 (1989); *see also United States v. Eichman*, 496 U.S. 310 (1990).
[6] Lauren Rubenstein, Justice Scalia Delivers Defense of Originalism at Hugo Black Lecture, News @ Wesleyan (Mar. 26, 2012), http://newsletter.blogs.wesleyan.edu/2012/03/26/scaliahugoblack/.
[7] *District of Columbia v. Heller*, 554 U.S. 570 (2008).
[8] *Id.* at 591-92.
[9] *Id.* at 592-605.
[10] *Id.* at 636-80 (Stevens, J., dissenting).
[11] *California v. Acevedo*, 500 U.S. 565, 569 (1991).
[12] *Id.* at 581 (Scalia, J., concurring).
[13] *Id.*
[14] *United States v. Jones*, 132 S. Ct. 945, 949 (2012).
[15] *Id.* at 947.
[16] *Id.* at 954.
[17] *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013).
[18] *Id.* at 1417-18; *see also id.* at 1418 (Kagan, J., concurring); *Kyllo v. United States*, 533 U.S. 27 (2001).
[19] *Crawford v. Washington*, 541 U.S. 36, 68 (2004).
[20] *Id.* at 42-50.
[21] *Blakely v. Washington*, 542 U.S. 296, 298 (2004).
[22] *Id.* at 305-06.
[23] *Id.* at 313-14.
[24] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality opinion).
[25] *Troxel v. Granville*, 530 U.S. 57 (2000); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).
[26] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003).
[27] *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).
[28] *Planned Parenthood*, 505 U.S. at 846.
[29] *Id.* at 980 (Scalia, J., concurring in part and dissenting in part).
[30] *Cruzan*, 497 U.S. at 284.
[31] *Id.* at 300-01 (Scalia, J., concurring).
[32] *Obergefell*, 135 S. Ct. at 2627 (Scalia, J., dissenting).
[33] *Id.* at 2627-28.
[34] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182-83 (1989).
[35] *Id.* at 1179.
[36] Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 Geo. L.J. 183, 186-87 (2005).

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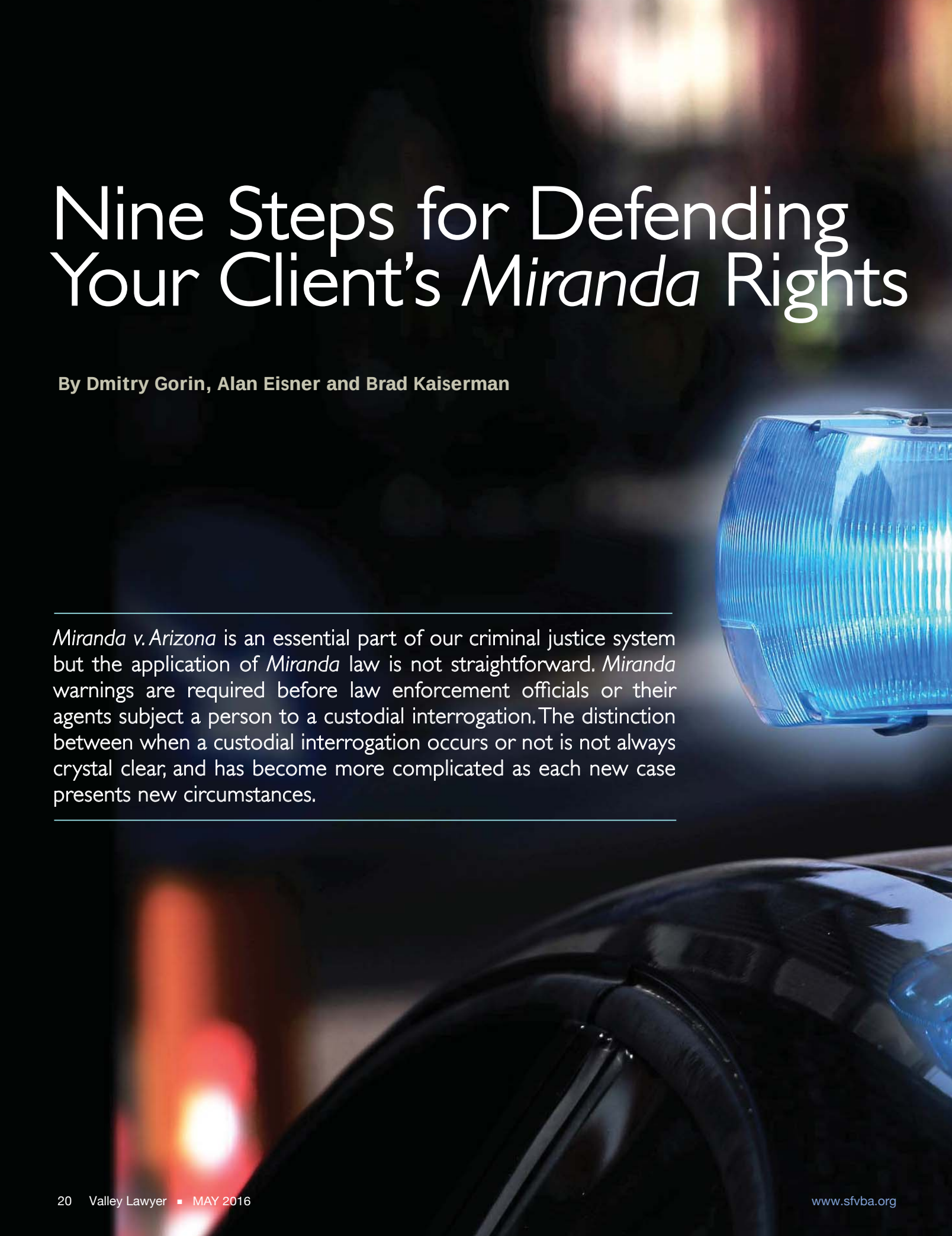
Nine Steps for Defending Your Client's *Miranda* Rights

By Dmitry Gorin, Alan Eisner and Brad Kaiserman



Miranda v. Arizona is an essential part of our criminal justice system but the application of *Miranda* law is not straightforward. *Miranda* warnings are required before law enforcement officials or their agents subject a person to a custodial interrogation. The distinction between when a custodial interrogation occurs or not is not always crystal clear, and has become more complicated as each new case presents new circumstances.

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 29.

"I WAS NOT GIVEN MY RIGHTS. . . . THE CASE should be dropped." This is a typical client statement to a criminal defense attorney, and the typical answer is that "*Miranda* rights are relevant only to whether a statement you made is admissible against you in court, not to whether your arrest was valid."

The case law arising from *Miranda v. Arizona*[1] is an important part of our criminal justice system, and this article examines its most highly litigated areas. The government's case can collapse if a defendant's statement is excluded. Alternatively, a defendant can talk himself or herself into a life sentence. The stakes are indeed very high during *Miranda* litigation.

Miranda warnings are required before law enforcement officials or their agents or court agents subject a person to a "custodial interrogation." Although law enforcement and courts understand this absolute constitutional right, criminal defense lawyers regularly must deal with potential *Miranda* violations.

When a prosecutor seeks to introduce a defendant's statement, a defense lawyer must be aware of *Miranda* case law to address its admissibility, and generally should ask nine questions:

1. Was a law enforcement official or agent or a court agent asking the questions?
2. Was the defendant "in custody" or "detained"?
3. Was there an "interrogation" or other questioning process?
4. Did the public safety exception apply?
5. Were the *Miranda* rights accurately stated in English or a foreign language?
6. Did the defendant waive his or her *Miranda* rights?
7. Did the defendant invoke the right to counsel?
8. Did the defendant invoke the right to remain silent?
9. Did questioning continue post-invocation?

1 Who asked the questions?

Miranda warnings are required only when a person is interrogated in custody by law enforcement officials or their agents or agents of a court.[2] The general test used "is whether he [the individual] is employed by an agency of government, federal, state or local, whose primary mission is to enforce the law."[3] Courts have held that law enforcement officials for purposes of *Miranda* can be Immigrations and Customs Enforcement agents[4] or Internal Revenue Service agents.[5]

A member of law enforcement working undercover, however, need not provide *Miranda* warnings.[6] This includes an agent undercover as a prison inmate.[7] Additionally, questions by a probation officer during a pre-plea interview that are not about the offense itself do not require *Miranda* warnings, even if the defendant is in custody.[8]

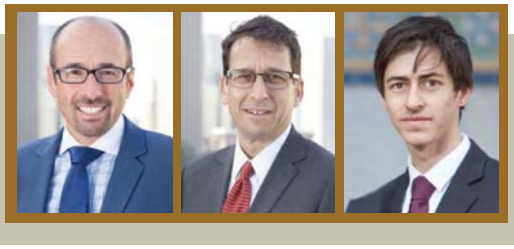
For purposes of *Miranda*, law enforcement officials do not include doctors asking questions about medical history,[9] social workers,[10] school officials,[11] plainclothes private store detectives,[12] private security guards,[13] or private investigators.[14] Thus, for example, where a suspect confesses to shoplifting to a department store's loss prevention officer, or where an employee suspected of embezzlement incriminates himself or herself to the employer's private investigator, *Miranda* warnings are not required.

Nonetheless, even if an individual is a private citizen instead of a member of law enforcement, he or she must provide *Miranda* warnings before engaging in a custodial interrogation, if he or she is acting as an agent of law enforcement or the courts. Examples of these "agents" include psychiatrists hired by the prosecution[15] or appointed by a court.[16]

2 Was there "custody" or "detention"?

Once it is established *Miranda* applies to the person asking the questions, the next question is whether the suspect was "in custody" as defined by *Miranda* case law.

To determine this, courts ascertain if in light of "the objective circumstances of the interrogation," "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave."[17] "[T]o determine how a suspect would have 'gauge[d]' his 'freedom of movement,' courts must examine 'all of the circumstances surrounding the interrogation.' "[18] Relevant factors include "the location of the questioning," "its duration," "statements made during the interview," "the presence or absence of physical restraints during the questioning," "and the release of the interviewee at the



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end of the questioning."[19] Although a common example of custody is an individual handcuffed and placed under arrest, formal arrest is not a requirement of custody for purposes of *Miranda*.

Age can also be a factor in assessing custody.[20] As the Supreme Court explained, in discussing a 13-year-old defendant, "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[21]

A "detention" does not qualify as "custody" as defined by *Miranda* case law. The most common example of detention is a driver pulled over for a traffic violation. Law enforcement need not provide *Miranda* warnings when initially questioning a driver prior to arrest under such circumstances.[22] Nor does law enforcement need to provide *Miranda* warnings when an individual is detained in public pursuant to *Terry v. Ohio*.[23] Law enforcement also has no obligation to provide *Miranda* warnings during negotiations with an individual who has a hostage.[24]

In *People v. Bejasa*,[25] the defendant was contacted by law enforcement after crashing his vehicle. The defendant acknowledged he was on parole and consented to a search, during which, two syringes were found. The defendant admitted shooting up methamphetamine. He was handcuffed and placed in the back of a police car. No *Miranda* warnings were provided. The defendant was then asked several questions regarding when and how much he had been drinking. The Court of Appeal held these circumstances qualified as custody for *Miranda* purposes as the "[d]efendant was confronted with two of the most unmistakable indicia of arrest: he was handcuffed and placed in the back of a police car."[26]

On the other hand, in *People v. Davidson*,[27] the defendant was detained and handcuffed for a motorcycle theft investigation. The officer then asked the defendant if the motorcycle he had been seen with was his. The Court of Appeal held that although the defendant was handcuffed, it was a short detention that did not amount to custody for *Miranda* purposes.

A person in prison is not in custody for *Miranda* purposes. Although incarceration limits the freedom of inmates, it "does not create the coercive pressures identified in *Miranda*" as prison has become their accustomed surroundings and part of their daily routine.[28]

In sum, determining whether a person is in custody under *Miranda* case law is a nuanced inquiry. For example, a court might hold a defendant being initially handcuffed is insufficient to constitute custody under *Miranda* if the incriminating statements were made after the suspect was later uncuffed. Unfortunately, nuanced custody disputes arise frequently because custody often forms the basis for motions to exclude incriminating statements.

❸ Was there an "interrogation" or other questioning process?

In addition to showing he or she was in "custody" as defined by *Miranda* case law, a defendant must show he or she was subject to an "interrogation" as defined by *Miranda* case law.

"Interrogation" for purposes of *Miranda* " 'refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.' "[29] Accordingly, "[i]ndirect comments (or coercive actions) by an officer that cause an accused to make inculpatory statements can also constitute interrogation."[30]

For example, *Miranda* warnings must be provided before a post-arrest sobriety test,[31] questioning for a routine tax investigation,[32] or questioning by an Immigration and Naturalization Service[33] (INS) agent during a criminal investigation.[34] A warning is not required, however, where an INS[35] agent questions a suspect in an investigation for an administrative deportation action.[36]

Likewise, routine booking questions, including asking a defendant about his or her gang moniker, do not require *Miranda* warnings.[37] Questions about gang affiliation, however, do require a *Miranda* warning, although unadmonished questions can be asked during booking for purposes of placing an inmate in jail or prison.[38]

It is the experience of most criminal defense attorneys that officers will ask routine questions after an arrest to "break the ice" with the suspect, with the intention of asking questions about the crime afterwards. The law does not require *Miranda* warnings for this "softening up" process.

❹ Did the public safety exception apply?

Under certain circumstances, implicating the interests of public safety, officers can ask a suspect certain questions without providing *Miranda* warnings.

In *New York v Quarles*,[39] the Supreme Court held no *Miranda* warning was required when an officer asked a suspect, who had just been arrested, where in a supermarket he had discarded his gun. The Supreme Court held the police:

> were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might

make use of it, a customer or employee might later come upon it.[40]

5 Were the *Miranda* rights accurately read?

Most persons are familiar with the reading of *Miranda* warnings because of its popular use in television and movies. The required *Miranda* warnings are: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you."

The officer or agent must then ask the suspect if he or she understands these rights and if he or she still wishes to speak to the officer or agent. Only after receiving affirmative answers to both questions can the officer or agent proceed to interrogate the suspect.

If the suspect does not speak English, the rights must be read to him or her in his or her language. In such instances, it is important for defense attorneys to confirm the *Miranda* warnings were accurately translated. For example, in *People v. Diaz*,[41] the Court of Appeal held *Miranda* warnings, which were "a verbatim reading of the Spanish *Miranda* card," were defective. The deficiency was the translation stated, "[i]f you cannot get a lawyer, one can be named before they ask you questions." By using "get" instead of "afford," law enforcement failed to convey to defendant that the defendant's "indigent status . . . entitled him to appointed counsel."

6 Did the defendant waive his or her rights?

A suspect's waiver of *Miranda* rights must be voluntary, knowing and intelligent.[42] As the Ninth Circuit has noted, "[t]he government's burden to make such a showing 'is great,' and the court will 'indulge every reasonable presumption against waiver of fundamental constitutional rights.' "[43]

A suspect's waiver and subsequent statement are considered voluntary only if they were "the product of a rational intellect and a free will."[44] A suspect's statement is considered involuntary if it was "coerced by physical intimidation or psychological pressure."[45] A waiver of *Miranda* rights based on promises of leniency by law enforcement is not considered voluntary.[46] Yet law enforcement's urging a suspect "to 'cut a deal' before his accomplice" cooperated did not render his statement involuntary.[47]

To consider a waiver knowing and intelligent, a suspect must be "aware of the nature of the right being abandoned and the consequences of the decision to abandon it."[48] If a suspect indicates he or she is willing to continue answering questions, he or she will be held to have waived his or her *Miranda* rights.[49]

❼ Did the defendant invoke the right to counsel?

An invocation of *Miranda* rights must be unequivocal. If a suspect's invocation is ambiguous, law enforcement can proceed with questioning.[50] For example, courts have held the following statements ambiguous:

- "Maybe I should talk to a lawyer[.]"[51]
- "I think I probably should change my mind about the lawyer now. . . . I think I need some advice here[.]"[52]
- "I think it'd probably be a good idea for me to get an attorney[.]" [53]

Likewise, in *People v. Suff*,[54] the suspect during interrogation stated, "I need to know, am I being charged with this, because if I'm being charged with this I think I need a lawyer[.]" The detective answered, "Well at this point, no you're not being charged with this," and the questioning continued. The California Supreme Court held the defendant's statement was an insufficient invocation.

Along the same lines, in *People v. Williams*,[55] the suspect initially started answering questions, but then, mid-interview, stated, "I want to see my attorney cause you're all bullshitting now." The California Supreme Court held this statement was ambiguous and not an invocation of *Miranda* rights.

And in *People v. Sauceda-Contreras*,[56] the suspect stated, "If you can bring me a lawyer . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me." The California Supreme Court held this was an insufficient invocation of *Miranda* rights.

❽ Did the defendant invoke the right to remain silent?

A suspect's answering "no" after being asked if he or she would like to give up his or her *Miranda* rights is unambiguous and questioning must stop.[57] A suspect's repeated requests to be taken home or picked up by his parents, as a whole, is an unequivocal invocation of *Miranda* rights.[58] A minor asking if he can have an attorney has also been held an unequivocal invocation.[59] Remaining silent, however, does not invoke one's *Miranda* rights.[60]

Context can be important in determining if a statement invokes *Miranda* rights. In *People v. Peracchi*, the defendant's statement, "I don't want to discuss it right now[,]" was held sufficient to invoke his rights.[61] In *People v. Martinez*, however, the defendant's statement, "I don't want to talk anymore right now" was held insufficient to invoke his rights.[62] The *Martinez* Court distinguished Martinez from Peracchi on the basis that Peracchi "invoked his right to silence at the outset of the interrogation," but Martinez made his statement *after* waiving his rights and answering a series of questions.[63]

Once a suspect has waived his or her *Miranda* rights, he or she need not be advised again of his or her rights during a second interrogation as long as the second interrogation is "reasonably contemporaneous" with the first.[64]

9 Did questioning continue post-invocation?

When an individual invokes his or her *Miranda* rights, questioning must stop immediately. If a suspect invokes his or her right to counsel, all questioning must stop until an attorney is present.[65] Law enforcement must wait at least 14 days before attempting to interrogate again without counsel.[66] If questioning continues, any statements made by the defendant are inadmissible at trial.

Statements obtained in violation of *Miranda*, however, are admissible at a probation violation hearing "in the absence of egregious conduct by law enforcement[,]"under the truth-in-evidence provision of the California Constitution.[67]

Additionally, after *Miranda* warnings are given, if a suspect answers questions, but is then silent in response to specific questions, that silence can be admitted as an adoptive admission.[68]

But when law enforcement intentionally does not provide *Miranda* warnings in order to obtain a confession, and then subsequently provides *Miranda* warnings and has the suspect repeat the confession, that confession is inadmissible.[69]

The application of *Miranda* law is not straightforward but has become more complicated as each new case presents new circumstances. The distinction between when a custodial interrogation occurs or not is not always crystal clear. Likewise, the line between a sufficient and insufficient invocation of *Miranda* rights can be very thin. Regardless, when facing a prosecutor who is seeking to admit a defendant's statements, defense counsel should see if they can be excluded by running through the nine questions discussed in this article to see if a *Miranda* violation has occurred.

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[1] 384 U.S. 436 (1966).
[2] *In re Deborah C.*, 30 Cal.3d 125 (1981).
[3] *People v. Wright*, 249 Cal.App.2d 692, 694-95 (1967) (footnote omitted).
[4] *See, e.g., United States v. Maier*, 646 F.3d 1148 (9th Cir. 2011).
[5] *Mathis v. United States*, 391 U.S. 1 (1968).
[6] *People v. Walker*, 47 Cal.3d 605 (1988).
[7] *Illinois v. Perkins*, 496 U.S. 292 (1990).
[8] *United States v. Gonzalez-Mares*, 752 F.2d 1485 (9th Cir. 1985).
[9] *People v. Salinas*, 131 Cal.App.3d 925 (1982).
[10] *People v. Battaglia*, 156 Cal.App.3d 1058 (1984).
[11] *In re Corey L.*, 203 Cal.App.3d 1020 (1988).
[12] *In re Deborah C.*, 30 Cal.3d 125 (1981).
[13] *United States v. Birnstihl*, 441 F.2d 368 (1971).
[14] *People v. Mangiefico*, 25 Cal.App.3d 1041 (1972).
[15] *People v. Polk*, 63 Cal.2d 443 (1965).
[16] *In re Spencer*, 63 Cal.2d 400 (1965).
[17] *Howes v. Fields*, ____ U.S. ___, ___, 132 S.Ct. 1181, 1189 (2012).
[18] Id. (quoting *Stansbury v. California*, 511 U.S. 318, 322, 325 (1994) (internal quotation marks omitted)).
[19] *Id.*
[20] *J.B.D. v. North Carolina*, 564 U.S. 261, ___, 131 S.Ct. 2394, 2402-2403 (2011).
[21] *Id.* at ___, 131 S.Ct. at 2403.
[22] *Berkemer v. McCarty*, 468 U.S. 420 (1984).
[23] *Terry v. Ohio*, 392 U.S. 1 (1968); *McCarty*, 468 U.S. 420.
[24] *People v. Mayfield*, 14 Cal.4th 668 (1997).
[25] 205 Cal.App.4th 26 (2012).
[26] *Id.* at 38.
[27] 221 Cal.App.4th 966 (2013).
[28] *Maryland v. Shatzer*, 559 U.S. 98, 113 (2010); *see Howes v. Fields* ____ U.S. ___, ___, 132 S.Ct. 1181 (2012).
[29] *People v. Mickey*, 54 Cal.3d 612, 648 (1991) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (footnote omitted)).
[30] *United States v. Foster*, 227 F.3d 1096, 1103 (9th Cir. 2000).
[31] *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).
[32] *Mathis v. United States*, 391 U.S. 1 (1968).
[33] When the Department of Homeland Security was created in 2003, most of the functions of Immigration and Naturalization Service were transferred to Citizenship and Immigration Services (C.I.S.), Immigration and Customs Enforcement (I.C.E.), or Customs and Border Protection (C.B.P.).
[34] *United States v. Mata-Abundiz*, 717 F.2d 1277 (9th Cir. 1983).
[35] *See supra* note 33.
[36] *United States v. Salgado*, 292 F.3d 1169 (9th Cir. 2002).
[37] *United States v. Washington*, 462 F.3d 1124, 1132-1133 (9th Cir. 2006).
[38] *People v. Elizalde*, 61 Cal.4th 523 (2015).
[39] 467 U.S. 649 (1984).
[40] *Id.* at 657.
[41] 140 Cal.App.3d 813, 822-823 (1983).
[42] *United States v. Garibay*, 143 F.3d 534, 536 (1998).
[43] *Id.* at 537 (quoting *United States v. Heldt*, 745 F.2d 1275, 1277 (9th Cir. 1984)).
[44] *Mincey v. Arizona*, 437 U.S. 385, 398 (1978).
[45] *Mickey v. Ayers*, 606 F.3d 1223, 1233 (2010).
[46] *People v. Gonzalez,* 210 Cal.App.4th 875 (2012); *see People v. Boyde* (1988) 46 Cal.3d 212.
[47] *Bobby v. Dixon*, ___ U.S. ___, ___, 132 S.Ct. 26, 29-30 (2011).
[48] *United States v. Younger*, 398 F.3d 1179, 1185 (9th Cir. 2005) (quoting *United States v. Garibay*, 143 F.3d 534, 536 (9th Cir.1998)) (internal quotation marks omitted).
[49] *People v. Sauceda-Contreras*, 55 Cal.4th 203, 218-219 (2012).
[50] *Davis v. United States*, 512 U.S. 452, 459 (1994).
[51] *Id.* at 462.
[52] *People v. Shamblin*, 236 Cal.App.4th 1, 20 (2015).
[53] *People v. Bacon*, 50 Cal.4th 1082, 1104 (2010).
[54] 58 Cal.4th 1013, 1067 (2014).
[55] *People v. Williams*, 49 Cal.4th 405, 431 (2010).
[56] 55 Cal.4th 203, 206 (2012).
[57] *Garcia v. Long,* 808 F.3d 771 (9th Cir. 2015).
[58] *People v. Villasenor*, 242 Cal.App.4th 42 (2015); but see *People v. Lessie*, 47 Cal.4th 1152 (2010) (holding a minor's request to speak with his father an insufficient invocation).
[59] *In re Art T.*, 234 Cal.App.4th 335 (2015).
[60] *Berghuis v. Thompkins*, 560 U.S. 370 (2010).
[61] *People v. Peracchi*, 86 Cal.App.4th 353, 360-61 (2001).
[62] *People v. Martinez*, 47 Cal.4th 911, 951 (2010); see also id. at 946 n.8 (discussing similar version of defendant's statement).
[63] *Id.*
[64] *People v. Mickle*, 54 Cal.3d 140, 170 (1991); *see People v. Smith*, 40 Cal.4th 483, 504 (2007).
[65] *Davis v. United States*, 512 U.S. 452, 458 (1994).
[66] *Maryland v. Shatzer*, 559 U.S. 98 (2010); *see People v. Bridgeford* (2015) 241 Cal. App.4th 887.
[67] *People v. Racklin*, 195 Cal.App.4th 872, 881 (2011) (discussing subdivision (f)(2) of section 28 of article 1 of the California Constitution).
[68] *People v. Bowman*, 202 Cal.App.4th 353 (2011).
[69] *Missouri v. Seibert*, 542 U.S. 600 (2004).

Test No. 91

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. Undercover agents of law enforcement are not required to provide *Miranda* warnings during a custodial interrogation.
❑ True ❑ False

2. A court-appointed psychiatrist is required to provide *Miranda* warnings during a custodial interrogation.
❑ True ❑ False

3. The duration of the interrogation is not an established factor to be used in determining whether a person was in custody for purposes of *Miranda*.
❑ True ❑ False

4. Law enforcement should provide *Miranda* warnings when a suspect is detained for a vehicle code violation while driving.
❑ True ❑ False

5. Questions by an INS agent regarding an administrative deportation action do not require *Miranda* warnings if the person is in custody for purposes of Miranda.
❑ True ❑ False

6. Urging a suspect to cut a deal would not render a waiver of the *Miranda* warnings involuntary.
❑ True ❑ False

7. "Maybe I should talk to a lawyer" has been held to be a sufficient invocation of the *Miranda* rights.
❑ True ❑ False

8. Silence has been held to be a sufficient invocation of the *Miranda* rights.
❑ True ❑ False

9. Once a suspect has invoked his or her right to counsel, law enforcement must wait 14 days before attempting to interrogate a suspect again without counsel.
❑ True ❑ False

10. A suspect who waived his rights during a first interrogation does not need to be advised again of his *Miranda* rights during a second interrogation if the suspect signed his waiver.
❑ True ❑ False

11. Interrogation for *Miranda* purposes does not include the silent treatment.
❑ True ❑ False

12. Public Safety exception is an established exception to the *Miranda* warnings.
❑ True ❑ False

13. The following rendition of the *Miranda* warnings has been held as insufficient: If you cannot get a lawyer, one can be named before they ask you questions.
❑ True ❑ False

14. Statements obtained in violation of *Miranda* can still be used if the suspect is charged with a capital offense as long as a lie detector test was used.
❑ True ❑ False

15. Whether or not the questioning was recorded is not an established factor to be used in determining whether a person was in custody for purposes of *Miranda*.
❑ True ❑ False

16. It has been held that a confession following a *Miranda* warning is not admissible when law enforcement provides the warnings but then intentionally shows the suspect surveillance video of the incident before the confession.
❑ True ❑ False

17. Whether the suspect was in custody is not one of the central factors to be assessed to determine whether there is a *Miranda* issue.
❑ True ❑ False

18. Veterans are not considered part of law enforcement for *Miranda* purposes.
❑ True ❑ False

19. Asking a recently arrested suspect how he or she knows the victim illustrates an exception to the *Miranda* rule.
❑ True ❑ False

20. A waiver of the *Miranda* rights must be voluntary, knowing and intelligent.
❑ True ❑ False

MCLE Answer Sheet No. 91

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 $20 testing fee for SFVBA members (or $30 for non-SFVBA members) to:**

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METHOD OF PAYMENT:
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Authorized Signature

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

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Law Firm/Organization_____
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Address_____
City_____
State/Zip_____
Email_____
Phone_____
State Bar No._____

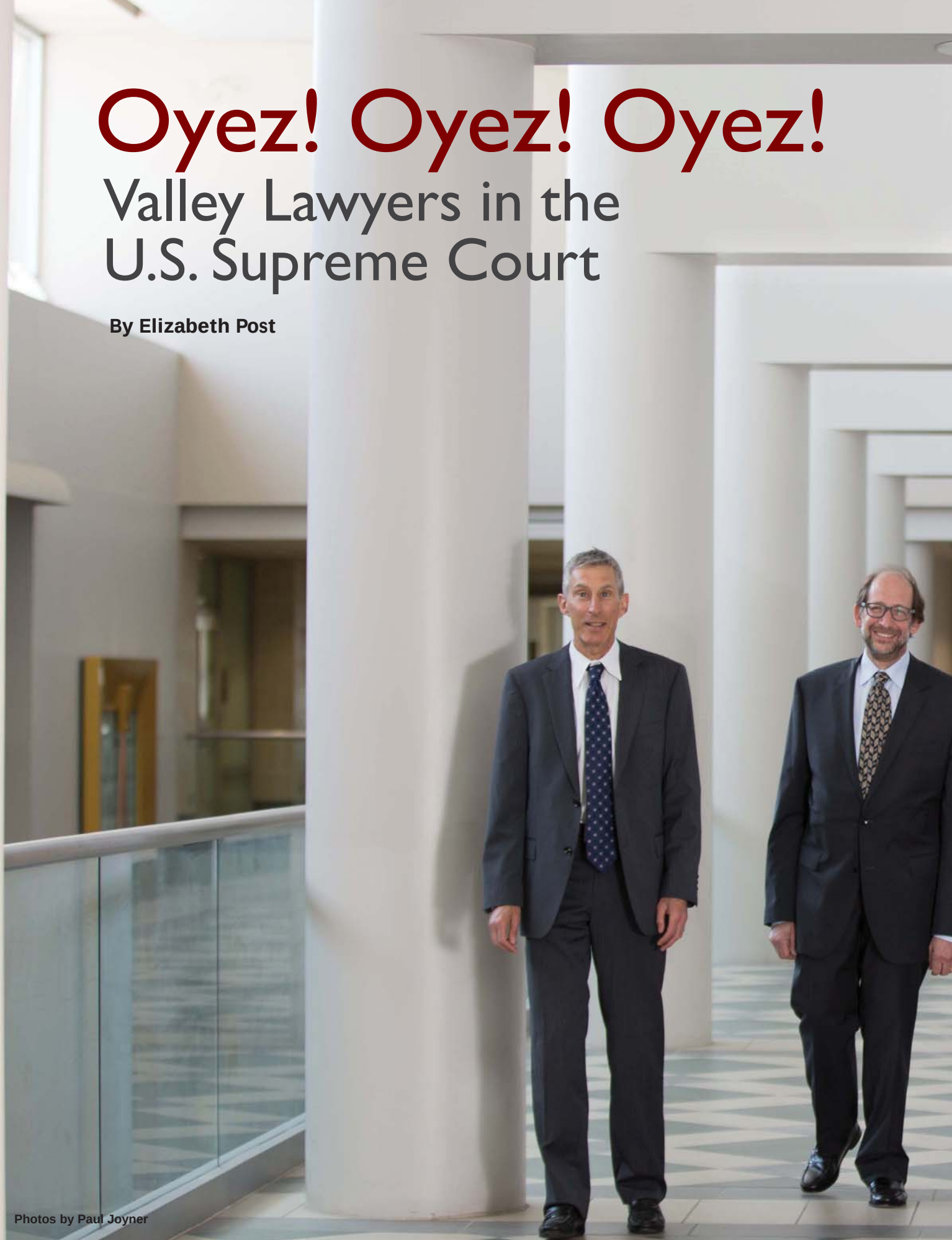
ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ **True**	❑ **False**
2.	❑ **True**	❑ **False**
3.	❑ **True**	❑ **False**
4.	❑ **True**	❑ **False**
5.	❑ **True**	❑ **False**
6.	❑ **True**	❑ **False**
7.	❑ **True**	❑ **False**
8.	❑ **True**	❑ **False**
9.	❑ **True**	❑ **False**
10.	❑ **True**	❑ **False**
11.	❑ **True**	❑ **False**
12.	❑ **True**	❑ **False**
13.	❑ **True**	❑ **False**
14.	❑ **True**	❑ **False**
15.	❑ **True**	❑ **False**
16.	❑ **True**	❑ **False**
17.	❑ **True**	❑ **False**
18.	❑ **True**	❑ **False**
19.	❑ **True**	❑ **False**
20.	❑ **True**	❑ **False**

Oyez! Oyez! Oyez!

Valley Lawyers in the U.S. Supreme Court

By Elizabeth Post



Photos by Paul Joyner

The United States Supreme Court hears oral argument each term in about 80 cases out of approximately 7,000-8,000 petitions for writ of certiorari received. With so few cases selected, most appellate attorneys can only dream about appearing before the nation's highest court. Valley lawyers Douglas Benedon, Gerald Serlin, Jeff Ehrlich, James Blatt and Neal Dudovitz have occupied the counsel table before the raised mahogany bench where the nine Supreme Court justices hold court. These accomplished advocates share their experiences and insights about this highlight in their careers.

Gerald M. Serlin and Douglas G. Benedon

Meyer v. Holley, 537 U.S. 280 (2003)

DOUGLAS BENEDON AND Gerald Serlin met in 1990 while associates at the Valley's nationally recognized appellate law firm, Horvitz & Levy. Three years later, the colleagues opened Benedon & Serlin in Woodland Hills, which has since grown to a six-attorney firm specializing in all aspects of civil appellate litigation. Each firm partner is a certified appellate law specialist.

Benedon and Serlin represented David Meyer, the defendant officer of a real estate company who was sued by plaintiff homebuyers, David and Emma Mary Ellen Holley. The Holleys alleged the officer was liable under the Fair Housing Act (FHA) because a company salesperson purportedly refused to sell them a house on the basis that they were an interracial couple.

Benedon and Serlin became involved after their client had prevailed on a motion to dismiss in the District Court, which found the FHA did not impose personal vicarious liability upon a corporate officer. The Ninth Circuit reversed, holding the officer could be vicariously liable under the FHA for the allegedly discriminatory conduct of the salesperson, even though the officer did not personally engage in or ratify any unlawful conduct.

The Supreme Court granted the petition for a writ of certiorari. The issue before the Court was whether the FHA imposes personal liability without fault upon an officer or owner of a residential real estate corporation for the purported unlawful activity of the corporation's employee or agent. Benedon had principal responsibility for preparation of the briefs and oral argument. Serlin was intimately involved in the editing of the briefs and preparation for oral argument, and kept the office afloat while Benedon was consumed with this case.

In an opinion authored by Justice Stephen Breyer, the Supreme Court reversed the Ninth Circuit and unanimously held in *Meyer v. Holley* that vicarious liability under the FHA was limited to liability of the real estate company, but not its officer, in accordance with traditional agency principles.

Q: How did you prepare for oral argument?

A: *Benedon:* We learned that the Court had granted our cert petition at the end of May, and that the case would be heard on the Court's December calendar. In addition to assisting me with all aspects of my preparation, my law partner, Gerald Serlin, took over running our firm which allowed me to devote myself entirely to briefing and preparing for oral argument in this case.

I participated in several moot courts with local practitioners and retired [Los Angeles Superior Court and United States District Court] Judge George Schiavelli, and spoke with attorneys who had clerked for, or had conducted arguments before, the Court.

I also participated in the Supreme Court moot court program organized by Professor Gerald Uelman at the Santa Clara University School of Law, where several of the "justices" were professors who had clerked at the Court. Finally, I attended the Court's oral arguments the month before my case was to be heard.

Q: What was the best advice you received?

A: *Benedon:* The Boy Scout motto: Be Prepared!

Q: Was there a question during oral arguments that caught you by surprise?

A: *Benedon:* Justice Kennedy asked about the holding in a state appellate case that was part of a string cite in a footnote of the respondents' brief. Although I was prepared to address the question, what caught me by surprise was the level of the justices' knowledge of all the details of the parties' briefs.

Q: How would you describe your experience?

A: *Benedon:* In a word, fun.

Serlin: As Doug and I entered the Supreme Court building on the day of argument, we were struck by a sense of awe, history, and tradition. That sense was magnified when we were seated at counsel table, only feet away from the justices. (Who knew they were so close?)

I felt immense pride watching Doug adeptly address the Court's questions and present the arguments that he had refined for months. I had the best seat in the house but none of the anxiety. It only got better when we learned that the Supreme Court had reversed the Ninth Circuit 9-0 in our client's favor.

Q: Following oral arguments, did you have a sense of what the outcome would be?

A: *Benedon:* Based on the tenor of the Court's questions, I had a strong sense that the outcome would be in favor of our client.

Q: What was your reaction when the Supreme Court issued its decision?

A: *Benedon:* The feeling is hard to put into words. I was elated for our client who had been vindicated after years of litigation. I felt an incredible amount of pride in our firm for the amount of work that had been put into the case and the result we obtained.

Q: Do you think any lawyer is qualified to argue their case before the Supreme Court?

A: *Benedon:* Prior significant appellate experience is invaluable before preparing and presenting a case to the United States Supreme Court.

Q: What are some ways that lawyers can position their own cases to eventually be heard by the U.S. Supreme Court?

A: *Benedon:* You never know what case it will be. This case came to us out of Twenty-Nine Palms, California after what appeared to be a routine dismissal based on established principles of law. Then it went up on appeal and the entire nature of the case changed into an issue of national importance. The best way to position a case for this eventuality is to ensure that all issues are raised and adequately briefed in the lower courts.

Q: Any additional insights you would like to share with Valley lawyers?

A: *Benedon:* I was thrilled after prevailing in a unanimous opinion by the United States Supreme Court. It was, however, all put in perspective when I realized that I might be able to convince nine justices of the Supreme Court to agree with my position, but I still couldn't convince my teenage daughter to clean her room.

Benedon was interviewed for the March 2003 issue of *Valley Lawyer's* predecessor, *Bar Notes*, following the firm's Supreme Court victory. Benedon shared, "I felt good after the argument. I was impressed with the level and intensity of the questions. The courtroom was extremely intimate. The podium is very close to the justices.

"It was one of the most pleasurable experiences—very fun. If I had any disappointments, it was that Chief Justice Rehnquist was not present [due to undergoing knee surgery to repair a torn quadriceps tendon the week before.] I would love to go back."

James E. Blatt

United States v. Bajakajian, 524 U.S. 321 (1998)

JAMES BLATT HAS ARGUED criminal cases from both ends of the counsel table since he passed the bar in 1973. He served as a deputy district attorney for Los Angeles County following graduation from Loyola Law School, and has since represented criminal defendants in private practice in high-profile cases for forty years.

In 1994, Blatt's client, Hosep Krikor Bajakajian, boarded an international flight to Cyprus and failed to declare that he was carrying over $10,000. A subsequent search of his luggage and person by money-sniffing dogs uncovered $357,144. The funds were seized by U.S. Customs agents pursuant to a federal customs statute.

Blatt was originally retained to represent Bajakajian in the criminal case in federal court and handle the forfeiture proceedings. U.S. District Judge John G. Davies ruled that the money was lawfully obtained and targeted to pay legal debt overseas; total forfeiture would be grossly disproportionate under the Eighth Amendment Excessive Fines Clause. Davies ordered Bajakajian to turn over only $15,000 and pay a $5,000 fine. The government appealed. The Ninth Circuit declared that the money was not an instrumentality of the failure to report and therefore not subject to seizure at all.

The government appealed and it's petition for certiorari was granted. Blatt decided to keep the case. "I received notice four months before the hearing," says Blatt. "I am not an appellate lawyer and it was the first time, and I knew probably the last [time], that I would appear before the U.S. Supreme Court."

The issue before the Court was whether the forfeiture of $357,144 cash, a sum involved in the offense of failure to report property in excess of $10,000 while attempting to leave the country, is a violation of the Eighth Amendment's Excessive Fines Clause.

The Courts decision, *United States v. Bajakajian*, authored by Justice Clarence Thomas, was 5-4 in favor of Bajakajian. According to Blatt, "It was the first and only time that Justice Thomas ever broke away from Justice Scalia, and frankly it was the last thing I expected."

Q: How did you prepare for oral argument?

A: I had four months to prepare for the argument before the Supreme Court. I immediately put a team together. My associate Michael Raab's primary responsibility was to research and write the brief and he did an outstanding job. I also brought in Michael Hikeland to assist me in oral argument and preparation for the practice moot courts. I used Ralph Nader's organization [Public Citizen Litigation Group] to go back to D.C. twice and argue in a moot court setting. Both times, I was soundly defeated.

For the subsequent three months, at least three or four times a week, the team would get together and go over the research, arguments, and make an effort to formulate the best strategy in the case. Our goal was simple: money that was obtained lawfully and for a lawful purpose should not be forfeited and that the test under the Eighth Amendment should be that any forfeiture or fine cannot be grossly disproportionate to the crime. This case was the first time in our nation's history that the Eighth Amendment's Excessive Fines Clause was going to be defined. It has had major repercussions across the

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United States in reference to forfeitures and fines throughout state and federal courts.

Q: What was the best advice you received?

A: The best advice I received was from the pamphlet that the U.S. Supreme Court sends regarding how to prepare the brief and presentation. The pamphlet indicated that simply because someone is a solo practitioner and has not had appellate or Supreme Court experience, it does not mean that you should transfer the case. The pamphlet inferred that plenty of solo practitioners, with limited experience, have presented their cases and have done well.

I also received a phone call from Lawrence Tribe, the great Harvard constitutional lawyer, who has been before the Supreme Court many times, who politely asked me if he could take over the case. I believed he felt that the case was perhaps winnable. I declined his assistance but it made an impression on me that if he thought he could win, then I certainly thought that I could win. I also received advice from my wife, which was "show up and win."

Q: How would you describe your experience?

A: It's not really an argument, it's a discussion and you are constantly being interrupted. Your goal, if you are lucky, is to convince one, probably no more than two, the validity of your position. I knew that I needed one conservative [justice] to rule in my favor. I expected Justice Anthony Kennedy and to my surprise he wrote the decent.

The discussion at times, especially with Chief Justice William Rehnquist and Justice Antonin Scalia, was very aggressive. But frankly I had been doing this for 25 years and I had encountered even tougher judges in state and federal court in reference to their questioning. I was used to that kind of tough questioning and I felt confident that I could hold my own. I put my emotions aside that I was before Supreme Court and the significance of the case, and approached that oral argument as if it was any other case and the argument went very well for the respondent.

Q: Was there a question during oral arguments that caught you by surprise?

A: …Justice Stephen Breyer did ask me a question and towards the end of the question it became obvious to him that it was an unartful question. Rather than say I do not understand the question, I smiled at Justice Breyer and said, "I'm sorry but I don't know the answer to that question." He smiled back and said he understood.

I also had some levity with Justice Ruth Bader Ginsburg who I could tell was on the respondent's side and she asked me a series of questions about how I felt about the government's position. I said the government's position was shocking and it got a laugh out of some of the justices.

I remember Justice Scalia almost jumping out of his seat with that bulldog expression, yelling at me, "So, you want to change the Constitution?" and I said, "Yes, I do Justice Scalia, and I thought isn't that why we are here."

Emotions did run high during the argument. After the argument, I did not have a sense of what the outcome would be. It was 50/50 and I just hoped for the best. I knew I needed one conservative to vote in my favor, but I never anticipated it would be Justice Thomas.

Q: What was your reaction when the Supreme Court issued its decision?

A: I was in Arizona on a federal matter when I was advised we won the case. My reaction was a sense of pride and accomplishment. I was very proud of my team, and the tremendous efforts that we all put into this case. I felt a sense of accomplishment for defining a part of our great Constitution and helping millions of people receive justice. It was clearly the experience and the result.

I consider to this day to be the most significant achievement of my career. I am grateful that I had this opportunity and fortunate for the outcome.

Q: Any additional insights you would like to share with Valley lawyers?

A: We always like to think that oral argument can sway a justice, but in reality that is very rare. In the vast majority of cases the justices have already made up their minds, with the exception of one, no more than two that have not made a decision prior to oral argument.

Neal S. Dudovitz

Herweg v. Ray, 455 U.S. 265 (1982)
Heckler v. Edwards, 465 U.S. 870 (1984)

FOR MORE THAN 40 YEARS, Neal Dudovitz has been providing meaningful access to justice to the nation's poor, and since 1993, he has served as Executive Director of Neighborhood Legal Services of Los Angeles County. Earlier in his career, in the 1980s, his nationally-focused litigation with the National Senior Citizens Law Center twice brought him to the U.S. Supreme Court.

Dudovitz's first argument before the Supreme Court involved a challenge to Medicaid financial eligibility rules that deemed the income of an at-home spouse available to the institutionalized spouse, resulting in the denial of benefits. That left elderly couples with unacceptable choices of either impoverishing the at-home spouse, returning the institutionalized spouse to the home, or divorcing. The Center began a national effort to change the law through a series of cases across the country. Three of those cases eventually found their way to the Supreme Court over a three year span. Dudovitz second chaired the first two cases and was given the opportunity to argue the third case.

According to Dudovitz, "We were successful in the Medicaid case, *Herweg v. Ray*, by an 8-1 vote, with the opinion written by Chief Justice William Rehnquist. However, the decision was premised on another more significant Medicaid case, *Schweiker v. Gray Panthers*, that we had lost the previous term, an opinion also written by the Chief Justice."

The second case Dudovitz argued involved the scope of the Supreme Court's direct appeal jurisdiction under a statute that was a relic of the Roosevelt "court-packing" efforts in the 1930s and has since been repealed. The underlying case was a nationwide class action challenging the constitutionality of a social security provision that attributed the income of the woman to her husband as blatant sex discrimination. The Social Security Administration conceded the statue was unconstitutional, but vigorously opposed the district judge's efforts to find a remedy that would ensure women's rights were protected without taking away benefits from their husbands.

The government eventually sought to appeal the remedial orders to the Ninth Circuit where the Center successfully moved to have the appeal dismissed on the grounds that it should have been filed in the Supreme Court under the Roosevelt direct appeal statute and the time for filing that appeal had lapsed.

The government then filed a writ of certiorari asking the Supreme Court to review whether the Ninth Circuit had properly dismissed the original appeal. Dudovitz was selected to present the oral argument on the procedural issue before the Court.

Dudovitz experienced the opposite result in the appellate jurisdiction case, *Heckler v. Edwards*, losing 9-0 in an opinion authored by Justice Thurgood Marshall. "For a public interest lawyer that is about as bad as you can lose a case," Dudovitz reflects. "The irony is the result was to reinstate the government's original appeal to the Ninth Circuit where the Court of Appeals eventually affirmed the complex and comprehensive national remedy of the District Court and granted us attorney fees. So despite the Supreme Court procedural loss, the clients totally succeeded."

Q: What was the best advice you received?

A: The best piece of advice I received was to relax and enjoy the experience—it may not happen a second time. Many people also reminded me that at this stage of a case it is rare for someone to "win" a case because of the oral argument, but it is possible to lose a case by not appropriately answering a key question. Thus, being relaxed, confident and thoughtful are key.

Similarly, I was taught to identify three important points that were key to my argument and to write them on a paper to keep at the lectern, then to take a breadth after a difficult question and glance at that list before I answered questions in order to avoid making a mistake and not staying on message. And, of course, in preparation we identified key judges to concentrate on that we thought were likely to be important in the final decision: who to avoid and who to engage.

Q: How would you describe your experience?

A: My first argument in *Herweg* was emotional—I felt honored to be there, to have the opportunity. And, it felt personally affirming that I was a quality lawyer who could effectively litigate at the highest levels of the justice system.

It was particularly meaningful to have my family see me in that setting—I think it was the first time they had watched me present an appellate argument. I can still remember my father, who was not a lawyer, telling me how moved he was to hear the justice's say my name. For him, [the Supreme] Court was an important historical national symbol of freedom and democracy. We remembered visiting the Court together when I was a boy. And, it was meaningful to have my oldest daughter see me. She was only eight at that time, barely old enough to be allowed to attend an argument. The experience moved her and later was the basis of her law school application essay. Today, she teaches law school.

The day also turned out to be memorable and emotional. *Herweg*

was argued during a terrible snowstorm (Justice Marshall was stuck at home); it was the day [January 13, 1982] the Air Florida plane hit the bridge in D.C. There was also a terrible fire in the Metro, closing down the system for many hours. We could not get back to my friend's house where we were staying until midnight. It was a very long day.

Q: Which justice did you feel asked the toughest questions?

A: In my second argument in *Edwards*, I had a very testy exchange with Justice Sandra Day O'Connor. She had done the most writing about the direct appeal statute that was the issue in the case, often agreeing that a case should be reviewed by the court directly from the district court when the government asked for it. I felt the only real chance of winning was to get her to agree with our argument.

She was not happy with the way we had characterized one of her earlier opinions and she essentially said to me, "I did not say that." I decided to go for broke and openly disagree with her, so I said "Yes you did" and read part of her earlier decision. She was fuming and continued to argue with me that I had misinterpreted her case. And not surprisingly, we lost.

The author of the *Edwards* opinion, Justice Marshall, did not speak much during the argument, tried to soften the result by avoiding reliance on O'Connor's decisions and instead concluding that even though our interpretation of the statute at question was consistent with literal language of the law, it was the "sense" of the law, not the words of the statute, that controlled.

Q: Do you think any lawyer is qualified to argue their case before the Supreme Court?

A: I do not think any lawyer who represents a client is able to present the best oral argument. The Supreme Court judges are not only interested in the facts and law of the case before them, but they also contemplate how the ruling will impact future cases. It takes a certain amount of experience...

Jeffrey I. Ehrlich

Unum Life Ins. Co. v. Ward, 526 U.S. 358 (1999)

APPELLATE WORK HAS BEEN a substantial part of Jeff Ehrlich's practice since he passed the bar in 1985. After graduating cum laude from Harvard Law School, Ehrlich clerked for Judge Judith Keep, the former Chief Judge of the U.S. District Court for the Southern District of California. As an associate with the Los Angeles law firm of Hufstedler, Miller, Carlson & Beadsley, he worked with retired California Supreme Court Justice Otto Kaus, retired Federal Circuit Judge Shirley Hufstedler, and retired Justice of the California Court of Appeal Robert Thompson. He also worked very closely with current California Court of Appeals Justices Dennis Perluss and Laurie Zelon. Ehrlich has argued over 200 appeals in his career and is a State Bar Certified Specialist in Appellate Law.

Ehrlich represented John Ward, who was attempting to obtain long-term disability benefits from Unum Life Ins. Co. of America through a policy issued to his employer. Ward's policy contained a provision requiring that a claim for disability benefits be submitted within 180 days after the onset of disability. Ward submitted his claim roughly six months late and Unum relied on the deadline to deny it. The case was governed by ERISA, so Ward filed suit in the district court to recover benefits. The district court granted summary judgment in favor of Unum.

Ward appealed to the Ninth Circuit, which reversed, relying on California's common-law notice-prejudice rule. Under that rule, an insurer cannot deny an insurance claim based on late notice unless the insurer was substantially prejudiced by the late notice. Unum filed a petition for certiorari in the Supreme Court, arguing that ERISA preempted the notice-prejudice rule.

Ehrlich was retained by Ward's counsel to draft the opposition to the cert petition, and when the Court unexpectedly granted the petition, Ehrlich was retained to handle the proceedings in the Supreme Court. The principal issue was whether California's notice-prejudice rule qualified under ERISA's "saving clause" as a state law that "regulated insurance." If so, then it was saved from preemption and provided the rule of decision. The Ninth Circuit also relied in the alternative on a secondary ground for its decision, which was based on California agency principles. Unum also contended that this secondary basis was also preempted.

The Supreme Court ruled 9-0 that the notice-prejudice rule was a state-law that regulated insurance, and so was not preempted by ERISA. (The Court also ruled 9-0 that the agency rule was preempted.) Justice Ginsburg authored the opinion in *Unum Life Ins. Co. v. Ward*.

Q: How did you prepare for oral argument?

A: I lived in Washington D.C. at the time, and I would periodically attend Supreme Court arguments in interesting cases, so I was familiar with the process, at least as a spectator. I spent a considerable amount of time preparing for the oral argument.

I also had a mock argument, which was put on by one of our amici. They recruited various lawyers who were interested in ERISA preemption issues to be the "justices." For me, the briefing process was far more time intensive than the preparation for oral argument.

Q: What was the best advice you received during your preparation?

A: I knew that the secondary agency argument was a loser, and I did not want to talk about it during argument. When I told the Assistant Solicitor General who had been working on the case for the government about my plan, he told me that if the Court had granted cert on the issue, they would probably want to hear about it in during argument. That was good advice.

Q: Was there a question during oral arguments that caught you by surprise?

A: I had completed my argument without having to discuss the agency argument, and was about to sit down, but Justice Ruth Bader Ginsburg misheard something I said as I was winding down, and asked me a new question, asking if we were making a certain argument. I explained to her that we were not making that argument, and that I was "trying to finish up and sit down." But she asked another question, and that kept me up there long enough for Chief Justice William Rehnquist to ask me about the agency issue.

I was flustered at that point, and in trying to answer his argument, I was trying to reference a case we had cited in our briefs, and my mind just went blank. I could see in my mind the footnote in the brief where we discussed it, and I recalled that it was from the Oregon Supreme Court, but I could not recall the name. That was really uncomfortable.

As I was stammering in response to Chief Justice Rehnquist's questions, Justice Paul Stevens leaned forward and asked, "Isn't it true that if we rule your way on the notice-prejudice issue, the agency issue does not matter? " I said, "Yes Justice Stevens, that's correct." At that point, Justice Antonin Scalia quipped, "And now would be the time to sit down." The courtroom erupted in laughter, and I sat down.

Q: How would you describe your experience?

A: As an appellate lawyer, it was a remarkable privilege to argue a case in the Supreme Court. It was also very challenging to try to stay calm and focused on the argument. Normally, when I argue I am focused so intently on the judges on the bench that I am literally unaware of anything happening behind me in the courtroom. This was not true during my Supreme Court argument. I would find myself as I waited to argue looking around the courtroom, just admiring the architectural details. And I was aware of the gallery, and the press sitting in the gallery.

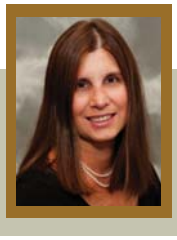
Most distracting, even as I argued, I had a running commentary in my head. When Justice Scalia asked me a question, I recall thinking, "Oh, watch out! Scalia can be mean." Although I felt that I gave a few answers that were solid, there were also a few that I wished I could have re-done. After the argument, I felt like a batter who had gotten to bat in a World Series game, and who had gotten to first base by beating out a dribbling grounder. I felt like I had swung at the pitch, and just missed the right spot to make contact.

[Also], at the time of my argument, I lived in Arlington, Virginia, about nine miles away from the Supreme Court. I normally took the subway into D.C. On the morning of my argument, I left early to make sure that if anything happened, I'd have a cushion. Sure enough, as soon as the train I was on went underground between the station near my house and the next station, it grounded to a halt. The train in front of it had caught on fire, and they had to close the track to clear it.

Sitting in that train car, in a tunnel (so no cell service), waiting to move, was like a waking nightmare. There was about an hour delay. When I finally got to the Court, I was about ten minutes past the time that the clerk had told us to arrive for our briefing. It was an excruciating walk from the metro station to the Court. But once I arrived, all was fine. I guess the moral of the story is, stay within walking distance for big oral arguments.

Q: What was your reaction when the Supreme Court issued its decision?

A: I had a job interview that morning with Mike Bidart at the Shernoff Bidart firm in Claremont. The clerk had called at 8:00 or 9:00 a.m. that morning (D.C. time) telling us that the opinion would be coming out at 10:00 a.m. Since I was in California, this was long before my interviews. When I walked into the firm for my interview, Mike asked me how I was doing, and I was able to say, "I'm going very well; I just won a unanimous decision in the U.S. Supreme Court this morning." That's a strong way to start a job interview—particularly when the position was for an appellate lawyer.



Elizabeth Post is Executive Director of the San Fernando Valley Bar Association, a position she has held since 1994, and Publisher of *Valley Lawyer*. She can be reached at epost@sfvba.org.

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About 50 attorneys and legal professionals attended the inaugural meetings of the Valley Bar Networking (VBN). VBN is dedicated to offering organized, high quality networking for SFVBA members. Contact the Bar office at (818) 227-0490 to find out more.

The Kelly Rutherford Custody Case: *It All Could Have Ended Differently If...*

By Maya Shulman

MUCH HAS BEEN WRITTEN about actress Kelly Rutherford's custody battle with ex-husband Daniel Giersch. But not enough has been examined about what could have been done to result in a completely different outcome.

According to media reports, in December 2015, Rutherford lost custody of her two children and is further barred from bringing them to the United States. A Monaco judge delivered the final decision granting full custody of her 9-year-old son and 6-year-old daughter to Rutherford's ex-husband Daniel Giersch. People magazine reported that Rutherford will only be able to visit her children in Monaco or France.

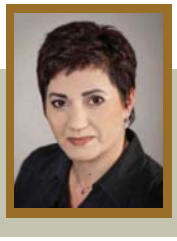
The decision follows a stream of jurisdiction issues, international cross-border challenges, visa and residency issues, Rutherford's refusal to return the children to their father at the end of her visitation with them in the United States, and almost a dozen family law attorneys, ten engaged by Rutherford alone.

Could the outcome have been any different for Rutherford or the children, who Rutherford claims are more at home in the United States than in Europe? Yes, but only if….

- Rutherford had been better counseled on the intricate residency custody issues. It appears that at the time the case was pending, Rutherford resided in New York and yet she requested that the children be returned to her in California while their father resides in Monaco. Even though their divorce took place in Los Angeles, neither parent remained in Los Angeles, so Los Angeles court's jurisdiction, i.e. power to issue orders over people and things, can and was, in this case, taken away in favor of a different state or even country.

  Rutherford should have filed for a *forum non-conveniens* and moved the case to New York prior or concurrently to litigating custody issues. *Forum non conveniens* is a discretionary power that allows courts to dismiss a case where another court or forum is much better suited to hear the case. Had Rutherford requested that the children be returned to her in New York while she was living in New York, the outcome of the case would have been more favorable to her.

- Rutherford should have been counseled on the legal impact of her decision to refuse to return the



Maya Shulman, a specialist in child custody and asset division disputes, founded the Shulman Family Law Group in Calabasas. In addition to interstate and international custody cases and contested surrogacy and paternity claims, the Group provides litigation and mediation in all areas of complex family disputes. Shulman can be reached at mshulman@sflg.us.

children back to the father because there is an important distinction between physical and legal custody. The residence in Monaco is the physical custody; the issuance of a passport addresses legal custody.

If the court refused to grant joint legal custody, it may have had something to do with Rutherford's refusal to return the children to the father in Monaco. If there is a reasonable belief that the children will not be returned, the issuance of the children's passport will be weighted in favor of the complying parent. Furthermore, any parental non-compliance diminishes the requesting parent's chances to prevail in general and on a specific issue.

- If a custody evaluation was done, which in California is governed by Evidence Code Section 730, it didn't appear to have been weighed heavily in this case. Therefore, it may have never been done, and thus diminished Rutherford's influence in physical custody determination. Overall, it appears that the case was focused more on jurisdictional issues than faulty parental judgment. Jurisdictional criteria can strongly impact inter-state cases as well as international ones.

Recently, a California-based father with minor children faced similar issues. The mother brought the children to Washington State after she convinced the court she would properly facilitate visitation between the father and the children. The father client was advised to establish a second residence in Washington State in order to exercise and protect his parental rights. Ultimately, the mother was non-compliant in visitation facilitation and the father was permitted to bring the children back to California. The father was successful in this request not only because he proved to be a better parent but because he correctly maintained California residency.

At this point, the outcome for Kelly Rutherford is next to impossible to alter. Many family law experts have opined what Rutherford should do at this point. The key is what she should have done to support her and her children's custody objectives from the legal and judicial perspective before her case and her actions went off the rails.

More and more commonly, family law and custody cases are entailing multiple residence issues. Thus, having specialized knowledge and expertise in this area can make all the difference in the outcome.

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.

Amanda: A Victim No More

LAURENCE N. KALDOR
President

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THE VCLF IS PROUD TO support Save Passages and their empowerment of victims of domestic abuse.

Breaking free of the chains of domestic abuse is not an easy thing. Long after the source of physical, sexual or emotional abuse is removed, the memories of abuse remain a constant challenge.

And so it was for Amanda Durante, a youth in the San Fernando Valley who lived in the shadow of the abuse she once suffered from. It consumed her, and kept her from living a normal life. Amanda's struggle with past abuse left her feeling worthless and hopeless. She didn't believe she was capable of healing. Safe Passages showed her otherwise.

"I was a depressed, anxious, and very angry resentful person," tells Amanda. "My emotions and my thoughts controlled me, and I would act impulsively on feelings rather than on thoughts. My struggle with past abuse had left me feeling worthless and hopeless. I never believed I was capable of healing."

Amanda was introduced to Safe Passages by a friend. And Amanda was understandably skeptical. Meeting up with strangers asking "How does that feel" just didn't sound like what she needed. But she gave it a go, and began meeting with Linda, one of the directors.

"It's no longer a chain that I feel is tying me down every day," reflects Amanda. "I feel like I am able to carry on with my life, without any strings attached. For the first time since I was very little, I feel free."

Aside from the sessions she had with Linda, there were weekly meetings with the other women in the program and a life coach, Madelon. Amanda remembers their first meeting and listening to the material she had. It was about the three people you need to forgive before you can really move on with your life: your parents, yourself, and anyone and everyone who has ever wronged or hurt you. This truth hit Amanda like a truck.

"Forgiveness is for you," Amanda learned, "so you can move on and not be tied down emotionally or mentally to situations and circumstances in the past. All the tools and material Madelon worked so hard to prepare for us each week have changed my life, and will continue to change me every time I go back through it. She has shown me that I can accomplish anything I put my mind to through the use of goals, good habits, hard work, dedication, and good time management."

Through this program, Amanda has grown to have a sense of maturity in understanding things she never could before. Meeting with the other woman helped with that as well. Seeing that these women came from all different walks of life, and all dealing with domestic violence or abuse in one form or another, showed her that she was not alone.

"Some of my fellow graduates have shown me much love and support for the time I had with them, and I would like to thank everyone at Safe Passages for that and all the advice and wisdom you have passed down to me."

Safe Passages is supported by the generous contributions of many individuals, companies, and organizations. The VCLF is proud to support Safe Passages and amazing people like Amanda Durante.

About the VCLF

The Valley Community Legal Foundation is the charitable arm of the San Fernando Valley Bar Association. The Foundation's mission is to support the legal needs of the youth, victims of domestic violence, and veterans of the San Fernando Valley. The Foundation also provides educational grants to qualified students pursuing legal careers. The Foundation relies on donations to fund its work. Please visit thevclf.org to donate.

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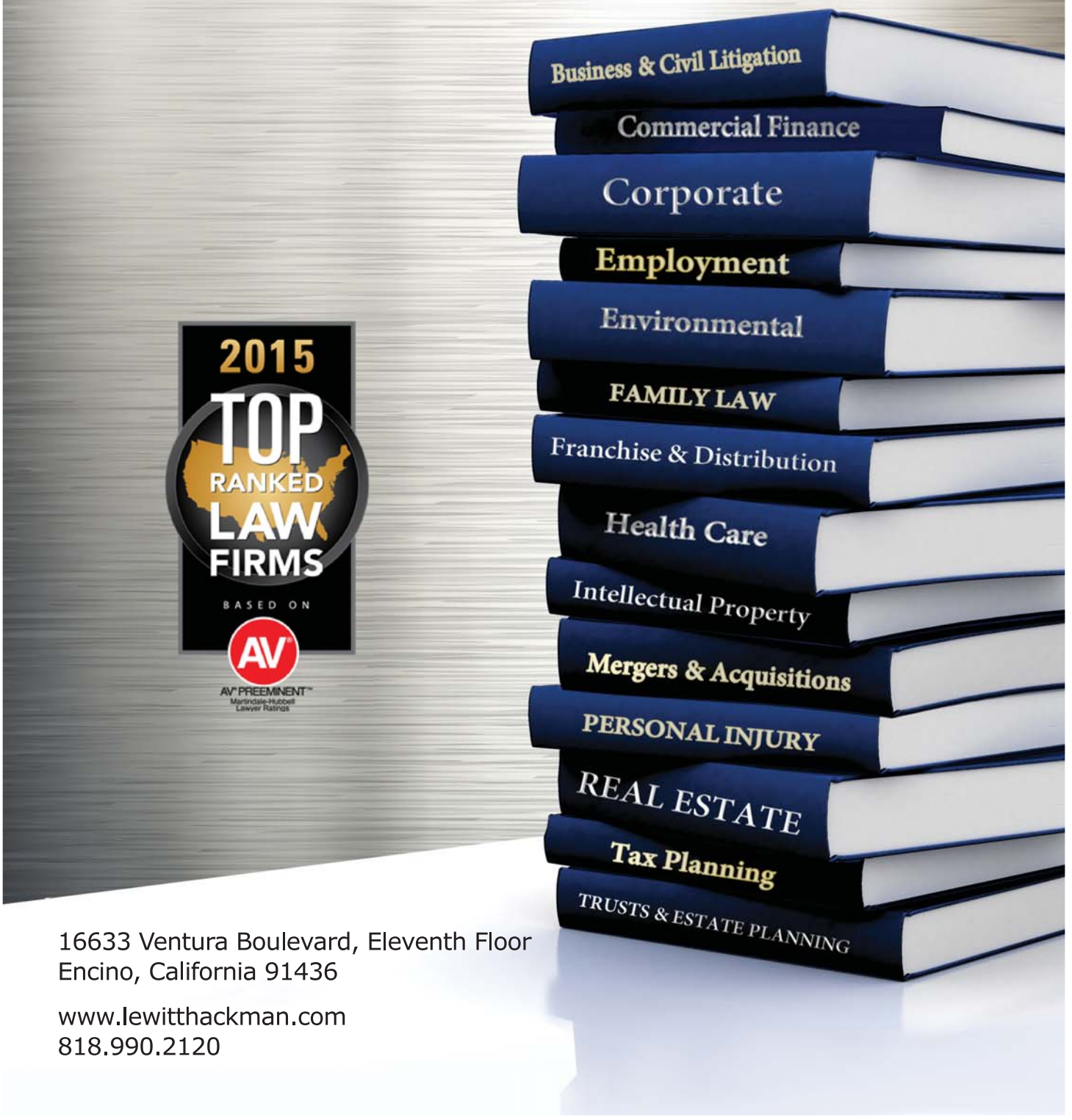

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