VALLEY LAWYER

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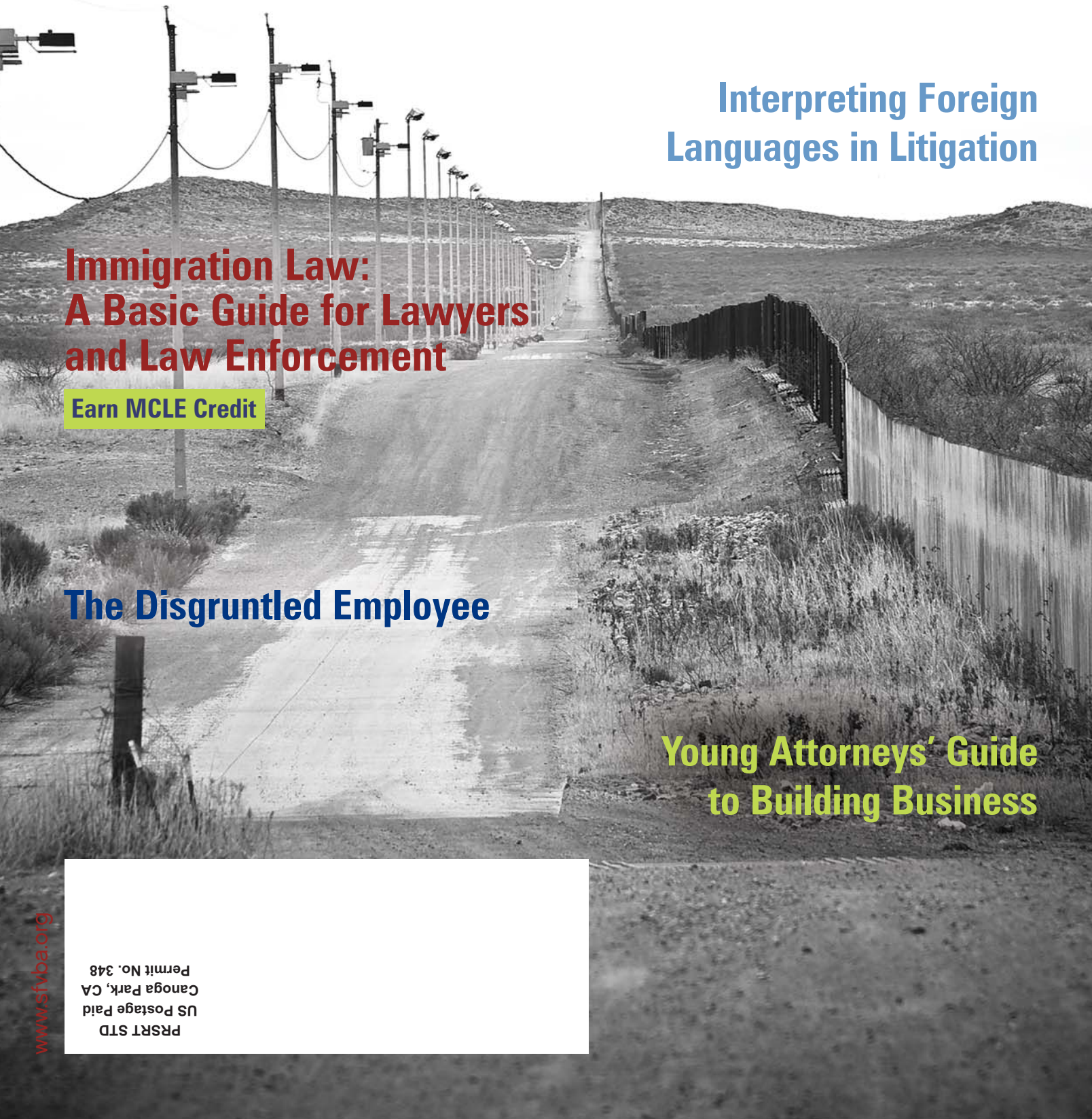
A Publication of the San Fernando Valley Bar Association



Interpreting Foreign Languages in Litigation

Immigration Law: A Basic Guide for Lawyers and Law Enforcement

Earn MCLE Credit

The Disgruntled Employee

Young Attorneys' Guide to Building Business

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FEATURES

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VALLEY LAWYER

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Are We Achieving the Most We Can Together?

SEYMOUR I. AMSTER
SFVBA President

ORGANIZATIONS MUST define their relationship and acknowledge what it is in order for them to have a successful relationship. The San Fernando Valley Bar Association and the Valley Community Legal Foundation have a relationship. But what exactly is it?

These two entities are housed in the same office. These two entities purport to be part of each other. But do we really define ourselves as being part of each other? Or are we like siblings at times living in the same house just tolerating each other?

In the coming year I would like to see the working relationship between these two great institutions become strengthened. Not only would I like to see a stronger working relationship, I would like to see each entity believe and define itself as being part of the other.

Why? It will make each entity more successful. We need each other, and together we can reach for the stars. If we continue in the same direction we have been going, we will be all right. Each entity will be relatively successful, doing good things, but together we can do great things.

The Valley Community Legal Foundation is supposed to be the charitable arm of the San Fernando Valley Bar Association. Years ago the Bar saw a need to become involved with such an institution because charitable opportunities were presented to the Bar, but the Bar did not have a means to deal with these opportunities. Thus, instead of creating its own foundation, the Bar adopted the Valley Community Legal Foundation.

Presently, the Bar and the Foundation hold many events together. The Bar does many administrative tasks for the Foundation. Many board members of the Foundation are Bar members, and many board members of the Foundation also sit on the Bar's board. But the relationship between these two entities does not go much further than this.

In order for the relationship to become closer, each entity must address the concerns of the other. It is because of this belief that I appointed Foundation President Michael Hoff to be a board member of the Bar. There is no doubt that his vast experience in the legal community will be a tremendous asset to our board.

But I did it for another reason as well; I wanted to strengthen the bonds between the Bar and the Foundation – allow an easy means of communication between the two entities. When one entity is doing something, or not doing something that the other entity would like to see changed, a means of communication that can be accessed without little effort is in place. I also sit on the Foundation board. Thus, the leaders of our two entities now sit on each other's boards, allowing two to start acting as one.

How can the two start acting as one? There are close to two thousand members of the SFVBA. Not all of them are donating monies to the Foundation. I am sure they donate money somewhere each year, maybe not always a lot, but something, probably not considering the Foundation their first priority. I would like to see that change; I would like our members to think of the Foundation first.

Why? The Foundation supports programs that are closely associated with affecting the legal community. If we can increase the amount of monies the Foundation has to work with, try to give the Foundation another source of income besides just their annual Gala, then our Foundation can do so much more. The more can be programs that are near and dear to the hearts of the Bar.

I never want the Foundation to lose its independence. I never want the Foundation to be run by the Bar nor the Bar run by the Foundation. But we can be independent and together at the same time. We could become a great marriage. Each entity preserving its independence, having its needs addressed and considered by the other, but then working with the other towards a common goal.

The community will be better served. The community will see the legal profession of the San Fernando Valley as a caring one. Citizens of the Valley will look upon the judges and lawyers in their community with respect and high regard. By working together, these two great institutions better serve our community, better serve our members, and better serve us.

Seymour I. Amster *can be contacted at Attyamster@aol.com.*

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Flash to the Future

ELIZABETH POST
Executive Director

I am filling in for Editor Angela Hutchinson, who is out this month on family leave. Before I tell you about an exciting new member benefit, I am thrilled to announce that Angela gave birth on October 3 to a healthy 8-pound baby girl, Alyssa. Congratulations to Angela, proud dad Arthur and big brother Alexander!

The deadline for California attorneys in Group 3 (N-Z) to report their MCLE credits earned over the 3-year period is February 1, 2011. The San Fernando Valley Bar Association has ample opportunities for all our members to obtain quality and affordable MCLE, from participating in our monthly Section meetings, to attending our annual MCLE Marathon, to borrowing CDs from our complimentary MCLE audio library, to reading the monthly MCLE article in our *Valley Lawyer* magazine.

Of the 25 required MCLE hours, half can be self-study. SFVBA Members have a new way to earn the maximum allowable self-study credits efficiently and cost-effectively. The SFVBA is offering an MCLE Flash Drive containing 13 of our most popular self-study articles which have or are scheduled to appear in *Valley Lawyer* magazine. Six of the articles on the MCLE Flash Drive fulfill attorneys' special requirements (4 hours Legal Ethics, 1 hour Detection/Prevention of Substance Abuse or Mental Illness, 1 hour Elimination of Bias in the Legal Profession).

Sales of the MCLE Flash Drive will begin later this month along with registration of our annual MCLE Marathon, scheduled for January 14 and 15, 2011 at Braemar Country Club. Members purchasing individual articles pay $15 an issue, but members will be able to buy the MCLE Flash Drive for just $99 (a savings of $96). Members registering for both the MCLE Marathon and the Flash Drive pay just $199. That's an incredible value for 25 hours of MCLE and piece of mind.

For information on the MCLE Flash Drive, the upcoming MCLE Marathon or questions about your MCLE requirements, contact our Director of Education & Events Linda Temkin at events@sfvba.org or (818) 227-0490, ext. 105.

Contact Liz Post about member benefits and services at epost@sfvba.org or (818) 227-0490, ext. 101.

Interpreting Foreign Languages in Litigation

By Mark S. Shipow

IN THIS AGE OF GLOBAL ECONOMY, IN WHICH IT IS increasingly common to have disputes between individuals and companies from around the world, interpreting between English and a foreign language requires significant attention in the course of litigation. There are a number of legal and practical issues that should be considered when using interpreters. An interpreter provides the meaning of oral statements from one language to another; a translator provides the meaning of written statements from one language to another. See Evidence Code Sections 751(a), (c).

Preliminary Strategic Considerations

The first issue counsel needs to confront is whether to use an interpreter at all. Often there is no choice; the client simply cannot testify in English, or the other side's witness demands an interpreter. Sometimes it's a closer call; the witness is not fluent, but can understand and be understood. In that situation, the issue is one of strategy: is it better to use an interpreter or not?

It is important to make a good decision early in the litigation, since it is difficult to change the approach at trial. A witness who testifies through an interpreter at deposition, and then without an interpreter at trial, or vice versa, is likely to lose credibility.

Among the considerations that counsel should take into account when deciding whether to use an interpreter are:

- The importance of the witness communicating directly with the judge or jury, versus the importance of the testimony sounding exactly like what the jury expects
- The importance of conveying the nuances of what the witness means or the witness' state of mind, much of which is lost in the translation through an interpreter
- Impact on the judge or jurors hearing a witness speak with an accent, use unfamiliar idioms, or make errors in vocabulary and grammar, or having to struggle to understand the witness
- Whether the witness has been in the U.S. for a long time, and/or regularly conducts business in English, such that using an interpreter may signal an attempt to hide behind the interpreter, take advantage of the extra translation time to concoct answers, or otherwise appear evasive
- Whether the witness uses English to speak with his/her own attorney, so that using an interpreter to speak with opposing counsel in the deposition may make it appear that the witness is playing games
- Using an interpreter at least doubles the time it takes to provide testimony, whether in deposition or at trial
- The decreased control that an attorney has over the testimonial process when an interpreter is used

Selecting the Interpreter

As soon as a decision is made that an interpreter is needed, counsel should take steps to identify a qualified interpreter. Government Code Section 68561 requires use of a court-certified interpreter in any court proceeding using a language designated by the Judicial Council under Section 68562(a), except for good cause shown. A court proceeding is defined as any civil, criminal or juvenile proceeding, including a deposition in a civil case. Government Code Section 68560.5. Designated languages are listed at www.courtinfo.ca.gov/programs/courtinterpreters. One source of interpreter candidates is the court's list of certified interpreters (available at the above-identified website). Many reporter services also can provide interpreter candidates.

In deciding which interpreter to use, an attorney should consider numerous factors. Ideally, the interpreter should be fluent in both English and the foreign language. However, most interpreters are stronger in one language than the other. In that situation, attorneys are well-advised to use an interpreter who is stronger in English than in the foreign language. It is critical to have an English translation that a judge or juror will readily understand. After all, the purpose of the interpretation is to provide information to the fact-finder in a clear, cogent and understandable manner. That purpose is undermined by having an interpreter speak in halting or stilted English.

Another factor is whether the interpreter is experienced in litigation. Interpreting at a deposition or during trial is quite different from interpreting at a business meeting. The interpreter must be familiar with, and not intimidated by, the adversarial process. Also, a litigation-savvy interpreter is more likely to understand the need to provide precise

interpretations, rather than simply conveying the gist of the question or the testimony.

Before retaining an interpreter, counsel should interview the candidate, in person if possible. At the least, confirm that the interpreter's English is strong, that the candidate will be able to get along with all involved in the case, and that the candidate will be generally available for assignments to avoid multiple interpreters working on the case. Speaking to other attorneys who have used the interpreter will help in considering these factors. After selecting a primary interpreter, it is good practice to identify an alternate interpreter in case the need arises.

Using the Interpreter

Counsel can take several steps to increase the likelihood of obtaining interpretations that are understandable and useful for the case. Counsel should help the interpreter understand the case, so that the interpreter has an idea of what the controversy is about, and what events and issues are important.

In addition, the interpreter should be given a list of the key names, terms of art and technical terms that are likely to be used in the course of testimony. If possible, all counsel should agree to the proper interpretation of these terms.

The interpreter should speak with the witness prior to the testimony. They should not discuss the case per se, since their conversation will not be privileged. But having them talk to each other in advance (even if only for a few moments prior to the testimony) will help both the interpreter and the witness become used to particular accents, mannerisms, speech patterns, etc.

During the course of testimony, counsel should take breaks more frequently than normal, since the interpreter is concentrating and talking essentially all the time, interpreting either the question or the answer. Counsel should try to use the same interpreter for as many witnesses as possible, to increase the continuity of the interpretations and reduce the time and effort needed to bring the interpreter up to speed.

Since interpreters are supposed to be impartial (and the good ones truly are), it should not matter whether the interpreter interprets the testimony of the witness or that of the opposing witness. Of course, if counsel needs to use the interpreter in order to be able to speak confidentially with his or her witness, letting the other side use the interpreter is not wise.

If possible, real-time reporting should be used at the deposition. This allows the interpreter to look at the questions while framing his/her interpretation, rather than having to rely solely on handwritten notes, or having to have the question read back. It also allows counsel to more easily refresh his or her memory as to the exact question being answered (since the question might have been asked several minutes earlier).

Consideration should be given to whether to use simultaneous translation (the interpreter interprets as the question is being asked or the testimony being given) or seriatim interpretation (the interpretation is given only after the question or answer is completed). The latter is more commonly used in depositions. Typically, it is easier and more accurate to have the interpretation given after the entire question or answer is provided. In addition, it is difficult to concentrate when two people (the interpreter and the attorney or witness) are speaking at the same time.

In either event, it is important that the interpreter provide a complete and accurate interpretation that conveys the entire intended meaning of the witness. *People v. Wong Ah Bank*, 65 Cal. 305 (1884); Standard 2.11, (a)(5), Standards of Judicial Administration. Also, examining counsel should keep in mind that the questions are directed to the witness, not the interpreter (e.g., "Did you attend that meeting"; not "Ask her whether she attended that meeting"), and the interpreter is to interpret in the first person ("Yes, I attended that meeting"; not "She says that she attended that meeting"). Standard 2.11(b)(1), (a)(6), Standards of Judicial Administration; *People v. Shaw*, 35 Cal.3d535 (1984).

Counsel should educate his or her witness on ways to make the interpreter's job easier (and thus increase the likelihood of accurate interpretations), and should keep these points in mind as he or she is conducting the examination. It is especially important to speak slowly and distinctly. Counsel and the witness should avoid using slang or colloquialisms.

The question or answer should be as complete within itself as possible. This is particularly important in languages (such as Chinese and Japanese) in which it is common to speak without specifically identifying such things as who is the subject of the sentence or what quantity of items is being discussed; leaving it to the interpreter to guess is a recipe for disaster.

Counsel should keep questions short, and witnesses should do the same with answers to the extent possible. If a longer answer is necessary, have the witness break it down into parts, a sentence at a time. Remind the client that everything he/she says will (or at least is supposed to be) interpreted, so the witness should avoid starts/stops to answers, and avoid asking the interpreter to explain the question.

As with English, if the witness does not understand the question as interpreted, he/she should simply say so and let the attorney and interpreter figure out how to get it right. On the other hand, if the witness is continually having difficulty understanding the interpretations, or believes that the interpretations are not accurate (which can happen even if the witness is not fluent in English), he/she should say so and steps should be taken to figure out what the problem is and correct it.

Checking Interpreters

When opposing counsel is taking the deposition of a client and retains an interpreter for the deposition, who is considered the official interpreter, it is advisable to try to learn whether that interpreter is likely to do a good job. If there are concerns, counsel should try to work them out beforehand. Both sides are well-served by having a competent interpreter agreeable to all parties. In any event, there is a right to object to the competency or qualifications of the interpreter, either before the proceeding begins or later if competency becomes an issue. *People v. Phillips*, 12 Cal.App. 760 (1910); *People v. Aranda*, 186 Cal.App.3d 230 (1986).

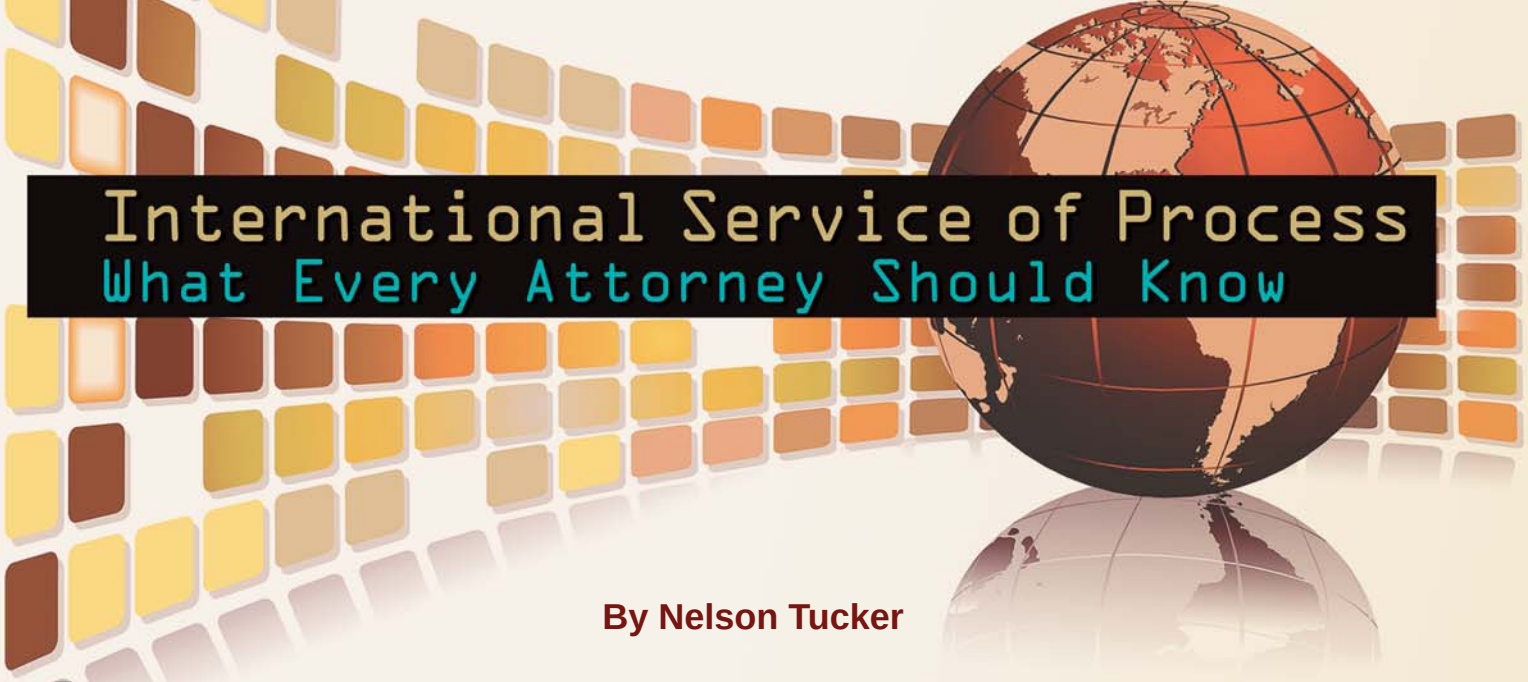
If there is a lack of confidence in the interpreter chosen by the other side, and sometimes even if the official interpreter is believed to be good, counsel should consider bringing an interpreter to the deposition in order to check the work of the official interpreter. Counsel has the right to discredit the accuracy of an interpretation through cross-examination or independent proof. *People v. Walker*, 69 Cal. App. 475 (1924).

When selecting a checking interpreter, the same care should be taken as when selecting an official interpreter. As an additional consideration, select someone who knows how to be discreet and professional in making suggestions and corrections to the official interpreter. This is no easy feat. Have the checking interpreter provide suggested changes only when truly necessary to make the question or answer intelligible, or where some word or phrase that is important to the litigation is used. Thus, highlighting the need to make sure that the interpreter has been briefed beforehand and understands the key issues in the case.

Sometimes it is best to have the checking interpreter explain the problem to counsel personally (by speaking off the record or by providing a note), and then counsel decides whether or not to raise it on the record. If there is a disagreement, and the interpreters cannot work out a mutually-agreeable interpretation, an objection should be made on the record, and the checking interpreter should specify what he/she believes is the correct interpretation.

It has become common for cases to involve witnesses whose native language is not English. Counsel should take care to ensure that the inability of a witness – particularly one's client – to communicate in English does not adversely impact the case. As with every other aspect of litigation, proper preparation and attention to detail will allow non-English speakers to have a fair day in court.

Mark S. Shipow *has his own practice in West Hills where he handles commercial litigation, including intellectual property, shareholder and partner disputes, real estate disputes and contracts. He can be reached at (818) 710-1906 or mshipow@socal.rr.com.*



International Service of Process
What Every Attorney Should Know

By Nelson Tucker

LAW SCHOOLS OFTEN NOT ONLY MINIMIZE THE importance of the laws related to service of process, but also rarely mention international service. After all, such service was a rarity until recent years.

Now, with the world shrinking and the global economy expanding, litigation between parties in the United States and foreign countries is increasing at a substantial annual rate. No doubt, within a short period of time, most U.S. attorneys will be faced with having a foreign defendant served with legal documents. What happens, then? The research time to determine the laws of another country can be staggering.

To combat the challenge of handling international matters for clients, it is important to understand the basic issues related to international service of process. Most international disputes arise from such areas as personal injury, trademark and patent infringement, products liability, family law, collections and real estate matters.

International service of process seems to be a maze until you discover that certain treaties and local foreign laws may apply which simplify the process. The most widely used treaty is the Hague Service Convention, which outlines the methods for process service in a specific country.

Another formal method of international service is by Letters Rogatory, a cumbersome, expensive and time-consuming method that should be used only as a last resort. Letters Rogatory is simply a request from the court of jurisdiction to the court where the service is to be made asking for judicial assistance. It is used when enforcement of judgment is sought in a nation where no service of process treaty exists. It is also used when serving a civil subpoena in a foreign country. Preparing it correctly to conform to the specific requirements of each country is an art.

State Law does Not Apply to Service Outside the United States

Understanding the procedures for compliance with applicable treaties and local laws will avoid civil and criminal penalties against the attorney and client who violate the law, albeit unknowingly. In many instances, state law does not apply to service outside the United States, so it is essential that the process begins with a complete understanding of the laws of the country involved.

For U.S. District Court cases, Federal Rule 4(f) is the authority for service of process outside the United States. It specifies the procedures that must be followed in serving federal cases. Some nations, such as Germany, Japan, Switzerland, Korea, Argentina and Italy, currently outlaw service by private party or process server. Others such as Taiwan, Australia, The Philippines and Saudi Arabia do not have treaties in force and allow service by an informal method, such as by private process server.

Many nations require the court documents to be translated into the official language of that country, while others accept an English version. Translation costs can often exceed the fee for service so it is vital to consult with the process service firm prior to filing the case, if possible. Once the case has been filed, all documents to be served must be translated; there are no exceptions.

5 Things to Consider with International Service of Process

1. To enforce the judgment in the foreign country, formal service is recommended. This method includes service pursuant to a treaty, such as the Hague Service Convention, or by Letters Rogatory.
2. Only use an experienced and qualified process service company who understands the barriers to international service and who can overcome them.
3. Allow sufficient time for completion of service as work habits, customs and bureaucracy in other nations typically cause delays that we do not experience here in the States.
4. Price is usually important but the successful completion of the service in the foreign nation is the ultimate goal.
5. Utilize the expertise of an international service of process specialist, preferably one who is local.

Challenges in International Service of Process

The greatest challenge in international service of process is meeting court-established deadlines. An extension of time for completion of service can normally be obtained by providing the court with a proper declaration from the process server.

Although few private process servers understand the rules related to international service, a handful specialize in serving the needs of clients in foreign markets where the maze is simplified.

According to Scott Spooner, International Specialist with Process Service Network in the San Fernando Valley, "It's amazing how each country has such a vast difference of laws that must be followed. U.S. attorneys are often frustrated by the myriad of requirements that some countries impose on services coming from outside their jurisdiction."

Spooner pointed out Mexico as a prime example of a nation whose legal system has gone beyond reason and common sense in imposing unnecessary requirements for service.

"Mexico attempts to protect its corporations and citizens from legal matters that may eventually result in attachment of assets. They do everything possible to delay service of process in hopes that the case will just go away," says Spooner.

However, Mexico is a signatory to the Hague Service Convention and in doing so agreed to follow the terms of the treaty. They are also a signer of the Inter-American Convention on Letters Rogatory which is a separate treaty. They cleverly combined the requirements of both treaties, thus making service there more difficult for foreign attorneys.

Eddie Varón Levy is an attorney who practices in California and Mexico. He is a former employee of the Mexican Central Authority who understands the challenges of service there.

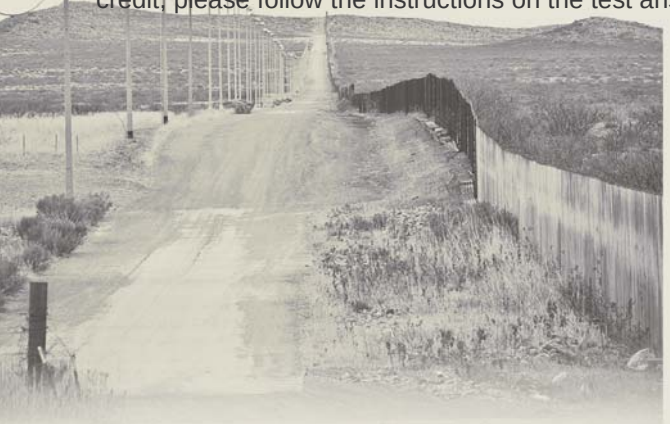
"They are very clever at putting up roadblocks to slow down the process of serving their corporations," said Levy. "I know, firsthand, how the system works there. The only way around it is to fully understand how to bypass their obstacles."

Other countries are not as protective and service of process is as easy as it is in the United States. Such nations as the United Kingdom, Canada, Spain, Australia, Malaysia and Sweden allow private process servers a free rein to complete service of process without governmental obstacles.

International service of process is something best left to professionals who understand the issues thoroughly. Process service firms that specialize in international matters can make an attorney's job seamless and take the mystery of dealing in foreign legal systems.

***Nelson Tucker** is CEO and founder of Process Service Network, LLC located in Winnetka. He has owned the legal support business since 1978 and has written several books on service of process. Tucker is also a qualified expert witness in process service issues. He can be reached at (800) 417-7623 or processnet@sbcglobal.net.*

MCLE ARTICLE AND SELF-ASSESSMENT TEST
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 17.



Immigration Law:
A Basic Guide for Lawyers and Law Enforcement

By Ronald J. Tasoff

WITH THE PASSAGE OF Arizona's SB 1070, a person's legal status has taken on a new significance. Indeed, despite the fact that a constitutional challenge has resulted in a temporary injunction against its enforcement, states across the country have proposed or enacted hundreds of bills addressing immigration since 2007, the last time a federal effort to reform immigration law collapsed. Last year, there were a record number of laws enacted (222) and resolutions (131) in 48 states, according to the National Conference of State Legislatures.

Despite the common misconception that undocumented individuals are easy to identify, those attempting to identify them quickly learn that undocumented immigrant status can be very ephemeral, and an immigrant's status often changes into legal status and visa versa. This guide will examine the various classes of immigrants, some of the ways their status can transform from "undocumented" to "documented" or legal status and contrariwise, and the many ways those who are legally in this country – even for many years – can easily violate their status and become "illegal".

Since the term "illegal" or "illegal alien" does not appear anywhere in the statute or regulations, for purposes of this guide, the term "undocumented alien" will be used. "Undocumented alien" means any alien who entered the country without inspection ("ewi's"), overstayed their authorized period to remain in the country ("overstays"), or has a determination by the U.S. Citizenship and Immigration Services (USCIS) or immigration judge that he/she has either violated his/her status ("out of status") or committed one of the many acts that renders him/her removable ("removable alien").

A Brief Overview

The Immigration and Nationality Act[1] (the "Act") has four primary goals: family unification, allowing skilled individuals to work in the United States while protecting the jobs of American workers, refugee relief and diversity. With apparent simplicity, it divides all of humanity into U.S. citizens and aliens. Under the 14th Amendment of the U.S. Constitution, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[2] Congress has additionally provided citizenship for certain children of U.S. citizens born abroad.[3]

The Act then subdivides the class of aliens into immigrants and nonimmigrants. Immigrants are people who are allowed to live and work in the United States permanently – although as we will see, "permanency" is not guaranteed – and immigrants are eventually eligible to become naturalized U.S. citizens. Once a person with an immigrant visa is admitted to the United States or he or she adjusts their status while in the country, they are referred to as lawful permanent residents (LPR's) and receive an alien registration card also known as a "green card"[4].

Nonimmigrants are individuals who are allowed to legally enter the United States for a temporary period of time to pursue specific goals or activities. These activities range from being a tourist or doing business in the United States to "alien victims of sever forms of trafficking in persons". Indeed, given the numerous subdivisions and duplication in section 101(a)(15) of the Act and 8CFR214.1, it is difficult to get an exact count of how many nonimmigrant classes there are. Let it suffice to say that the alphabet soup of nonimmigrant visas range from an "A-1" visa (diplomats) to "V-3" (dependent of a V-1 spouse of child of a lawful permanent resident). Please refer to the accompanying chart for a list of common visas, including several that allow for employment authorization.

Selected Nonimmigrant Visas
** Designates Employment Authorized*

- B-1 Temporary visitor for Business
- B-2 Temporary visitor for Pleasure (Tourist Visa)
- E-1 Treaty Trader, spouse and children*
- E-2 Treaty Investor, spouse and children*
- F-1 Student Visa (* possible)
- H-1B Work Visa for Specialty Occupations (including fashion models)*
- J-1 Visas for exchange visitors*
- K-1 Fiancée and Fiancé Immigration Visa*
- O-1 Extraordinary ability in Sciences, Arts, Education, Business, or Athletics*
- P-1 Individual or team athletes or entertainment groups*
- R-1 Religious workers*
- TN Trade visas for Citizens of Canada and Mexico*

Note: Citizens for certain countries do not need visas. The Visa Waiver Program enables foreign nationals, mostly from developed countries, to visit the United States for up to 90-day visa-free.

The Department of Homeland Security ("DHS") has recently reported that the illegal immigrant population dropped to 10.8 million in 2009, compared to 11.6 million in 2008. It was the second consecutive annual decline and the largest in at least three decades. The same report estimates the legal resident population at 20.5 million. The foreign born population of Los Angeles County is currently around 35 percent, 1 percent less than ten years ago.

A final note, the professionals responsible for identifying undocumented aliens are the men and women who administer and enforce our nation's immigration laws: the three bureaus of the Department of Homeland Security[5] and the Department of Justice's Executive Office of Immigration Review[6] (EOIR). However, despite their expert status, even they get it wrong, as demonstrated by the many federal court decisions interpreting the law differently than these executive branch agencies do.

Illegal to Legal

On many occasions, often with the assistance of immigration lawyers, an undocumented alien can transform into one with legally acceptable documentation. Since ewi's, overstays and those out of status cannot change to a new nonimmigrant classification without first leaving the United States to obtain a new visa abroad – something most are loath to do – nearly all of these miraculous conversions are to LPR ("green card") status.

There are two barriers stopping the masses from legally immigrating to the United States. First, there are quantitative restrictions, quotas, which limit the number of people who can come to the United States in any one category of eligibility or from a specific country[7]. Second, there are qualitative restrictions, people that Congress has determined should not be allowed to live here due to a myriad of reasons ranging from criminal convictions and health issues to membership in terrorist organizations[8]. Of course, there are exceptions to all these rules.

Vast majorities of the people legally immigrating to the United States are "immediate relatives" of U.S. citizens (spouses, parents of citizen over 21-years-old and unmarried under 21-year-old child of a citizen) and are not subject to any quotas. Several of the grounds of admissibility have waivers, usually for relatives of U.S. citizens or LPR's, however for many there are no waivers.

The various categories of aliens that Congress has given a path to LPR status can be basically broken down into four groups: family based immigration, employment based immigration, refugees and asylees and successful applicants to a "diversity" lottery selection process. See the accompanying Chart for more details regarding the family and employment based categories.

By far, the majority come under the family sponsored categories. Of the 1.13 million new LPR's in 2009, over 535,000 were immediate relatives of U.S. citizens. Another 212,000

Immigrant Visas Categories aka Lawful Permanent Resident ("Green Card") Status

Family Based

Immediate Relative *(no quota restrictions)*

- Spouse, Child (unmarried and under 21) of U.S. Citizen or Parent of U.S. Citizen Child who is over 21 years old.

Preference System *(subject to quota limit of 226,000 for 2010)*

- Unmarried Son or Daughter of USC (over 21)
- Spouse or Child of LPR
- Unmarried Son or Daughter of LPR (over 21)
- Married Son or Daughter or USC
- Brother or Sister of USC

Employment Based

(subject to quota limit of 150,657 for 2010)

EB1 1st Preference
- Extraordinary Alien
- Outstanding Professor/Researcher
- International Executive or Manager

EB2 2nd Preference
- Advanced Degree or Exceptional Ability Workers

EB3 3rd Preference
- Baccalaureates/Skilled Workers and Unskilled Worker (under smaller sub-quota)

EB4 4th Preference
- Certain Special Immigrant

EB5 5th Preference
- Immigrant Investor ($1 million or $500,000 in redevelopment zone + creation of 10 new jobs)

Refugees and Asylees

(subject to quota set each year by President, approximately 80,000 in 2010)

Diversity Visa Program ("Green Card" Lottery)

(subject to quota limit of 55,000 for 2010)

came under the family preferences. Employment based immigration was 144,000, refugees and asylees accounted for 180,000 and nearly 48,000 won the "green card lottery". All in all, America allowed more legal immigration than the rest of the world's countries combined.

In addition to the quantitative and qualitative limitations stated in the Act, regulatory policy and procedurescan also create obstacles in the path of legalization. A classic example is the dilemma discovered by ewi's who marry U.S. citizens.

Many of these ewi's came illegally to the U.S. as children. Not allowed to adjust their status in the United States because of their illegal entry, they must apply abroad at an American Consulate for an immigrant visa[9]. However, upon their departure, they immediately become subject to the 3 or 10 year bar of section 212(a)(9)(B) of the Act[10]. Although eligible for a waiver, current CIS policy requires them to apply after they travel abroad. Due to processing delays, applicants are stuck living abroad for anywhere from 6 weeks to 15 months, assuming the waiver is granted.

Legal to Illegal

It is common knowledge that with the passage of time, a nonimmigrant's permission to remain in the United States expires and the alien is subject to removal. In fact, DHS has estimated that there are at least 2.3 million aliens who overstayed their authorized period of admission now living in the United States.

What is less well known are the multitude of ways that a LPR can become subject to removal or barred from reentering the United States after a trip abroad. The most common reason is a criminal conviction. Approximately 128,000 "criminal aliens" were removed in 2009, especially for crimes involving controlled substances, firearms and domestic violence. However, some of the grounds of removal found in section 237 of the Act apply to activities that are not so serious. For instance, the violation of a civil protective order is considered a removable offense. Even the act of remaining abroad for over one year continuously may result in "abandonment" of LPR status and confiscation of an alien's green card.

For LPR's, the discovery of a removable offense might occur when the person is arrested and booked for any offense and a fingerprint check reveals a criminal record. Others, after traveling abroad without incident for many years, find out upon being routinely inspected at an airport that CBP official have access to new databases. And others are caught upon applying for naturalization or renewal of their green cards which expire every 10 years.

Thus, being a lawful permanent resident is not all that permanent. Only one thing can halt the possibility of the loss of legal immigration status: naturalization. Once a person has LPR status for 5 years, 3 if married to a U.S. citizen, he or she is eligible to apply. The applicant must also show that during that period he or she has been a person of "good moral character", and has spent at least half the period physically in the United States. The applicant must also pass a citizenship and American history test and be able to speak and read basic English, although exceptions exist for the physical and mentally disabled and long term LPR's who reach a certain age. As a result, many naturalized U.S. citizens look like undocumented aliens, a complication that must be considered by those in law enforcement.

Conclusion

If you believe the popular media, identifying undocumented aliens sounds like a simple task that nearly anyone can do. However, it is hoped that this guide will illuminate how difficult determining immigration status can be.

It is by no means an easy task given the amazing complexities of the immigration laws and how easily those who are granted the right to live legally in the United States on a "permanent" basis can lose that privilege.

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[1]Title 8 of the U.S. Code (8 USC), sets out the statutory scheme for regulating immigration in the United States.

[2]Lately, anti-immigrant groups have advocated repealing this provision by a Constitutional amendment. However, the original purpose of the citizenship clause — to prevent the creation a politically disenfranchised underclass of former slaves — is still relevant. Several countries in Asia and the Middle East already have a permanent underclass of people born to foreign workers on their soil who for various reasons cannot be deported, exploited and with little hope of legitimizing their status they are easily recruited by criminal and radical elements.

[3]If both parents are U.S. citizens, the child is a citizen. However, if only one parent is a U.S. citizen then the length of time the citizen parent lived in the United States before the child's birth, the child's birthdate and even the gender of the citizen parent can affect eligibility and the use of derivative citizenship charts are required. see *Kurzban's Immigration Law Sourcebook:* American Immigration Lawyer Association, © 2010.

[4]The current version of the card, USCIS Form I-551, is a high security document white and bluish green in color, that is machine readable and contains the alien's photograph, fingerprints, and signature as well as optical patterns to frustrate counterfeiting. Before 1976 the card was green. The current version of the card looks like this:

[5]The Citizenship and Immigration Services (CIS) administers the benefits side – the adjudication of petitions and applications for various immigration classifications and the naturalization process. Customs and Border Patrol (CBP) enforces the law along the land borders and ports of entry, and Immigration and Customs Enforcement (ICE) is responsible for enforcement in the interior of the country including investigations, arrests and detention and prosecution of removal cases.

[6]EOIR administers the 58 immigration courts located throughout the country and the Board of Immigration Appeals.

[7]For 2010 quota for total Family Based immigration is set at 226,000 not including "immediate relatives" of U.S. citizens for which there is no numerical limitation. Employment Based is set at 150,657. These visa numbers are allocated in unequal proportions set by law to the various subcategories (see chart). No single country can be issue more than 26,366, 7% of total) which has resulted in large backlogs for Mexico, Philippines, India and China.

[8]See section 212 of the Act for the grounds of inadmissibility — the rules that prevent aliens from receiving visas and/or entering the United States. Similar but different in significant ways, is Section 237 of the Act, the grounds of removal, which allow DHS to remove people who are already in the United States.

[9]There is an important exception for aliens who are beneficiaries of an immigrant relative petition or labor certification application filed before April 30, 2001 and certain aliens related to such individuals, see section 245(i) of the Act.

[10]Passed in 1996, section 212(a)(9)(B) of the Act, for the first time, sought to punish anyone, legal immigrants or nonimmigrants, who stayed in the United States illegally by barring them from future entry. Known as the 3/10-year bar, this provision bars from re-entry those who have accumulated more than six months of illegal presence. Illegal aliens with six to 12 months of unlawful presence are barred for 3 years; those here for more than a year illegally are barred for 10 years. Waivers are available to the sons, daughter and spouses (but not parents) of U.S. citizens and LPR's applying for immigrant visas upon a showing of extreme hardship to the LPR or U.S. citizen. Nonimmigrant waivers are less restrictive.

MCLE Test No. 27

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. Some of the goals of the Immigration and Nationality Act are to reunite families and protect American workers.
   True
   False

2. A child born abroad with at least one U.S. citizen parent is a U.S. citizen.
   True
   False

3. Aliens who enter on B-1 Business visas are allowed to work in the United States.
   True
   False

4. There is no quota for parents of U.S. citizens who are over 21 years old.
   True
   False

5. There is no quota for spouses of LPR's.
   True
   False

6. A "green card" is not green.
   True
   False

7. A LPR can be removed for violation of a civil protective order.
   True
   False

8. A LPR could lose his or her green card if they remain abroad for over 12 months.
   True
   False

9. Naturalized U.S. citizens can be removed from the United States if they commit aggravated felonies.
   True
   False

10. ICE officers are in charge of protecting America's borders from aliens attempting to enter the United States without inspection.
    True
    False

11. A spouse of a U.S. citizen who entered without inspection and lives in the United States for over one year cannot return to the United States for 3 years even if they qualify for an immigrant visa unless they are granted a waiver.
    True
    False

12. A lawyer in a criminal matter should always know his client's immigration status because a plea to a lesser offense that might be beneficial to a U.S. citizen could result in removal if the person is an alien, unless the client is a permanent resident of the United States.
    True
    False

13. An alien here illegally can never become a naturalized U.S. citizen.
    True
    False

14. LPR's married to U.S. citizens can naturalize 2 years before those who are not married to U.S. citizens.
    True
    False

15. Both U.S.C.I.S and the Immigration Courts are parts of the DHS.
    True
    False

16. If an illegal alien is married to a U.S. citizen they can apply for their green card in the United States if a penalty fee of $1,000 is paid.
    True
    False

17. According to the Immigration and Naturalization Act all people are either U.S. citizens or aliens.
    True
    False

18. An alien can get a green card if they win a lottery.
    True
    False

19. America allows more legal immigration than all of the other countries of the world combined.
    True
    False

20. Although approximately 1 out of 3 people in Los Angeles County were born in a foreign country, this is less than 10 years ago.
    True
    False

MCLE Answer Sheet No. 27

INSTRUCTIONS:

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

   San Fernando Valley Bar Association
   21250 Califa Street, Suite 113
   Woodland Hills, CA 91367

METHOD OF PAYMENT:

Check or money order payable to "SFVBA"

❒ Please charge my credit card for

❒ $_____.

_____

Credit Card Number Exp. Date

_____

Authorized Signature

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

Name_____

Law Firm/Organization_____

_____

Address_____

City_____

State/Zip_____

Email_____

Phone_____

State Bar No._____

ANSWERS:

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

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

Young Attorneys' Guide to Building Business

By Michael G. Kline

TEN YEARS AFTER ATTORNEYS have entered the practice of law, they find themselves in similar surroundings to those in existence the decade prior. They will look back over their careers and wonder where the time went, and why they still toil away behind their computer screens while their supervising partners are off trying cases or, better yet, enjoying lengthy and well-deserved vacations to exotic destinations.

They will look through law school alumni magazines and read of classmates with more prestigious titles practicing in larger firms with presumably better office views than their own. They will wonder what they did wrong … and how they let their golden opportunity pass them by.

Fortunately, for attorneys of all ages and experience levels, it is never too late to build a book of business. However, the most prudent counselors realize early in their careers that success in the business of law is built on a foundation of focus that is buttressed by four primary pillars: experience, knowledge, interpersonal relationships and effort.

Focus

Focus in the practice of law goes hand in hand with success. Whether upon a certain client base, industry or area of practice, concentration in a given area expedites attorneys' development of the pillars referenced above. Of course, it is hard to imagine a potential client with an employment dispute choosing a civil litigator over a labor and employment specialist, all other things being equal.

The same holds true across virtually all spectrums; an attorney with a specialization gains instant credibility over general practitioners with clients in their chosen field. If history does, in fact, repeat itself, young attorneys should take note that being a jack of all trades but master of none has proven to be the death knell of many attorneys with more experience, knowledge, social skills and drive than their singular-focus counterparts.

For those seeking to choose an area of expertise, two common lines of thought apply. The first is to choose an area in which the attorney possesses a personal interest or expertise. Using this rationale, the technophile should target computer and technology companies and learn about the legal issues facing that industry, and the fashionista should do the same with respect to apparel companies.

Practicing in an area of interest makes the development of one's career more enjoyable, to be sure. Yet a second line of thinking suggests that the best opportunity may lie elsewhere. For those whose interests do not necessary afford them the greatest chances at success (think moviegoers or avid golfers), many have found success by capitalizing upon the needs of the day. Whether deciding to specialize in real estate in 2000 or bankruptcy in 2008, attorneys seeking a specialization have foregone choosing a focus area, and have allowed their niche to find them instead.

Experience

Once the attorney has picked his or her area of focus, he or she must then turn to the four pillars of success. With respect to experience, clients are like voters – more often than not, they place a large emphasis upon experience when deciding who to choose. Unfortunately for those recently admitted to the Bar, experience practicing law is something that cannot be rushed or hidden; an

attorney has either been practicing for a long time, or he has not. However, young attorneys can get a leg up on their competition by placing a strong emphasis on developing the remaining three factors early in their career. By doing so, they will be able to build their book of business much faster than those who wait for the work to come to them.

Knowledge

Young attorneys must remember that while knowledge is readily obtainable, not all knowledge will help them become a partner one day. Ask anyone who has been practicing law for a few years, and they can identify a plethora of attorneys with what they believe are circumspect intellectual pedigrees who have somehow managed to make it on their own. Thus, the knowledge the young attorney must strive to obtain is not necessarily knowledge in the law, as this will largely be developed through the work he or she does on a day-to-day basis. Rather, the knowledge young attorneys should seek to develop as early as possibly is that possessed by their desired client base.

By becoming an expert in the client's field, the attorney gains instant credibility with potential clients, which can often-times give more experienced attorneys who lack similar knowledge a run for their money when competing for that client.

Relationships

The typical client is looking for experience and knowledge to be sure, but the vast majority also put heavy emphasis on the person behind the business card. Trust can never be overstated in this context – a client who has no legal background puts an inordinate amount of trust in the attorneys who represent him or her.

It does not take long for the young associate to realize that many of his supervising partner's clients were obtained not through happenstance or coincidence, but through word of mouth, friends or family. Developing personal relationships with people in the industry targeted by the young attorney not only develops that trust, but it enables the young attorney to gain industry expertise by spending time with those who already possess the knowledge they seek.

Drive

Young attorneys entering the practice of law in the 21st Century are typically bombarded by their more experienced counterparts with messages concerning the importance of one's personal time and the need to balance his or her professional life with moments of physical and emotional respite.

Today's new lawyers begin their careers with the belief that if they work hard and exhibit the same skill and passion for the law that they exhibited during their law school careers, the only thing standing between them and a corner office with an amazing view is time. More experienced attorneys may state otherwise. While messages of personal and professional balance certainly encapsulate the ideals of the legal industry, the reality is that to remain competitive, one must sacrifice some of that personal time for the betterment of his or her career.

Whether keeping business cards on hand, attending weekend events for networking purposes or simply spending a couple extra hours here or there to further one's marketing goals, young attorneys who seek success in an industry that is more competitive than ever must remember that time is not enough. They must follow the well-known "ABC" mantra: Always Be Closing.

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Cost of Raising a Child Calculation Tool

Issues Involving Child Support

By Mark B. Baer

SINCE 1960, THE UNITED STATES DEPARTMENT OF Agriculture (USDA) has been assigned to provide estimates of expenditures on children from birth through the age of 17. Those expenditures consist of the following categories: housing, food, transportation, clothing, health care, child care, education and miscellaneous expenses. It is important to note that the report only covers through the age of 17 because parents do not stop supporting their children once they reach the age of 17. In other words, people should expect that children will actually cost them more than what is set forth by the USDA.

According to the USDA report entitled, "Expenditures on Children by Families, 2009," "In 2009, estimated annual average expenses on the younger child in two-child, husband-wife families increased as income level rose. Depending on age of the child, annual expenses ranged from $8,330 to $9,450 for families with a before-tax income less than $56,670, from $11,650 to $13,530 for families with a before-tax income between $56,670 and $98,120, and from $19,380 to $23,180 for families with a before-tax income more than $98,120. On average, households in the lowest income group spent 25 percent of their before-tax income on a child; those in the middle-income group, 16 percent; and those in the highest group, 12 percent. The range regarding these percentages would be narrower if after-tax income were considered."

"Compared with expenditures on each child in a two-child, husband-wife family, expenditures by husband-wife households with one child average 25 percent more on the single child and expenditures by households with three or more children average 22 percent less on each child."

Taking inflation into account, it is estimated that to raise a child born in 2009 to age 17, it will cost the lowest income group $205,960, the middle income group $286,050 and the highest income group $475,680.

"For husband-wife families with one child, USDA estimates 27 percent of total family expenditures are spent on the child; for two children, 41 percent; and for three children, 48 percent."

"In 1960, average expenditures on a child in a middle-income, husband-wife family amounted to $25,229, or $182,857 in 2009 dollars. By 2009, these estimated expenditures climbed 22 percent in real terms to $222,360 (assuming a family had child care and education expenses on a child)."

Family Size and Income Correlation

As set forth by Jason M. Lindo in his September 24, 2008 study for the University of California, Davis, entitled, "Are Children Really Inferior Goods? Evidence from Displacement-Driven Income Shocks":

> "Cross-sectional evidence suggests that family size and income are negatively correlated," in that lower income families tend to have more children than do higher income families.

Rather than getting caught up on this inverse correlation and the fact that those having most of the children can least afford it, it should be noted that those in the lowest income group are effectively keeping themselves in that group by having children they can ill afford to support. How does one expect to improve their economic station if they burden themselves with expenses that prevent them from saving money and actually cause them to live beyond their economic means?

Rather than taking responsibility for poor financial decisions (having children they cannot afford), people tend to blame others for their circumstances. As stated by Lindo in his study, research shows that "a household not only chooses how many children to have, but also when to have them."

Clearly, this does not apply to all income groups because otherwise there would not be an inverse correlation between family size and income. Nevertheless, for those who are interested in knowing how many children they can afford, if any, the United States Department of Agriculture has developed a "USDA Cost of Raising a Child Calculator."

Children Are Expensive

Parents typically say that their children mean more to them than anything else. Considering the cost of raising a child, one would certainly hope this statement to be true. However, what parents seem to forget when they are divorcing or their relationship is ending is that children are expensive.

Since most parents never used the USDA Calculator, they never really thought about the cost of their children. It is only when the relationship comes to an end that the parents have to deal with the issue of child support.

Child support is the payment by one parent to the other for the support of the child/children of their relationship. The law requires that the amount of child support be determined in accordance with a guideline. Child support calculations take into account the respective gross incomes of the parents, tax deductible expenses and the percentage of time that each parent has the children, among other things.

Let's consider the following factors to calculate child support for a divorcing family:

- Father's gross monthly income is $4,500
- Mother's gross monthly income is $3,500
- There are 3 minor children involved, ages 3, 5 and 7
- Father has the children 25 percent of the time
- Father files his taxes as single
- Mother files her taxes as head of household
- Mother spends $600 a month on child care

For the above example, no other factors exist for purposes of calculating guideline child support. The father in this case would be ordered to pay the mother guideline child support in the sum of $1,310 per month and he would be left with net spendable income of only $2,019 per month. After taking into account the child support she receives, the mother would have monthly net spendable income of $4,765.

Invariably, father would complain that the laws are unfair and that he cannot afford to pay that amount of child support. He may also be troubled by the fact that the mother is not obligated to account for her use of that money. The father might refuse to purchase clothing and other basic necessities for the children because he is paying child support to the mother.

However, what the parents have not considered is that according to the USDA Calculator, the estimated annual cost of those three children is $29,492 and he is paying the mother $15,720 per year in child support, which is $13,772 less than the estimated annual cost of raising those children. The child support that he pays to the mother basically equalizes the fact that she has the children 75 percent of the time and therefore incurs 75 percent of their cost. Father still has the children 25 percent of the time and has costs associated with his time with them. Both parents struggle to support the children, one thinking he is paying too much in support and the other that she is receiving too little in support. In reality, the only reason the couple was able to afford the three children while still together (assuming that they could afford the three children) is because they only had one household to support.

According to the USDA's report, "As a proportion of total child-rearing expenses, housing accounted for the largest share across income groups, comprising 31 to 35 percent of total expenses on a child in a two-child, husband-wife family. For families in the middle-income group, child care/education (for those with the expense) and food were the next largest average expenditures on a child, accounting for 17 and 16 percent of child-rearing expenses, respectively."

In determining housing expenses, the USDA takes into account the average cost of additional bedrooms needed to accommodate the children. Considering the number of marriages that end in divorce, it might be a good idea if more couples considered the financial costs associated with children before actually having them.

Mark B. Baer *has a family law and estate planning practice in Pasadena. He has a regular column in the San Gabriel Valley Psychological Association's Newsletter, which was honored by the California Psychological Association. He can be reached at (626) 389-8929 or Mark@markbaeresq.com.*

The Disgruntled Employee

By Ann A. Hull

"DISGRUNTLED" IS A TERM FREQUENTLY used to describe a person who is mad at their employer. Failing to take complaints seriously, particularly when the complaining employee has a history of complaints or is regarded as a "trouble maker", can lead to a lawsuit. In the internet era, an ill-timed comment, a sudden reduction in scheduled work hours or a snap decision to terminate the complaining employee can turn a "disgruntled employee" into a plaintiff.

Workers have a variety of options when it comes to filing lawsuits against their employers. In California, workers are protected by the Fair Employment and Housing Act ("FEHA")[1], which is the primary statute prohibiting workplace discrimination. The FEHA prohibits employment discrimination based on race or color; religion; age; national origin or ancestry; physical disability; mental disability; marital status; sex; sexual orientation; pregnancy; childbirth, or any related medical condition. It also prohibits retaliation for opposing any practice forbidden by the Act, for filing a complaint, or for testifying. And the FEHA entitles a successful plaintiff to *unlimited* compensatory and punitive damages.[2]

A plaintiff that wishes to pursue a FEHA claim must file an administrative complaint with the Department of Fair Employment and Housing ("DHEF") within one year of the alleged discrimination, retaliation or harassment.[3] The employee can then wait for the DFEH to conduct its investigation or can request an immediate "right to sue letter" online at: www.dfeh.ca.gov. Once the employee has a right to sue letter he or she has one year to file a civil action with the court.[4]

Disgruntled employees who have been terminated can file a lawsuit for "wrongful termination in violation of public policy" if they are able to articulate that their firing did not comport with public policy. For example, in *Flait v. North American Watch Corp.*, a supervisor who objected and tried to stop sexual harassment of another employee was entitled to protection.[5] Similarly, in *Green v. Ralee Eng. Co.*, the California Supreme Court held that "a public policy termination claim was properly stated by a quality control inspector who complained about unsafe conditions."[6]

Instead of making a snap decision to disregard the complaints of an unhappy worker, wise employers should view each employee complaint as a warning sign of a potentially serious problem with a single manager, several managers or even an entire department. Employers have a duty to investigate employee complaints.[7] And a common error occurs when the employer's "investigation" consists merely of questioning the supervisor about whom the disgruntled employee complained, or that same supervisor's peers.

Too frequently, employers do not have an adequate policy for handling employee complaints. This situation frequently arises in small business settings. If a company has no policy, they should consult an attorney or the DFEH for help in establishing such procedures.

The FEHA is clear: "Harassment of an employee … shall be unlawful if the entity, or its agents or supervisors, knew or should have known of this conduct and failed to take immediate and appropriate corrective action." It need not be shown that the alleged harassment was intended to be seen by the victim. For example, in *EEOC v. PVN, LLC*, vulgar and offensive email between two male employees concerning a female worker's genitalia was evidence of harassment, even though the female worker was not the intended recipient of the email.[8] Likewise, even a decision-maker's "remarks" about race, age or gender may be an indicator of discriminatory bias.

As soon as one becomes aware that an employee has complained about a boss, co-worker or another aspect of their job, effort should be made to meet with the employee and to communicate that the complaint is important. It is also recommended to use the importance of the employee's complaint as an excuse to bring another person into the meeting to serve as a witness. An example might include: "Thank you for alerting me about this important concern. I'd like to have Joe Smith come in and hear this."

Employers, however, should never require the employee who is making a complaint to confront the same employee or supervisor about whom they complained, at least until facts have been gathered, and an incident report of some type has been prepared. In incidences where one employee complains about a co-worker or supervisor, efforts should also be made to assign the two workers to duties where they are not likely to encounter each other.

Regardless of whether a witness is present at the meeting, prompt effort should be made to document every detail of the employee complaint in writing. The employee should be asked the names of witnesses that can substantiate the allegations, and as many details as possible. The employee should also be asked what actions the employee would like the employer to take, which should be reflected in the supervisor's detailed notes.

The employee should be requested (in writing) to make a written complaint that includes all of the details of their allegations, and that it be submitted the next business day. If the company does not already have a form letter requesting that an employee submit a written statement about their

allegations, one should be created.[9] A copy of the request letter should be dated and placed in the employee's file, regardless of whether the employee does or does not provide a written complaint.

Employees who are faced with a workplace problem are likewise counseled to document the details of their complaint (times, witnesses and other specifics), to advise their employers promptly and in writing of their complaint, and to keep copies of all such documents at home (as opposed to the company's computer at work). Employees should use email, fax or another method which will provide them proof that their message was delivered and received. And, if a complaint must be hand-delivered, the employee is advised to have a third-party witness; one who preferably is not employed by the same employer.

Employers should immediately forward employee complaints to a person whose opinion will not affect the complaining employee's performance evaluations, promotions or raises. And, an investigation must be conducted. While it is advisable to seek the assistance of an attorney in conducting an investigation, doing so can result in the disqualification of counsel. Therefore, it is preferable that an independent attorney or neutral third party be contacted to immediately begin an investigation.

All investigations of employee complaints should include interviews of the complaining employee's witnesses and a review and summary of any evidence he or she may have mentioned. Too frequently, employers rely solely on the statements of managers and supervisors. If a lawsuit is filed, an employer's failure to consider the employee's evidence can be used by a plaintiff's attorney as evidence of retaliation or discrimination.

Delaying an investigation or taking too long to complete it sends a message that the employee's complaint was not important to the employer, or that it took a long time to "cook the books." And an investigation should be conducted, even if the employee states that he or she does not want anything done or said.

In addition to suing for discrimination, wrongful termination or other common actions such as assault, workers who are subjected to bully bosses or co-workers can also sue for their emotional distress.[10] Emotional distress claims are separate causes of action and damage awards can be significant.

Employers who devalue workplace stress should think again. Worker relationships with bosses were shown in a study to be a predictor of depression and other psychiatric problems in the workplace.[11] In another study, hospital workers who regarded their bosses as lacking in respect, fairness or sensitivity "had dramatically higher blood pressure throughout the day" and had roughly 20 percent higher risk of heart disease.[12] Furthermore, the California Supreme Court has held that the Workers' Compensation Exclusivity Rule does not bar emotional distress damages resulting from harassment, unlawful discrimination or other misconduct that exceeds the normal risks of the employment relationship.[13]

Frequently, employers err by transferring a complaining employee to a less-desirable assignment or work schedule. The Fair Employment and Housing Commission's regulations provides: "It is unlawful for an employer or other covered entity to demote, suspend … (or) adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or filed a complaint …"

In recent years, some employers have developed a practice of keeping records about imperfections in quality of each of every employee's workplace performance. For example, a growing trend is for employers to include narratives that focus on employee weakness (i.e.: "opportunities for improvement") in every annual performance review so as to justify termination should the need arise.

Some employers even hold frequent "touch-base" or "one-on-one" meetings of every employee to document "improvement opportunities," regardless of whether the employee does or does not have performance issues. While documenting employee weakness may have at one time been viewed as an "insurance policy" to avoid wrongful termination lawsuits, due to the awareness of these procedures, such documentation may not be sufficient to justify the termination of a complaining employee.

Employment attorneys point out many common mistakes in investigating employee complaints:

1. Employers often make a mistake by informing the complaining employee that his or her complaints will be kept "confidential." Once a complaint is made, the employer has a duty to investigate.[14] And, an employer who states that the complaint will remain "confidential" is in a lose-lose scenario. If she investigates the employee's claim, and co-workers are questioned, the complaining worker can claim she was intentionally humiliated or subjected to retaliation due to the breached promise of confidentiality. Or at a later date, the disgruntled worker may say that the company's promise of confidentiality was in itself proof that no investigation was done.
2. Failing to document the investigation of the employee's complaint is a common error. A report should be made after the investigation. It should include credibility determinations, discussions of discipline to be imposed, the reasons for the discipline and it should be reviewed by counsel.
3. The biggest error an employer can make is failing to investigate employee complaints. In situations where an employee has been terminated, the employer's failure to investigate can be used to demonstrate that the termination was based on pretext.[15]

When an employee comes to believe that his or her manager, or company policy, cannot address his or her concerns, the stage is set for trouble. For this reason, employers should keep the employee informed as to the status of his or her complaint and/or its investigation.

Even if the company decides to take no action in response to an employee complaint, a meeting should be held with the employee, and the employer should explain the actions the company took to respond to the complaint. The company should inform the employee, in writing, that an investigation was made, and that certain responsive actions will be taken. If no actions will be taken, the letter should address the reason why. The letter should invite the employee to advise the employer in writing if problems persist. And, if possible, such letter should always be reviewed by counsel prior to being presented to the employee.

Companies should seriously consider any bias that may exist within their industry when launching an investigation. According to a *New York Times* report, women are more likely to be bullied then men. Therefore, in cases where an employee has alleged sex or gender discrimination, it may be advisable to have a third-party perform the investigation, particularly if the complaint is made by a female and all of the persons who would normally perform the investigation are male. Likewise, when complaints are made against a supervisor, other supervisors in the same chain of command may try to "cover" for their boss or subordinate.

In addition to the legal concerns implied by a disgruntled employee, there are business reasons why a dissatisfied employee should be regarded with concern. According to a Gallup poll of one million employed workers, "a bad relationship with a boss is the number one reason for quitting a job."

Ann A. Hull *is a graduate of UCLA and the University of La Verne College of Law, where she served as Senior Staff Writer on the Law Review. She is a member of the California Employment Lawyer's Association. Hull has her own practice in Tarzana. She can be reached at hull_ann@yahoo.com.*

[1]Cal. Gov. Code §§12900 – 12996.
[2]*id.*
[3]Cal. Gov. Code §12960.
[4]Cal. Gov. Code §§12900 – 12996.
[5]*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 477.
[6]*Green v. Ralee Eng. Co.* (1998) 19 Cal.4th 66, 79.
[7]California Gov. Code §12940(j)(1).
[8]EEOC v. PVN, LLC (10th Cir. 2007) 487 F3d 790, 798.
[9]Example: "Dear _____ (name of employee). Today you made a complaint about an aspect of your employment. All employee complaints are important to our company. Our company requires that employee complaints be made in writing and delivered to ___ __(name of HR Manager, owner, etc.) within 24 hours of the report so that adequate steps can be taken to address your concerns. When we receive your written complaint we will arrange a follow-up meeting. Thank you for bringing this matter to our attention."
[10]*Alcorn v. Anbro Eng., Inc.* (1970) 2 C3d 493, 497-499 (holding that the extreme and outrageous character of defendants conduct mar arise from an abuse of a position or relationship to plaintiff, which gives the defendant actual or apparent authority over the plaintiff).
[11]Gilbreath, Brad. Indiana University-Perdue University in For Wayne. Cited in: Psychology Today. February 24, 2010. Online at: http://www.psychologytoday.com/articles/200510/good-boss-bad-boss
[12]Wager, Nadia. Buckingham Chilterns University College. Cited in: *Psychology Today*. February 24, 2010. Online at: http://www.psychologytoday.com/articles/200510/good-boss-bad-boss
[13]*Livitsanos v. Sup. Ct . (Continental Culture Specialists, Inc.)* (1992) 2C4th 744, 756 (holding that the Workers' Compensation Exclusivity Rule does not bar emotional distress damages resulting from harassment, unlawful discrimination, or other misconduct that exceeds the normal risks of the employment relationship).
[14]California Gov. Code §12940(j)(1).
[15]*Duchon v. Cajon Co.* (6th Cir. 1986) 791 F2d 43 (finding that "little or no attempt to investigate" an employee's complaint was sufficient to defeat summary judgment).

Annual Autumn Gala

October 2, 2010

Judge David Wesley installs President Seymour Amster

Past President Robert Flagg presents David Karp with the President's Award

Actor Joe Mantegna receives the Law, Arts & Media Award from North Valley Supervising Judge Robert Schuit

Judge Michael Hoff, Ret., President of the Valley Community Legal Foundation

Actor Joe Mantegna with Law Post members Christian Herrera, Makena Young and Nina Christie

Joe Mantegna, Alan Sedley and Seymour and Lisa Amster

SFVBA 2010-2011 Board of Trustees (L-R): Mark Shipow, Diane Trunk, John Yates, Caryn Sanders, Judge Michael Hoff, Ret., Seymour Amster, Carol Newman, Phil Feldman, Natasha Dawood, Adam Grant, Alan Sedley, Lisa Miller, Gerald Fogelman, Robert Flagg (Missing: Leonard Comden, Brent Finch, David Gurnick, Kira Masteller and John Stephens)

New Members

The following SFVBA members joined in September 2010:

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Spiga & Associates
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Law Offices of Jeffrey D. Horowitz
Sherman Oaks
(818) 907-8000 • echang@ssmlaw.com
Civil Litigation

Steve J. Colella
Alpert, Barr & Grant, APLC
Encino
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Real Property

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Corporate Law, Securities

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Bollington, Stilz, Curry & Bernard
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Insurance Defense

George S. Vorgitch
Calabasas
(818) 591-9580 • gsv@att.net
Estate Planning, Wills and Trusts

Valley Community Legal Foundation

The Charitable Arm

HON. MICHAEL R. HOFF, RET.
VCLF President

GREETINGS! THE VALLEY Community Legal Foundation would like to thank Immediate Past President Steve Holzer for guiding the organization for the past two years. His leadership helped steer the Foundation through some troubled waters. He is not totally escaping responsibility to the VCLF. As Past President, he has duties to help and the Foundation will hold him to his commitment. It is certain that Steve will willingly continue to serve and help the group, and the Foundation will look to him for assistance.

It could be argued that because membership in the VCLF is open to all members of the San Fernando Valley Bar Association and also to community minded non-attorneys, that our membership could and does contain representatives from diverse national backgrounds. The various attorneys and non-attorney members, although from different national backgrounds, have one thing in common – service to the San Fernando Valley's international community.

The VCLF is open to all members of the SFVBA and to non-attorneys that want to help the Valley. The VCLF is actively seeking new members that will bring new ideas on how the Bar and the VCLF may make the Valley a better place to practice and to live.

The VCLF is in reality the charitable arm of the SFVBA. Some members of our community, both local and international, may be shocked that attorneys have a charitable gene in their bodies. The SFVBA attorneys do have a charitable spirit, and through the VCLF, have contributed greatly to the Valley. Over the past several years, the VCLF has been instrumental in making things better for the children of litigants and witnesses who have to go to court. Visit the new Children's Waiting Rooms at the Van Nuys and San Fernando courthouses and see what a difference your efforts have made.

The VCLF has scholarship programs for needy students that are headed for law-related careers. The VCLF donates money to a number of established charities that serve the less fortunate members of our community, including the victims, both adult and children, of domestic violence.

The VCLF depends on donations of money, and equally important, active participation in the foundation's activities. The local and international economic situation is presenting a problem to nearly everyone and every charitable group. The VCLF is not immune from the effects of the slump in the economic mess that has many in its grasp. VCLF has a yearly gala dinner as the major fundraiser. It is with regret to report that this year's income from the gala was not good, which means that there will be less money to distribute to the worthy causes supported by your Foundation.

The gala is a fun event that is usually held at a local film studio lot. Those attending get to see the television and movie sets of some of their favorite shows, have a great deal of fun by being entertained by professionals, socialize with colleagues, and have a great meal prepared by the studio. The 2011 Gala is set for June 11, 2011 at CBS Studios; watch for announcements and plan to attend. It is a worthwhile and fun event that helps the Foundation.

The major message the Foundation would like to get across is that the VCLF is truly the Foundation for Valley attorneys. It is structured so that the SFVBA and its members get public recognition for the unseen, but very helpful things that the Valley attorneys do to help the community. Come help VCLF prove to the public that attorneys do actually have charitable genes in their DNA.

Please help. Please consider applying for membership on the Board of Directors. The meetings are generally held the third Wednesday of the month at 6:00 PM at the Bar's offices and the meetings usually terminate by 7:00 PM. To apply for membership, simply email mrhoff2@verizon.net.

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Calendar

Why do I belong to the SFVBA?

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Harmon Sieff
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"I have maintained my membership since moving to Encino seven years ago because of the convenience and quality of the CLE lunches, the local relevance of the publications, and the generous participants in the list serves who help us retain some of the collegiality of our profession.

Fastcase is an unexpected bonus which is also quite helpful to me as a practitioner in a small office."

Renew your SFVBA membership online at
WWW.SFVBA.ORG
or call (818) 227-0490.

Probate & Estate Planning Section
New Laws

NOVEMBER 9
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorney Jim Birnberg will discuss the latest laws that you need to know.

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

Business Law, Real Property & Bankruptcy Section
Joint Meeting with CALCPAs
Buy-Sell Agreements from the Attorney's and CPA's Perspective

NOVEMBER 10
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorney Michael Hackman and accountant Adrian Stern will highlight the ins and outs of buy-sell agreements from their particular professional perspective.

MEMBERS	NON-MEMBERS
	CALCPAs
$35 prepaid	$35 prepaid
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1.5 MCLE HOURS	1.5 CPE HOURS

Santa Clarita Valley Bar Association
Awards and Installation Dinner

NOVEMBER 18
6:00 PM
TOURNAMENT PLAYERS CLUB
VALENCIA

MEMBERS	NON-MEMBERS
$50 prepaid	$60 prepaid
$65 at the door	$65 at the door

RSVP at www.scvbar.org.

All-Section Meeting
Increase Your Presence Via the Web

NOVEMBER 17
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Dave Hendricks, renowned marketing specialist, returns to guide members in getting the most out of the web. Space is limited so RSVP as soon as possible.

FREE to SFVBA Members!

Litigation Section
California Expedited Jury Trials Program

NOVEMBER 18
6:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

California's new Expedited Jury Trials Act will make the handling of many small to mid-size cases economically feasible for litigators. Judge Mary Thornton House, who chaired the group that steered the legislation, will provide an overview of the voluntary program that will take effect in January.

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

Family Law Section
Hot Tips

NOVEMBER 22
5:30 PM
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorney Gary Weyman will discuss the latest tips to help you in your practice. This is an annual seminar and a must for those seeking to stay current!

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

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

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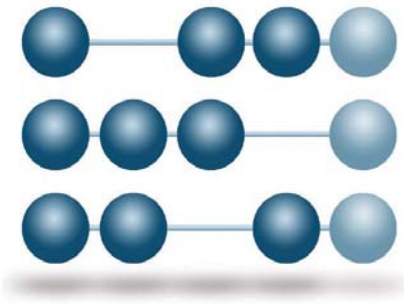

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