VALLEY LAWYER

OCTOBER 2011 • $4

A Publication of the San Fernando Valley Bar Association

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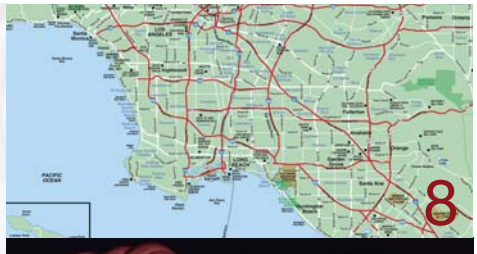
Valley Lawyer is published 11 times a year. Articles, announcements, and advertisements are due by the first day of the month prior to the publication date. The articles in Valley Lawyer are written for general interest and are not meant to be relied upon as a substitute for independent research and independent verification of accuracy.

Graphic Design Marina Senderov
Printing Southwest Offset Printing

FEATURES

DEPARTMENTS

Editor's Note to September 2011's MCLE Article: Since the publication of the article on "Recapturing Copyrights: A Window of Opportunity for Creators," authored by Dorothy Richardson, there has been a lot of activity regarding the issue of termination of copyright transfers. In the lawsuit between Victor Willis, former lead singer of the Village People, and his publishing company, seeks to regain control of his share of the song "Y.M.C.A." And U.S. Congressman John Conyers of Michigan recently announced that he will seek legislation to clarify recording artists' eligibility to reclaim their recording copyrights.



Let's Praise All the Lawyers

ALAN J. SEDLEY
SFVBA President

AT THE AUTUMN GALA AND BOARD Installation, I sought to address the centuries-old challenge posed to the legal profession in general, and lawyers in particular, "How to rightfully raise the image of lawyering in the eyes of the public to its rightful place."

How often do each of us experience the smirk response on another's face when we answer the question posed, "So what do you do for a living?"

Though one would think it easy to shrug off another's insensitive, sarcastic comment to our response, "I practice law," it's often easier said than done. You see, lawyers occupy a unique place among career professionals. For all our complaints about physicians, for example (always rushed, never listen, billings much too high, arrogance), they most often perform an indispensable service to our most treasured assets – our health and well-being. For most of us, the accountant performs a once-a-year service sometime each April, making it possible for us to respond to our governments' demand that we file tax returns. We surely don't place blame on the accountant for the requisite ritual for filing – those hated returns.

Then there are the teachers, easily the most universally-accepted profession and therefore rarely the subject of public ire or ridicule; they provide an indispensable service for our children and grandchildren. And given their unjustly low salaries, they can hardly be accused of greed.

Whether a lawyer is providing a necessary or indispensable service to the public in countless instances is more often than not up for debate. Lawyers are often called in to resolve heated disputes. They may be asked to take on unpopular or controversial positions: represent the despicable spouse, advocate for the auto rear-end victim who has the gall to sue for those 'invisible' soft-tissue injuries, or defend a criminal defendant accused of a heinous crime.

Other professionals rarely have to justify their task at hand. A lawyer, however, quite often is questioned by the public for his or her motives or ethics. Take on a difficult divorce where your client is accused of infidelity? "All you care about is your fee!" Never mind that the accusation of infidelity is explainable or is one of a multitude of reasons for the disintegrating marriage.

How about the criminal defense lawyer who is assigned by the court to represent the defendant accused of second-degree murder? "How can you represent such a despicable person? How do you sleep at night? Must be getting one heck of a fee, win or lose!" Irrelevant to many is that attorney's response that under our Constitution, each and every accused is entitled to a competent defense and is presumed innocent until proven guilty. This response would surely fall on deaf ears.

And the attorney representing the plaintiff complaining of excruciating, albeit non-visibly detectable soft-tissue pain often hears the jeer, "If I can't see it, he isn't injured!"

The superficial and dismissive attitude often displayed by the public through these and many other examples can give rise to gross generalizations and cynicism towards lawyers and the legal profession. And yet, the lawyer knows to proceed undaunted, despite the jokes and comments, encouraged to carry on as a member of a very noble profession.

Nonetheless, and despite the Bar's best efforts to correct the public's generalizations, the well-worn technique for lawyer-bashing, the "lawyer joke", remains as favorite cocktail fodder.

Rarely funny and more often downright cruel, the lawyer joke has been around for centuries. One of the earliest lawyer jokes – actually a statement – was recited in Shakespeare's play, *Henry VI*, Part II way back in 1594. Few of us are unfamiliar with the phrase from *Henry VI*, "The first thing we do, let's kill all the lawyers." Rueful, mocking, it often expresses the ordinary person's frustration with the complexities of law (many a literary scholar will point out that in context, the line is really intended as a praise of the lawyer's role).

Let's take a look at this 18th century effort at humor.

> JUDGE: "I have read your case, Mr. Smith, and I am no wiser now than I was when I started."
> ATTORNEY SMITH: "Possibly not, My Lord, but much better informed."
> JUDGE: "Are you trying to show contempt for this court, Mr. Smith?"
> ATTORNEY SMITH: "No, My Lord. I am attempting to conceal it."

And who amongst us does not readily know the punchline to the question, "What do you call a busload of lawyers at the bottom of the sea?" As downright insulting and unjust as these jokes can be to endure, we as members of the Bar have few options to change some of these public misperceptions. Given the 24/7 news cycle filled with reports of sensationalized cases and characters, we are forced to defend what is often depicted not as a well-designed system of jurisprudence, but more resembling a three-ring circus.

Therefore, we should focus on what we can control, something that I have long held is responsible for at least a part of the public's misconception – the lawyer's self-image. Each of us has been a witness to a colleague's complaint that they simply hate their law practice. They may cite boredom, lack of challenge or interest, financial frustration. Too common we overhear a person saying to a colleague, "Oh you're a lawyer? Too bad", only to witness the colleague sheepishly reply, "Yah, I know."

And so, I submit that one way to convince the public of the virtues of law practice is to convince ourselves that law practice is challenging, is interesting, is a great profession. Though some reading this article would say that this is precisely how they feel, many would not.

For years, I must admit that I was one who grew increasingly dissatisfied with law practice, so much so, that too often I could not recall the reason I chose to practice law in the first place. Days of boredom and drudgery turned into months. Fortunately, a colleague came to the rescue and with one simple recommendation, started my path on the road of extreme satisfaction and a renewed appreciation for the practice of law.

In my case, it was the suggestion that I register for a three-day conference of the American Health Lawyers Association. From the first session to the last lecture, I was introduced to legal issues I frankly didn't know existed. To this very day, some fifteen years and countless conferences and seminars later, I have not regretted a day of practice. Rather, I embrace it. Colleagues have often remarked that since I made the transition to health law, I have never seemed so engaged, so interested and energized.

I am so convinced that there exists areas of law each practitioner can embrace, we are rolling out a new program entitled the Mentorship Program. Once configured, we will invite lawyers to contact the SFVBA office and share any number of areas of practice that might interest him or her with a staff member, who in turn will connect the lawyer with a member of our Mentorship panel. Each panel member specializes in an area of law that they find to be most rewarding to practice, one that fills their days with challenge and fulfillment. The panel member will speak with the lawyer, perhaps set up a breakfast or face-to-face meeting. The contact will remain confidential if requested.

The goal of the program is to expose the lawyer to information and resources that could open up the door to an entirely new practice on the one hand, or perhaps serve as a new portfolio to add to an existing practice. It may serve to guide a young lawyer to better understand the intricacies of starting a practice, and energize a seasoned attorney to consider a new area of law he has been curious to explore, but did not quite know where to begin.

Neither this nor any other program or bar activity will forever end the lawyer joke. Yet imagine a legal community where many more lawyers look forward to each day of practice, embrace membership in this great profession, and will have a satisfied smile when answering the question, "So you are a lawyer, huh?"

Alan J. Sedley *can be reached at Alan.Sedley@HPMedCenter.com.*

From the Executive Director

Survey Results into Action

ELIZABETH POST
Executive Director

I WANT TO THANK OUR MEMBERS WHO PARTICIPATED in this summer's *Valley Lawyer* readership survey. We received feedback from 153 members, both flattering and critical, that will steer the San Fernando Valley Bar Association toward publishing an improved, professional publication and providing a more valuable member benefit for SFVBA members.

Here is what we learned from members who responded to the survey:

- 96% read *Valley Lawyer*, with 69% reading it within a week of receiving it
- 63% have recommended or shared an article or advertisement with a client or colleague
- 41% have referred to back issues for an article or advertiser
- Readers are most interested in and satisfied with our feature and MCLE articles and calendar of events, and least interested in and satisfied with our monthly department columns
- Readers are very satisfied with the design features of *Valley Lawyer*
- 90% agree that *Valley Lawyer* is a valuable benefit of SFVBA membership

Many comments made me proud of the hard work that our editor Angela M. Hutchinson, graphic designer Marina Senderov, volunteer writers and our Editorial Committee put into each issue: "The magazine is better than most trade newsletters," "Better than my regular subscription with *California Lawyer*" and "*Valley Lawyer* is attention grabbing with its glossy colorful format. I always look at it the 1st day, and often save articles."

Other observations keep us humble: "It seems as though the magazine has little content compared to extensive advertising," "Most of the articles are too long to read" or "Good job on form, just lacking in substance."

We also received very specific recommendations to enhance Valley Lawyer: "It would be nice if each section published something about their sections – new laws, exciting cases, activities," "Focus on the people who buy the display and classified ads. Who are these people?" and "From the President's Message and Executive Director I would like to hear more on what is currently happening in our Bar among its members."

Our Editorial Committee began meeting in September to evaluate the results of the readership survey and to lay out a plan to enhance members' satisfaction with *Valley Lawyer*. You will notice some changes over the next few issues. All members who are interested in guiding *Valley Lawyer* to editorial excellence are invited to join our Editorial Committee; just contact me at epost@sfvba.org or (818) 227-0490, ext. 101 to become involved.

Navigating City Council Zoning Decisions

By Mark S. Shipow

THE CALIFORNIA COURT OF APPEAL recently had occasion to remind the bar and the government about the standards applicable to the proper role of the Los Angeles City Council in reviewing decisions of the Los Angeles Zoning Administrator regarding conditional use permits and variances.

In *West Chandler Boulevard Neighborhood Association v. City of Los Angeles, et al.*, Division Four of the Second Appellate District unanimously held that the Council had failed to follow the law applicable to the review process, failing to make proper findings and improperly acting in its legislative capacity rather than its assigned quasi-judicial capacity. (Court of Appeal Case No. B226663, Decision filed August 16, 2011, certified for publication September 7, 2011.)

The court directed the issuance of a writ of administrative mandamus requiring the Council to follow the requirements of the Municipal Code and California law in reviewing the Zoning Administrator's decisions regarding the conditional use permit and variance under consideration. Decision, p.22.

In 2007, Chabad of North Hollywood and Chabad of the Valley, Inc. (collectively "Chabad") submitted plans to tear down their existing facility in Sherman Oaks and erect a new, significantly larger facility for their congregation. At the time, pursuant to a 1981 conditional use permit ("CUP"), Chabad was limited to a maximum of 45 congregants occupying a 1,500 square-foot building on a 9,568 square foot lot in a residential neighborhood, with a parking variance of 13 spaces. Having outgrown the building, Chabad sought to modernize and expand its facilities. Chabad applied for a CUP to erect a 16,100 square foot three-story building, and a parking variance of 78 spaces (allowing five spaces rather than the 83 that would be required for a facility of that size).

The Los Angeles Zoning Administrator (the "ZA") vetted the application, including considering strenuous objections from a number of homeowners who had banded together to form the West Chandler Boulevard Neighborhood Association (the "Association"), headed by Mitchell Ramin and Jeff Gantman (who also were named plaintiffs in the action). In November 2008, the ZA issued her decision permitting Chabad to build a facility with a maximum of 10,300 square feet, of which 40% (4,120 square feet) had to be in a basement, leaving a maximum of 6,180 square feet above ground. The ZA, *inter alia*, limited the assembly space to 2,400 square feet, and approved a 63-space parking variance. The ZA made formal findings as required by Los Angeles Municipal Code ("LAMC") §12.24E, essentially determining that this size building was the largest that was consistent with the neighborhood, and was consistent with (and indeed larger than) other Chabad facilities on larger parcels in neighboring communities. Decision, p.17.

The Association appealed the decision of the ZA to the South Valley Area Planning Commission ("SVAPC"), the next level of review in the City zoning process (LAMC 12.24(I)) requesting that the SVAPC reverse the decision of the ZA. Chabad also appealed, requesting the SVAPC to permit an even larger facility: 18,049 square feet. The SVAPC conducted a hearing and considered evidence. Based on this, the SVAPC granted the Association's appeal, finding that the project approved by the ZA was much too large for the lot, would be materially detrimental to the character of the neighborhood, would not be in harmony with the City's General Plan, and did not provide sufficient parking. Decision, p.5.

The decision of the SVAPC was not appealable. Los Angeles City Charter ("Charter") §563. However, the Council is permitted to vote to take jurisdiction over the SVAPC decision. Charter §§245, 562. In June 2009, the City Council did so.

The LAMC sets forth specific standards for the Council to follow in reviewing decisions of the area planning commissions, in an attempt to prevent politics from interfering with the due administration of the City's zoning laws. Unfortunately, once the Council took jurisdiction in this case, the matter seemingly became more about politics than land use.

At its June 19, 2009, hearing on the matter, the Council heard public comment on the proposed project that had been approved by the ZA and rejected by the SVAPC (*i.e.*, 10,300 square feet). After public comment was closed, Councilmember Jack Weiss (who by then had decided

not to run again for his seat) presented a "compromise" proposal by which Chabad would be permitted to erect a 12,000 square foot building (15% more than permitted by the ZA and rejected by the SVAPC), with only 20% in the basement (allowing an above-ground footprint 50% larger than permitted by the ZA and rejected by the SVAPC), and a 3,370 square foot assembly area (an increase of 40% from the size permitted by the ZA and rejected by the SVAPC), with a 92-space parking variance (as opposed to the 53-space variance permitted by the ZA and rejected by the SVAPC). After a few minutes of consideration, and no opportunity for public comment on the new proposal, the Council gave its stamp of approval. The Council adopted some "conclusory" findings that purported to support the propriety of the new, larger project. Decision, pp.5, 21.

The Association thereafter filed an action in Los Angeles Superior Court, seeking a writ of mandamus directing the Council to reconsider its approval of the project, in accordance with the strict guidelines of the LAMC and applicable case law. After receiving extensive briefing, including supplemental briefs on issues specifically requested by the court, and hearing oral argument, the court rendered its decision on May 24, 2010. The court determined that the Council had failed to follow the requirements of the LAMC and applicable case law, but found that petitioners had waived that argument. The Association appealed the decision.

In its 22-page decision, the Court of Appeal thoroughly reviewed the actions of the Council in the context of the requirements of the LAMC and the dictates of *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 ("Topanga"). The court agreed with the trial court that the Council's actions thoroughly lacked the requisite conformance with either the LAMC or *Topanga*. The Court of Appeal also determined that the trial court had improperly found that the Association had waived this issue. In reaching its decision, the court carefully reviewed the process by which the City Council is permitted to review decisions regarding CUPs and variances.

Although the Council is allowed to review the actions of the ZA, its review is limited. The Council acts in a quasi-judicial capacity, and must "make its decision, based on the record, as to whether the [ZA] erred or abused his or her discretion." Decision, p.15; LAMC §12.24(I)(3). The Council must "base its decision only on the evidence and findings of the ZA, and [may] modify the ZA's decision only by setting forth specifically the manner in which the ZA erred." Decision, p.15.

Moreover, if the Council (properly) makes a decision varying from that of the ZA, it must set forth specific findings "'to bridge the analytic gap between the raw evidence and ultimate decision' and to show the 'analytic route the administrative agency traveled from evidence to action.'" Decision, p.19, citing *Topanga*. In other words, the Council had to make it clear how it went from the project approved by the ZA to the much larger project the Council approved.

After reviewing the evidence, the court first determined that the Council had proceeded outside the strictures of its quasi-judicial function under the LAMC. Under those regulations, "the City Council was required to 'make its

decision, based on the record, as to whether the initial decision-maker [i.e., the ZA] erred or abused her discretion.'" Decision, p.15, citing LAMC §12.24(I)(3). Further, the Council "was required to base its decision only on the evidence and findings of the Zoning Administrator and to modify the Zoning Administrator's decision only by setting forth specifically the manner in which the Zoning Administrator erred" or abused his or her discretion. Decision, p.15, citing LAMC §12.27 (K)(L).

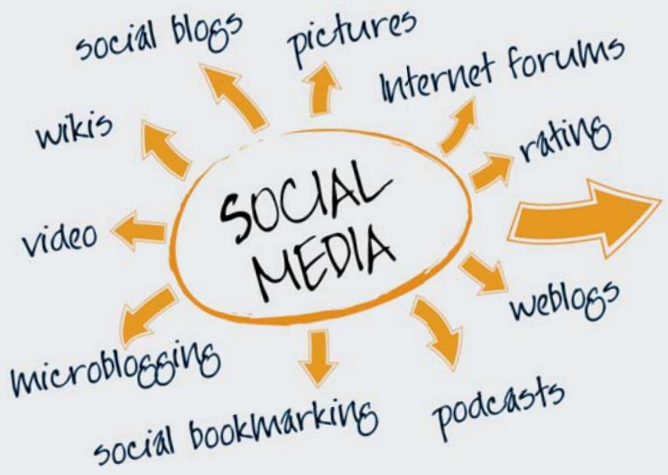
Based on its review of the record, the Court of Appeal agreed with the trial court's determination that "the City Council abused its discretion by failing to follow these requirements of the Municipal Code . . .." Decision, p.15. In particular, the court determined that by considering Councilmember Weiss's "compromise" proposal that had not been considered or approved by the ZA, the Council's decision was not "based on the record." Further, the court admonished the Council for failing to address the evidence before the ZA or her findings, and for failing to explain how the ZA's decision to limit the size of the project and limit the scope of the parking variance was erroneous or an abuse of discretion. Decision, pp.16-17. The court rejected Chabad's argument that it was sufficient to imply findings of error or abuse of discretion by virtue of the Council having approved a larger project. Decision, p.19.

Moreover, the court went on to find further deficiency in the Council's decision-making process. The court confirmed that, under the requirements of *Topanga*, the Council had to bridge the gap between the evidence presented to the ZA and the Council's decision to allow a much larger project; in effect to provide a "road map" to show how the Council went from the project approved by the ZA to the project approved by the Council. The court determined that the Council "gave no indication of the reason for the ultimate decision," thus violating the dictates of *Topanga*. Decision, p.19.

In sum, the court determined that the Council had improperly acted on evidence not in the record, had improperly acted without reference to the ZA's findings, and had generated conclusory findings that failed to show either how the Council traveled from evidence to action or how the ZA erred or abused her discretion. Based on this, the court directed that "the City Council is to comply with the requirements of the Municipal Code and *Topanga* in reviewing the Zoning Administrator's decisions on the CUP and variance." Decision, p.22.

The lesson from this case – for government, developers and homeowners alike – is to know the rules and the standards to be applied for a particular government action. By knowing the rules, they can be implemented in a way that serves the public interest and avoids uncertainty, and perhaps, unnecessary litigation.

Mark S. Shipow *practices commercial litigation, including disputes involving intellectual property, shareholders and partners, real estate and contracts. He was co-counsel with Noel Weiss on the West Chandler appeal. He can be reached at mshipow@socal.rr.com or (818) 710-1906.*



Ethical Hot Spots for Attorneys Using Social Media

While many are embracing social media, new ethical issues are emerging that could cause trouble for some attorneys.

By Brian Hemsworth, MBA, CBC

THERE HAS BEEN ARGUMENTS ABOUT attorney advertising ethics since the Supreme Court opened the doors for attorney advertising back in 1977 (*Bates v. Arizona State Bar* 433 U.S. 350). To this day, many senior partners feel resentment toward any kind of advertising, even to the point of resisting the use of websites for many years. Just a few short years ago, many attorneys thought that having a website was optional. Today, many consider working without a website to be business development suicide.

With the rise of social media, the legal profession is again facing conflicting opinions on social media's place, its rules of use and the ethics involved in participating. What appears to be different from the initial wave of attorney advertising from after the 1977 ruling, and even different from the internet wave that first hit in the 1990's, is that many attorneys are rushing into the social media space rather than avoiding an online presence.

Social media has the lure of being not only a great source of legal and case-specific research, but also a business development tool. To begin to understand the minefield of social media ethics, it's important to go further back to understand just how social media has transformed ways of communicating online.

Social Media, Web 2.0 and What They Mean

The first wave of the internet, what might be called "Web 1.0," was not so much a new form of communication, but rather a new media platform. For many, it was simply another place to post information. When the first websites came out, they basically mimicked ads, brochures, newspapers and even broadcast programs in style and content, only they were accessed through the internet. Law firms, if they had websites, typically posted general information about the firm, its practice areas and profiles of the key attorneys.

Web 2.0 and social media is different because it actually changed the way people communicate via the internet. Most importantly, what was once one-way communication via the internet has become two-way communications and conversations. Formerly, companies, brands, media companies and yes, law firms controlled the flow of information on their websites. Now, viewers and users have easy access to more information as well as the ability to engage in conversations or post their own information.

ABA Commission Proposal on Use of Technology

State bar associations have been rushing to keep up with social media, and the first wave of case law has been hitting the courts. In an effort to create some kind of national standards, the American Bar Association's Commission on Ethics 20/20 has just released its initial proposals relating to lawyers' use of technology-based client development tools. While not likely to be adopted until fall of 2012, the proposals are seen as a general indication of where the ABA sits on several keys issues.

The Commission is seeking to clarify the difference between a "potential" client and a "prospective" client. The Commission's proposed wording of Rule 1.18 (a): "A person who communicates with a lawyer about the probability of forming a client-lawyer relationship and has a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship with respect to a matter is a prospective client." While the term potential client has not been fully explained yet by the commission, it is believed to indicate the universe of all public persons.

The general idea here is that use of advertising, websites, and social media are okay when directed at potential clients. This becomes important in light of the ABA rules on advertising, whereby the ABA identifies a difference between "communication" and "solicitation."

Advertising Rule 7.3 (a) states: "A lawyer shall not by in-person, live telephone or real-time electronic contact, solicit professional employment from a potential client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain" with a few exceptions, such as contact with another attorney, family member or has a prior professional relationship with the lawyer.

The Commission seeks to define communication as less targeted than solicitation, such as advertising toward the general public rather than a single person or entity. So general advertising, internet advertising, or responding to requests for information, even when automated online, are considered communication, and not solicitation, when targeted to the general public.

Another area addressed by the Commission is recommendations, but unfortunately it did not address the most common one of the day, the LinkedIn recommendation. Rule 7.2 (b) currently prohibits a lawyer from giving anything of value for recommending a lawyer's services, with a few exceptions.

The commission noted that many law firms are now using websites and social media, and that recommendations are becoming more of an issue. One firm recently distributed free t-shirts containing the law firm's name; the firm then offered a chance to win a prize to everyone who posted a photo of themselves on Facebook that showed them wearing the t-shirt. For the moment, the Commission has indicated that the wearing of a t-shirt does not inherently constitute a recommendation, but this is an area the Commission will be looking to address more carefully before adoption of rule changes.

Ethical Hot Spots

Several social media areas have become hot spots for attorneys using social media. Here's a brief survey of some of these, and while they may have originated in other states, many social media ethicists and legal journalists believe these to be the main areas attorneys need to stay current on no matter what state an attorney is practicing in when engaging in social media activity.

Social Media as Advertising

The trend in classifying social media communication as advertising is governed by advertising rules and regulation. As such, it's prudent to review not only The State Bar of California rules and regulations, such as *Rules of Professional Conduct* Rule 1-400 on Advertising and Solicitation, but also the California Business and Professions Code from the Legislative Counsel of the State of California.

While some advocate advertising material disclaimers, others have adopted more simplified disclaimer statements. ABA rules require this for some advertising applications. As law in this area emerges, it appears prudent to assume that social media activity is very likely to be considered advertising, and therefore attorneys should use the same cautions as any other public communications, such as websites, advertisements, business materials, brochures, etc. As basic guidance, this includes general tenets such as not making untrue statements, not presenting matter in confusing or deceitful ways, not omitting necessary facts, using incorrect titles for "specialization," or failure to properly disclose the nature of the communication. While disclaimers are not fool-proof, it is better to have a well-written one than not at all.

Unauthorized Practice of Law

As simple as it seems to not practice law online in a social media context, this appears to be a slippery slope. Attorneys active in blogging and social media Q&A sites, especially in back and forth communications, can inadvertently create the possibility of attorney-client relationships.

Particular attention needs to be paid to two-way communication, such as blog comments, Q&A areas and chatrooms. Depending upon the information that is shared, attorneys can run the risk of chatting or connecting with clients or potential clients. One tactic being used by some legal bloggers is to either not allow comments, or if comments are allowed, they are not responded to by the blogger, allowing for information and opinions, but not ongoing conversation.

Location and Geography

There is no geographic protection when using the internet. Conversations by attorneys online in the San Fernando Valley can be shared with people across the country and even internationally. When discussions or conversations emerge, they may and will very likely cross geographic boundaries, and possibly even resulting in unauthorized practice of law in a state in which an attorney is not admitted to the Bar.

On the flip side of this issue is another potential location problem, only this time it's too much knowledge. Recent cases have come to light where attorneys posted on Facebook, Twitter, Yelp, Foursquare or other sites that identified their locations through GPS devices. In some cases, this has been interpreted as violation of confidentiality.

Blogs vs. Websites

Is a blog a website? In common usage, a firm's website is a place that holds information about a firm, its practice areas and biographical information of attorneys and personnel at the firm. A blog is a type of website, typically one by which the blogger disseminates news, information or opinion on a frequent basis. A blog can be a part of a firm website or separate.

With requirements to archive legal communications, law firms have begun using blogs more actively for news feeds because many of the popular blog platforms, such as Wordpress and Blogger, have automatic archiving. Using blogs has made this easy and inexpensive.

The biggest problem in blogging is that some attorneys have used blogs as soapboxes, and offered public opinions in areas that have later come to cause problems with clients or cases. The use of blogs to relay news or information without comment is becoming a more common use, even to the point that many newsfeeds on legal websites actually use blog software, though opinions and comments may not even be featured as blog content. A suggested approach is to treat one's blog as any other official communication, avoiding confusing, misleading or false claims.

Social Media as Research

Social media has been a great new research resource for many attorneys. The ability to connect with large numbers of other attorneys and non-attorneys very quickly has made it one of the primary uses for many attorneys.

Trouble has arisen for some attorneys who have sought to acquire information through less than ethical means. Cases have emerged where attorneys anonymously conduct questioning via social media. Courts have not had a favorable view of this.

The most important point to put into practice in social media is that if unsure of usage or ethics, contact the State Bar for clarification. Using caution is definitely recommended when embarking on new social media campaigns or efforts. By minimizing exposure to some of the areas identified here, attorneys will be able to maintain a prominent social media presence while staying clear of several pitfalls that social media, even in its infancy, has placed in the legal profession's way.

Brian Hemsworth *is a marketing and brand consultant specializing in professional services marketing. He is a member of the Pepperdine University Adjunct Faculty, and speaks frequently on media and ethics. Hemsworth can be reached at bhemsworth@newmangrace.com.*

Are Law Clerks Entitled to Overtime?

By Cindy Elkins

SHOULD A LAW SCHOOL GRADUATE, working as a law clerk, be classified as an exempt employee? This issue was recently decided by the First District Court of Appeal in *Zelasko-Barrett v. Brayton Purcell, LLP*[1]. The good news for law firms is the answer is "Yes."

Unlicensed attorneys, working as law clerks, can qualify under either the professional exemption or the "learned profession" exemption and do not need to be paid for overtime hours, or have their meals or breaks regulated under California law.

It is critically important for law firms to properly determine whether an employee is "exempt" so that their working hours, wages, meals and breaks are not regulated under the California Labor Code and/or the Industrial Welfare Commission Wage Orders, or "non exempt" and have their working hours, meals, breaks be regulated.

In California, there are several ways in which an employee can be "exempt". Under Industrial Welfare Commission Wage Order 4-2001 (which governs law firms), an employee may qualify as exempt in one of two ways: (1) under the enumerated professional exemption or (2) under the "learned profession" exemption.

The Wage Order defines the enumerated professions exemption as applicable if the employee "is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law....."[2]

The "learned professions" exemption will apply if someone is "primarily engaged in an occupation commonly recognized as a learned or artistic profession.... [A]n employee who is primarily engaged in the performance of work requiring knowledge of an advance type in a field .... customarily acquired by a prolonged course of specialized intellectual instruction and study...."[3]

Here, plaintiff worked for a law firm as a clerk while he was awaiting bar results. Plaintiff was unsuccessful in his attempts to pass the bar and worked as a clerk for approximately two years. During this time, he was treated as an "exempt" employee, paid a salary, without any overtime and his meals and breaks were not regulated. The plaintiff eventually passed the bar examination, became an associate attorney with the firm, worked for a few months, quit and filed a lawsuit claiming he was misclassified as "exempt" and sought payment for overtime hours worked, missed meal and rest period penalties, waiting time penalties and penalties for insufficient wage statements.

The trial court granted summary judgment for the law firm and found that the plaintiff was properly classified as "exempt" and that he was not entitled to overtime – the same would be found for the licensed associate attorneys.

The Court of Appeal found that the Wage Order was clear and allows employees working in a "law-related

capacity" to qualify under either the enumerated professions exemption or the learned professions exemption. The court found that the plaintiff's law school educational background satisfied the learned professions exemption.

The plaintiff argued that he did not "customarily and regularly exercise discretion and independent judgment " in the performance of his duties as a law clerk, which would be required to meet the exemption test, and should not be considered exempt. The plaintiff also asserted his work was supervised, corrected and approved by a supervising attorney, that the ultimate decision to craft an argument was made by the supervising attorney, and that he could not sign pleadings, make court appearances or provide advice to clients and hence did not have the discretion to meet the exemption test.

The Court of Appeal rejected these arguments, finding that such limitations and oversight did not negate the fact that plaintiff's duties required discretion and independent judgment. The court cited 29 Code of Federal Regulations §541.207(e), which states:

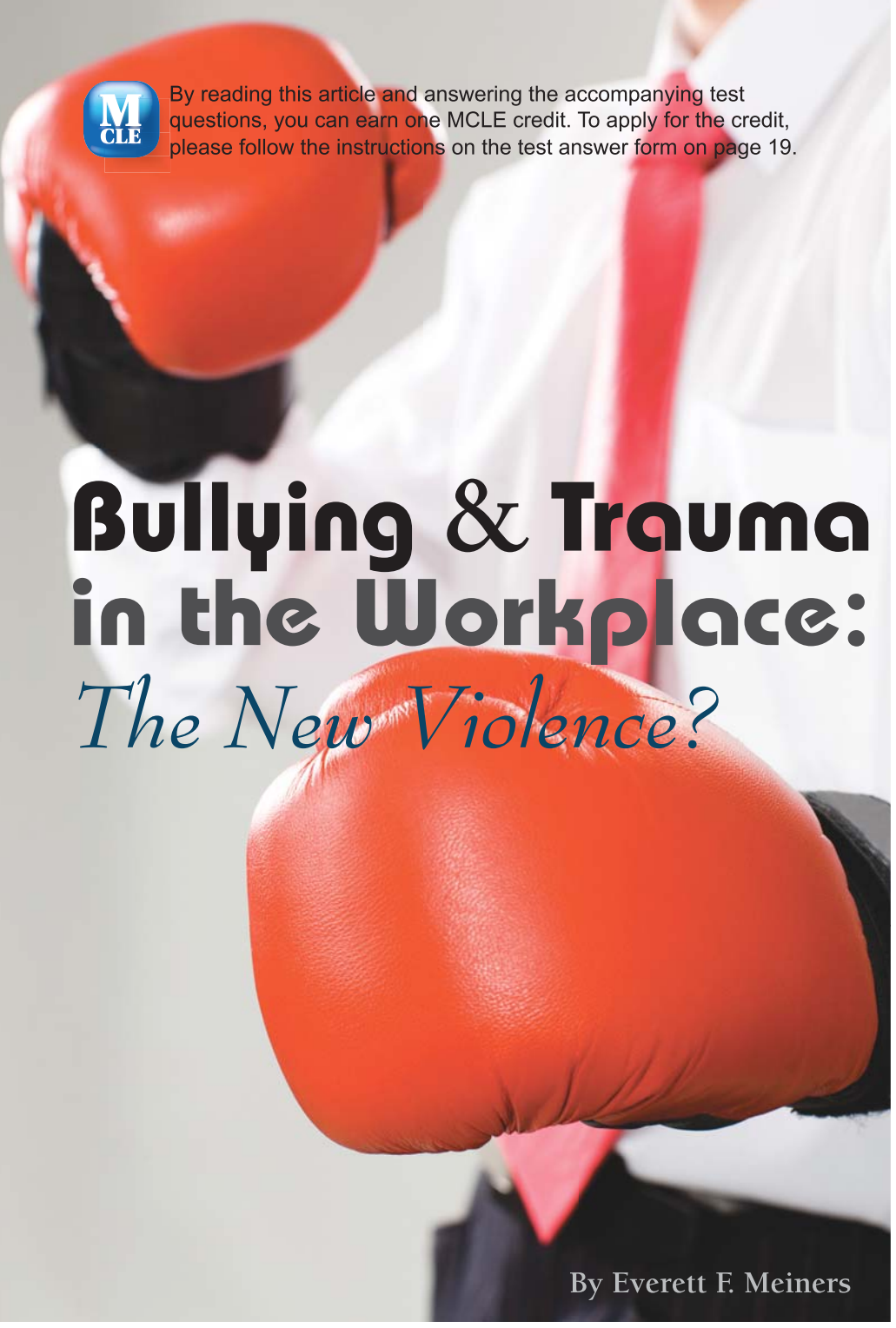
> The term 'discretion and independent judgment' … does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment within the meaning of the regulations …"

What the court found compelling in denying the plaintiff's claim was that even though the plaintiff did not have final approval on his work product, his duties in collecting and assimilating evidence, performing legal research and drafting legal memoranda required him to exercise a significant level of discretion, and that his tasks were not "routine mental, manual, mechanical or physical work."

This is going to be a critical part of the test that employers must undertake to establish that someone without a license to practice one of the enumerated professional categories in the Wage Order can properly be classified as exempt.

Cynthia Elkins *is the principal of Elkins Employment Law in Woodland Hills, representing management in all aspects of employment law and human resource matters. She can be reached at celkins@employer-law.com.*

1. Zelasko-Barrett v. Brayton Purcell, LLP, No. A130540 (Aug. 17, 2011)
2. Error! Main Document Only.IWC Wage Order 4-2001
3. IWC Wage Order 4-2001



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 19.

Bullying & Trauma in the Workplace: *The New Violence?*

By Everett F. Meiners

ONE OF THE MORE DIFFICULT workplace conflicts that employers must face is the issue of employees or supervisors who make crude, offensive, demeaning or other uncivil comments to co-workers. (See *Kelley v. The Conco Companies* (6/6/2011, 5th Dist.) 2011 DJDAR 8263, discussed in Sec. III d., infra.) Not only may they direct such language at co-employees, but they often make uncivil gestures and generally harass co-employees for various reasons. The term "workplace bullying" has been applied to many of those actions.

If the actions are clearly based on some prohibited characteristic protected by federal and state statutes (such as age, sex, religion, race, disability, etc.) the cases have clearly established that the employer has absolute liability for the acts of its supervisors and potential liability for acts of co-workers about which the company knew or should have known, and did not take any effective action to remedy. However, if the actions cannot be easily categorized in one of the established legal grounds, the legal issue is whether or not the employer has any legal liability for the uncivil acts.

There are applicable cases that address such action and assess whether employers are liable for alleged bullying, which depends on the underlying facts. There must be adverse action to justify a finding that federal or state law has been violated. The United States Supreme Court has stated that "petty slights [and] minor annoyances" in the workplace are not actionable "adverse actions." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)

If the alleged acts of bullying are not based on some prohibited characteristic, courts have struggled to find any legal violation, except in special situations involving state actions, arising from the states obligation to provide to provide a free appropriate public education ("FAPE") (see e.g. *T.K. v. New York City Department of Education* (USDC E.D. New York – April 25, 2011).

Employers must be aware that it is not uncommon for employees who have advised management that they have been bullied, to also make a subsequent claim that they have been retaliated against by supervisors and co-employees because they made the bullying claim. The employer must be cautious in taking any action with respect to the allegedly bullied employee because such action might be deemed to be an adverse action and alleged to be retaliatory. Employers have legal liability for such adverse action.

Actions for Employers with a Bullying Claim

In order to prevent a finding that federal or state law has been violated, the employer must immediately conduct a full and fair investigation of the allegations.

In addition, the employer must take effective remedial action to prevent the recurrence of such conduct, especially if it is based upon a legally protected characteristic.

Even if the investigation does not reveal any legal wrongdoing, the employer should consider the institution of workplace harassment training for all employees in order to make sure that employees are aware of conduct which violates company policy and federal and state laws prohibiting discriminatory actions by employees.

An employer must carefully consider any action taken with respect to the complaining employee, even reassignment to a different job, because the complaining employee may allege

the action is retaliatory for making a bullying complaint.

Legal Framework According to Courts

To analyze the liability of employers for allegations of workplace bullying, understanding various case decisions can be useful.

United States Supreme Court

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) the Court held that an employer is absolutely liable under Title VII for actionable discrimination caused by a supervisor.

The scope of the prohibition against discrimination is not limited to economic or tangible discrimination and covers more than terms and conditions of employment in a contractual sense.

An objectionable environment must be both objectively and subjectively offensive. Not only must a reasonable person find it to be hostile or abusive, but the victim must also perceive it to be so.

Title VII does not prohibit genuine but innocuous differences in the way men and women routinely interact with members of the same sex and of the opposite sex. Simple teasing, offhand comments and isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions of employment. (See *Yanowitz v. L'Oreal USA, Inc*. 2005 36 Cal.4th 1028 for a similar finding.) Conduct must be extreme to amount to a change in the terms and conditions of employment in order to violate Title VII.

To avoid vicarious liability, if no tangible employment action is taken against the alleged victim, the employer may raise a defense by showing that a) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

In *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) the Court held that an adverse action in the workplace extends beyond the actions of an employer which alter the terms and conditions of employment such as salary, benefits, job duties, perquisites, etc.

The Court ruled that an adverse action is not limited to discriminatory actions that affect the terms and conditions of employment. An adverse action occurs when a reasonable employee would have found the challenged action materially adverse. However, "petty slights [and] minor annoyances" in the workplace are not actionable as adverse actions.

Bullying and Retaliation in the Second Circuit Court of Appeal

There are not many cases which discuss the potential liability of employers for bullying where that term is actually used. However, the Vito case does and finds no liability.

In *Vito v. Bausch & Lomb* (2010) 2nd Circuit, 111 Fair Employment Practices Cases (BNA)285, 2010 WL 5129223 the Second Circuit held that co-workers sporadic use of abusive language, gender-related jokes, occasional teasing and workplace bullying did not create a hostile work environment.

The court found that many of the claims made by plaintiff, which she contended demonstrated a hostile work environment, amounted to, at the most, workplace bullying completely detached from any legally prohibited discriminatory motive.

Citing the *Burlington N. & Santa Fe Ry. Co. v. White* case (USSC 2006) 548 U.S. 53, the Second Circuit found that the alleged objectionable actions of co-employees (ringing a bell in her presence/ throwing tape at her) constituted nothing more than minor annoyances typical of those all employees experience.

The court also concluded that there was no basis for a claim by the plaintiff that she had been the subject of retaliation by the company since there was no conduct by the company "that could be considered an adverse employment action."

Bullying and Retaliation in the Federal District Court in New York

In the recent case of *Mendez v. Starwood Hotels & Resorts Worldwide, Inc.*, 746 F. Supp. 2nd 575 (S.D.N.Y. 2010) the court stated the following with respect to the statutory basis for a bulling claim: "… to be *actionably* hostile, a workplace must be rendered hostile by workplace-altering conduct attributable to some statutorily prohibited factor …[race, religion, sex, national origin, etc.] not simply incivility or nastiness. When we say that Title VII, and corresponding state and local laws, are not a civility code, See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), we are saying even if mean-spiritedness or bullying render a workplace environment abusive, there is no violation of the law unless that mean-spiritedness or bullying is rooted in ... [some form of legally prohibited] discrimination."

Bullying and Retaliation under California Law

The recent decision in the case of *Kelley v. The Conco Companies* (6/6/2011, 5th Dist.) 2011 DJDAR 8263 addresses the issue of workplace bullying under California law. In that case, the court concluded that grossly obnoxious remarks made to plaintiff by supervisors and co-employees were not motivated by sexual desire, or based on any protected characteristic. Thus, no violation under the California Fair Employment and Housing Act (FEHA) occurred.

Even though the remarks and conduct were crude, offensive and demeaning they did not establish the legal basis for any legally prohibited discrimination. (*Kelley v. the Conoco Companies, supra*, 2011 DJDAR at 8267. (This case may be reviewed by the California Supreme Court because of a conflict with the case of *Singleton v. United States Gypsum Co.* (2nd Dist. Court of Appeal, 2006) 140 CA4th 1547 which held that the same-sex harassment claimant does not have to establish that the harassment was motivated by sexual intent.)

However, retaliation claims are based on a different application of law. The court noted that it is well established that an employee who complains about conduct which he reasonable believes to be discriminatory, has a legitimate retaliation claim, even if later it is determined that the conduct was not actually prohibited by the FEHA.

The court stated, based on its reading of the *Yanowitz* case (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028) that "[c]reation or tolerance of a hostile work environment for an employee in retaliation for the employee's complaining about prohibited conduct is an adverse employment action within the meaning of ...[the FEHA]."

Thus, the court stated: "We therefore hold that an employer may be held liable for coworker retaliatory conduct if the employer knew or should have known of coworker retaliatory conduct and either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct."

As a result the case was sent back to the trial court for a determination "as to whether coworkers engaged in retaliatory harassment sufficiently severe to constitute an adverse employment action, whether … [the employer] had actual or constructive knowledge of the improper conduct, and whether it took appropriate action in response."

Ninth Circuit Case

In *EEOC v. National Education Association, Alaska*, (2001) 422 F.3d 840 the Ninth Circuit found that: "...offensive conduct that is not facially sex-specific nonetheless may violate Title VII if there is sufficient circumstantial evidence of qualitative and quantitative differences in the harassment suffered by female and male employees."

Thus, the court sent the case back to trial to determine if the offensive conduct (i.e. workplace bullying) was more severe for women than men. Such a finding would support a conclusion that the bullying was in fact based on sex (e.g. the harasser found it easier to bully woman) and therefore one of the requirements to establish a discrimination claim would be established.

Employer Considerations

Bullying is often based upon facts which are prohibited by federal and state law, i.e. age, sex, religion, disability, race, etc. However, most often the facts are not clear as to whether a violation of Title VII or the FEHA has occurred.

Upon the receipt of such claims the employer must immediately, thoroughly and impartially, investigate all complaints, even those without clear discriminatory conduct under the law.

In evaluating a workplace bullying claim, the employer should err on the side of finding a potential violation because of the uncertainty of the law as to what actions constitute a violation of Title VII or the FEHA, and because of the possible violation of company policy.

An effective remedy must be imposed for any clearly legally actionable wrongdoing, and should be considered for any facts which could lead to a contention that a violation has occurred, particularly of company policy.

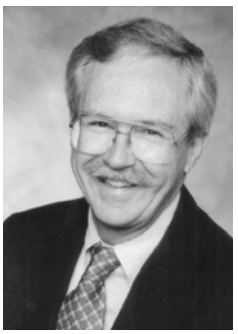
Any action taken with respect to the complaining employee must be carefully reviewed in order to consider the possibility of a claim of retaliation by the complaining employee.

Co-worker retaliatory conduct must also be considered to determine if the employer knew or should have know about the conduct, and took appropriate action to remedy allegedly discriminatory conduct.

The employer must consider remedial training about discrimination laws for all employees, and restatement of the company non-discriminatory, non-harassment policies.

The subject of this article is an expansion of the material presented by the author at the 29th Annual Labor and Employment Law Conference in Anaheim, CA.

Everett F. Meiners *was a Trustee for the SFVBA and is a long-time Partner and Of Counsel to the Labor & Employment Law Department at the law firm of Parker, Milliken, Clark, O'Hara and Samuelian. He is also a mediator of employment disputes for ARC, Alternative Resolution Centers. He can be reached at www.arc4adr.com and efmeiners@gmail.com.*



Test No. 38

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. Crude, offensive, demeaning or other uncivil comments made to co-workers have been classified as workplace bullying.
   True
   False

2. An employer does not have any liability for the unknown discriminatory actions taken by its supervisors.
   True
   False

3. An employer does not have any liability for the unknown discriminatory conduct by its non-supervisory employees.
   True
   False

4. The employer does have liability for the discriminatory conduct of its non-supervisory employees if the employer knew or should have known about the conduct.
   True
   False

5. Petty slights and minor annoyances are actionable under federal law.
   True
   False

6. Employees who report being bullied, even if not based on a legally protected characteristic, may have a legal claim if they are subsequently retaliated against for making the report.
   True
   False

7. Employers are legally required to investigate claims by employees that they have been bullied, if the alleged acts are based on some legally protected characteristic (like age, sex, race or religion).
   True
   False

8. Even if not based on a protected characteristic, it is best practice for employers to immediately conduct a full and fair investigation of all claims by employees that they have been bullied.
   True
   False

9. Employers should consider implementation of workplace harassment training to guard against potential bulling claims.
   True
   False

10. An employer may freely reassign a complaining employee to another job because they made a bulling claim which was not based on a protected characteristic.
    True
    False

11. The USSC *Faragher* case held that an employer is absolutely liable under Title VII for actionable discrimination caused by a supervisor.
    True
    False

12. Simple teasing, offhand comments and isolated incidents can amount to discriminatory changes in the terms and conditions of employment under the California case of *Yanowitz v. L'Oreal*.
    True
    False

13. The Second Circuit in the *Vito* case held that a co-workers sporadic use of abusive language, gender-related jokes, occasional teasing and workplace bulling, completely detached from any legally prohibited discriminatory motive, did not create a hostile work environment subject to a legal remedy.
    True
    False

14. The USSC in the *Oncale* case held that Title VII, and corresponding state and local laws do not create a civility code.
    True
    False

15. The Federal District Court in the *Mendez* case held that "even if mean-spiritedness or bullying render a workplace environment abusive, there is no violation of the law unless that mean-spiritedness or bullying is rooted in . . . [some form of legally prohibited] discrimination."
    True
    False

16. The California Court of Appeals in the *Kelley* case held that even "crude," "offensive" and "demeaning" comments which are not motivated by sexual desire or some protected characteristic did not violate the California FEHA.
    True
    False

17. The Court in *Kelley* held that an employee who reasonably believes that conduct by supervisors or co-employees is discriminatory, has a valid retaliation claim for adverse action taken against him by the employer.
    True
    False

18. The *Kelley* case held that an employer may be liable for co-worker retaliatory conduct if the employer knew or should have known of the co-worker conduct and failed to take reasonable action to end it.
    True
    False

19. A claim of bullying may be based on facts which do not clearly implicate Title VII or the FEHA.
    True
    False

20. It is best practice to thoroughly and impartially investigate all workplace bullying claims, even those without clear discriminatory conduct under the law.
    True
    False

MCLE Answer Sheet No. 38

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 $_____.

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

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Law Firm/Organization_____
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City_____
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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
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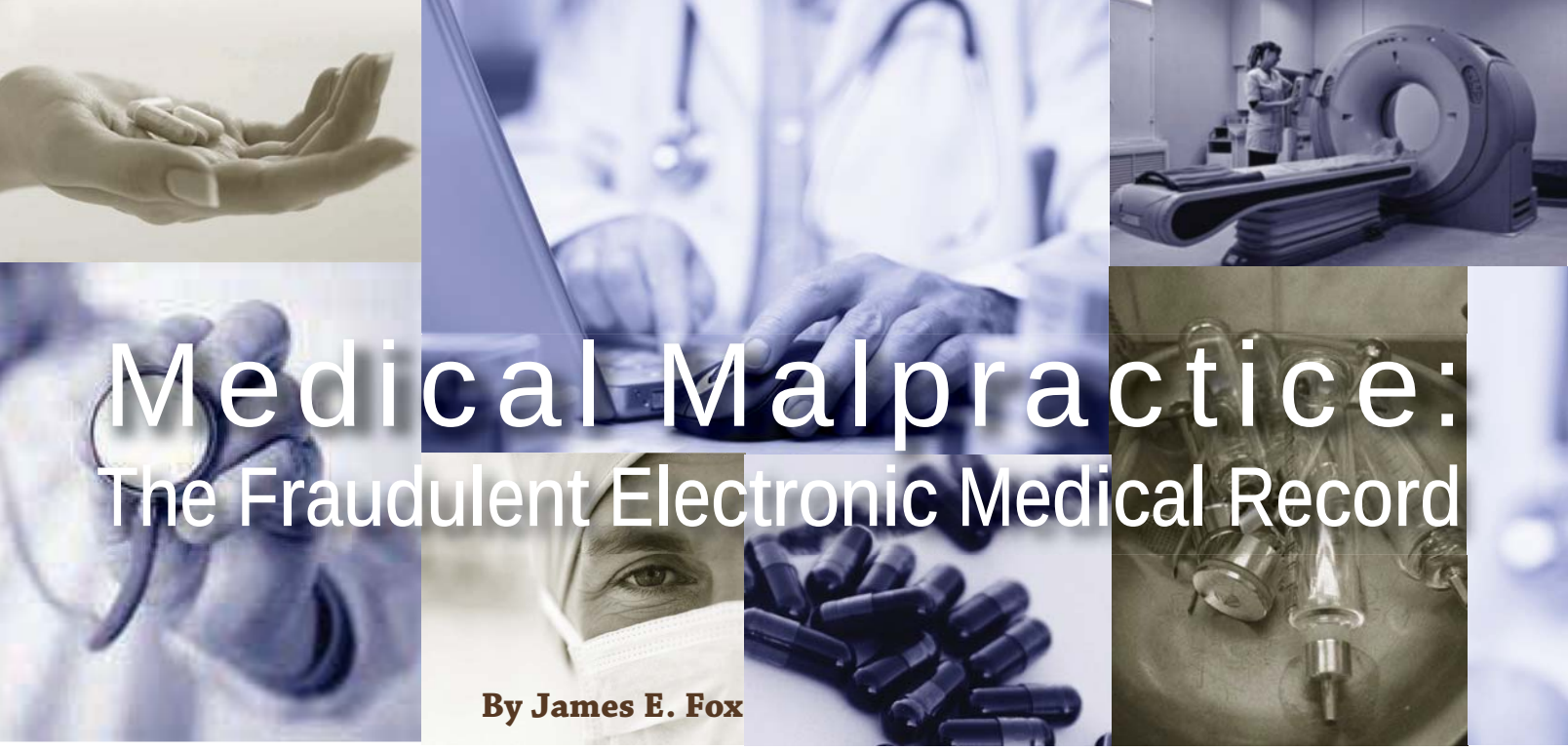
12.	❑ True	❑ False
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False



Medical Malpractice:
The Fraudulent Electronic Medical Record

By James E. Fox

PROVING THAT A DEFENDANT PHYSICIAN has falsified the medical record virtually assures a plaintiff victory in a medical malpractice lawsuit. The centerpiece of any malpractice case is the medical record which is relied on by lawyers, claims representatives, judges and juries in assessing the culpability of a physician or hospital charged with malpractice.

Malpractice insurance companies and hospital risk managers drill physicians about the importance of careful documentation in the medical record. A physician note that is exculpatory, carefully explaining his medical decision making, promotes a successful defense to a medical malpractice claim. Oftentimes a patient's version of events differs dramatically with what is in the medical records.

The frustrated plaintiff's attorney frequently rejects seemingly meritorious cases because the prospective client's version of events conflicts with the medical record. But if an attorney can prove the records have been falsified (after sworn denials to the contrary), the tide can be turned in favor of the injured/deceased patient.

All of the major hospitals now have some version of digital/electronic medical record (EMR) systems that have largely replaced handwritten physician and nursing progress notes. This is good news/bad news for malpractice trial lawyers. The bad news is these electronic medical records are very easy to falsify since physicians with user/login privileges can go into the EMR system with ease and make changes/alterations in narrative notes. Now, the good news is these falsifications are detectible by gaining access to the system through discovery into the bowels of the EMR system.

A typical falsification scenario: On day one, defendant surgeon performs a gallbladder resection on a 42-year-old female with gallstones and the surgeon prepares a routine operative report. To write the report, he logs onto the hospital's EMR system and prepares the record by cutting and pasting from a routine operative report for gallbladder removal – one he has used many times before. The patient is discharged home with dull ache in her belly.

On day two, the patient returns by ambulance with severe jaundice. It is discovered that the surgeon had transected the common bile duct which allows bile to drain from the liver to stomach, a devastating complication. The panicked surgeon logs back into the patient's EMR and pulls up his operative report and begins rewriting, adding exculpatory entries explaining how he carefully inspected for leakage of bile (or describing scarring/adhesions that made the operation very difficult, or adding information that the patient had been specifically warned of this complication). As far as the clever surgeon is concerned, the old operative report has been completely replaced by the new exculpatory version. However, through discovery every step the surgeon took to falsify the record can be documented. The EMR system has built-in audit software – made to order for the patient's lawyer.

There are several features common to EMR systems that are discoverable through traditional written discovery and "PMK" depositions (CCP Section 2025.230). The EMR systems permit auditing of each individual medical record entry. For each entry that appears to exculpate the physician (suspicious entry) one should be able to discover:

- The precise date/time of the original entry and the content of the original entry before exculpatory alterations
- The date/time of any changes and content of any changes to the original entry
- The date/time of each time the defendant logged into the plaintiff's medical record
- The content of the note/record both before and after the alterations

It is recommended that the discovery to detect medical record falsification should be conducted only after the defendant physician deposition is taken. The physician defendant will generally commit perjury by denying changes or alterations in the medical record. So once material alterations are demonstrated through discovery, the physician has got himself caught in a pickle of deepening the medical cover-up.

The written discovery should include asking defendant to produce all versions of the medical record entry in question (original, amendments, addendums, etc). Invariably, the defendant's insurance defense counsel will object and produce only the official printout from the EMR system, hoping that will satisfy the plaintiff's discovery request.

Following production of a printout of the EMR, a PMK deposition should be taken of a person with full access to the plaintiff's EMR medical record. The PMK deposition should be an IT person most knowledgeable about the operation of the EMR software—one capable of performing audits of the designated record entries (date, time, authorship and content). The subject record entries should be included in the notice. The notice of deposition should request the deposition occur at the hospital in a room with computer terminal with full access to the plaintiff's EMR. The deposition could occur outside the hospital if the deponent has remote access to the system. Without cooperation of defense counsel, attorney will require a notice of an online digital inspection of the plaintiff's medical record. The PMK deposition should demonstrate each date/time the defendant logged into the system and every entry made, deleted or altered.

Although California courts have rejected the "spoliation" claim as a separate cause of action (*Cedars Sinai v. Superior Court* (1998)18 Cal.4th 1, proof of medical record falsification destroys the defendant physician's credibility and creates an evidentiary inference on causation. In *Thor v. Boska* (1974) 38 Cal. App. 3d 558, a case where the doctor destroyed his original and completely rewrote the medical record, the court of appeal wrote: The fact that defendant was unable to produce his original clinical record concerning his treatment of plaintiff after he had been charged with malpractice, created a strong inference of consciousness of guilt on his part… (at p. 565)

The basic principle is explained by Wigmore: "It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's ... suppression of evidence by ... spoliation ..., is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause." (2 Wigmore, Evidence (3d ed. 1940) Section 278, p. 120. Italics added.) Again: "But so far as spoliation or suppression partakes of the nature of a fraud, it is open to the larger inference already examined (ante, section 278), namely, a consciousness of the weakness of the whole case."

"….the proponent of such evidence – plaintiff, in this case – should be entitled to an instruction that "the adversary's conduct may be considered as tending to corroborate the proponent's case generally, and as tending to discredit the adversary's case generally." (at 567).

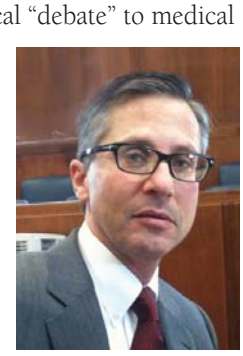
Although rejecting the spoliation cause of action in *Cedars*, supra, the California Supreme Court recognized the imposition of discovery and evidentiary sanctions on the physician who concocts or falsifies the clinical record: "Chief among these is the evidentiary inference that evidence which one party has destroyed or rendered unavailable was unfavorable to that party. This evidentiary inference, currently set forth in Evidence Code section 413 and in the standard civil jury instructions, has a long common law history. (See *The Pizarro* (1817) 15 U.S. (2 Wheat.) 227, 240, 4 L.Ed. 226 (per Story, J.); 2 *McCormick on Evidence* (4th ed. 1992) § 265, pp. 191–192; 2 *Wigmore on Evidence* (Chadbourn rev. 1979) §§278, 291, pp. 133, 221; Maguire & Vincent, *Admissions Implied from Spoliation or Related Conduct* (1935) 45 Yale L.J. 226.) As presently set forth in Evidence Code section 413, this inference is as follows: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's ... willful suppression of evidence relating thereto...."

The standard California jury instructions include an instruction on this inference as well: "If you find that a party willfully suppressed evidence in order to prevent its being presented in this trial, you may consider that fact in determining what inferences to draw from the evidence." (Citation omitted.) Trial courts, of course, are not bound by the suggested language of the standard BAJI instruction and are free to adapt it to fit the circumstances of the case, including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation.

In addition to the evidentiary inference, our discovery laws provide a broad range of sanctions for conduct that amounts to a "[misuse] of the discovery process." (Code Civ. Proc., §2023.) Section 2023 of the Code of Civil Procedure gives examples of misuses of discovery, including "[f]ailing to respond or to submit to an authorized method of discovery" (id., subd. (a)(4)) or "[m]aking an evasive response to discovery." (Id., subd. (a)(6).) Destroying evidence in response to a discovery request after litigation has commenced would surely be a misuse of discovery within the meaning of section 2023, as would such destruction in anticipation of a discovery request.

The sanctions under Code of Civil Procedure section 2023 are potent. They include monetary sanctions, contempt sanctions, issue sanctions ordering that designated facts be taken as established or precluding the offending party from supporting or opposing designated claims or defenses, evidence sanctions prohibiting the offending party from introducing designated matters into evidence, and terminating sanctions that include striking part or all of the pleadings, dismissing part or all of the action, or granting a default judgment against the offending party. Plaintiff remains free to seek these remedies in this case." (*Cedars*, supra, pp 12-13)

Winning any medical malpractice claim is difficult for the simple reason that the juries tend to favor physicians. This is true no matter how egregious the malpractice. The judge (and standard jury instructions) tend to push the case in the direction of a professional debate between expert witnesses – a losing formula for the plaintiff. By proving a physician falsified the medical record (and then lied about it!), the plaintiff can change the nature of the trial from a medical "debate" to medical "cover-up"– a winning strategy.



James E. Fox *practice areas include medical malpractice, legal malpractice, products liability, personal injury and wrongful death. Since 1957, the law firm of Fox and Fox has been providing legal representation to victims of catastrophic injuries. Fox can be reached at (818) 986-4494 or foxandfox@sbcglobal.net.*

Brief Assessments in Child Custody Matters

By Terri Asanovich, M.F.T.

IN THESE DIFFICULT FINANCIAL times child custody brief assessments are a less expensive and viable alternative to the full 730 evaluation in supplying information to the court. Brief assessments can provide particular information to the court when addressing specific and well defined questions.

One such example is the degree to which a child's custodial preference is based on developmentally appropriate reasoning. This is especially important given the new Elkins guideline where the court may utilize the brief assessment/solution focused evaluation ("BA/SFE") to gather information needed to make decisions on opinions expressed by the child for their preferences of timeshare with their parents, school selection or other aspects of the parent/child relationship.

Research has shown that children and adolescents want to be heard in some way in matters that affect that. They understand the difference between providing input and making decisions. They prefer voluntary input and want the right not to be heard. Many wish they could talk with family members rather than professionals. (Cashmore, J. & Parkinson, P., 2008, Gallop, et al., 2000, Kelly, 2002, 2007, Smith, et al., 2003, Smart, 2002, Taylor, 2006)

Also, the BA/SFE is beneficial in determining threat assessment/safety issues for child protection where monitoring a parent's contact may be indicated. This would include issues where the psychological problems may impinge upon parenting ability, such as mental illness, substance abuse and/or alcohol abuse. Also, the model is appropriate to assess domestic violence allegations and modification of the parenting plan.

Another benefit is that the BA/SFE is less intrusive to the family than a full child custody evaluation due to assessing a specific topic. It can provide useful information to the court more expeditiously to aid in conflict resolution than a full 730 custody evaluation. It is possible that the BA/SFE may indicate that a full evaluation is necessary due to the complexity of the problems or allegations and would therefore be useful in obtaining such an order.

A drawback of the BA/SFE is that data gathered is limited and any recommendations or opinions by the evaluator must stay within the confines of the data collected. Also, information collected must be presented in a manner that delineates the limitations of the findings and must stay within the scope of the referral question(s). It is a more descriptive model, and broader inferences cannot be drawn as in a comprehensive evaluation.

BA/SFE's also differ from comprehensive evaluations in that they are not designed to provide information about general family functioning and parenting capacity. Such general information is not appropriate to the BA/SFE model.

Another limitation of this model is that certain problems and populations are not appropriately suited for it. Examples include cases involving sexual abuse, physical child abuse, alienation allegations, move away cases, cases that have longstanding DCFS involvement, most special needs cases or when there is a child with severe chronic illness.

In regard to move away cases, the BA/SFE could be used if a well defined question is asked. For example, what would be a developmentally appropriate access plan, if post divorce relocation is allowed? Or when a parent asserts that a child/teen wishes to live with the non-custodial parent, possible assessment questions may include: What is the context of and the basis for the child's/teen's wish to change residence; is the child/teen able to articulate his/her reasoning in a developmentally appropriate way or does it seem parentified, manipulated, or aligned with an alienating parent;

what are the parent's report of the history of this request as well as the parenting and attachment history; does the child have any special needs and what would be the impact on the child/teen of such a change were granted? (AFCC Guidelines on Brief Assessments 2009).

In Los Angeles County, typically there is no written report with a brief assessment, only written recommendations and oral testimony regarding the findings and rationales for the recommendations. The format for the brief assessment evaluations performed by the Los Angeles Superior Court staff includes meeting in the morning with the parties and children, limited collateral witness interviews if possible, criminal background checks and limited document review. This type of evaluation was previously called a "Fast Track Evaluation" and later a "Limited Scope Evaluation".

Usually, the case is scheduled for a hearing the same afternoon. The evaluator makes recommendations and presents them in written and oral form. If the parties do not reach an agreement after reviewing the written recommendations, then oral testimony is provided to the court.

In the private sector, brief assessments can be more detailed and delve into the issues more thoroughly because the evaluator has more time to interview and collect information than that which is provided in the court model. As a result, the private evaluator is able to formulate more informed opinions and recommendations. The cost of a private evaluation ranges from $1,500 to $4,000, depending on the scope and complexity of the questions that need answers. Some evaluators provide a more extensive assessment that includes a home visit to each parent, as well as some limited testing.

Most private evaluators only provide written recommendations and court testimony. However, some also provide an attorney feedback session on the recommendation(s). Brief assessment evaluators must be seasoned child custody clinicians because the evaluator must be able to quickly assess the situation and be able to present findings in a coherent manner.

PRACTICE TIP: *Write some questions for the evaluator to answer or consider while staying within the scope of the BA/SFE. Organize the collateral contact list with the client indicating what information each witness will contribute in answering the issues that need investigation.*

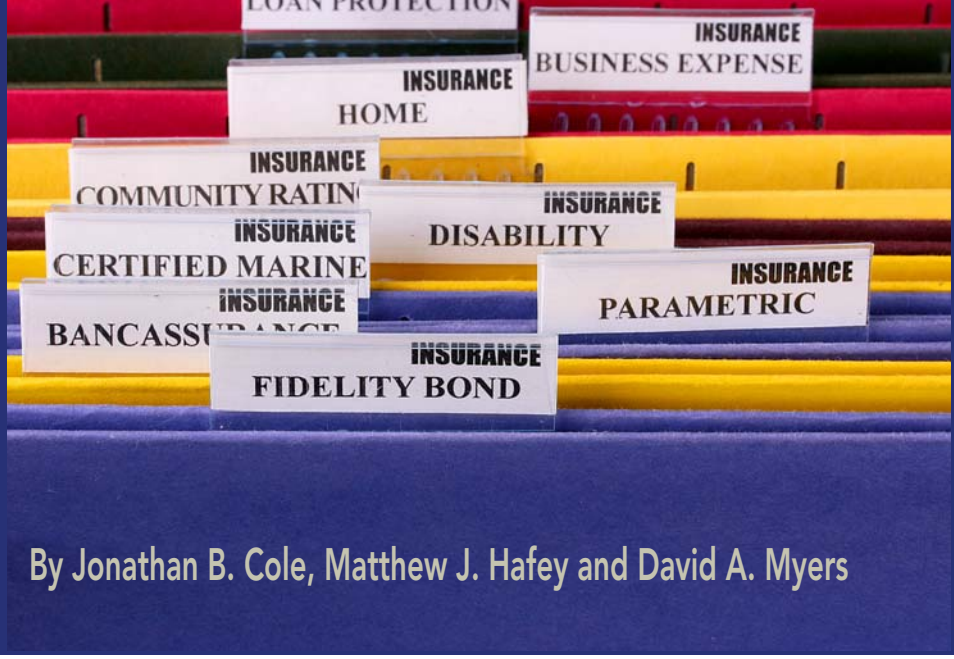
A list of private court approved brief assessment evaluators can be found on the court's website. To access the list, go to "Family Law," click on "Online Services," and a sidebar of the "Private Counselor and Evaluator Directory" will appear. Next, click on "Advanced Search" and fill out the form, checking the box for "Brief Assessment" and enter search criteria including dates needed for a brief assessment and any other information important to the case. Then click "search" and a list of available evaluators will appear.

PRACTICE TIP: *Don't specify a zip code. Not selecting a zip code will provide a greater selection of evaluators.*

BA/SFE's are more affordable and less time consuming than full 730 custody evaluations. They are appropriate for specific issues such as substance abuse or mental health screening of the parents, modifying a teenager's time share and determining threat assessment/safety issues. The BA/SFE is an appropriate vehicle through which a court could consider a child's opinions without requiring direct testimony that may prove damaging to them. In an appropriate case, the BA/SFE can provide the court and litigants with useful information to help reduce conflict and lead to a more timely resolution of the issues to promote healthier family functioning.

Terri Asanovich, M.F.T.*, is a Marriage and Family Therapist practicing in Sherman Oaks. She specializes in divorce-related issues such as counseling for adults, children and teens, co parenting, 730 evaluations, brief assessments, reunification and case consultation. She can be reached at (818) 906-3734 or TAsanovichMFT@aol.com.*

California's Regulation of Insurance Claim Settlements



By Jonathan B. Cole, Matthew J. Hafey and David A. Myers

A BASIC UNDERSTANDING OF the law governing claims settlement practices in California is essential for attorneys who deal with insurance carriers. The statutory touchstone on this topic is Insurance Code Section 790.03(h), known as the Unfair Insurance Practices Act, or UIPA. Pursuant to that statutory authority, the Insurance Commissioner adopted regulations known as the Fair Claims Settlement Practice Regulations (10 Cal. Code Regs. Section 2695.1–2695.13) (Hereafter, the cited regulations are to 10 Cal. Code of Regulations.)

These regulations apply to nearly every type of insurance, and any person or entity holding a license from the California Department of Insurance ("DOI"), or needing the Commissioner's consent to do business in California. These laws set minimum standards of conduct that carriers must comply with in order to conduct business in the state (2695.1-2), and violations may result in penalties ranging from fines to license revocation. (The Commissioner has the authority to suspend or revoke a licensee's license to engage in the business of insurance. Ins. Code §§701, 704 and 728)

Without a valid license from the Commissioner, a person may not "solicit, negotiate or effect" contracts of insurance in this state. (Ins. Code §1631) Despite the seminal California Supreme Court decision in *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal. 3d 287, 304, which held that there was no longer any private right of action for violations of the UIPA, the UIPA and regulations are also frequently subjects in insurance bad faith litigation.

The UIPA prohibits certain types of conduct by insurance carriers in dealings with their insureds. A partial list of this proscribed conduct includes: misrepresenting facts or insurance policy provisions; failing to acknowledge claims; failing to act reasonably promptly on claims; failing to adopt and implement reasonable claims investigation and claims processing standards; failing to accept or deny coverage within a reasonable time after the insured complies with the proof of loss requirements; not trying to enter into a fair settlement when liability is clear; using the practice of appealing arbitration awards to compel acceptance of settlements for less than the amount of the award; failing to settle claims promptly where liability under one portion of the insurance policy has become apparent in order to influence settlement under other coverages of the policy; failing to provide a prompt explanation of the basis relied upon in the policy for the denial of a claim or settlement offer; advising the insured not to get an attorney; misleading a claimant as to the applicable statute of limitations. (Ins. Code §790.03(h))

The Fair Claims Settlement Practices Regulations (FCSPR), promulgated not only by statutory authority of the UIPA but also upon additional and implied powers given to the Insurance Commissioner by statute (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal. 4th 216, 245), set out more explicit rules that most insurance carriers must follow. (The FCSPR do not apply to certain types of insurance such as workers compensation insurance.) Generally, these regulations govern disclosures the carrier must make and assistance the carrier must provide to the insured, claims investigations, time periods in which claim processing must be accomplished, claim file documentation and reporting requirements to the DOI.

Disclosures

Pursuant to these regulations, all licensees must disclose to their insureds or beneficiaries all benefits, coverages, time limits or other potentially applicable insurance policy provisions. This applies regardless of whether the insured is represented by counsel. (2695.4(a); *Superior Dispatch Inv. v. Insurance Corp. of N.Y.* (2010) 181 Cal. App.4th 175, 187-190) Whenever additional benefits might be owed upon receipt of additional proofs of claim, the carrier must not only so inform the insured, but assist the insured in determining the extent of the insurers additional liability. (2695.4(b))

Claims Handling Standards

No insurer may make unreasonably low settlement offers (2695.7(g), and criteria are provided in the regulations for determining whether the offer is unreasonably low). Insurers must diligently pursue a thorough, fair and objective investigation of a claim. It is improper for the carrier to persist in seeking information not reasonably required for or material to the resolution of a claim. (2695.7(d)) If denial of a claim is going to be based upon a phone conversation or

interview with someone, than that communication must be documented in the claim file. (2695.7(l))

When the claimant is not represented by counsel, the carrier must provide notice of any statute of limitations or other time period upon which the insurer may rely to deny a claim, at least 60 days before expiration. (2695.7(f)) Insurers must maintain data on claims that is accessible, legible and retrievable, subject to an exception for extenuating circumstances. (2695.3)

Time Periods

Within 15 days of notice of a claim insurers must acknowledge the claim, provide the claimant with necessary claim forms and instructions, and begin investigation. (2695.5(e)) Insurers must respond to an inquiry from the claimant within 15 days. (2695.5(b)) Unless an exception applies, insurers must accept or deny claims within 40 days after receipt of the notice of claim, unless they advise the claimant in writing of the reasons for the delay, and thereafter update the reasons for further delay in writing every 30 days. (2696.7(b),(c))

If a decision on the claim cannot be made until some future event occurs, the notice shall advise the claimant accordingly and provide an estimate of when the decision can be made. (2695.7(c)(1)) Unless an exception applies, claims must be paid within 30 days after coverage is determined or a settlement agreement is executed. (2695.7(h))

The above is only a partial list of the Claims Settlement Practice regulations. There are also additional claims handling standards applicable to certain types of insurance such as automobile, life and disability claims. (2695.8 and 2695.11)

One consequence of violations is penalties, the amount of which depends on evidence of a list of factors, such as: whether there was a reasonable belief that the claim was fraudulent, the complexity of the claim, whether the claimant grossly exaggerated the value of the property involved. (2695.12(a)) In addition to penalties, however, insurance companies may be required to submit to a market conduct examination by the DOI, in which many of the carrier's claims files are examined for other violations, which are then tallied in a report that is made public.

It is common for alleged violations of the UIPA/FCSPR to arise in the context of insurance bad faith litigation. Typically, this type of case alleges that the insurance carrier unreasonably delayed or withheld payment of insurance policy benefits. While a violation of the UIPA itself is not actionable (see *Moradi-Shalal*, supra), violations may evidence a lack of reasonableness or a breach of the implied covenant of good faith and fair dealing by the carrier in the handling of the claim, supporting a finding of bad faith. *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1078.

Violations may also support liability against other licensees, like insurance brokers. *Eddy v. Sharp* (1988) 199 Cal. App.3d 858, 866. Expert witness testimony on insurance claims handling may reference non-compliance with regulation(s) as part of the foundation for opinions about whether the insurance carrier's conduct in adjusting the claim was reasonable, or in broker/agent malpractice cases, regarding whether the agent's conduct was below the standard of care. Evidence of violations may also be used to impeach the credibility of claims representatives and/or expert witnesses. The regulations also create norms, and standards of care for insurers and others. Proof of a violation shifts the burden of proof to the carrier to justify non-compliance. *Spray, Gould & Bowers v. Associated Int'l Ins. Co.* (1999) 71 Cal.App.4th 1260, 1270, fn. 10.

Insurance companies that conduct business in California must know the UIPA and FCSPR, implement effective compliance procedures, and train their claims adjusters and agent workforce accordingly. (All licensees "shall have a thorough knowledge of the regulations contained in this sub-chapter." 2695.1(e))

Why is this important? For attorneys representing claimants, reference to an appropriate regulation if done in a professional, non-threatening manner, signals a familiarity with the UIPA and FCSPR with the adjuster. Later on, if the claim proceeds to litigation, violations of the UIPA and FCSPR can be used as evidence of bad faith. For attorneys representing carriers, advising compliance with the regulations will support a reasonableness defense and also keep the carrier out of administrative hot water with the DOI.



Jonathan B. Cole *is the founder and managing partner of Nemecek & Cole.* ***Matthew J. Hafey*** *has been a member of Nemecek & Cole since 2005.* ***David A. Myers*** *has been a member of Nemecek & Cole since 2010. Hafey and Myers combined have over 34 years of experience representing insurers and insureds in insurance bad faith litigation. Nemecek & Cole attorneys can be reached at (818) 788-9500.*

New Members

We welcome the following new members who joined the SFVBA in August 2011.

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Calendar

Probate & Estate Planning Section
Estate Planning for Same Sex Couples

OCTOBER 11
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorney Wendy Hartmann will provide the latest on how to guide same sex couples in estate planning.

MEMBERS
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1 MCLE HOUR

NON-MEMBERS
$45 prepaid
$55 at the door

Business Law, Real Property & Bankruptcy Section
To Be Represented or Not To Be Represented in Bankruptcy

OCTOBER 12
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Judge Maureen Tighe and Jennifer Braun, AUST, discuss pro se litigants, how to prevent bankruptcy petition preparers from acting as attorneys and the court's implementation of the e-filing system for pro se litigants and how attorneys will be affected.

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Workers' Compensation Section

OCTOBER 19
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
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Family Law Section
The New Wave of Entering and Challenging Judgments

OCTOBER 24
5:30 PM
MONTEREY AT ENCINO RESTAURANT
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Judge Christine Byrd, court clerk Carl Bushnell and attorney Amir Aharonov will update the group on this timely topic.

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NON-MEMBERS
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Criminal Law Section
A to Z Re: Parole Violation Hearings Including Update on the New Realignment Law as it Relates to New Protocols at Count Level

OCTOBER 26
6:00 PM – 8:30 PM
MONTEREY AT ENCINO RESTAURANT
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Attorneys William Crisologo, Chief Deputy of the Southern Region of the Parole Board, Richard "Scott" Stickney, Director of Los Angeles County Probation Executive Support for Legislation and Legal Analysis, and Bruce Zucker, an expert on representing felons at parole violation hearings, will discuss the latest on violation hearings and the new realignment law as it applies to new protocols at the count level. Stickney worked on the committee to implement the realignment protocols in Los Angeles County.

MEMBERS
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2 MCLE HOURS

Litigation Section
Malicious Prosecution

OCTOBER 27
6:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Attorney Don Weissman will discuss the varied aspects of malicious prosecution.

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COMING IN NOVEMBER

Social Media for Attorneys 101

NOVEMBER 10, 2011
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

SFVBA Member Services Coordinator Irma Mejia will cover the basic principles of social media that attorneys should know to help market their practice.

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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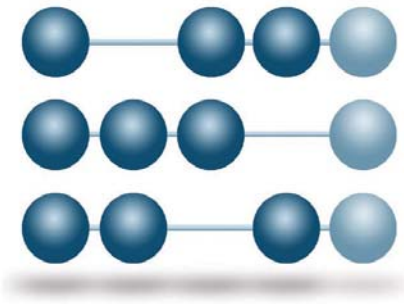

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