VALLEY LAWYER

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A Publication of the San Fernando Valley Bar Association

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Annual Judges' Night Dinner

Valley Lawyers Secure Temporary Judge Assignments

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A Publication of the San Fernando Valley Bar Association

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VALLEY LAWYER

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Judicial Independence

TAMILA JENSEN
SFVBA President

THERE MAY NOT BE A MORE important concept in the American constitutional form of government than the notion of an independent judiciary. The notion is straight forward, and yet we need to be reminded from time-to-time of its deep roots and essential function in our constitutional democracy.

We need first to remember that our Constitution was a second try at a governing document. The Articles of Confederation, proposed at the time of the Declaration of Independence and not formally adapted until after the War of Independence, created a loose confederation which was on the road to failure when Alexander Hamilton and others engineered a conference which ended in the Constitution which governs us today. The convention ostensibly was called to amend the Articles of Confederation, but, in reality, the goal was to write a wholly new document.

Second, the more radical democratic ideas of Thomas Paine (*Common Sense*) did not prevail. The Constitution limits the power of the people as well as that of the government. Our Founding Fathers were steeped in the theories of governance articulated by the great minds of the time. They were working from careful consideration of the theories of governance which wonderfully were the meat and grist of intellectual thought of the day. They wrestled mightily to make the theories into a practical document – our Constitution. Moreover, it was a great time of constitution writing – each of the states had its own constitution and many of the Founders had experience in their home states on how the task could best be carried out. While we think of writing a constitution as a rare and wonderful event, they were doing quite a lot of it!

Third, the tension between liberty and government was understood in theory and in practice. The Constitution embodies the tension between the freedom of the people and the institutions of government. Thomas Paine may have been pushed aside but his spirit lingered. The "people" clamored for liberty. But good governance held that the will of the people must be balanced against protection for the minority and the rule of law. This is achieved in part in the Constitution by balancing three branches of government: the legislative (U.S. Constitution Article I), the executive (U.S. Constitution Article II), and the judicial (U.S. Constitution Article III). Article III Section 1 provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior, and shall, at stated Times, receive for their Services Compensation, which shall not be diminished during their Continuance in Office.

It is the essence of our democracy that the judiciary is established as a third and co-equal branch of government. The importance of this was clear to the Founding Fathers, steeped in the political theory of the day. Once the Constitution was finally written, it was not at all a foregone conclusion that it would be approved by the requisite number of state conventions called for that purpose. After all, the Constitutional Convention was called on the pretense of refining and improving the Articles of Confederation. It met in secret. The resulting document created a government much more centralized than that with which many people felt comfortable. They had fought a war against a monarchy and most had no desire to return to a strong centralize form of government.

Alexander Hamilton, John Jay and James Madison wrote a series of 83 pamphlets under the pseudonym Publius explaining the Constitution and arguing for its adoption. (Both pamphlets and pseudonyms were common in that day – what a glorious time it must have been.) Hamilton had the foresight to gather the articles together and publish them as a group – *The Federalist* or *The Federalist Papers*. Today, we frequently look to *The Federalist* to find the meaning the Founding Fathers ascribed to various parts of the Constitution. *The Federalist* was written by the most brilliant minds of the time, who had participated in drafting the Constitution, and was virtually contemporaneous with the Constitution itself. What *The Federalist* says about judicial independence is simple and straight forward in *Federalist* No. 78 - 83.

Federalist No. 78 (written by Hamilton) discusses the judiciary as established by the Constitution. First reminding us that the judicial branch has neither force (as the executive) nor will (as the legislative), "but merely judgment." As long as the judiciary remained truly distinct from the other branches, the freedom of the people would be protected: "For I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" (Citing Montesquieu, *Spirit of Laws*, vol.1, page 186.)

Hamilton continues: "The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

Hamilton goes on to argue that the Constitution being the supreme law of the land is superior to the momentary whims of a legislative body. If there is a conflict between the Constitution and legislative enactment, the Constitution controls because it is the ultimate intention of the people. It is not that the judiciary is superior to the legislative branch, but, rather, that the people as their will is expressed in the Constitution, are superior to both. "The interpretation of laws is the proper and peculiar province of the courts." This does not mean that the courts are superior to the legislature. "It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes,

stands in opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental." "The courts must declare the sense of the law..." The courts, Hamilton argues, are "the bulwarks of a limited Constitution against legislative encroachments . . ."

Therefore, this independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctions, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

While the people have the power to change their Constitution, until they do so formally, the written constitution controls (even over the otherwise expressed desires of the populace) and the judiciary is its guardian. Therefore, the independence of the judiciary is essential.

Hamilton continues: "But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may imagine. The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer to-day And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress."

In Federalist No. 80, Hamilton continues this argument. What good are limits on the authority of the legislature if there is no method of enforcing them? It is the role of the judiciary to "restrain or correct the infractions" of the legislature. "If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number."

Therefore, when *Marbury vs. Madison*, 5 U.S. 137 (1803) established the principal that the court has the authority to interpret the Constitution and issue a writ against the executive branch based thereon, Chief Justice Marshall argues along the same lines as Hamilton in *The Federalist*. The legislature cannot oversee itself if liberty is to be preserved. That is the job of the judicial branch. "It is empathically the province and duty of the judicial department to say what the law is." Where a law is in opposition to the Constitution, the Constitution, being superior, controls.

"Certainly all those who have framed a written constitution contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void." [5 U.S. 137, 177.] The constitution being supreme, the court is bound to follow it (and issue the writ against the executive branch). "Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument." [5 U.S. 137, 178.]

To bring us back to the present day, *Marbury vs. Madison* arose when John Adams appointed several magistrates on the eve of leaving office as president. James Madison, as Secretary of State, refused to issue their commissions and they sued for a writ. Much the same thing is being played out in Chicago as I write this. The governor has appointed someone to a vacant senate seat. The Secretary of State of Illinois has refused to certify the appointment.

By the way, *The Federalist*, makes great bed time reading. Go get a copy and let me know what you think.

From the Editor

For question, comments or candid feedback regarding ***Valley Lawyer*** *or* ***Bar Notes****, please contact Angela at (818) 227-0490, ext. 109 or via email at Angela@sfvba.org*

ANGELA M. HUTCHINSON
Editor

Dear Members,

February is an exciting time for celebrities and their fans. Actors,writers, musicians, artistic entrepreneurs, and industry trailblazers will be honored this month at the Academy Awards, WGA Awards, The Grammys, NAACP Image Awards, and other high-profiled events.

Due to global media convergence, the entertainment industry is witnessing a dynamic boom in recent years. From a legal perspective, there are a host of subtle and complicated issues that affect the entertainment and legal communities.

Inside this issue of *Valley Lawyer*, our MCLE article reports on a current FCC investigation of embedded advertising in television. On a lighter note, we also cover sprinkles and cupcakes. How can delicious sweets be related to law you might wonder...read the article to find out!

While entertainment is a key focus this month particularly in Los Angeles, for others around the world more attention may be given to their Valentine or more focus dediciated to achieving deliverables and kicking new year's resolutions into high gear.

As SFVBA members, be sure to take a moment to reflect on what you can do to enhance the Bar and our Valley community. One great way to start is to write articles for *Valley Lawyer*. Please review the adjacent editorial calendar and contact me if you would like to become a contributing writer.

Seize the year!

Angela M. Hutchinson

VALLEY LAWYER

2009 EDITORIAL CALENDAR*

ISSUE FOCUS		DUE DATE
APRIL	Business Law, Bankruptcy and Tax	March 2
MAY	Family Law, Probate and Estate Planning	April 1
JUNE	Alternative Dispute Resolution	May 1
JULY/ AUGUST	Healthcare and Insurance	May 22
SEPT.	Litigation and Law Practice Management	August 3
OCT.	New Lawyers and Law Students	September 1
NOV.	Public Policy and Government	October 1
DEC.	Civil Law	November 2

**Article word count is typically 500-1,000. MCLE Articles are based on the Issue Focus, with a 1,500-2,500 word count.*

A Beneficial Relationship Between the ARS and the Courts

ROSIE SOTO
Director of
Public Services

TO THE PUBLIC, COURT personnel are often the first impression of the legal system. Generally, callers who have been referred to the Attorney Referral Service have an understanding of who the ARS is and how the ARS programs are instrumental, thanks to the court personnel.

The ARS receives about 100 calls per day from members of the public seeking legal assistance. About 30% of the calls the ARS receives are court referrals. This number includes sources like the local court signs, judges, commissioners, clerks, court administrators, bankruptcy court personnel, offices of the City Attorney, District Attorney and Public Defender, and Self-Help Center personnel.

Very noteworthy sources of referrals are the local court signs. A typical caller to the ARS line is an individual that had elected to represent themselves in a legal proceeding who has realized after visiting the court that the case is indeed a complex matter and that many considerations are involved. As the individual walks down the halls of a local Valley court, overloaded, defeated, or confused with the court system, they can turn to their left or right and see a help line, "Need a Lawyer? Call the San Fernando Valley Bar Association."

The ARS strives to give callers an outstanding first impression and help each individual get the assistance they need as quickly as possible. These callers are screened by staff to gain pertinent information regarding the nature of the legal matter before they are referred to an attorney's law office.

In the last ten years, nearly *2000 pro pers* were successfully referred to ARS panel members. These are individuals that were referred to our program by the local courts. These are *pro pers* for many reasons, some because of their lack of means, others whom simply were at a loss on how to find the right attorney or felt they couldn't afford an attorney, or some clients dropped by their attorney.

To individuals, the ARS is an extension of the courts and of attorneys' law offices. As the ARS staff, attorney members, and court personnel excel at working together, clients' expectations will be met more frequently and efficiently.

The ARS helps individuals appreciate that an ARS panel attorney can help explain how the process works, the expectation of legal fees and options. The ARS also wants to provide appropriate and profitable referrals to members. So if attorney members are being referred cases that are no longer being handled by their office, attorneys can contact the ARS immediately or visit their profiles online at www.sfvba.org (Go to Member Login to update your panel selection.)

Please continue to spread the word about the Attorney Referral Service of the San Fernando Valley Bar Association.

Valley Lawyers Secure Temporary Judge Assignments to Support Their Practices

By Lisa Miller

Judge Stuart M. Rice

Commissioner Michele E. Flurer

WHO IS INSIGHTFUL, EXPERIENCED, AND SITS on both sides of counsel table? Valley lawyers who volunteer as Los Angeles Superior Court temporary judges, that's who!

The Los Angeles Superior Court Temporary Judge office staffs numerous full-time pro tem courts in the Valley courthouses, as well as slotting fill-in temporary judges for judges and commissioners who are unavailable for their assigned calendars. Assignment locations in the Valley include Van Nuys, Chatsworth, San Fernando, Burbank and Glendale, among others. Available positions are in both the civil and criminal courts systems. The Temporary Judge Committee is anchored by Judge Stuart Rice, Commissioner Michele E. Flurer and Administrator Michael Ewing.

"We have a great need for temporary judges in the San Fernando Valley courthouses," says Judge Rice, Chair of the Temporary Judge Committee. "We are down by about a dozen judges throughout the Valley court system, and we have to fill those slots daily."

According to Judge Rice, who was a long-serving commissioner before being elevated to a judge position, attorneys who volunteer as temporary judge gain an immediate perspective that makes them demonstrably better advocates for their clients. Once they are able to see things from the bench perspective, they can incorporate these insights in their advocacy for their clients when they are off the bench. And these invaluable improvements in practice skills are not lost on Valley lawyers. Many of them attest to the steep learning curve they experience through the bench perspective.

"More than 120 Valley attorneys attended our recent temporary judge training through the San Fernando Valley Bar Association," says Judge Rice. "We offer online training and self-study as well for temp judges, as part of our effort to recruit much-needed temporary judges for Valley courthouses."

Not only is volunteering as a temporary judge an opportunity to give back to the legal community and the judicial system, the bench assignments are stimulating for attorneys and help them understand that they are a productive part of the administration of justice.

"Temporary judges adjudicate disputes that the parties could not resolve on their own," says Judge Rice. "But the parties are satisfied after their matters receive fair hearings through the temporary judge on the bench."

The program offers important practical considerations as well, according to Judge Rice. "Not only are temporary judges helping effectuate the efficient administration of justice," he says. "Temporary judges get Elimination of Bias MCLE credits at a really reasonable price."

Judge Rice says that the Los Angeles Superior Court temporary judge program needs to hear from attorneys who were trained in the past as temporary judges, but who let their training lapse; attorneys who are not yet trained, but would like to be; and lawyers who have been trained but who do not have assignments.

"We especially need temporary judges who can sit on an emergency basis," Judge Rice says. "We are looking to recruit some attorneys who are semi-retired, who can make themselves available for short lead-time assignments."

Judge Rice urges attorneys to let the assignment office know if their calendars clear suddenly and they become available to fill in as temporary judges.

Judge Rice understands that some counsel are wary of volunteering in a program that might at first seem a bit mysterious in its workings. So he relies on an able administrator to help make the program work for attorneys on a practical level, especially focusing on qualification and scheduling issues. Mike Ewing is the administrator in charge of the temporary judge assignment office. Mr. Ewing says that from an administrative standpoint, qualifying as a temporary judge is easy.

"Applicants must be admitted to practice for 10 years, at least, and once qualified, they must re-certify themselves every three years," he says. "It's really not hard at all."

While temporary judges are not permitted to advertise their practices by mentioning that they sit as temporary judges, they can mention their bench service in applications or on their resumes, he says.

Before receiving an appointment, the temporary judge applicant must have attended, in person, at least three hours of Bench Conduct and Demeanor training; three hours of ethics,

LASC Temporary Judge Requirements

- Be a member of the State Bar for at least 10 years
- Complete application, available at *www.lasuperiorcourt.org*
- Attend required training, both in-person (Bench Conduct and Demeanor) and through distance learning options

which can be through distance learning modalities as well as in-person; and courses in the substantive law of the subject area in which the attorney would like to sit. The areas include unlawful detainer, small claims, traffic, and family law, among others.

"Applications are accepted on a rolling basis, and sometimes attorneys get frustrated when they don't hear back from us right away," he says. "But the review committee meets when a number of applications have been received, so some applicants wait a little longer to hear about the status of their applications."

Many applicants are concerned about fitting their temporary judge obligations into their existing practices, according to Mr. Ewing. But they needn't worry. The Temporary Judge Office has implemented a number of protocols to make calendaring as easy as possible for attorneys who volunteer as temporary judges.

"Requests for temporary judges to sit on assignment are sent via e-mail well in advance, or through telephone calls from the central assignment office in the Mosk Courthouse, so counsel just accept the assignments that work for their schedules," he says. "And we can block out time periods where the temporary judge is unavailable, so we don't accidentally request them when they are away from the office or in trial."

A big part of his job revolves around using technology to work with the attorneys in the program. And for that, he relies on Commissioner Michele E. Flurer, the technology whiz behind the program and a key member of the committee.

Commissioner Flurer is an important part of the Temporary Judge Committee, working closely with Judge Rice. One of the guiding principles for temporary judges who sit in small claims court is that appearing in small claims court is one of the most important days of the litigants' lives, according to the 2005 Administrative Office of the Court's Survey of Attorneys and the Public, she says.

"Small claims litigants will retell their small claims court experiences to family, friends and colleagues for years to come," Commissioner Flurer says. "It is the temporary judge's job to make sure that experience is positive."

While generally half of all small claims participants will leave the courthouse having lost their cases, they can still have a positive experience with the court system. This can be achieved where the bench officer is attentive, impartial, and gives a rationale for the decision. And this leads to fewer complaints and appeals.

Temporary Judge Program Contact Information
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tempjudgeprogram@lasuperiorcourt.org

Commissioner Flurer, as chair of the Temporary Judge Committee Subcommittee on Technology, is working to create a sophisticated temporary judge website for program participants. The new site will give temporary judges access to the Judicial Bench Guidelines, online training, and other supportive resources.

Commissioner Flurer knows first-hand what active temporary judges need. Commissioner Flurer was working as in-house counsel when she sat as a temporary judge for the first time. She liked it so much, she became a full-time bench officer.

***Lisa Miller**, a Trustee of the San Fernando Valley Bar Association and Chair of the Small Firm & Solo Section, is a busy Temporary Judge with the Los Angeles Superior Court. Miller can be contacted at sfvba@lmillerconsulting.com.*

Temporary Judge Profile

Lisa Miller

By Angela M. Hutchinson

AFTER WORKING AS A trial lawyer, law professor, legal editor, and published author, Lisa Miller was thinking about her next move. So it was kismet when she saw an advertisement in the Metropolitan News newspaper announcing training for temporary judges through the Los Angeles Superior Court.

For $50, applicants would receive the required training for the volunteer pro tem positions, and earn difficult–to-obtain, but required, MCLE credits in Elimination of Bias and Ethics. This was a deal too good to resist.

"My application, training, and participation in the temporary judge program was one of the best decisions I could have made regarding notching up my legal skills," says Miller. "I started learning about what works in court and what's a mistake in court with my first bench assignment."

Miller is fully trained in all areas of bench service, including the family law training recently offered through the SFVBA at the Van Nuys courthouse. Her bench participation includes both civil and criminal calendars.

"Advocates who prepare and present efficient cases have an edge over counsel who have not done adequate preparation," says Miller. "I sometimes wonder why counsel make their cases needlessly complex and confusing, rather than simplifying them as much as possible."

Miller's legal expertise is in civil, criminal, and administrative law. She has worked for government agencies, as in-house counsel and in private practice. She has also handled criminal defense matters as well as both sides of civil litigation. Miller is a SFVBA Trustee and Chair of the Small Firm & Sole Practitioner Section.

"My broad background and depth of experience has been an asset on the bench, no question," she says. "But I keep learning more and more with every bench assignment I accept. And I wouldn't trade that free education for anything."

During the past four years, Miller has been working as a temporary judge and recently re-certified herself through updated training.

"The Bench Conduct and Demeanor training and Elimination of Bias class are really invaluable," she says. "These reminders of the important aspects of bench service really help strengthen my performance on and off the bench."

From every bench assignment, Miller gains helpful hints about effective advocacy. "Watching other advocates approach different challenges in different ways is an endless education".

Miller says, "Volunteering as a temporary judge has been the best education in advanced advocacy I could want, and it's a no-cost learning opportunity. And the Ethics and Elimination of Bias MCLE credits are a great addition to the program."

By proactively scheduling bench assignments through the Temporary Judge Office in the Mosk Courthouse, Miller is able to manage her volunteer time. She sets aside two Friday mornings each month in her calendar for participation in the Temporary Judge program. To stay in sync with the needs of the Courts, she e-mails the Pro Tem Office every month to check on available assignments on her preferred dates in the following month.

"By scheduling anticipatorily, I can serve both my own calendar and the needs of the pro tem program with little conflict," she says. "Even the local court staff knows that if it's Friday morning, Lisa's likely in Van Nuys 109 handling criminal matters."

Miller recommends applying for the program, undergoing training, and committing to a calendar assignment each month. When attorneys frequently sit as temporary judges, they will not only excel in their practices, but also absorb more knowledge to better serve their clients.

"The view from the bench is invariably enlightening for advocates," says Miller. "Counsel should not overlook the opportunity that the temporary judge volunteer position offers to serve their clients better. Temp judge work pays off with immediate and surprisingly rewarding results."

New Members

The following joined the SFVBA in December 2008:

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Sprinkles Cupcakes is Seeing Red... Velvet, That Is!

By John Stephens and Jennifer Burtness

CUPCAKES, THE STAPLE OF classroom birthdays everywhere, have become a huge phenomenon with adults and children alike. Cashing in on the current cupcake craze, cupcake-only bakeries have been springing up around the nation. Sprinkles Cupcakes of Beverly Hills, which touts itself as "The Original Cupcake Bakery," is turning up the heat on a new batch of copy-cupcakeries. In a climate where branding is vital to increasing client base and protecting marketplace reputation, Sprinkles Cupcakes has trademarked its name as well as its distinctive "modern dot" motif. Armed with these trademarks, Sprinkles has launched a campaign against those companies it sees as eating into its business and potentially creating brand confusion. In a not-so-sweet move, Sprinkles filed multiple lawsuits in the past year, and sent numerous takedown letters to competitors it sees as treading on its trademarks.

Let Them Eat (Cup)Cake

In 2005, Sprinkles opened its first retail bakery in Beverly Hills, and has since skyrocketed into popular culture. The Beverly Hills location is known to be a celebrity bastion and a must see on any star watcher's list. Its confections are so popular that there is seldom a time when a line is not formed in front of the store. The company and its gourmet cupcakes have been featured on shows such as "Entourage," "The Oprah Winfrey Show" and "Good Morning America," as well as in many major publications. Sprinkles has also begun aggressively expanding its brand, with multiple new nationwide locations in the works and by marketing its cupcakes mixes online and through Williams and Sonoma.

Batter Up

In a move that takes the (cup)cake, Sprinkles filed a trademark infringement lawsuit in the Central District of California against Famous Cupcakes, Inc. for its alleged use of Sprinkles' "modern dot" design (U.S. Trademark Registration No. 3,224,075). *Sprinkles Cupcakes, Inc. v. Famous Cupcakes, Inc.*, No. CV08-05349, (C.D. Cal. filed August 14, 2008). Last year, Sprinkles trademarked its "modern dot" design. The "modern dot" is comprised of two concentric candy circles, one small circle on top of another larger circle, which adorns the top of Sprinkles' cupcakes. Various color combinations of the smaller and larger circles denote the cupcake flavor – including red velvet, chocolate marshmallow, and chai latte.

Sprinkles trademarked its "modern dot" design under 15 U.S.C. section 1052(f), for a mark that has acquired distinctiveness. The official mark consists of a nested-circle design placed prominently on the top center of a cupcake. The "modern dot" trademark was originally denied as being purely decorative or ornamental and then for being a non-distinct configuration. The trademark was ultimately granted based on the mark gaining secondary meaning.

Under trademark law, secondary meaning arises when the relevant consuming public has been exposed to the use of the descriptive mark enough to recognize the mark as an indication of the source of the product or service. Sprinkles gained the mark based on the showing that customers and food industry professionals associate the "modern dot" with Sprinkles' cupcakes. In its trademark application, Sprinkles included the declarations of food professionals and customers stating that they associate the "modern dot" design exclusively with Sprinkles. These affidavits, included one from "The Fonz," Henry Winkler, declaring that his household purchases more than 30 dozen cupcakes a month from Sprinkles.

For a Food Fight

In its complaint against Famous Cupcakes, Sprinkles alleges Famous adopted the "modern dot" design to promote its bakery goods business. It alleges the Famous website (www.famouscupcakes.com) prominently displays the "modern dot" design on each page. In addition, the complaint states that the Famous Cupcake store in Valley Village prominently features the "modern dot" design on the interior walls and on all its marketing and promotional materials, including its cupcake boxes and water bottles.

The claims against Famous include infringement of a federally registered trademark (15 U.S.C. § 1114). Famous Cupcakes is allegedly using Sprinkles' "modern dot" design in commerce in a manner that is likely to cause confusion, deception or mistake among consumers – taking into account the extremely similar commercial activities of the

parties. Sprinkles also alleges violations of the Lanham Act § 43(a), including passing off. These claims are followed by a dilution claim, a common law infringement claim, and various state law claims. Sprinkles requests that Famous be enjoined from using the "modern dot" design and that it be required to deliver for destruction all media, packaging and other materials that bear the "modern dot" design.

Sprinkles' complaint does not allege that Famous is using the "modern dot" design as a cupcake topper, but rather as a basis of its décor and marketing. Although Sprinkles primarily uses these dots on its cupcakes, it contends that Famous has infringed on Sprinkles' trademark by using dots on its website and other products. Since Famous is not using the design on the cupcake itself, the court will have to decide if the distinctiveness of the "modern dot" loses all significance. The court might find that, removed from the cupcake, the "modern dot" design does not genuinely identify Sprinkles Cupcakes as a business.

If the "modern dot" is actually associated with Sprinkles in the minds of the public, how does it differ from the toppers that bakers everywhere have traditionally put on top of cupcakes, such as Reese's Peanut Butter Cups or Necco Wafers? Under Trademark Examining Procedure section 1202.03, a design cannot serve as a mark when it is a mere refinement of a commonly adopted and well-known form of ornamentation for a particular class of goods without secondary meaning. It remains to be seen if the "modern dot" is a mere refinement of the toppers used by bakers throughout time or if it is a unique mark that does signify the origin of the cupcake to consumers.

A Sprinkle of This and a Dash of That

In addition to the fight over the "modern dot," Sprinkles also set its sights on other cupcakeries with similar names. Earlier this year, Sprinkles filed a lawsuit against a bakery in the Manhattan and Brooklyn areas of New York for using the website "www.sprinklesprinkle.com," alleging infringement of its Sprinkles trademark. SprinkleSprinkle has since changed its name. There have been similar stories of small cupcake shops who have received cease and desist letters from Sprinkles. The *Los Angeles Times* wrote a piece on one such shop, Sprinkled Pink Cupcake Couture in Montecito. The question on everyone's mind is whether Sprinkles can appropriate for itself a word commonly associated with baking.

Under trademark law, common words and phrases can be trademarked if the phrase has acquired a distinctive secondary meaning apart from its original meaning. That secondary meaning must be one that identifies the phrase with a particular good or service. While Sprinkles is now commonly identified with the cupcake bakery, it remains to be seen whether a trademark of a word that is so commonly associated baking in general, such as "sprinkle," will survive a legal challenge. As the holder of valid trademarks, Sprinkles has every right to protect its original creations and brand by using the courts to enforce its rights. Until Sprinkles' marks are truly challenged, Sprinkles may have found an effective way to take a bite out of the competition.

***John Stephens**, a partner in Sedgwick's Los Angeles office, focuses his practice on media and entertainment litigation, intellectual property licensing and transactions, and specialty insurance coverage and litigation. He is Co-Chair of the SFVBA Intellectual Property, Entertainment & Internet Law Section.*

***Jennifer Burtness** is an associate in Sedgwick's Los Angeles office.*

Requesting Proposals for Changes in the Law

By Anne C. Adams

ATTORNEYS FREQUENTLY BECOME frustrated with some aspect of their cases. There may be the opportunity to try to change some legal procedures or substantive law issues through submitting a resolution to the Conference of Delegates of California Bar Associations.

The Conference of Delegates is currently requesting proposals for resolutions to revise current laws or create new laws. The resolutions cover many substantive areas of law such as family law, real property, criminal law, tax law, estate planning, insurance and employment law. Resolutions may also cover procedural issues, such as changes to the Code of Civil Procedure.

Preparing a Proposed Resolution

- Prepare a statement of the reasons for the proposed law (not to exceed 500 words)
- Include a section describing the existing law
- Include a section describing how the resolution would change existing law
- Include a description of the problem the proposed resolution would correct
- Include a statement about how the proposed resolution would impact other laws

Bar associations throughout the state send members to the annual Conference of Delegates meeting that is held in conjunction with the State Bar of California's annual meeting around September. The delegates spend three days speaking in favor of or against the proposed resolutions and voting on them. Resolutions that are approved by the Conference of Delegates are then submitted for consideration as proposed laws.

Every year, the San Fernando Valley Bar Association sends a delegation to the Conference of Delegates. The delegation is currently seeking resolutions from SFVBA members on substantive law matters or procedural issues. All resolutions should be submitted to the SFVBA's delegation to the Conference of Delegates. Proposed resolutions should be submitted by February 24.

Any member interested in submitting a proposed resolution or joining the delegation should contact Co-Chairs Anne Adams at (818) 715-0015 or Roger Franklin at (818) 986-5253.

Anne C. Adams is a business and family law sole practitioner in Canoga Park. She represents clients sued for consumer debt. Adams can be reached at anneadamslaw@sbcglobal.net

MCLE ARTICLE AND SELF-ASSESSMENT TEST

By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 23.

FCC Investigates Embedded Advertising in TV

By Mishawn Nolan

WHEN TELEVISION FIRST became popular in the 1940's and 1950's, advertising agencies determined that the most effective way to reach consumers with a strong message would be through single product or single brand television programming. Thus, the typical television show in the 1950's was sponsored by one product or brand and was often named with that product or brand, such as the Colgate Comedy Hour or Kraft Television Theater. These television programs were produced by advertising agencies for their clients.

This practice worked well for a while, but as television became more popular, the cost to the advertising agency's clients escalated. In searching for a cost-effective solution for sponsors and a greater profit stream for networks, an NBC executive came up with the magazine concept of television advertising. This meant that networks would own and control the television shows and the sponsors would merely purchase blocks of time from the network during a particular television show. For several decades, this was the dominant form of television sponsorship.

With the increasing ability to time-shift television programs and experience television content on demand, the general public is increasingly bypassing commercial advertisements and advertising agencies and networks have once again restructured television sponsorship. Instead of advertising to the public during small breaks in the show only viewable when an individual watches the program on television, sponsors are now embedding their messages within the content of the television shows.

Embedded advertising of today and the 1950's model of television are similar, but many believe that there is a key distinction. The single product television program of the 1950's, such as the Colgate Comedy Hour, explicitly informed the public watching the program that the Colgate Corporation is trying to sell them something.

Embedded advertising, on the other hand, according to many consumer groups, attempts to convey a commercial message covertly because the less the public is aware that they are being advertised to, the more effective the advertisement.

Embedded advertising includes product placement (where a television producer obtains permissions to use a particular identifiable branded product in their program and no consideration is exchanged), product integration (where consideration is given, usually to a television producer and/or network, for the use of an identifiable branded product in their program) and branded entertainment (where consideration is given, usually to a television producer and/or network, to integrate the brand attributes with a piece of entertainment).

Many television programs are currently financed to some extent through embedded advertising and this trend is increasing. It has become so prevalent and there is so much public concern about its implications that on June 26, 2008, the Federal Communications Commission (the "FCC"), which regulates the disclosure of sponsorship identification, released a Notice of Inquiry and Notice of Proposed Rule Making regarding the existing sponsorship rules and embedded advertising (the "Inquiry").

The goal of the Inquiry is to solicit comment on the existing FCC rules and procedures, the increasing industry reliance on embedded advertising and whether any changes to the FCC's rules and procedures are necessary to ensure the public is adequately informed.

The fundamental basis of the sponsorship disclosure laws is that the public should know who is trying to persuade them. The current law can be found in the Communications Act of 1934, in Sections 317 and 508, as amended (the "Communications Act"), and are designed to protect the public's right to know the identity of the sponsor when consideration has been provided in exchange for the airing of material. Section 317 requires broadcasters to disclose when they use material "for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting . . . ."

Section 508 expands the disclosure rules beyond the broadcasters to the employees of the station, producers of programs, and suppliers of program materials which ensures that anyone

who creates, distributes, and uses broadcast material must inform the public that the material is being sponsored by a corporate entity.

The Communications Act specifically excludes instances where the material was provided "without charge or at a nominal charge" by the person furnishing the material. So, products appearing in a television program through product placement would be an exception to the Communications Act and the FCC's rules would not apply.

The rationale behind this exception is that there is a distinction between the television producer that wants to use a real product in its program to create an authentic situation who obtains the permission of a brand owner and the television producer that is looking to finance the cost of production who finds a brand owner willing to pay for air time in order to influence the viewing public. In concept, the distinction is artistic integrity versus commercial advocacy, but it is unclear whether the viewing public experiences any difference.

The Communication Act also does not apply when the identity of the sponsor and the fact that there has been sponsorship from a commercial brand is obvious. As further discussed below, many advocate that embedded advertising is obvious to the viewing public and therefore, no additional regulations are necessary or desirable.

The Communication Act also does not apply to cable stations or any entity that does not come under the FCC's purview. Many opponents of FCC regulation change cite this inequity as one reason that regulations should not be tightened.

To enforce the Communications Act, the FCC has implemented several regulations and procedures. The FCC requires that an announcement occur once during the program and be on the screen long enough to be read by the average viewer. The FCC leaves all other decisions regarding the disclosure of sponsorship to the reasonable, good faith judgment of the network and television producer. In practice, the sponsorship disclosure, if made, usually amounts to an arguably legible text.

Now the FCC is seeking comment on the current trends in embedded advertising and whether the FCC is effectively protecting the public's right to know who is advertising to them. Several organizations have filed comment seeking to influence whether the FCC should make any changes to their regulations and procedures, and if so, what those changes should be.

The Center for Media and Democracy (the "CDM"), a nonprofit public interest organization reporting on the public relations and marketing industries and promoting media literacy and citizen journalism, is mostly concerned about embedded advertising in news programming. The CDM believes that the growing practice of using video news releases ("VNRs") and product integration, such as placing a cup of Starbuck's coffee on the table in front of the news anchor, raises serious questions about editorial independence and the public's right to know.

The CDM has found that the advertising agencies that secure the placement of products like the Starbuck's cup expect that if there is a negative story about Starbuck's, it would have the right to pull the cup off the set and could lead to the termination of the sponsorship agreement. The CDM believes that this will have a negative impact on a news station's journalistic integrity and could cause self-censorship.

Of even greater concern to the CDM (and several others) is the

proliferation of the VNR. A VNR is when a public relations, marketing or advertising company produces a piece of multimedia that looks like a news report, but in fact is a promotion for a particular product. News broadcasters in desperate need of content use VNRs to supplement their programming, typically without disclosures. The effect is that the viewing public is seeing a commercial produced by a corporation trying to influence their buying behavior, but believes that they are seeing a news story about the product. This journalistic context gives the advertisement even more credibility.

To address their concerns, the CDM is urging the FCC to take the following steps: (1) concurrent disclosure whenever embedded advertisements occur during a news program which is distinguishable in terms of font and color from all other on-screen text and news crawls; (2) on-screen disclosure for the duration of the embedded advertisement, which includes an aural disclosure; (3) list of all sponsors at the end of the news program and on the network's website; (4) extend all disclosure requirements to cable television; and (5) strict enforcement of these rules by the FCC.

The Writer's Guild of America, West (the "WGAw") believes that there should be a distinction between advertising and entertainment and that embedded advertising blurs this line. In addition, the WGAw is concerned that its writers are increasingly being required to create storylines that incorporate sponsored products which it believes damages the creative process, impacts journalistic integrity and deteriorates the quality of the entertainment product. The WGAw would prefer that embedded advertising be banned. However, the WGAw acknowledges that the practice is so prevalent, it is impossible to reverse entirely.

As a concession, the WGAw is urging the FCC to take strong action to insure that a broadcaster adequately disclose that products are integrated into a story in order to educate the viewing public that they are watching a paid advertisement. To achieve this type of disclosure, the WGAw advocates the following changes to the existing FCC rules: (1) real time disclosure at the time the product is exhibited or referenced in a crawl appearing at the bottom of the screen that is reasonably conspicuous and legible; and (2) the end of the use of VNRs.

The Campaign for Commercial-Free Childhood (the "CCFC") wants the FCC to explicitly ban embedded advertisement in all programs directed at children. The CCFC argues that embedded advertising is deceptive because it is predicated on obscuring the commercial message. In addition, children are unable to distinguish between entertainment and the commercial message and are particularly vulnerable to influence. Most broadcasters do not oppose clarifying that children's shows are off limits to embedded advertising, but the CCFC wants to limit embedded advertisements in programs that are watched by a lot of children, such as American Idol and other primetime programming.

The Progress & Freedom Foundation (the "Freedom Foundation") believes that the Inquiry is an attempt by the FCC to limit free speech and regulate the marketplace of ideas. The Freedom Foundation believes that embedded advertising is anything but stealth and deceptive. They believe that anyone experiencing media today clearly identifies the commercial messages and understands that consideration was paid for a product's inclusion. The Freedom Foundation further believes that embedded advertising does not pose any greater risk of deceiving the public than the standard 30 second commercial. They also propose that the consuming public has a greater ability to investigate the commercial messages through the internet, which makes them less vulnerable to being mislead. The Freedom Foundation advocates that the proposed changes are unconstitutional and that the current law regulating commercial speech is sufficient.

The Radio-Television News Directors Association (the "RTNDA") shares the same basic view as most broadcasters, namely that the existing law and its current enforcement policies are sufficient to inform the public and that any additional regulations would violate the First Amendment. The RTNDA points out that there is no evidence supporting a finding that the public is harmed by the existing sponsorship disclosure rules. The RTNDA advocates that embedded advertising is not deceptive and supports the existing law protecting speech. The RTNDA therefore proposes that the FCC reject any new sponsorship regulations and terminate the present Inquiry.

The FCC will undergo some change when the White House Administration changes and will likely not take any action until such time. Depending on the outcome of the Inquiry, advertising on television may change substantially.

***Mishawn Nolan** is a principal at Stone Rosenblatt & Cha and focuses her practice on entertainment and intellectual property matters. She is co-chair of the SFVBA Entertainment, Intellectual Property & Internet Law Section. Nolan can be reached at (818) 999-2232 or mnolan@srclaw.com.*

MCLE Test No. 8

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. The FCC has changed its laws relating to the disclosure of sponsorship.
True
False

2. Every entity that produces or distributes television programming is subject to the FCC's rules relating to sponsorship disclosure.
True
False

3. Embedded advertising is inherently deceptive.
True
False

4. The FCC is considering changes to its laws relating to sponsorship disclosure.
True
False

5. Broadcasters generally believe that the existing FCC regulations are sufficient.
True
False

6. Broadcasters and consumer advocates agree that there should be no embedded advertising in television programs that children watch.
True
False

7. The fundamental basis of the sponsorship disclosure laws is that the the public should know who is trying to persuade them.
True
False

8. Broadcasters need not disclose sponsorship identifications where they are obvious.
True
False

9. A video news release is a segment produced by the sponsor and shown during a news program.
True
False

10. Consideration is given for all types of embedded advertising.
True
False

11. The WGAw wants embedded advertising banned completely.
True
False

12. Many believe that children are unable to distinguish between entertainment and advertising.
True
False

13. Whether to implement new FCC regulations will be a balance between the First Amendment and protecting the public's right to know.
True
False

14. Financing television through sponsorship dollars is a new business model.
True
False

15. Cable television is excluded from the current sponsorship identification rules.
True
False

16. The FCC currently regulates specifically the form of the sponsorship disclosure.
True
False

17. The magazine concept of advertising was not widely adopted.
True
False

18. When television began, advertising agencies produced television programs.
True
False

19. The FCC rushed to take action before the White House Administration change in January 2009.
True
False

20. Changes to the existing sponsorship disclosure rules will likely have no effect on television sponsorship.
True
False

MCLE Answer Sheet No. 8

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

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

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Surveyed Members Speak Out

ROBERT MANSOUR
SCVBA President

THE SANTA CLARITA VALLEY Bar Association would like to take this opportunity to wish *Valley Lawyer* readers all the best in 2009. Hopefully, the year is off to a great start for small firms, large firms and sole practitioners.

Near the end of last year, SCVBA conducted a membership survey, asking members what they would like to see in the months ahead. It was learned that members were interested in three primary things. First, they wanted more educational opportunities (via MCLE events). Second, they requested more networking events. Finally, many desired more "community outreach" events.

On December 18, 2008, SCVBA presented an exciting topic entitled, "Filming in Santa Clarita: The True 'Behind the Scenes' Story." Members of the SCV Film Office lead a lively discussion about what brings productions to the Santa Clarita Valley. They also shared some interesting stories about all the productions that routinely film out here in Santa Clarita, including Heroes, NCSI, and The Shield to name a few. SCVBA plans to continue offering interesting MCLE events each month. Check out www.scvbar.org for more information about upcoming events.

Speaking of upcoming events, the SCVBA Meetings Committee recently met to outline upcoming MCLE events. A variety of topics include:

"How to Hang Your Own Shingle"
"Important Insurance Policy Provisions You Shouldn't Overlook"
"Effective Retainer Agreements"
"Negotiation Strategies"
"Effective Mediation Techniques"
"How to Market Your Law Practice"
"Effective Attorney Websites"
…and much more!

SCVBA also intends to reprise the successful event at West Ranch High School entitled, "Now That You're 18," which will review legal topics relevant to those who reach age of majority. These young adults are eager to learn about how the law affects them. SCVBA hopes to repeat this program and bring it to other high schools in the Santa Clarita Valley, as well as explore the possibility of working with other local high schools on mock trial program. This program is still in the early stages, but interested attorney members will be invited to participate in the near future.

SCVBA looks forward to a strong affiliation with the San Fernando Valley Bar Association as the two organizations forge ahead!

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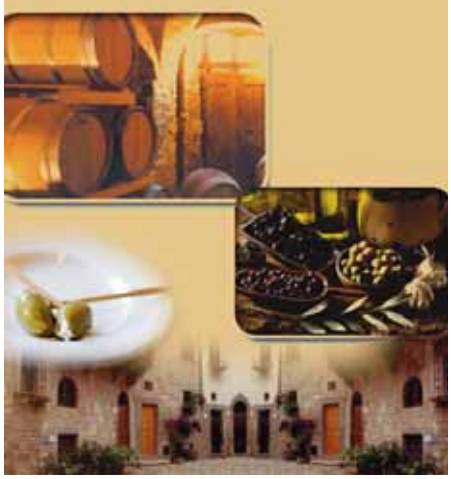

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FEBRUARY 10
12:00 NOON
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Probate attorneys Kira Vincze and Certified Family Law Specialist Barry Harlan highlight the key areas where probate and family law intersect and review pertinent case law.

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Business Law, Real Property & Bankruptcy Section
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FEBRUARY 17
12:00 NOON
OLIVA TRATTORIA
SHERMAN OAKS

Join colleagues for a great Italian lunch and a roundtable discussion on how to better define your practice area and gather insider tips on how to best present yourself.

MEMBERS	NON-MEMBERS
$30 prepaid	$40 prepaid
$40 at the door	$50 at the door
1 MCLE HOUR	

Workers' Compensation Section

FEBRUARY 18
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Mike Gregorian, LexisNexis, tackles ethical quandaries faced by workers' comp lawyers.

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

Santa Clarita Valley Bar Association
View from the Bench

FEBRUARY 19
12:00 NOON
TOURNAMENT PLAYERS CLUB
VALENCIA

Judge Graciela Freixes of the North Valley District provides a view from the Valencia courthouse.

MEMBERS	NON-MEMBERS
$30 prepaid	$40 at the door
$40 at the door	
1 MCLE HOUR	

Family Law Section
After Proposition 8, Now What?

FEBRUARY 23
5:30 P.M.
MONTEREY AT ENCINO RESTAURANT
ENCINO

Judge Harvey Silberman and Attorneys Roberta Bennett and Diane Goodman will discuss same-sex marriage.

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

Litigation Section
Mechanics Lien Law

FEBRUARY 26
6:00 P.M.
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Paul Bauducco speaks on differing perspectives of Mechanics Lien law for contractors and property owners.

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

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