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Legal Governance: Four Valley Lawyer Legislators

The Somewhat Secret World of Pre-Election Litigation

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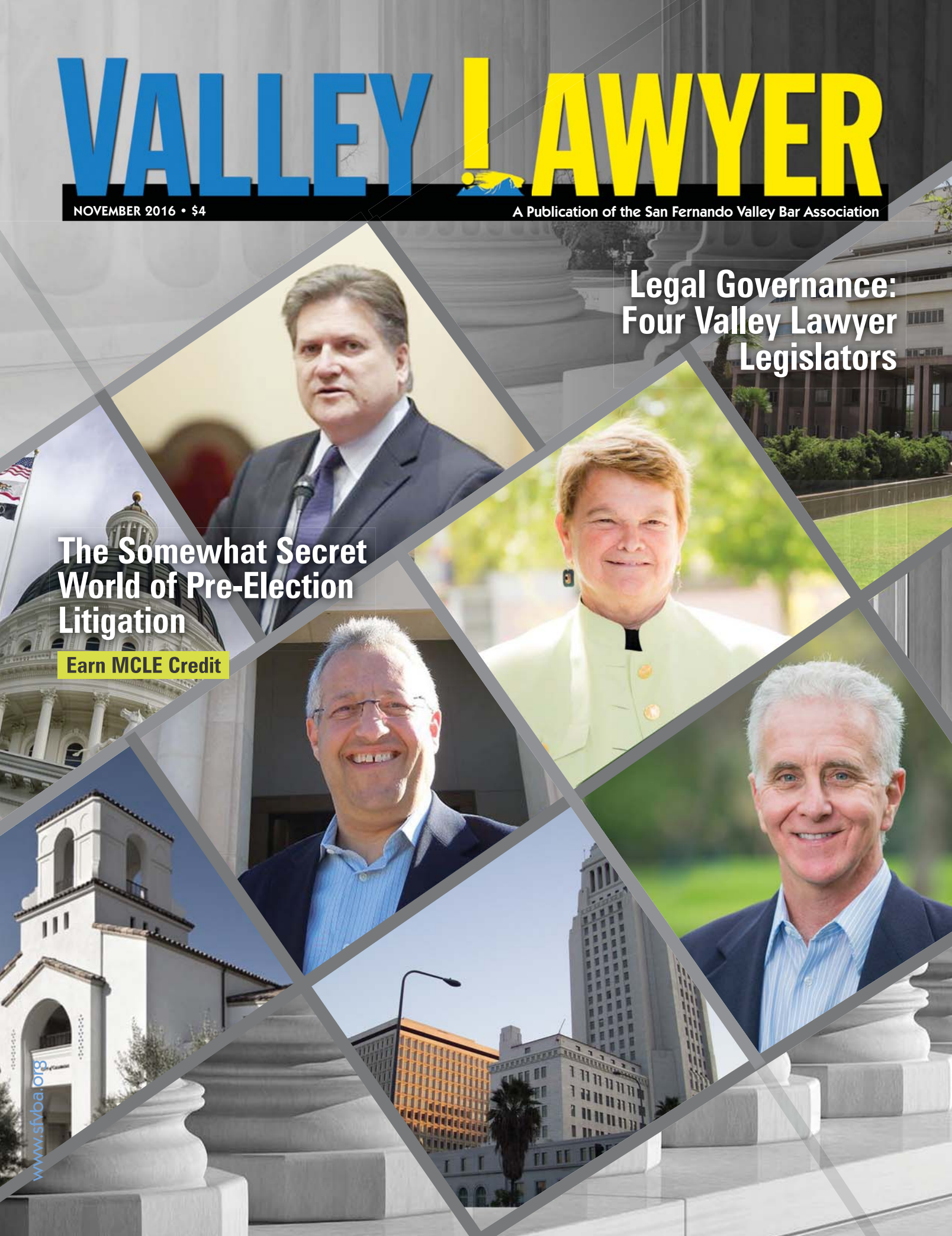

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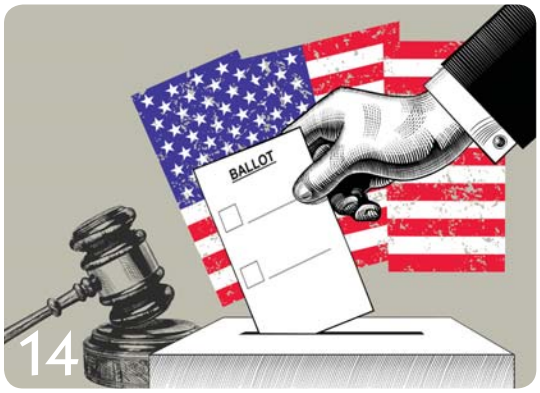

On the cover (clockwise): *California State Senator Bob Hertzberg, Los Angeles County Supervisor Sheila Kuehl, Los Angeles City Councilman Paul Krekorian and Calabasas City Councilman Fred Gaines*

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VALLEY LAWYER

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Printing Southwest Offset Printing

"Electing" the Next Supreme Court Justice

KIRA S. MASTELLER
SFVBA President

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THIS YEAR WE VOTE TO elect a new president. While this may be a difficult election to vote in, it is an incredibly important election because the next president will choose the replacement for U.S. Supreme Justice Antonin Scalia, who died earlier this year.

In thinking about Justice Scalia's impact on judges and legislators, we can acknowledge the position that he championed during his tenure—his position that laws, whether statutes or the Constitution, must be applied according to their text.

This approach is known as 'textualism,' meaning that judges should not apply law based upon what might be good policy or what he or she assumes that Congress may have intended, but did not clearly express when they passed legislation. The law should be applied as written. Further, Scalia consistently took the originalist position that the words of the law should be understood as they were understood by the people at the time the law was enacted.

Scalia's judicial opinions consistently applied both textualism, originalism and the idea of popular government—the concept that laws, including the Constitution, receive their legitimacy from the people.

> "Scalia's position was that laws should be applied according to their text."

He reiterated that the Constitution is not an automatically evolving document that creates new rights or responsibilities to which the people have not given their approval. Instead, said Scalia, judges must adhere to the constitutional prerogative of the people to pass laws through their legislatures, limited by the restraints imposed by the Constitution, which itself, was ratified by the people.

Scalia dedicated his life's work to zealously defending the Constitution, including individual rights such as free speech and the rights of criminal defendants, the Constitution's protection of liberty through the checks and balances between the branches, and its division of powers between the federal government and the states.

His shoes are big ones to fill. Below are several of the issues that the Court may be deciding in the near future:

Religious Liberty

A "Blaine Amendment" is a provision that was added to a state constitution during a time of anti-Catholic fervor dating back to the 1870s. The effect of a Blaine

Amendment was to prevent any state funds from being used to benefit a religious organization or parochial school for any reason. This means that state programs that provide resources to private institutions have to discriminate against religious institutions, even if the program being helped by the state has nothing to do with the promotion of religion.

The Court will review *Trinity Lutheran Church of Columbia v. Pauley*, wherein a program overseen by the State of Missouri provided scrap tires for playground flooring to make them safer for children. Citing the Blaine Amendments, the State of Missouri refused to extend the program to include a religious preschool, even though the program, and the playgrounds impacted, were solely concerned with child safety, not with the promotion of religion.

Cruel and Unusual Punishment

Also on the docket this term is the death penalty case, *Bobby James Moore v. Texas*. Moore was sentenced to death in 1980 and has spent more than 35 years living on death row. Despite a low IQ in the range of mild mental retardation, Texas found Moore qualified for the death penalty based on outdated tests.

The justices will explore whether it violates the Eighth Amendment to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed.

Right to Bear Arms and Other Issues

It is likely that the Court will be deciding whether or not to continue to recognize an individual's right to keep and bear arms, while voting laws, affirmative action, the death penalty and regulation of abortion, are all issues that could be granted review.

I encourage each of us to spend the time to look beyond the individual candidates and learn who each proposes to appoint to the Supreme Court before we decide for whom to cast a vote for in November. This decision may be the most important act of our next president, as Justice Scalia's replacement will change the country's course for generations to come.

The Real Deal: Four Authentic Legislators…Really

MICHAEL D. WHITE
SFVBA Editor

michael@sfvba.org

OVER THE PAST FEW DECADES, I've interviewed my fair share of interesting people—ambassadors, merchant marines, a couple of U.S. Trade Representatives, historians, corporate bigwigs, long-haul truck drivers, authors, academics, longshoremen, fire fighters, and the first human being to set foot on the moon.

Tack on to that list a fair number of lawyers, legislators, and, perhaps among the most compelling, the combination lawyer/legislator, a vanishing breed that brings the skills and acumen polished in law school to the Mixmaster that is contemporary politics.

This month is the focal point of an electoral process that needs no further illumination here; suffice it to say that come Thanksgiving, some will tuck into their turkey and cranberry sauce with added gusto, while others are sure to moan over their melancholy oyster stuffing and dilute their pan gravy with bitter tears of gloom and sorrow.

In any event, we felt it would be both appropriate and instructive to spotlight four lawyers that happen to be legislators or legislators that happen to be lawyers—you choose—who have committed themselves to public service representing the San Fernando Valley at the state, regional and local levels, and, it just so happens, are not up for reelection this month. No worries, then, about rehearsed sound bites and the usual bumper-sticker bromides that, unfortunately, sometimes accompany election-time press interviews.

The number of attorney legislators are actually diminishing. In 1969, 48 percent of legislators at all levels of California government were law school graduates; within 30 years, that number had shrunk to 22 percent, and it's even smaller today.

We got the real deal here. Interviewing, conversing really, with California State Senator Bob Hertzberg, Los Angeles County Supervisor Sheila Kuehl, Los Angeles City Councilman Paul Krekorian, and Calabasas City Councilman Fred Gaines provided a unique opportunity to get a different perspective on how the great meat grinder of California politics grinds out its pungent legislative sausage.

All four are authentic public servants, committed to their chosen paths who've brought much in terms of style, technique, attitude and personal experience to the rough-and-tumble of day-to-day politics.

It was a genuine privilege to be able to spend some time with them.

Six Degrees of Separation

Maybe some of you remember the "six degrees of separation," the somewhat compelling idea that everyone and everything is six or fewer steps away, by way of introduction, from any other person in the world, so that a chain of "a friend of a friend" statements can be made to connect any two people in a maximum of six steps. You know…my barber's cousin went to high school with a guy whose sister knew the chiropractor who used to realign the spine of the basement-dwelling whiz kid who hacked into the CIA's computer database.

Researching the backgrounds of the four aforementioned legislators, I discovered that Fred Gaines was Bob Hertzberg's campaign manager during his unsuccessful bid for Los Angeles mayor a few years ago; Sheila Kuehl was Gaines' student advisor when he served as student body president at UCLA; Gaines and Paul Krekorian both attended Boalt Hall School of Law at UC Berkeley; and, while at UCLA, Gaines roomed with none other than David Gurnick, SFVBA past President and current Chair of *Valley Lawyer's* Editorial Committee.

OK. Perhaps not the most eyebrow-raising connective thread, but, maybe, something worth sharing at the next Bar networking event. Regards.

CALENDAR

NOVEMBER 2016

SUN	MON	TUE	WED	THU	FRI	SAT
		1 *Valley Lawyer* Member Bulletin Deadline to submit announcements to editor@sfvba.org for December issue.	**2**	**3** Membership & Marketing Committee **6:00 PM** **SFVBA OFFICE**	**4**	**5**
6	**7** VBN Valley Bar Network **5:30 PM** **KAHN RESIDENCE** VBN is dedicated to offering organized, high quality networking for SFVBA members.	**8** Probate & Estate Planning Section Fraud's Origins and Consequences **12:00 NOON** **MONTEREY AT ENCINO RESTAURANT** CPA Chris Hamilton will discuss the ethical implications surrounding fraud and the attorney's legal obligations; players involved in the Madoff scandal; and the practical application regarding the professional's role in detecting, preventing and reporting fraud. (1 MCLE Hour Legal Ethics)	**9**	**10** Board of Trustees **6:00 PM** **SFVBA OFFICE**	**11** Veterans Day	**12**
13	**14**	**15** Taxation Law Section Income Tax Update **12:00 NOON** **SFVBA OFFICE** Stuart Simon will present his annual update on income taxes and potential changes due to the newly elected president's tax agenda. (1 MCLE Hour)	**16** Workers' Compensation Section A Psychiatrist's Perspective on *Rolda* **12:00 NOON** **MONTEREY AT ENCINO RESTAURANT** Brian Jacks M.D. with input from Judge Shiloh Rasmusson offers an analysis of Rolda. (1 MCLE Hour)	**17** Networking Mixer **6:00 PM** **LAKESIDE CAFÉ ENCINO** Sponsored By City National Bank Hutchinson and Bloodgood LLP See page 42	**18** Bankruptcy Law Section Ninth Circuit Review **12:00 NOON** **SFVBA OFFICES** Judge Maureen Tighe, her law clerk Christopher Wong and attorneys Andrew Goodman and Steven Fox will provide the annual review. (1.25 MCLE Hours)	**19**
20	**21** Family Law Section Hot Tips **5:30 PM** **MONTEREY AT ENCINO RESTAURANT** Gary Weyman offers his classic presentation. Don't miss this opportunity to get the latest insights into the inner workings of the court and the family law practice. Approved for Family Law Legal Specialization. (I.5 MCLE Hours)	**22**	**23**	**24** Happy Thanksgiving	**25**	**26**
27	**28**	**29** Editorial Committee **12:00 NOON** **SFVBA OFFICE**	**30**			

The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. Visit www.sfvba.org for seminar pricing and to register online, or contact Linda Temkin at (818) 227-0490, ext. 105 or events@sfvba.org. Pricing discounted for active SFVBA members and early registration.

CALENDAR

SUN	MON	TUE	WED	THU	FRI	SAT
				1 *Valley Lawyer* Member Bulletin Deadline to submit announcements to editor@sfvba.org for January issue.	**2**	**3**
4	**5** VBN VALLEY BAR NETWORK **5:30 PM CHABLIS RESTAURANT TARZANA** VBN is dedicated to offering organized, high quality networking for SFVBA members.	**6**	**7**	**8**	**9** Bankruptcy Law Section The 10 Supreme Court Cases You Must Know **12:00 NOON SFVBA OFFICES** Noted bankruptcy attorneys Jonathan Hayes and David Gould and the Hon. Alan Ahart will discuss the ten critical Supreme Court Cases that can ruin your client's day and yours! (1.25 MCLE Hours)	**10** Blanket the Homeless and ARS Legal Clinic **8:00 AM L.A. FAMILY HOUSING NORTH HOLLYWOOD** 
11	**12**	**13** Probate & Estate Planning Section New Medi-Cal Recovery Laws **12:00 NOON MONTEREY AT ENCINO RESTAURANT** Certified Elder Law Attorney Ruth Phelps will outline the latest. (1 Hour MCLE) *Holiday Open House*	**14**	**15**	**16**	**17**
18	**19**	**20**	**21**	**22**	**23**	**24**
25 	**26**	**27**	**28**	**29**	**30**	**31**

Save the Date

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Fastcase: An Untapped Resource

ELIZABETH POST
Executive Director

epost@sfvba.org

OCTOBER 1 MARKS THE start of the new Bar year, which means new SFVBA officers and trustees, a fresh budget, and plenty of planning and reflection. At the beginning of each year, the Board of Trustees and senior staff convene for a half day Board retreat. This year's meeting was held on a Sunday morning at Lewitt Hackman Shapiro Marshall & Harlan (home to new SFVBA President Kira Masteller) in Encino.

The Board retreat is part orientation, part brainstorming. Introductions are made and new trustees receive an overview of board policies, budgets, and Board and staff responsibilities. There is also plenty of dialogue about how to enhance the SFVBA membership experience. When our twenty Bar leaders were asked to speak about why they joined or are members of the SFVBA, the common answers were: community service, MCLE, networking, their firm is a President's Circle member, or they were asked to join by a colleague. But the most frequent answer was access to Fastcase.

The SFVBA offers the comprehensive online law library as a free service to all SFVBA members. Members can enjoy unlimited usage of Fastcase at no cost. Subjective feedback indicates that members who use Fastcase find it invaluable, while more objective statistical reports show less than 5% of SFVBA members take advantage of the Fastcase benefit.

Unfamiliar with Fastcase? Fastcase's libraries are searchable—just like you search the web or traditional legal research services—by keyword, natural language search, or citation lookup. What makes Fastcase stand out is its tools that find the best answers fast, saving you time, and making your practice more competitive to clients.

Fastcase's libraries include primary law from all 50 states, as well as deep federal coverage going back to 1 U.S. 1, 1 F.2d 1, 1 F.Supp. 1, and 1 B.R. 1. The Fastcase collection includes cases, statutes, regulations, court rules, and constitutions. Fastcase also provides access to a newspaper archive, legal forms, and a one-stop PACER search of federal filings through our content partners.

Users can download its training guides located at fastcase.com/support. There's a one-pager for quick reference as well as a more comprehensive multi-page version. You can find both in the Help & Training section on the website. Fastcase also offers ten on-demand training videos on its support page. Each video focuses on a different aspect of legal research and provides step-by-step instructions to make your research more efficient.

In addition, Fastcase sponsors frequent, free training webinars. In November, you can sign up for classes at fastcase.com/webinars on Introduction to Legal Research on Fastcase, Advanced Tips for Enhanced Legal Research on Fastcase, Introduction to Boolean (Keyword) Searches, Intro to TopForm Web, and Intro to Fastcase 7.

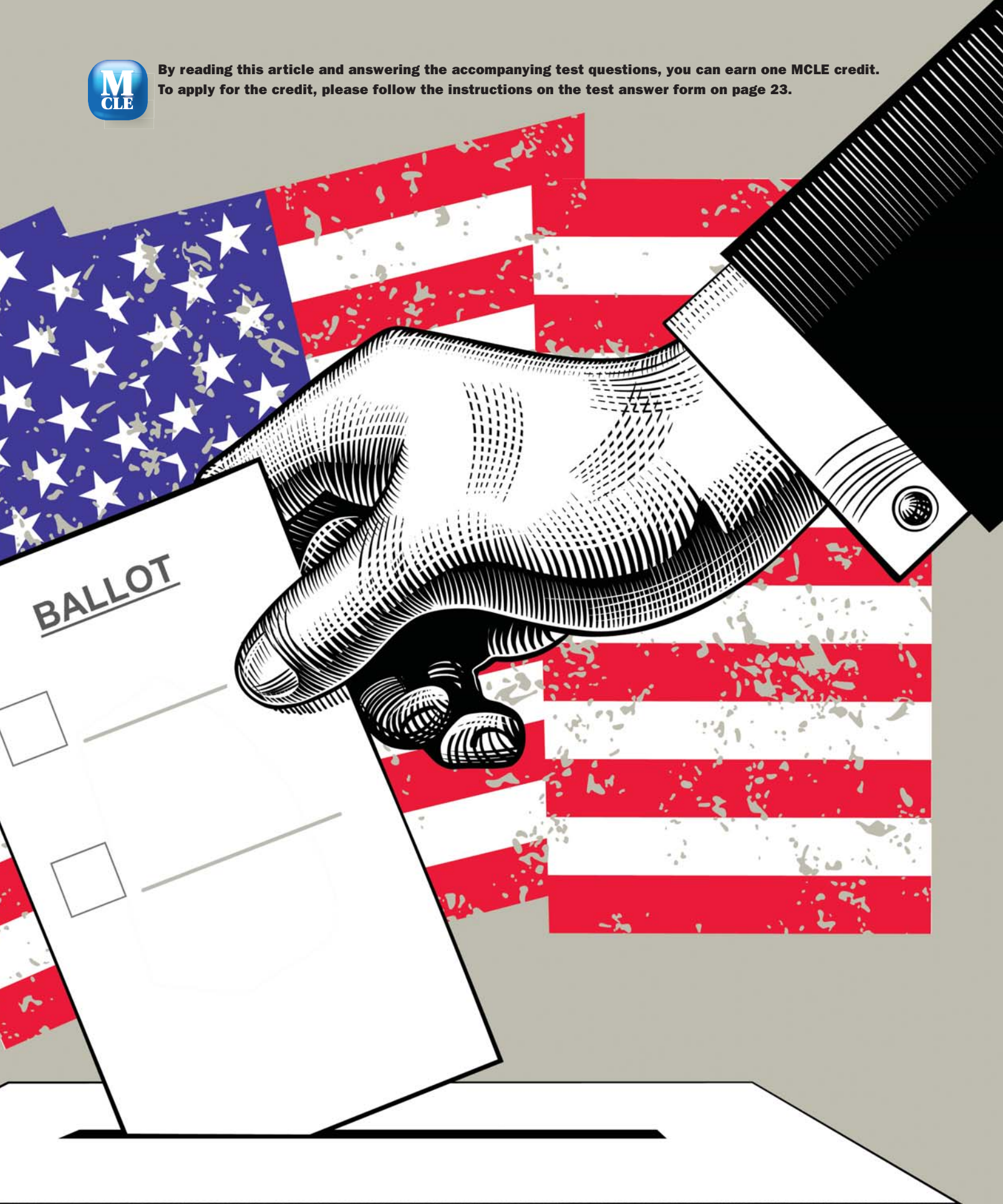
To access Fastcase, log in at www.sfvba.org and click on the Fastcase logo.

The Somewhat Secret World of Pre-Election Litigation

By Bradley W. Hertz

The murky world of pre-election litigation involves high-stakes skirmishes over issues such as how candidates are permitted to describe themselves to voters, how ballot questions are worded, and how ballot measures are summarized.

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.



UNBEKNOWNST TO MANY ATTORNEYS, A flurry of litigation precedes the printing of the voter information guide and sample ballot each election cycle. This somewhat secret world of pre-election litigation involves high-stakes skirmishes over how candidates are permitted to describe themselves to the voters, how ballot questions are worded, how ballot measures are summarized, and various other nuanced aspects of the information voters ultimately receive from elections officials. This obscure area of law encompasses several legal disciplines, including First Amendment jurisprudence, administrative law, civil procedure, and of course, the California Elections Code (CEC).

Pre-election litigation has a significant impact on the voter information guide, the sample ballot, and oftentimes, the election. Not only do political consultants, pollsters, and political scientists emphasize the importance of voter information such as candidate ballot designations, candidate statements, ballot arguments, and the like, but the fact that those involved in the process often allocate substantial portions of their budget to this type of litigation is illustrative of its overall significance.

When preparing to vote in the November 8, 2016, presidential election and beyond, and when diving into the multi-faceted voter information guide and sample ballot, voters who read this article will be well-equipped to read between the lines and know that much of the wording was vigorously litigated prior to the documents being printed.

This article seeks to demystify the world of pre-election litigation, discussing not only the types of voter information that are most often litigated, but also focusing on the procedural and other aspects of these types of matters.

Procedural Preliminaries and Constitutional Considerations

Pre-election litigation benefits from several procedural protocols that make it at once exciting and stressful. Elections Code §13314(a)(3) and Code of Civil Procedure §35 give these types of actions priority over all other civil matters. In addition, because relief cannot be granted if it would "substantially interfere with the conduct of the election,"[1] the cases are almost always specially set for hearing via ex parte application.

In an era where many civil litigants wait for years to get to trial, most pre-election cases are heard by the trial court in a matter of days. The time-pressure caused by an upcoming election, and the public interest in protecting the voters from improper materials, ensures that litigants are afforded their day in court in record time. In addition, these cases are almost always considered "special proceedings of a civil nature"[2] and are decided on the papers, thus not consuming too much of the court's time.[3]

Although First Amendment speech is most certainly implicated in this type of litigation, the voter information guide and sample ballot are limited public forums and thus subject to governmental oversight. Unlike the unfettered rough and tumble of the campaign trail, in which prior restraint of speech would not be allowed, because these government-funded and distributed election materials carry the imprimatur of government, the law has evolved in a way so as to allow judicial intervention before the ballot materials are finalized.

Even though to some it may seem unusual for parties to engage in heated litigation over mere words in a booklet that is sent to voters, a "voter's pamphlet can have a substantial impact on the equality and fairness of the electoral process."[4] Unlike other vehicles for political discussion, the information set forth in the voter guide is likely to carry greater weight in the minds of voters than other forms of campaign information.

What's Your Day Job?

The ballot designation a candidate chooses plays a significant role in how the public perceives the candidate, and can dramatically increase or decrease the likelihood of a candidate's success on Election Day. This is especially the case for judicial candidates[5] and for those in other low visibility, or down ballot races, where the candidates are not widely known.

Other than the candidate's name, the ballot designation is one of the main factors voters use to distinguish among candidates. The designation, which appears directly under the candidate's name in the sample ballot and on the ballot itself, describes—usually in three words or less—the candidate's "current principal professions, vocations, or occupations."[6]

Bradley W. Hertz is a partner at the Sutton Law Firm, which specializes in political and election law in Los Angeles and throughout California. He can reached at bhertz@campaignlawyers.com. Special thanks to law clerk Gabrielle E. Gordon for her assistance with this article.

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While the three-word designation is the most commonly used and the most frequently litigated, candidates may also choose to describe themselves by designating their elective office, in which case the three-word limit does not apply.[7] They may also use the word "incumbent," "appointed incumbent," or "appointed" followed by the non-judicial office to which they were appointed.[8] "Community volunteer" may also be used if specified criteria are met.[9]

Ballot designations are heavily regulated via the CEC and the Secretary of State's Ballot Designation Regulations,[10] with the goal of preventing candidates from making false or misleading claims about their official or professional endeavors. At the time candidates file their paperwork with the appropriate elections official, they are required to complete a ballot designation worksheet explaining and justifying their chosen designation.[11] These worksheets become available for public examination 87 days before the election and any voter may file a petition for writ of mandate alleging that an error, omission, or neglect of duty has occurred or is about to occur in connection with the ballot designation.[12]

The CEC provides that elections officials shall not accept designations that would mislead voters; use the name of a political party; or refer to a racial, religious or ethnic group or to any activity prohibited by law.[13] There are also strict rules pertaining to the use of the word "Retired," which cannot be abbreviated or follow any words it modifies, and may only be used if certain criteria are met.[14] Nor are the words "former" or "ex-" permitted.[15]

Yet another prohibited designation is one that suggests an evaluation of the candidate, such as "outstanding" or "virtuous." In a recent election for Republican County Central Committee, a candidate sought to use the designation "Conservative Author/Commentator," but the elections official rejected the use of the word "Conservative" as constituting an evaluation of the candidate. The Ballot Designation Regulations are extremely detailed, providing definitions of "principal," "profession," "vocation" and "occupation," as well as types of activities that are not allowed, including one's "avocation," "*pro forma*" position, or "status."[16]

Although much of the jurisprudence surrounding ballot designations stems from statutory and regulatory requirements, there are also appellate cases that elaborate upon these issues. The appellate cases, however, are relatively few and far between, given the lack of time that exists between the public availability of proposed ballot designations and the deadline for printing the ballot materials. Often, by the time a voter prepares and files the litigation, seeks an order shortening time for the briefing

and hearing of the matter, and has the matter heard, it is the proverbial eleventh hour and there is no time for appellate relief.

One of the key appellate cases that provides guidance regarding ballot designations is *Andal v. Miller*.[17] In that instance, the term "Peace Officer" was rejected as part of a ballot designation because it was not a "principal" profession, vocation or occupation as the candidate's volunteer service as a reserve deputy was nominal, pro forma and titular in character and did not entail a significant enough involvement of time to enable him to use that term.

Another key appellate case is *Luke v. Superior Court*,[18] which focused on a judicial candidate's proposed ballot designation of "Judge, Los Angeles County (Acting)."[19] In *Luke*, the appellate court held that a court commissioner, even though often sitting as a judge pro tem, was precluded from utilizing the term "judge" or a derivative thereof, as it would mislead the public.[20]

Be Careful What You Wish For

In litigation of this kind, sometimes a litigant can win the battle but lose the war. In a recent case,[21] a school board candidate's ballot designation of "Education Foundation President" was successfully challenged in court. However, the candidate was given an opportunity to submit and justify an alternative designation, "Educator," which both sides agreed was better than the challenged designation. Lawyers who litigate in this area of the law should warn their clients that in addition to the unpredictable nature of litigation in general, "winning" in pre-election litigation does not necessarily mean achieving a politically desirable result.

Attorneys' Fees: The Double-Edged Sword

Pre-election litigation can be complicated by the possible assessment of attorneys' fees against the unsuccessful party. Code of Civil Procedure (CCP) §1021.5 authorizes a court to award attorneys' fees to a successful party in any action "which has resulted in the enforcement of an important right affecting the public interest." In addition, a significant benefit must have been conferred on the general public or a large class of persons (i.e., the voters), and the necessity and financial burden of private enforcement must be such as to make the award appropriate.

Because litigating in an area protected by First Amendment rights of free speech and petition can lead not only to CCP §1021.5 private attorney general fees but also to other types of statutory fee awards, clients should be advised to pursue these types of cases only after a thorough cost-benefit analysis of the legal, financial, and political pros and cons.

What's in a Name?

Yet another aspect of pre-election litigation involves candidates' names, and there have been efforts to obtain court orders changing such names on the ballot for various reasons. In one case,[22] a judicial candidate was to appear on the ballot with the first name of "Pat" (in addition to his last name). The candidate's opponent sued, seeking to require the use of his full first name, Patrick.

The argument was that by using a gender-neutral nickname, an improper effort was being made to cater to female voters. After evidence (including a declaration from the candidate's mother) was presented to the court that the candidate had long used the name Pat, the court denied the challenge.

Another challenge to a candidate's name involved now-Congresswoman and U.S. Senate candidate Loretta Sanchez. Her then-married name was Loretta Brixey, but she sought to run as Loretta Sanchez (which was her maiden name) to represent a heavily Latino part of the state.

A lawsuit sought to require her to use the last name Brixey instead of Sanchez, but the trial court rejected the attempt. The general rule regarding candidate names is that there is fairly wide latitude for the candidate to choose his or her name so long as the candidate can demonstrate the prior use of that name.

> "Although First Amendment speech is most certainly implicated, the voter information guide and sample ballot are limited public forums and thus subject to governmental oversight."

Vote for Me!

Candidate statements are another important aspect of pre-election litigation. However, because many such statements are expensive for candidates to purchase, there are less statements to challenge as compared to ballot designations. Candidate statements are usually limited to 200 words and are autobiographical statements that introduce the candidate, illustrate his or her qualifications for office, and set forth their positions regarding particular issues.

According to Elections Code §13307, candidate statements may include the name, age, and occupation of the candidate and a brief description of the candidate's education and qualifications. The statement is not allowed to include the candidate's party affiliation or membership or activity in partisan political organizations. Moreover, a candidate may not make references to other candidates for that office.[23]

In addition to codifying the catch-all election law writ of mandate provision found in Election Code §13314, the legislature created a specific provision for challenging candidate statements, namely CEC §13313. Under that provision, "any voter of the jurisdiction in which the election is being held, or the elections official… may seek a writ of mandate . . . requiring any or all of the material in the candidates[']statements to be amended or deleted." The writ "shall issue only upon clear and convincing proof that the material in question is false [or] misleading . . . ."

Oftentimes, elections officials will intercept an errant candidate statement that refers to an opponent. Sometimes, however, such statements pass muster with the officials, leading a voter to commence litigation as permitted by the Elections Code. Such litigation must be commenced within ten days, which constitutes one of the shortest, if not the shortest, statute of limitations periods. Sometimes, efforts at administrative advocacy—seeking to convince the elections official to reject a candidate statement or other proposed candidate document—meet with success.

More often than not, however, the elections official stands back and allows the parties to battle it out in court, appearing through counsel only to ensure that the court's ruling is completed by the "drop dead date" for the printing of the ballot materials.[24] In addition to litigation challenging the materials that candidates provide for the voter information guide, litigation also is available to challenge the wording put forth by a governmental body, such as ballot questions or impartial analyses.

Ballot Questions: Yes, No, Maybe So

The Yes-No questions that confront voters in connection with ballot measures are required to be neutral and not to create favor or disfavor toward the measure.[25] Oftentimes, however, the public officials drafting the question put a positive or negative spin on it—something for which they can be taken to task.

Recently, in *McDonough v. Superior Court*,[26] the appellate court concluded that the use of the word "reform" in a ballot question relative to a pension reform measure was biased in favor of the measure. The court thus replaced the word "reform" with the word "modification."

In another case, where the city seemed to be telegraphing its desire for a yes vote, the question as drafted was "Shall Ordinance 94-011, a gaming ordinance, zoning modification and Development Agreement . . . be

enacted to allow and regulate card room gaming at Golden Gate Fields . . . in order to provide revenue for the City of Albany, create jobs, provide for an Albany Bay Trail, and allow Albany waterfront access?"

Opponents of the ballot measure sued, and the court agreed that the question was biased in favor of the measure. The court viewed the phrase "in order to provide revenue for the City of Albany, create jobs, provide for an Albany Bay Trail, and allow Albany waterfront access" as not only unnecessary, but as also having the effect of stating a partisan position on the measure. Finding that the phrase overtly endorsed arguments advanced by proponents of the measure, the court ordered the biased language to be deleted.

Similar principles apply with regard to other government-drafted election documents. For example, in addition to ballot questions—also known as ballot labels—government officials prepare titles and summaries that accompany initiative petitions and that appear in the voter information guide, fiscal analyses, and impartial analyses. To the extent voters believe that any of these materials are biased, litigation can be brought seeking to amend such language. Although the courts show considerable deference toward these public officials and their work product, courts are willing to intervene if the officials abuse their discretion in a way that puts the proverbial governmental thumb on the scale and renders the electoral process patently unfair.

Ballot Arguments

Although ballot arguments are by definition argumentative, they nevertheless are still not permitted to be false or misleading. The Elections Code contains provisions enabling courts to amend or delete false or misleading portions of ballot arguments so that the voters will not be misled.[27]

In a recent case in which Secretary of State Alex Padilla was the respondent and the authors of the principal and rebuttal ballot arguments against Proposition 60—the California Safer Sex in the Adult Film Industry Act—were real parties in interest, the petitioner successfully obtained a large number of court-ordered amendments to the challenged arguments.[28]

Although pure statements of opinion cannot be false and are protected from the reach of the courts, portions of ballot arguments that are presented as fact, and that are false or misleading, are subject to judicial amendment. Thus, the courts have broad discretion to protect voters from being subjected to false or misleading information in ballot arguments and often have no problem weighing in as courts of equity to amend such arguments. Sometimes

courts will give counsel the benefit of their thinking (either via a tentative ruling or via colloquy from the bench) and then advise the parties to meet and confer in an effort to agree on mutually acceptable language.

Another consideration that counsel should be sure to emphasize to clients is the optics of a judicial ruling. Sure, it is great to prevail and then inform voters that the court concluded that one's political opponents were seeking to mislead the electorate. But on the other hand, a loss could mean that one's opponents can claim that the court has blessed the accuracy of the challenged argument.

Due to the nuanced and unforgiving nature of this practice area and the extremely small margin of error that exists when seeking such immediate and impactful relief from the courts, pre-election litigation is not for the faint of heart. As voters thumb through (or voraciously read) their voter information pamphlets and sample ballots in the run-up to the election, hopefully they will have greater appreciation as to the roles attorneys have played in the fine-tuning of the information they are being presented.

Even more importantly, hopefully the ballot questions, ballot arguments, impartial analyses, and other pre-election materials are clearer, fairer, and more precise and the electorate is better informed as a result of the litigation efforts discussed above.

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[1] Cal. Elec. Code §13314(a)(2)(B).
[2] Cal. Civ. Proc. Code §1063 et seq. See also CCP §1085 writs of mandate.
[3] On rare occasions, live testimony is allowed, but only where good cause is shown and the court grants permission.
[4] *Patterson v. Board of Supervisors*, 202 Cal.App.3d. 22 (1988).
[5] Judicial candidates who are deputy district attorneys are often seen trying to out-designate each other with increasingly dramatic ballot designations, such as "Gang Homicide Prosecutor" or "Child Molestation Prosecutor." Judicial candidate ballot designations are the most-heavily litigated, with the outcome of the election often turning on those few all-important words.
[6] Elec. Code §13107(a)(3).
[7] *Id.* at §13107(a)(1).
[8] *Id.* at §13107(a)(2) and (4).
[9] *Id.* at §13107.5.
[10] 2 CCR §20710 et seq.
[11] Elec. Code §13107.3.
[12] *Id.* at §13314.
[13] *Id.* at §13107(b)(1), (5), (6) and (7).
[14] *Id.* at §13107(b)(3).
[15] *Id.* at §13107(b)(4)
[16] 2 CCR §§20714, 20716.
[17] *Andal v. Miller*, 28 Cal.App.4th 358 (1994).
[18] *Luke v. Superior Court*, 199 Cal.App.3d. 1360 (1988).
[19] California geographical names count as one word, so this designation satisfied the three-word requirement. Elec. Code §13107(a)(3).
[20] In *Andrews v. Valdez*, 40 Cal.App.4th 492 (1995), an administrative law judge was allowed to designate herself as such, because the term was authorized by statute, accurate, and did not mislead.
[21] *Richard C. Cassar v. Michael Vu (Mark B. Wyland)*, San Diego County Superior Court Case No. 37-2016-00027737-CU-WM-CTL (August 12, 2016).
[22] *Mildred Escobedo v. Conny McCormack (Patrick "Pat" David Campbell)*, Los Angeles County Superior Court Case No. BS091869 (Filed August 17, 2004).
[23] Elec. Code §13308; *Dean v. Superior Court*, 62 Cal.App.4th 638 (1998); *Clark v. Burleigh*, 4 Cal.4th 474 (1993).
[24] Procedurally, the elections official is named as the "Respondent" and the opposing candidate is named as the "Real Party in Interest."
[25] Elec. Code §9050(c); *Citizens for Responsible Government v. City of Albany*, 56 Cal.App.4th 1199 (1997).
[26] *McDonough v. Superior Court,* 204 Cal.App.4th 1169 (2012).
[27] See Elec. Code §9092 re: statewide ballot measures.
[28] *Derrick Burts v. Alex Padilla (Eric Paul Leue)*, Sacramento County Superior Court Case No. 34-2016-80002404 (filed July 28, 2016).

Test No. 97

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. Lawyers should warn their clients that, in addition to the unpredictable nature of litigation in general, prevailing in pre-election litigation does not necessarily mean achieving the politically desirable result.
❑ True ❑ False

2. Many aspects of pre-election litigation have priority over all other civil matters, and most pre-election cases are heard by the trial court in a matter of days.
❑ True ❑ False

3. Because First Amendment speech is implicated in pre-election litigation, governmental oversight is not permissible.
❑ True ❑ False

4. Courts strictly limit the name a candidate chooses to use on an election ballot, even when the candidate can demonstrate prior use of that name.
❑ True ❑ False

5. Candidate statements must include the name and occupation of the candidate, a brief description of the candidate's education and qualifications, and a comparison to the candidate's opponents.
❑ True ❑ False

6. Candidate statements are permitted to include the candidate's party affiliation or membership or activity in partisan political organizations.
❑ True ❑ False

7. Any voter in the jurisdiction where the election is being held may seek a writ of mandate requiring that any or all of the material in a candidate statement be amended or deleted.
❑ True ❑ False

8. A court may award attorneys' fees to a successful party in an action which has resulted in the enforcement of an important right affecting the public interest and where other criteria are satisfied.
❑ True ❑ False

9. Ballot questions may be drafted as the drafter chooses, so long as they are accurate in describing the matters at issue.
❑ True ❑ False

10. Litigation regarding candidate statements must be commenced within ten days of the statements being made public, one of the shortest statute of limitation periods.
❑ True ❑ False

11. Ballot questions need not be neutral.
❑ True ❑ False

12. Courts tend to show considerable deference toward public officials and their work with regard to the drafting of initiative titles and summaries.
❑ True ❑ False

13. The California Elections Code provides lax guidelines regarding the use of the term "Retired," which is allowed to be abbreviated as "Ret'd."
❑ True ❑ False

14. Even with the lack of time that exists between the public availability of proposed ballot designations and the deadline for printing the ballot materials, a large number of appellate cases provide guidance regarding ballot designation issues.
❑ True ❑ False

15. A court commissioner who often sits as a judge *pro tem* is precluded from utilizing the term "judge," or a derivative thereof, as it would mislead the public.
❑ True ❑ False

16. Candidate statements are inexpensive for candidates to purchase, and as a result, there are many candidate statement challenges preceding each election.
❑ True ❑ False

17. Materials distributed to voters by a candidate's own campaign are subject to the same level of judicial scrutiny as the official voter information guide that carries the *imprimatur* of government.
❑ True ❑ False

18. More often than not, an election official will accept a candidate's statement or other proposed candidate document and will appear through counsel only to ensure that the court's ruling is completed by the "drop dead date" for the printing of the ballot materials
❑ True ❑ False

19. In 2012, the Court of Appeal disallowed the use of the word "reform" in a ballot question relative to a measure to change a pension law on the grounds that it indicated a bias in favor of the measure.
❑ True ❑ False

20. Judges are required to issue writs of mandate from the bench and are not permitted to advise the parties to meet and confer in an effort to agree on mutually acceptable language for the voter information guide.
❑ True ❑ False

MCLE Answer Sheet No. 97

INSTRUCTIONS:

1. **Accurately complete this form.**
2. **Study the MCLE article in this issue.**
3. **Answer the test questions by marking the appropriate boxes below.**
4. **Mail this form and the $20 testing fee for SFVBA members (or $30 for non-SFVBA members) to:**

San Fernando Valley Bar Association
5567 Reseda Boulevard, Suite 200
Tarzana, CA 91356

METHOD OF PAYMENT:

❑ **Check or money order payable to "SFVBA"**
❑ **Please charge my credit card for $_____.**

_____
Credit Card Number **Exp. Date**

_____
Authorized Signature

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

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

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

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

Legal Governance:
Four Valley Lawyer Legislators

By Michael D. White

Four Valley lawyer legislators—State Senator Bob Hertzberg, County Supervisor Sheila Kuehl, City Councilman Paul Krekorian, and Calabasas Councilman Fred Gaines—share their unique perspectives about how law school and real life experiences help them maneuver and tackle the rough-and-tumble of day-to-day politics.

STRIP AWAY ALL THE VARNISH, DIM THE OFTEN HARSH LIMELIGHT, AND IT BECOMES APPARENT THAT SERVING as a legislator demands tremendous personal, financial, and professional sacrifices. Factor in long hours, limited family time, rubber chicken dinners, almost endless campaigning, and relentless media scrutiny, and it's a wonder why anyone, let alone an attorney, would sacrifice so much and subject themselves to the grinding, and often exasperating, demands of public service.

And yet, a significant number of attorneys do throw their hats into the ring and run for public office, playing a unique role in California's legislative bodies by virtue of the mental discipline, analytical skills, and working knowledge of the law they learned in law school.

The residents of the San Fernando Valley are represented at the state, regional and local levels by a number of such lawyer legislators. The stories of what drives four of them, their experience, their vision, and how being a lawyer has helped them be better legislators follow.

THE ENTREPRENEUR DISRUPTOR

California State Senator
Bob Hertzberg

ALMOST 250 YEARS HAVE PASSED WITH THE Valley, at different times, struggling and prospering under four different flags, transforming itself from an arid imperial backwater into a 200 square mile state-of-mind that serves as a home and workplace for one out of every 35 Americans—a place that California State Senator Bob Hertzberg calls a "world within a world."

Hertzberg, who's successfully melded careers in the law, business and the legislature, is the son of a lawyer, a constitutional attorney "who loved the law. I can remember sitting around the dinner table when I was in the fourth grade talking about the framers and the Constitution and things like searches and seizures."

The 18th Senate District, which Hertzberg represents, reaches from Sherman Oaks, Universal City and Studio City in the south to the northern border with Santa Clarita.

After graduating *Magna Cum Laude* from the University of Redlands, he earned his J.D. from Hastings College of the Law and served in the California Assembly from 1996 to 2002, during which period he was chosen by his colleagues as the 64th Speaker of the legislative body.

During his tenure, the *California Journal*, a Sacramento-based, non-partisan magazine covering California politics and government, rated Hertzberg as one of three "elite members" of the 80-seat Assembly during these years, saying he is best at problem solving, influence and work ethic while possessing "serious (brain) wattage."

'Term limited' out of the Assembly in 2002, Hertzberg invested in a number of successful international solar, wind and electric-car projects, traveling extensively in China and Africa.

The international experience gave him "different approaches to problem solving," he says. "You develop a respect and sensitivity for diversity in a whole different way and gain a genuine respect for the U.S. which has a system based on the rule of law. To be successful both as a legislator and as a business person today, one needs to have a deep understanding of the world and how it works."

His work in the private sector garnered him recognition in the United States and abroad with the award of the "World Bank Award for Lighting Africa" and the 2005 *Wall Street Journal* Innovation of the Year Award.

In 2014, Hertzberg decided it was time for a second act in politics. The Valley Democrat ran for the 18th District of the California State Senate, garnering more than 70 percent of the vote. Decades of successfully juggling frenetic activity in three separate arenas—the law, private business and politics—Hertzberg, who's gained a reputation as a political free-thinker, labels himself a "disruptor…an entrepreneur…always challenging…always pushing because it's hard swimming upstream a lot and it's tough, partly because I'm impatient and I live in a world of backslappers and everybody wants to be nice to each other and go along with the status quo," he says.

THE AUTHENTIC ACTIVIST

Los Angeles County Supervisor

Sheila Kuehl

FRENETIC COULD ALSO DESCRIBE THE CAREER of Los Angeles County Supervisor Sheila Kuehl, whose Third Supervisorial District, which encompasses the 200 square mile entire San Fernando Valley, forms a "unique place of exciting opportunities with the greatest potential of any in the county."

A highly-respected child actress who worked in radio and on several popular TV series, Kuehl is, perhaps, best known for portraying from 1959 to 1963 the irrepressible Zelda Gilroy, Dobie's wannabe girlfriend in the popular sitcom, "The Many Loves of Dobie Gillis."

Kuehl spent years as a grassroots activist and advocate before her first stab at elected office, a successful 1994 run for the State Assembly. Active in school politics at UCLA, she later graduated from Harvard Law School, practiced family law, taught at Loyola, USC and UCLA law schools, founded the California Women's Law Center, and served eventful terms in both the California State Assembly and Senate.

Earlier this year, she was honored by the Los Angeles County Bar Association with the Shattuck-Price Outstanding Lawyer Award for her "extraordinary dedication to the high principles of the legal profession and to improving the administration of justice in Los Angeles County."

Rather than a potential albatross, it was, she says, her grounding as an actor that gave her an understanding of "how to use your own self like a musical instrument, so that when you're passionate about something, you're able to show it."

Most people "think acting is putting on a show or pretending," says Kuehl. "It's not. It's just the opposite. Acting is digging deep within yourself to find authenticity, so that if you're playing someone who's really upset, you don't pretend to be upset, you find 'upsetness' in yourself and you manifest it. And so the ability to get your voice and your face and your whole body to show what you feel has been very helpful. I feel as though my acting experience has allowed me to show what I was genuinely feeling at the time and that can be very important."

That "digging deep," and her decades-long experience as an activist, an attorney and legislator in Sacramento, has given her an understanding of how to handle what she sees as an even more challenging job working on the County level, says Kuehl.

California, like the federal government, has three branches of government; on the county level, the Los Angeles Board of Supervisors "isn't structured that way," she says.

"In effect, I'm one of five people serving as both the executive and legislative branches overseeing the governance of a county something the size of Ohio," says Kuehl, who credits her experiences as an attorney and legislator in Sacramento with giving her an understanding of the process of how laws are crafted and decisions are made on a legislative level.

THE ZEALOUS ADVOCATE

Los Angeles City Councilman
Paul Krekorian

THE BLEND OF STATE AND LOCAL LEGISLATIVE and legal experience was also key in Los Angeles City Councilman Paul Krekorian's development as a legislator.

Raised in the San Fernando Valley, Krekorian earned his undergraduate degree in political science from USC before earning his law degree from Boalt Hall at the University of California.

After graduating, he spent two decades practicing business, entertainment, and property litigation, and, in 2006, after three years on the Burbank Board of Education, won election to the California State Assembly, representing the 43rd District.

Since 2010, he has served on the Los Angeles City Council and currently serves as Chairman of the Ad Hoc Committee on Job Creation and Vice Chair of the Entertainment and Facilities Committee.

He also sits on the Council's Economic Development Committee, Trade, Commerce and Technology Committee, Executive Employee Relations Committee, as well as the Board of Referred Powers.

Krekorian also is an active member of the boards of the Los Angeles County Metropolitan Transportation Authority, Metrolink, and the San Fernando Valley Council of Governments.

"There's a skill set in being a lawyer that you develop that has applications in legislating," says Krekorian, whose Council District 2 encompasses much of the eastern San Fernando Valley, from Studio City to Sun Valley.

Lawyers, he says, "come from an environment of zealous advocacy, so we're not afraid to get into the mix and duke it out with someone who has an entirely different perspective."

Facing often forceful opposition to a policy position can often lead, he says, "to better policy, so I don't shy away from that and in that respect it's helpful. A lot of what we do in the City Council, as it does in the state

legislature, involves the application of law and a lot of times my colleagues will look to me as the translator, if you will, of the legal ramifications on the policy making process…so I can straddle both worlds and help guide the process along a bit."

The stereotype of thinking 'like a lawyer,' says Krekorian, "is valid in seeing the value in being able to breakdown issues and analyze facts and evidence and being able to apply those to policy making. I think there's an advantage to acquiring the academic discipline that we've all gone through and then applied out in the real world. There's a real advantage to bringing those skills to the policy making process."

Michael D. White is editor of *Valley Lawyer* magazine. He is the author of four published books and has worked in business journalism for more than 35 years. Before joining the staff of the SFVBA, he worked as Web Content Editor for the Los Angeles County Metropolitan Transportation Authority. He can be reached at michael@sfvba.org.

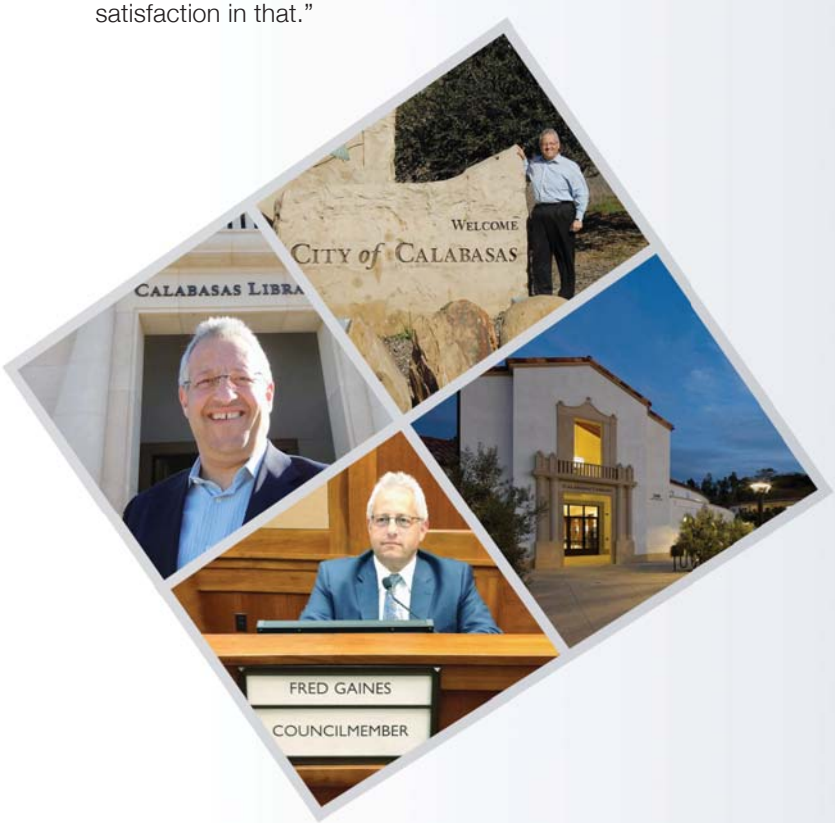
THE LOCAL "GO TO" GUY

Calabasas City Councilman

Fred Gaines

SERVING IN ELECTED OFFICE ON A MORE LOCAL level is helpful "in achieving things for people that have a direct impact on the community that people live in," says attorney Fred Gaines, Managing Partner at Gaines & Stacey, LLP, an Encino-based law firm which specializes in land use, zoning and environmental law matters.

According to Gaines, who currently serves on the Calabasas City Council, "I get telephone calls from people who need help with everything from a cracked sidewalk to some idea that they may have for a civic project. We can repair that sidewalk; we can solve problems in a time schedule that's realistic and achievable, and there's a lot of satisfaction in that."



His 30 years in law practice, "makes me a better public servant. I'm better at what I do professionally because I'm sitting on the other side of the table," he says. "I'm up there having to make decisions for a constituency on land use issues, for example, which are the same kinds of issues I'm litigating."

In 2011, Gaines was elected to the Calabasas City Council and reelected to a second four-year term in 2015. Gaines also served as the city's mayor from 2013-2014. Lauded for his many years of community involvement, Gaines currently serves as the City Council's representative on the Economic Alliance of the San Fernando Valley Board of Directors and to the Valley Industry and Commerce Association (VICA).

Recipient of numerous awards for public service, Gaines also was a Regent of the University of California, and is a past President of the San Fernando Valley Bar Association, a past Trustee of the Los Angeles County Bar Association, and a Past President of the Executives of the Los Angeles Jewish Home.

A self-described "Valley Boy," Gaines grew up in North Hollywood, graduated from Grant High School, earned his undergraduate degree in economics and political science from UCLA and a Masters in Public Policy from the John F. Kennedy School of Government at Harvard University, before receiving his JD from Boalt Hall at the University of California—Berkeley.

"While you get to pontificate on larger issues when you're in the state legislature or Congress, helping to run an efficient and effective government program that can provide solutions is one of the real advantages of working at a local level and smaller city," says Gaines.

Los Angeles is so big, so spread out "that it can be difficult there. The most satisfying thing isn't sitting at meetings and voting on some issue. It's when someone calls you with a problem and you put the things in motion necessary to get it taken care of."

The chronic disconnect, Gaines says, "diminishes the closer government is in proximity to the people it serves because you're dealing with local issues, which are what people care about on a day-to-day basis."

With no plans to run for higher office, Gaines sees his service on the Calabasas City Council as the perfect way to combine a successful legal career with his passion for local community involvement.

That experience of governing, he says, can't be learned in a classroom "or even at the Kennedy School. They offer qualitative analysis and case studies that are great, but there's still no balance there to try and come up with local decisions balancing good solutions."

All in all, says Gaines, "I see politics as offering an opportunity to make a difference in people's lives. Simply said, it's all about trying to make things better and help the community around you. It was something I've found very appealing."

Proposition 47 Update

By Angela Berry

* The first, second, and seventh paragraphs of this article have been updated from the original print version to correct errors which occurred during *Valley Lawyer's* editing process.

PROPOSITION 47, THE SAFE NEIGHBORHOODS and Schools Act, was decidedly passed by California voters on November 4, 2014. It made sweeping changes to the Penal Code by redefining some laws, declaring others that had been felonies now misdemeanors, and creating still new laws.

Some of the changes include designating possession of drugs for personal use as misdemeanors, and designating many theft-related crimes as misdemeanors, unless the value of the property involved in the crime exceeds $950. Value exceeding $950 is now an essential element of these theft-related felonies that must be proved by the prosecution beyond a reasonable doubt.

Prop. 47 doesn't only affect crimes committed after the law's passage; it also permits prior felony convictions to be reduced to misdemeanors.[1] The new law applies to convicts whose sentences have already been served and to those currently serving sentences. For those in the latter category, PC §1170.18 has potentially sweeping ramifications, such as release from custody when serving a life sentence under the Three Strikes Law of 1994.

PC §1170.18 has only a three-year window from the date of enactment of the law for the affected defendants to seek relief. Therefore, anyone who potentially qualifies must not further delay filing the appropriate papers in the superior court where the conviction occurred. According to Article 2 of the California Constitution, "An initiative statute or referendum approved by a majority of the votes thereon takes effect the day after the election unless the measure provides otherwise." Since Prop. 47 (and the concurrent enactment of PC §1170.18) doesn't designate a specific effective date, it became effective November 5, 2014. Convicts seeking relief must, therefore, file on or before November 4, 2017.

Procedure for Relief for Past Convictions

Where the defendant has been previously convicted of a crime that's now defined as a misdemeanor and has completed his or her sentence, the defendant should file and serve an application. The applicant must assert that he or she has not suffered a prior conviction for what are now considered 'super strike' offenses.[2] Assuming the applicant qualifies, the court must reclassify the conviction a misdemeanor.[3] [4]

If the defendant is currently serving a felony sentence for any of the offenses affected by Prop. 47, he or she may qualify for resentencing and release from state prison. In this instance, the defendant files a petition. If the petitioner has not previously suffered a 'super strike' conviction, the petitioner is eligible for recall of both the sentence and resentencing. If eligible, the court must resentence the petitioner according to the new statutory punishment unless it determines that resentencing and releasing the defendant poses an "unreasonable risk" of danger to public safety.[5]

This latter analysis is referred to as the suitability determination. Suitability or "unreasonable risk" is defined in the statute as "an unreasonable risk that the petitioner will commit a new violent felony as set out in Penal Code

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§667(e)(2)(C)(iv).” In short, the court must determine whether there is an unreasonable risk that the petitioner will commit one of the super strikes. That the petitioner may pose an unreasonable risk of committing other serious or violent felonies such as a robbery, kidnapping, or arson is immaterial to this analysis.

The Evolving Aspects of Proposition 47

Despite defining unreasonable risk, the law left many questions unanswered. For instance, the statute did not direct whether the petitioner must disprove a presumption of unreasonable risk or if the prosecution bears the burden of proving that risk. Similarly, the statute does not specify the standard of proof, e.g. preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt. Additionally, the statute does not specify whether the right to a jury trial as guaranteed to every criminal defendant by the Sixth Amendment of the U.S. Constitution and Article I, Section 16 of the California Constitution applies to the determination of unreasonable risk and suitability for release from custody.

Also left unanswered by the initiative is how to address the monetary value of theft-related crimes since Prop. 47 deems many theft-related crimes misdemeanors if the monetary value of the crime does not exceed $950. Prior to Prop. 47, the monetary value of a theft-related crime did not necessarily determine the felony or misdemeanor status of the crime. Now, an essential element of these felony charges is “an amount exceeding $950,” and competent evidence must be submitted to prove the value beyond a reasonable doubt.

So how is a court now to determine whether the value in a pre-Proposition 47 case exceeded the threshold amount when the theft-related offense did not require proof of the amount? And who carries the burden of proving the value and what standard of proof is required? And is the petitioner entitled to a jury trial regarding the value since post-Proposition 47 felony filings on these theft-related crimes now require jury trials on the value of the property stolen, illegally obtained and/or received?

Case law shows that in an initial filing for reduction of a previously suffered felony conviction, the defendant bears the burden of proof of showing the offense is eligible when seeking reduction of a previously imposed sentence.[6] But the prosecution has the burden of showing ineligibility based upon the dangerousness or prior convictions.[7] With respect to the burden of proof and who bears that burden for suitability, the prosecution must prove unreasonable risk and by a preponderance of the evidence.[8] Furthermore, the defendant has no right to have a jury determine disputed facts when petitioning for reduction to a misdemeanor.[9] It is noteworthy, however, that the California Supreme Court has yet to weigh in on those issues.

Unresolved Prop 47 Issues

Vehicle crimes are among the subjects of much debate in the appellate courts. *People v. Page*[10] and *People v. Haywood*[11] held that the new definition of grand theft—the value of the property exceeding $950—doesn’t apply to crimes charged under California Vehicle Code §10851.[12] Similarly, *People v. Peacock*[13] held that the initiative has no application to receiving a stolen vehicle under PC §496d. In accord with *Page* and *Peacock* are *People v. Orozco*[14] and *People v. Johnston*.[15]

Page, Haywood, Peacock, and *Orozco* have been granted review by the Supreme Court. *People v. Solis*[16] also held the new definition of grand theft does not apply to violations of Vehicle Code §10851 but it too has been granted review.

Taking the opposing position, *People v. Ortiz*[17] held the theft of a vehicle of a value less than $950 does qualify for misdemeanor disposition, even though the crime was charged under Vehicle Code §10851. It also, has been granted review along with *People v. Garness*[18] and *People v. Nichols*.[19] Despite the uncertainty as demonstrated above, *People v. Acosta*[20] holds that the crime of attempted auto burglary does not fall under the scope of Prop. 47.

Many issues still remain as to the reach, applicability and impact of Prop. 47. But what is clear is that any action for reduction to a misdemeanor—and release from custody, if applicable—must be filed by November 4, 2017 before permanently losing the opportunity for relief.

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[1] Calif. Penal Code §1170.18.

[2] The “super strikes” are enumerated in PC §667. They are: oral copulation under §288a, sodomy under §286, or sexual penetration under §289, if these offenses are committed with a person who is under 14 years of age, and who is more than 10 years younger than the defendant; a lewd or lascivious act involving a child under 14 years of age, in violation of §288; any homicide offense, including any attempted homicide offense, defined in §§187 to 191.5, inclusive; solicitation to commit murder as defined in §653f; assault with a machine gun on a peace officer or firefighter, as defined in §245(d)(3); possession of a weapon of mass destruction, as defined in §11418(a)(1); and any serious or violent offense punishable in California by life imprisonment or death. (PC §667(e)(2)(C)(iv))

[3] Penal Code §1170.18.

[4] Note that Proposition 47 reduction does not permit the legal ownership, possession or control of a firearm, unlike traditional PC §17 reduction of a felony to a misdemeanor. (See: *People v. Gilbreth*, 156 CA4th 53, (2007)) If firearm possession is important to the defendant, the reduction procedure of PC §17 is preferable.

[5] Penal Code §1170.18(b).

[6] *People v. Rivas-Colon*, 241 Cal.App.4th 444 (2015); *People v. Sherow*, 239 Cal. App.4th 875 (2015); *People v. Perkins*, 244 Cal.App.4th 129, 136-137 (2016); *People v. Bush*, 245 Cal.App4th 992, 1007 (2016).

[7] *People v. Jefferson*, 1 CA5th 235, pet. rev. filed 8-17-16, S236639 (2016).

[8] *People v. Osuna*, 225 Cal.App.4th 1020, 1040 (2015).

[9] *People v. Rivas-Colon*, 241 CA4th 444 (2015).

[10] *People v. Page*, 241 Cal.App.4th 714 (2015).

[11] *People v. Haywood*, 243 Cal.App.4th 515 (2015).

[12] Vehicle Code §10851 criminalizes driving or taking a vehicle not his/her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his/her title to or possession of the vehicle.

[13] *People v. Peacock*, 242 Cal.App.4th 708 (2015).

[14] *People v. Orozco*, 244 Cal.App.4th 65 (2016).

[15] *People v. Johnston*, 247 Cal.App.4th 252 (2016).

[16] *People v. Solis*, 245 Cal.App.4th 1099 (2016).

[17] *People v. Ortiz*, 243 Cal.App.4th 854 (2016).

[18] *People v. Garness*, 241 Cal.App.4th 1370 (2015).

[19] *People v. Nichols*, 244 Cal.App.4th 681 (2016).

[20] *People v. Acosta*, 242 Cal.App.4th 521 (2015).

Reducing Court Congestion: *New Rules in Civil Procedure*

By Amy I. Huberman

SEVERAL CHANGES TO THE California Code of Civil Procedure went into effect January 1, 2016. As a result, litigation counsel in California must take note of the changes before filing a demurrer or motion for summary judgment. The new legislation also amends §998 to address an unintended inequity in the statute.

Meet and Confer Before You Demur

Since January 1, counsel must meet and confer at least five days prior to filing a demurrer.[1] The new code section resulting from passage of Senate Bill 383 requires a good faith meet and confer in person or by telephone between counsels. The demurring party must identify all the specific causes of action that party believes are subject to demurrer and why. In response, the complaining party must provide legal support for its complaint.

The purpose of this process is to determine if agreement can be reached that would eliminate the need for unnecessary and time consuming demurrer hearings. If the parties are unable to meet and confer as the statute requires, the demurring party will be granted an automatic 30-day extension of time to file a responsive pleading after submitting a declaration to the court regarding the inability to meet and confer.

The rule takes into consideration the problem of a complaining party not making itself available to meet and confer. But the new rule is silent as to a demurring party's failure to meet and confer. Moreover, the rule specifically states that "any determination by the court that the meet and confer was insufficient shall not be grounds to overrule or sustain a demurrer." This could assume some form of the meet-and-confer process occurred. It is an open question what happens if the process did not occur at all.

The new text also prohibits a party from amending a complaint or cross-complaint in response to a demurrer more than three times.[2] However, the three-amendment rule does not

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include amendments made without leave of court. For instance, a moving party who amends their complaint before the demurrer hearing, making the demurrer hearing moot, still has three opportunities to amend. But a moving party who wishes to amend prior to the demurrer hearing, must now amend and file before the opposition to the demurrer is due. This suggests that amended complaints filed on the eve of the demurrer hearing may no longer be allowed.

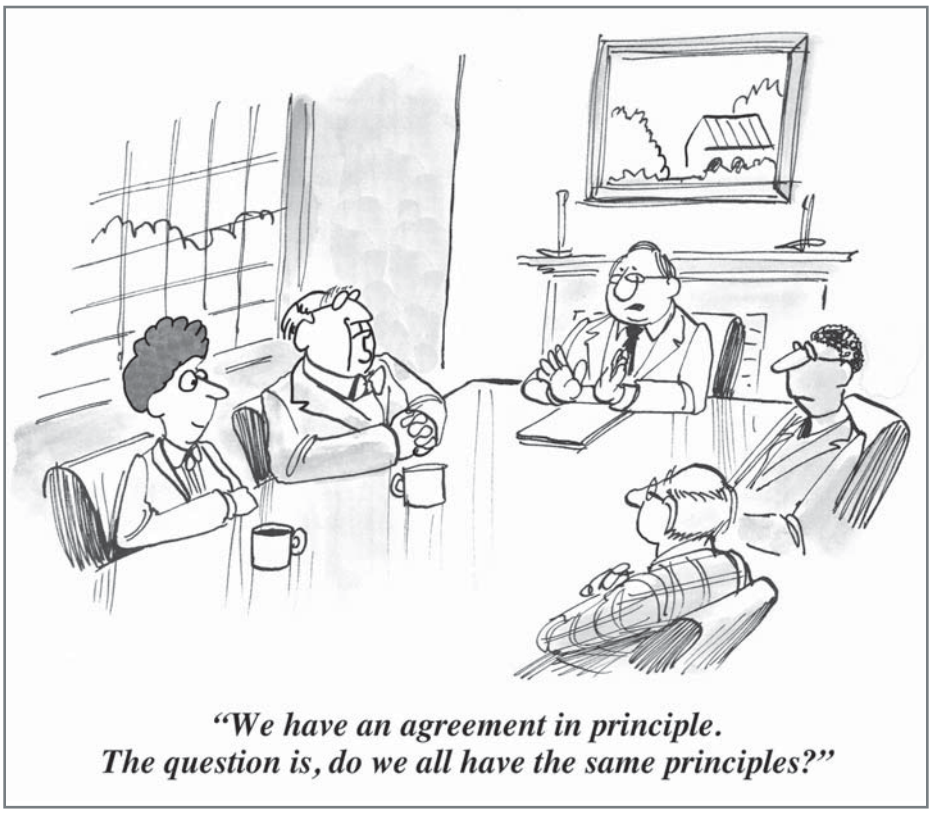
The rule is an attempt by the legislature to reduce court congestion, urge good faith litigation, and discourage plaintiffs from filing frivolous complaints.

Reenacting Summary Adjudication of "Partial" Issues

Assembly Bill 1141 reenacts and makes permanent a summary adjudication statute that was inadvertently allowed to sunset. §437(c)(s) was originally enacted to improve judicial efficiency by allowing a court to issue summary adjudication of partial issues, though the ruling would not dispose of the entire cause of action. Section 437(c)(s) required parties to stipulate in advance that a ruling on the issue would further the interest of judicial economy, but the section lapsed on January 1, 2015 because no legislation was enacted to reauthorize its provisions. New §437(c)(t) is essentially the same as the lapsed section.

Prior to §437(c)(s), if summary adjudication was not dispositive of the entire cause of action, the court was not authorized to hear it. Under the new amendment, stipulating parties may file a motion for summary adjudication which does not dispose of the entire action. Before filing the motion, the parties must file a joint stipulation stating the issue or issues to be adjudicated.

Each party must also submit a declaration stipulating that the motion will further the interest of judicial economy and that a ruling on the motion will either reduce the amount of time of the trial or significantly increase the chance that the parties will agree on a settlement. Procedurally, a stipulation between at least two parties is required. The moving party must serve the joint stipulation upon any party to the action who is not a party to the motion. The



"We have an agreement in principle. The question is, do we all have the same principles?"

non-stipulating party must be given the opportunity to object.

Within fifteen days of the court's receipt of the stipulation and declarations, the court will notify the stipulating parties as to whether a motion for summary adjudication may be filed.

Code of Civil Procedure §998 and Equity

The primary purpose of what is commonly referred to as a 998 settlement offer is to encourage parties to settle. Assembly Bill 1141 seeks to equalize expert witness costs when a settlement offer is rejected pursuant to §998. An omnibus bill in 2005 created what appears to be an inadvertent inequity.

The word "postoffer" was added to §998(d), but was not added to §998(c). Its addition created inequity between plaintiffs and defendants because if a plaintiff rejected a 998 settlement offer, and failed to receive a better award at trial, the court had discretion to award defendant's pre- and post-offer expert witness fees. On the other hand, if a defendant rejected a 998 settlement offer, the court had discretion only to award the plaintiff's post-offer expert witness costs.

Initially, AB 1141 sought to remove "postoffer" from §998(d) to remedy the inequity. However, the legislature proposed inserting "postoffer" in §998(c). Now, both parties are able to recover expert witness costs incurred only after the §998 offer is made. Litigants are therefore encouraged to make and accept 998 settlement offers early in litigation to recover maximum expert witness fees.

Civil litigators in California should familiarize themselves with all recent amendments to the Code of Civil Procedure, follow the new rules and assist judges in reducing court congestion.

[1] CCP §430.41(a)(2).
[2] CCP §430.41(e).

Celebrating Diversity in the Legal Profession

ROSIE SOTO COHEN
Director of Public Services

referrals@sfvba.org

ON SATURDAY, OCTOBER 1, 2016, THE STATE BAR COUNCIL ON Access and Fairness presented the San Fernando Valley Bar Association with its 2016 Bar Association Diversity Award in recognition of the SFVBA's extensive efforts promoting diversity within the organization and in the legal profession. The ceremony was held during the State Bar's Annual Meeting at the Marriott Marquis San Diego Marina.

The award was presented by Chief Justice Tani Cantil-Sakauye, outgoing State Bar President David Pasternak, Alameda Superior Court Judge Brenda Harbin-Forte, and Los Angeles Superior Court Judge Marguerite Downing. On hand to accept the award were SFVBA Past Presidents Carol Newman, Richard Lewis, and Caryn Brottman Sanders; Inclusion & Diversity Committee Co-chairs Joanna Sanchez and Valarie Dean; Secretary Yi Sun Kim; and Director of Public Services Rosie Soto Cohen. The Black Women Lawyers Association of Los Angeles was a co-recipient of the Bar Association Award.

The SFVBA Inclusion & Diversity Committee invites all members to participate in its programs. The Committee meets at the Bar offices on the last Friday of each month at 8:15 a.m.

De'Shan Jones: An Inspiration of What Is Possible

LAURENCE N. KALDOR
President

phenix7@msn.com

FOUR YEARS AGO, DE'SHAN Jones, then 15, didn't think much of school. "I don't know how I graduated eighth grade, but I did," he remembers. "Going into high school, my mindset was 'I'm just going to push through, do the four years, get a diploma, and that's it.' Then I'd get a job at McDonald's, something to pay the bills and cover the rent, and that would be good enough."

His lack of interest was evident in his grades. In his first semester, he failed four courses and wasn't even on track to get a diploma. That's when he serendipitously was assigned volunteer Court Appointed Special Advocate (CASA) Rosemary Enzer.

They appeared to be an odd couple—an African-American teenager and a white retiree. De'Shan continually mistook Rosemary for just another social worker, while Rosemary, a former elementary school teacher, could see immediately that the young man was in a bad place. "He had a terrible attitude," Rosemary says. "He was extremely depressed, but then who wouldn't be after everything he had been through?"

The trouble started a few years before, when De'Shan's great-grandmother—who had adopted him when his mother couldn't care for her kids—passed away. He had been in foster care ever since, separated from his siblings. Rosemary could track many of his problems in school to a simple function of his depression. However, instead of diagnosing

things and laying out a plan of action for De'Shan, she listened while, over time, he shared why he was having trouble.

"I didn't really think I had any problems, but after a while I started noticing what I was doing," De'Shan says. "I wasn't going the extra mile to understand the material."

Once the light bulb switched on for De'Shan, the veteran educator in Rosemary took charge. She set up meetings with his teachers to see what he could do to pass his classes and made sure he was committed to the tutoring she had arranged for him. All the while, she was in constant contact with his teachers, emailing many of them weekly or even daily.

Gradually, De'Shan's grades improved and he took on more activities. By his junior year he was earning A's. He became the mascot of his school's football squad and was named captain of the swim team and even recruited and fundraised for it.

As his senior year progressed, another opportunity came into view. "At first I was really hesitant about college," De'Shan says. "I was just going to go to community college and call it a day. But Rosemary really recommended it. She encouraged me to apply to other universities."

In February, De'Shan got an email from Cal State Northridge with news that he had been accepted. He later received acceptance letters from

About the VCLF of the SFVBA

The Valley Community Legal Foundation is the charitable arm of the San Fernando Valley Bar Association. The Foundation's mission is to support the legal needs of the youth, victims of domestic violence, and veterans of the San Fernando Valley. The Foundation also provides educational grants to qualified students pursuing legal careers. The Foundation relies on donations to fund its work. To donate to the VCLF or to learn more, visit www.thevclf.org and help us make a difference in our community.

several other schools, eventually opting to attend CSUN because it's close to home and one of his social workers also studies there.

Now, a couple months into his freshman year, he's taking 15 units—including English literature, advanced mathematics and computer science—and living in a dorm. On the weekends, he goes home to his foster family, with whom he has become very close. His foster mother now calls him 'son.'

De'Shan has taken advantage of California's AB 12 law, which allows him to remain in foster care until he reaches the age of 21. As for Rosemary, she expects to be taken off De'Shan's case soon, but she says she'll always be in touch with him. The two of them still get together for dinner on occasion and she checks on him with frequent texts.

"His responses are usually no more than one word when I ask, 'How are you doing?'" His answer: "Awesome!"

VCLF at Work

The mission of CASA of Los Angeles is to improve the lives of children in the dependency system by pairing them with trained volunteer advocates. CASA seeks to reduce and reverse the effects of child abuse and neglect. Nowhere in the nation is the problem greater than in Los Angeles County, where 30,000 children who have been abused or neglected are under the jurisdiction of the Dependency Court.

CASA is supported by the VCLF and the generous contributions of civic-minded organizations, companies and individuals like Rosemary Enzer.

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Michelle B. Yermus
Kraft, Miles & Miller, LLP
Woodland Hills
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In Memory of Our Friend, David Rickett

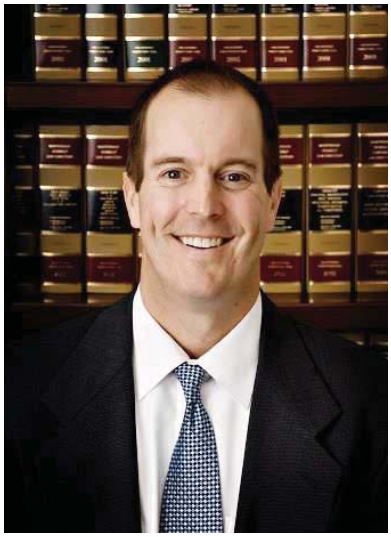
SAMUEL R.W. PRICE
SCVBA President

sprice@pooleshaffery.com

AFTER A BATTLE WITH CANCER, DAVID RICKETT, founding partner of the Reape-Rickett Law Firm and long-time Trustee of the Santa Clarita Valley Bar Association, passed away on September 28, 2016.

For those that didn't know David, one of the first things you would notice was just how remarkably tall he was. However, despite his towering height, he was not imposing. Instead, the warm, gentle smile that he constantly displayed was a comfort to those around him, and he was often described as a gentle giant.

As a family law attorney, he practiced in what is often a particularly contentious field, but he always maintained his composure and was never combative. And he excelled. He was extremely knowledgeable, always prepared, and perpetually dignified, which earned him the respect of his clients, his colleagues, and the family law bench.



When the news of David's passing was released to the family law community and was making its way around a courtroom gallery, the judge hearing cases that morning recognized that something significant was happening and asked what it was. Upon hearing that David had passed, she paused; then she began to weep. Before resuming her calendar, she recounted for those present some of her favorite memories of David, and what he meant to her and to the family law court as a whole.

David's faith was incredibly important to him. But rather than loudly proclaim his beliefs, David quietly acted on them. He was determined to make the world a better place in any way he could. He said that he was drawn to family law for the same reason that so many attorneys are repelled by it—because the parties in family law matters are grieving and in pain with emotional needs often as critical as their need for legal counsel. David's genuine sympathetic concern could never be questioned, and was most clearly displayed in the considerable amount of time he devoted to being Minor's Counsel, where he acted as a voice for children caught in the middle of contentious custody proceedings.

David advocated living by the "three Ps" — always be poised, polished, and professional. Anyone who knew David would confirm that he epitomized each trait. Over the fifteen years since founding the Reape-Rickett Law Firm, David had the opportunity to work with and mentor many young lawyers, most of whom are practicing in the Los Angeles area. Fortunately, through them, David's compassion and commitment continues to flourish, and those he mentored are now passing on to their own associates the standard of the three Ps that he so personified.

As important as his professional life was, his family always came first. He never missed a game where his daughter was cheering or where his son was playing. In fact, he often scheduled abbreviated days in the office so that he could coach his son's basketball and football teams. An avid golfer, among David's most favorite times were those spent on the links with his children; as soon as his son could walk, David was with him on the course.

David lived his entire life in Santa Clarita and over the years became a genuine fixture in our community. He was that rare type of person who is an example of what we all can aspire to be and he will be greatly missed.

Our thoughts go out to David's wife and children, his family, his colleagues at the Reape-Rickett Law Firm, and everyone who was fortunate enough to know him. I can truly say that it was a pleasure and an honor to have known and worked with David, and I am forever grateful to have been given the opportunity to do so.

The Santa Clarita Valley Bar Association will be paying a special tribute to David Rickett at our Installation and Award Gala on November 9, 2016. Anyone who would like to share in a celebration of David's life is welcome to join us at The Players Club in Valencia, beginning at 6:00 p.m. Please RSVP to info@scvbar.org.

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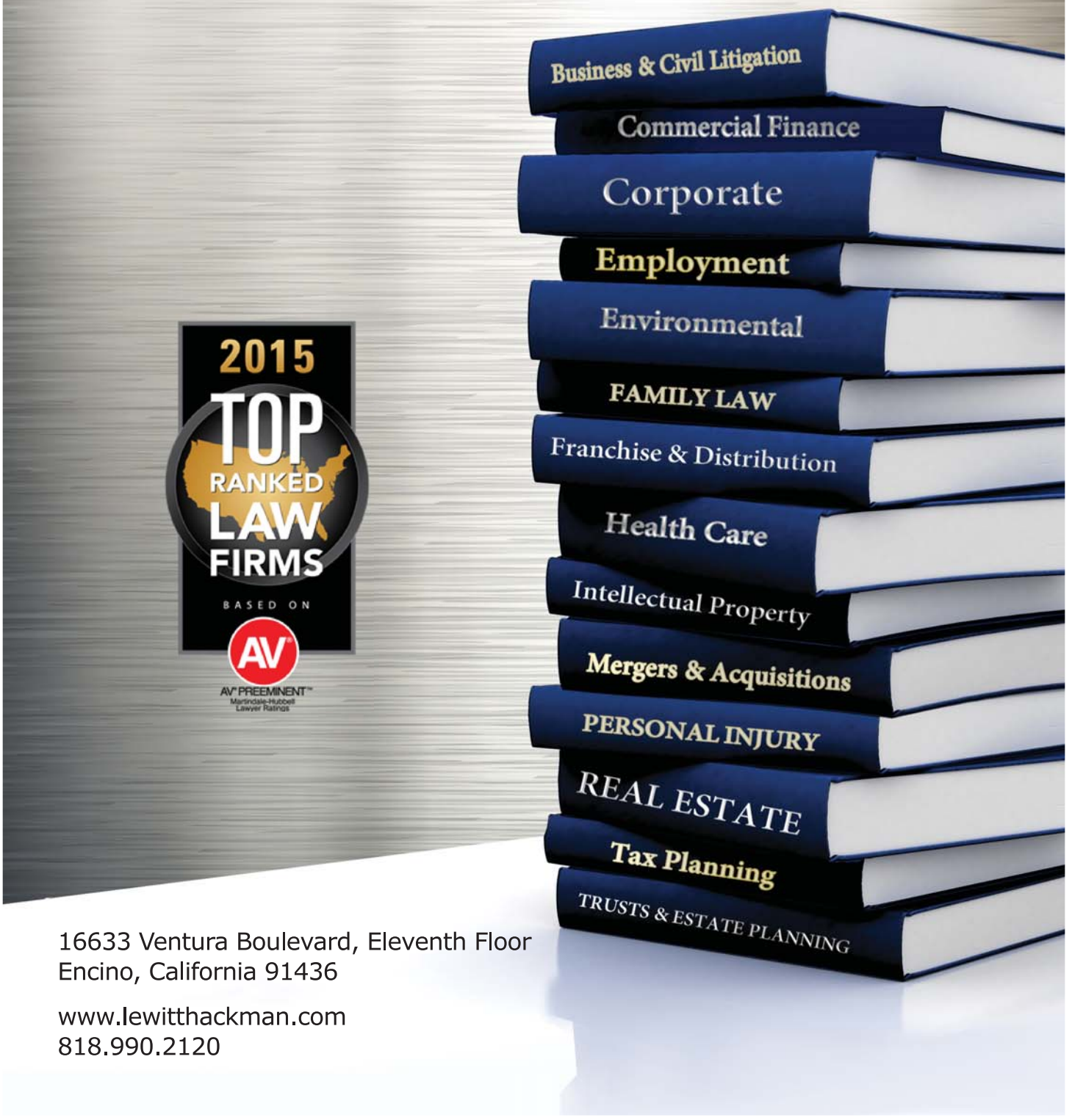

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