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Celebrating 75 Years
San Fernando Valley Bar Association
Association
founded in 1926

BarNotes

A Publication of the
San Fernando Valley Bar Association

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The SFVBA Goes To The ABA Meeting

by Lyle F. Greenberg

Following the Pledge of Allegiance and an invocation, I stood and was introduced to the House of Delegates of the American Bar Association. I was warmly welcomed and announced on the floor of the ABA House of Delegates as their newest member, on behalf of our San Fernando Valley Bar Association, and then took my seat amongst 539 other House members.

Our San Fernando Valley Bar Association is one of a select few local bar associations across the country to earn a seat in the House – most seats being occupied by state bar delegates, state delegates, and a variety of other categories of members. Who are these delegates? I am told that only fifteen years ago membership in the House was substantially different from what it is today, a diverse group of attorneys dedicated to ensuring liberty and defending justice.

But first, I need to start at the beginning. We *earned* our seat, qualifying with 2,000 or more members. We have much to be proud of at the SFVBA and all of our members, our Board of Trustees, and our past leaders and Past Presidents are all a part of our recognition in this national organization. Before even arriving in Seattle for the ABA Mid-Year Conference, the ABA certified the SFVBA and our delegate. After certification, I received 25 lbs. of paperwork, including the ABA Constitution and By Laws, reports, resolutions and amendments to resolutions (frequently amendments of amendments), with the expectation that I would read this material and be prepared for the meeting.

After signing in (the "Role Book"), I entered the House and felt like the country mouse going to the city. The House has assigned seating and I sat with the California delegation. The House also has three large-screen TVS, two focused on the speaker and one keeping the delegates apprised of the subjects being debated and the vote count. They used electronic, voice and standing votes to tabulate the votes on the issues being presented.

The Bylaws of the ABA provide that I am responsible only to our San Fernando Valley Bar Association, even though I sit within the California delegation. The Bylaws also provide that I

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Judges' Night

More than 270 members and judges attended the SFVBA's Annual Judges' Night at the Warner Center Marriott on February 20. The evening featured a heartfelt recognition of Judge of the Year Kathryne Ann Stoltz by Loyola Law School professor and legal commentator Laurie Levenson; a side-splitting roast of new Assistant Presiding Judge William MacLaughlin by colleagues Howard Schwab, Warren Greene and Harvey Giss; and special acknowledgment of SFVBA member Douglas Benedon for his recent Supreme Court victory.

BarNotes

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President's Message

Stephen T. Holzer

State of the Bar

On February 20, 2003, the San Fernando Valley Bar Association held its annual Judges' Night at the Marriott Hotel in Woodland Hills. Over 270 people attended to honor Judge Kathryne Stoltz as our Judge of the Year and to wish farewell to Judge William MacLaughlin as he leaves San Fernando for his new duties as Assistant Presiding Judge of the entire Los Angeles Superior Court system.

At each Judges' Night, the President of the SFVBA presents a "State of the Bar" address. I use the opportunity of this President's Column to print that address on the state of our Bar:

Ladies and gentlemen:

Good evening, and thank you for attending this annual event at which we honor our Judges.

I want to talk to you about three subjects of importance to everyone in this room: identifying the Bar's leadership; the fact that we now have an ABA delegate; and the funding crisis facing our State Courts.

As for identifying the Bar's leadership, I understand you get, and I'm sure religiously read, your Bar Notes; and the Board of Trustees is listed in each edition. Nonetheless, tonight I want to put a face behind each Trustee's name so that you begin you feel you know each of them and can more easily communicate any problem or suggestion to them about the Bar.

Accordingly, I am rapidly going to ask each Board Member to stand up as I call his or

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Technology Challenges in Law Firm Mergers: 10 Critical Factors for Growing Profits and Cementing Client Relationships

BY EDWARD POLL, J.D., M.B.A., CMC

When law firms merge with one another, one of the more significant front-line issues is "Which firm's technology will survive?" When there is a merger (buy-out) by a large firm of a much smaller law firm, the answer seems obvious. But, when there is a merger of equals, or of larger firms, even if not equal in size, the answer is not so clear. And, where there is a merger of small firms, things get murkier still.

What may be worse is that frequently, the question is not even considered before it is too late to make a smooth transition.

There are 10 critical factors that the leaders and management of law firms should consider during the discussion and transition phases to assure a successful passage and profitable picture after the merger.

1. Look at the firm culture. How involved is the technology department with the management committee? If the technology department is well-connected with the managing partner, with the management committee, or with the goal-setters and directors of the firm, the technology department will help the merger succeed.

2. Have the firms prepare white papers. Even before the creation of a combined technology team (see below), both law firms to the merger should create technology teams for the transition if they don't already have them. Each team should create a "white paper" for its respective firm that details the existing technology employed by the firm, the technology that is "on order" but not received, the technology that was being considered seriously for near-term purchase, the future vision of the department if the firms had remained separate, and their respective visions of the combined department in the new, enlarged firm.

3. Create a team to develop and implement a technology plan. There will be many tasks to accomplish in a merger of technology departments including the evaluation of both systems, determination of which approach more nearly will meet the needs of the combined firm, purchase of equipment necessary to bring both firms into parity in the use of technology to serve client needs, combining accounting systems, and many more. No one person can accomplish all this. Therefore, the creation of a team with specific assignments will be necessary. A basic business principle—delegation—will come into play because successfully merging the technologies of two firms, even small firms, is no easy undertaking. And it will be better to begin the thought process sooner rather than later.

In the merger of equals, the negotiating team will usually divide areas of technology responsibility to each side, or appoint one person from each firm to act as co-leaders. And in a merger of firms with unequal power, the head of the larger firm's technology department will normally be asked to be the new technology leader.

4. Create a "client" survey. Most marketing experts suggest that client surveys are critical to knowing what clients want and to developing strategies to meet their needs or desires. The same can be said about the merger of technology platforms. To help the merger succeed, create a customer or client survey where the client is the lawyers of the merged firm. They are the customers of the new technology department, and the new technology team needs to know what the combined firm's lawyers need. Also, consider taking this survey to the clients of the combined firm to find out what they want in the way of technology services. These two surveys will guide future technology efforts.

5. Place all purchase decisions on hold until after the merger takes place, otherwise there will be duplication of expenditures and of equipment. Since, at least in a merger of equals, no one really knows at the early stage which technology system is going to survive the merger, avoid the purchase of everything but absolutely necessary hardware and software. Failure to put a "hold" on new purchases will likely result in conflicts with the ultimate system to be created by the merged entity. Only in a merger of greatly different-sized organizations will the surviving technology be obvious. The larger firm tends to think that "... if it's not invented here, we don't need it." Even if the smaller firm has better technology, it's not likely to be used.

6. Think about how you are going to merge your accounting policies. Depending on what those policies are, this can be a significant challenge. Merging the billing systems is clearly a very important element since that is what the clients will see first. Thus, this is the area the technology department should tackle first.

7. Integrate the financial data of the acquired firm into the new system. Most lawyers do not really know how much it costs them to perform their services. But if the firm is to move away from hourly billing to a new system (as many people believe will happen regardless of how it may be defined), then costing information becomes critical. Without this information, it is impossible to create a fee projection for the client. The financial data of the acquired organization must be merged into the financial data of the acquirer.

8. Carefully review the compensation issue. The pay schedules in the two organizations must be reconciled, and one way to do that is to take into consideration the varying living standards in different cities or at the respective branch offices. However, that will only take you so far. Compensation equity must be reviewed and confirmed at the conscious level. Various firms have differing policies toward compensating their technology personnel. Some look to local standards and the cost of living in each area; others have a standard compensation policy and pay scale, irrespective of office location or cost-of-living differences. Which path the combined firm takes will depend on the firm culture and its previous experience in such mergers. But, whatever the approach, it must be conscious and deliberate.

9. Consider the importance of training and education. In today's environment of higher billable hours and increasing demands on everyone's time, too few firms pay attention to the idea of educating and training both their attorneys and their staffs. This is particularly true when new technology is introduced into a merged environment.

10. Focus on knowledge management. This is one area that will set apart the OK merger from the wildly successful merger. One of the characteristics that differentiates lawyers is their ability to coordinate knowledge, information, and data, and then to use those to the benefit of the clients. In most firms, the concept of knowledge management is only given lip service without real implementation. There is even a different term for the underlying concept I am raising: "knowledge sharing." That is what we are really talking about: sharing the knowledge that one lawyer has for the benefit of others in the firm and for the firm's clients. When two firms merge, there is a very dynamic opportunity to implement that philosophy of sharing knowledge among the various offices, and among all the lawyers within the firm and in the different practice groups.

The ultimate goal of the above suggestions is a seamless integration of the merging firms' technology capabilities along with the expanded use of technology to better serve their clients. Not as a toy or as an end unto itself, but as a tool to help the new firm grow its profits and cement its client relationships.

Edward Poll, J.D., M.B.A., CMC, is a coach to lawyers and certified management consultant who shows attorneys and law firms how to be more profitable. Ed's latest book is *Collecting Your Fee: Getting Paid From Intake to Invoice* (ABA 2003); he is the author of *Attorney & Law Firm Guide to The Business of Law, 2d ed.* (ABA 2002); *Secrets of the Business of Law: Successful Practices for Increasing Your Profits.* To make suggestions or comments about this article, call (800) 837-5880 or e-mail edpoll@lawbiz.com. You can also order a free e-zine or visit Ed on the web at www.lawbiz.com.

Quitting Forever . . . Again?

BY DAVID GURNICK

"Closing." "Quitting Forever." "We Give Up." A challenged economy puts more pressure on retail stores. Some cannot make a profit, resulting in more frequent "going out of business" signs and advertising.

Quitting business sales happen in good times too. Some people notice the furniture or leather store with the long-running "last days" sale, but the store never closes. Or the jewelry shop or art gallery that "must liquidate" but soon reopens under a new name. Others notice the appliance or music instrument store advertising "everything must go," but the store has a full inventory.

For the lawyer, a client's quitting business sale is more than a matter of truth in advertising. Laws in many states and localities require a permit to conduct a "going out of business sale." While truth in advertising is a universal requirement, laws in some jurisdictions specifically prohibit advertising "going out of business," unless the statement is true. These rules have led to some interesting reported decisions.

The State of Massachusetts sought to enjoin a furniture store's "going out of business" sale conducted less than two years after running a "must vacate" sale. At the time it was unlawful to conduct more than one such sale at a location within two years. The trial judge ruled that "must vacate" was different than "going out of business," and therefore refused to prohibit the store's advertising. By the time the case reached the state Supreme Court, the store really was out of business, so the high court found the case was moot. Commonwealth v. Lane Furniture Co. 388 N.E.2d 1189 (1979).

An Ohio appliance shop ran a "going out of business sale" without applying for the required permit. The defense was that the store had been in business a long time, its winding up sale was genuine, and the law had not been uniformly enforced. A state court held that truthfulness of the advertising was no defense and the failure to seek a permit prohibited any defense concerning inconsistent enforcement. The offending business was held liable for violating the ordinance. Foltzer's Electric City v. Cincinnati. 137 N.E.2d 523 (1956).

Clever marketers still seek ways around valid statutes. In California, a furniture chain obtained bankruptcy court approval for an ongoing liquidation sale, with inventory to be restocked regularly. The court was satisfied that the sale would raise funds for the estate. The organizers were professionals whose business was conducting distress sales. Based on federal supremacy they used the bankruptcy court's authorization to stop local authorities from interfering with the sale.

The State then intervened, informing the bankruptcy judge that the Los Angeles Superior Court had enjoined the organizers from running financial hardship or distress sales, and the judge revoked the order. The judge noted that bankruptcy law requires trustees and debtors to conduct business according to state law (28 U.S.C. Sec. 959(b)) and bankruptcy is not a license to exploit gullible consumers. In Re White Crane Trading Co. 170 B.R. 694 (Bankr. E.D. Cal. 1994).

California law criminalizes false or misleading statements in advertising. B& P Sec. 17500 (six months imprisonment and/or $2,500 fine). In Southern California, the County and many cities have ordinances that require a permit to conduct a quitting business sale. See for example, LA County Code Sec. 7.40; L.A. Muni. Code Sec. 103.308.

Long running or repeat going out of business sales and the like, may be more than they seem. Consumers, and business lawyers should be alert to clients who quit their businesses too often, or for too long.

David Gurnick is a partner in the Woodland Hills' office of Arter & Hadden. To contact the author, email david.gurnick@arterhadden.com.

Message From LRIS Coordinator

Michele C. Morley

If you have only a little extra reading time, **stop reading this column now!** Instead read a book, an article, a columnist.

If America is to be the country with the most power and the most economic influence on earth, Americans should strive to be the wisest too. There is a place for all opinions and we each need to be willing to study "the other viewpoint." Remember how prepared you feel when you anticipate and understand opposing counsels' arguments.

On my current re-reading list is: *All Quiet on the Western Front (1929)* the World War I book by Erick Maria Remarque, *Practicing History (1981),* and *The March of Folly (1984)* by Pulitzer Prize winning historian, Barbara Tuchman.

Tuchman in *March of Folly* states: "We all know, from unending repetitions of Lord Acton's dictum, that power corrupts. We are less aware that it breeds folly; that the power to command frequently causes failure to think; that the responsibility of power often fades as its exercise augments. The overall responsibility of power is to govern as reasonably as possible in the interest of the state and its citizens. A duty in that process is to keep well informed, to heed information, to keep mind and judgment open and to resist the insidious spell of wooden-headedness. If the mind is open enough to perceive that a given policy is harming rather than serving self-interest, and self-confident enough to acknowledge it and wise enough to reverse it, that is a summit in the art of government."

I am also reading *Michelangelo and the Pope's Ceiling* by Ross King (2003). The Sistine Chapel's ceiling had been frescoed before, but that artwork had cracked and faded. Michelangelo needed to develop a new answer to the problem of the Pope's ceiling. The very independent minded sculptor learned from workmen and lesser-known artists about more permanent fresco techniques and a manner of mixing the paint pigments so they retained their vivid color. The famous sculptor did not want to learn something new. He wanted to carve a monument for the Pope, not paint a ceiling. He did not eagerly engage in this project requiring his time and patience. He was literally dragged and cajoled to the scaffolding. But he then designed a new scaffolding technique that allowed him to work with more ease. This ingenious scaffolding system was used again when the ceiling was cleaned in the 1980s. He combined what he knew, sculpture, with what he had learned about fresco painting.

Combining different perspectives and knowledge created results that are lasting and magnificent.

SFVBA Goes to ABA... continued from cover

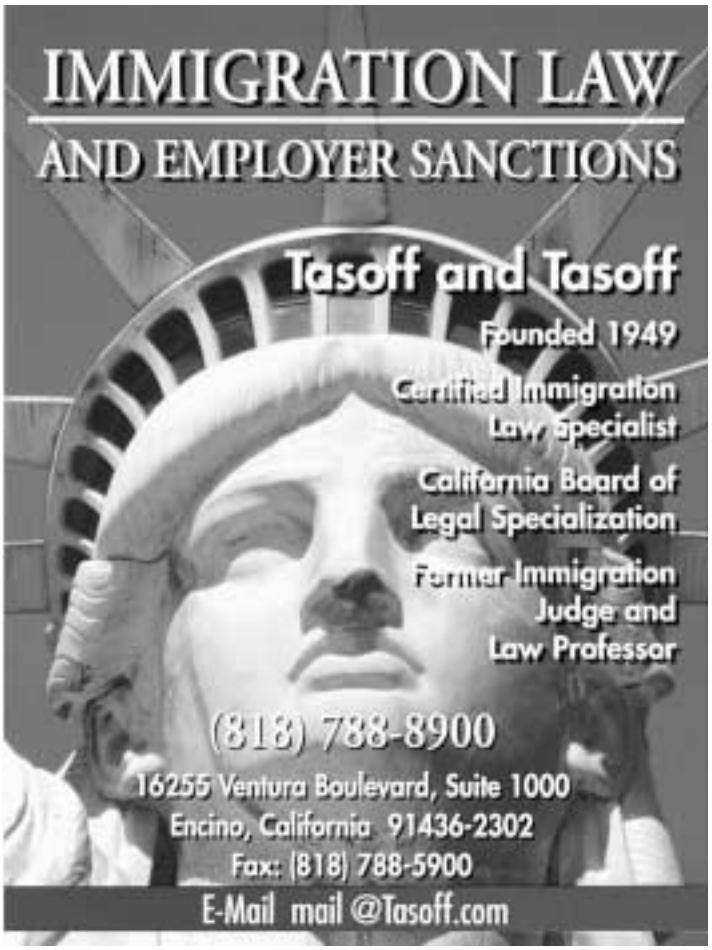
am responsible for reading the material on the various issues, attending the House meetings, participating fully in the debate, keeping our constituents fully apprised and assisting our constituents in presenting issues of concern for debate and action by the House. Yes, I did read the material and carried it all the way to Seattle only to learn that they had additional copies for me there.

Approximately half of the practicing lawyers in the nation belong to the ABA (almost 500,000), with the purpose generally defined as improving the legal profession and the processes of justice, and fulfilling the profession's public service obligations. The House of Delegates is the official policy-making body of the ABA. During our two days of business, we listened to reports from various committees and addressed numerous pieces of business. We debated and voted on a variety of issues, including legal technology and information systems, veterans' disability claims, criminal justice, tort law and insurance company insolvency, legal assistance for military personnel, the development of a program to assist the homeless with appropriate legal services and treatment programs, and a request to Congress that it enact an immediate and significant increase in federal judicial salaries, to name but a few.

The most heavily debated issues, both in the House and by way of the protesters outside the meeting and in the newspapers, were the resolutions regarding standards for legal aid and indigent defendants (#107 - passed), the treatment of enemy combatants (#109 - passed), and standards for claims for non-malignant asbestos related disease (#302 - passed).

Number 107, standards for legal aid and indigent defendants, adopted revisions to the already existing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, making it clear that the ABA was taking no position on the death penalty, only that an individual charged with a capital crime have full, complete, and competent representation.

Number 109, titled "Task Force on Treatment of Enemy Combatants" (which was revised many times), was dubbed by many speakers as the "right to access to counsel" resolution. The *Los Angeles Times* (Tuesday, February 11, 2003) wrote that "the ABA's House of Delegates approved the resolution, which also states that such individuals should be 'afforded the opportunity for meaningful judicial review of their status', subject to national security requirements." The *Times* characterized the ABA as "opposing a Bush administration anti-terrorism policy that bars U. S. citizens jailed in this country as 'enemy combatants' from conferring with lawyers." The debate centered around whether to utilize criminal justice standards or defer to national security interests as it relates to these individuals, with both sides exclaiming their support for President Bush and the U. S. Constitution.



Number 302 addressed the issue of setting ABA standards for non-malignant asbestos related disease claims. In a debate that extended from Monday to Tuesday, from a procedural issue that passed by one vote out of 539, to a vote on the merits which was ultimately not even close (#302 passed), this resolution also attracted protesters outside the Seattle Convention Center where the House met and also received *L. A. Times* attention stating that the ABA voted "to support anticipated federal legislation that would curb asbestos litigation by allowing lawsuits to be filed only by victims who meet certain medical criteria." The entire second day was dedicated to addressing the merits of Number 302, which essentially allows for non-malignant asbestos-related disease claims if the claimants meet specific medical criteria, and, also tolls the statute of limitations until the claimant meets the ABA-defined medical criteria.

Although I was advised by many long-term House members to tell you how much work it was (and it was), I was so excited about our involvement that I called our Executive Director at a break on the first day to tell her how fortunate I felt in being able to represent our association. No, it was not a vacation; but it was great!

I encourage you to communicate with me on issues that you feel would be important for me to raise before the ABA - we have the opportunity to present resolutions on a myriad of issues of concern to lawyers in our association that can have an impact on a regional and national scale. My thanks to members of the California delegation who made me feel welcome and took the opportunity to befriend me and educate me through my first meeting of the ABA House of Delegates, including Judge Laurie D. Zelon, John L. McDonnell, David Pasternak, and Bert Tigerman, to name but a few.

To our members, Executive Board and Board of Trustees, Past Presidents and past leaders in our SFVBA - I hope you are proud of our organization's recognition on this national level and our participation and key role. Thank you for this honor and opportunity to serve you in this national lawyers' organization.

THE PRACTICE

a series of essays on practice of law and life

Kirsten's Day Planner

BY DAVID R. HAGEN

My daughter Kirsten is in third grade. Recently she came home and showed me a day planner that had been given to every kid in her class. This day planner was apparently one of the books that the teacher planned to use in class for the rest of the school year. I thought that third grade was a little young for this and asked to look at it. Sure enough, each day contained lines upon which every activity during the day could be filled in as well as tasks to be completed.

Initially, this bothered me a bit. Third grade seems to be a little young for an individual to get on the "to do" treadmill. My "to do" list, both personal and professional, is one of the guiding documents in my life. However, I remember when I was in third grade, homework assignments were light. The majority of my time after school was spent playing with my friends in the front yard. My folks would say, "Go out and play and be back in time for dinner." I never kept a calendar or a to do list. I just played and went to school.

Things are different now. Parents would never tell their kids to just "go out and play"; we keep a much closer eye on them in these crazy times. It also seems as though my kids do not have nearly as much free time as I had either. (Of course, I think they read better than I did at that age and my daughter already knows how to use Microsoft Word.)

I certainly hope that even though my kids are more educationally advanced that they do not lose the precious time in their childhood when they can play and explore with their friends in the neighborhood. I guess it all comes back to balance. Kids have less free time but are probably ahead of where we were in terms of education.

This led me back to the issue of the day planner. I began to think that maybe it was not such a bad idea. It seems to be a good idea to teach children about being responsible with their time and responsibilities. However, I also thought it would be good if children were encouraged to plan their time to not only accomplish school work but also to ensure they had plenty of play time with their friends and family. This is what I think of as "planned balance." I try to do it in my life; perhaps kids should be introduced to this concept at some point as well. Unfortunately, I did not see any allowance for "play time" in her day planner. I hope to go over her day planner with her and hope that she begins to understand the concept of "planned balance." She needs to be organized and motivated, but she still needs to plan for plenty of time to play.

How about your day planner? If it only contains due dates for briefs and times of hearings, I would suggest that you are missing the boat. Do you schedule fun things in your day? Do these thing show up in your day planner? Fun things give us richness of life and allow us to pause and refresh.

Do you set aside time to have fun, pause and refresh? If not, you are missing out on a real opportunity to have balance and richness in your life. Because we all work so hard as lawyers, it is very easy to become one-dimensional and forget to have some fun or rest. In my opinion, this is why a day planner, with time set aside for fun and rest, is especially essential for lawyers. If you don't want your staff to see what your fun is, just schedule an out of office appointment. Who needs to know that you are out of the office to see the latest James Bond movie or that you went to the club to swim? The important thing is that you schedule it and follow through most of the time.

Keeping track of what you need to do and planning to have some balance in your life is one of the fundamental concepts behind the works of Steven Covey, author of The Seven Habits of Highly Effective People and the Franklin Day Planning System. It is this fundamental concept that has driven his series of best selling books and makes millions for this publicly traded company. In our busy, busy world, planned balance is a concept that we all must strive for if we want to be happy and healthy human beings.

Take a look at your day planner. Do you have some fun planned? Is it is helping to provide you with balance in your life?

Dave Hagen is a principal at Merritt & Hagen. The firm's practice focuses on representing individuals and small businesses in bankruptcy. He speaks to attorneys often on the areas of bankruptcy, the marketing of legal services, and the practice of law. He welcomes your comments to this series of essays.

Mediator's Notebook

BY CHARLES B. PARSELLE

On Confidentiality:

Evidence Code, Sections 1119 & 1120, as Interpreted By The Rojas Decision

Mediators are now under a duty, set forth in the new Rule1620.4 of the Rules of Court, to "provide the participants with a general explanation of the confidentiality of mediation proceedings." Complying with this duty may not be that easy, in the light of Rojas v Superior Court, certified for publication by the Court of Appeal, Second District, in October, 2002, Docket #B158391.

The mediator's personal position is clear: first, he must keep all confidential communications confidential [CRC 1620.4(c)]; secondly, he is not competent to testify in any subsequent proceeding [Evidence Code, section 703.5, subject to the four limited exceptions set forth in that section], or to make any report to a court concerning the mediation, except the mandated Statement of Agreement or Non-agreement [EC 1121].

The provisions of EC 1119 and 1121 were tested in Foxgage Homeowners Assn. v Bramalea California, Inc. (2001) 26 Cal. 4th 1, a case in which the mediator had submitted to the court a report setting forth his view of the bad faith conduct of one of the parties. The Supreme Court held: "The language of sections 1119 and 1121 is clear and unambiguous…Section 1119 prohibits any person, mediator and participants alike, from revealing any written or oral communication made during mediation. Section 1121 also prohibits the mediator, but not a party, from advising the court about conduct during mediation that might warrant sanctions. It also prohibits the court from considering a report that includes information not expressly permitted to be included in a mediator's report. The submission to the court, and the court's consideration of, the report of [the mediator] violated sections 1119 and 1121." This decision seemed clearly to affirm the confidentiality of the mediation process.

The confidentiality of written or oral communications during the mediation process is set forth at EC 1119, which says in subsection (a) that no evidence of anything said or any admission made in the course of a mediation is admissible or subject to discovery, and in (b) that no writing prepared for the purpose of a mediation is admissible or subject to discovery.

However, there is an exception to EC 1119, set forth at EC 1120, which says that evidence otherwise admissible or subject to discovery outside of a mediation shall not become protected from disclosure solely by reason of its use in a mediation.

In Rojas, the purchaser of an apartment complex sued the developers alleging numerous construction defects leading to toxic infestation. That litigation went to mediation and settled. The court's Case Management Order providing for the mediation required specified documents to be held in a document repository; the preparation of a defect list; the final defect list, after a "meet and confer" of the parties' experts, to contain the type, extent and location of defects, etc., and a report setting forth in detail the necessary repairs and specific costs of each repair.

Subsequently, some of the tenants of the apartment complex sued both the owner and the developers for health problems caused by the toxic infestation. By the time of the second action, the toxic infestation and the conditions causing it had been remedied; the physical evidence no longer existed.

The plaintiffs sought discovery of the documentary evidence of the defects in the first action. The defendants resisted on the grounds that all such evidence constituted writing "prepared for the purpose of, in the course of, or pursuant to, a mediation" and was therefore "not admissible or subject to discovery," as set forth in EC 1119(b).

The issue went to the Court of Appeal, which found in favor of plaintiffs, concluding that "the language of sections 1119 and 1120 is clear and unambiguous and that the plain language of the statute's privilege from disclosure does not apply to 'evidence.' Rather, sections 1119 and 1120 are meant to protect the substance of mediation, i.e. the negotiations, communications, admissions, and discussions designed to reach a resolution of the dispute at hand. These statutes do not protect pure evidence."

The court also describes "pure" evidence as "hard" evidence and "raw" evidence, and elaborated that "mediation confidentiality is meant to protect the substance of the negotiations and communications in furtherance of the mediation, not the factual basis of those negotiations. Thus, even if evidence is used or introduced in the mediation, it is not protected."

What about the work product privilege in connection with documents prepared for the mediation? The court found that the mediation privilege is co-extensive with the work product privilege. Therefore, "test data that is in a chart that in any fashion indicates the attorneys' or parties'

evaluation of the case or their negotiation posture, [it] is protected. However, to the extent such test data may be extrapolated from the chart and given to petitioners, it must be produced. Such determinations shall be made by the trial court after a careful in camera review of the materials."

Does this ruling simply reiterate the "clear and unambiguous" language of sections 1119 and 1120 of the Evidence Code, without interfering with the mediation privilege, as thought by the majority? Justice Dennis Perluss thought otherwise in a somewhat blistering dissent: "Divining a distinction between "derivative" and non-derivative" materials nowhere found in the statutory scheme and acknowledging only a qualified protection from disclosure even for concededly privileged materials, the majority has now effectively eradicated any significance from the mediation privilege in California."

Because Rojas has an unusual fact pattern, what effect it might have on the openness of mediation proceedings remains to be seen. The defendants in Rojas were both of the parties in the underlying litigation, against whom the plaintiffs in the second action, who were tenants of the apartment complex, alleged conspiracy to conceal the defects and microbe infestation from them; indeed, the court specifically sets out part of confidentiality agreement between them, in which the parties in the first case mutually agreed that "all parties…shall not take any action to facilitate…any claims by any tenant…" Generally, additional litigants are not waiting in the wings, so to speak, to take advantage of the evidence collected by others, and generally, the parties have already exchanged the information they need by way of discovery before commencing mediation, so that the mediation process itself does not generate any new evidence.

Nonetheless, the requirement now laid on mediators to provide participants with "a general explanation" of the confidentiality of mediation proceedings must take into account the Rojas decision. A simple statement in compliance might be as follows: "This mediation is subject to the confidentiality provisions contained in Evidence Code, sections 1119 and 1120, and other relevant provisions of law, as interpreted by the courts." Not very helpful, yet the law on mediation confidentiality is now quite complicated and it not the mediator's role to give advice on the law. The best advice one might give informally is: "Anything you say to me in confidence will be held in confidence. But in joint session don't say where the body is buried unless you want the other side to know where the body is buried. To be better informed, read Evidence Code 1115 through 1128, and Rojas."

Charles Parselle has practiced law in California since 1983. An experienced litigator, his practice is now devoted to mediation and arbitration, including recent mediations in business, construction, employment, insurance, professional liability, personal injury, probate, real estate, and toxic tort cases. www.Parselle.com. He can be reached at 818.781.5810, and Charles@Parselle.com

President's Message continued from page 3

her name. I start with the Executive Committee: Jim Felton, President-Elect; Alice Salvo, Secretary; Richard Lewis, Treasurer; and Lyle Greenberg, Immediate Past President.

Now, our Board: Seymour Amster, Sue Bendavid-Arbiv, Caron Caines, James Curry, Robert Flagg, Gerald Fogelman, Cynthia Hogan, Tamila Jensen, Lloyd Mann, Kevin Rex, Myer Sankary, Judith Simon, Larry Simons, and Deborah Sweeney. After putting together the names with the faces, please use tonight's opportunity or future opportunities when together with Board Members to offer your suggestions for the leadership's consideration.

The second topic I indicated concerns the American Bar Association. With the San Fernando Valley Bar Association having now reached approximately 2,100 members, we have qualified for a delegate to the ABA. The Board recently elected our Immediate Past President, Lyle Greenberg, to be that delegate, and Lyle has already been on the job by attending this month's semi-annual ABA House of Delegates meeting in Seattle, Washington. I am sure you'll be hearing from Lyle, in Bar Notes and otherwise, about both this conference and his general experience in representing our Bar to the ABA

This recognition of our Bar by the ABA is, of course, a milestone achievement. I recognize the opinion of some that the ABA has on occasion taken positions on matters more political than legal; and I don't mean to diminish those concerns. Nonetheless, the ABA remains the premier voluntary bar association in the Nation; and, whatever our politics, we should all take pride in this achievement.

Finally, on a more sobering note, I want to refocus your attention on our Courts' budget crisis about which Judge Hill has spoken to you. From the papers, TV and radio, all of us of course know that the State in general faces a severe budgetary crisis, with the Governor's estimate of this year's deficit at approximately $35 billion dollars.

Since the funding for our Courts now comes directly from the State and is no longer a County function, this budget crisis inevitably has affected the Judiciary, just as the crisis has affected the other branches and agencies of Government. As you are likely aware, budgetary constraints resulted in State edicts under which the Los Angeles County Court system has had to cut $57 million or more this fiscal year ending June 30, 2003; and it does not take a crystal ball to predict that, with a $35 billion deficit, the State will likely mandate additional cuts for the fiscal year beginning July 1.

Our Bench-Bar Committee, chaired by Judith Simon and Jim Curry, meets regularly with the Valley's Judges and has been able to follow the impacts of this funding crisis. Judge Hill, for example, has been very helpful in explaining to us the publicly available facts about how the Court has planned and implemented the mandated cuts. We on the Committee have all been impressed by the fact that the Judiciary has up to now been able, with good humor, to absorb the severe funding cuts in this fiscal year without sacrificing the Courts' core mission of dispensing justice speedily, which is what our Constitution and sense of fair play envision. Most of the practitioners in this room have, as a result, likely not seen their cases substantially delayed or otherwise affected.

Applications For Admission

THE FOLLOWING JOINED THE SFVBA IN FEBRUARY:

Lewis G. Belfer
Law Office of Shai Oved
20550 Pesaro Way
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Estate Planning, Family Law

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(818) 920-1129 Fax (818) 920-1128
General Practice, Immigration

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Family Law

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ginatanner@familylawjustice.com
Family Law

Lawrence J. Waldinger
Rushfeldt, Shelley & Drake LLP
12925 Riverside Drive 2nd Floor
Sherman Oaks, CA 91423-2209
(818) 906-1441 Fax (818) 906-2532
Litigation

However, ladies and gentlemen, given the additional funding cuts likely to take place next fiscal year beginning July 1, life may become a lot different. Those of us old enough remember the days when, in the '70's and '80's, it took a civil jury case fully 5 years to get to trial. Given that, constitutionally, criminal cases must receive preference, further shrinkage of judicial resources could, among other things, bring those 5-year delays back again.

While the Bar's first reaction to this pending situation may understandably be to cry out to the Legislature for more money, we need to be realistic. Everyone, every interest group, is asking for the same thing. It appears there simply isn't enough money to go around. While accepting this reality, nonetheless the Bar, if there is a consensus to do so, can impress upon the Legislature and the Governor that the Judiciary is a co-equal branch of the Government and must be guaranteed at least a basic, irreducible level of funding enabling this branch to continue to carry out its Constitutionally-mandated function.

But, again, it would fanciful to think that funding is for the foreseeable future is going to be anywhere near the levels the Courts have previously enjoyed. Thus, we are compelled, as the saying goes, to "think outside the box."

Our Bar is committed to working with the Judiciary to help it, despite that severe budget crisis, continue effectively on the core mission of dispensing timely justice. As many of you know, the Bar already offers mediation in family law matters and periodically, through the "Valley Associated Settlement Team" or "VAST" program, makes lawyer-mediators available to the Van Nuys Court. We hope to do more.

In addition to this being a priority of the Bench-Bar Committee, our recently formed Government Affairs Committee, chaired by Marcia Kraft, met earlier this week to discuss this subject; very creative ideas were discussed. I plan to ask the two Committees to have a joint session to discuss these and other ideas whereby the organized Bar can assist the Judiciary in this time of constraints. The Committees' recommendations will then, of course, be discussed with the Judiciary; and, to the extent the Judiciary is receptive, the recommendations will be brought to the Board of Trustees for consideration and, if approved, implementation.

This Bar has the great leadership I have previously introduced. We have enhanced stature from such things as qualifying for an ABA delegate. I am confident that with such leadership and stature all of us in the SFVBA can and will assist the Judiciary in weathering, and emerging stronger from, the budgetary storm that we now confront.

Thank you.

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April Events

calendar and MCLE event listings

Probate and Estate Planning Section

Topic: **Legislative Update**
Speakers: James Birnberg and Matthew S. Rae
Date: April 8
Time: 12:00 Noon
Place: Radisson Hotel, Sherman Oaks
Cost: $30 members prepaid; $35 at the door
$35 non-members prepaid; $40 at the door
MCLE: 1 Hour

Workers' Compensation Section

Topic: **Check Out *www.sfvba.org* for details!**
Date: April 16
Time: 12:00 Noon
Place: Encino Glen Restaurant, Encino
Cost: $30 members prepaid; $35 at the door
$35 non-members prepaid; $45 at the door
MCLE: 1 Hour

Litigation Section

Topic: **Surviving A Client's Business Failure**
Speakers: Steven R. Fox and Patrick F. Rettig
Date: April 24
Time: 6:00 p.m. Dinner and Program
Place: SFVBA Conference Room, Woodland Hills
Cost: $30 members prepaid; $35 at the door
$35 non-members prepaid; $40 at the door
MCLE: 1Hour

Family Law Section

Topic: **Support Issues in a Depressed Economy**
Speakers: Judicial Officers and Vocational Evaluators
Date: April 28
Time: 5:30 p.m.
Place: Encino Glen Restaurant, Encino
Cost: $38 members prepaid; $45 at the door
$45 non-members prepaid; $50 at the door
MCLE: 1 Hour

Business Law & Real Property Section

Topic: **Preparing A Witness and the Cross Examination**
Speaker: Sanford Michelman, Esq. Michelman & Robinson
Date: April 23
Time: 12:00 p.m. Lunch and Program
Place: SFVBA Conference Room, Woodland Hills
Cost: $25 members prepaid; $30 at the door
$30 non-members prepaid; $35 at the door
MCLE: 1 Hour

Information & Reservations 818•227•0490

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