VOLUME 8 • ISSUE 10 • JANUARY 2002

Celebrating 75 Years
San Fernando Valley Bar Association
founded in 1926

BarNotes

A Publication of the
San Fernando Valley Bar Association

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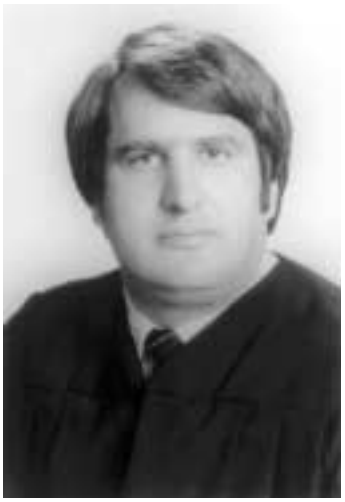


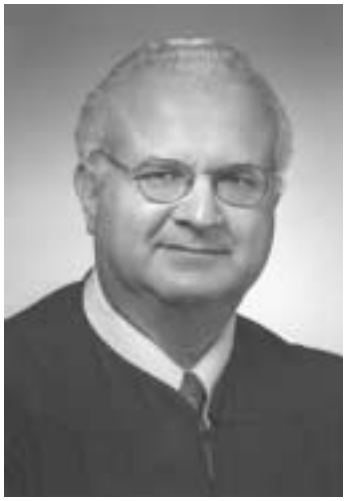
Judge Howard Schwab

Los Angeles Superior Court Judge Howard Schwab will receive the San Fernando Valley Bar Association's 2002 Judge of the Year Award and California Supreme Court Associate Justice Carlos R. Moreno will be the special guest speaker at the SFVBA's Annual Judges Night on February 21 at the Warner Center Marriott. The evening will also pay tribute to Judge John Gunn and Commissioner Manly Calof, who have recently announced their retirement from the Bench.

Judge Schwab was appointed to the Los Angeles Municipal Court in 1984 by Governor Deukmejian and to the Superior Court the following year. He has served all but six weeks of his seventeen-year tenure in San Fernando or Van Nuys. He currently hears civil trials in the North Valley District. He chairs the Los Angeles Superior Court's BAJI Committee, which drafts and recommends jury instructions for civil trials, and spearheads the courts' annual "Meet the Judges" forum at CSUN. He has authored six published opinions as an Associate Justice Pro-Tem of the California Court of Appeal.

Howard Schwab was raised in the San Fernando Valley, graduating from Van Nuys High School in 1961, and received his B.A. and J.D. from UCLA. He served as a Deputy Attorney General of California from 1969 to 1984. As Deputy Attorney General, he argued the landmark U.S. Supreme Court case Faretta v. California, which set forth an independent right of self-representation in a criminal trial; represented California in the appellate courts in the Charles Manson Family cases and The Onion Field case; and argued and briefed leading cases upholding the constitutionality of the death penalty in California.

"Judge Schwab was selected as our Judge of the Year because of his judicial achievements and his support of the Bar," says SFVBA President Lyle Greenberg. "Schwab is highly-regarded among the Bar and Bench for his intellect and skills. And his concern for the Court, the Bar and the public is widely recognized."



Justice Carlos Moreno

Associate Justice Carlos Moreno, born and reared in East Los Angeles and the first in his family to attend college, was sworn in on October 18 to replace the late Justice Stanley Mosk, who died June 19 after serving almost 37 years, the longest tenure of any Supreme Court justice in California.

Moreno served on the Los Angeles Municipal and Superior Courts for twelve years before being appointed in 1998 by President Bill Clinton to sit as Federal District Court Judge in Los Angeles. He was President of the Mexican American Bar Association in 1982 and was the Los Angeles County Bar Association's 1997 Criminal Justice Superior Court Judge of the Year.

Past recipients of the San Fernando Valley Bar Association Judge of the Year Award include Judges Alan Haber, Marvin Rowen, Meredith Taylor, Judith Ashmann, Bert Glennon, William MacLaughlin, Juelann Cathey, Geraldine Mund, Michael Farrell, and Michael Hoff.

Judges' Night will be held on Thursday, February 21, at the Warner Center Marriott. The reception begins at 5:30 p.m., followed by dinner and program at 6:30. Individual tickets are $55 and Sponsor Tables are $550.

BarNotes

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

Layout & Design
Pre-press & Printing,

Master Graphics Printing
(818) 343-0500

President's Message

Lyle F. Greenberg

Our Professions' New Year's Resolution: Courtesy, Integrity, Professionalism

I believe in New Year's resolutions. Quite simply, I want to try to be a better person, father, husband, and lawyer. I would like to be a better community leader. I know that many of my friends and the people that I admire also have such resolutions, a belief that each day, week, month and year offers them an opportunity to be the best they can be in each aspect of their lives.

Sometimes, however, I feel that all of us are not on the same page. Have you ever come across attorneys who, while everyone else is trying to be better, they are trying to pull a fast one? It reminds me of the inspired feeling I have after leaving High Holiday Services (the Jewish New Year), but wondering whether everyone else got the same positive message, and my frustration when I come face to face with someone who obviously did not.

In discussions I have had with fellow attorneys, there seems to be agreement on the following subject - attorneys who are courteous, have integrity and respect for themselves and our profession will read this article because of their concern for their profession; those that don't have these qualities, won't read it or worse yet, dismiss these thoughts as mere sentiment. Its like the alcoholic who, until he admits that he has a problem, thinks that everyone else is to blame.

This is a different subject than the public image of lawyers (although the subjects relate to each other) - this Message focuses on how we get along amongst ourselves and how we define ourselves. Certainly if we can't do a better job in our own family, we can't expect the press to do anything but publicize the negative side of our profession.

When considering this Message, I reviewed the term "profession" in Black's Law Dictionary. From the 1910 Second Edition to the 1968 Revised Fourth Edition, the definition was what I would want it to be, that is - "a public declaration respecting something...In ecclesiastical law...the act of entering into a religious order." By the time Black's Law Dictionary published the Seventh Edition in 1999, "profession" was nothing more than a "vocation" requiring "a high level of training and proficiency." It seems to me that when we don't define ourselves by the highest standards, that we are bound to fall prey to the discourteous and unprofessional. How is it that our own dictionary went from describing us as taking an oath, a pledge, a commitment, a public declaration, to just a job?

According to ABA surveys of the public's view of lawyers, with consistent results year after year, the leading negative perceptions the public holds about lawyers are that we lack caring, compassion, and ethics. Personally, I am less concerned about the damage the press does to our profession than the damage we do to our own profession. We control the image of lawyers when we conduct ourselves with decorum amongst our clients, our adversaries, the community, and ourselves.

Attorneys remember when they have been treated poorly. Just ask us - we remember names and incidents with great clarity, sufficient to convince others attorneys we are speaking with to deal with the offender at arms length.

So why, after years of school, making a nice living, having control over our practices and lives, do we find that "attorney courtesy" is still a subject for discussion? Is it because law schools don't have a course in "courtesy and etiquette"? I have been practicing law for 18 years and the cycle is clear - older practitioners (we are all on the conveyor belt of becoming older practitioners) reminisce about "how it once was" (suggestive that it is the new attorneys who are to blame); newer attorneys come to me expressing frustration and their feeling that they are powerless to combat the offensive practitioner.

In my years of practice, I have had the good fortune of dealing with some very reputable

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The San Fernando Valley Bar Association and the *San Fernando Valley Business Journal* will be a co-hosting a reception in April that will recognize the top 25 attorneys in the San Fernando Valley.

To help with the identification of those lawyers who should be considered, the Bar and the Business Journal are asking for your help. If you know a Valley lawyer who should be recognized for his or her contributions to the law and our community, please submit your nominations for consideration to San Fernando Valley Business Journal Associate Publisher Pegi Matsuda via email to pmatsuda@sfvbj.com or call (818) 676-1750.

Further information regarding the event will be included in next month's Bar Notes.

THE SEARCH FOR ...

BY SCOTT R. ERVIN AND WILLIAM SCHREIBER

Scott Ervin and William Schreiber are Certified Public Accountants with the Sherman Oaks Accountancy Firm of Krycler, Ervin, Schreiber & Walheim. To comment about the article, email scott@kesw.org.

As we enter the holiday season, our thoughts this year turn to anthrax, security, and the search for OBL (you know who that is). Now that we've got your attention, this article is not about governmental headaches, but those, which your business practice may cause you, and finding acceptable alternatives other than massive doses of codeine to lessen their effect.

Do you keep your books and records on the computer or are you still in the dark ages, with hand records or, worse yet, the old shoebox method? Is your financial information at your fingertips, available at the touch of a few buttons? If it isn't, it could be and should be. Even if your practice is easily monitored by a quick call to your bank to check the current balance, you can benefit from computerizing your records. If for no other reason than saving money at yearend when it's time to provide your tax preparer with information, you should consider the simple to use software available today.

One of the more simple programs to operate is *Quickbooks*®. It is ninety-nine percent true that if you can write a check and make out a deposit slip, you will be qualified on the *Quickbooks* program. *Quickbooks* can generate listings of what is in your trust account (as well as help comply with trust accounting rules), what bills you need to pay, what you regular checking account looks like, and if you feel adventurous, can even do your payroll, eliminating certain bank or data processing fees. We generally recommend doing payroll by yourself for only the most confident and detail oriented clients as there are numerous pitfalls, which quickly make those data processing fees look cheap by comparison.

Quickbooks can track your time on any particular engagement and does the billing on your specially designed invoices, or renders statements. It can also generate detail accounts receivable registers to enable you to follow up on collections. This is certainly not the only program there is on the market, but it is one of the easiest, and it's the one that we recommend most to our clients.

Other entry-level programs in the marketplace include *Peachtree*, *M.Y.O.B.*, *Great Plains*, *One Write Plus*, and *Oracle Small Business*, among others. Of course there are more accounting programs for mid-range and high-end users with large software budgets. You can also have a system tailored directly for your practice (at an even higher price).

If you are currently using a "stand alone" time and billing (TB) program that you simply cannot do without, there is a solution. It is very common to use one program to track time and bill your clients, and keep the "Company Books" on a separate general ledger (GL). As a service business, you probably file your tax returns on a "cash basis" which ignores the income for which you have billed but not collected (Accounts Receivable). You can simply record actual collections in your general ledger program (without duplicating individual client detail already in your TB program) along with actual payments for expenses and you're done. There should be some measure of reconciliation between data entered to your TB program and data entered to your GL, but that would be minimal.

With the advent of user friendly accounting programs that cater to smaller businesses yet retain the ability to access data with the click of a few buttons, more and more of our clients are keeping their own financial information in-house. If you're not satisfied with your current situation, contact your accounting professional and inquire as to the alternatives that will suit your practice and your budget.

Employers' Obligations to Employees Called to Service By the President[1]

BY EVERETT F. MEINERS AND JEFFREY A. MERRIAM-REHWALD

Everett F. Meiners and Jeffrey A. Merriam-Rehwald practice Labor and Employment Law with Parker Milliken Clark O'Hara & Samuelian, Los Angeles. They are contributing authors to *Advising California Employers* published by CEB.

The United Services Employment and Reemployment Rights Act of 1994 (USERRA or the "Act," 38 U.S.C. §4301 et seq.) provides the legal basis for the obligations of employers to those employees called to duty by President Bush to fight terrorism.

Following the Gulf war, USERRA was adopted to coordinate and expand the rights of employees to serve their country and return to their jobs without interruption of their job rights. USERRA applies to every employer, from small businesses with only one employee to multi-national conglomerates with hundreds of thousands of employees. Thus it is critical that all employers be aware of their obligations to employees called to duty and the rights guaranteed to employees upon their return from service.

While there are specific provisions in the Act relating to nondiscrimination in hiring and firing based on the employee's membership in the uniformed services and reemployment rights for employees of federal and state agencies, such issues, as well as the enforcement and investigation procedures under the Act, are beyond the scope of this article. In addition, this article will only address issues raised when the employee leaves for military service.

California has enacted parallel, and for the most part overlapping, protections at California Military and Veterans Code §§394 et seq, which will be noted where they provide greater protections to employees than USERRA. The California Legislature enacted special provisions in response to the Gulf War and to the Bosnian Crisis (Mil. & Vet. Code §§395.07, 395.08, 399.5), so it is likely that they will enact additional provisions in the future relating to the current situation. The California statutes also include additional protections for government employees.

What employees are covered by the Act?

The Act covers all members of the "uniformed services," which, for the purposes of the Act, consist of: Army & Army Reserve; Navy & Naval Reserve; Marine Corps & Marine Corps Reserve; Air Force & Air Force Reserve; Coast Guard & Coast Guard Reserve; Air & Army National Guard; Commissioned Corps of the Public Health Services; and any other category of persons so designated by the President in Time of War or Emergency. §4303(16).

The Act covers both current members of the uniformed services and those that enlist in the future. §4303(13). The Act only covers current full-time employees. Under USERRA, there is an exclusion from re-employment obligations to employees whose employment is for a "brief, nonrecurrent period [where] there is no expectation that such employment will continue indefinitely or for a significant period." §4312(d)(1)(3). However, California protects the temporary employment of California National Guard members. Mil. & Vet. Code §395.06(b).

In order to be eligible for the protections under the Act, the employee must separate from service under honorable conditions. §4304. The Act does not protect employees who separated from service with a dishonorable or bad conduct discharge, whose discharges involved court martial, discharge by reason of imprisonment by civilian courts, or any other separation on "other than honorable conditions." Id.

What leaves are covered by the Act?

Employers are legally obligated to provide time off to employees who leave for active duty, training for active duty, inactive duty, full time National Guard Duty, for an examination to determine fitness for such duty, or to perform funeral honors duty. §4303(13).

The Act guarantees employees certain rights to return to their employment so long as the employee's total military obligation does not exceed five years. The five-year period is cumulative and therefore includes past, present, and future periods which the employee takes off for such duties while employed by his or her current employer. §4312(c). However, some types of service are not counted towards the 5-year period, including:

- Any additional time that is required to complete an initial period of obligated service;
- If the employee cannot obtain a release within the five-year period through no fault of the employee;
- If the employee is involuntarily retained beyond his or her original discharge date;
- Any time an employee who is a member of the Reserves or National Guard has regularly scheduled training; and
- If the employee is ordered to or retained on active duty because a war or national emergency is declared by the President or the Congress. §4312(c)

It is likely that the current situation falls within the exception for involuntary calls to service in time of war or national emergency. California provides an unlimited leave period for California National Guardmembers called to active duty. Mil.& Vet. Code §395.06(a).

An employee must be allowed to leave work prior to the beginning of service "in order to travel to the duty location and arrive fit to perform military service." ASVET Memo. 5-99. Thus the time for the commencement of the term will be determined on a case-by-case basis.

What must employees do when they leave for service?

Employees must give advance written or verbal notice to their employers of the necessity for such a leave, §4312(a)(1), unless such notice is impossible or unreasonable given military necessity or the relevant circumstances. §4312(b).

An employee may request that any unused vacation, annual, or similar leave and any accrued pay be utilized at the beginning of his or her leave prior to the start of the absence by reason of service in the uniformed services under the Act. §4316(d). If the employee requests such benefits, the five-year period does not begin until the exhaustion of such benefits. Employers are prohibited from requiring an employee to use such accrued time.

What is the status of an employee who leaves for service?

When an employee is absent due to service in the uniformed services, the

employer must treat such an employee as being on a furlough or leave of absence from his or her employment. §4316(b)(1)(A). Therefore, the employee should be placed in some type of military leave status and the employee's file should not reflect that employment has been terminated. §4311. While the Act refers to an "application for re-employment" when the employee returns, no inference should be drawn that the law contemplates a break in the employment relationship. The "application" contemplated is simply the process of notifying the employer that the employee is ready to return to work and the employer determining what position the employee is entitled to be reinstated to as determined under the Act.

When an employee gives notice of the need for a leave, it is also deemed to be notice of the employee's intent to return to such employment. §4316(e)(2). If during service the employee "knowingly" notifies the employer in a clear writing that he has no intent of returning to work for the employer, the employer may stop providing the rights and benefits under the Act. §4316(b)(2)(A). For the notice to be "knowingly" the employee must be aware of the specific rights and benefits which will be lost by making such a communication. §4316(b)(2)(B). The employer has the burden of proving that the employee made such a communication if the denial of rights is challenged by the employee. §4316(b)(2)(B).

What Health Benefits must employers provide to employees?

If the employee was covered by any health plan in connection with his or her employment, the plan must provide for the continuation of coverage for the employee (and the employee's dependents who were also covered by such plan) following the beginning of the employee's service in the uniformed services for the lesser of 18 months or the term of service. §4317(a)(1). The employer may require the employee to pay up to 102% of the employer's cost for such benefits, unless the term of such service is for less than 31 days in which case the employee may be required to pay only the normal employee share of such coverage. §4317(a)(2). When the employee returns to work for the employer, the health plan may not impose an additional exclusion or waiting period for the employee or the employee's dependents covered under such a plan that would not have been imposed if the employee had not been in the uniformed services. §4317(b)(1). In addition there are specific rules which apply to multi-employer health plans which are not discussed in this article.

Are employees entitled to vacation benefits while they are on leave?

While the employee is on leave the Act does not require the accrual of vacation benefits. The United States Supreme Court held that since vacation benefits are more in the nature of short-term compensation for work performed, they are not a perquisite of seniority and therefore not within the coverage of the Act. *Foster v. Dravo Corp.*, 420 U.S. 92 (1975). However, after an employee returns to work, employers must credit as time employed with the employer the term of service for purposes of entitlement to vacation benefits. Therefore if the employee's number of vacation days is dependent on the length of service with the employer, the employer must include the employee's time on military leave as normal employment time in computing such future vacation benefits.

What, if any, additional job security do employees have after they return from service?

When an employee returns to work after a term of service, the Act provides greater job protection if the employee is normally classified as an "at-will" employee. The employee's service with the employer may be terminated only "for cause" for one year after returning from military service lasting more than 180 days. §4316(c)(1), Mil. & Vet. Code §395.06. If the term of service was more than 30 days but less than 181 days then the "for cause" job protection lasts for 180 days. §4316(c)(2). If the term of service was 30 days or less, the employee has no additional job protection.

Additional Concerns for Employers.

Employers should be aware that the Act imposes additional requirements on employers when employees return from military service which are not discussed in this article. As just one example, the Act requires employers to make up contributions to the employee's pension account as if the employee had not been absent.

Where else can an employer go to get advice on the Act?

For employers with specific questions there are a number of governmental resources that can be consulted. The Department of Labor has an on-line advisor in question and answer format: www.elaws.dol.gov/userra/wren/page2.htm. The Veterans' Employment and Training Service (VETS) is the federal agency charged with enforcement of the Act. In Southern California (Santa Monica) the VETS representative is Michael Beadle who can be reached at (310) 576-6444 or mbeadle@dol.gov. In Northern California the VETS representative is John Giannelli who can be reached at (916) 657-0763. In addition there is a Non-Technical Resource Guide to USERRA with general guidance available online: *www.dol.gov/dol/vets/public/whatsnew/uguide.pdf*. In addition the Employer Support of the Guard and Reserve maintains a web site with additional resources at *www.esgr.org*.

[1] This article was first published in the Case n' Point newsletter on the website for Continuing Education of the Bar, California. See http//ceb.com. An extended version of this article appears in the January, 2002 edition of the California Business Law Reporter, published by Continuing Education of the Bar - California.

"President's Message" continued from page 3

attorneys, over and over again. What I have learned is that these attorneys are straightforward in their personality and about their cases. They are confident but not arrogant. They are cooperative and don't view this in terms of "weakness". What I have also learned is that reputable attorneys, for the most part, beget more reputable attorneys. They tend to associate with reputable attorneys and also educate their associates to behave in the same manner.

So who are these offenders that we all talk about, try and stay away from, but once in a while must deal with? I am certainly not without stories about these offenders, despite my good fortune of dealing with some very fine people. This Message will not blame "their parents" - this has nothing to do with their parents, their law professors, the pressures they have in their offices or with their finances or families. I think that the root cause is their failure to remember that unique feeling that we all felt when we were sworn in as attorneys - that public declaration, oath, pledge, and commitment.

By now, the offenders, even if they started to read this Message, have moved on to other things. Perhaps I can be so bold as to "stereotype" these offenders: there is a good chance that they don't even belong to a bar association, they have little respect for the profession, they are not generally inclined to give back to the profession and perpetuate its high standards, but rather, practicing law is simply a vehicle for money - nothing more. It is a job. At the end of the day, they are not worried about their reputation, but rather, only their bank account. In the context of a bar association, we answer to each other because we belong to the same community.

But in the end, reputation is everything. To quote a morning radio-editorialist (one time bar exam educator and now ethicist) - "character counts".

How do we get a handle on these offenders, correcting their attitude and behavior? I have a plan and it goes like this:

1. As a good attorney, you must never lower yourself to their level. Never. We must individually renew our commitment to the honor and integrity of our profession. We inspire each other by our efforts to do what is right. Take pride that we are the key players in the best dispute resolution process that has ever devised. Past President David Gurnick wrote that "[O]ur actions are subject to higher scrutiny because we hold ourselves to a higher standard of integrity, intellectual challenge and all other aspects of our performance." (Valley Lawyer, Vol. 1, No. 5, Jan/Feb. 1994) Yes, each one of us can make a positive difference.

2. Don't be hesitant to share your experience at bar association meetings, with other attorneys, etc., (publicize the offender's offenses, this is how lawyers learn about what is and is not acceptable behavior).

3. Judicial Officers should admonish poor behavior and conduct - it is not enough to say "work it out amongst yourselves".

As lawyers, our impression of our profession is fundamental to our evaluation of whether we have contributed to society. While the public may view us based on wins and losses, and how we are portrayed on television and written about in the press, are you satisfied that you have not demeaned the profession? We cannot rely on the press or Hollywood to remedy the disputes within our profession, or, portray us, as we would like to be. We must look at ourselves in the mirror, commit ourselves to that resolution, and measure our success by the eradication of unprofessional conduct. No, we will never be entirely rid of attorneys who conduct themselves in an unprofessional manner. But those that I admire most and hold dear, remember that moment, after years of work, of being asked to raise their hand and take an oath to practice law - I renew my resolution to practice well and enhance our profession.

Years ago I worked for a public interest law firm. Our offices were on the second floor of a warehouse. The offices were dreary and dark and the cash flow was more dehydrated than flowing. Most of the time was spent in a long and wide hallway where the three lawyers and one economist on staff discussed case strategies while tossing a foose ball up and down the corridor. We spent hours of thinking out loud and crafting devil's advocate arguments to test our strategies. In that warped floor hallway, I experienced learning through listening and discovered others' experiences do provide lessons for you. Finally, I came to recognize that continuing legal education is a benefit and not a burden. It can also improve your slider.

This month we will hold our annual MCLE Marathon. This is an excellent way for panel members to obtain their required hours, but also to discuss current legal issues and cases with peers who can offer new strategies and perspectives. LRIS staff will attend portions of these sessions in order to further hone our skills.

LRIS staff works hard at effectively screening calls. We know the importance of sending callers to the right LRIS panel based on the caller's legal issue. In order to be effective in call screening, the staff studies manuals that outline various areas of the law and pose sample questions. Recently these manuals were updated with some additional information obtained at the recent ABA/LRIS conference. Many of you have provided mini-CLE lectures to the staff when we call with unique questions. Others have given lunch and learn presentations to the staff about current issues and answered staff questions. The staff learns so much from the panel members and we do appreciate the time you take to keep us informed and effectively do our job. Not only does the training increase our effectiveness, it also makes our job more rewarding. Discussing challenging legal issues and referral cases builds our skills and increases our sense of the value of the work we do.

We would like to have at least one lunch and learn program for LRIS each quarter. Please call me if you would be willing to present a program in any area of practice. We will benefit from your experience and you will receive lunch. For old times sake, I will provide the foose ball.

SAN FERNANDO VALLEY BAR
Association

Invites You to Attend Our Annual

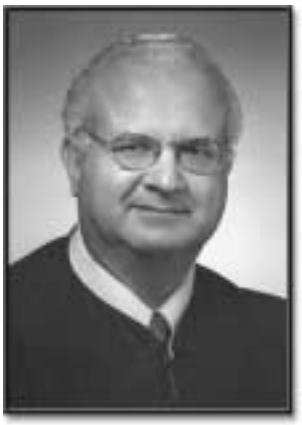
JUDGES' NIGHT

Judge Howard Schwab
Los Angeles Superior Court, North Valley District
2002 SFVBA Judge of the Year

Thursday, February 21, 2002
Warner Center Marriott
21850 Oxnard Street
Woodland Hills

5:30pm Reception
6:30pm Dinner & Program

Special Recognition to
Judge John Gunn and
Commissioner Manly Calof
on their retirements from the
Los Angeles Superior Court



Associate Justice Carlos Moreno
Supreme Court of California
Guest Speaker

Please return with payment by **February 15** to:
SFVBA, 21300 Oxnard Street, Suite 250, Woodland Hills, CA 91367 • FAX (818) 227-0499
For additional information call (818) 227-0490, x105.

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Credit Card #: _____ Exp. Date: _____

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Please reserve

____ ticket(s) at $55 each

____ table(s) at $550 each*

*Please allow two seats for judicial officers. Attach a list of names of your guests.

What's Happening to the "Case Within a Case" in California

BY PHILLIP FELDMAN

Phillip Feldman , BS, MBA, JD, is a consultant and attorney. To comment about this article, Mr. Feldman can be reached at (818) 986-9890.

To prevail in a legal malpractice matter, BAJI 6.37.5 requires proof that proper handling of the prior lawsuit would have resulted in a collectible judgment or successful defense. BAJI cites Marshak v Ballestros (1999) 72 CA 4th 1514 for the proposition that if the malpractice is based on a negligent settlement, the plaintiff must either prove that he would have had a better settlement or a more favorable judgment. Plaintiffs need to prove they would have obtained a better result but for the attorney's malpractice. The "case within a case" is just another way of expressing the elements of legal and actual cause for the tort of lawyer's professional negligence.

In Viner v Sweet 112 Cal Rptr 2d 426, 2001 Daily Journal DAR 10491 (9/28/01) the Second District distinguished Marshak in a professional negligence matter involving bad business advice and poor contract negotiation. Viner held that plaintiffs are not required to prove they could have obtained a better deal but for their lawyer's negligence because California State Automobile Assn. v Parichan (2000) 84 Cal App 4th 702 concluded that transactional malpractice cases call for a less structured approach to proof of causation and damages, and a business deal doesn't have a single winner but a lot of inter-dependent relations. The court felt that speculation was less likely in transactional matters than litigation.

Restatement of the Law Third - The Law Governing Lawyers (ALI) has a separate chapter for "representing clients in litigation" which deals only with standard of care and conduct issues and not causation. Professor Geoffrey Hazard ("The Law of Lawyering" et al.) has noted differing standard of care/conduct issues but no causation distinction. "Causation and Damages" are succinctly stated in the Restatement as: "A Lawyer is liable (for professional negligence or breach of fiduciary duty) only if the lawyer's breach of a duty of care or breach of fiduciary duty was a legal cause of an injury, as determined under generally applicable principles of causation and damages." (Vol. I, p. 389)

Legal Malpractice 5th Edition, Mallen & Smith has expansive coverage on litigation attorneys but notes that the rules governing causation are discussed in a section covering causation for all legal malpractice matters. (Vol 4, p. 422). They note that "If causation is analyzed as causation-in-fact, 'but for', then the client must prove that but for the lawyer's error, there should have been a better result. If the legal causation, that being a substantial factor or proximate cause, controls, then negligence that is a contributing cause can result in liability." (Vol 4, p. 425). The 2001 supplement notes that Parichan (supra) "carved out an exception for what is called 'transactional' malpractice."

Galanek v Wismar (1999) 68 Cal App 4th 1417 had previously held that where the negligent attorney's conduct makes it impossible for plaintiff to prove causation, the burden of persuasion shifts to the negligent lawyer. Ohio is the only jurisdiction whose Supreme Court has abandoned the "trial within a trial" test based on unfairness of a lawyer's exculpation where legal negligence causes evidentiary dissipation. Vahila v Hall (1997) 77 Ohio St. 3d 421, 674 N.E. 2d 1164. The analysis of spoliation and time lapse matters doesn't turn on the litigation versus transactional rubric, but on equitable considerations.

Attempts to distinguish "transactions" gets fuzzy when the underlying matter is a dissolution of a marriage or business relationship, probate, corporate or securities litigation, etc. Many representations involve both transactional and litigation aspects. Since reasonable trial lawyers usually attempt negotiation and mediation before filing actions, the "cross-over" between the "transactional lawyer" and the "litigator" is sufficiently muddled to preclude its use in determining plaintiff's burden of proof on causation in legal malpractice.

Many lawyers do not really understand the difference between "direct" causation (the "set stage") and convoluted patterns introducing independent supervening forces. Some California lawyers are still using "proximate cause" in malpractice jury trials instead of legal cause. Some trial judges still use "causation" as a means to implement equity or social policy. Bench and bar both forget that legal malpractice is only the negligence of one who happens to be an attorney.

As long as causation is a question of fact there will always be complex factual patterns in torts (Ingham v Luxor Cab Co. 2001 DJ Dar 12123 (10/01) citing Palsgraf v. Long Island Railroad Co. (1928) 248 N.Y. 339) as well as transactions. Complexity and time consumption are invalid reasons to alter burdens of proof. A plaintiff who would not have been able to prove a better transactional result with a better lawyer ought not get a "free lunch" against the lawyer whose conduct had no effect at all. Judicial speculation on where the speculation vs. evidentiary "line" ought be drawn, in all cases, for all time is neither workable nor sound.

In the absence of certainty, predictability and reliability, few errors and omissions underwriters would suggest doing business in California. Unless the plaintiff's bar wishes to see a "LICRA" (Lawyer's Emergency Reform Act), they would be well advised to join the defense bar and objective analysts in getting Viner de-published or overruled.

The San Fernando Valley Bar Association joined the Los Angeles County Bar Association and other California bar associations in filing an amicus letter asking the California Supreme Court to accept review of the Court of Appeal's decision in Viner v. Sweet and, if review is accepted, to overrule the decision's holdings regarding causation requirements in "transactional" malpractice cases.

The SFVBA Legislation Committee reviews and makes recommendations on legislation, court decisions and voter initiatives that affect the practice of law. Members interested in participating in this nonpartisan committee should contact Chair Steve Holzer by email at *sholzer@pmcos.com* or call (213) 683-6671.

THE PRACTICE

a series of essays on practice of law and life

On New Year's Resolutions

BY DAVID R. HAGEN

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.

January is a great time of year for me. It is filled with hope and high expectations for the coming year. My business plan has been completed and I can begin to start accomplishing some of the milestones that I have set for the first part of the year. (What, you don't have a business plan for this year done? Take a day out of the office and get one! Don't let a whole year of your professional life happen by "accident.")

January is also an exciting time because it is when many of us make New Year's resolutions. In the exhaustion of the holiday season, we have taken stock and put together a list of things we want to do in the new year. I know I have done this for many years. Yet many of these resolutions never seem to get done. Why is this? We almost laugh at them not getting done. I cannot tell you how many times I have resolved to get back into shape, leave the office everyday at 5pm, or plan more time for vacation. These things never seem to get done in the crush of a busy law practice.

I think one of the reasons these things don't get done is that the resolutions are all things to do, not things to be. Very few of us need more things to do. They just get lost. But I think that if you have a resolution to be something, it is more real and has a better chance of getting accomplished.

One of my resolutions is to be more like the person idealized by the Optimist Creed. I don't belong to Optimists International, yet a number of years ago I walked into an attorney's office and found a copy of the creed sitting on his desk. I found the words so positive that I immediately requested a copy and have kept it on my desk ever since. I look at this often, yet I plan to look at it more often this year. It is not a resolution of things to do, it is a resolution on more of what I plan to be. I think so much of this creed that I thought that this month I would share it with you.

PROMISE YOURSELF

Promise yourself --
To be so strong that nothing can disturb your peace of mind.
To talk health, happiness and prosperity to every person you meet.
To make all your friends feel that there is something in them.
To look at the sunny side of everything and to make your optimism come true.
To think only of the best, to work only for the best, and expect only the best.
To be just as enthusiastic about the success of others as you are about your own.
To forget the mistakes of the past and press on the greater achievements of the future.
To wear a cheerful countenance at all times and give every living creature a smile.
To give so much time to the improvement of yourself you have no time to criticize others.
To be too large for worry, too noble for anger, too strong for fear and too happy to permit the presence of trouble.

What are your resolutions this year, both personal and professional? Are they what you want to do, or what do you want to be?

A Road to a Successful Mediation

BY HON. BRUCE J. SOTTILE, RET.

Bruce Sottile is retired from the Los Angeles Superior Court, after serving seventeen years on the bench. Judge Sottile is a private neutral with Alternative Resolution Centers (ARC), where he specializes in complex litigation of all types.

Alternative Dispute Resolution or ADR is not by any means a new or novel concept. In fact it has been around for centuries. It is a historical fact that some Asian cultures have employed constructive dispute resolution techniques which resemble our present day mediation process.

In order to have a better appreciation of the value of mediation, a comparison between the characteristics of the adjudication process versus the mediation process may be helpful. An essential aspect of mediation is that the process is informal as compared to the formalities of a court trial or a trial by jury. The decisions and agreements in a mediation process are arrived at and created by the parties themselves whereas in an adjudication process, decisions are subject to appeals while an agreement reached in mediation by the parties is final. The rules for how the mediation process shall proceed are the guidelines set forth by the mediator as compared to the rules of evidence and discovery statutes which must be complied with in a judicial proceeding. In a mediation the parties are afforded the opportunity to present their interest and needs. In a court of law the parties are required to present proof and arguments in order to prevail in a formal judicial setting. The resolution of disputes under the judicial system requires more resources in terms of time and money.

For example, a case may take as long as months or years before even getting to trial. While in contrast to a trial, mediation and resolution of a matter is obtained in a much shorter time frame. The human effort and stress in preparing for trial, versus mediation are far greater and onerous. The private process of mediation virtually guaranties confidentiality as opposed to the public process of the court system. Finally, experience has shown that in certain types of cases, the relationship between the parties is preserved or even improved whereas through adjudication, the relationship is lost forever or not improved in any respect. This is particularly true in family business dispute matters.

Mediation Techniques

A technique found to be effective for a successful mediation, is for the mediator to commence the proceeding by introducing himself and giving a brief description of his experience and qualifications. The respective parties, attorneys and other representatives should then be introduced. The participants should be told that mediation is an informal proceeding and its success or failure depends on the participation of the parties in resolving their own dispute. It should be noted that the matter will proceed in a relaxed atmosphere, and that the parties are free to leave at any time. The mere fact that the parties and attorneys are present indicates their willingness to settle; in fact there is an excellent chance that their dispute will be resolved.

In most instances, the parties have never attended a mediation and should be told that mediation is a non-binding proceeding. However, if a resolution is reached and reduced to writing, signed by the parties, the agreement can be enforced in a court of law. (CCP 664.6). It is of the utmost importance to explain to the participants that mediation is a confidential process. The mediator is bound not to disclose information relayed to him in confidence without the express authorization of the participants.

The Role of the Mediator

The exact role of the mediator should be explained to all the participants. They should be informed that a mediator is a neutral, that their role is not to render advice, and that the mediator has absolutely no interest in the outcome. The parties should be advised that the mediator's function is to manage the process of resolving the dispute. The true function of a mediator is to assist in facilitating communication. It should be noted that attorneys sometimes prefer a retired judge to conduct the mediation since the attorneys often solicit input from the judge concerning the merit of their case. When this occurs the role of a true mediator changes. The mediator in effect is asked to become an evaluator and to weigh the strengths and weaknesses of the respective parties position. When both sides make such a request, they are calling upon the mediator to render his opinion as to the outcome or value of the case based on the judge's background and experience.

Some of the elements a retired judge is frequently asked to consider are: the nature of the case, the forum in which it is scheduled to be tried, the judge to whom it is assigned, the experience and qualification of the attorneys, impressions the parties to the action will make on the trier of fact, the vulnerability of the case to affirmative defenses, and other issues that may effect the outcome of the case. The process then becomes expanded to include some of the features of a traditional settlement conference as opposed to a mediation. The versatility and experience of a retired judge may be a key factor in selecting the mediator. The involvement of a retired judge may also assist the attorneys by giving the parties an opportunity to interact, vent their concerns and feelings, and actually put their case before someone who is vested with the title of a "judge", albeit a retired one, who is simply acting to effectuate the mediation. The retired judge's stature may also assist counsel in communicating with, and ultimately persuading, their client to see their case realistically, ultimately leading to settlement.

The Benefits of Mediation

It is important that the parties be informed of the benefits of resolving their dispute through mediation. The parties must be informed that mediation is a time saving procedure as compared to litigation, and that cost savings are significant. The parties should be reminded that the outcome of any litigation is always a risk no matter how confident they may feel about winning their case.

Emphasis must be placed on the finality of an agreed upon resolution. Of major importance is the fact that ultimately it will be the parties own solution. The attorneys must realize that mediation is a team effort and that a resolution to their clients dispute can best be achieved by the parties participating in a dialogue concerning the issues in the case. What must be emphasized is the fact that the more participation through discussion that occurs in a mediation the more likely a resolution will be achieved.

continued on page 20

Applications For Admission

THE FOLLOWING JOINED THE SFVBA IN NOVEMBER:

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Property, Trademark

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dmwohl@earthlink.net
Corporate

Letters To The Editor

Dear Colleagues:

Please excuse my delay in thanking you for sending me the *Lawyers of the Valley* video commemorating your 75th Anniversary. It was most enjoyable to see old friends like Al Ghirardelli, Kevin Lynch and most especially Harry Pregerson, whom I momentarily mistook for John Wayne! I was a member of your association from 1949 to 1975, when I was appointed to the Superior Court bench; so many of the background incidents were familiar to me. The video was certainly most professionally produced, and I am very grateful for the copy you sent me. Thanks very much for your kindness.

Please send my greetings to all those currently among your membership, and all my best wishes to you for the continued success of your fine organization.

HON. PHILIP F. JONES, RET.
Superior Court of Los Angeles County
SFVBA President, 1964

Notice To Attorneys

Los Angeles Superior Court Notice to Attorneys Re: Class Action Cases

Effective December 1, 2001, the assignment of class action cases will change. All new class action filings shall be filed in the Central District and assigned to Department 309 at the Central Civil West Courthouse (CCW) located at 600 South Commonwealth Avenue, Los Angeles. Department 309 will determine if a class action case is complex under CRC 1800. Complex class action cases will be randomly reassigned to one of the complex litigation departments in CCW for all proceedings connected with the case. Non-complex class action cases will be randomly reassigned to one of the Individual Calendar (IC) departments at the County Courthouse located at 111 North Hill Street, Los Angeles, for all proceedings connected with the case.

Local Rule 15.1 will be changed to reflect these reassignments.

United States Bankruptcy Court Public Notice Re: Amended Bankruptcy Forms

The Judicial Conference of the United States has approved amendments to the Voluntary Petition and requirements for a Chapter 11 Order Confirming Plan effective December 1, 2001.

Voluntary Petition

Official Form 1, Voluntary Petition, has been amended to require the debtor to disclose whether the debtor owns or has possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety. If any such property exists, the debtor must complete and attach Exhibit C, describing the property, its location and the potential danger it poses. Exhibit C will alert the United States Trustee and any person selected as trustee that immediate precautionary action may be necessary.

It is mandatory that the amended Voluntary Petition and Exhibit C be used beginning December 1, 2001. These two documents are part of the Court's Petition Filing Package and may be downloaded at no charge from the Court's website at www.cacb.uscourts.gov. These documents may also be purchased from the on-site copy service located in all Central District Divisional Offices.

Order Confirming a Plan

The requirements for the Order Confirming a Plan (Chapter 11) were amended to conform to amendments to Rule 3020 of the Federal Rules of Bankruptcy Procedure. Those amendments will require that, if the plan provides for an injunction against conduct not otherwise enjoined under the Bankruptcy Code, the order of confirmation shall describe in reasonable detail all acts enjoined, be specific regarding the injunctions and identify the entities subject to the injunction. Please see Rule 3020 of the Federal Rules of Bankruptcy Procedure for these amended requirements.

"Mediation" continued from page 16

Importance of Dialogue

One mechanism most commonly used to get communication started is for the mediator to give each side an opportunity to be heard. Usually the mediator has been provided a brief by the attorneys and has a general understanding of the issues. However, by having each side relate to the mediator their respective positions, the parties acquire a sense "that they have had their day in court." It gives that party the feeling that they have been heard by telling their story in their own words or through their attorney. The parties then have been given the opportunity to vent or air their true feelings in front of a neutral person. If the attorneys prefer to speak on behalf of their client, the client should be given the opportunity to add their comments if they so choose. The mediator then can summarize each side's position, isolate the issues and determine whether all the issues have been disclosed.

Mediation Guidelines

Before any discussion takes place the participants should be informed by the mediator of the guidelines that they are to follow. It should be made abundantly clear that mediation is not an adversarial proceeding as compared to a trial. Some of the preferred guidelines imposed in a mediation proceeding are as follows:

- Civility must be maintained at all times during the proceeding.
- Participants are to speak one at a time.
- Caucuses will take place where each side will have an opportunity to discuss their case in private with the mediator.
- Confidentiality of any discussions with the mediator is of paramount importance.
- Formalizing the agreement in writing and having it signed by the parties will enable its enforcement in a court of law.

Pitfalls to Avoid

A major error sometimes committed by well meaning attorneys, against their client's best interest, is to over estimate the value of their client's case when coming to a mediation. This error may cause his or her client to have a totally unrealistic expectation in the outcome of the mediation. Generally, a client's attitude toward accepting something far less than his or her expectation makes resolution of the matter extremely difficult, if not impossible in some instances.

A word to the wise, remember the three "R's"; couch your demand in a way that is reasonable, realistic and reachable in light of all the circumstances of your case. Many times unrealistic demands are not considered demands at all and produce no counter offers.

Tips for a Successful Resolution

If mediation is to be successful in satisfying the needs of your client then flexibility is a necessary component to achieve a resolution. Remember the secret to a successful mediation is staying committed and maintaining a positive attitude to a settlement especially since settlement may become a painful process for your client. Settlement usually involves significant movement from each party's initial position. However, with determination and persistence together with earnest and good faith negotiations, settlement is virtually assured in a mediation process

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SAN FERNANDO VALLEY BAR ASSOCIATION & SAN FERNANDO VALLEY COLLEGE OF LAW

5TH ANNUAL MCLE MARATHON

January 10, 11 and 12, 2002

San Fernando Valley College of Law, Woodland Hills, CA

THURSDAY, JANUARY 10, 2002

❑ 9:00 a.m. - 9:55 a.m. *1 MCLE Hour Ethics*
Keeping Your Law Practice and the Client's Accounts on Track
Scott R. Ervin, CPA

❑ 10:00 a.m. – 10:55 a.m *1 MCLE Hour*
Mediating the Employment Dispute
Eugene Moscovitch, Esq., Arbitrator and Mediator

❑ 11:00 a.m. – 11:55 a.m. *1 MCLE Hour*
Alter Ego Liability
James Sigler, Esq.

LUNCH ON OWN

❑ 1:00 p.m. – 1:55 p.m. *1 MCLE Hour*
How to Determine the Community Property Interests and the Enhanced Value of a Separate Property Business
Steven Zand , Esq.

❑ 2:00 p.m. – 3:55 p.m. *2 MCLE Hours Ethics*
A Brief Refresher: Malpractice and Bar Discipline Avoidance
Fee Agreements: What the Bar Has To Say
Prof. Robert Barrett, San Fernando Valley College of Law

❑ 4:00 p.m. - 4:55 p.m. *1 MCLE Hour*
Fractional Aircraft Ownership
Patrick Bailey, Esq., Stephen Hofer, Esq. and Jay Foonberg, Esq.

❑ 5:00 p.m. – 5:55 p.m. *1 MCLE Hour*
Presenting Graphic Evidence in the Courtroom
Hon. George Schiavelli, Ret.

FRIDAY, JANUARY 11, 2002

❑ 8:30 a.m. – 9:25 a.m. *1 MCLE Hour*
Intellectual Property for All: Trademark, Trade Secret, Copyright and Patent Basics
David Gurnick, Arter & Hadden

❑ 9:30 a.m. – 11:25 a.m. *2 MCLE Hours Ethics*
Tips for the Keeping the Client Coming Back for More
Edward Poll, Esq

❑ 11:30 a.m. -12:30 p.m. *1 MCLE Hour*
Negotiate Like the Winners
Linda Bulmash, Esq., Mediator

LUNCH ON OWN

❑ 1:30 p.m. – 3:25 p.m. *2 MCLE Hours*
Update on Insurance Issues Regarding the General Practitioner
Jeffrey Diamond, Esq.

❑ 3:30 p.m. – 5:25 p.m. *2 MCLE Hours*
Legislative Update:
Recent Probate and Trust Changes
Mark Phillips, Goldfarb, Sturman & Averbach

❑ 5:30 p.m. - 6:30 p.m. *1 MCLE Hour*
Do's and Don'ts of Arbitration and Mediation
Hon. Bruce Sottile, Ret.

SATURDAY JANUARY 12, 2002

❑ 9:00 a.m. – 10:55 a.m. *2 MCLE Hours*
Family Law Update: Child and Spousal Support Refresher
Robert Holmes, Holmes & Holmes

❑ 11:00 a.m. –11:55 a.m. *1 MCLE Hour Elimination of Bias*
Elimination of Bias
Paula Daniels, Esq.

LUNCH ON OWN

❑ 1:00 p.m. – 2:55 p.m. *2 MCLE Hours*
Intellectual Property on the Internet: How Copyright, Trademark, and Patent Laws Protect Your Client's Cyber Property
Darla Anderson, Esq.

❑ 3:00 p.m. – 4:55 p.m. *2 MCLE Hours*
Update: Workers Compensation and Social Security Disability Topics
George Slotnick,Esq.

❑ 5:00 p.m. - 5:55 p.m. *1 Hour MCLE Prevention of Substance Abuse*
Identification and Treatment of Substance Abuse in the Legal Profession
Patricia Tierney, Esq., Wendy Slavkin, Esq., and Garrett O'Connor, MD

MCLE MARATHON REGISTRATION FEES (Includes written materials and refreshments.)

		Member	Non-member
❑	3-Day Seminars	$99	$399
	OR		
❑	Thurs., January 10	$35	$159
❑	Fri., January 11	$35	$159
❑	Sat., January 12	$35	$15
❑	Individual Class *(✓ Class Attending)*	$15	$30
❑	Late Registration Fee *Pre Registration deadline in Jan. 3.*	$10	$25

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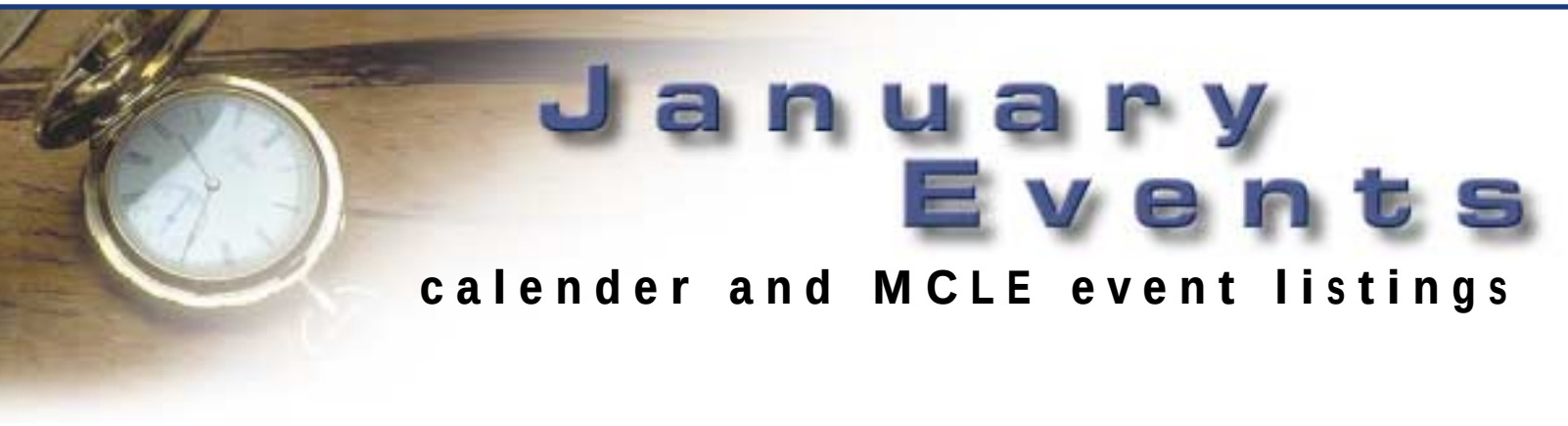
No cancellations after January 3. Reservations at the door not guaranteed.

Mail registration form and payment to SFVBA, 21300 Oxnard Street, Suite 250, Woodland Hills, CA 91367.



January Events

calender and MCLE event listings

Probate and Estate Planning Section

Topic: **Post-Mortem Trust Administration**
Speaker: Michael Antin, Esq.
Date: January 8
Time: 12:00 Noon
Place: Radisson Hotel, Sherman Oaks
Cost: $25 members prepaid; $30 at the door
$30 non-members prepaid; $35 at the door
MCLE: 1 Hour

Workers' Compensation Section

Topic: **Check out www.sfvba.org for details**
Date: January 16
Time: 12:00 Noon
Place: Encino Glen Restaurant, Encino
Cost: $25 members prepaid; $30 at the door
$30 non-members prepaid; $40 at the door
MCLE: 1 Hour

Barristers Section

Topic: **Aspects of Family Law**
Speaker: Michelle Robins, Esq. & Cari Pines, Esq.
Date: January 17
Time: 12:00 Noon
Place: SFVBA Conference Room, Woodland Hills
Cost: $15 members prepaid; $20 at the door
$20 non-members prepaid; $25 at the door
MCLE: 1 Hour

Litigation Section

Topic: **Unclear at Any Cost: Deciphering Medical Records**
How to read and understand medical charts. Interpret the signs and symbols used as short-hand in medical practice. Learn why an attorney should always get the copies of medical records ordered by opposing counsel.
Speaker: Kathy Cross, R.N.
Date: January 17
Time: 6:00 P.M.
Place: SFVBA Conference Center, 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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SEND CHECK TO **SFVBA**
21300 Oxnard St., Suite 250
Woodland Hills, CA 91367

FOR MORE INFORMATION CALL (818) 227-0490

SECTION _____
NAME _____
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Food and beverages served at every MCLE event!

* Please note that no credit will be given unless notice of cancellation is provided 48 hours before scheduled event

Intellectual Property & Internet Law Section

Topic: **Mediation and Intellectual Property**
An Advocate's approach to Mediation. Why it's not all about resolution and how a Mediator can be a negotiation asset.
Speaker: Todd Smith, Esq.
Date: January 18
Time: 12:00 Noon
Place: SFVBA Conference Center, Woodland Hills
Cost: Brown Bag Lunch!
$5 members prepaid; $10 at the door
$10 non-members prepaid; $15 at the door
MCLE: 1 Hour

Family Law Section

Topic: **Meet the Supervising Judges**
Speaker: Judge Paul Gutman and Judge William MacLaughlin
Date: January 28
Time: 5:30 p.m.
Place: Encino Glen Restaurant, Encino
Cost: $35 members prepaid; $40 at the door
$40 non-members prepaid; $45 at the door
MCLE: 1 Hour

Disaster Relief Training and Luncheon

Topic: **Operation Enduring LAMP: Legal Assistance for Military Personnel**
This attorney training provides an overview of the Soldiers' and Sailors' Civil Relief Act (SSCRA) and Uniformed Services Employment and Reemployment Rights Act (USERRA), which govern many of the issues that are paramount for the reservist being activated, e.g., notify employer of call-up, re-employment rights. This training also addresses related litigation and potential volunteer legal services needed by our active-duty reservists.
Date: January 25
Time: 12:00 noon
Place: SFVBA Conference Room, Woodland Hills
Cost: $20 members prepaid; $25 at the door
$25 non-members prepaid; $30 at the door
MCLE: 1.5 Hours

Criminal Law Section

Topic: **Update on the D.U.I. Court**
Did you know there was a D.U.I. Court? Find out more from the Commissioner who heads it.
Speaker: Commissioner Steven Sanora
Date: January 31
Time: 6:00 P.M.
Place: Sportsmen's Lodge, Studio City
Cost: $35 members prepaid; $40 at the door
$40 non-members prepaid; $45 at the door
$30 Barristers and Public Defenders prepaid
MCLE: 1 Hour

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