



BarNotes

A Publication of the
San Fernando Valley Bar Association

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FOCUS ON WORKERS COMPENSATION SECTION BIG CHANGES IN LAW AND REGULATION

The year 2005 was one of the most tumultuous years in Workers' Compensation law that many practitioners have ever known. Existing laws were revised and new ones implemented with breathtaking speed, according to SFVBA Workers' Compensation Section Chair William J. Kropach.

Workers' Compensation law requires that if an employee is injured on the job, the employer must provide workers' compensation benefits. Employee injuries can be caused by a single event at work, for example, a slip and fall, chemical burn, or car accident. Repeated exposure at work can also cause injury, including repetitive motion syndrome or hearing loss caused by constant loud noise.

"The last year and a half has seen the most dramatic changes in the workers' compensation system since it's inception over 90 years ago," Kropach, principal of Encino's Law Offices of William J. Kropach, says.

The focus of Workers' Compensation law is to provide benefits to injured workers, he says. These benefits include medical treatment, temporary or permanent disability benefits, vocational rehabilitation and death benefits.

"The Workers' Compensation Section of the San Fernando Valley Bar Association holds monthly meetings designed to help practitioners deal with the realities of this new, changing world," Kropach says.

Kropach recommends that clients consider using certified specialists to handle their workers compensation cases.

"A certified specialist is more than just an attorney who specializes in a particular area or law," Kropach explains. "A California attorney who is certified by the State Bar

must have taken and passed a written examination in Workers' Compensation law, demonstrated a high level of experience in the area, fulfilled ongoing education requirements and been favorably evaluated by other attorneys and judges."

The Section offers members guidance on understanding the Workers' Compensation process, which Kropach terms "very complicated."

"The outcome of any client's case can be seriously affected by who presents the matter," he says. "A certified specialist can explain rights and benefits, help get the medical care that the client needs and choose qualified doctors to evaluate the client's medical condition, help the client return to work or vocational rehabilitation, maximize results and provide quality representation before the Workers' Compensation Appeals Board."

Kropach says that the Section's overall goal is to continue to assist practitioners in keeping abreast of all the changes in the statutory and regulatory schemes as well as Board and Appellate decisions affecting those changes. This includes Senate Bill 46, which would allow a panel of voter-elected politicians to decide workers' compensation rates.

Section programming in 2005 included "The New Ratings Schedule," "New GAF Schedule for Rating Psychiatric Disability," "AMA Guides to the Evaluation of Permanent Impairment," "Impairment Ratings as They Affect Individual's Ability to Perform Activities of Daily Living," "Application of AMA Guides in Internal Medicine Toxicology" and "Case Law Update."

For more information on the SFVBA Workers' Compensation Section, contact the Law Offices of William J. Kropach at (818) 609-7005. ☎



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*Yale University, Magna Cum Laude, Phi Beta Kappa; Yale Law School; and
Past President, San Fernando Valley Bar Association*

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Stephen's practice will continue to emphasize environmental transactions and litigation, including contaminated property issues, hazardous materials and hazardous waste regulation, clean water issues, underground storage tank regulation, asbestos regulation, toxic mold and toxic tort issues. Stephen will also continue to practice general civil litigation and appellate advocacy.



WE ARE ALSO PLEASED TO ANNOUNCE THAT
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A DREAM REAFFIRMED

Richard A. Lewis, SFVBA President

I recently read the poems of Langston Hughes, the great African-American poet and writer. I was particularly taken with his poem, "Dream Deferred," which inspired the stage play "A Raisin in the Sun," by Lorraine Hansberry. In "Dream," Hughes, born in Joplin, Missouri on February 1, 1859, wrote

*"What happens to a dream deferred?
Does it dry up like a raisin in the sun?
Or fester like a sore - and then run?
Does it stink like rotten meat?
Or crust and sugar over - like a syrupy
sweet? Maybe it just sags like a heavy
load. Or does it explode?"*

As I read these haunting words, I thought of Dr. Martin Luther King Jr.'s

famous dream, which he detailed on August 28, 1963 at Washington, D.C.'s Lincoln Memorial. He spoke at the end of the March on Washington civil right action of his dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident, that all men (and women) are created equal." What would happen if Dr. King's dream was deferred?

However, that dream need not be deferred as long as we believe in and support the rule of law, and honor those that uphold that rule of law.

In the big-screen film "Hud," the grandfather, named Aristotle, tells his young grandson, who admires Hud, that a nation will go the way of the men it

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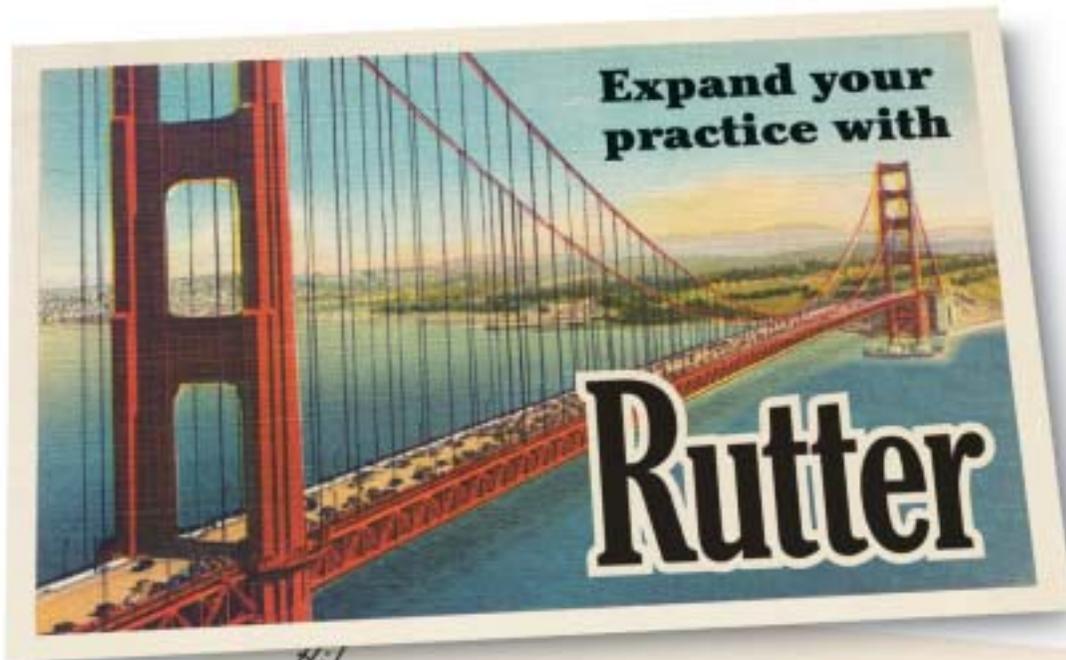
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Limited-Scope Representation: Unlimited Skills and Service

Michela C. Morley, Associate Executive Director for Public Service



One year ago, the San Fernando Valley Bar Association began its Limited Scope Representation Family Law Panel. In this one year, we have administered almost 200 limited-scope family law referrals. This commitment has earned the LRIS approximately \$10,000, with panel members earning combined fees approaching \$67,000. Most importantly, we have provided representation through limited-scope services to 200 individuals, and the courts heard well-prepared and well-argued cases. And I am proud that the Association has received no complaints from clients, attorneys or judicial and court staff (and these individuals are never reticent about notifying me of issues or concerns!).

The key to the program's success is excellent guidance and training from attorney Sue Talia. And I must praise the attorneys who were eager to try something entirely new (for many of them) and create success through their efforts.

One of the first attorneys to sign up for the Limited Scope Panel was John Goffin, in practice ten years. His current focus is family law and general litigation, and for a time he also represented a major automated teller machine company. Only a few LRIS attorneys will agree to meet with a referral when as many as three or four other panel members have declined. Goffin's response when I call is always the same: "I will be happy to meet with them." This embodies Goffin's emphasis on client service.

In his early days as a sole practitioner, Goffin experienced the usual hesitancy to turn away any potential client. But he says that he learned that to truly gauge a matter and a potential client, he must visit with and observe them. This approach carries over to the how Goffin works with LRIS referrals. To Goffin, a half-hour consultation is not too much time out of his practice; after all, any lawyer can waste 30 minutes chatting and surfing the Internet. And he views each appointment as a marketing opportunity.

When meeting a referral, Goffin sees an opportunity to acquire a sense of that person. Goffin's approach reminds me of a favorite saying of the children's' mentor Mr. Rodgers, "You can learn to love anyone, if you learn their story." Goffin also says that the face-to-face meeting helps him and the individual achieve an acceptable comfort level between them and develop an ability to work together.

Goffin learned to manage a solo practice from his father, who practiced family law in Los Angeles and the Valley, and from his mother, a legal secretary. At one point, Goffin's mother told him that an attorney threw a project on her desk with a same-day deadline. Because of this, Goffin conducts his practice with "foresight." He knows that unpredictable events frequently arise

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ADR Special Focus

California Supremes Find Anticipatory Jury Trial and Class Action Waivers Unenforceable



BY TIMOTHY A. LAMBIRTH AND DIANE BUCKA

Recent decisions emerging from the California Supreme Court have spoken unambiguously: Contracts containing waivers of jury trials, class actions, and provisions requiring judicial reference are not only likely unenforceable, they may even be actionable.

Class Action Waivers

On June 27, 2005, the California Supreme Court issued its decision in *Discover Bank v. Superior Court of Los Angeles (Boehr)*, 36 Cal.4th 148 (June 2005). The key issue is whether class action waivers are valid as a part of an arbitration provision within a consumer contract.

In a 4-3 decision, the court held that in most circumstances, under California law, class action waivers in consumer form contracts are unenforceable. This is so regardless of whether the consumer is being asked to

of 1:00 p.m. The cardholder filed suit on behalf of a nationwide class, as the alleged damages were quite small individually, but significant in the aggregate.

The Court reasoned that an anticipatory waiver of class-wide remedies is unfair to consumers if the effect would be to allow a large company to deprive large numbers of its customers of

small sums of money without legal recourse. If the party with superior bargaining power attempts to strong-arm large numbers of consumers out of, individually, small sums of money,

waive the right to class-wide arbitration or the right to class-action litigation. The case arose when a California credit card holder incurred late fees for payments made on the due date, but after the lender's payment cut-off hour

small sums of money without legal recourse. If the party with superior bargaining power attempts to strong-arm large numbers of consumers out of, individually, small sums of money,

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“California courts have held that mandatory judicial reference, even under the express provisions of the state's Code of Civil Procedure, is unconscionable in certain circumstances.”

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President's Message, continued from page 3

admires. Commenting on that movie, my college political philosophy professor lectured that a nation that admires Jesus (or Abraham, Mohamed or Buddha) would be radically different from a nation that admired Achilles. To paraphrase that from a legal perspective, a nation that admired Oliver Wendell Homes, Benjamin Cardozo, Learned Hand or Thurgood Marshall would be radically different from a nation that admired Sun Tzu.

We determine our national character by the people we choose to honor and admire. This is why it is extremely important that we honor our judicial officers with our Judge of the Year Award, and that we support the San Fernando Valley Bar Association's Judge's Night event.

On February 16, the Association honors Judge Kathleen Thompson of the United States Bankruptcy Court with its Judge of the Year award. The Association also honors Judges Richard Kolostian, Michael Farrell, Howard Schwab, Michael Knight, Floyd Baxter, and Meredith Taylor. Further bench honorees include Commissioners Mark Weiss and Robert Zakon, judicial officers who are leaving or have already left the bench after long and dedicated legal careers and service to the courts and the community. By honoring these judicial officers, we reaffirm our commitment to the rule of law, where we resolve our disputes through our courts of law rather than violence.

Another important reason for supporting Judge's Night is that in honoring the men and women who serve in our judiciary, we state our preference for the type of society in which we want to live. We choose a society in which we value the rule of law. We support a society in which all people are equal before the law, rather than a society ruled by the personal caprice of its leader, and where "justice" is based purely on our social position or tribal allegiance.

By holding these jurists up as symbols of the society in which we wish to live, we support and ensure that Dr. King's dream that this nation lives up to its creed, "We hold these truths to be self-evident, that all men (and women) are created equal," is not deferred. Moreover, we ensure that our nation goes the way of a Maimonides, rather than a Machiavelli. ♣

Richard Lewis can be contacted at (818) 704-0585 or rlewis@Richardlewis.com.

ADR Special Focus, continued from page 7

the waiver is deemed to be unconscionable as “unlawfully exculpatory.”

And while the Federal Arbitration Act requires the enforcement of arbitration clauses including class action waivers, the *Discover* court held that the Act does not preempt California’s unconscionability defense to the enforcement of such waivers. *Discover Bank* demonstrates that a contract that tends to favor the interests of the party with greater bargaining power will not fare well under the *Discover Bank* analysis.

In the consumer context, it is particularly problematic to retain a provision in a contract that has been held to be unenforceable. Including unconscionable or unenforceable provisions in consumer contracts in California is itself actionable under the Consumers Legal Remedies Act in the Civil Code. (Civ. Code §1751) Clients, it appears, should avoid putting their money – Big or otherwise – on arbitration clauses with “no class action” provisions.

Further complicating the class-action scenario is the recent passage of the federal Class Action Fairness Act (28 U.S.C. §1332), which will effectively channel class-action lawsuits from state courts to the federal system.

This seemingly procedural change could have far-reaching implications, as federal courts have traditionally been less sympathetic to class actions than certain state venues. The legislation would create federal jurisdiction for most class-action cases in which defendants are from

multiple states and claims exceed \$5 Million. Only when two-thirds of the plaintiffs – and the defendant’s business headquarters – are domiciled in the same state would these cases remain in state courts.

Jury Trial Waivers

Another recent California Supreme Court decision effectively invalidates pre-dispute jury trial waivers in California State Courts. *Grafton Partners v. Superior Court*, 36 Cal.4th 944 (August 2005). The Court, in refusing to enforce a jury trial waiver provision in a contract between Grafton Partners and its “Big 4” accounting firm, held that Section 631 of the California Code of Civil Procedure preserves as “inviolable” the right to a jury trial in accordance with the California Constitution. The *Grafton* Court found that Section 631 does not permit a party to waive the right to a trial by jury prior to the commencement of a lawsuit.

The Big Money bombshell here is that the unenforceability of jury trial waivers applies to all consumer contracts in California, whether or not a successful contract-of-adhesion argument is made.

A question remains as to the applicability of this decision on federal cases within California or to cases in other states. Federal policy strongly favors jury trials as an important, almost inalienable, right arising out of the Seventh Amendment.

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In *Jacob v. New York*, 315 U.S. 752 (1942), the Court stated:

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

This position was solidified by the landmark Seventh Amendment case, *Simler v. Conner*, 372 U.S. 221 (1963) and other cases that protect the right to jury trial in diversity cases, regardless of state practice. Jury trial waivers have withstood legal challenge in some federal courts, depending on the sophistication of the parties entering into the agreements, and the standards of consent (whether a waiver has been knowingly and voluntarily made). *Leasing Service Corp. v. Crane*, 804 F.2d 828 (4th Cir. 1986).

While the *Grafton* decision does not eliminate all arbitration provisions in all contracts, counsel should consider reviewing clients' contracts for jury trial waiver violation.

New contracts, or amendments to existing contracts, should at least be modified to include limiting language on jury trial waiver clauses such as "to the extent permitted by law." This could help ensure viability if courts enforce a waiver or if future legislation authorizes it specifically. Barring a comprehensive review of individual agreements, clients with consumer contracts may wish to consider notifying customers that the companies will no longer seek to enforce such provisions.

Judicial Reference

In what appears to be the final bastion of alternative dispute provisions, an exploration of the lesser known option of judicial reference, addressed under Code of Civil Procedure §638 is in order.

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Notice To Attorneys

U.S. Bankruptcy Court Central District of California Office of the Clerk Amended Public Notice Re: Depositing Rent Due Pursuant to §362(l)(1)

To deposit a rent check with the Court that is due to a landlord, pursuant to §362(l)(1)(B), the form of payment must be made as follows:

- A certified or cashier's check or money order made payable to the lessor (landlord) in the amount of rent that would be due during the 30-day period after the filing of the bankruptcy petition.
- Payment must be made at the time the bankruptcy petition is filed.
- A copy of the judgment for possession should accompany the payment.

In addition, Local Bankruptcy Rule form F 4001-1.2, when applicable, should be filed within 30 days after the filing of the debtor's petition [F 4001-1.2 is titled *Debtor's Further Certification of Cure of Monetary Default Underlying Judgment for Possession of Residential Property and Proof of Deposit (11 U.S.C. §362(l)(2))*].

Pursuant to §362(l)(5)(D) of the Code, the Clerk's Office will transmit the Payment to the lessor at the address listed on the bankruptcy petition.

Central Family Law

Commencing January 3, 2006, all cases assigned to Department 7, Commissioner Timothy Murphy, are assigned to Department 6 (Room 247), Commissioner Harvey Silberman.

All requests for Civil Harassment Restraining Orders, temporary and permanent, are assigned to Department 7 (Room 240), Commissioner Murphy. Parties are to submit requests for temporary orders in Department 8 (Room 245), to obtain a case number.

Requests for Default Trial Settings will continue to be submitted in Room 235. Default trials will be heard in Department 7, Commissioner Murphy. On the hearing date, parties are to report to the clerk in Room 235, prior to appearing in Department 7. ↗

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Members in the News

William D. Koehler was elected to the Agoura Hills City Council on November 8, 2005, and was sworn in by Los Angeles Superior Court Judge Lawrence Mira on December 5, 2005. He is a member of the Council's Affordable Housing Committee, Agoura Village Task Force, Economic Development Committee, Law Enforcement Committee, Legislative Committee, Traffic/Transportation Committee and is the Chamber of Commerce Liaison.



Encino law firm Greenberg & Bass LLP has announced that Mishawn L. Nolan has become a partner and shareholder in the firm. She joined Greenberg & Bass in 2000 as an associate and has helped build the firm's transactional, intellectual property and entertainment practices.

Nolan is a Trustee of the San Fernando Valley Bar Association.

Santa Clarita Valley attorney L. Rob Werner appeared on the entertainment news show *Access Hollywood* in December to discuss the Brad Pitt and Angelina Jolie adoption and name change matter. Werner is the immediate past president of the Santa Clarita Valley Bar Association.



Gerald E. Curry and Barbara Frankel Siegel were honored by the *San Fernando Valley Business Journal* in its December 19, 2005 issue as the Valley's Health Care Leaders. Health Care Business Volunteer Gerald E. Curry has sat on the Board of West Hills Hospital & Medical

Center for over a decade, including positions as president of the executive committee and chairman of the board of trustees.

Health Care Public Policy Advocate Barbara Siegel is Managing Attorney for the Health Consumer Center of Los Angeles County, a project of Neighborhood Legal Services. Siegel received the 2000 Public Service Award from the San Fernando Valley Bar Association.



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SMALL STEPS, BIG RESULTS

BY WILLIAM R. LIVELY, SCVBA PRESIDENT

I heard a lawyer joke over the holidays. I really didn't want to hear it, but I let myself. I was in a group of "friends," and I was just too weary to speak out. I didn't want to rock the boat and change the otherwise festive mood to one of overly earnest heaviness. I'm troubled by my behavior.

Part of my discomfort might have to do with a recent documentary on public television about the singing trio Peter, Paul & Mary and the musical "Folk Movement" of the 50's and 60's. I reminisced on my youth, the idealism of the age, the hope of a nation and the challenge of "causes." If you tell that story, you review a great amount of the history of the past 50 years, including the civil rights movement and the Vietnam War. Some of it reminds me of what we see today; some of it seems agelessly profound.

This was a time of commitment; a time when people spoke out for what they believed. It changed national policy; it changed the world. Today, we seem to have tired of such things. Today it's all about "political correctness," and we've allowed it to be co-opted, and to acquire a negative and derisive connotation. I recall when one dared not tell a pejorative joke, in even the loosest of social situations. I'm particularly concerned about how we, as lawyers, sometimes allow ourselves to hear those who would soil who we are, and what we stand for, by way of insulting jokes and anti-professional comments.

Now, I know that some of us (and perhaps most of us from time to time) don't care, or don't feel we have

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One segment showed the group singing Bob Dylan's song "Blowin' in the Wind" in front of the Washington Monument, just before Dr. Martin Luther King Jr. gave his "I Have a Dream" speech. I know of no other art form that has actually changed the course of history.

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time for such lofty goals and dreams so large. But we bent history, once. When Shakespeare's character says, "First thing, let's kill all the lawyers," he was actually afraid of us. He was afraid of what we would do to those who do wrong to the weak.

The point is, we often don't seem to do enough to foster respect for our profession. So how could we complain that others do us wrong? That's why I'm glad to see the Consumer Attorneys Association of Los Angeles aggressively portraying the profession in a positive and honorable light through television spots and other media events.

I actually have a great lawyer joke to tell you. But that will have to wait for another article. Hope to see you this month.

Remember to check out our website (at scvbar.org); or call (661) 287-3600 and ask for Stephanie to make reservations for Association events. ↗

Bill Lively can be contacted at (661) 287-3600 and wrlively@sbcglobal.net.

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Limited-Scope Representation, continued from page 5

and that he must get his known work done early, to allow time and resources for emergencies and ex-parte hearings.

I asked Goffin why he signed up for the Limited Scope Panel. He responded that his commitment has been a good experience and he has obtained new matters. He finds that the clients like the economics that limited-scope representation offers. And some limited-scope clients have hired him to provide full representation.

I think Goffin signed up because he seeks out opportunities to become a stronger attorney. He related that, several years apart, he appeared before the same judge with the same type of family-law fact situation. The second time he sensed that his legal skills were markedly improved and that he was a more skillful attorney. He felt a sense of accomplishment and satisfaction knowing that he magnified his abilities. After all, John says, "It is called the 'practice' of law."

Attorneys like John Goffin may "practice" law, but they also have a gift of intuition that produces success and professionalism. ↗

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ADR Special Focus, continued from page 10

At first blush, judicial reference is appealing. The Code of Civil Procedure expressly provides for this mechanism and still seems to accomplish much of what arbitration can accomplish:

"A referee may be appointed upon the agreement of the parties filed [with the court], or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties:

(a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision.

(b) To ascertain a fact necessary to enable the court to determine an action or proceeding."

Section 638 expressly refers to appointing a referee based on a

"written agreement or lease" that contains a provision to the effect that any controversy shall be heard by a referee. According to Code of Civil Procedure §644, the decision of a referee (often retired judges) is the equivalent of a judgment after a bench trial. On the face of it, judicial reference under Section §638 looks like a strong candidate to replace private arbitration in pre-dispute clauses in contracts in California.

Before placing all eggs in the judicial reference basket, however, consider some of this proceeding's limitations. One important caveat is that once a party files an action in court, the court must verify that a valid reference agreement exists between the parties.

Nothing in Section 638 or related sections excludes class actions or precludes the referee from hearing the class action. On the contrary, the *Discover Bank* decision supported class-wide arbitration, so long as parties in a non-adhesion contract have relatively equal bargaining power.

California courts have held that mandatory judicial reference, even under the express provisions of the state's Code of Civil Procedure, is unconscionable in certain circumstances. (CCP §1670.5) In *Pardee Construction v. Superior Court*, 100 Cal.App.4th 1081, a court of appeal held in 2002 that a mandatory pre-dispute judicial reference provision in a consumer home purchase contract was void for unconscionability.

The court objected to a perceived lack of clarity and prominence of the reference provision. The *Pardee* Court held that the provision's waiver of punitive damages and waiver of a jury trial was unconscionably one-sided.

More recently, however, a judicial referee provision was upheld by the 5th District Court of Appeal. *Trend Homes Inc. v. Superior Court* (Azperren), 131 Cal.App.4th 950 (August 2005). In evaluating the parties' relative bargaining power and the extent to which a provision is veiled, the court determined that because the terms were clearly written and contained no element of surprise, the contract was not overly one-sided.

Based on this line of decisions, the law is unclear whether the Code of Civil Procedure's judicial reference procedure is any more immune from unconscionability attacks in a consumer setting than arbitration clauses have proved to be.

These challenges notwithstanding, the process of alternative dispute resolution itself is not at risk. But blanket contract provisions requiring these methodologies seem to be in danger.

To protect clients' interests and avoid professional vulnerability, however, smart money would scour boilerplate language to steer clear of not only these waiver provisions, but any that could be perceived as unconscionable. ⚡

Santa Clarita-based Timothy A. Lambirth, of Irvine's Aldrich & Bonnefin, focuses his practice on defense of large clients in business-related matters. He can be reached at tlambirth@aldrichandbonnefin.com. Diane Bucka is a paralegal at the firm.

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Cost: \$30 members prepaid; \$35 at the door
 \$35 non-members prepaid; \$40 at the door
MCLE: 1 Hour

Workers' Compensation Section

Topic: Update
Speaker: G. Ronald Feenberg, Esq.
Date: February 15
Time: 12:00 Noon
Place: Encino Glen Restaurant, Encino
Cost: \$30 members prepaid; \$35 at the door
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MCLE: 1 Hour

Santa Clarita Valley Bar Association

Topic: Ethics Seminar
Date: February 16
Time: 6:30 p.m.
Place: Marie Callender's Restaurant
 27630 The Old Road, Valencia
Cost: \$30 pre-registration
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MCLE: 1 Hour Ethics

Intellectual Property, Entertainment and Internet Law Section

Topic: Grokster: Where Do We Go Now?
Panel: Sedgwick, Detert, Moran & Arnold LLP
Date: February 17
Time: 12:00 p.m. Lunch Included
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Probate and Estate Planning Section and Neighborhood Legal Services of LA

Topic: Medicare Part II: New Laws Regarding Prescription Drugs
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Date: February 23
Time: 12:00 p.m. Lunch Included
Place: SFVBA Conference Room, Woodland Hills
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MCLE: 2 Hours

Family Law Section

Topic: Contempt and Family Law
Panel: Commissioner Michael Convey, Commissioner Martin Gladstein and Steve Zand, Esq.
Date: February 27
Time: 5:30 p.m.
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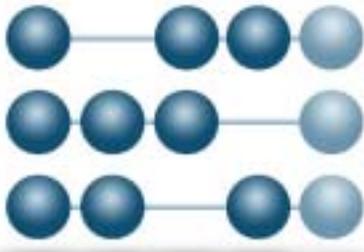
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