



# BarNotes

A Publication of the  
San Fernando Valley Bar Association

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## FEE ARBITRATION PROGRAM GOES LIVE! ASSOCIATION RULES APPROVED BY STATE BAR COMMITTEE JANUARY TRAINING PLANNED

Attorney-client fee arbitration is an important outlet for disgruntled clients as well as uncompensated counsel. And nobody knows this better than smaller firms, such as those practicing in the San Fernando Valley.

The San Fernando Valley Bar Association, recognizing the need for a local fee arbitration program, developed local rules for the program and submitted them for review by the State Bar Committee on Mandatory Fee Arbitration in the last fiscal year. The State Bar Committee calendared the project for review in September, and recently notified the Association that the program has been approved.

“This new Fee Arbitration program is a significant addition to the services we offer our members,” new Association President Patricia McCabe says. “I know that this helps attorneys

and clients equally, and I'm thrilled that the Association is leading the way.”

The Association Board of Trustees adopted the completed program rules at its October 10, 2006 meeting.

“Clients need to have this sort of outlet for their questions and concerns about their billing,” immediate Past President Richard Lewis says. “And counsel need it every bit as much so they have an organized forum in which to present their billing and service arguments to the clients and the neutrals.”

The new Rules of Procedure for Fee Arbitration will be available soon. They will be posted on the Association's website in downloadable and printable form.

“The SFVBA is leading the way in providing a well-rounded alternative dispute

*continued on page 18*



More than two hundred and thirty members and friends of the Bar attended the San Fernando Valley Bar Association's Annual Gala on September 30 at the Woodland Hills County Club to celebrate the installation of Patricia L. McCabe as the SFVBA's seventy-seventh President. McCabe and the SFVBA's officers and trustees were sworn in by Superior Court Judge Michelle Rosenblatt. The evening also recognized the accomplishments of Immediate Past President Richard A. Lewis, who presented the President's Award to Barry Harlan for his years of service to the Valley Community Legal Foundation.

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## I am Grateful

November is The Month to Give Thanks  
in Many Ways for Many Blessings

PATRICIA L. McCABE, SFVBA PRESIDENT



“Thanks,” a plural noun, is defined as grateful thoughts, gratitude, appreciation or blessing. Etymologically, the word is derived from Old English *thanc*, meaning thought or gratitude; Old High German *dank*, meaning gratitude; and Latin *tong ere*, meaning to know. November is associated with thoughts of gratitude.

Thanksgiving is synonymous with family gatherings and good food. It is a time to reflect on blessings received and to give thanks. I feel blessed by my family and friends; I am grateful that I am a lawyer; I am honored that my clients entrust me with their litigation; and I am grateful that I can help those who cannot help themselves. And November is the month in which we honor veterans. Veteran’s Day is a day to honor and thank the men and women who have served this country in times of peace and conflict. Many have served of their own volition while others have been called to duty. I, myself, have never served in the military.

I know that my experience cannot compare, but the only time in my life that is even close to military service was a three-day survival training course at a military base, under concealed supervision, which I underwent as part

of Girl Scouts. No, not regular Girl Scouts: I was a First Class senior Girl Scout, the highest honor awarded. As part of this training, we were required to live off the land, navigate by the stars and get from point A to point B in only three days. We had no equipment and no provisions. We had the clothes on our backs and our skills. It was both awful and wonderful. It gave me a sense of accomplishment to which little else compares. This was the last time, to this day, though, that I have ever been camping.

I cannot imagine carrying a 65 pound pack for 15 or 30 miles, day after day, or sleeping in fox holes or bunkers or the mud. I cannot imagine being deployed in some foreign location all the while waiting and wondering what will happen next. For the ability to do these things, and so much more, I am so grateful to those who have served my country. As a way of thanking those who have served, I represent veterans pro bono in claims before the Veteran’s Administration.

One such client is a World War II veteran, injured in a shipboard explosion. He saved two of his shipmates from the fire that resulted.

*continued on page 12*

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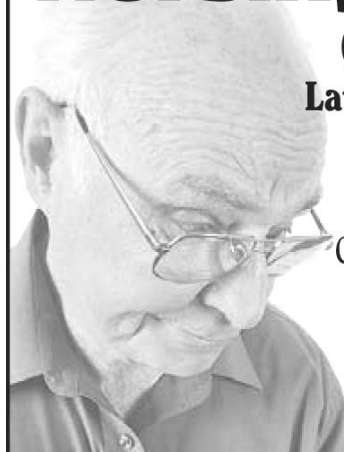
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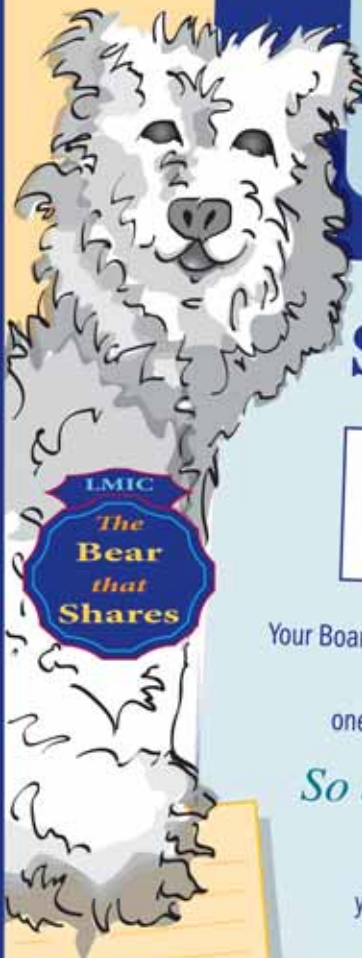
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# Be Creative! But Don't Forget the Grunt Work

MICHELE C. MORLEY, ASSOCIATE EXECUTIVE DIRECTOR FOR PUBLIC SERVICE



While the final numbers are not in, it is clear that this year, the Lawyer Referral & Information Service of the San Fernando Valley Bar Association has broken last year's percentage fee income record, meaning that the LRIS generated even more income for panel members. We know that our LRIS panel attorneys have earned combined fees of close to \$2.5 million. But what is truly significant is that the several large cases with the potential of generating millions in legal fees are still pending. The income generated this year was from important, but smaller, matters. The top percentage fee earned this year was in the range of \$40,000.

This means that we are being successful in referring the range of cases, from the bread and butter matters to the cream of the crop. The LRIS is required by the State Bar Rules to accept any attorney who applies for the program, meets our stringent requirements, and passes the personal interview.

Just today, I received an application from an attorney in practice since 1979, and one from a lawyer admitted in 2004. Attorneys are seeking LRIS membership because of the new emphasis on attorney marketing and the LRIS' reputation as an excellent referral service. Because of the number of attorneys who are applying and qualifying for the LRIS, it is essential that we continue work to provide sustainable growth in the number of referrals available to our panel members.

To further increase the number of referrals, the LRIS Committee and the Board of Trustees have approved a budget for the LRIS website. The content for the site has been selected and the design will begin soon. We

have hired a marketing company to help us accelerate and sustain our growth.

The LRIS is delivering great results, so now is the time to urgently focus on what we can do to take us to the next level of success. Continued growth requires both grunt work and creativity. Any successful project requires doers and thinkers, not just one or the other.

The LRIS is committed to treating those who contact us with respect and providing them with good service. The program is committed to creatively finding ways to guide the public to the LRIS so they can benefit from the services of our skilled attorneys. This includes increased referrals through support from our new full-time referral coordinator. ↕

## Time to Focus!

One good hour of solid thinking about business development each week can enhance all of the other hours. Here are eight easy steps to accelerate your law firm's growth, courtesy of The Coughlin Company:

- Block out one hour per week for pure thinking time
- In that hour, select one important issue you want to focus on in your business
- Turn the issue into an open-ended question: For example, how can I find more clients?
- Answer that question from your perspective
- Answer that question your current clients' perspectives
- Answer that question from your competitor's perspectives
- For 45 minutes write down as many answers as you can
- Take the last 15 minutes to select your best ideas, combine them where possible, and develop an action plan



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## Probate Notes

### Judge Hoff's Helpful Hints Supervising Jurist Gives Section an Overview

BY AARON D. AFTERGOOD



On Tuesday, September 12, the Probate & Estate Planning Section was treated to an update from Judge Michael Hoff, Supervising Judge of the Northwest District. He began his remarks by addressing some of the facility-related changes that can be expected in and around the Van Nuys courthouse in the near future.

Trailers to the south of the courthouse, which currently house the probate filing room and other administrative offices, will be removed, and a parking structure erected in their place. Probate filing will likely be relocated to the third floor of the courthouse, which will cut down on the travel time between Department A and the Probate Attorney's office.

We can expect a new child-friendly waiting room near the entrance to the courthouse courtesy of the Valley Community Legal Foundation and Supervisor Zev Yaroslavsky. Finally, the Juvenile Traffic Court will likely be moved to the West building, cutting down on lines to enter the East courthouse.

Judge Hoff happily announced that he has signed on to preside over the probate calendar for at least another year. He said that he has truly enjoyed his nine months in

Department A. He cited the drama as well as the occasional comedy and tragedy of probate as one of the highlights of the job.

He said he has been thoroughly impressed with the Probate Volunteer Panel program and quality of work submitted by PVP attorneys. While on the subject of attorney work product, he made sure to remind practitioners that submitted pleadings and briefs should be short, and should clearly present the issues to the Court. He stressed the importance of complying with pretrial orders and filings.

Finally, Judge Hoff took some time to share his experience with jurors in Van Nuys, as one of his responsibilities as Supervising Judge is to oversee jury "service" (rather than jury "duty"). He detailed the sanction procedure for no-shows, which involves a first letter, then a second letter accompanied by a \$250 sanction, a third letter accompanied by a court order, and finally, collection efforts effectuated through the Department of Motor Vehicles and other State departments. ↗

*The Probate & Estate Planning Section meets the second Tuesday of each month at noon at Monterey at Encino Glen Restaurant.*

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# On the Home Front

**Michelle Robins and Keri Caetano Helm**  
**Family Law Section**

BY LISA MILLER



Family law issues cut across all sectors and levels of society, affecting most participants profoundly. The subject area offers unending twists and turns as matters move through the process, according to Family Law Section Co-chairs Michelle S. Robins and Keri S. Caetano.

Hot topics include fulfilling mandatory disclosure declaration requirements, the intersection of family law and estate planning, uncovering additional compensation of self-employed spouses, transmutation issues, and trends in custody and visitation. Robins and Caetano have big plans for the Family Law Section this year, they say.

"We've expanded the mediation programs, currently coordinated for Van Nuys by my law firm, Lewitt Hackman, and for San Fernando by the Law Offices of Cynthia Berman, to include the Burbank courthouse, coordinated by the Law Offices of Sandra Etue," Robins says.

Robins received her Bachelors degree from the University of California at Berkeley, graduating Phi Beta Kappa. She received her law degree in 1989 from the University of California, Hastings College of the Law, where she was technical editor of the Hastings Constitutional Law Quarterly. "Hastings gave me a great grounding in the skills I would need to help clients in my practice," she says. "But I really learned a lot from my colleagues at the firm as soon as I started practicing."

She joined Encino's Lewitt, Hackman, Shapiro, Marshall & Harlan after graduation, and became a shareholder of the firm in 2000. Her practice emphasizes the area of family law.

"The Section works closely with other bar sections and bar associations to present programs of interest to a broader section of the legal community," Robins says. "The Family Law Section proposes and supports new legislation that directly impacts family law practitioners and their clients."

Robins and Caetano are in their third year as Co-Chairs of the Family Law Section. Before taking on leadership of the Section, these two dynamos co-chaired the Programs Committee of the Section for two years.

Caetano also received her Bachelors degree from the University of California at Berkeley and graduated from Pepperdine Law School in 1997. She is a partner at the law firm of Mooney & Caetano, which recently took over the family law practice of Judge Thomas Trent Lewis. The firm practices exclusively in the area of Family Law. Caetano is certified by the State Bar of California as a Family Law Specialist.

"Building on the work of the prior Chair, Cari Pines, we have worked with the family law bench officers of the San Fernando Valley to initiate a volunteer program to support Pro Per Day in Van

Nuys and San Fernando," Caetano says. "It brings volunteer family law attorneys together with community members that cannot afford attorneys to help them complete their matters."

"In the last year we worked closely with Commissioner Alan Friedenthal to establish a Children's Waiting Room in the Van Nuys Courthouse," Caetano says. "We are continuing work this year to raise funds for a second Children's Waiting Room in the San Fernando Courthouse." ✎

*The Family Law Section welcomes newcomers and invites your participation. For more information about joining the Family Law Section or attending Section programs, contact Linda Temkin at the San Fernando Valley Bar Association at (818) 227-0490, ext. 105.*



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## U.S. Bankruptcy Court Central District of California Public Notice Amendments to Official Bankruptcy Forms Effective October 1, 2006

On September 19, 2006, the Judicial Conference of the United States approved amendments to Official Bankruptcy Forms 1, 5, 6, 9, 22A, 22C, and 23 to implement the statistical reporting requirements of BAPCPA. The Judicial Conference also approved an amendment to Interim Rule 1007 that will require individual and joint debtors to file the new *Exhibit D* with their Voluntary Petition (Official Form 1). The revised forms and new Exhibit D are available on the Court's website at [www.cacb.uscourts.gov](http://www.cacb.uscourts.gov).

The revised Official Forms will become effective on October 1, 2006. The Bankruptcy Court for the Central District of California will require the use of the new forms (the petition; Exhibit D, if applicable; Statistical Summary (new page 2 of the Summary of Schedules); Schedules, D, E, F, I, and J; Declaration Concerning Debtor's Schedules; and Forms 22A, 22C, and 23) beginning October 7, 2006, to coincide with its conversion to the new version of CM/ECF (3.1).

Attorneys and parties may use the current versions of the Official Bankruptcy Forms through October 6, 2006, but the revised forms must be used on or after October 7, 2006.

CM/ECF filers will need to upgrade their petition preparation software and/or templates in order to file petitions, schedules, or other amended documents after CM/ECF version 3.1 is implemented.

Additional information regarding the revised form changes, including the amended Interim Bankruptcy Rule 1007, can be found at <http://www.uscourts.gov/bankform/index.html>. ↗

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## Defective Exception to Time Bar in Construction Defect Cases



STEPHEN T. HOLZER

Many practitioners have encountered the limitations provisions of Code of Civil Procedure §337.15, supposedly providing a 10-year absolute cut-off for claims against a contractor for latent defects in construction projects. CCP § 337.15 provides in part:

- a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following:
- 1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.
  - 2) Injury to property, real or personal, arising out of any such latent deficiency.

- b) As used in this section, 'latent deficiency' means a deficiency which is not apparent by reasonable inspection.

The Legislature enacted CCP §337.15 in response to the construction industry's concern that its members were facing stale claims arising out of projects completed years, sometimes decades, before the claims were brought. As the Court stated recently in *Acosta v. Glenfield Development* (2005) 128 Cal.App.4th 1278, 1294-1295:

[T]he purpose of *section 337.15* is to protect contractors and other professionals and tradespeople in the construction industry from perpetual exposure to liability for their work. ...The statute reflects a legitimate concern that 'expanding concepts of liability could imperil the construction industry unless a statute of limitations was enacted.'...Such concerns legitimately include the prohibitive cost of insurance against a perpetual ...and never ending risk...."

Nonetheless, in enacting the statute, "the Legislature included an exception to this 'firm and final' outside

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limitation period. In subdivision (f) of section 337.15, any action based on either willful misconduct or fraudulent concealment was expressly excluded.” *Acosta*, at 1294-95. Thus, subdivision (f) specifies: “This section shall not apply to actions based on willful misconduct or fraudulent concealment.”

Courts have given little guidance on the meaning of the phrase “willful misconduct” (“Insofar as we have been able to discover, there is no published decision assessing the impact of subdivision (f) of section 337.15....” *Felburg v. Don Wilson Builders*, 142 Cal.App.3d 383, 391; “[u]nfortunately,

there is little case authority discussing willful misconduct as the term is used in *section 337.15, subdivision (f)*” *Acosta*, 128 Cal.App.4th at 1294 (emphasis in original)). Only two published decisions wrestle with the phrase, and the decisions are in disagreement with each other.

In *Felburg*, as part of building a residential housing tract in Torrance, the defendant real-estate developer (Wilson) purchased a lot adjacent to a former oil-exploration field; the lot was eventually sold to the Felburgs as a finished residence. During the construction-phase investigation of soil conditions, Wilson allegedly

learned of “several old [oil] sumps, including one identified as ‘Boring 27,’ in the area of the lot eventually purchased by the Felburgs.” 142 Cal.App.3d at 389.

The Felburgs eventually experienced structural disintegration of their home, which began to sink, caused by the fact that their lot overlay oil sump “Boring 27”. After additional soil testing discovered the cause of the Felburg’s problems, the Felburgs brought suit against Wilson in 1978.

Wilson invoked CCP §337.15 via summary judgment motion, asking the Court to dismiss the case on the ground that the Felburgs’ house had been substantially completed more than 10 years before the Felburgs’ suit, i.e., in 1966 “when Wilson filed the ‘Notice of Completion’ [of construction of the Felburgs’ home] with the City of Torrance.”

The trial court granted Wilson’s motion, but the Court of Appeals reversed. The appellate court rejected Wilson’s reliance on the limitations statute, finding that the Felburgs’ had placed at issue the question of Wilson’s knowledge of Boring 27 and the failure to disclose that knowledge to the Felburgs’. *Id.* Per the appellate court, placing such matters at issue brought the Felburgs’ claims within the willful misconduct exception of CCP 337.15 (f).

Moreover, the *Felburg* Court was of the view that, to avoid limitations, the plaintiffs need not show Wilson had a specific intent to conceal the defect. Rather, the Court stated that “[t]he term ‘willful misconduct’ ...encompasses not only intentional wrongdoing, but negligence of such a character as to constitute reckless disregard for the rights of others.” *Id.* (emphasis added).

*Felburg’s* approach to the “willful misconduct” concept as a form of heightened negligence was recently criticized in *Acosta v. Glenfield Development*, supra, 128 Cal.App.4th at 1294 (quoting prior case law): “Unlike negligence... willful misconduct is not marked by a mere absence of care....

*continued on page 16*

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# Bench Brief: Judge Darlene E. Schempp

## Jurist is Firm but Fair Minded



BY M. JONATHAN HAYES

Judge Darlene E. Schempp has sat on the bench in the criminal courts in Van Nuys for twenty-two years. In fact, she was supervising judge of the Van Nuys Court in 1995-1996. Judge Schempp's caseload in Department S is primarily felony matters, which currently includes 91 cases, of which 11 are murders or attempted murders.

Trials in murder cases typically last from five days to several months. And this means that Judge Schempp is very busy these days.

"The murder and attempted murder cases are way up, even from the first of the year," Judge Schempp says. "The other matters often 'dispo,' or get resolved within 60 days, but the murder cases usually go to trial."

Judge Schempp, who presides over one of five criminal trial courtrooms in Van Nuys, hears a full calendar every morning, pre-trial hearings, probation violations, and last-minute trial motions. When the need arises, stemming from other judge's overwhelming calendars, she will be assigned the occasional preliminary hearing.

"Cases are assigned to me after the defendant has been held to answer," she says.

Among her more notorious cases was the recent Robert Blake murder trial. "The lawyers were excellent, the legal issues were interesting, and some of the witnesses were quite colorful," she says.

She read the entire preliminary hearing transcript before ruling on some pre-trial issues. Another judge handled her day-to-day calendar during that period, she says.

Judge Schempp is a 1970 graduate of the San Fernando Valley College of Law. She had been a court clerk, which sparked her interest in law. Schempp spent seven years as a Deputy District Attorney after law school and seven

years after that as a Commissioner handling family law matters in the Stanley Mosk Courthouse downtown before she was assigned to Van Nuys.

*"The lawyers (in the Robert Blake case) were excellent; the legal issues were interesting, and some of the witnesses were quite colorful."*



Valley practitioners consider Judge Schempp a no-nonsense bench officer.

"I am probably considered to be tough on sentencing," she says. "When someone has violated the terms of their probation, they are probably going to prison. But I will always listen and take the facts and other circumstances into consideration and if there is a good alternate solution, I will no doubt use it."

When asked what mistakes lawyers make in her courtroom, she said that during voir dire, attorneys could focus a little more on the things that are relevant.

"Who really cares what each of the juror's five children are doing for a living as long as they are not in law enforcement?" she says. "The attorneys could also focus a little more on the juror's answers to the various questions

*continued on page 20*

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*President's Message, continued from page 3*

He was awarded the Purple Heart and Distinguished Service Medal, but, due to a change in duty station, he never received his medals. More than 50 years later, he still had not received his medals, even though he had asked several times. And the VA never processed his request for a service-connected pension, even though he was receiving treatment for injuries from the shipboard explosion.

He was living on a limited income and was too proud to ask for anything he didn't deserve. He came to me to see if could get his medals so that he could show his grandchildren. I thanked him for his service to his country, and he got tears in his eyes. After he received his service-connected pension and increased health care benefits, he thanked me for treating him with dignity and respect.

Too often, veterans are not thanked for their service. During this month of thanks, if you know a veteran, thank that person for service to this country. All politics aside, military service is not an easy life. Our past Association President, Richard Lewis, is a veteran of the Vietnam era. One of my nephews is currently a Lieutenant in the U.S. Army Rangers. I thank them both for their duty and sacrifice. I thank all those who had to be ready, at a moment's notice, to put their life on the line. Their courage inspires me. ♠

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# Farewell, It's Been Great! Hope to See You at the Courthouse

WILLIAM R. LIVELY, SCVBA PRESIDENT



This will be my last article as president of the Santa Clarita Valley Bar Association. On November 16, we will install our newly elected Board of Directors. I will be succeeded by Caryn Sanders, who will write this article in the coming months of her term, and sit as a member of the Board of Trustees of our San Fernando Valley Bar Association. I consider it a distinct honor and privilege to have been associated with our two great organizations, and to have participated in the work of the last year,

On October 16, our SCVBA presented its second annual Law Day, where we celebrated with members of our community a commitment to the Rule of Law as a method for resolving conflict. Our federal, state, county and city agencies and their elected officials were in attendance, as we concentrated on that which we have in common, rather than that which often puts us in contention with one another on a daily basis. Awards were given and speeches were made. I am proud that so many distinguished persons chose to stand with us on that day. It is truly encouraging.

We were reminded how the adversary process and the vigorous exchange of ideas are the tools by which we flesh out the truth of the matter; and that the truth of the matter is how we seek to bring order to chaos. Chaos is our enemy. It fosters the cancerous caprice that constantly threatens the decay of order, and the consequent defeat of civilization as we have come to know it.

If one has at all read the words that have been written in this space for the last several months, one would likely conclude that I, personally, believe that the civil justice system has been and will continue to be a last and best line of defense against the kind of tyranny that could well destroy that civilization. I speak of the tyranny of ignorance, and of an unbridled self-interest that is devoid of compassion and reason. I trust I am not alone in that estimation; in fact, I am confident that I am not.

The changes against which we guard are often subtle in their subversiveness. I'm reminded of the work Robert Bucholz, Professor of History at Loyola University of Chicago, who, in his publication "Foundations of Western History," observed that civilization is a fragile thing. It is not so durable as a building or a book. It's not a cathedral, a bible or a constitution. It's rather an act, a way of being, a state of mind.

We make civilization every day: In the stories we tell, the jokes we make, the advice we give, and the ways we treat each other, as individuals. The Holocaust, for example, did not begin at a pulpit or a podium; or in a congress, a parliament or a duma. It began at a dinner table; in a line, waiting for a bus; at a bedside when a child was being tucked in to sleep.

Every time a judge or jury tells a powerful leader he or she cannot just do

what seems natural to the exercise of great power, we win as a civilization. Every time the powerful, or the weak, are circumspcctly punished for the harm they have done to the rest of us, or prevented from doing great harm, we survive as a people. Every time we stand when the judge first enters a court room, not out of respect for that individual, but in order to face the flag of our Nation in recognition of the principles for which it stands, we participate in and affirm the subtle acts that guarantee our survival as a civilization.

At the conclusion of a high-profile civil trial some years ago, I made T-shirts reading on the front, "We do it the Civil Way". On the back they said, "When it was all said and done, it was the Civil Justice System that finally got him."

See you in court! ⚡

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# Report From the Foundation

## Thank you, Thanks, and I am Grateful



MARCIA L. KRAFT, VCLF PRESIDENT

*"Let your heart feel for the afflictions and distress of everyone, and let your hand give in proportion to your purse."*

*George Washington*

November is traditionally the month in which we take time to sit with our families and friends and say thanks for all the nice things we have. If your tummy is full, your car is operative, you are relatively healthy and you have time to read this column, then your life is probably good.

Now is the time to help those in your community who need assistance. If you don't help your neighbor, who will be there to help you, if and when you need it?

"No one can sincerely help another without helping himself." (Charles Dudley Warner). Help yourself by taking a moment to make a generous donation to your San Fernando Valley Bar Foundation. We assist member of OUR community. We give scholarships to worthy and needy students. We are establishing a Children's Waiting Room at the Van Nuys Courthouse and are exploring doing the same at the San Fernando Courthouse. We appreciate any amount and we'll use it for these and other LOCAL good causes.

Help us to help your neighbor. Please!

My previous offers in past Bar Notes columns of a t-shirt for a \$100 donation and a Foundation mug for a \$50 donation still stands. Donations to the Foundation will be the best investments you ever make. We have already received generous donations from past Association presidents David Gurnick, Richard Lewis, and Steve Holzer. Thank you all for your generosity!

I want you to get to know the people who generously donate their time and efforts to the Foundation.

One of our officers is Treasurer David Nadel. David is a CPA, receiving his certification in 1991. He graduated Magna Cum Laude from the William Howard Taft School of Business with a Master of Science in Taxation. David owns his own accounting firm, which is responsible for more than 1,000 tax returns. He offers accounting, tax preparation, bookkeeping and business management. He offers expert testimony, litigation support and management advisory services. David has clients from New York to New Zealand.

Each month, David balances the Foundation's records and keeps the Foundation's taxes up-to-date. We are very grateful to him for donating all of this assistance, and he is very generous with his time and money. People like David Nadel and Christine Lyden (see last month's *Bar Notes* column) are caring and hard-working individuals.

Another valuable asset to the Foundation is board member Lynne Tracy, M.A. She has a B.A. in Psychology from UCLA and a Master's Degree in Marriage and Family Counseling from Azusa Pacific University. Lynne has provided vocational and career counseling services since 1980. She has numerous certifications in vocational counseling and

disability management. She serves on the Peer Review and Public Policy Committees for the California Association of Rehabilitation and Reemployment Professionals.

Lynne is frequently called upon to offer expert opinions on employment matters in a variety of court proceedings, including family law, employment law, Social Security disability hearings, long term disability, and workers' compensation. She maintains a private practice as a psychotherapist and vocational counselor with offices in both Woodland Hills and West Los Angeles.

Lynne is Vice-President of Grants for the Foundation, overseeing all grant applications and their distribution. She is a volunteer who cares about her friends and neighbors who may need assistance.

I hope that these people have inspired you to donate your time and/or money, just as they have been giving to their community. I know I am very grateful to have such fine people working with me at the Foundation. Why not follow their example at this Thanksgiving and donate at least \$20 to the Foundation?

Remember, generosity counts! ♣

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*Defective Exception to Time Bar in Construction Defect Cases,  
continued from page 10*

Rather, it involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences.” (emphasis added). The Acosta Court specifically chastised *Felburg’s* formulation of the “willful misconduct” standard: “We take the *Felberg* court’s reference to ‘negligence’ as an inadvertent choice of words....” *id.* at 1296, n. 13.

While *Acosta* rejected the “negligence/reckless disregard” standard set forth in *Felburg*, nonetheless, on facts “remarkably similar” to those in *Felburg*, *Acosta* likewise reversed the dismissal of a developer who had prevailed in the lower court on the basis of the 10-year limitations bar of CCP §337.15. Moreover, the *Acosta* opinion then curiously went on seemingly to make a sub rosa endorsement of the “negligence/reckless disregard” standard the Court had just rejected:

At a minimum, *Felburg* illustrates the proposition that a contractor or developer cannot avoid application of section 337.15, subdivision (f), by a claim of ignorance of the existence of a serious latent defect *where the evidence permits the reasonable inference that he knew or should have known otherwise.*

*Id.* at 1296. (emphasis added in part).

This confusion over “intent” vs. “negligence/reckless disregard” as the appropriate standard for showing willful misconduct is not adequately addressed by reference to cases decided in other contexts. The California Supreme Court, for example, in *Ewing v. Cloverleaf Bowl* (1978) 20 Cal.3d 389, 402 (involving the issue of a bartender’s liability for allegedly serving drinks to a patron who subsequently died of alcoholic overdose and cited by both *Felburg* and *Acosta*) plainly reasons more in line with *Felburg*: “If conduct is sufficiently lacking in consideration for the rights of others, reckless, heedless to an extreme, and indifferent to the consequences it may impose, then, *regardless of the actual state of the mind of the actor and his actual concern for the rights of others*, we call it willful misconduct . . . .” (quoting prior case law; emphasis added).

On the other hand, the Supreme Court also stated in the more recent case of *Cavillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 729 (involving the issue of a store owner’s claimed statutory immunity under Civil Code Section 847 in regard to the use of force to resist a robbery): “Unlike negligence, which implies a failure to use ordinary care, and even gross negligence, which connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, *willful misconduct is not marked by a mere absence of care.* Rather, it involves a more positive intent actually to harm another or to do an act with a



positive, active and absolute disregard of its consequences.” (also quoting, in part, prior case law; emphasis added).

Can advocates rely on *Cavillo-Silva*'s recent formulation of the “willful misconduct” standard as settling the “intent” vs. “negligence/reckless disregard” issue for purposes of CCP §337.15? Probably not.

First, the case involved a different factual context from that of CCP §337.15 (f); the *Cavillo-Silva* Court itself noted that “it bears emphasis that legislative use of the term “willful” may not be precisely the same for all purposes....” *Id.* at 728.

Second, the case itself cites *Morgan v. Southern Pacific Transportation Company*, (1974) 37 Cal.App.3d 1006 (upholding trial court's refusal to grant defendant's request for nonsuit on willful misconduct claim), which reasons more in line with *Ewing* and *Felburg* than with *Acosta* (and, for that matter, with the above quotation from *Cavillo-Silva* itself): “Willful or wanton misconduct' travels under several other names. Its aliases include 'serious and willful misconduct,' 'wanton misconduct,' 'reckless disregard,' 'recklessness,' and combinations of some or all of these. These terms are interchangeable because *they all identify the same thing--an aggravated form of negligence, differing in quality rather than degree from ordinary lack of care'....*” 37 Cal.App.3d at 1011 (emphasis added).

So, for the advocate trying fit a case within (or defend against) the “willful misconduct” exception to limitations embodied in CCP §337.15 (f), the lesson is that the legal standard for meeting the exception is still up for grabs. Until the Court rules definitively, even in the absence of fraudulent concealment, the exception on appropriate facts should be alleged on the basis of *Felburg* and should be opposed on the basis of *Acosta*. ↕

**Stephen T. Holzer** is a partner with Encino's Lewitt, Hackman, Shapiro, Marshall & Harlan. He can be contacted at (818) 907-3299 and sholzer@lewitthackman.com.

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## Membership Has It's Priveleges!

### Fee Arbitration Program Goes Live, continued from page 1

resolution environment for both clients and counsel," Fee Arbitration Committee Chair Myer Sankary says. "The Fee Arbitration program is just one aspect of bringing an overall culture of ADR to the San Fernando Valley practice community."

The State Bar Board of Governors is scheduled to review the program for approval on November 16, 2006. Jill Sterber, Director of the State Bar Fee Arbitration Program, was central to the SFVBA's success in getting its Fee Arbitration Rules before the State Bar Committee in a finished, approvable form.

"The Fee Arbitration program doesn't just allow smaller firm practitioners to access a low-cost, highly efficient forum for their disputes," McCabe says. "It offers the SFVBA a chance to serve the larger public by offering a mechanism to bring these disputes to a knowledgeable hearing panel quickly and in a largely uncomplicated way."

The Association is grateful for the leadership provided by retired judges Marvin Rowen and Richard Kolostian, and long-time member Robert Bob Ackrich. As invaluable members of the committee, they were unendingly generous with their insights, time and patience in helping the Association shape this important program, Lewis says.

"Now that we are slated to go before the State Bar Board of Governors for approval in November, I urge anyone interested in serving the larger ADR community to sign up for training," Executive Director Liz Post says. "I know the SFVBA would be grateful for everyone's support and participation."

Training on the new Fee Arbitration Rules and in the administration of the new fee arbitration hearings is scheduled for January 11, 2007 at the Association's offices.

*For more information and to sign up for the January 11 Fee Arbitration training, contact Liz Post at (818) 227-0490, ext. 101. ↗*

### Do you know the origins of Birdie and Eagle?

According to about.com, in American slang of the 19<sup>th</sup> Century, the term "bird" was applied to anything particularly great. "Bird" was the "cool" of the 1800s in the U.S.

So on the golf course, a great shot - one that led to an under-par score - came to be known as a "bird," which was then transformed into "birdie." The term birdie was in worldwide use by the 1910s, and it's believed it debuted in the U.S. in 1899.

An "eagle" simply followed "birdie," being added to the lexicon in keeping with the avian image of birdie. And "albatross" later came along for the same reason.

You might be asking yourself why you are learning this trivia in a Bar publication.

The SFVBA has established a Golf Tournament Committee to organize a charity and social event in the fall, 2007. Co-Chairs Cynthia Elkins and James Felton are seeking volunteers to serve on the committee to begin planning the event. And you don't even need to know the difference between an eagle and birdie!

To volunteer, contact Cindy at (818) 598-6771 or celkins@employer-law.com; Jim at (818) 382-6200 or jfelton@greenbass.com; or Liz Post at (818) 227-0490, ext. 101 or epost@sfvba.org. ↗



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*Bench Brief: Judge Darlene E. Schempp,  
continued from page 11*

and avoid some of the repetition of questions.”

But Judge Schempp says that, overall, she is pleased with the skills of the attorneys who appear before her. “I have two and a half public defenders assigned to my court,” she says. “They and the district attorneys who appear before me are excellent, very professional and serious about doing a good job.”

She is always available to discuss trial performance with new attorneys who seek her advice after a trial is concluded, she says. And she is willing to help with settlements when counsel wants it.

“I will give the parties my impression of what a case is worth if they request it or just want to know what I think,” Judge Schempp says. “But overall, chamber conferences are fairly rare. There is just not enough time.”

In her free time, Judge Schempp loves to play golf and travel. She has photographs of African animals on her desk, which she snapped on a safari in Kenya several years ago.

“When I retire, I would like to sit on assignment so that I can travel a little more,” she says.

Judge Schempp has some thoughts to share when asked what has surprised her most about being a judge.

“I didn’t know being a judge would be so much fun. You have to make quick, fast calls. A lot of them,” she says. “This is a very ominous responsibility. But I enjoy it a lot and look forward to coming to work most mornings.”

According to Judge Leslie Dunn, Supervising Judge of the Criminal Department, “Judge Schempp is knowledgeable and hard working, handling our most complex criminal matters with competence, efficiency and grace. Her reputation from both sides, prosecution and defense, is firm but always fair minded. She is a treasured asset in Van Nuys; the public is very well served when she dons her black robe.” 🐾

*M. Jonathan Hayes is a 1976 graduate of Loyola Law School. His practice is primarily in the area of bankruptcy. He can be contacted at (818) 710-3656 and [jhayes@polarisnet.net](mailto:jhayes@polarisnet.net).*

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# November Events

## Probate & Estate Planning Section

### Topic: Estate and Retirement Tax Law

Speaker: Steve Trytten, Esq.

Date: November 14

Time: 12:00 noon

Place: Monterey at Encino Glen Restaurant, Encino

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

MCLE: 1 Hour

## Workers' Compensation Section

### Topic: Internal Medicine Impairments Under the AMA Guides

Speaker: Jeffrey Hirsch, M.D.

Date: November 15

Time: 12:00 noon

Place: Monterey @ Encino Glen Restaurant, Encino

Cost: \$30 members prepaid; \$35 at the door  
\$35 non-members prepaid; \$45 at the door

MCLE: 1 Hour

## Santa Clarita Valley Bar Association

### Topic: Installation of New Officers

*Followed by Musical Version of Christmas Carol*

Date: November 16

Time: 6:00 p.m.

Place: Canyon Theatre Guild,  
24242 San Fernando Rd., Newhall

Check out [www.scvbar.org](http://www.scvbar.org) for more details!

## Intellectual Property, Entertainment & Internet Law Section

### Topic: 2006 Year in Review Roundtable

Speakers: Mishawn Nolan, Esq. and John Stephens, Esq.

Date: November 17

Time: 8:30 a.m.

Place: Greenberg & Bass, 16000 Ventura Blvd,  
Ste 1000, Encino

Cost: \$20 members prepaid; \$25 at the door  
\$25 non-members prepaid; \$30 at the door

MCLE: 1 Hour

## Business Law, Real Property & Bankruptcy Section

### Topic: Update on PACER

Panel: Judge Geraldine Mund, Lou Esbin, Esq. and  
Court Personnel

Date: November 22

Time: 12:00 noon

Place: Woodland Hills Bankruptcy Court  
21041 Burbank Blvd.

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

MCLE: 1 Hour

## Family Law Section

### Topic: Hot Tips

Speaker: Gary Weyman, Esq.

Date: November 27

Time: 5:30 p.m.

Place: Monterey @ Encino Glen Restaurant

Cost: \$40 members prepaid; \$45 at the door  
\$45 non-members prepaid; \$50 at the door

MCLE: 1 Hour

## SIGN ME UP!

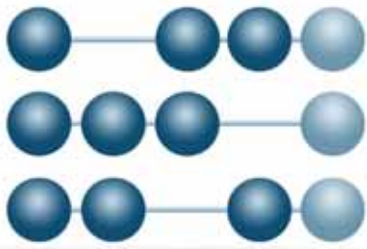
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