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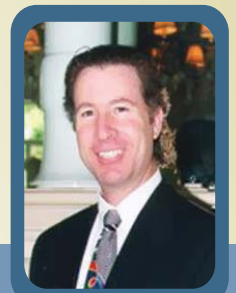


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AS A FOLLOW-UP TO MY RECENT PRESIDENT'S MESSAGES, BELOW you'll see a list of the federal, state, and local legislators representing the greater San Fernando Valley and their contact information.

The SFVBA Board of Trustees, as I shared in an earlier column, believes the time is ripe to communicate the principle of judicial independence not only to our members, the judiciary, and the public, but to our elected officials as well.

I want to take the opportunity to encourage each and every Bar member to communicate with their elected representatives and express their own opinions and the concerns generated by timely and relevant issues brought to them by their clients.

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Personable, Efficient and Highly Professional

PIECING TOGETHER THIS month's cover article on the Bar's Attorney Referral Service wasn't altogether difficult as I happen to share an office with the ARS team. Every day, the work they accomplish is quite remarkable.

Without repeating the facts and stats conveyed in the article, it remains altogether astounding the number of people that the ARS' bilingual consultants Fanny Arellano and Catherine Carballo-Merino assist every day (dozens, actually) and the breathtaking variety of potential cases they play traffic cop, directing potential litigants onto the right road to a hopefully successful legal outcome.

"We get challenging calls from people wanting to sue the city because they tripped and fell over a curb, to heart breaking calls from people who are being abused in their workplace," says Carballo-Merino. "Every time I pick up the phone, I learn something new and I never know if it's going to be a typical call, a challenging call, or a call that's simply interesting."

The ARS staff, says panel attorney John Goffin, "is personable, efficient and highly professional, and it says a lot about the Bar that it would offer such an impactful service," expressing a sentiment echoed by every one of the lawyers interviewed for the article.

"The ARS staff is outstanding," says attorney Laura Horton. "They serve

MICHAEL D. WHITE
SFVBA Editor



michael@sfvba.org

not only as capable and professional representatives of the ARS, but of the Bar and the legal profession in general. Most of the people who call the office have never had any contact with the legal system before and the staff very positively molds their first impression."

Attorney William Koehler recalls an ARS-referred case involving two siblings contending over a family residence. "We were able to find common ground and find resolution without having to go to court," he says. "The ARS played a large part in that process by collecting and vetting the basic information we needed to get the pair to talk and finally reach a mutually agreeable outcome."

You name it...disability claims, dog bites, unpaid wages, gender or age discrimination, slips and falls, auto accidents, contested wills, contract disputes, medical malpractice, IP theft, child custody, property rights, marriage annulments, patent infringement...Fanny and Catherine have heard it all.

Be they poignant or odd, extraordinary or mundane, all the calls received in the ARS office are dialed by ordinary, plain folk desperately seeking justice and the square deal promised by the lady with the blindfold and scales.

So, hats off to the professionals at the San Fernando Valley Bar Association's Attorney Referral Service. Long may they...refer.

Regards. 

CORRECTIONS

In the March issue of *Valley Lawyer*, the cover story, "A Truly Dynamic Duo: SFVBA Honors Outstand Jurists," contained two errors. First, Judge Paul Bacigalupo practiced law at Castle & Lax for about five years, not eleven years. Second, to clarify, Judge Bacigalupo is a member of the Advanced Judicial Studies Workgroup and will teach at class at the Advanced Judicial Studies Institute this June in San Diego. The course is called *Trauma in the Courtroom* and is similar to the one he taught in Los Angeles in August, 2016. A separate course will be presented by faculty who are associated with the McArthur Foundation Research Network on Law and Neuroscience.



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SUN	MON	TUE	WED	THU	FRI	SAT
						1
2	<div>VBN VALLEY BAR NETWORK</div> <div>5:30 PM CHABLIS RESTAURANT TARZANA</div> <div>VBN is dedicated to offering organized, high quality networking for SFVBA members.</div> <div><i>Valley Lawyer</i> Member Bulletin</div> <div>Deadline to submit announcements to editor@sfvba.org for May issue.</div>	<div>4</div> <div>ANNUAL JUDGES' NIGHT DINNER</div> <div>SHERATON UNIVERSAL</div> <div>5:00 PM COCKTAIL RECEPTION</div> <div>6:30 PM DINNER AND PROGRAM</div> <div>See Page 8</div>	5	<div>6</div> <div>Membership & Marketing Committee</div> <div>6:00 PM</div> <div>SFVBA OFFICES</div>	7	8
9	<div>10</div> <div></div>	<div>11</div> <div>Probate & Estate Planning Section</div> <div>E-Discovery: How to Avoid Problems You Didn't Know You Had!</div> <div>12:00 NOON</div> <div>MONTEREY AT ENCINO RESTAURANT</div> <div>Do you know what ESI encompasses and who is responsible for ensuring ESI is properly protected? Do you know what a litigation hold or a preservation letter is? The answers provided by retired Judge Reva G. Goetz will surprise you! (1 MCLE Hour)</div>	12	<div>13</div> <div>Intellectual Property, Internet & Entertainment Law Section</div> <div>Reduce Cyber Risk!</div> <div>12:00 NOON</div> <div>SFVBA OFFICES</div> <div>John Stephens will discuss how you and your clients can reduce cyber risk. (1 MCLE Hour)</div>	14	15
<div>16</div> <div></div>	<div>17</div>	<div>18</div> <div>Taxation Law Section</div> <div>New IRS Audit Rules</div> <div>12:00 NOON</div> <div>SFVBA OFFICES</div> <div>Monica Gianni, CSUN tax professor and Of Counsel at Davis Wright Tremaine LLP, will outline the new IRS audit rules that apply to partnerships and limited liability companies, including their ramifications to the entity and the partners/members. (1 MCLE Hour)</div>	<div>19</div> <div>Workers' Compensation Section</div> <div>The Shoe's on the Other Foot</div> <div>12:00 NOON</div> <div>MONTEREY AT ENCINO RESTAURANT</div> <div>Arthur Fass, DPM will discuss industrial foot and ankle injuries and how best to proceed in these cases. (1 Hour MCLE)</div>	<div>20</div> <div>21</div> <div>22</div>		
<div>23</div> <div>30</div>	<div>24</div>	<div>25</div> <div>Editorial Committee</div> <div>12:00 NOON</div> <div>TONY ROMA'S</div>	<div>26</div> <div>ADMINISTRATIVE PROFESSIONALS DAY</div> <div></div>	<div>27</div> <div>Dinner at My Place</div> <div>6:00 PM</div> <div>PORTER RANCH</div> <div>See Page 40</div>	<div>28</div> <div>29</div>	



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

SUN	MON	TUE	WED	THU	FRI	SAT
1	 2 5:30 PM CHABLIS RESTAURANT TARZANA	3 <i>Valley Lawyer</i> Member Bulletin Deadline to submit announcements to editor@sfvba.org for June issue.		4 Membership & Marketing Committee 6:00 PM SFVBA OFFICES	5	6
7	8 Probate Settlement Officer Training Program 1:00 PM STANLEY MOSK COURTHOUSE ROOM 222 A panel of distinguished judicial officers and attorneys will discuss the highly successful LASC Probate Settlement Conference Program and the mediation process in probate. (3 MCLE Hours)	9 Probate & Estate Planning Section 12:00 NOON MONTEREY AT ENCINO RESTAURANT (1 MCLE Hour) Board of Trustees 6:00 PM SFVBA OFFICES	10	11	12 Bankruptcy Law Section Consumer Potpourri 12:00 NOON SFVBA OFFICES Nina Javan, Dennis McGoldrick and Roksana Moradi will discuss consumer cases filed under Chapters 7, 11, and 13, including the hows and whys of converting cases from 13 to 7, 13 to 11, and 11 to 7; exemptions and asset planning; undisclosed assets; cooperation with the trustee; and employing professionals in Chapter 13. (1.25 MCLE Hour)	13
14	15	16 Taxation Law Section Tax Credit Update 12:00 NOON SFVBA OFFICES Nojan Bolourchi will discuss the federal and California incentives. (1 MCLE Hour)	17 Workers' Compensation Section 12:00 NOON MONTEREY AT ENCINO RESTAURANT	18 Inclusion & Diversity Committee Demystifying the Judicial Appointment Process 3:00 PM VAN NUYS COURTHOUSE WEST See Page 28	19	20
21	22 Family Law Section 5:30 PM MONTEREY AT ENCINO RESTAURANT Approved for Family Law Legal Specialization (1.5 MCLE Hours)	23 Editorial Committee 12:00 NOON TONY ROMA'S	24	25 Dinner at My Place 6:30 PM GRANADA HILLS See Page 40	26	27
28	 SFVBA OFFICES CLOSED	29	30	31		

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Spring Is the Time of Plans and Projects

THE SAN FERNANDO VALLEY Bar Association has planned a number of special outreach programs this spring to educate our members and the public—including elected officials—about issues affecting our community and the profession.

On April 7, the SFVBA Bench-Bar Committee and the Los Angeles Superior Court's leadership will meet with new state Senator Henry Stern to discuss how inadequate funding for California's trial courts affects our communities.

The next day, on Saturday morning, April 8, our Attorney Referral Service will sponsor *Know Your Rights: Immigration Law* at the Marvin Braude Constituent Service Center in Van Nuys to provide free information to the public on immigration law and President Trump's executive orders. The program is cosponsored by Neighborhood Council Operations, CARECEN, Los Angeles City Councilwoman Nury Martinez, and the LAUSD Parents and Community Engagement Unit.

Next month, on May 8, a distinguished panel of judicial officers and attorneys with the Pro Bono Probate Settlement Program will conduct a three-hour *Probate Settlement Officer Training Program* for current and prospective volunteers

ELIZABETH POST
Executive Director




epost@sfvba.org


at the Stanley Mosk courthouse in downtown Los Angeles.

On Thursday, May 18, the Inclusion & Diversity Committee is hosting *From the Bar to the Bench: Demystifying the Judicial Appointment Process* at the Van Nuys courthouse for lawyers interested in becoming judges. The notable panel includes Governor Brown's Judicial Appointments Senior Advisor Joshua Groban, former JNE Commission Chair Helen Zukin, and Valley Judges Paul Bacigalupo, Rupert A. Byrdsong, and Shirley K. Watkins.

The Membership & Marketing Committee is also holding a Community Blood Drive on Thursday, May 4 from 12:00 noon until 6:00 p.m. at the Encino-Tarzana Branch Library in Tarzana.

Lastly, the SFVBA Inclusion & Diversity and Membership & Marketing Committees kick off our newest member benefit, *Dinner at My Place*, on April 27 in Glendale. The dinners are set up to help spur referrals and get members to meet each other in an intimate setting of 6 to 12 colleagues. Scheduled for the last Thursday of each month, these casual get-togethers are hosted by members at their homes and cost is only \$25 per member.

More details about these programs can be found in this issue of *Valley Lawyer* and on the Bar's website, www.sfvba.org. 



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In Memoriam

Many in our community have been personally touched by the passing on February 11 of family law attorney Barry T. Harlan. A long-time member, Barry presented his annual "New Laws" seminar to the SFVBA Family Law Section just two weeks prior to his death.

A former trustee of the Bar and the Valley Community Legal Foundation, Barry was the 2002 recipient of the SFVBA's highest honor, the Stanley M. Lintz Award, for his community service.

The Foundation has set up a special fund to honor Barry. Donations can be made in his memory at <http://www.thevclf.org/harlan-fund>.





By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 23.

Gifts to Care Custodians and Certificate of Independent Review

By Nancy Reinhardt and Yevgeny L. Belous



The legal standing of care custodians—those who provide health and social services to dependent adults—is a potentially thorny area where, sadly, the exertion of undue influence on dependents and malpractice claims sometimes come to the fore. As the authors point out, “Strict adherence to the statute and case law will help ensure that a client’s testamentary wishes are carried out and that the attorney’s risk of discipline and malpractice are minimized.”

THE CALIFORNIA COURTS AND LEGISLATURE recognize there are individuals in our society who are particularly vulnerable to undue influence. These vulnerable members of our society are protected by a diverse set of laws designed to prevent unscrupulous individuals from taking advantage of this susceptibility. One area where the exertion of undue influence is common is estate planning.

The California Probate Code lists seven categories of persons who cannot validly receive donative transfers, including, *inter alia*, a care custodian of a dependent adult.¹ Here, our focus is on those care custodians.

California Probate Code §21350 and *Bernard v. Foley*

California Probate Code §21350 is the predecessor to the current statute identifying the categories of individuals who cannot validly receive donative transfers. It is still the effective statutory framework for instruments which became irrevocable between September 1, 1993 and January 1, 2011.² Today, most cases related to this issue will be analyzed under the current statute.

However, there are still situations requiring analysis under §21350. The instrument shall be deemed irrevocable if the testator, by reason of incapacity, was unable to change the disposition of his or her property and did not regain capacity before the date of his or her death.³ Hence, if a person became incapacitated on or before January 1, 2011, but died this year and never regained capacity, donative transfers made in his or her estate plan would be analyzed under §21350.

Under Probate Code §21350(a)(6), no provision, or provisions, of any instrument shall be valid to make any donative transfer to a care custodian of a dependent adult who is the transferor. One of the landmark cases in the area of prohibited transfers to care custodians is *Bernard v. Foley*. This 2006 California Supreme Court decision not only explains how §21350 relates to the common law doctrine establishing a presumption of undue influence these types of transfers, but is also the reason the California legislature overhauled §21350.

In *Bernard v. Foley*, the California Supreme Court recognized that California Probate Code §21350 was designed to supplement the common law doctrine establishing a rebuttable presumption of undue influence where the person who is alleged to have exerted such influence (1) has a confidential relationship with the testator; (2) actively participated in procuring the instrument; and (3) would benefit unduly by the instrument.⁴

One such “confidential relationship” addressed in §21350 is the relationship between a dependent adult and their care

custodian. In *Bernard*, James Foley and his girlfriend, Ann Erman, were longtime personal friends of Carmel L. Bosco. For two months before Carmel L. Bosco’s death, she resided at the Riverside home shared by James Foley and Ann Erman, who jointly cared for her during her final illness. The court was asked to determine whether close personal friends of a dependent elder adult who at the end of her life provided her with personal care are care custodians for the purposes of §21350. The court concluded that:

“When an unrelated person renders substantial, ongoing health services to a dependent adult, that person may be a care custodian for purposes of the statutory scheme at issue, notwithstanding that the service relationship between the individuals arose out of a preexisting personal friendship rather than a professional or occupational connection.”⁵

The court recognized that a substantial personal friendship existed between the testator and the disqualified individual. Despite this relationship, the court concluded that the statutory directive was clear—under California Probate Code §21350, there is no exception for preexisting social relationships. The court also concluded it was immaterial if the personal care services were provided with no expectation of compensation. Despite recognizing the harsh effect this statute may have in certain situations, the court explained that Probate Code §21351 provides a simple mechanism for avoiding the application of §21350. This mechanism is called the Certificate of Independent Review.⁶

At the conclusion of the *Bernard* decision, the court invited the Legislature to “correct our error” if they believed the court’s interpretation of the §21350 went beyond the intended application.⁷ The legislature did exactly that, creating the new statutory framework for potentially invalidating gifts to those defined as “care custodians.” This new statutory framework is contained in California Probate Code §§21360 to 21392.

Current Statutory Framework for Donative Transfers

Under California Probate Code §21380(a)(3), a donative transfer to the care custodian of a dependent adult is presumed to be the product of fraud or undue influence if the instrument containing the transfer was executed during the period in which the care custodian provided services to the transferor or within 90 days before or after that period.

Once applicable, this presumption can be rebutted if the beneficiary can prove, by clear and convincing evidence, that



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the donative transfer was not the product of undue influence or fraud.⁸ If a beneficiary is unsuccessful in their attempt to rebut this presumption, they shall bear all costs of those proceedings, including reasonable attorney fees.⁹

In order to determine whether a gift to a particular situation triggers the applications of California Probate Code §21380, it is important to understand the definitions and case law analyses of several key terms.

“Care custodians” are persons who provide health or social services to dependent adults, except for those individuals who provided such services without remuneration if the persons had a personal relationship with the dependent adult: (1) at least 90 days before provide those services; (2) at least 6 months before the dependent adult’s death; and (3) before the dependent adult was admitted to hospice care, if the dependent adult was admitted to hospice care.¹⁰

“Health or social services” are services provided to a dependent adult because of the person’s dependent condition, including, but not limited to, the administration of medicine, medical testing, wound care, assistance with hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances.¹¹ Probate Code §21362(b) clearly expands on the California Supreme Court’s previous analysis of which services can properly be considered “health or social services.”

In *Conservatorship of Davidson*, a case decided before the enactment of California Probate Code §§21360 to 21392, the court concluded that cooking, gardening, driving the transferor to the doctor, running errands, grocery shopping, purchasing clothing or medication, and assisting the transferor with banking did not qualify as health and social services.¹²

“Dependent adult” is a person who, at the time of the execution of the instrument, is either: (1) 65 years of age or older and is unable to provide properly for his or her personal needs for physical health, food, clothing or shelter, or due to one or more deficits in the mental functions listed in paragraphs (1) to (4), inclusive, of subdivision (a) of Probate Code §811, the person has difficulty managing his or her own financial resources or resisting fraud or undue influence; or (2) is 18 years of age or older and is unable to provide for his or her personal needs for physical health, food, clothing, or shelter, or due to one or more deficits in the mental functions listed in paragraphs (1) to (4), inclusive, of subdivision (a) of Probate Code §811, the person has substantial difficulty managing his or her own financial resources or resisting fraud or undue influence.¹³

It is important to note that the rather expansive list of activities included in the definition of “health or social services” must be provided to the dependent adult because of the person’s dependent condition. In *Estate of Shinkle*, a case decided prior to the enacting of the California Probate Code §§21360 to 21392, the California Supreme Court determined that a person with a pre-existing, genuine, personal relationship

with the donor can provide health and social services without being a care custodian if the services naturally flow from the relationship.¹⁴ It seems clear that the courts and the Legislature want to avoid disqualifying transferees rewarded by a transferor who received the genuine benefits of a personal relationship.

Instruments and Transfers

California Probate Code §21382 excludes the application of the care custodian rules to the following transfers and instruments: (1) transfers to person related by blood or affinity within the fourth degree or who is a cohabitant of the transferor; (2) instruments drafted or transcribed by a person related by blood or affinity within the fourth degree to transferor or is a cohabitant of the transferor; (3) a transfer of property valued at \$5,000 or less, if the total value of the transferor’s estate equals or exceeds the sum listed in California Probate Code §13100 (currently \$150,000); or (4) the instrument is executed outside of California by a transferor who was not a California resident at the time of execution.¹⁵

Table of Consanguinity

While many of the terms in California Probate Code §21382 require no further explanation, certain terms require outside guidance. Determining whether an individual is related to the transferor within the fourth degree can be tricky in large families. One very useful guide used by practitioners to make this determination is the Table of Consanguinity.

The meaning of “cohabitant” is defined by California Penal Code §13700. The term “affinity” relates to a relationship created because of marriage (i.e., in-laws). For the purposes of §21382, this marriage can be entered into after the transferee previously served as a care custodian.¹⁶ Further, if the requisite relationship by affinity exists at the time the instrument is executed, the exemption still applies, even if the relationship is no longer present at the time of death of the transferor.¹⁷

Certificate of Independent Review

There are a number of ways to render this section of the Probate Code inapplicable or to rebut the presumption that the transfer was the product of fraud or undue influence.

A review by an independent attorney that results in the execution of a Certificate of Independent Review is the primary methodology to help ensure that a gift to a care custodian does not fail as a result of the application of the statutory provisions discussed above.

Probate Code §21384 sets out the statutory requirements. First, the instrument containing the gift must be reviewed by an independent attorney. Second, the independent attorney must counsel the transferor. This counsel must address the nature and consequences of the intended transfer, including the effect of the intended transfer on the transferor’s heirs and on any beneficiary of a prior donative instrument. Third, this

counsel must be outside of the presence of any heir or proposed beneficiary. Fourth, the independent attorney must attempt to determine if the intended transfer is the result of fraud or undue influence. Fifth, an original Certificate of Independent Review in substantially the form set out in this section must be signed and delivered to the transferor with a copy provided to the drafting attorney.¹⁸

The term “independent attorney” is defined in Probate Code §21370. It means an attorney who has no legal, business, financial, professional, or personal relationship with the beneficiary of a donative transfer at issue. This term also excludes an attorney who would be appointed as a fiduciary or receive any pecuniary benefit as a result of the operation of the instrument containing the donative transfer at issue.¹⁹

It is interesting to note that there is at least one appellate court decision which contains a much more expansive definition of who is or might not be independent for purposes of the review and execution of a Certificate. In *Estate of Eugene Winans*, the court focused its discussion as to independence on the reviewing attorney’s relationship with the donor. By reviewing the legislative history, the *Winans* court concluded that the word “independent” “would entail, at a minimum, ‘an attorney not related to, or associated with, the drafter or the beneficiary of the transfer.’”²⁰

Although *Winans* was decided under the prior statutory framework, there are some insightful comments in the opinion for consideration. While the prior statute did not discuss a minimum, adequate level of counseling and only contained “the barest description of the necessary counseling,” the court declined to require that the reviewing attorney discuss the existence of the statute, its purpose and operation, and the concept of “disqualified persons.”²¹

The term “nature and consequences” must be construed in light of the purpose of the statute, that is to ensure that the testator makes the bequest to a disqualified person both voluntarily and fully aware of the scope of the action. “Nature” extends to both the type and amount of the property being transferred.

The term “consequences” extended to those individuals who will not only receive the property but those who will not receive the property. The court found that proper counseling required the attorney to ensure that a testator understood that a disqualified person would receive the property and that the natural objects of the testator’s bounty would not.²²

The *Winans* court went on to require that the testator voluntarily intended this result and that he or she did not “believe himself or herself to be under any compulsion, whether legal, financial or otherwise, to make the bequest.” This may extend to documenting advice to the testator and confirming his or her understanding that the disqualified person has already been fully compensated for services provided to the testator or otherwise has no legal claim on the testator’s bounty.²³

While the statute does not specifically require the counseling to be confidential, the Certificate provided for in §21384 stipulates that the reviewing attorney certify that he or she has advised the

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transferor “independently, impartially, and confidentially.” Thus, the *Winans* court agreed the statute required the counseling to occur confidentially. Caution should be taken to ensure that the otherwise disqualified person is not privy to the counseling discussions (in *Winans*, she is “in and out”) and that the conversations cannot be overheard by third parties.²⁴

The *Winans* court noted the best practice is “to hold the counseling session in complete privacy with only the testator and certifying attorney present.” But the court refused to adopt a rule strictly prohibiting the presence of a third party. The court recognized that there might be circumstances in which the presence of a third party would be necessary to effect the counseling. It concluded that, at a minimum, the disqualified person and any person associated with the disqualified person must be absent during the counseling session.

Further, any person whose presence might discourage the testator from speaking frankly with the attorney must also be absent. If any person other than the certifying attorney is present during a counseling session, the court imposed a burden on the disqualified person to demonstrate that the counseling session was confidential by showing that the presence of third parties was either necessary to accomplish the counseling session, or did not interfere with the transferor’s full and honest conversations with the drafting attorney regarding the transfer to the disqualified person.²⁵

With respect to “independence,” the *Winans* court focused on ensuring that the attorney’s personal circumstances permitted the rendering of a disinterested judgment about the validity of the request. Dissociation from the beneficiary’s interests alone was insufficient to constitute independence. Relationships with the transferor and the drafting attorney were also considered in the determination.²⁶

Failure to Obtain Certificate of Independent Review

In *Osornio v. Weingarten*, the drafting attorney failed to obtain a Certificate of Independent Review for a plan in which the entire estate was left to a care custodian. When the care custodian was unable to overcome the statutory presumption against

the bequest, the bequest failed. The care custodian then sued the drafting attorney, contending that the failed bequest was a result of the attorney’s negligence in failing to obtain a Certificate of Independent Review.

The *Osornio* court found that the drafting attorney owed a duty to advise the transferor that, absent taking certain steps, the subject transfer, if challenged, had a significant likelihood of failure because of presumptive disqualification and to recommend that the client seek independent counsel in an effort to obtain a Certificate of Independent Review. This counseling is clearly intended to occur prior to the client’s decision to obtain a Certificate of Independent Review.²⁷

The four elements to a legal malpractice claim are duty, breach of duty, proximate cause, and damage. The *Osornio* court found that the caregiver could have alleged that the attorney breached a duty owed to her by failing to advise the testator of the caregiver’s presumptive disqualification and referring the testator to independent counsel to advise her and to provide a Certificate of Independent Review. Additionally, in the absence of a certificate, the caregiver would be required to prove by clear and convincing evidence (not including her own testimony) that the transfer was not the product of fraud, menace, duress, or undue influence, which is a high burden.²⁸

In *Osornio*, the court identified six factors to be evaluated when determining the existence of an attorney’s duty to a non-client. One of those factors queries whether the extension of liability to a non-client, here the care custodian, would “impose an undue burden on the profession.” In extending liability, the court found that the care custodian was a third party beneficiary of the contract to provide legal services.²⁹ Hence, third-party liability could reasonably be imposed.

The *Osornio* court, in analyzing the duty of a drafting attorney, also found that an attorney is expected to possess a knowledge of “plain and elementary principles of law,” to undertake reasonable research, and “to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.”



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The court went on to say that the attorney **must** (emphasis added) assist his client in making the transfer “in a manner that does not unduly expose the transfer to attack.” Imposing a duty does not create a situation where the attorney would have conflicting loyalties. Imposing a duty in cases such as this would only encourage attorneys to “devote their best professional efforts on behalf of their clients.” The attorney’s duty was to take appropriate actions to carry out the testator’s wishes that were expressed and formalized in a signed estate planning instrument.³⁰

Other Methods to Render Probate Code §21380 Inapplicable

As the *Osornio* court commented, in the absence of a Certificate of Independent Review, a presumptively disqualified donee may rebut the presumption where the court determines on clear and convincing evidence, not based solely on his or her own testimony, that the transfer was not the product of fraud, menace, duress, or undue influence. This burden of proof requires the care custodian to persuade the court that it is “highly probable that the fact is true.”

Framed differently, the care custodian must demonstrate that there is no substantial doubt that the transfer was not the product of fraud, menace, duress, or undue influence. If the proposed donee fails to meet this burden, he or she shall bear all costs of the proceedings, including reasonable attorney’s fees. However, the converse is not true. A proposed donee who establishes the validity of the donative transfer by successfully rebutting the presumption is not entitled to an award or costs and reasonable attorney’s fees.³¹

If the transferor is also a conservatee, the court may issue an order on a substituted judgment petition which seeks authority to execute an estate planning instrument containing a presumptively disqualified transfer after full disclosure of all of the relationships involved.³²

Finally, it is worth mentioning that lifetime transfers not made on written instruments are not subject to the presumptive disqualification statute. These gifts would exclude gifts evidenced by a deed, a bank or securities account transfer, a vehicle transfer, or similar transfers. These exempt lifetime transfers are still subject to issues of fraud, duress, and undue influence.

The Gift Has Failed

If the proposed transfer is subject to the statute and none of the above approaches are either available or can be satisfied, the gift will fail. If the gift fails, the instrument operates as if the beneficiary had predeceased the transferor without a spouse, domestic partner, or issue.³³ The invalid transfer will pass to the donor’s intestate successors or beneficiaries under a prior instrument if no provision has been made for an alternative or residuary beneficiary. Under the doctrine of dependent relative revocation, a will that is revoked by a later will in the belief that

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the later document is effective remains in effect to the extent that the later will is invalid.³⁴

In addition to the potential malpractice liability imposed under *Osornio* which is discussed above, Business and Professions Code §6103.6 makes an attorney's violation of part 3.5 commencing with Probate Code §21350 (the predecessor statute) or part 3.7 commencing with Probate Code §21360 grounds for discipline "if the attorney knew or should have known of the facts leading to the violation." This section is only applicable to violations that occur on or after January 1, 1994.³⁵

Practice Pointers

In an effort to avoid the potential failure of the client's expressed proposed transfer, the potential imposition of malpractice liability and risk of discipline by the State Bar, the attorney should consider the adoption of practice pointers raised by the applicable statutes and case law.

First, the drafting attorney should revise his or her estate planning questionnaire to aid in the identification of all care custodian issues. The questionnaire should closely follow all statutory definitions so as to assist in the identification of all possible disqualified transfers. The questionnaire should be used with each and every estate planning engagement.


Second, to the extent that the drafting attorney will not prepare a Certificate of Independent Review for a gift to a care custodian (which review is specifically authorized by statute in

this very limited circumstance), it is recommended that the drafting attorney specifically excludes this service in their written Agreement of Representation. There is no statutory duty imposed on the drafting attorney to perform this service.

Third, the authors recommend extreme caution in making referrals to attorneys for preparation and execution of the Certificate of Independent Review. The *Winans* court has expanded the definition of "independent attorney." Query how far a court may go in its analysis of independence and whether the landlord/officemate situation in *Winans* might also be expanded to other relationships such as friendships, referral relationships, or the like. The authors recommend the use of a lawyer referral service such as the service provided by the San Fernando Valley Bar Association in an effort to ensure as much independence as possible.

Fourth, in keeping with *Osornio* and *Winans*, the drafting attorney should document the risk that the contemplated gift will fail and that he or she recommends the client seek independent counsel to procure a Certificate of Independent Review. This letter should be sent to the client multiple times and copious notes maintained regarding discussions with the client.

Fifth, in further keeping with *Osornio* and *Winans*, the certifying attorney should prepare a Certificate of Independent Review that is both statutorily compliant and considers the *Osornio* issues such as discussed above.

Strict adherence to the statute and case law will help ensure that the client's testamentary wishes are carried out and that the attorney's risk of discipline and malpractice are minimized. 

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¹ CAL. PROB. CODE §§21350(6) and 21380(a)(3).

² CAL. PROB. CODE §21355.

³ CAL. PROB. CODE §21355(a).

⁴ *Bernard v Foley*, 39 Cal.4th 794, 47 Cal.Rptr.3d 248 (2006).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ CAL. PROB. CODE §21380(b).

⁹ CAL. PROB. CODE §21380(d).

¹⁰ CAL. PROB. CODE §21362(a).

¹¹ CAL. PROB. CODE §21362(b).

¹² *Conservatorship of Davidson*, 113 Cal.App.4th 1035 (2003).

¹³ CAL. PROB. CODE §21366.

¹⁴ *Estate of Shinkle*, 97 Cal.App.4th 990 (2002).

¹⁵ CAL. PROB. CODE §21382.

¹⁶ *Estate of Pryor*, 177 Cal.App.4th 1466 (2009).

¹⁷ *Estate of Lira*, 212 Cal.App.4th 1368 (2012).

¹⁸ CAL. PROB. CODE §21384.

¹⁹ CAL. PROB. CODE §21370.

²⁰ *Estate of Eugene Winans*, 183 Cal.App.4th 102 (2006).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Osornio v. Weingarten*, 124 Cal.App.4th 304 (2004).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² CAL. PROB. CODE §§2580 and 21380.

³³ CAL. PROB. CODE §21386.

³⁴ *Estate of Anderson*, 56 CA 4th 235 (1997).

³⁵ CAL. BUS. & PROF. Code §6103.6.



Test No. 102

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Tom signed his trust containing a gift to his caregiver on December 3, 2010. Tom had a stroke on January 15, 2011, causing him to go into a coma, and died on January 15, 2016, never regaining consciousness since his stroke. In a lawsuit to invalidate the gift to Tom's caregiver, it would be appropriate to use Probate Code §21350 for the analysis.
☐ True ☐ False
2. In 2017, Tim's brother-in-law, Sam, was asked to leave his job in order to care for Tim, who was diagnosed with dementia. Tim paid Sam \$50 per day to help with the administration of Tim's medication and to drive Tim to the doctor. Two weeks after Sam started providing these services, Tim contacted his attorney and changed his trust to leave Sam a substantial gift. One month later, Tim died. PC §21380 does not apply to this situation.
☐ True ☐ False
3. In *Estate of Shinkle*, the court determined that, under certain conditions, a person can provide the donor with health and social services without being considered a care custodian.
☐ True ☐ False
4. PC §21350 was designed to supplement, not replace, the common law doctrine establishing a presumption of undue influence for gifts to those who share a confidential relationship with the donor.
☐ True ☐ False
5. A properly executed Certificate of Independent Review cannot rescue a gift to care custodian made in a trust which became irrevocable on January 2, 2008.
☐ True ☐ False
6. Under *Bernard v. Foley*, a person with a pre-existing friendship with the donor falls outside of the statutory definition of a care custodian.
☐ True ☐ False
7. There is no way to overcome the presumption of undue influence once it is established under PC §21380.
☐ True ☐ False
8. In 2017, Sam establishes a friendship with John, who was receiving hospice care when they became friends. This genuine friendship lasts until John's death 11 months later. Four months into the friendship, John changes his trust to leave everything to Sam. If Sam provided John with health or social services without remuneration starting one month before John's death, Sam is not a care custodian.
☐ True ☐ False
9. A Table of Consanguinity is used to determine the degree of kinship between two related people.
☐ True ☐ False
10. PC §21384 sets out the statutory requirements for a Certificate of Independent Review. Under §21384, the independent attorney must counsel the transferor on the nature and consequences of the intended transfer.
☐ True ☐ False
11. "Care custodians" is defined as persons who provide health or social services to dependent adults, including those individuals who provide such services without remuneration under certain circumstances.
☐ True ☐ False
12. In *Estate of Eugene Winans*, the California Supreme Court adopted a rule prohibiting the presence of a third party at confidential counseling sessions.
☐ True ☐ False
13. In *Bernard v. Foley*, the California Supreme Court concluded that whether the personal care services were provided with no expectation of compensation was immaterial to the outcome of the case.
☐ True ☐ False
14. Dissociation from a beneficiary's interests alone is insufficient to constitute independence.
☐ True ☐ False
15. In certain circumstances, an "independent attorney" is permitted to have a legal, business, financial, professional, or personal relationship with the beneficiary of a donative transfer at issue.
☐ True ☐ False
16. In *Conservatorship of Davidson*, the court found that a variety of activities—including cooking, gardening, driving the transferor to the doctor, running errands, and grocery shopping—qualified as health and social services.
☐ True ☐ False
17. PC §21384 fails to set out the statutory requirements of a Certificate of Independent Review.
☐ True ☐ False
18. The best practice is for a reviewing attorney to hold a counseling session with a testator and the certifying attorney in a public venue so that witnesses can corroborate whatever counsel is given.
☐ True ☐ False
19. The three elements to a legal malpractice claim are breach of duty, proximate cause, and damage.
☐ True ☐ False
20. The relationship between a dependent adult and their care custodian is not considered a confidential relationship under the provisions of PC §21350.
☐ True ☐ False

MCLE Answer Sheet No. 102

INSTRUCTIONS:

1. Accurately complete this form.
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3. Answer the test questions by marking the appropriate boxes below.
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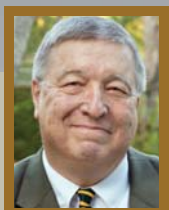
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The SFVBA Attorney Referral Service: All the Right Stuff

By Michael D. White



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

T STARTS WITH A TELEPHONE

call, a call from a distraught spouse whose family is being torn apart by divorce, domestic violence, or child custody; a senior citizen abused by professional malpractice; a bereaved son or daughter struggling with the disposition of a parent's will; a back-to-the-wall entrepreneur battling through a contract dispute with a business client—all sorts of people caught up in issues that run the gamut from the mundane and sometimes entertaining to the most poignant and gut-wrenching.

In 1948, the San Fernando Valley Bar Association (SFVBA) launched its fledgling Legal Aid and Lawyer Referral Service to vet Valley residents in need of legal assistance and direct them to qualified attorneys based on the worthiness of their case and their ability, or inability, to pay. The service was expanded in 1977 to offer a legal services program for seniors in cooperation with the Van Nuys Senior Citizens Center.

Almost 70 years as one of almost two dozen referral services certified by the California State Bar in Los Angeles and Ventura Counties, the SFVBA's Attorney Referral Service (ARS) carries on that work every day from 9:00 a.m. to 6:00 p.m., Monday through Friday, deftly fielding an average of 600 telephone calls every month from people, often desperate and emotional, who feel their only recourse is the protection afforded by the law.

"We serve a dual purpose," says SFVBA Director of Public Services, and ARS Director, Rosie Soto Cohen. "Simply, we assist the public by offering access to qualified lawyers and, at the same time, the legal profession by helping member attorneys grow their practice."

The ARS' team of bilingual consultants interview every caller, vetting the veracity of their claims and documenting the collected data before discussing the details of the

potential case with the "right lawyer" from its battery of 125 attorneys who practice in a broad range of legal fields, including probate and estate planning, family, employment and business, real estate, bankruptcy, consumer, criminal, worker's compensation, immigration, and tax law.

Based on the detailed information gleaned from the caller, the ARS attorney then decides whether a face-to-face interview with the potential client is in order. Once a case is accepted, a case file is opened and a monthly status report is compiled to monitor its progress through the system.

"In addition to running advertisements and occasionally highlighting fees generated in *Valley Lawyer*, when we experience a shortage in specific areas of law, we call and email individual attorneys until we find what we need," says Soto Cohen, describing how the ARS recruits its attorneys.

"We also contact the [Bar's] section chairs and ask them to announce at their meetings that the ARS has a need for new members or they send a message on their listserve. This has been effective for us," she adds.

All ARS lawyers have to meet certain requirements, including good standing with the State Bar, professional liability insurance, an office within the greater San Fernando Valley, and extensive case experience in their selected areas of legal expertise.

"I see where the money goes that's generated by the ARS referral fees collected," says attorney Barry Goldberg, who serves as both Co-Chair of the ARS Committee and as the SFVBA's elected treasurer. "The ARS money funds a part of the Bar Association operations and pays for valuable programs and education for the public. Often, ARS fees ultimately benefit the disadvantaged through



“

The ARS money funds a part of the Bar Association operations and pays for valuable programs and education for the public.” —
Barry Goldberg

the bar's charitable activities and low income legal services.”

In March 2006, a call to the ARS led to a referral and the eventual crafting of a class action lawsuit against a local motorcycle dealership that was found negligent in failing to comply with the provisions of the hang tag requirements outlined in the California Vehicle Code.

The suit uncovered the fact that the dealership routinely misrepresented the actual price of the motorcycles it had sold in violation of California's Consumer Legal Remedy Act (CLRA). The Act makes unlawful "methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer."

A decade later, after considerable back-and-forth in court, the matter was found against the motorcycle dealership, which was ordered to pay \$2.8 million in attorney's fees, from which the ARS is slated to



“

Everyone who meets the qualifications should become active in the ARS.” —
Steven Simons

soon receive an agreed-to six-figure percentage share.

Northridge attorney Steven Simons handled the suit, one of more than 350 other referred cases he's handled since he signed-on with the ARS in 1999.

“The dealership claimed the suit was based on buyer's remorse,” he says. “But the case morphed from one of misrepresentation on the dealership's part to a class action suit that ultimately meant restitution for about 2,300 people.”

The vast majority of ARS referrals do not rate as big ticket, but make up with entertainment value what they lack in monetary compensation. Veteran ARS attorney William Koehler has handled “hundreds” of ARS referrals since 1977, with vivid recollections of a particularly memorable one involving a brother and sister at odds over a classic case of “who gets the house” following the death of their parents.

Both of the individuals involved had been adolescent body builders and were “rather bombastic,” recalls Koehler. “Every time they were in the same room, there were sparks, with one always picking a fight with the other and vice

versa. The police actually got involved on several occasions.”

Ultimately, though, “we were able to find some common ground that allowed them to both grudgingly walk away from the matter. In the end, it had to do more with saving face than it did with the economics.”

According to Koehler, who practices in Studio City, his first goal is to set that “common ground” as a place from which to resolve the problem without having to wind up in court.

The ARS is, he says, a “tremendous program” that, at a minimum, gives him “the opportunity to educate people about the judicial system and the reality of how it works—the time delays, the costs, and the emotional toll.”

A lot of people “don't see that,” he adds. “They're mad and they want their pound of flesh. If I can educate them to that and point out that a resolution, even one that doesn't get them everything they wanted, may very well be much better than what they'd find at the end of the litigation trail after spending a lot of money and finding themselves at the mercy of a judge who's going to make a decision that may not be what they'd like to see.”

The ARS, says Koehler, “is especially helpful for people who have limited means because most of the time they have no idea where to turn. It's not pro bono, but more often than not, they get their questions answered, or at the very least, get pointed in the right direction.”

“I don't know if working with the ARS has made me a better lawyer, but there have been a lot of times when I've felt better about being able to give direction or assistance, even to someone who didn't retain me, but took that information and later on told me that it had helped them resolve their issue,” he says.

Quite often, he adds, “it would turn out to be someone who didn't have the economic wherewithal to get involved in litigation. So they were able to resolve their dispute without incurring a large expense.”

Northridge attorney Laura Horton has practiced employment and personal injury law since graduating from Pepperdine

School of Law in 1992. She has served with the ARS for more than ten years and has proved herself the right attorney in a number of ARS-referred cases.

A recent case involved a woman fired after 37 years with a local company for reasons that, Horton says, deserved “serious litigation.”

The client “is supporting several other people and was close to being destitute,” says Horton. “The company tried to combine her age with the fact that she blew the whistle on the company for mistreating some of the people who worked under her. She stood up, did the right thing, and was made to pay the price for it.”

Success in the courtroom garnered a judgment against the company and the plaintiff “receiving sufficient resources to retire and continue her good works.”

Originally active with the LACBA's ARS, Horton signed up with the San Fernando Valley Bar's ARS because “it's proved to a better fit for me. The staff is outstanding



“

The ARS is especially helpful for people who have limited means because most of the time they have no idea where to turn.” —
William Koehler

and goes out of its way to connect people with the right attorney.”

Another lawyer “highly pleased” with the ARS staff is Woodland Hills’ business and family law attorney John DaCorsi, who joined the ARS to grow his practice. DaCorsi appreciates the staff’s “professionalism and the efficient way in which the referrals are vetted and then paired with the right lawyer.”

While many of the referrals processed at the ARS office originate at the self-help legal centers located at the courthouses in the San Fernando Valley, as well as in adjacent Ventura County, a number are generated by other attorneys and participation in regional community events and programs. The ARS takes part in about eight major San Fernando Valley community events annually and regularly engages the public at senior centers and numerous street fairs and law-related observances.

“Everyone in my office has the ARS phone number nearby,” says Goldberg, a member of the ARS’ Personal Injury panel. “When we cannot take a case, we always give out the ARS phone number and tell the potential client that they will be paired with a well-qualified lawyer and that the ARS has the best lawyers. By providing the ARS number, we’ve given valued potential clients sound information and have taken care of them even if the case was not right for our office.”

While encouraging SFVBA members to consider participating in the ARS, he says, “I think that if our members really considered the ARS program, they all would, and should, have the service’s telephone number handy to every office phone, and train lawyers and staff alike to use this valuable resource.”

Glendale family law practitioner and ARS member John Goffin mirrors that sentiment, saying that “working with the service is a great way to build



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The staff is outstanding and goes out of its way to connect people with the right attorney.” —

Laura L. Horton

one’s practice,” and, he adds, make connections outside the legal profession, alluding to his years-long bond with a referred client who, of all things, happened to share a mutual interest in tennis.

“Everyone who meets the qualifications should become active in the ARS,” says attorney Steven Simons. “The Service needs lawyers in a wide variety of practice areas and there’s really no reason why anyone who calls the ARS office can’t be connected with a lawyer who can help them.”

One of the staff members at the heart of what the ARS accomplishes every day is Catherine Carballo-Merino, who has served as a Referral Consultant since early 2016.

“When I started working here, my understanding of the legal system was drawn from television shows and commercials. It was a hard hit when I came to realize that the majority of the things I thought I knew about the legal system were wrong,” she says. “Our ARS attorneys have taught me so much about the law, that I have been able to create a consultant handbook with legal information of over 20 major areas of law.

I want to thank them for their support and patience in teaching me about the law so that I can refer better quality clients and cases.”

That “patience” has paid off, particularly with callers who, she says, “don’t understand that an immigration attorney is different from a personal injury attorney or a business attorney. To them, all attorneys are the same and should be able to handle all the areas of law. It’s rewarding to be able to steer them in the correct direction.”

Carballo-Merino and her fellow consultant, Fanny Arellano, “let them know what kind of an attorney they need, why certain attorneys may have to turn down their case, and give them tailored resources. We may not be able to give them legal advice, but we can at least help guide them in the correct direction so they can have a better informed idea of what they should be looking for and what they should expect moving forward.”

There have been instances “when an attorney takes on a caller knowing full well that he will only be giving legal advice,” she says.



“

The program is a win for the people who call and a win for the attorney who has a case that has been pre-screened by the ARS’ efficient staff.” —

John DaCorsi

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Working with the service
is a great way to build
one's practice.” —

John Goffin

“Fanny and I can't give out legal advice, so it's gratifying that our attorneys, especially those that participate in our Senior Citizen Program, get a chance to assist seniors who may not know exactly what kind of problems they actually have,” she adds. “There are times when a senior calls saying that they received court papers, but they don't know what the court papers say or why they received the papers in the first place.”

Every call she handles stretches her knowledge of the legal field and, says Arellano, “is a chance for me to do my good deed for the day by passing on useful information and legal options to a public that's largely unaware of how the legal system works. Every call, even the complicated ones, provides us with feedback that helps make our screenings more thorough.”

All in all, says attorney John DaCorsi, the SFVBA's Attorney Referral Service is “a win for the people who call and a win for the attorney who has a case that has been pre-screened by the ARS' efficient staff.”

There are, he says, “more than just a few law offices that should be so effective and so well organized.” 

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- David L. Fleck, Esq.



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Attention Shoppers!

Surveillance on Aisle 6



By Ronald P. Abrams
and Michael A. Bernet

ONCE CONSIDERED PURE sci-fi fantasy, artificial intelligence is now a reality with very real implications for a variety of business areas, particularly fashion apparel retailing and fashion-related copyright protections. Companies like Apple, Google and Microsoft are investing billions of dollars¹ into the development of highly sophisticated computer systems that are capable of synthesizing mass amounts of data, solving complex problems, and even answering questions that its programmers never thought to ask.²

Artificial intelligence, or AI, is defined as “a branch of computer science that is concerned with the development of highly advanced computer systems that can perform

functions normally thought to require human mental processes, such as perception, reasoning and creativity.”³

AI systems are already a part of our everyday lives, and are in everything from our phones and cars to video games and thermostats—built not only to make our personal lives easier and more enjoyable, but also to save us time and money. Likewise, companies are developing AI systems that can supplement or replace human workers, which will not only cut overhead costs, but might even perform more efficiently.⁴

From entertainment,⁵ to law,⁶ and even medicine,⁷ AI systems are emerging in every industry.

Retail Shopper’s Eye in the Sky

Within the retail industry, AI systems

that collect and analyze online user data have been used for many years to tailor product and service offerings to individual consumers.⁸ The technology is also being used to manage inventory based on predictive modeling, and even identify ideal store locations for certain products.⁹ These systems have improved dramatically over time and are continually evolving.¹⁰

Many online shoppers are already familiar with AI-powered chat boxes that function as both salespersons and customer service representatives on retail websites.¹¹ Some retailers are even experimenting with camera systems and virtual reality headsets that track consumer body and eye movements as they shop both in stores and online.¹²



Ronald P. Abrams, of counsel at Brutzkus Gubner, counsels small and start-up companies on intellectual property matters, and litigates trademark and trade secret cases. **Michael A. Bernet** is an associate at Brutzkus Gubner whose practice is primarily devoted to intellectual property and general civil litigation matters. They can be reached at mbernet@brutzkusgubner.com and rabrams@brutzkusgubner.com, respectively.

According to one survey from September 2015,¹³ at least 27 percent of all retailers, 43 percent of the largest retailers, and 59 percent of fashion and apparel retailers, have used facial recognition technology in stores to prevent shoplifting,¹⁴ identify VIP clients and potential big spenders,¹⁵ and even interpret facial expressions as shoppers view merchandise,¹⁶ although retailers may not want to admit it.¹⁷

Other companies are developing AI systems that can remember what a customer bought and tried on, and even the things they said.¹⁸ These types of technological advances are not only lowering costs and increasing revenues, they are revolutionizing the way the retail industry does business.¹⁹

Interestingly, some AI systems, including IBM's Watson, are being used to determine not only what consumers are buying today, but forecast what they'll be wearing and purchasing tomorrow.²⁰

Within the apparel industry, many are wondering whether it's possible for an AI system to predict fashion trends.²¹ Indeed, some are already attempting to do exactly that.²² Some AI systems are being used to create unique garment designs tailored to individual consumers based on their responses to a series of questions and user-created sketches.²³

The question then becomes whether those AI-created garment designs can be copyrighted, and, if so, who owns the copyright? Brand owners and their attorneys may be in for a rude awakening when they seek copyright protection for such designs since the answers are anything but straight-forward.

Cognitive Dresses and Media Moods

The primary difficulty lies in the application of old statutory language to modern day technological works, where the human element has been

severely limited (or even eliminated) in the creative process.

The Copyright Act only extends protection to "original works of authorship fixed in any tangible medium of expression."²⁴ While the Act provides that the medium must be fixed "by or under the authority of the author," it does not define the terms "author" or "works of authorship."²⁵ In 1984, the U.S. Copyright Office said that "[t]he term 'authorship' implies that, for a work to be copyrightable, it must owe its origin to a human being."²⁶

In 1989, the U.S. Supreme Court indicated that the term "author" refers to "persons,"²⁷ and various circuit and lower courts have since then consistently said that not only does author mean "human beings,"²⁸ but the "work" itself requires "some element of human creativity."²⁹

In 2014, the Copyright Office updated its practice guidelines for the first time since 1984, and declared that "[t]o qualify as a work of 'authorship' a work must be created by a human being."³⁰ "The Office will not register works produced by nature, animals, or plants," such as a "photograph taken by a monkey" or a "mural painted by an elephant," or works "purportedly created by divine or supernatural beings."³¹

Perhaps with AI in mind, the Copyright Office went so far as to say that it "will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author."³² It appears then that the Copyright Office might register a work that is made by a human with the assistance of AI, however, in the context of AI, it remains to be seen what amount of human "creative input or intervention" will be required.

But what if a human and an AI system jointly create a work? For instance, last year fashion design

70% of Americans will need some type of Long Term Care



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house Marchesa teamed up with IBM's Watson to create a "cognitive dress" for the 2016 Met Gala, which was embedded with LED lights that changed colors in real time, according to the social media moods of users who were commenting on the gala through Twitter.³³ While it does not appear that any copyright dispute arose in that instance, or any other similar instance involving AI systems, it seems like a novel question.

The Copyright Act defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."³⁴ Even if Marchesa and Watson's dress meets this standard, the Copyright Office might refuse to register the design because one of the authors is not a human being, as some have suggested.³⁵ On the other hand, since the Copyright Office has said that machines cannot be authors, the Copyright Office might not consider it a joint work at all, but rather the sole and registerable work of Marchesa.³⁶

Use and Profit Entitlement

This AI-related copyright quandary, as with myriad other legal issues raised by AI, has yet to be resolved, and it may be quite some time until such issues are sorted out. In the meantime, intellectual property attorneys need to counsel apparel clients to protect their intellectual property rights and to steer them away from trouble. It might be advisable for a fashion design house such as Marchesa, and the owner of the partner-AI system such as IBM, to have a written agreement as to the nature of the work that will be created. A work for hire agreement, for instance, might be appropriate.

The Copyright Act defines a "work made for hire" as "a work prepared by an employee within the scope of his or her employment; or a work specially ordered or commissioned for use as a

contribution to a collective work . . . or other audiovisual work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."³⁷ It should be cautioned, however, that the Copyright Office might still refuse to register the work if it considers an AI system to be one of the authors.³⁸

Even if the Copyright Office refuses to register a work because of an AI system's purported involvement in its creation, the owner is still generally entitled to use and profit from the work, assuming it does not infringe on anyone else's rights. Further, just because registration has been refused, it doesn't necessarily mean that the owner lacks the means to protect itself from copycats.

The Copyright Act provides that if an application is delivered "in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights."³⁹ In the context of AI systems, however, any such case would probably face an uphill battle since the defendant would likely raise the defense of non-copyrightable subject matter. If the court determines that the work does not involve a sufficient amount of human "creative input or intervention," the defense would probably defeat the copyright claim(s).⁴⁰ Discovery into the creative process and the AI system's role will be key to establishing this defense.

For example, what were the machine's contributions and what were the human contributions to the work? Are there human-created early drafts or other materials evidencing human involvement? How about the ability or inability of the purported author to recreate the same or a similar work during a deposition? In some circumstances, the Lanham Act might also provide relief if the

alleged improper use can be shown to amount to unfair competition or false designation of origin.⁴¹

IP Infringement and Derivative Works

On the other hand, what if a client has used AI in some manner to create a design that is alleged to infringe on the intellectual property rights of another? How will the degree of human involvement, if any, in the creation of the accused design impact the case? While it remains to be seen how a court would handle this scenario (some believe that human involvement is a prerequisite to liability for infringement),⁴² it is certainly possible that liability could be attributed to the owner of the allegedly infringing work.

What if the AI system was programmed to create designs that are similar to or based on other designs? The resulting work might be considered a "derivative work," and therefore an infringement.⁴³ If it can be demonstrated that this was intentional, then willful infringement might be found and statutory damages of up to \$150,000 per infringed work could be awarded.⁴⁴


Fashion designers and brand owners interested in using an AI system to create designs should be made aware of the potential legal pitfalls and use caution when programming or adopting the AI system. Add to the equation the common misperception that it is permissible to modify an existing design by adding or subtracting some uncertain percentage of design elements without permission. If a work intentionally resembles any other work by any percentage, without permission from the rights holder, it may be considered an unauthorized derivative work, which constitutes copyright infringement.⁴⁵

In other words, fashion designers and brand owners should be very careful when experimenting with

AI systems to create new works, not only because the works may not be protectable works of authorship, but because the AI-produced work may infringe on another's design.

Closely related to the AI copyright dilemma, apparel retailers and designers should also be aware of new digital computer programs able to scour the internet and instantly detect exact or similar apparel designs.

For years, audio fingerprint recognition technology has existed that enables music copyright holders to digitally detect unauthorized uses across the digital landscape by matching the audio "fingerprints" of the protected music.⁴⁶ In the apparel realm, "reverse image" searches can be used to search the internet for potentially infringing apparel designs.⁴⁷

Perhaps now more than ever, intellectual property attorneys need to keep abreast of the latest technological advances, including AI, to provide sound advice to their apparel clients for protecting their intellectual property rights and for steering clear of potential infringement claims. 

¹ See Lisa Calhoun, *Artificial Intelligence Deals Top \$1 Billion*, INC. MAGAZINE, November 30, 2016

² See Charlie Rose, *Artificial intelligence positioned to be a game-changer*, 60 MINUTES, October 9, 2016.

³ See, e.g., Kris Hammond, *What is artificial intelligence?*, COMPUTERWORLD, April 10, 2015.

⁴ See Kevin Maney, *How Artificial Intelligence and Robots Will Radically Transform the Economy*, NEWSWEEK, November 30, 2016.

⁵ Examples include subscription recommendation services, such as Pandora, Spotify, and Netflix that adapt their recommendations based on a subscriber's history, likes or dislikes, as well as those of other subscribers.

⁶ See Chris Weller, *The world's first artificially intelligent lawyer was just hired at a law firm*, BUSINESS INSIDER, May 16, 2016.

⁷ See Robert McMillan and Elizabeth Dwoskin, *IBM Crafts a Role for Artificial Intelligence in Medicine*, THE WALL STREET JOURNAL, August 11, 2015.

⁸ See Leslie Hook and Lindsay Whipp, *Retailers look to artificial intelligence to bag sales*, FINANCIAL TIMES, November 9, 2016.

⁹ See Bryan Pearson, *Using Artificial Intelligence Both In Apps And In The Aisles*, FORBES, January 30, 2017.

¹⁰ See Kevin Kelleher, *3 Ways Artificial Intelligence Will Impact Marketing*, TARGET MARKETING MAGAZINE, July 21, 2016.

¹¹ See Shep Hyken, *How Artificial Intelligence Creates A Better Customer Service Experience*, FORBES, November 5, 2016.

¹² See Alison Embrey Medina, *Eye Tracker Technology for Retail*, DESIGN RETAIL ONLINE, June 2, 2016.

¹³ *Next Generation In-Store Technology: Where Do Shoppers and Retailers Stand?*, COMPUTER SCIENCES CORPORATION, September 10, 2015.

¹⁴ See Chris Frey, *Revealed: how facial recognition has invaded shops – and your privacy*, THE GUARDIAN, March 3, 2016.

¹⁵ See Natash Singer, *When No One Is Just a Face in the Crowd*, THE NEW YORK TIMES, February 1, 2014.

¹⁶ See Emily Chung, *Face-reading tech could make shopping more convenient — and creepier*, CBC NEWS, March 14, 2015.

¹⁷ See Patrick Healy, *Facial Recognition Providers Offer Service That Retailers Want to Have, But Not Acknowledge*, NBC LOS ANGELES, December 12, 2016.

¹⁸ See John Callan, *What's Driving Artificial Intelligence? How AI Will Make Consumers Fall for Brands*, TOTAL RETAIL, February 15, 2017.

¹⁹ See, e.g., Shan Li, *How retail stores are using virtual reality to make shopping more fun*, LOS ANGELES TIMES, April 10, 2016.

²⁰ See Bryan Pearson, *Using Artificial Intelligence Both In Apps And In The Aisles*, FORBES, January 30, 2017.

²¹ See, e.g., Kate Abnett, *Is Fashion Ready for the AI Revolution?*, BUSINESS OF FASHION, April 7, 2016; Haosha Wang, *Machine Fashion: An Artificial Intelligence Based Clothing Fashion Stylist*, UNIVERSITY OF GEORGIA, August 2014.

²² See, e.g., Torrence Boone, *Fashion Trends 2016: Google Data Shows What Shoppers Want*, THINK WITH GOOGLE, August 2016.

²³ See, e.g., PROJECT MUSE.

²⁴ 17 U.S.C. §102(a).

²⁵ See 17 U.S.C. §101.

²⁶ *Compendium of U.S. Copyright Office Practices, Second Edition*, UNITED STATES COPYRIGHT OFFICE, 1984.

²⁷ *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

²⁸ See, e.g., *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011); *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231, at *4 (N.D. Cal. Jan. 28, 2016).

²⁹ See *Urantia Found. v. Maaherra*, 114 F.3d 955, 958 (9th Cir. 1997).

³⁰ *Compendium of U.S. Copyright Office Practices, Third Edition*, UNITED STATES COPYRIGHT OFFICE, December 22, 2014.

³¹ *Id.*

³² *Id.*

³³ See, e.g., Brian Mastrojanni, Marchesa, *IBM Watson design "cognitive dress" for Met Gala*, CBS NEWS, May 2, 2016.

³⁴ 17 U.S.C. §101.

³⁵ See Chad Rutkowski, *The Monkey in the Machine*, COPYRIGHT, CONTENT, AND PLATFORMS, February 3, 2016.

³⁶ See *Compendium of U.S. Copyright Office Practices, Third Edition*, UNITED STATES COPYRIGHT OFFICE, December 22, 2014.

³⁷ 17 U.S.C. §101.

³⁸ See *Compendium of U.S. Copyright Office Practices, Third Edition*, UNITED STATES COPYRIGHT OFFICE, December 22, 2014.

³⁹ 17 U.S.C. §411(a).

⁴⁰ See, e.g., *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987).

⁴¹ See 15 U.S.C. §1125(a).

⁴² See, e.g., Gregory Bufithis, *Comment: Artificial Intelligence and changing intellectual property standards*, LEGAL INSIDER, April 5, 2016.

⁴³ See 17 U.S.C. §101.

⁴⁴ See 17 U.S.C. §504(c)(2).

⁴⁵ See 17 U.S.C. §101.

⁴⁶ See, e.g., *Collective Digital Studio, LLC v. Freeplay Music, LLC.*, Case No. 15-cv-00936 JFW-RZ (C.D. Cal. 2015).

⁴⁷ See, e.g., <https://www.tineye.com>.

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Toxic Stress, Job Burnout and How to Fix It

By Terri L. Asanovich, MFT

AN INTERESTING REPORT was published several years ago that addresses the issue of what's come to be known as "secondary traumatic stress" in people working in the legal profession.¹ The study, commissioned by the Wisconsin Public Defender's Office, found that the agency's attorneys demonstrated significantly higher levels of PTSD symptoms, depression, secondary traumatic stress, burnout and functional impairment compared with administrative support staff.

By definition, secondary traumatic stress is "the stress resulting from

helping, or wanting to help, a traumatized or suffering person."²

Secondary Trauma

The occurrence of secondary traumatic stress or vicarious traumatization was first defined in the mid-1980s, originally observed in therapists and roughly coinciding with the growth in treatment focused on professional clients who were themselves victims of trauma.

Among attorneys, secondary trauma occurs when intrusive thoughts, avoidance and withdrawal, and the symptoms of tension and

disturbed sleep result from the exposure to traumatic material that so often can comprise the part-and-parcel of some difficult cases. Moreover, professionals may develop changes in basic assumptions about themselves, people, society, and personal safety.

In addition to secondary traumatic stress and vicarious traumatization, professionals working on particularly intense cases can develop burnout—an accumulation of stress and the erosion of idealism characterized by fatigue, poor sleep, headaches, anxiety, irritability, depression,



Terri L. Asanovich, MFT is a licensed family therapist practicing in Sherman Oaks. An Associate Member of the San Fernando Valley Bar Association, she provides the legal community with therapy, child custody evaluations, and case consultations. She can be reached at tasanovichmft@aol.com.



hopelessness, aggression, cynicism, and even substance abuse. Also, according to the Wisconsin State Public Defender's study, attorneys were seen to have demonstrated significantly higher levels of PTSD symptoms. This difference was mediated by attorney's longer work hours and greater contact with clients who had experienced trauma.³

Secondary traumatic stress is often found in certain categories of legal practice, such as family law, where lawyers must deal with emotionally charged issues that often revolve around violence and abuse; personal injury lawyers who interface with clients who have suffered physical, emotional or psychological injury or distress; and criminal attorneys who defend individuals accused of committing crimes of violence. Other studies have shown that attorneys demonstrated higher levels of secondary trauma and

Some Helpful Steps to Mitigate Stress and Burnout

- **DEVELOP YOUR EMOTIONAL INTELLIGENCE.** This is defined as the "capacity for recognizing our own feelings and those of others, motivating ourselves and managing emotions well in ourselves and our relationships."¹³ Greater ratios of emotional intelligence lead to increased happiness, professional satisfaction, and can decrease burnout.¹⁴ Acknowledge the people and experiences in your life to be thankful for and cultivate your own emotional intelligence by keeping a daily gratitude journal.
- **AEROBIC EXERCISE.** This office-friendly activity can be very effective in reducing stress and optimizing brain function.¹⁵ Any exercise that raises the heart rate for an extended period of time increases blood and oxygen flow to the brain, elevates and balances key neurotransmitters, and causes the release of the proteins that build and protect brain cells.¹⁶
- **GET ENOUGH SLEEP.** Extensive research shows that a good night's sleep greatly enhances memory.¹⁷ It is postulated that enhanced memory consolidation takes place during REM (rapid eye movement) sleep when certain genes are activated.¹⁸ Researchers recommend that lawyers optimally get eight hours of sleep per night to enhance memory recall.¹⁹
- **DE-STRESSED BREATHING.** There is a simple breathing technique that can be utilized anywhere to calm yourself quickly or are experiencing anxiety. First, take a long, deep breath in through your nose and hold it for a count of three seconds. Slowly exhale through your mouth to the count of four. Do this at least three times. As odd as it may sound, no one really knows exactly how this stress-relieving technique works, but it really does.
- **MEDITATION.** Meditation can increase your ability to serial task, or prioritize and focus, on one thing at a time rather than try to juggle too many tasks at once.²⁰ A serial-tasker is present in the moment, listens actively to others, maintains a working flow on projects, and ignores the false sense of urgency that multi-tasking creates. Another component of meditation is mindfulness which activates self-awareness rather than self-reflection.²¹ Meditation has proven to have four benefits that could potentially lead to improved legal practice: regulating attention, being aware of physical limitations, regulating emotions, and re-calibrating how you see yourself.²²

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burnout direct correlation to excessive caseloads.⁴

Fight or Flight vs. Rest and Digest

In another study, researchers found that increased levels of occupational stress was associated with high levels of personal and work related burnout among lawyers.⁵ Prolonged stress response causes ongoing damage to the emotional well-being of the stressed lawyer.⁶ Due to prolonged stress, the level of the steroid hormone cortisol rises and the executive functioning in the thinking brain is compromised during chronic stress response; thus, emotional regulation in the face of real or perceived threats can be very difficult.⁷

Many lawyers and law students are immersed in a culture of stressful response overdrive, and actually believe that the adrenaline rush that they feel enhances their performance.⁸ Research has proven, though, that memory and cognitive functions are impaired during the “fight or flight” stress response, but by enhancing “rest and digest” systems, it can actually help reverse the damage.⁹ The rest and digest part of the nervous system restores balance by curtailing the release of stress hormones, slowing the heart rate, lowering blood pressure and promoting digestion.¹⁰ This restores feelings of contentment and calm.¹¹

In short, lawyers and other legal professionals can reverse stress damage, build cognitive reserves to counter stress, and foster resilience by improving their ability to rest and digest.¹²

To be effective, attorneys must be diligent in protecting themselves from the debilitating effects of toxic stress that, unfortunately, are inherent in the often high stakes and emotionally charged legal profession. 

¹ Andrew P. Levin, et al., *Secondary Traumatic Stress in Attorneys and Their Administrative Support Staff Working With Trauma-Exposed Clients*, THE

JOURNAL OF NERVOUS AND MENTAL DISEASE, 199(12), 946-955 (December 2011).

² Charles R. Figley, *Compassion Fatigue: Coping with Secondary Traumatic Stress Disorder and Those Who Treat the Traumatized*, 1-20, Brunner/Mazel (1995).

³ Andrew P. Levin, et al., *supra* note 1.

⁴ Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE LAW REVIEW 245 (2003).

⁵ Feng-Jen Tsai, Wei-Lun Huang & Chang-Chuan Chan, *Occupational Stress and Burnout of Lawyers*, 51 JOURNAL OF OCCUPATIONAL HEALTH, 443-450 (2009).

⁶ Rick Hanson, *Buddha's Brain: The Practical Neuroscience of Happiness, Love & Wisdom*, 52-53 (2009); John J. Ratey, *Spark: The Revolutionary New Science of Exercise and the Brain*, 66-67 (2008).

⁷ Rick Hanson, *supra* note 6, at 50.

⁸ Gayatri Devi, *A Calm Brain: How to Relax Into A Stress-Free, High-Powered Life*, 7 (2012).

⁹ Rick Hanson, *supra* note 6, at 52-60; John J. Ratey, *supra* note 6, at 67-71; Gayatri Devi, *supra* note 8, at 83-86; Joseph LeDoux, *Anxious: Using the Brain to Understand and Treat Fear and Anxiety*, 59 (2015).

¹⁰ William J. Broad, *The Science of Yoga: The Risks and the Rewards*, 90 (2012); Gayatri Devi, *supra* note 8, at 53; Rita Carter, *The Human Brain Book*, 184 (2nd Ed. 2014); See, Michael S. Sweeney, *Brain: The Complete Mind: How It Develops, How It Works, and How To Keep It Sharp*, 41 (2009); Larry Squire, et al., *Fundamental Neuroscience*, 734 (4th Ed. 2012).

¹¹ See Eric H. Chudler, *The Little Book of Neuroscience Haiku* (2013); Rick Hanson, *supra* note 6.

¹² Gayatri Devi, *supra* note 9, at 37; See also Linda Graham, *Bouncing Back: Rewiring Your Brain for Maximum Resilience and Well-Being*, 208 (2013).

¹³ Andrew P. Levin, et al., *supra* note 1.

¹⁴ Daniel Goleman, *Working with Emotional Intelligence*, 317 (1998).

¹⁵ See Reuven Bar-On, *The Impact of Emotional Intelligence on Subjective Well-Being*, 23 PERSPECTIVES IN EDUCATION, 41-61 (2005).

¹⁶ Daniel G. Amen, *Change Your Brain, Change Your Body: Use Your Brain to Get and Keep the Body You Have Always Wanted*, 110 (2010); see also, Barry J. Gibb, *The Rough Guide to the Brain*, 6-8 (2d ed. 2012); Judith Horstman, *The Scientific American Brave New Brain*, 3-4 (2010); David Perlmutter & Alberto Villoldo, *Power Up Your Brain: The Neuroscience of Enlightenment*, 16-21 (2011).

¹⁷ Gayatri Devi, *supra* note 8, at 165.

¹⁸ Robert M. Sapolsky, *Why Zebras Don't Get Ulcers*, (3d ed. 2004).

¹⁹ See Rita Carter, *supra* note 10, at 184; See Michael S. Sweeney, *supra* note 10, at 189.

²⁰ Gayatri Devi, *supra* note 8, at 123.

²¹ Srinivasan S. Pillay, *Your Brain and Business: The Neuroscience of Great Leaders*, 50 (1st ed. 2011).

²² See Britta K. Hölzel, et al., *How Does Mindfulness Meditation Work? Proposing Mechanisms of Actions from a Conceptual and Neural Perspective*, 6 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE, 537 (2011).

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Giving Back to Our Community

WHEN DRIVING INTO SANTA Clarita, you might notice a prominent sign proclaiming that the city has been named as one of the Top 20 communities to live in America—a genuine source of pride for the attorneys and other professionals of the Santa Clarita Valley Bar Association who have the good fortune of living or working in that remarkable community.

The Bar is working to continue its growth as a symbol of the legal profession in our community and to educate our citizens about the law, the legal profession, and the judicial system. Over the last several years, the Bar's Board of Trustees has placed a special emphasis on giving back to our community for the gifts that we have been given, and working to better the quality of life in the Valley.

One of our long-standing community activities is an annual blood drive, which is held in conjunction with the American Red Cross and the Henry Mayo Newhall Memorial Hospital. On March 10, our members participated in yet another very successful blood drive, which will provide lifesaving supplies for our local hospital.

Several years ago, as part of our efforts to give back to the community, the Bar launched a speech competition for local high school students. Over the years, the event has proved to be a truly remarkable affair, showcasing some exceptionally talented young people who have renewed our faith in the future of the legal profession. We are extremely proud to be holding the fifth annual competition on April 19, 2017.

The junior and senior competitors are required to give a short presentation on a pertinent legal issue, with the top three receiving cash scholarships.

In past years, competitors have addressed topics ranging from the rights granted by the Second Amendment to issues regarding federal immigration policy. This year, the competitors will address a timely topic: Does the process for appointing a U.S. Supreme Court justice adequately vet and provide sufficient information to confirm a candidate?

The Bar has also been incredibly fortunate to have the support of local judicial officers, who volunteer their time each year to judge the competition. This year, the competition will be scored by a distinguished panel of Los Angeles Superior Court (LASC) Judges—Hon. Cynthia Ulfig, Hon. Graciela Freixes, Hon. Hayden Zacky, Hon. Bernie Laforteza, Hon. Lisa Chung, and Commissioner Martin Gladstein.

On May 18, the Bar will recognize the top three finishers at its annual Scholars & Bench Night. In addition to presenting the winners' scholarships, the event will also include a special "View from the Bench" MCLE presentation by LASC Assistant Presiding Judge Kevin C. Brazile, who will discuss the current state of the court.

The talent, passion, and promise displayed each year by the participants in the speech competition is quite remarkable and the Bar takes great pride in providing scholarships to assist

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the winners in pursuing their goals and dreams.

We welcome everyone—members and non-members alike—to join us for the SFVBA's Speech Competition on April 19 at West Ranch High School in Stevenson Ranch, and for the Scholars & Bench Night celebration and CLE program on May 18 at TPC Valencia. Please feel free to contact info@scvbar.org to register for either, or both, of these worthwhile events. 

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AS A CHILD, MARGO AKOPOV admits that her father's world of addiction and abuse were something she was blind to "for only in my lacerated memories do I recall the welded stench of toxic, sweat, and liquor that had stalked my father into oblivion," she says. "Guided by the countless number of cigarettes that fed his ravenous cancer, my father had ignited his own death."

Reflecting on her past, Margo exhibits an uncommon maturity and command of the language for a 17 year old, while expressing a longing for the days of her childhood innocence when the perceptions of her father's sicknesses were shielded by, "the jovial collection of ponies that had once colonized [her] bedroom."

But plagued by her "painful revelations," as she so keenly puts it, "I am convinced that no combination of words could feasibly grasp the nefarious connotation at hand. The dim years following my father's passing were languid, but I found comfort in knowing that the devious monster responsible for my father's life had been vanquished."

Throughout her childhood, despite her mother's best to protect the family from the abusive and often violent behavior of her father, it wasn't until Margo found the Boys & Girls Clubs that she felt she'd found a truly safe harbor. Before her introduction to the Clubs, she was overwhelmed by her



fears and insecurities. As early as second grade, she "...decided that [she] was absolutely insignificant." And that, "She had no power, no influence, and no voice."

Even her first few weeks "at the Club, she found [herself] constantly sinking into the same sulky chair in the art room, too scared to participate."

Soon, though, it wasn't long before Margo's "fortress of invisibility and insignificance" finally came tumbling down, replaced by a safe place to grow and develop her confidence and self-worth, as well as an escape from the horrors at home. Through her art classes, she was able to develop her voice and find a vehicle of positive expression that gave her the tools to transcend her financial hardships and begin healing the scars of domestic abuse. "During my 10 years as a member of the Club, I was transformed into a new person."

Currently an honors student and a leading member of several clubs, including the Girl Scouts and the Dance Team, Margo joined the Torch Club in middle school, a move that steered her towards involvement in, and current president of, Keystone, a nationally recognized teen leadership program.

"The reward of helping a person in need is a feeling that I can't put into words," she says. "I've always felt obligated to change lives, and the Club has provided me with access to

About the VCLF of the SFVBA

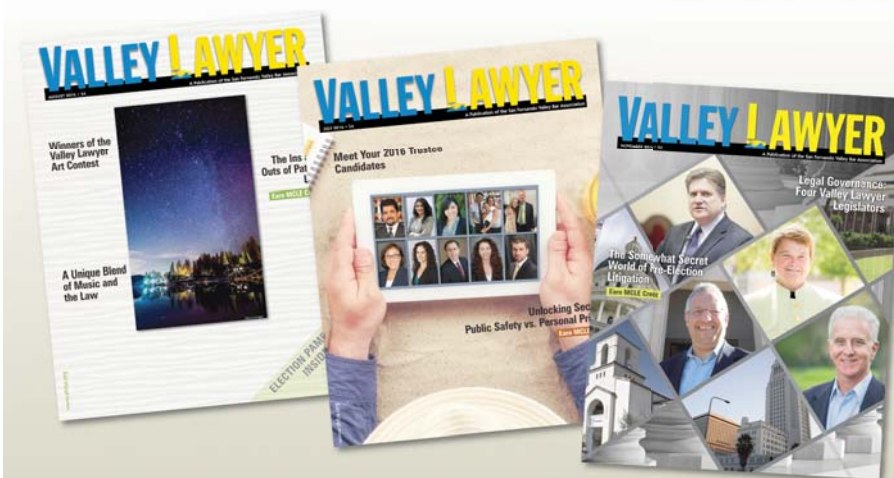
The Valley Community Legal Foundation is the charitable arm of the San Fernando Valley Bar Association. The Foundation's mission is to support the legal needs of the youth, victims of domestic violence, and veterans of the San Fernando Valley. The Foundation also provides educational grants to qualified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

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do so. I want to encourage youth to dream big, no matter how small they may think they are."

Looking forward, Margo hopes to use her public speaking skills and her rising position in the community to positively influence others to rise above their own situations, avoid drug addiction and thrive. She envisions "a world where the youth of America comprehend the vast capacity of what they can accomplish" and is optimistic about, "a world where teens don't need to intoxicate themselves to feel significant in society."

As National Youth of the Year, Margo inspires teens across the country, speaking about utilizing the Boys & Girls Clubs as an invaluable resource. Ultimately, her ambitious goal is to collaborate with Club CEOs across the country to develop a rehabilitative program for teens either battling substance abuse or coping with its destruction. Margo is optimistic and "confident that the monster pervading the lives of millions of youth will soon find itself face to face with extinction."

Her involvement with the Boys & Girls Clubs transformed her into "a confident leader, well-equipped to take on the world," with aspirations to "utilize [her] Youth of the Year title to express [her] everlasting gratitude for the Club by serving as an advocate for youth" and "inspire youth to get involved, so that the Clubs can do for them what it has done for [her]."

The VCLF at Work

Margo is just one of more than 3,000 local youth helped by the Boys & Girls Clubs, which are funded in part by Valley attorneys through their support of the Valley Community Legal Foundation. "The Boys & Girls Club is a great example of an organization the VCLF proudly supports," says VCLF President Laurence Kaldor. "They are providing great and necessary services to our community, and we are proud to support their efforts." 

Defamation, The Play

By Anngel Benoun, VCLF Board Member



ON FEBRUARY 13, THE VALLEY Community Legal Foundation of the SFVBA was proud to sponsor a performance of the nationally acclaimed production of *Defamation* for more than 200 students from Reseda High School and James Monroe High School Law Magnets, Canoga Park High School, Hale Middle School, and the eighth grade class of St. Bernardine of Siena Elementary School.

Held in the auditorium of St. Bernardine of Siena Church, students were welcomed to a pre-performance reception, followed by a pre-play discussion with case studies led by SFVBA President Kira Masteller and VCLF President Laurence Kaldor about the meaning of defamation.

Once the six performers entered the stage and the play began, students were riveted by the brilliant and shifting jigsaw puzzle of a courtroom drama that explored the highly charged issues

of race, religion, gender, class and how the law applies. The students were engaged throughout the play because they knew that they were not just there as spectators, but would serve as the jury to deliberate the case and render a verdict.


A lively discussion followed the play, with excellent interaction between the performers and the students as they deliberated the merits of the case between the plaintiff and defendant, ultimately delivering a verdict. Students were heard leaving the event saying how much they enjoyed themselves and one excited James Monroe student went so far as to say it “was the best event “ he’s attended in high school.

“My students loved the play,” said Reseda’s Magnet Coordinator Alyse Cayen. “There was nothing but positive feedback about the event.”

Fundraising efforts by the Foundation and Reseda and James

Monroe High Schools yielded about \$4,000 in donations, just short of the \$6,000 goal set by the VCLF. “This is exactly the type of educational, thought-provoking and informative work that both the Bar and the Foundation should be supporting,” exclaimed Kaldor. “I was truly blown away by the attentiveness of the students as well as their articulated insights and discussions following the performance.”

Kaldor concluded, “We are immensely proud of the support we have received from our loyal donors in order to make this production happen, and we are all looking forward to more events like this one in the future.”

Many thanks to St. Bernardine of Siena Catholic Church and its incredible support team for providing the venue, especially Facility Manager Jean Sampson for her tremendous help and efforts. 



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A Balancing Act

Dear Phil,

I am able to attract potential multi-million dollar matters to my small law firm but I still get treated in a manner that's borderline disrespect. I spoke with the managing partner about this, but he felt the treatment was somehow appropriate, based on my being relatively new to the firm. I don't want to do anything to destabilize the big cases I bring in and am counting on for compensation, so what can I do short of pressing the issue in the middle of depositions?

Sincerely,

Magnet Man



Illustration by Gabriella Soderon

DEAR MAGNET MAN: I ORIGINALLY TOSSED YOUR question around with some colleagues of mine to make sure we understood exactly what you were asking. We concluded that you're trying to balance the lack of appropriate respect and recognition from your employers without taking any action that would be disruptive to an ongoing case or demonstrate your displeasure with the unprofessional way you feel you're being treated.

Bringing in cases is a very valuable asset and should be handled with a very clear understanding in writing. I am fairly certain that you wouldn't mind being treated like a junior associate if you were being paid like a cherished rainmaker. At the very least, such an agreement should be in place going forward.

I found it interesting that you don't mention compensation in your question. I'm guessing that that issue has been swept under the rug and that there's no clear arrangement for giving you additional compensation for attracting good cases.

Doing anything that would mess up a case during the deposition and discovery phase is obviously out of the question. I could also tell by the way you phrased your question that you would never do anything to derail a case that you brought into the office. In fact, your duties to both

your client and to your employer deserve your utmost loyalty and effort. The fact that there may or may not be a dispute hovering in the background is not an issue for your client or for the administration of the case.

If you have the ability to bring in valuable cases in the future and happen to have a positive professional relationship with the client, you have fairly decent leverage in possibly having the client go out the door with you should you leave the firm. In California, it is the client who decides which lawyer will represent him or her. Probably, just having a discussion at the right time with your bosses about additional compensation will suggest to them that you should be given the appropriate respect and recognition, as well.

Consistently delivering excellent work and demonstrating loyalty to your firm by bringing in cases will make your value obvious to your bosses. But in the end, you have to be willing to clearly communicate your feelings to your employer and relieve them of the burden of guessing at how your resentment may or may not be impacting your work.

Best of luck,

Phil

Dear Phil is an advice column appearing regularly in *Valley Lawyer Magazine*. Members are invited to submit questions seeking advice on ethics, career advancement, workplace relations, law firm management and more. Answers are drafted by *Valley Lawyer's* Editorial Committee. Submit questions to editor@sfvba.org.

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