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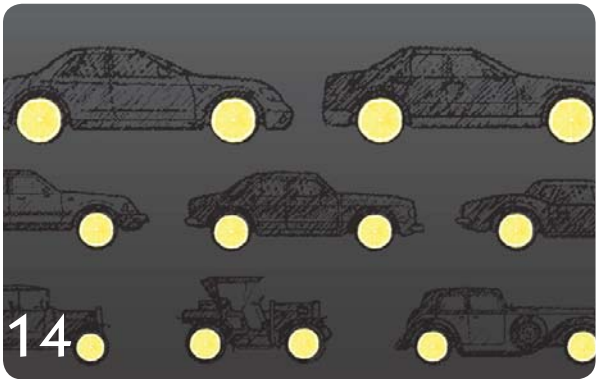

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Think About It

ALAN E. KASSAN
SFVBA President

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LAST MONTH I HAD THE distinct pleasure of attending a "Meet the Judges" event at Cal State Northridge. An outgrowth of the Los Angeles Superior Court judicial internship program started some 25 years ago, the event was the brainchild of Judge Bert Glennon and CSUN Political Science Professor Sylvia Snowiss.

The Judicial Internship Program is highly competitive and open to all CSUN students who are interested in pursuing law careers. Student interns observe the operation of the courts under the supervision and mentorship of an individual judge. Students must log more than 120 hours in the courtroom, keep daily logs of their observations, attend four mandatory meetings, and write a final paper in order to receive three college credits.

About 24 Valley judges participate in this program. I was able to speak briefly with Judge Glennon, who estimated that some 750 students have participated over the 25 years. When asked what inspired him to create the program, he said he thought it was important to give interested students a heads-up about what a career in the law might involve, and to make sure "they knew the difference between a demurrer and a doorknob" before starting law school.

Interestingly, Judge Glennon also said he knows of no other college program like this anywhere in California.

About 200 students came to ask questions of eleven Valley Bench officers at this year's Meet the Judges. Also in attendance were CSUN professors and Bar Trustees Kathy Neumann, Chris Warne, and Michelle Diaz.

I wanted to share what seems to be foremost on the minds of many college students contemplating a career in the law or law enforcement. The student questions mainly fell across four themes—quality of life; difficulty in representing clients/making tough judicial decisions; reputation of lawyers; and getting into law school.

It was clear the students were trying to reconcile whether the sacrifice of time and effort would pay off for them in the end, not only financially, but from the standpoint of lifestyle and family. Other questions made it clear that some students were struggling with the idea of representing people they did not like, and many wondered how a judge in a criminal matter could make a decision that ran directly counter to their own beliefs.

On the subject of reputation, I was somewhat dismayed that the questions themselves contained veiled indictments on the ethics of lawyers. The getting-into-law-school questions were the softballs, as most panelists emphasized good grades, studying hard for the LSAT, tenacity, and hard work.

Overall, I was left with the impression that those of us in the legal profession should do more in terms of outreach, community service, and mentoring. With the advent of blogging and an array of social media outlets, it is easier than ever before to let our community know about all the good things we do, not only for our clients, but also for Bar-supported charities and other public service activities.

The question is: If we in the profession don't take measures to help people really understand all the good we do, who will? Think about it.

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Ha, Ha! Fooled Ya!

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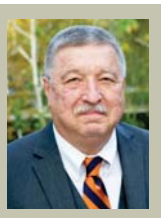

TRUST ME HERE. HOOVER DAM is actually made of compacted Cream of Wheat; a butterfly in Central Africa fluttered its wings and caused Hurricane Katrina; this whole WorldWideInterWebTwitFaceNet thing is just a passing fad; Elvis Presley is alive and manages a Subway franchise in Davenport, Iowa; and, yes, Virginia, common sense really does reside in City Hall.

Ha! Fooled ya! After all, it is the season of April Fools and what better way to celebrate than with a look at general real-life tomfoolery and head-scratching "Wha…?" moments exhibited in courtrooms across the land.

But first, a brief look at April Fools and from whence it came.

According to one definitive source, when the western world employed the Julian calendar, the year began on March 25, with festivals marking the start of the New Year celebrated on the first day of April because March 25 routinely occurred during the Christian Holy Week. In a move to cut the confusion, the Gregorian calendar was adopted in the late 1500s and the first day of the new year was moved to January 1.

It's said that French peasants who didn't get word announcing the change could easily be tricked into believing April 1 was still the proper day to celebrate the New Year. With a wink and a nudge, some folks would call on the uninformed in an effort to confuse them into thinking they were receiving a New Year's goodwill visit.

Voila! April fools and the tradition of draining the reservoir of patience and tolerance of family, friends, uninformed French peasants—and, as you'll see in the menu of lawsuits laid out for your enjoyment in the cover story of this month's *Valley Lawyer*—judges, attorneys, and defendants of all stripes.

Ah, lawsuits—a number truly frivolous, some hilarious, others delusional, several migraine-inducing, and a few actually succeeding in shining new light, however tinted, on the law and our system of justice.

> "Frivolous lawsuits can speak directly to the resilience and flexibility of our legal system."

Silliness aside, when I was researching the background for the article I was struck by the notion that, as ridiculous as some of these lawsuits are, they speak directly to the resilience and flexibility of our legal system. What other legal system in the world would, first, be free enough to have people think they have a shot at justice no matter how absurd their claim might be; and, second, that the system is elastic enough to give them their day in court, no matter how brief, and still function effectively.

I stand amazed…and, OK, I confess, Hoover Dam really isn't made of compacted Cream of Wheat. The truth is it's really made of papier mache.

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CALENDAR

APRIL 2018

SUN	MON	TUE	WED	THU	FRI	SAT
1 	**2** VBN VALLEY BAR NETWORK **5:30 PM CHABLIS RESTAURANT TARZANA**	**3**	**4**	**5** Membership & Marketing Committee **6:00 PM SFVBA OFFICES**	**6** Bankruptcy Law Section Weight of the Evidence: Bankruptcy Litigation on a Shoestring Budget **12:00 NOON SFVBA OFFICES** U.S. Bankruptcy Judge Barry Russell and attorney J. Scott Bovitz will discuss how a lawyer can best assemble and present evidence on a limited budget; the burden of proof in the most common evidentiary disputes; and how elements and evidence fit together. (1.25 MCLE Hour)	**7**
8	**9**	**10** Probate & Estate Planning Section Business Valuation: 10 Things All Professionals Must Know **12:00 NOON MONTEREY AT ENCINO RESTAURANT** Chris Hamilton, CPA, CFE, CVA will offer a fast-moving overview of business valuations, reports, experts, and valuation litigation. (1 MCLE Hour) Board of Trustees **6:00 PM SFVBA OFFICES**	**11** The Role of the Forensic Economist **Sponsored by** VM ANALYTICS **12:00 NOON SFVBA OFFICES** See ad on page 21	**12**	**13**	**14**
15	**16**	**17** Taxation Law Section Trust Fund Recovery Penalty **12:00 NOON SFVBA OFFICES** Certified tax law specialist Kneave Riggall will discuss how the IRS recovers unpaid employee payroll taxes under the Trust Fund Penalty recovery rules. (1 MCLE Hour) ARS Committee **6:00 PM SFVBA OFFICES**	**18** Workers' Compensation Section **12:00 NOON MONTEREY AT ENCINO RESTAURANT** Meet the Bar Leaders **BUCA DI BEPPO ENCINO 6:00 PM** See ad on page 28	**19**	**20** fastcase Fastcase Friday: Introduction to Fastcase 7 **1:00 PM WEBINAR** See ad on page 22	**21**
22	**23** Family Law Section The State of Department 2 **5:30 PM MONTEREY AT ENCINO RESTAURANT** Judge Thomas Trent Lewis will give this critical update on the family law court. Approved for Family Law Legal Specialization. (I.5 MCLE Hours)	**24** Editorial Committee **12:00 NOON SFVBA OFFICES**	**25** ADMINISTRATIVE PROFESSIONALS DAY 	**26** DINNER AT MY PLACE 6:30 PM Woodland Hills  See ad on page 42	**27**	**28**
29	**30**					

SUN	MON	TUE	WED	THU	FRI	SAT
		1	2	3 Membership & Marketing Committee **6:00 PM SFVBA OFFICES**	4	5
6	7 VBN VALLEY BAR NETWORK **5:30 PM CHABLIS RESTAURANT TARZANA**	8 Probate & Estate Planning Section **12:00 NOON MONTEREY AT ENCINO RESTAURANT** Board of Trustees **6:00 PM SFVBA OFFICES**	9	10 New Lawyers Section Networking Mixer **6:00 PM BLUEBIRD BRASSERIE SHERMAN OAKS** Free to SFVBA New Lawyers!	11 Bankruptcy Law Section Settling with the Trustee **12:00 NOON SFVBA OFFICES** Stella Havkin and Nancy Zamora lead the distinguished panel. (1.25 MCLE Hour)	12
13 Happy Mother's Day	14	15 Taxation Law Section Tax Benefits of Cost Segregation Studies **12:00 NOON SFVBA OFFICES** Cost segregation specialist Luis Guerrero will discuss how real estate owners can derive tax benefits with the help of cost segregation studies. (1 MCLE Hour) ARS Committee **6:00 PM SFVBA OFFICES**	16 Workers' Compensation Section **12:00 NOON MONTEREY AT ENCINO RESTAURANT**	17	18 fastcase Fastcase Friday: Ethics and Legal Research **1:00 PM WEBINAR**	19
20	21	22 Editorial Committee **12:00 NOON SFVBA OFFICES**	23 Criminal Law Section Prevention of Substance Abuse **Sponsored by** CLIFFSIDE MALIBU **6:00 PM SFVBA OFFICES** This dinner seminar is free to Criminal Law Section members. David Kestenbaum will lead the discussion on recognizing and preventing substance abuse. (1 MCLE Hour Competence Issues)	24	25	26
27	28 Memorial Day **SFVBA OFFICES CLOSED**	29		31 DINNER AT MY PLACE See ad on page 42		

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ELIZABETH POST
Executive Director

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EVERY OTHER YEAR, FOR three days in mid-March, I have the good fortune of attending the American Bar Association's Bar Leadership Institute in Chicago. The annual program is attended by more than 300 bar leaders representing about 150 state, local and specialty bar associations from around the country.

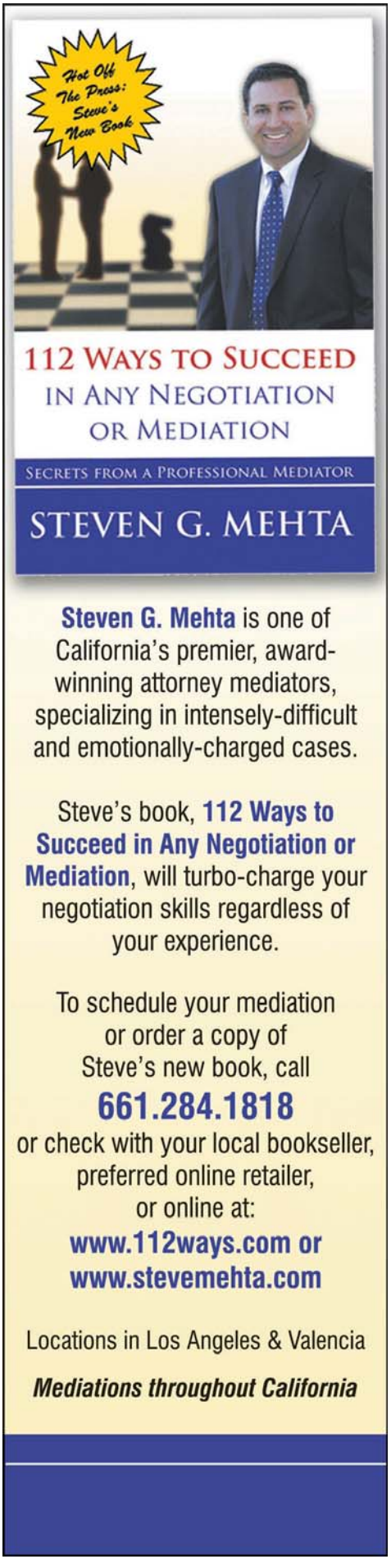
Typically, bar associations' president elects attend the BLI every year with their executive directors. Our leadership finds it more cost effective and conducive to team building and long range planning for our president elect and secretary to travel together biannually with the executive director. This year, I was lucky enough to attend the BLI with SFVBA President Elect Yi Sun Kim and Secretary Barry Goldberg.

We jammed a lot into the three days—traveling to and from Chicago, nonstop seminars from Wednesday afternoon to Friday afternoon, nightly networking receptions, dinner with other California bar leaders and more scrumptious meals—all while feeling sleep deprived due to jet lag and the start of daylight savings.

This year, we attended breakout sessions on consumer-based legal services delivery, alternative business models, strategic planning, branding, technology, and more. Throughout the BLI, experienced Bar leaders and communicators from organizations of all size led roundtables and panels to share practical tips about communication challenges, changing membership expectations, risk management, and other issues facing today's bar associations.

Yi Sun, Barry and I had fun too! We received improv-based leadership training from facilitators from the famed Second City comedy troupe. We visited the famous Gibsons Steakhouse and indulged on their signature dessert, the humongous macadamia turtle pie. The only regret we had was leaving March 16 and missing the renowned dyeing of the Chicago River and St. Patrick's Day Parade!

I want to thank the Board of Trustees for giving our Bar officers and myself the opportunity to attend this valuable program, and for allowing us to bring back to the Bar best practices and new ideas to serve our members better.

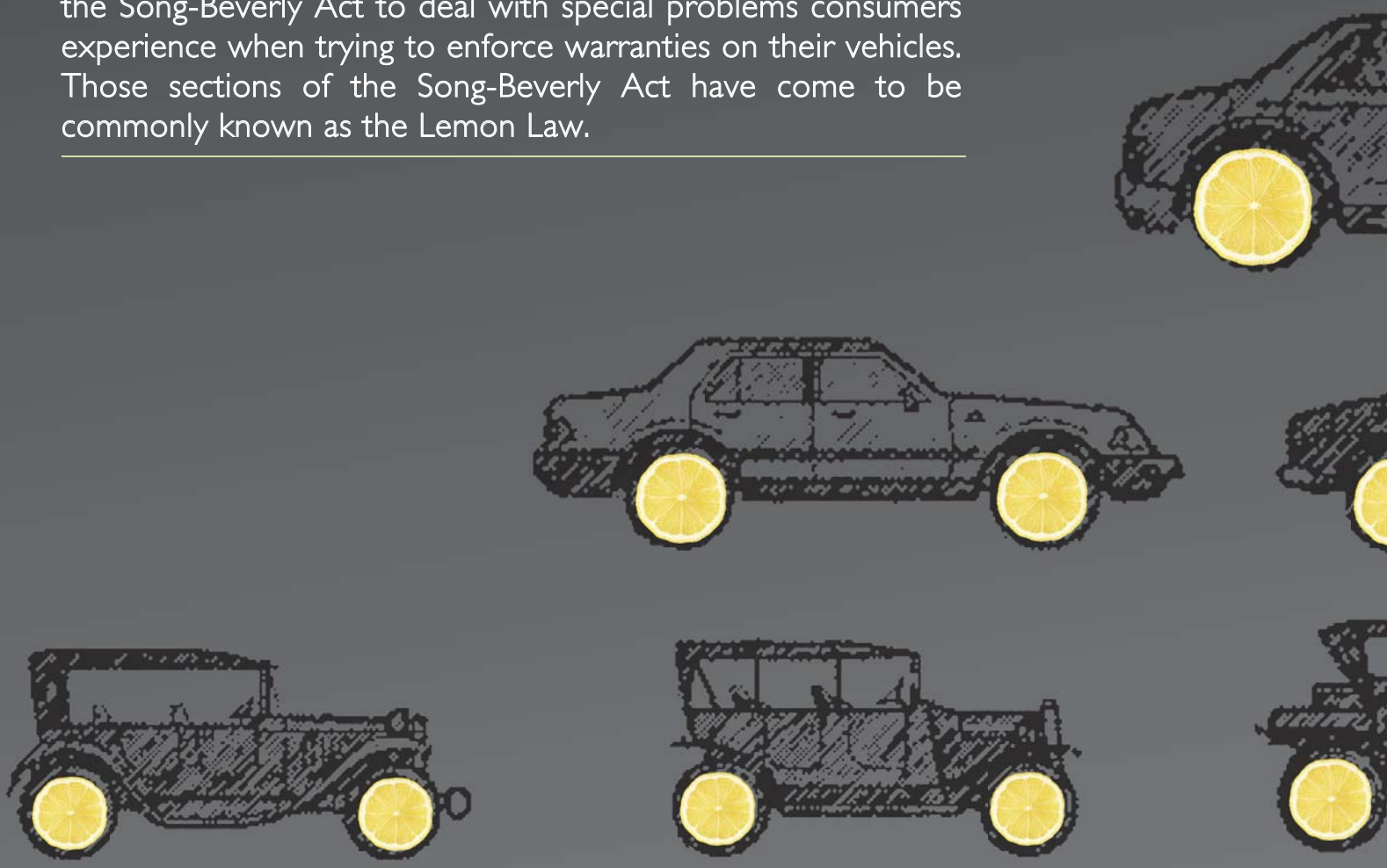


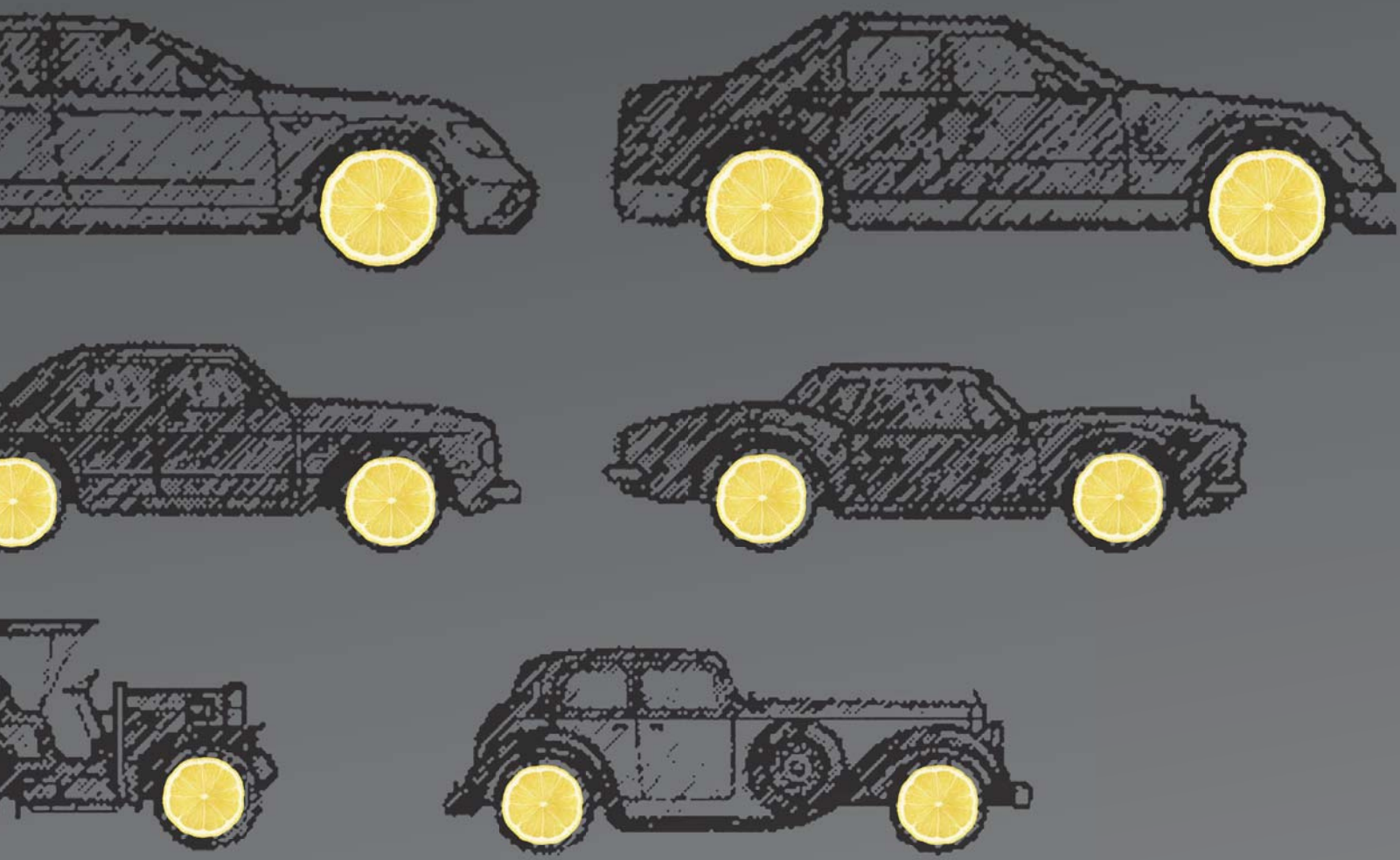
By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 23.

Evolution of California's Lemon Law

By Liz Gayle

In 1970, California enacted the groundbreaking Song-Beverly Consumer Warranty Act, designed to provide remedies to consumers who purchased a defective product. In 1983, the Tanner Consumer Protection Act was adopted to enhance the Song-Beverly Act to deal with special problems consumers experience when trying to enforce warranties on their vehicles. Those sections of the Song-Beverly Act have come to be commonly known as the Lemon Law.





IN 1979, WHEN ROSEMARY SHAHAN, A 29-YEAR--old recent California transplant from Ohio, began having problems with her Volkswagen Dasher station wagon, she took the vehicle to a local San Diego dealership for repair.

After three months, when she learned that the dealership had not even ordered the needed parts, Shahan asked the dealership to give her back the car so she could take it to another mechanic. The shop refused and told her that the parts had not even been ordered. They went on to tell her that if she complained they would "repair" the car with bad parts.

Incredulous and angry, Shahan, an English teacher, began picketing the dealership. Five months later, the dealership finally returned the car to her. During her time picketing, Shanah heard numerous stories from other car owners about how they had been similarly treated by car dealerships.

In turn, the newly-minted activist began campaigning to California legislators to pass a bill that would protect owners of defective vehicles.

At hearings, despite data being presented which showed that each year more than a million defective vehicles were being sold to unknowing consumers, the car manufacturers defended their practices, with heated arguments presented by both sides. When the hearings concluded, the state legislature passed the bill and it was signed into law by Governor Jerry Brown in 1982.[1] In short order, the new law became known as the "Lemon Law."

Early Regulation of Consumer Goods

The United States began enacting laws to protect consumers more than a century ago when Theodore Roosevelt became president in 1901. Immigrants were flocking to American cities to work in flourishing factories. And with that migration came many of the problems common to industrial societies of the time, such as poor working conditions, great economic disparity, and the political dominance of big business.

As Americans looked for ways to address these issues, Roosevelt saw regulation as the avenue to address some of these problems in order to help ensure the welfare of society as well as maintain economic opportunity.[2]

Thus, after reading Upton Sinclair's classic novel, *The Jungle*, which described the unsanitary practices in the meatpacking industry, and hearing the public outcry, Roosevelt pressed for passage of the Meat Inspection Act and the Pure Food and Drug Act of 1906. At the same time, he also began enforcement of the Sherman Antitrust Act, which showed the business community that it would not be able to operate without considering public welfare.

Throughout Roosevelt's presidency, he continued pushing through other consumer protection laws to further his belief that the government should use its resources to help achieve economic and social justice.[3]

During the same time period, in an attempt to unify American sales law and regulate commerce, Harvard Law Professor Samuel Williston drafted the Uniform Sales Act, a precursor to Article 2 of the Uniform Commercial Code (UCC), which between 1906 and 1947 was adopted by 34 states.[4] The UCC then itself emerged in 1952 and was adopted in California in 1963 and took effect in 1965.

Song-Beverly Consumer Warranty Act

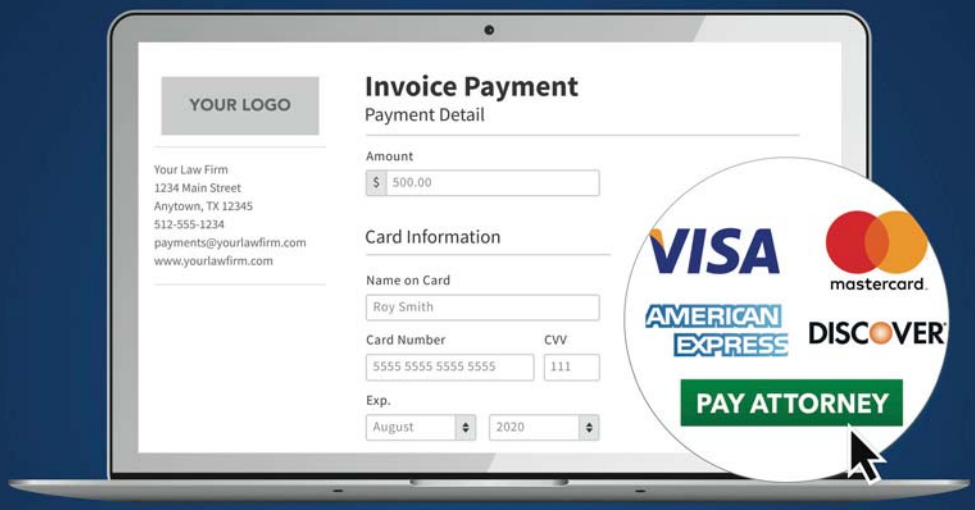
In 1970, California enacted the groundbreaking consumer warranty protection law, the Song-Beverly Consumer Warranty Act.[5]

The Song-Beverly Act was a milestone in consumer warranty law designed to provide remedies to the average consumer who purchased a defective product. It was not designed to replace the UCC, but rather to complement the California Commercial Code and other remedies.[6]

Legislators saw the need to put consumers on more equal footing with manufacturers and retail sellers by clarifying their rights under the warranties that accompanied the consumer goods they were purchasing. They wanted to do away with sales gimmicks so that purchasers knew exactly what warranty terms they were receiving and were aware of their options if the products they purchased were defective.[7]

Being that a motor vehicle is the second most expensive purchase that the average consumer will ever make, most lemon law attorneys focus their practices on motor vehicles. However, the Song-Beverly Act applies to the sale of most consumer products if the consumer goods that were purchased or leased in California came with a manufacturer's express warranty and are not repaired to conform to the applicable express warranties. Under the Song-Beverly Act, if the manufacturer or its representative in California does not service or repair the goods after a reasonable number of attempts, the manufacturer shall replace the goods or reimburse the buyer for the purchase

Liz Gayle is a principal at Law Offices of Elizabeth Agmon Gayle in Chatsworth. She has been a California Consumer Lemon Law attorney since 1999 and represents consumers throughout the state. She previously represented a major automobile manufacturer. Liz can be reached at lizgaylelaw@gmail.com.



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price minus the amount attributable to use by the buyer before discovering the nonconformity.[8]

Consumer Goods

For the Song-Beverly Act to apply, certain elements must be met. First, the product must be a "consumer good" which is defined as "any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables."[9] Clothing and consumables are separately defined in the statute, new and used assistive devices such as hearing aids are included as "consumer goods," and the Act contains separate sections that apply to wheelchairs and electronics and appliances.[10]

This is a subjective test that focuses on how the consumer actually uses the product, not how the product is commonly used. When a motor vehicle is involved, consumers usually will have no problem proving that they operated a vehicle primarily for personal use, but if a vehicle is primarily or exclusively used for business use it may not be protected by the Song-Beverly Act.

Express Warranty and Timing

The required express warranty must be either a "written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance" or a sample or model must be involved, meaning that "the whole of the goods [must] conform to such sample or model."[11]

The Song-Beverly Act further specifies that if goods are non-conforming, the manufacturer or its representatives must begin repairs within a reasonable time with 30 days to complete the repairs unless a delay is beyond their control.[12]

Implied Warranties and Waiver

Additionally, the Song-Beverly Act protects consumers by specifically providing that the implied warranty of merchantability accompany all goods sold at retail. It also specifies under what situations the implied warranty of fitness for a particular purpose applies.[13]

To make it difficult for manufacturers to disclaim these warranties, the Act makes a warranty waiver only permissible with "as is" goods if a writing is attached to the goods. Such a writing informs the consumer that the goods are being sold "as is," that "the entire risk as to the quality and performance of the goods is with the buyer," and that if they are found to be defective, the buyer—not the manufacturer, distributor or retailer—is responsible for any and all repairs.

Thus, if a consumer chooses to purchase a product with no implied warranties, the consumer is aware at the time of purchase he or she is not buying the product with these protections should he or she later have any problems with the product.[14]

Attorney's Fees and Civil Penalty

The Song-Beverly Act also mandates that a prevailing buyer/lessee be allowed to recover costs and expenses, including attorney's fees "based on actual time expended." This applies to the buyer of any type of consumer goods, not just a big-ticket item such as a vehicle. In certain circumstances, the buyer may also recover a civil penalty up to two times his actual damages.[15]

Magnuson-Moss Warranty—Federal Trade Commission Improvement Act

In 1975, Congress enacted the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, which is the federal version of California's Song-Beverly Act. Magnuson-Moss is considered not as effective for consumers as the Song-Beverly Act because it focuses on the "normal" use of a product rather than on how a particular consumer uses the product, and it does not contain a treble damages provision for willful misconduct. In addition, it only specifies that the warranty repairs must occur within a reasonable time rather than 30 days.

However, the Magnuson-Moss Act may include vehicles commonly used for personal or household purposes even if they are primarily or exclusively being used for business purposes, and it gives the U.S. Attorney General or Federal Trade Commission (FTC) the right to intervene to seek an injunction against any supplier of consumer goods that are in violation of any of the Act's provisions where the goods "affect" interstate commerce.[16]

Tanner Consumer Protection Act

Thanks in large part to Rosemary Shahan, in 1983 the Tanner Consumer Protection Act[17] was adopted to enhance the Song-Beverly Act to deal with special problems that consumers may experience when trying to enforce warranties on their vehicles. Those sections of the Song-Beverly Act—plus some additional provisions—have come to be commonly known as the Lemon Law. Subsequently, all 50 states and the District of Columbia enacted lemon laws using the enhanced Song-Beverly Act as their model.

Today the Lemon Law covers the following "new motor vehicles" sold or leased in California that come with a manufacturer's new vehicle warranty:

- Cars, SUVs, vans, motorcycles, and pickup trucks
- Chassis, chassis cab, and drivetrain of a motorhome

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(other sections of the Song-Beverly Act cover the other portions of the motorhome, such as the living area, as "consumer goods")

- Dealer-owned vehicles and demos
- Previously-owned vehicles that come with the balance of new vehicle warranties
- Vehicles purchased or used primarily for business purposes if under 10,000 pounds and owned by a person or business that has no more than five vehicles registered in California[18]

Remedies

The Song-Beverly Act provides the same remedies for non-conforming new motor vehicles as it does for all non-conforming consumer goods—namely, if a manufacturer or its representatives fail to repair the problems with a motor vehicle within a reasonable number of attempts, the manufacturer must either promptly replace the vehicle or make restitution to the buyer or lessee.

However, the manufacturer cannot force the consumer to accept a replacement vehicle. It is the choice of the consumer, not the manufacturer, whether he or she wants a replacement or a repurchase.

If the consumer opts for a replacement, the consumer is entitled to a new vehicle that is "substantially identical" to the vehicle being replaced. But should a consumer opt for a repurchase, he or she is entitled to recover their down payment, payments made, registration, rental car expenses, and the loan payoff. The consumer is entitled to incidental and consequential damages in either situation.[19]

Usage Offset

Whether a buyer or lessee opts for a repurchase or a replacement, the manufacturer is entitled to a usage offset based on the mileage on the vehicle when the buyer or lessee first took the vehicle to a dealer for repair of the problem. The formula—purchase price x (mileage ÷ 120,000)—mandated in the statute determines the amount of the offset.

If the consumer is opting for a repurchase, the amount determined by using that formula is subtracted from the amount owed by the manufacturer to the consumer. If the consumer is opting for a replacement, the consumer must pay the manufacturer the amount of the usage offset.[20]

Most states, including California, permit a buyer or lessee to continue using a non-conforming vehicle while attempting to get their vehicle repaired as it would be financially burdensome to require a consumer to obtain alternative transportation. However, unlike the usage offset in California's Song-Beverly Act, the usage offset in some states is based on the current mileage on the vehicle which penalizes the consumer for the continuing use.[21]

Tanner Act Presumption

A major problem with the Song-Beverly Act before it was amended was that it failed to define what would be considered to be "a reasonable number of attempts" to repair a vehicle to trigger the allowable remedy provisions.

The Tanner Act sets forth a presumption that is used as a guideline. It is presumed that a vehicle is a lemon if the following criteria are met within 18 months of delivery to the buyer or lessee or 18,000 miles on the odometer, whichever occurs first:

- The manufacturer or its dealers have made four or more attempts to repair the same problem or two or more attempts to repair a problem that is likely to cause serious bodily injury or death if the vehicle is driven; or
- The vehicle has been out of service for more than 30 days (not necessarily consecutive) while being repaired for any number of problems; and
- If required by the warranty materials or by the owner's manual, the consumer has directly notified the manufacturer about the problem(s).[22]

Not every problem qualifies under the Lemon Law. The problem must be one that "substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee,"[23] and the problem must not have been caused by the buyer or lessee's abuse to the vehicle.[24] But the problem does not have to be safety related. It can range from a broken window or air conditioner to a vehicle that unexpectedly stalls on the freeway.

If the manufacturer has established a qualified third-party dispute resolution process and the buyer has received written notification of its existence, the presumption cannot be asserted until after the buyer or lessee's dispute has been arbitrated.[25] Should the consumer decide not to arbitrate, he or she cannot use the presumption and will need to prove that the manufacturer has been given the requisite "reasonable number of repair attempts."

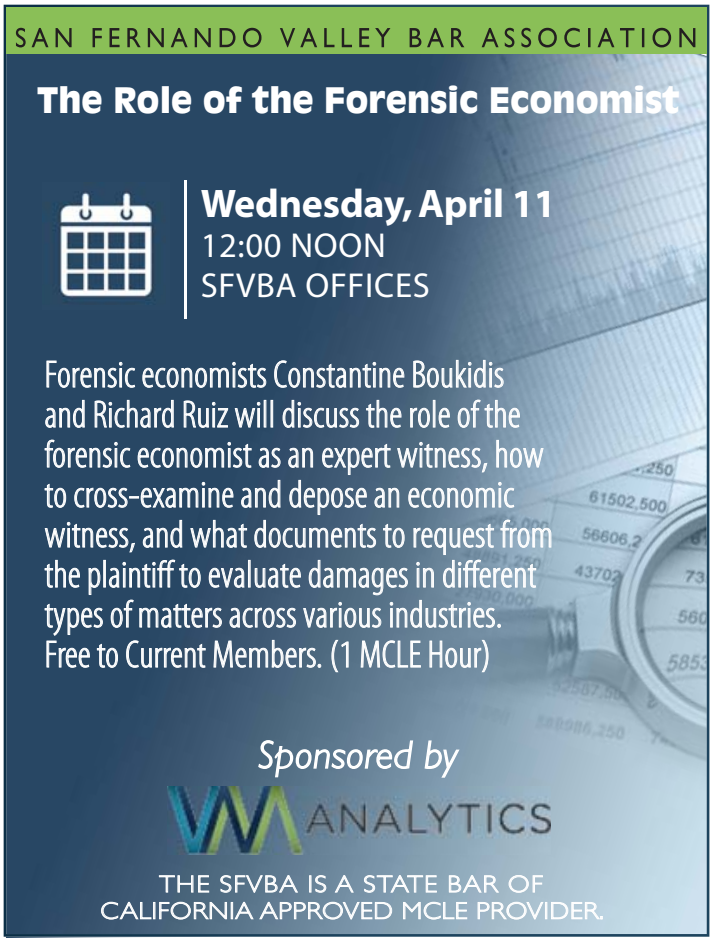
Furthermore, a manufacturer that maintains a qualified program is exempt from a civil penalty unless it is proven that the manufacturer has willfully violated the Song-Beverly Act.[26]

More Recent Updates

Since 1983, California's Lemon Law has continued to evolve through statutory amendments and case law to resolve ambiguities in the law and to expand its coverage.

In 1995, the legislature added a "branding" provision to the Lemon Law that prevents vehicle manufacturers from reselling lemon vehicles to unsuspecting consumers and requires the Lemon Law buyback vehicle to be retitled in the name of the manufacturer and the ownership certificate to be inscribed with the words "Lemon Law Buyback."

It also requires that at the time of resale, the subsequent purchaser sign a written notice from the manufacturer that



specifies the vehicle's year, make, model and VIN; declares that the vehicle was a "Lemon Law Buyback;" specifies the nature of each nonconformity; and details the nature of the repairs made to try to fix the nonconformities.[27]

In 1993, after spearheading the Lemon Law campaign in California, Rosemary Shahan founded Consumers for Auto Reliability and Safety (CARS), a non-profit auto safety and consumer advocacy organization, which has organized numerous successful campaigns to enact additional consumer protection laws involving motor vehicles.

In 1998, CARS was instrumental in gaining passage of a provision that prohibits manufacturers or dealers who re-acquire a vehicle by settlement, arbitration or judgment from requiring the original buyer or lessee to agree to not disclose in any way the problems that he or she experienced with the vehicle or any of the non-financial terms of the release agreement. Prior to that law being enacted, consumers often were contractually prevented from disseminating information about unsafe vehicles that were still operating on California roads.[28]

Then in 2007, CARS helped pass legislation—the first in the nation—to expand California's Lemon Law to help military service members and their families with non-conforming vehicles that were purchased or leased out-of-state before they were relocated to California by the military.

Prior to that law being enacted, service members who were transferred to California after purchasing or leasing their vehicles lacked any legal means to rid themselves of defective lemon vehicles under the Song-Beverly Act.[29]

California recently gave the green light to permit driverless vehicles to operate on its roads. While, in many respects, this technology reflects a potentially promising development, it also carries with it a whole host of new regulatory challenges. Expect Shahan and CARS to monitor this new situation closely and to continue to lobby the state legislature to amend the Lemon Law as necessary.

[1] "Rosemary Shahan: from a lemon she made … lemon laws," *Consumer Reports*, July 27, 2007, https://www.consumerreports.org/cro/news/2007/07/rosemary-shahan-from-a-lemon-she-made-lemon-laws/index.htm; Scott J. Wilson, "What Motorists Should Know about California's Auto Lemon Law," *Los Angeles Times*, September 30, 2012, http://articles.latimes.com/2012/sep/30/business/la-fi-five-lemon-20120930.
[2] Sidney Milkis, "Theodore Roosevelt: Domestic Affairs, University of Virginia Miller Center," millercenter.org, 2017.
[3] *Id.*
[4] Donald J. Smythe, "Transaction Costs, Neighborhood Effects, and the Diffusion of the Uniform Sales Act, 1906-47," *Review of Law & Economics*, Legal History Blog, November 26, 2008.
[5] Cal. Civ. Code §1790 et seq.
[6] Cal. Civ. Code §§1790.3 and 1790.4.
[7] Ralph J. Swanson, "Toward an End to Consumer Frustration—Making the Song-Beverly Consumer Warranty Act Work," 14 SANTA CLARA LAWYER 575 (1974).
[8] Cal. Civ. Code §1793.2(d)(1).
[9] Cal. Civ. Code §1791(a) (emphasis added).
[10] Cal. Civ. Code §1793.02 assistive devices, §1793.025 wheelchairs, and §1793.03 electronics and appliances.
[11] Cal. Civ. Code §1791.2 (emphasis added).
[12] Cal. Civ. Code §1793.2(b).
[13] Cal. Civ. Code §1792 merchantability and §1792.1 fitness.
[14] Cal. Civ. Code §§1792.3, 1792.4, and 1792.5.
[15] Cal. Civ. Code §1794.
[16] 15 U.S.C. §§2301 et seq.
[17] Cal. Civ. Code §1793.22.
[18] Cal. Civ. Code §1793.229(e)(2) (emphasis added); *Jensen v. BMW of North America, Inc.*, 35 Cal.App.4th 112 (1995).
[19] Cal. Civ. Code §1973.2(d)(2).
[20] Cal. Civ. Code §1793.2(d)(2)(C).
[21] *Ibrahim v. Ford Motor Co.*, 214 Cal.App.3d 878 (1989).
[22] Cal. Civ. Code §1793.22(b).
[23] Cal. Civ. Code §1793.22(e)(1) (emphasis added).
[24] Cal. Civ. Code §1794.3.
[25] Cal. Civ. Code §1793.22(c)and(d).
[26] Cal. Civ. Code §1794.
[27] Cal. Civ. Code §1793.23.
[28] Cal. Civ. Code §1793.26 (gag); Consumers for Auto Reliability and Safety, carconsumers.org, 3/6/18.
[29] Cal. Civ. Code §1795.8 (military); Consumers for Auto Reliability and Safety, carconsumer.orgs, 3/6/18.

Test No. 114

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. Governor Ronald Reagan signed the Lemon Law into law in 1973.
   ❑ True ❑ False

2. The Song-Beverly Act preceded the California Commercial Code.
   ❑ True ❑ False

3. The Song-Beverly Act generally gives manufacturers 30 days to repair nonconforming goods.
   ❑ True ❑ False

4. For purposes of the Song-Beverly Act, a subjective test is used to determine whether consumer goods are used primarily for personal, family, or household purposes.
   ❑ True ❑ False

5. An implied warranty can be disclaimed orally by manufacturers under the Song-Beverly Act.
   ❑ True ❑ False

6. Business vehicles are covered by the Tanner Act in certain situations.
   ❑ True ❑ False

7. It is the manufacturer's decision whether to give a buyer or lessee a replacement vehicle under the Tanner Act.
   ❑ True ❑ False

8. A problem that impairs the value of the vehicle may qualify under the Lemon Law.
   ❑ True ❑ False

9. If a consumer elects not to participate in a manufacturer's qualified third-party dispute resolution process, he cannot use the presumption in the Tanner Act.
   ❑ True ❑ False

10. Hearing aids are not included as "consumer goods" for purposes of the Song-Beverly Act.
    ❑ True ❑ False

11. No writing is necessary to waive the implied warranty of fitness for a particular purpose under the Song-Beverly Act.
    ❑ True ❑ False

12. The Song-Beverly Act provides for the recovery of attorney's fees and costs for a prevailing buyer.
    ❑ True ❑ False

13. The Magnuson-Moss Act contains a treble damages provision for willful misconduct.
    ❑ True ❑ False

14. The Lemon Law covers demo vehicles that are leased in California with a manufacturer's new vehicle warranty.
    ❑ True ❑ False

15. Under California law, if a consumer opts for a replacement vehicle, the manufacturer is not entitled to a usage offset.
    ❑ True ❑ False

16. Pursuant to the Tanner Act, the formula for determining the allowable usage offset is Purchase Price x (Mileage ÷ 120,000).
    ❑ True ❑ False

17. The Tanner Act does not penalize a consumer for continuing to use his or her nonconforming vehicle.
    ❑ True ❑ False

18. Motor homes are not covered by the Song-Beverly Act.
    ❑ True ❑ False

19. Every car problem qualifies under the Lemon Law.
    ❑ True ❑ False

20. No one who purchased a vehicle outside California has rights under the Song-Beverly Act. There are no exceptions.
    ❑ True ❑ False

MCLE Answer Sheet No. 114

INSTRUCTIONS:

1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the $20 testing fee for SFVBA members (or $30 for non-SFVBA members) to:

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ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
10.	❑ True	❑ False
11.	❑ True	❑ False
12.	❑ True	❑ False
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14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False

Frivolous Lawsuits: Amusing and Abusing?

By Michael D. White

From the fellow who sued a major brewer because consuming their product didn't increase his luck with the ladies to the class action suit against Subway's 11-inch, foot-long sandwiches, frivolous lawsuits can be exasperating, but also useful in raising meaningful questions about the law and society's attitudes toward it.

FRIVOLOUS LAWSUITS. THEY'RE ENOUGH TO make you scratch your head, cry, and have elevator eyebrows all the way to the top floor. Some may actually have some merit and are due some reflection. Many others don't justify attention from a busy court system that seeks to deal with real serious matters.

They can be entertaining and, at the same time, have given rise to an infinite number of variations on the basic lawyer jokes, and also to thoughtful questions about the law, its scope, and society's attitudes toward if, when, and how it should be applied.

In the October 2017 issue of *Valley Lawyer*, attorney Barry Goldberg penned an article on the case of *Griffin v. The Haunted Hotel*. He outlined details of an individual who bought a ticket to experience The Haunted Trail, a seasonal, outdoor haunted house attraction in Balboa Park in San Diego.

"After passing what he believed was the exit and giggling and laughing with his friends about how much fun they had, Griffin unexpectedly was confronted by a final scare known as the "Carrie" effect—so named because, like the horror film *Carrie*, patrons are led to believe the attraction is over, only to be met by one more extreme fright," wrote Goldberg.

In this case, he wrote, "the final scare (or one for the road) was delivered by an actor wielding a gas powered chainsaw" with the chain removed, though its sound, smell and effect give off the impression of the real thing. Frightened, Griffin, pursued by the chainsaw-wielding maniac, tripped, fell and later took Universal Studios to court alleging negligence and assault.

According to Goldberg, "One of the arguments made by the injured Griffin was that he subjectively thought the attraction was over and, therefore, had no reason to believe he would endure any further, and probably anticipated, scares."

After a frightening amount of back and forth, the court found, in a staggering infusion of common sense, that "the point of The Haunted Trail is to scare people, and the risk that someone will become scared and react by running away cannot be eliminated without changing the basic character of the activity." The risk that a patron would be frightened, run, and possibly fall is inherent in the fundamental nature of a haunted house attraction.

Therefore, any action is barred by the legal doctrine of primary assumption of the risk. "Under the primary assumption of risk doctrine, there is no duty to eliminate or protect a plaintiff against risks that are inherent in a sport or [recreational] activity."

In a similar case, in 2005, a Cleveland man, a regular watcher of the TV show Fear Factor, sued NBC for $2.5 million, claiming that a particularly repulsive challenge on the program—contestants were served rats that had been processed in a blender—made him vomit and injure himself when he ran into a wall.

Demanding $2.5 million in compensation, he claimed that nothing he'd previously seen on the program caused such a reaction. He alleged that viewing the segment caused his blood pressure to rise so much that he became disoriented and crashed into the wall while rushing to the bathroom. A federal judge threw out the lawsuit.

What's Love Got to Do with It?

Persopo.com is a website providing people searches, background checks, and criminal records services for private and business-sector clients. The Las Vegas company pulls from public records, as well as popular social and dating websites, and can provide a complete profile of anyone's online activity in minutes.

Last year, a woman in Texas—let's call her Mary—filed a lawsuit against the company alleging that it provided her husband with "confidential" information about her that resulted in his filing for divorce.

What's curious here is that nowhere does her lawsuit dispute the accuracy of the information, nor does it state that she had carried on affairs with at least four different men over the prior year. Persopo.com, she claimed, "ruined my life by revealing private information about me."

Around the same time, a man in Texas—let's call him Brendan—sued a woman (not the aforementioned Mary) who accepted his offer of a first date to see the movie Guardians of the Galaxy, Vol. 2 because she was texting during the film. The suit sought the $17.31 cost of the movie ticket.

Only a short while into the film, his date began texting on her phone, which he described as "like one of my biggest pet peeves. She used her phone at least 10-20 times in fifteen minutes to text and check her messages." He asked her to stop, but she refused and left the theater, leaving Brendan to find a ride home for himself.

After much back and forth, the woman decided to reimburse him for the cost of the movie and apologize.

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Brendan accepted both, but told a local newspaper that, all in all, "It was kind of a first date from hell."

In 2011, Melissa Cooper was awarded $50,000 after she sued Christopher Kelley—her former fiancé and father of one of her children—for fraud and breach of promise. Kelley gave Cooper a ring in 2004. After a ten-year relationship, he broke off their engagement for another woman. Kelley argued that the $10,000 engagement ring was not a promise of marriage; however his argument did not hold up in court.

In 1991, Richard Harris (not the actor) sued St. Louis brewer Anheuser-Busch for $10,000 for false advertising. Harris claimed he suffered "severe emotional distress in addition to mental and physical injury" after downing a few Buds and failing to improve his luck with the ladies as promised in the company's television ads. He also didn't like the fact that he got got sick sometimes after he drank, hence the "mental and physical injury." The case was thrown out of court.

Raise Your Right Hand…If You Can

A friendly handshake between two lawyers back in 2015 turned into a lawsuit in Palm Beach County, Florida, with one attorney claiming that another lawyer shook his hand so hard he's been in pain for years.

The grip in question took place at a birthday party in Boca Raton. With no apology forthcoming, the suit, asking for $100,000 or "as much as I can get" for past and future pain and suffering, was filed about a year after the handshake, which was described as "unexpected, unprovoked, uninvited, unauthorized, uncalled for, and most certainly negligent."

Another Florida attorney was charged with assault when she caused a federal prosecutor to lose her balance while shaking hands. A marshal who witnessed the handshake said it seemed that the "shaker" was trying to pull the prosecutor's arm out of its socket.

In 2008, a woman sued the manager of an Applebee's in Oak Ridge, Tennessee for giving her a painful handshake. A few years earlier, an elementary school teacher in Salt Lake City took a parent to court for giving her an angry handshake during a confrontational parent-teacher conference.

YoHo, YoHo…A Pirate's Life for Me

Pirate Joe's was a specialty grocery store in Vancouver, British Columbia, with shelves stocked with a dizzying selection of items that consisted entirely of products bought across the U.S. border at Trader Joe's markets in Washington State.

Owned by Michael Hallatt, the Canadian store operated out of a former dry cleaners and not only carried Trader Joe's products, but maintained the Hawaiian vibe of Southern California-based Trader Joe's, which does not operate stores in Canada.

As might be expected, the rogue operation drew the ire of Trader Joe's, which filed a lawsuit in U.S. District Court in 2013, claiming that Pirate Joe's infringed its trademarks and damaged its reputation.

Even though Hallatt spent more than $350,000 at Trader Joe's markets in the United States, Trader Joe's tried to stymie Hallatt's operation by banning him from its stores. He countered by traveling to locations in Seattle and even Los Angeles to procure a menu of TJ-branded products—including Cookie Butter Cheesecake Bites, Chocolate Dilemma Cheesecake, Two-Buck Chuck Wine, Chipotle Toscano Cheese, Rose Water Facial Toner, Reduced Guilt Mac & Cheese, and Organic Tunisian Extra Virgin Olive Oil—for resale at his Canadian store.

On one occasion, Hallatt tried to disguise himself by donning a fake mustache and wig, and on another occasion, dressed in drag, but a bystander in a nearby drugstore parking lot mistook him for a robber, and called the police. On another undercover visit, he reportedly opted for a more urbane look—a gray, tailored pinstripe suit and wire-rimmed glasses.

A few months after filing, the case was tossed. The court ruled that Hallatt could not be convicted under U.S. trademark law because the alleged infringements occurred in Canada, not in the United States. Trader Joe's was not able to prove the business caused them any harm, and it was determined that Trader Joe's benefitted since all products purchased by

Hallatt and his crew of $25 per hour Craigslist operatives from its stores were bought at full retail price. Three years later, the dismissal was overturned by the Ninth Circuit, which sent the case back to the district court after ruling that a U.S. court did, in fact, have the authority to hear the case.

The amusing kerfuffle drew to a close last June when Hallatt announced that Pirate Joe's would close its doors because the ongoing lawsuit was too expensive and both sides had reached an undisclosed settlement.

Really…?

There's more.

- In 1995, Robert Lee Brock, a Virginia prison inmate, decided to take a new approach to the legal system. After filing a number of unsuccessful lawsuits against the prison system, Brock sued himself. He claimed his civil rights and religious beliefs were violated when he let himself get drunk. After all, it was inebriation that created his cycle of committing crimes and being incarcerated. He demanded $5 million from himself, but since he didn't earn an income behind bars, he felt the state should pay. Case dismissed.

- Subway, the world's largest fast food chain, came under fire two years ago when a photo showing that one of its foot-long sandwiches positioned next to a tape measure sized-in at just 11, not 12, inches in length. The revelation led to a class-action filed in Chicago from Subway consumers who said they were cheated out of an inch of their sandwiches and that Subway engaged in "a pattern of fraudulent, deceptive and otherwise improper advertising, sales and marketing practices." Subway settled out-of-court for about $500,000, with workers instructed to have a ruler handy to prove to customers that, in fact, their foot-longs actually do measure 12 inches in length.

- In 2017, a 62-year-old man in New York City sued the city after a rabid canine nipped his middle finger while he was riding a city bus. He sought damages of $2,000,000,000,000,000,000,000,000,000,000,000—that's two undecillion dollars (a "2" followed by 36 zeros), equal to all the money currently in circulation on the planet. Though he felt his suffering couldn't be fully compensated by mere money, the incomprehensible sum he asked for, in his own words, "could help."

- In 1999, 27-year-old Daniel Dukes made headlines after fulfilling a life-long dream to swim with a whale at SeaWorld in San Diego. Dukes had hidden from security guards after the park closed before jumping naked into a killer whale's tank. The dream turned into a nightmare when Tilikum, a 6-ton killer whale, attacked and killed Dukes. His parents sued SeaWorld on account of its failure to display public warnings that the killer whale, which had already taken the lives of two other people, could actually be dangerous.

- Todd Kirkpatrick, a convicted bank robber incarcerated at the Clallam Bay Corrections Center, filed a claim against Snohomish County seeking $6.3 million in damages for "pain and suffering. He charged that the law enforcement officers present at his arrest had failed to stop the sheriff's deputy who had shot him "from trying to execute" him.

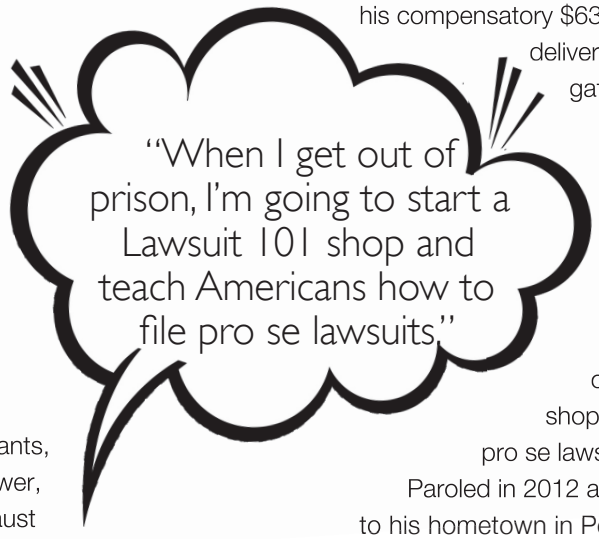
- In 2015, Minnesota illusionist Christopher Roller sued counterparts David Blaine and David Copperfield individually for "defying the laws of physics." In addition to demanding a combined $80 million, Roller insisted they reveal their magic tricks to him, and pay him ten percent of their future earnings. Roller believed the two magicians routinely use "godly powers," and because he believed he was, in fact, God, it was his powers that the magicians were using without his expressed permission.

- In 2000, a Southern California attorney sued GTE California after her name was listed in the GTE Yellow Pages Directory under the heading "Reptiles." She sought damages in excess of $100,000 and claimed the incident caused her to become "the target of bad jokes and rude telephone calls."

- In 2015, a Neldin Molina was enjoying her dinner with several friends at Hamburger Mary's restaurant in Tampa, Florida, when she claims she was injured when a drag queen performing that night "unexpectedly grabbed her head" and "wiggled her breast against the plaintiffs face and head" before "violently pounding it against her chest." Molina complained to the manager and went to a nearby emergency room "suffering from excruciating cervical pain and uncontrollable headaches." Her recently filed $1.5 million lawsuit against Hamburger Mary's also charges that the restaurant's management "failed to advise anyone of the possible dangers while dining at the restaurant."

And the Winner Is…

Jonathan Lee Riches. Since 2006, Riches—AKA the Man of Many Suits, the Patrick Ewing of Lawsuits, and Mr. Frivolous—filed more than 2,500 federal lawsuits from his cell at the Williamsburg Federal Correctional Institution in South Carolina, where he was serving time for multiple counts of wire fraud and violating his parole.



Compiling a dizzying list of litigants, Riches has sued God, the Eiffel Tower, Martha Stewart, every living Holocaust survivor, Plymouth Rock, UCLA basketball coach John Wooden, the "I Can't Believe It's Not Butter" butter substitute, the Holy Grail, the entire crew of the destroyer U.S.S. Cole, the Garden of Eden, New England Patriots coach Bill Belichick, the Roman Empire, Three Mile Island, Nostradamus, Pluto—the former planet, not Disney's cartoon dog—and dozens of others having the misfortune to appear in his cross-hairs.

In May 2009, Riches sought an injunction against the Guinness Book of World Records, seeking to stop them from listing him as "the most litigious individual in history." He filed the case despite the fact that there was no such listing in the book and, according to the publisher, there have never been any plans to ever create one.

Two years earlier, embattled former Atlanta Falcons quarterback Michael Vick was not only facing federal charges related to his alleged participation in dogfighting, but he also found himself on Riches' target list. According to media reports, Riches filed a handwritten lawsuit in federal court alleging that Vick pledged allegiance to the terrorist group al-Qaeda and afterward stole his pit bulls and sold them on eBay to buy anti-aircraft missiles from Iran.

"Michael Vick has to stop physically hurting my feelings and dashing my hopes," Riches wrote in the complaint, demanding his compensatory $63 billion—"backed by gold and silver"—be delivered "for his convenience" to the front gates of the Williamsburg federal prison. A U.S. District Court judge wasted no time in dismissing Riches' suit against Vick, calling it "a self-promotional farce" and barring the suit from proceeding "per 28 U.S.C §1915(g)."

Not to be deterred, Riches told a newspaper reporter that, "When I get out of prison, I'm going to start a Lawsuit 101 shop and teach Americans how to file pro se lawsuits."

Paroled in 2012 after ten years in prison, Riches returned to his hometown in Pennsylvania and true to his word, set up a Facebook page as a base of operations for his fevered campaign to sue virtually everything and everyone on the planet.

"I want to flood the universe with more lawsuits," he warned, outlining his strategy to finance his global assault on sanity with funds raised from the sale of a Michael Jordan rookie basketball card. Riches figured that if could rake in at least $800 from the sale of the card—just about enough money to buy "1,800 stamps to send more lawsuits out."

After you reach for the Tylenol, you might want to check your mailbox. You never know…

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By Kenneth J. Rose and Robert H. Rose

Workplace Investigations in the #MeToo Era

SINCE THE OCTOBER 2017 revelations detailing decades of alleged sexual harassment and assault by Hollywood mogul Harvey Weinstein, the news cycle has been filled with one public figure after another facing accusations of sexual impropriety, followed by being placed on administrative leave, being fired or resigning—during or after an internal investigation of the alleged misconduct.

The sheer number of new accusers and individuals accused has been staggering with Hollywood, Las Vegas, and Washington D.C. particularly coming under fire for what has been described as a culture of powerful individuals taking advantage of those in their control.

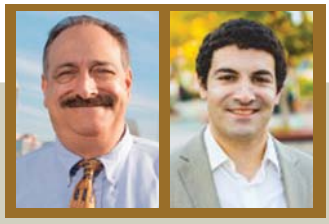
Since the accusations against Weinstein surfaced, there has been a growing list of high profile men who were fired or resigned after accusations—that they engaged in sexual misconduct toward co-workers—were corroborated to the satisfaction of their employer and Board of Directors based on an internal investigation. This list of the accused includes television personalities Matt Lauer and Charlie Rose, former U.S. Senator Al Franken, actor Kevin Spacey, and, most recently, billionaire casino developer Steve Wynn.

Even the judiciary has not been spared. Sexual harassment claims appear to have ended the judicial career of Ninth Circuit Court of Appeals Judge Alex Kozinski. On December 18, 2017, Kozinski retired from the Bench, effective immediately, after *The Washington Post* reported on claims by six women, including former judicial clerks and more junior staff members, that he subjected them to inappropriate behavior, including sexual conduct and comments.

It should come as no great shock that *Time* magazine named Silence Breakers as its 2017 Person of the Year.

Federal and state lawmakers are searching for new ways to complement existing anti-discrimination laws and help eliminate sexual harassment. Congress' recently enacted Tax Cuts and Jobs Act[1] amends section 162 of the Internal Revenue Code by removing as a business tax deduction the amount of a financial settlement related to a sexual harassment or abuse claim if the settlement is subject to a non-disclosure agreement.

Bills recently introduced before Congress include the Ending Forced



Kenneth J. Rose and **Robert H. Rose** are the principals and employment law specialists with The Rose Group APLC and TRG Workplace Investigations. Both regularly conduct workplace investigations throughout California and can be reached at krose@rosegroup.us and rrose@rosegroup.us.

Arbitration of Sexual Harassment Act of 2017,[2] which would prohibit employers from enforcing pre-dispute employment arbitration agreements with respect to employee allegations of workplace sexual harassment or any claim of gender discrimination filed under Title VII of the Civil Rights Act of 1964.[3] Instead of being compelled to litigate workplace allegations of sexual harassment before a private arbitrator, complainants would be allowed to bring their claims in court.

Before the California Senate is a bill[4] which if enacted, would invalidate non-disclosure provisions in settlements of lawsuits where the pleadings state a cause of action for sexual assault, sexual harassment, or workplace discrimination based on sex (unless the plaintiff requests the inclusion of a non-disclosure provision).

But while the famous and infamous have grabbed most of the headlines to date, accusations of sexual harassment extend far beyond the walls of Congress, casinos and Hollywood movie studios. Complaints of sexual misconduct can arise in every type of workplace, big or small, private or governmental, for profit or not-for-profit. No prudent employer can ignore the warning signs.

In corporate America, boards of directors and executive management are asking, "What should our company do when presented with an allegation of sexual harassment?" The same questions are being asked at all levels of local, state and federal government. The default answer should be that, as a first step, an impartial investigation will be undertaken immediately.

The avalanche of #MeToo sexual harassment claims across the nation has further underscored that all employers need to have policies and procedures in place to conduct prompt workplace investigations. For employers who learn of sexual harassment allegations either directly or indirectly, being proactive is crucial. To know what action to take, or to find out whether action is even necessary, the employer is compelled by law to investigate the situation and ascertain the facts.

Investigating Sexual Harassment Complaint Is the Law

The Equal Employment Opportunity Commission's (EEOC) *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*[5] states that, "An employer should set up a mechanism for a prompt, thorough and impartial investigation into alleged harassment."

In California, the Fair Employment and Housing Act (FEHA) requires employers to take "all reasonable steps necessary to prevent discrimination and harassment from occurring."[6] FEHA further makes it unlawful for an employer who "knows or should have known of this conduct and fails to take immediate and appropriate corrective action."[7]

The duty to prevent harassment and to take corrective action for any harassment an employer should have known about has been interpreted by courts as an employer's duty to thoroughly investigate complaints of sexual harassment.[8] The failure to do so can open an employer to additional liability for "failure to take all reasonable steps necessary to prevent discrimination and harassment from occurring."[9]

Investigation: An Employers' Most Effective Deterrent

Employers should investigate all reports and complaints of sexual harassment no matter what the employer thinks of the merits of the complaint. Besides the obvious strategic value in having investigations as a risk management tool, as stated, employers are required by law to promptly investigate all complaints of sexual harassment in the workplace.

Whether the accusations of sexual harassment are litigated in the court of

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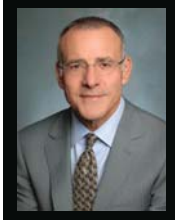

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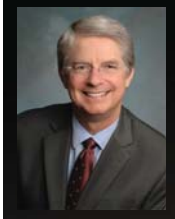

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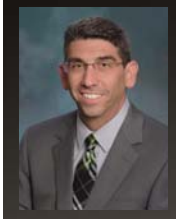

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public opinion or in the state or federal courts, or by private arbitration, having a full view of the situation before it gets out of control makes all the difference. Undertaking an immediate thorough investigation of complaints—or even rumors—of sexual harassment ensures that before the accusations evolve into a challenging lawsuit, the employer and legal counsel are fully aware of the extent of the accusations, and the witnesses and evidence which either support or refute them. As a result, the employer will be much better prepared to appropriately respond and pro-actively manage the situation.

Conversely, should an employer react slowly or fail to thoroughly investigate a complaint or fail to investigate at all—in addition to the reputational damage such accusations can cause—the costs of defending and potentially paying substantial damages in a lawsuit for sexual harassment can be overwhelming. Once an accusation of sexual harassment has advanced to the level of a court complaint of sexual harassment, the litigation discovery process to uncover the good, the bad, and the ugly evidence of what would have been revealed by a timely and thorough investigation could cost upwards of hundreds of thousands of dollars and take a year or more to complete.

If an investigation reveals that sexual harassment has occurred, and the alleged harasser is terminated as a result, the existence of a thorough and fair investigation provides a strong defense against a wrongful termination claim.[10] The recent California Court of Appeal decision in *Jameson v. Pacific Gas & Elec. Co.*[11] is instructive on the value of workplace investigations. The employee was terminated based on an outside investigator's report which concluded that the employee had retaliated against another employee for making a workplace safety complaint.

The employee sued for wrongful termination, claimed that PG&E's investigation was inadequate, and that the investigator, who was a former in-house attorney for PG&E, was not only biased, but had failed to interview identified witnesses or sufficiently consider plaintiff employee's arguments and evidence. Affirming the trial court's grant of summary judgment in favor of PG&E, the Court of Appeals held that PG&E had good cause as a matter of law to terminate the employee because it had relied upon the investigation.

The court opined that "the issue is not whether investigator's conclusions were correct or whether her investigation could have been better or more comprehensive. The question, rather, is whether PG&E's determination…was reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pre-textual."[12]

Conversely, an investigation which exonerates the accused that is not thorough and fair may be used by the complainant as evidence of unlawful retaliation for the protected activity of presenting complaints of harassment to the employer.

Selecting an Experienced Independent Investigator

Once the decision is made to launch an investigation, the next step is to decide who should conduct the investigation.

Using external, objective, and unbiased resources is critical to protect the both the employer and the individuals involved. Without impartial scrutiny respectful of all parties, future investigations will be hampered, fewer victims will report issues, and witnesses and offenders will be less likely to cooperate. Having an efficient and respectful process will, in the end, demonstrate the employer's commitment to all stakeholders.

It is fundamental that the employer assign an investigator who is well-versed in employment law and is properly trained, experienced, objective, skilled, credible, and not inhibited from

reporting his or her findings. A good investigator must be able to develop an effective investigation plan and must be experienced in reaching only those conclusions that are appropriate to the facts.

Employers may often be inclined to conduct an investigation internally or have it conducted by outside legal counsel. However, the employer should be cautious when proceeding down this path, as it doesn't come without hurdles such as an apparent lack of impartiality and independence.

On the other hand, selecting an independent attorney investigator who specializes in employment law—but has not been providing the employer with legal advice—brings neutrality to the investigation, yet offers the option of protecting the investigation under attorney-client privilege while the investigation is ongoing. However, if the investigation is relied on by the employer to make a decision that is challenged through a lawsuit, the investigation will no longer be protected by attorney-client privilege. Instead, it would be subject to discovery, with the investigator possibly called upon to testify at a deposition or at trial.

An experienced outside attorney investigator will be able to determine the necessary depth of an investigation based on the allegations, the employer's policies, and the applicable state and federal laws implicated. The investigation should uncover the facts to make a fair determination of whether any misconduct has occurred. Through confidential interviews of witnesses and review of relevant documents, an experienced investigator will be able to provide findings which will enable an employer to take steps to prevent further harassment or to counter false accusations (oftentimes before a lawsuit has been filed), identify whether any employee is guilty of misconduct, and put a stop to further wrongful actions.

> "An employer should set up a mechanism for a prompt, thorough and impartial investigation into alleged harassment."

The Take Away

The #MeToo movement has had the effect of making everyone pay closer attention to the issue of sexual harassment in the workplace. Accusers may now be more likely to come forward and the public is poised to pounce on any hint that such conduct has not been adequately investigated and dealt with.

Although nothing can fully insulate against employees making either legitimate or unsubstantiated complaints, legal counsel should urge their clients to immediately bring in an outside investigator with legal experience to review any accusations of workplace sexual harassment. Engaging an independent investigator is not only the right thing to do, it also gives employers the best chance of protecting themselves from potentially significant financial liability and irreparable reputational harm.

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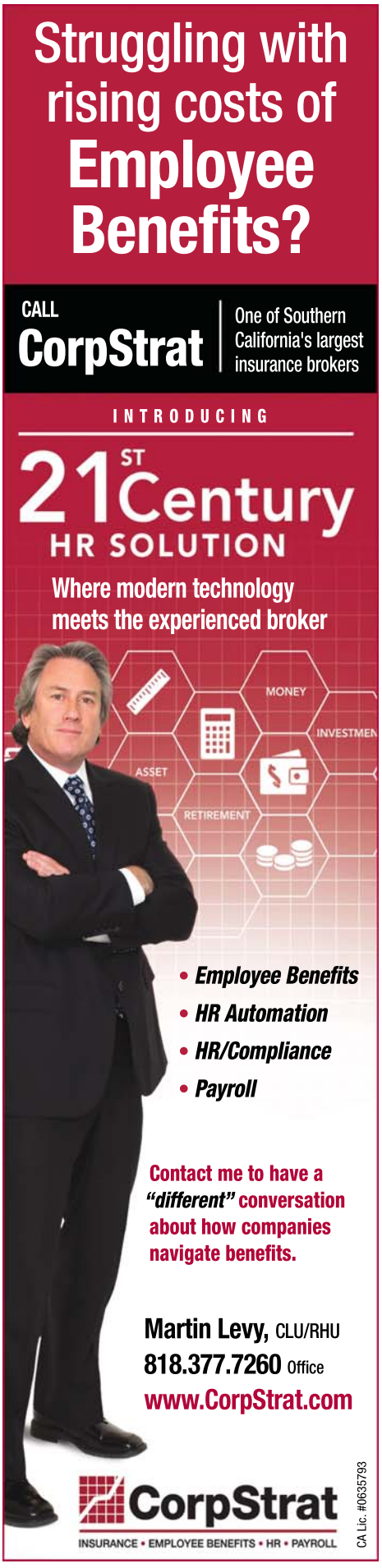
[1] Public Law No. 115-97 (December 22, 2017).
[2] H.R. 4734 and S. 2203, 115th Cong. (2017).
[3] 42 U.S.C. §2000e et seq. (1964).
[4] SB 820, 2017–2018 Reg. Sess. (CA 2018).
[5] EEOC Compliance Manual (BNA), N:4075 [Binder 3], available at www.eeoc.gov.
[6] Cal. Gov't Code §12940(k).
[7] Cal. Gov't Code §12940(j).
[8] See, e.g., *Holly D. v California Inst. of Technol.*, 339 F3d 1158, 1177 (9th Cir 2003).
[9] Cal. Gov't Code §12940(k).
[10] *Cotran v Rollins Hudig Hall Int'l, Inc.*, 17 C4th 93 (1998); *Silva v Lucky Stores, Inc.*, 65 CA4th 256 (1998).
[11] *Jameson v. Pacific Gas & Elec. Co.*, 16 Cal. App. 5th 901 (2017).
[12] *Id.* at 910.



New California Labor and Employment Laws

By Martin Levy, CLU/RHU

RETAINING, ATTRACTING AND REWARDING employees is increasingly complex, and at the core of the challenge is the management and compliance required as you run your practice. A host of new California laws have increased focus on gender protections, workplace harassment and training to guard against sexual harassment.

To help you stay ahead of any legal issues, below are the new laws that have taken effect in 2018 and what to do next:

Employment Eligibility Verification I-9 Form

Don't get caught with your hand in the cookie jar. I-9 audits are on the rise, with penalties starting at $4,313 for a first offense. Make sure you are using the I-9 form updated in 2017 with all new hires and re-verifications. Follow the new instructions and if a translator or preparer assisted the employee in completing the form, complete the Form I-9 Supplement.

Ban the Box Law

Employers with five or more employees may no longer consider an applicant's criminal history on an employment application or at any time—including the interview process—prior to making a conditional offer of employment. This new law does not apply in those limited circumstances where a public or private employer is required by law to conduct a criminal background check or to restrict employment based on criminal history.

Note: If an employer decides to deny employment based on the applicant's criminal history, the employer must follow certain steps before making a decision. Consulting HR or legal counsel is recommended.

AB 168—Salary History Inquiries

Both public and private employers are prohibited from inquiring about, or considering information concerning, an applicant's current or prior salary in determining whether to offer employment or the amount to pay the applicant. Employers will have to provide pay scale information upon an applicant's request. If an applicant voluntarily—without prompting by the employer—discloses prior salary history, the employer may consider it in determining compensation.

Martin Levy, CLU/RHU is President and Founder of CorpStrat/Corporate Strategies, Inc., located in Woodland Hills. The firm is comprised of professionals in human resource, executive leadership, insurance, employee benefit design, compensation, and tax and financial planning. Levy can be reached at marty@corpstrat.com.

Reminder: Employers still need to consider the Equal Pay Act and avoid paying applicant(s) less or more than others for substantially similar work.

SB 63—New Parental Leave

Employers with 20 to 49 employees now have to provide up to 12 weeks of unpaid parental leave to employees to bond with a new child within one year of the child's birth, adoption, or foster care placement. Employers must maintain an employee's group health coverage during leave on same terms as if the employee was actively reporting to work. This new law is only for employees not already entitled to leave under FMLA /CFRA.

AB 450—Immigration Worksite Enforcement

Both public and private California employers are now required to request an official warrant or subpoena from federal immigration enforcement officials to enter non-public areas of the employer's premises or to inspect the employer's records.

There is an exception for inspection of employer's I-9 records where an advance notice of inspection was provided. This requires employers to give written notice to employees (and any union representative) of any official inspection of the employer's I-9 records within 72 hours of receiving notice of an inspection. The Labor Commissioner will issue a template for written notice by July 1, 2018.

SB 396—Harassment Training

As a reminder, employers with 50 employees or more must provide at least two hours of sexual harassment prevention training to all supervisorial employees within six months of becoming a supervisor and once every two years thereafter. Effective January 2018, this training must also include information on gender identity, gender expression, and sexual orientation. Employers must also post transgender rights notices in the workplace.

AB1701—Contractor Liability/Wages

A direct contract or making or taking a contract in the state for the erection, construction, alteration, or repair of a building, structure, or other private work, may be held liable for a subcontractor's failure to pay wages to a worker. The direct contractor's liability extends only to any unpaid wage, fringe or other benefit payment or contribution, including interest owed, but does not extend to penalties or liquidated damages.

The Labor Commissioner or a wage claimant may bring a civil action against a direct contractor to collect wages owed. This law applies to contracts entered on or after January 1, 2018.

What to Do Next

Life moves fast. Employment law changes even faster. Hire and review your employment applications and practices with a skilled HR consultant and or an employment law attorney whose focus is in counseling employers.

TIPS FOR RUNNING YOUR PRACTICE

Update Employer Policies and Train Staff

- ☐ Delete requested information regarding criminal history, gender, and salary inquiries
- ☐ Update all effective policies (e.g., drug- and alcohol-free workplace policy, anti-harassment/discrimination policy to include new gender regulations, smoking-free workplace policy, pregnancy disability leave, and background checks disclosures)

Audit Pay Practices

- ☐ Fair Pay considerations (gender, race and ethnicity)
- ☐ Develop written compensation guidelines
- ☐ Review piece-rate and commissioned based pay plans
- ☐ Conduct Equal Pay and I-9 audits
- ☐ Minimum wage increases (exempt and nonexempt pay requirements have changed)

Local Ordinance Watch

- ☐ Check the localities where employees work
- ☐ Ensure compliance with requirements

Review and Update Employment Applications

- ☐ Consider whether to continue including prior salary inquiries
- ☐ Be sure applications do not ask about juvenile convictions
- ☐ Update notices and posters (e.g., minimum wage notice/no smoking signage/gender neutral signage on single-user restrooms)

Stay Updated on Pending Regulations and Rulemaking

- ☐ Transgender regulations
- ☐ Criminal history regulations
- ☐ Cal/OSHA reporting rules to comply with federal requirements

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A Presence at the Court

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Director of Public Services

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IN RECENT YEARS, SCORES OF complaints have been logged with the San Fernando Valley Bar Association about the aggressive soliciting tactics practiced by unscrupulous representatives of lawyers outside the Van Nuys courthouses.

The Attorney Referral Service approach is refreshingly different and effective.

The next time you find yourself in a Valley courthouse, check the clerk windows, elevators and the halls to the courtrooms to see the "Need a Lawyer?" signs, which for almost 20 years, have clearly displayed the San Fernando Valley Bar Association's commitment to providing the public with access to justice through the ARS.

Putting a face on that commitment, every Tuesday since January (weather permitting), the public can visit the ARS booth in the Van Nuys Civic Center courtyard outside of the courthouses. The booth is staffed by ARS Intake Consultant Miguel Villatoro and Rosie Soto Cohen, SFVBA Director of Public Services, who offer the public face-to-face counsel and immediate referrals to reputable, experienced attorneys.

The ARS staff doesn't haggle or offer legal advice. Rather, the staff is present and readily available to help

anyone learn about the comprehensive vetting process for the lawyers that participate in the ARS.

"They appreciate learning about such a service available in the community," says Villatoro, who in addition to processing referrals, also answers questions that range from locating the Self-Help Center to finding the nearest ATM machine.

In addition to onsite assistance available at the ARS booth, the public can also access the SFVBA's State Bar-certified ARS program on the Los Angeles Superior Court's website.

The ARS' presence at the Van Nuys court and its online access has given it an unparalleled opportunity to reach people that are truly in need of affordable legal assistance. There is no surprise that the presence has also sparked the interest of a growing number of attorneys considering joining the Bar and the referral service's ranks.

For more information on ARS membership, contact Rosie Soto Cohen at rosie@sfvba.org.


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300+ STUDENTS WERE TREATED TO THIS NATIONALLY ACCLAIMED PLAY AT THE PERFORMING ARTS EDUCATION CENTER ON THE CAMPUS OF CALABASAS HIGH ON TUESDAY, FEBRUARY 6, 2018.

THEY WITNESSED THIS RIVETING COURTROOM TRIAL DRAMA THAT EXPLORES HIGHLY CHARGED ISSUES OF RACE, RELIGION, CLASS AND THE LAW. THE HON. VIRGINIA KEENY AND HON. FIRDAUS DORDI LED A THOUGHT PROVOKING PRE-SHOW DIALOGUE WITH THE STUDENTS AND FOLLOWING THE PERFORMANCE, STUDENTS BECAME THE JURY AND RENDERED THE VERDICT.

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- Kira Masteller - Lewitt Hackman
- Laurence Kaldor, Esq.
- Anngel Benoun - Dilbeck Estates

$500
- Raji Rab - Raji Rab for Congress 2018 California 30th District

$250
- Stephen Holzer - Lewitt Hackman
- The Leavitt Group - Terri Peckinpaugh
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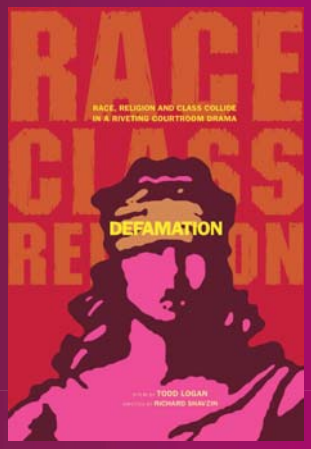
- Deborah Chodos, Esq.
- Jay Rubin - Lee & Associates Commercial Real Estate
- Mark Shipow, Esq.
- Kathy Neumann, Esq.
- Hon. Valerie Salkin
- Amy Huberman - Lewitt Hackman

$150
- Stanley Getz, Esq.



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DEFAMATION: The Play! Another Huge Success this Year

LAURENCE N. KALDOR
President

phenix7@msn.com

IN FEBRUARY OF 2017, MORE than 200 students were on hand for a performance of DEFAMATION, The Play, the nationally acclaimed theatrical courtroom drama about race, religion and class. This February 6, twice as many local high and middle school students were in attendance at Calabasas High School's Performing Arts Education Theatre for a repeat performance.

The showing, sponsored by the Valley Community Legal Foundation of the SFVBA, drew students from Valley law magnets, participating law posts and Teen Court programs, including John Burroughs High School, Taft High School, James Monroe High School and Reseda High School. Eighty students from the A. E. Wright Middle School in Calabasas, a co-sponsor of the event, also attended.

The play is "a trial," which runs approximately 80 minutes and is followed by a live 15-minute student-audience deliberation led by the judge from the play, who polls the student-audience twice—once before the deliberation begins and again at its end. The final vote for the plaintiff or for the defendant decides the outcome of the trial.

This year, the VCLF was honored to have two esteemed Los Angeles Superior Court judges and current VCLF board members—the Honorable Virginia Keeny and the Honorable Firdaus Dordi—lead the pre-show dialogue with the student-audience. Many of the young adults commented after the show how fascinated they were with both of the judges.

Attending faculty and administrators, too, were once again impressed by how articulate, interested and engaged so many of the students were during the post-show deliberation and discussion. Judge Dordi, a 14-year veteran of the federal Public Defender's Office, and Judge Keeny, an expert in civil liberties issues, proved to be the perfect duo to introduce and explain the serious social issues brought to life in the play.

VCLF President-Elect Mark Shipow observed how impressive and involved all of the students were, later commenting that "this is exactly the type of educational program we should be supporting in our Valley community."

Following the performance, Alise Cayen, coordinator of the Reseda High School Law & Public Service Magnet/Police Academy Magnet, said, "My students thoroughly loved the play again this year. We hope the Foundation can bring it back every year for our senior class."

The play, said VCLF volunteer event coordinator Anngel Benoun,

NEW MEMBERS

The following joined the SFVBA in February 2018

Yuri Aberfeld
IT Support LA
Tarzana, CA
Computer

Eduard Braun
Sherman Oaks, CA
Law Student

Brisa Cabrera
Ingenious Asset Group, Inc.
Encino, CA
Bankruptcy Law

David F. Calkins
Encino, CA
Personal Injury

Cristine S. Capitulo
Kraft, Miles & Miller, LLP
Woodland Hills, CA
Estate Planning, Wills and Trustes

Granth J. Crhoelman
California Injury
Van Nuys, CA
Personal Injury

Liz Gayle
Chatsworth, CA
Lemon Law

Rodney Gould
Sherman Oaks, CA
Probate

Dario Higuchi
Benchmark Resolution Group, LLC
Los Angeles, CA
Alternative Dispute Resolution

Hon. Michael Latin Ret.
Benchmark Resolution Group, LLC
Los Angeles, CA
Alternative Dispute Resolution

Lauren E. Mackay
Kraft, Miles & Miller, LLP
Woodland Hills, CA
Family Law

Kori Macksoud
Stone | Dean LLP
Woodland Hills, CA
Civil Litigation

Kristina Rosales
Legal Aid Foundation of Los Angeles
Los Angeles, CA
Housing

Sarah Weil
Office of Public Defender
Encino, CA
Criminal Law

"is informative and educational and the interaction and engagement with the students is truly inspiring," while Kira Masteller, current VCLF board member and the immediate past president of the SFVBA, commented that, "It was truly inspirational to see how engaged the student-audience was during the performance and especially the post-show discussion."

Since the Foundation is not permitted to sell tickets to this student performance, it relies on your generous support to bring DEFAMATION to the Valley.

To make a donation, visit www.thevclf.org/donate and click on the link for "DEFAMATION: The Play." For more information about how you can become a sponsor for this annual event, contact Anngel Benoun at anngel4re@earthlink.net.

The VCLF thanks you in advance and can't wait to share this worthwhile experience with even more young people again next year!

ABOUT THE VCLF OF THE SFVBA

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

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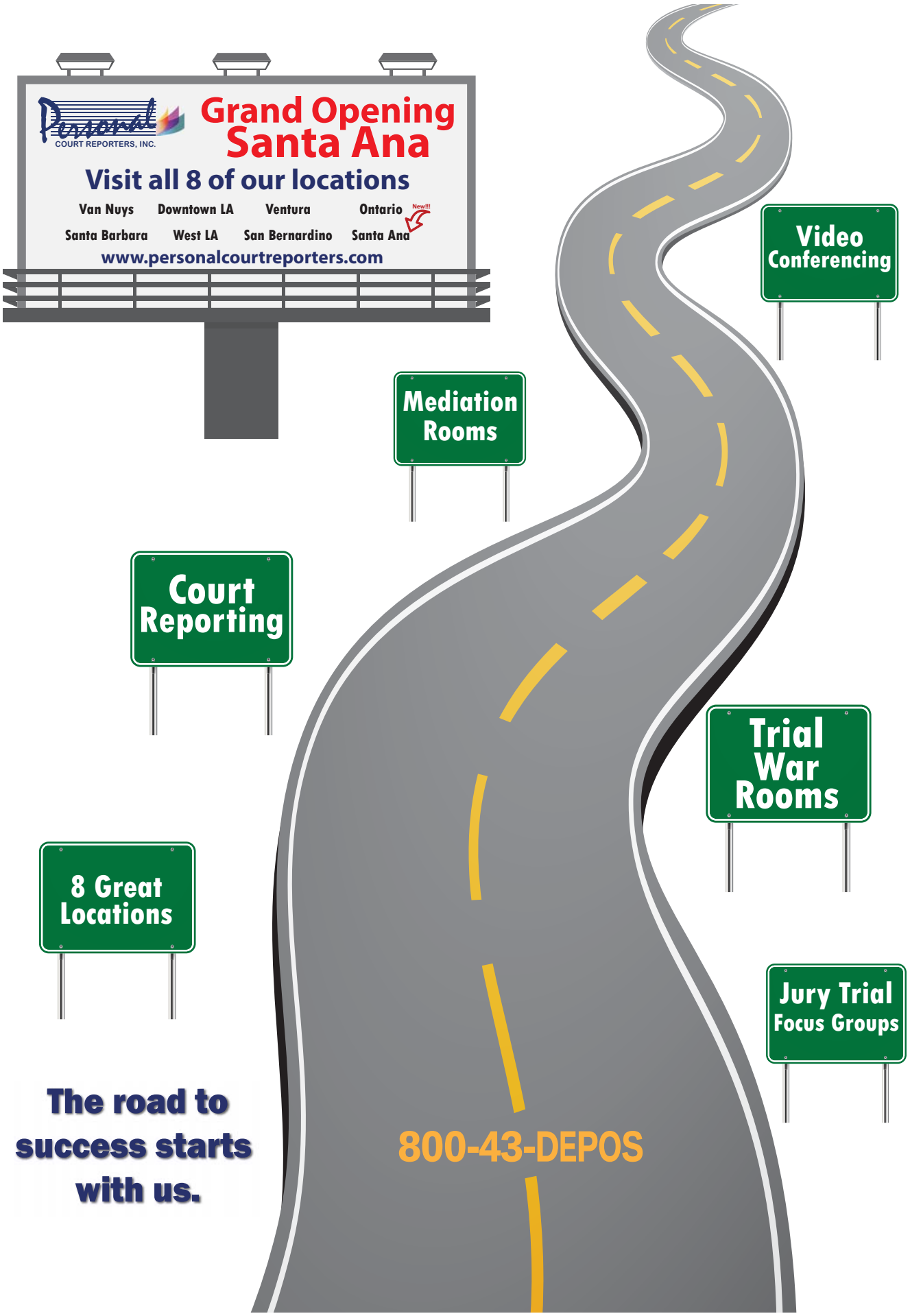
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