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Differing Tests of Mental Capacity for Wills and Trusts

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VALLEY LAWYER
A Publication of the San Fernando Valley Bar Association

On the cover (left to right): *Myer J. Sankary, Sue Gramacy, Susan Carlisle, Sonia Bernal and William M. Molfetta*
Photo by Ron Murray

FEATURES

COLUMN

DEPARTMENTS

VALLEY LAWYER

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Will the Future Need Us?

ALAN E. KASSAN
SFVBA President

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I JUST RECENTLY LEARNED THAT I am soon to become a grandfather for the first time. Very exciting news! After days of elation, my mental meanderings took me to the question of what the administration of justice might look like for my grandchildren and their progeny.

Books and movies have given us glimpses of the future of the law, and in some of those imaginings, the future has looked a bit frightful. Take for instance the Philip K. Dick short story, woven into the Steven Spielberg film, *Minority Report*, in which Tom Cruise plays the Chief of PreCrime, charged with arresting people even before they committed a crime. In that world, justice depended on so-called precogs who possessed psychic connections to imminent crimes.

While that might be too fantastical, what is inevitable in the law, as in most aspects of our lives, is the dependence on artificial Intelligence, or AI. AI is becoming ubiquitous. Alexa, Siri and Google Assistant are based in no small part on AI as they track our behavior, offering us guidance and advice based on past behavior. Facebook does the same thing.

AI is also at the doorstep of the legal profession. The relentless proliferation of data and the need to manage terabytes of documents has carved out a whole new industry in the law with software technologies that manage e-discovery becoming one of the biggest ever developments in legal tech. Those technologies are branching out and rapidly evolving into systems that can cull through thousands of pages in minutes, instead of days. They can, or will, intelligently identify and sort, and even summarize, pertinent documents.

Those systems are developing at such a rate, that very soon it will be acceptable to rely upon them completely. The good news is that we lawyers will be able to perform miracles when it comes to retrieving and analyzing legal research documents and evidence. The bad news is that these and related technologies also stand to replace us. For example, enterprising minds are also working on systems that represent viable alternatives for dispute resolution that rely entirely on AI.

AI is also fueling DIY law. For years we've seen software that can interview people with a series of questions in order to prepare wills and trusts and even business agreements with no lawyer necessary. But with AI, these systems can be even faster and more accurate than human lawyers very soon.

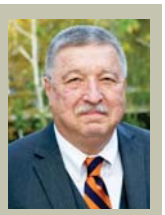
So what's the message here? For Baby Boomer lawyers with retirement looming 'round the corner, the impact will be minimal. But for Gen X, Millennial, and Gen Z lawyers, the impact will be substantial. While these systems are likely to devalue, or revalue, the services we as lawyers provide, and perhaps eventually even replace some of us, they will for the near future also help us to provide better service, with greater efficiency, and to remain competitive.

Furthermore, it will continue to be lawyers who help develop these systems and supervise and manage their implementation. For these reasons, it befits all of us to educate ourselves about, and experiment and become comfortable with, emerging legal technologies. As the successful practice of law is rapidly becoming as dependent on being able to fully understand and master the implementation of legal technologies, it is critical that we both understand and master the law itself.

One day though, AI and robots may well supplant all of us. This may be little unsettling for some, but I have to admit it is rather intriguing to imagine my distant heirs stepping into some virtual courtroom occupied entirely by virtual clerks, lawyers, judges, jurors…

Non-Arbitrary Arbitration and a Leader Lost

MICHAEL D. WHITE
SFVBA Editor



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EVERY NARRATIVE STORY that draws on a number of individuals who bring their own diverse perspectives and experiences to the party has, or at least should have, a "golden thread" that links it all together—a solid foundation upon which the narrative can build to its desired effect.

This month's cover article on attorney-client fee arbitration is no different. I interviewed half a dozen members for the piece and what they shared with me was eye-opening.

Attorney and fee arbitrator William Molfetta told me that "sometimes the litigants just want to vent and it's like them having their day in court. After a bit of time, they come to see the increased costs in taking a case to litigation. They tend to be a little more satisfied with the result, even if it didn't go exactly the way they were expecting."

A non-attorney regularly acting as a fee arbitrator, certified public accountant Sue Gramacy, shared that she offers a "different voice" to the arbitration process. The alternative of going to a "full-blown trial," she feels "puts the clients at a substantial disadvantage in that they're playing in the attorney's sandbox. It's very costly in terms of both time and money. An arbitration setting is much more relaxed and the clients have a way to be heard without the formal environment of a trial or hearing." The process, she says, "presents the public with a way to get justice."

"When I started I learned very quickly that arbitration is not arbitrary," veteran attorney and arbitrator Leon Alexander reveals. "The rules and laws, when you get down to a particular case and particular situation, virtually always lead to something worthwhile to be said by each side that deserves to be heard."

At the heart of any arbitration, no matter the issue, "is fairness," Alexander said. "It's not a case of who's the good guy and who's the bad guy, but what is appropriate commercial conduct in trying to do the right thing within the limits of what is considered proper."

That was it—fairness and doing the right thing, not refereeing a grudge-match slugfest to see who pays out how much to whom, but a search for what's just and equitable to all involved.

A golden thread indeed.

I had the honor of meeting the late Armand Arabian and, at one point, interviewing him for an article in *Valley Lawyer*. The occasion was last year's November issue, a salute to those members of the Bar who had served in the military. The justice, a true gentleman, was gracious with his time, recalling his days as a young lieutenant in the U.S. Army.

I asked him if he had any regrets along the way and he responded that he never received the coveted Ranger tab he had worked so hard to earn while training at Fort Benning, Georgia. "I completed the course, but I was so close to being separated from the service that they decided not to give it to me. It was very disappointing."

The motto of the Rangers is "Rangers Lead the Way." Tab or no, Armand Arabian did and everyone who ever came in contact with him was proud to follow.

CALENDAR

MAY 2018

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**	**8** Probate & Estate Planning Section Drafting See-Through Trusts **12:00 NOON MONTEREY AT ENCINO RESTAURANT** Attorney Steve Trytten will discuss the potential benefits of designating retirement and IRA assets to a see-through trust and the different methods of drafting one, including sample forms. (1 MCLE Hour) — Board of Trustees **6:00 PM SFVBA OFFICES**	9	**10** New Lawyers Section Networking Mixer **Sponsored by** cresa The Tenant's Advantage **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, Nancy Zamora and Edward M. Wolkowitz lead the distinguished panel. (1.25 MCLE Hour)	12
13 Happy Mother's Day	14 — **21** Family Law Section Parenting Plan Assessments: Selection, Preparation and Use at Trial **5:30 PM MONTEREY AT ENCINO RESTAURANT** Commr. Michelle Short, Judge Shirley Watkins, Dr. Susan Rempel, Ph.D. and moderator Gary Weyman will discuss parenting plan assessments. Approved for Family Law Legal Specialization. (1.5 MCLE Hours)	**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** — **22** Editorial Committee **12:00 NOON SFVBA OFFICES**	**16** Workers' Compensation Section Medical Apportionment Rebuttal with Vocational Evidence **12:00 NOON MONTEREY AT ENCINO RESTAURANT** WCAB Judge Clint Feddersen and attorney Jeff Swartz will discuss rebutting medical apportionment. (1 MCLE Hour)	17	**18** fastcase Fastcase Friday Ethics and Legal Research **1:00 PM WEBINAR** See Page 32	19
20			**23** Criminal Law Section Prevention of Substance Abuse **Sponsored by** CLIFFSIDE MALIBU **6:00 PM SFVBA OFFICES** See Page 23	**24** Santa Monica Bar Association Annual Judges' Night **ANNENBERG COMMUNITY BEACH HOUSE** SFVBA Members receive special rate. Visit http://smba.net for details.	25	26
27	28 Memorial Day **SFVBA OFFICES CLOSED**	29	30	**31** DINNER AT MY PLACE 6:30 PM | Valley Village See Page 44		

SUN	MON	TUE	WED	THU	FRI	SAT
					1  See Page 33	**2**
3	**4** VBN VALLEY BAR NETWORK **5:30 PM**	**5** Probate & Estate Planning Section **12** Probate Court Update **12:00 NOON MONTEREY AT ENCINO RESTAURANT** Judge David Cowan and the probate bench officers will share the latest updates re the Probate Court. (1 MCLE Hour) Board of Trustees **6:00 PM SFVBA OFFICES**	**6** Social Media and Reputation Management **Sponsored by** FindLaw. **12:00 NOON SFVBA OFFICES** Salar Yamani updates the group on FindLaw. Free to Members! (1 MCLE Hour)	**7** Recognizing Bias in the Workplace **12:00 NOON WEBINAR** Alyson Claire Decker will give the 411 on employment law. (1 MCLE Hour Elimination of Bias) Membership & Marketing Committee **6:00 PM SFVBA OFFICES**	**8**	**9**
10	**11**	**12**	**13**	**14**	**15**	**16**
17 	**18**	**19** Taxation Law and Litigation Sections Taxation of Settlements and Awards **12:00 NOON SFVBA OFFICES** Former U.S. Tax Court Attorney Adviser and Certified Taxation Law specialist Sharyn Fisk will discuss the legal ramifications of legal settlements and awards. This is a must attend event for all personal injury and plaintiffs' lawyers. (1 MCLE Hour) ARS Committee **6:00 PM SFVBA OFFICES**	**20** Workers' Compensation Section **12:00 NOON MONTEREY AT ENCINO RESTAURANT**	**21**	**22**	**23**
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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.

Justice Armand Arabian: A Legacy of Justice

ELIZABETH POST
Executive Director

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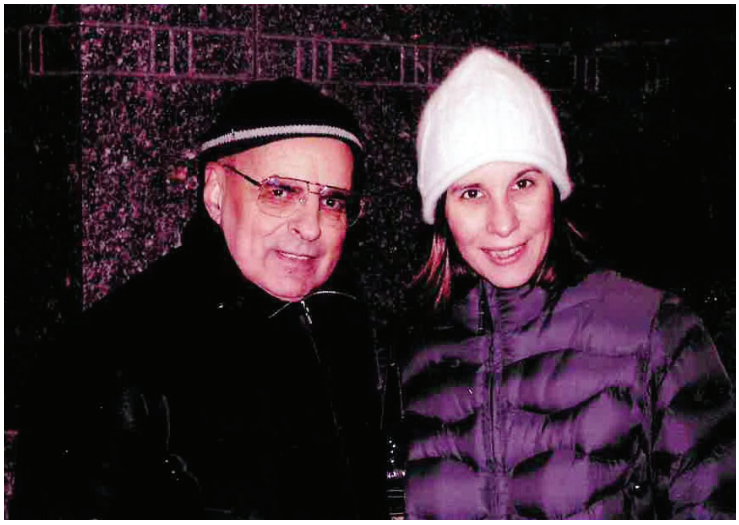
RECEIVING THE JUSTICE ARMAND ARABIAN Leaders in Public Service Award in 2014 is one of my proudest honors. The award—presented by the Encino Chamber of Commerce—recognized my two decades of service with the San Fernando Valley Bar Association, and celebrated an icon of our Bar Association and the Valley and statewide legal community.

Justice Armand Arabian passed away March 28 after a long, distinguished career. For more than 55 years, he was an active, revered SFVBA member. Following graduation from Boston University School of Law in 1961, and a short stint as a Deputy District Attorney, Justice Arabian maintained a private law practice for nearly a decade from a storefront office on Van Nuys Blvd., across from the civic center. In 1972, he was appointed by Governor Ronald Reagan to the Los Angeles Municipal Court and a year later elevated to the Superior Court. He served as the North Valley District's first supervising judge in San Fernando.



Governor George Deukmejian elevated Judge Arabian to the California Court of Appeal in 1983 and to the California Supreme Court in 1990, where he served until retirement in 1996. Earlier, Justice Arabian also had a role in an interesting footnote in California history. In 1979, while California Governor Jerry Brown was out of state, Lieutenant Governor Mike Curb appointed then-Judge Arabian to the Court of Appeal. Upon returning to the state, the governor immediately withdrew the appointment. The California Supreme Court later ruled both the brief appointment, and withdrawal by the governor, were valid. (*In re Governorship*, 26 Cal.3d 110 (1979)).

Justice Arabian served on the Supreme Court for six years, authoring over a hundred majority opinions. Justice Arabian's contributions to the law were significant, his proudest being his ground-breaking decision in 1973 as a Superior Court judge, refusing to give jurors the longtime mandatory instruction to view a rape victim's testimony with caution, a directive undermining the victim's allegations. In 1975, the California Supreme Court upheld Judge Arabian's ruling and struck down the controversial instruction.

Upon retirement from the Supreme Court, Justice Arabian set up an ADR practice at the same storefront office on Van Nuys Blvd. and continued his active participation in the SFVBA. Justice Arabian attended and participated in our events, was warm and friendly with our members, and was always a source of pride to our Association. Justice Arabian received the SFVBA's first and only Lifetime Achievement Award in 1993, which he graciously allowed us to proudly display here in the Bar offices. In 1999, the Bar dedicated two Attorney's Research and Communications Centers in his name at the Van Nuys and San Fernando courthouses.

Justice Arabian was born in New York City and liked to share a story when he and I were together in the company of others. During the Christmas holidays after 9/11, my husband and I were in the city, walking near Saint Patrick's Cathedral, and who did we encounter but none other than Armand Arabian. Justice Arabian would always ask, "What were the odds of finding each other in a city of more than eight million people?" My husband photographed us commemorating the chance meeting, which I gave to Justice Arabian upon receiving the Justice Armand Arabian Leaders in Public Service Award four years ago. Justice Arabian was truly a leader in public service. He was a true friend to the SFVBA. We will miss him dearly.

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 22.

Unreconciled:
Differing Tests of Mental Capacity for Wills and Trusts

By Mark J. Phillips

California legislation and cases over the years have changed dramatically the way lawyers understand and evaluate clients' testamentary capacity in estate planning matters, but anecdotal evidence is that attorneys have not changed the approach in measuring the mental fitness of their clients. While courts have held that attorneys are not liable to charges of malpractice for drafting and overseeing the execution of testamentary documents by clients later determined to be incompetent, they are still responsible for the choice of the appropriate documents used or their inadequate preparation.

IT IS A FUNDAMENTAL UNDERPINNING OF THE LAW of estates and trusts that to make a will an individual must have an undiminished view of one's circumstances and be able to clearly formulate the disposition of assets he or she wishes to make on death.

But California legislation and cases over the years have changed dramatically the way in which lawyers understand and apply the evaluation of testamentary capacity in estate planning matters. The rules are both foreign and in many respects beyond the training of even experienced lawyers who practice in the field. Despite the attention that has been given to the more recent statutory rules and cases, anecdotal evidence is that attorneys have not changed the approach they traditionally have taken in measuring the mental fitness of their clients.

Avoiding the undesirable consequences of an intestacy necessitates that an individual execute testamentary documents, typically a will or a trust that complies with statutory requirements. The validity of these documents in turn requires that the individual possess testamentary capacity, measured by a time-honored test for more than a century.

Common Law Test

The common law test was codified in California in 1985 with Probate Code §6100.5, which requires that a testator (1) demonstrate an understanding of the nature and extent of his or her property, the identity of those persons which society commonly expects to benefit on the death of the testator (referred to as the "natural objects" of one's bounty), and the nature of the plan being put into place by the will, and (2) not be suffering from delusions or hallucinations, defined as erroneous beliefs which the testator holds notwithstanding being confronted with evidence to the contrary, and which impact the disposition being made.

This low standard for capacity brings the ability to create wills to virtually anyone. A testator must be an adult, but little else is essential. Literacy is not a disqualifying factor, nor is old age, illness, physical weakness, or pure eccentricity.[1] A testator need not boast even average intelligence, or half of the population would be disqualified.

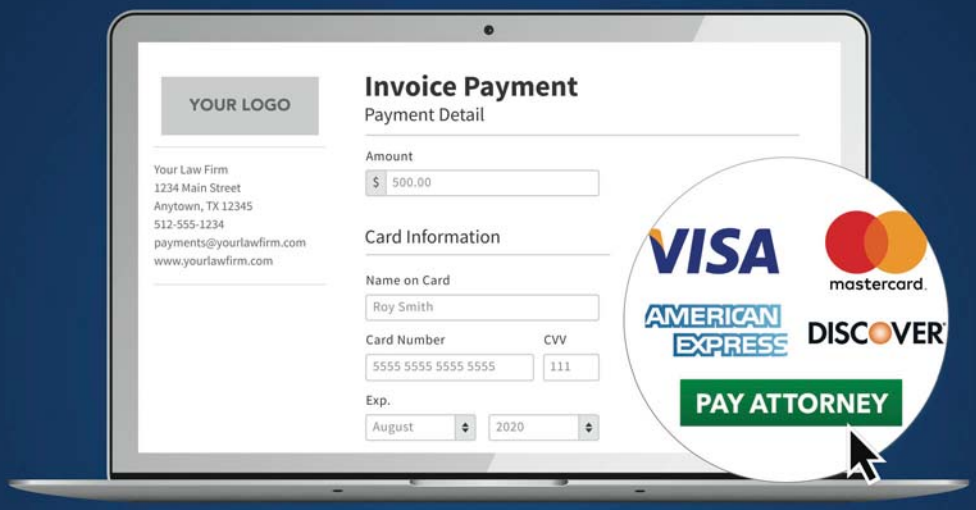
The difficulty arises because the modern testator usually doesn't execute a will only, but rather a collection of documents that necessarily together make up an entire plan. Revocable trusts have become the estate planning tool of choice in order to avoid the costs, delays and public nature of probate, and attorneys will offer to any client with an estate valued at more than a few hundred thousand dollars a package of documents that include a revocable trust intended to be funded with his or her assets and a will that simply leaves everything else to the trust, the latter known as a "pour-over" will.

The project is usually rounded out by a power of attorney, health care directive, assignments, deeds and assessor's documents. While the test of capacity in §6100.5 is on its face applicable only to wills, California courts have held for many years that the same low measure of testamentary capacity applied to these revocable trusts, since they merely function as will substitutes.[2] This ignored the applicability of Probate Code §811, enacted in 1995 as part of the Due Process in Competency Determinations Act (DPCDA), which in determining the validity of certain actions taken, including executing a contract, making a conveyance, entering into a marriage, and specifically creating a trust, requires that an individual be examined for:

- Alertness and attention, including level of arousal or consciousness, orientation to time, place, person and situation, and the ability to attend and concentrate
- The ability to process information, understand and communicate with others, recognize familiar objects and persons, understand and appreciate quantities, reason using abstract concepts, plan, organize and carry out actions in one's own rational self-interest, and reason logically
- Evidence of stable thought-processes, demonstrated by the absence of severely disorganized thinking, hallucinations, delusions, or uncontrollable, repetitive or intrusive thoughts
- The ability to modulate mood and affect

California estate planning lawyers can no longer ignore the reach of §811. In *Anderson v. Hunt*, the trial court was presented with an estate plan that included both a will and a trust, and held that §6100.5 applied only to the will, and while the decedent in that case might have satisfied the §6100.5 test of testamentary capacity, he lacked the higher contractual capacity required under §811 for the trust, bank accounts and beneficiary designations.[3]

Mark J. Phillips has practiced law for 35 years with the Law Offices of Goldfarb, Sturman & Averbach in Encino. He specializes in estate planning, trust and tax law, with certification as an expert by the California State Bar, and is the author (with Aryn Z. Phillips) of *Trials of the Century* (Prometheus, 2016). Phillips can be reached at mphillips@gsalaw.com.



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On appeal, the court reversed, but not on grounds that clarified for practitioners the application of the differing standards of capacity. While acknowledging that trusts, as enumerated, were governed by the more stringent standards of contractual capacity set forth in §811, the court nevertheless ruled that the contractual capacity test of that section was a sliding scale; easy decisions require less capacity and hard decisions require more. Finding that the decedent's particular trust amendments were simple and will-like, the court in *Anderson* held that in applying §811 the court would look to §6100.5 to provide a convenient test for evaluating simple trust documents. The opinion states:

> "In other words, while §6100.5 is not directly applicable to determine competency to make or amend a trust, it is made applicable through §811 to trusts or trust amendments that are analogous to wills or codicils."[4]

As interpreted by *Anderson*, the validity of trust provisions are not governed by the capacity rules of §6100.5, yet it provides a convenient standard for measuring simple, will-like trusts or trust amendments. Not entitled to the same standard, the joint tenancy accounts and beneficiary designations of the decedent were declared invalid, since he did not possess the higher level of capacity required by §811, an indefensible difference under either the court's language or rationale.

The *Anderson* case caught estate planning practitioners by surprise, but because it maintained the status quo, at least for these simpler trust instruments, it was not yet worrisome. A bright-line test maintaining the well-established test of capacity under §6100.5 for all revocable estate planning techniques was both more sensible and more workable.

Standard of Testamentary Capacity

Three years later came *Lintz v. Lintz*.[5] Robert Lintz had three children by his first two marriages. He married his third wife, Lois, in 1999, and through 2008 he executed subsequent amendments, then an entirely new trust, leaving most of his estate to Lois in a complicated pattern of life estates and powers of appointment. The facts reflected harshly on Lois, who browbeat Robert, spent his money lavishly, and interfered in his relationship with his lawyers. When he died in 2009, his children contested the documents benefiting Lois.

The trial court applied the standard of testamentary capacity set forth in Probate Code §6100.5 to the trust and trust amendments and the Court of Appeal reversed, stating:

> "Adopting the reasoning of *Anderson*, we conclude that the Probate court erred by applying the Probate Code §6100.5 testamentary capacity standard to the trusts and trust amendments at issue to this case instead of the sliding scale contractual standard in

Probate Code §810-812. The trust instruments here were unquestionably more complex than a will or codicil. They addressed community property concerns, provided for income distribution during the life of the surviving spouse, and provided for the creation of multiple trusts, one contemplating estate tax consequences, upon the death of the surviving spouse."

In turn, *Lintz* was followed by the unpublished decision in *Estate of Beach*, a difficult decision on several grounds but which recognized that §6100.5 applies only to wills.[6]

In *Beach*, the objector argued that since the will was simply a pour-over will, an adjunct to the trust which contained all of the dispositive terms of the estate plan, the documents were inextricably a single effort and thus the more stringent capacity test of §811 should also be applied to the will. The court rejected this argument, and the decision was upheld on appeal.

It is clear that two different standards of capacity continue to apply to wills and trusts, and more, that the two standards are not easily reconciled. The traditional test of §6100.5 is knowledge based; we ask each testator what they know about their family, their assets and their plan. We don't ask more. The standard is lawyer-friendly and has a century of case law defining it.

By contrast, the contractual capacity test under Probate Code §§810-812 is observation and analysis based, very complex, and not lawyer-friendly. Most lawyers are not equipped to gauge whether their clients are oriented to time, place, person and situation, capable of reason using abstract concepts, or modulate mood and effect. Legal capacity is a legal concept, and while the opinion of medical experts may be enlightening, removing the determination from the hands of lawyers is a disservice to the law and to the client.

Adapting to the Sea Change

What steps should an estate planning practitioner adopt in the face of this sea change in the measurement of capacity? Of course, most estate plans are not controversial, and the capacity of the vast majority of clients not compromised. When a client comes to an attorney desiring a trust that leaves everything to children in a pattern that intestacy would carry out even in the absence of estate planning, then anything more than a cursory evaluation of his or her capacity is likely unnecessary.

But when the plans are controversial or the disposition unnatural, some further steps are appropriate. First, it is now clear that wills are governed by the lighter standard of §6100.5, and that they alone should be used when a client's capacity is compromised. Thus, where capacity is an issue, practitioners should consider bucking the current trend toward trusts, and instead opt to prepare a simple will for the client.

Where a trust is deemed necessary to avoid a costly probate, practitioners should consider combining it with a will that includes identical dispositive provisions, rather than the now standard pour-over will. If the trust fails the standard of capacity set forth in §811, the will might still survive the lighter standard of §6100.5, even on the same facts.

Untested as yet, the will should be able to incorporate the trust by reference under Probate Code §6130 without heightening the standard of capacity applied.

Next, where there is an existing trust, it might be safer in cases of questioned capacity not to restate the document in its entirety, but rather to draft simple dispositive amendments, because simple trust documents have a greater chance of surviving a challenge than a complicated trust or amendment when the level of competence required of a testator under §811 depends on the complexity of the document being signed. Even better practice would be to have the client execute a will which exercises the settlor's power of appointment typically found in the trust, which escapes the stringent test of §811 altogether.

Where a practitioner still elects to create a trust, it is inescapable that simple trusts are more likely to survive challenge than complicated ones, as §811 sets forth a test that the *Anderson* and *Lintz* courts have held is a sliding scale, with simple documents requiring less capacity and complex documents more. It has been well-remarked that our word-processing prowess has destroyed any value to brevity in the law.

Facing Greater Vulnerability

Lawyers used to keep documents short because it was economical to do so. Now a single command can call up a trust of any length, and trusts of fifty to sixty pages are common, and trusts several times longer not unheard of. It is simply a reality to recognize that the complexity of trusts and other legal documents have progressed beyond the ability of even intelligent, well-educated clients to work their way through with any level of comprehension.

Faced with the greater vulnerability of trust to challenge under §811, it is worth considering dividing form trusts into segments, with a stand-alone part that deal just with the dispositive plan, others that deal separately with estate tax and generation-skipping provisions, and still others with complex administrative and powers provisions.

This was a common practice before excellent word processing made long documents easy to create, and many lawyers from past decades adopted these segmented trusts for convenience. Reinstituting this practice would permit the proponent of a document to argue that the dispositive, will-like segments of the trust can be tested by one level of capacity and the balance by a stricter standard.

Finally, as has always been an option, a lawyer should consider in exceptional cases having the client examined by a medical expert on or near the date of the signing of the documents. At most, the opinions of the expert may guide the lawyer towards or away from completing the project. Lawyers are not held responsible for damages that result from their refusal to draft documents.[7] At the very least, such an examination will provide evidence later that may help to satisfy the complicated four-part test of §811.

Left unresolved by both *Anderson* and *Lintz* are non-will dispositions, such as joint tenancy and life insurance. The court in *Anderson* did not save those devises by applying the lower standard of §6100.5 because they are not wills, even though they are in many ways will equivalents, and simple to understand. That change should be coming.

Attorney Liability

Still to be decided is the liability of attorneys in malpractice for the failure to consider and plan for the differing standards of capacity. California courts have consistently held that an attorney is not liable in malpractice for drafting and overseeing execution of testamentary documents by clients later determined to be incompetent.[8]

The cases are legion that an action for malpractice won't lie against a lawyer when the injured party has a reasonably available remedy for their injury.[9] Those who believe that a will or trust is invalid because the decedent lacked capacity have that available remedy in a court challenge to the validity of the document. But the issue may turn to choice of methods before long, and here the law is trending away from lawyers.

While the lawyer may not be responsible for correctly judging the capacity of a client, he or she is still responsible for the choice of documents used, or for the inadequate preparation of those documents.

The court has held that an estate planning attorney who drafts documents and fails to obtain a Certificate of Independent Review under Probate Code §21381, where a beneficiary might be a caregiver, is potentially liable in malpractice.[10] It is not beyond the reach of that case to argue that an attorney who fails to take steps to satisfy §§810–812 for a potentially incompetent client, or fails to use documents that are sheltered from the damaging reach of those sections, could stand liable to injured beneficiaries.

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[1] Estate of Selb, 84 Cal.App2d 46 (1948).
[2] *Goodman v. Zimmerman*, 25 Cal.App.4th 1662 (1994).
[3] *Anderson v. Hunt*, 196 Cal.App.4th 722 (2011).
[4] *Supra*. at P. 731.
[5] *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346.
[6] *Estate of Beach*, 2015 WL 5512775.
[7] *Chang v. Lederman*, 172 Cal.App.4th 67 (2009).
[8] *Moore v. Anderson, Zeigler, et al*, 109 Cal.App.4th 1287 (2003).
[9] *Lucas v. Hamm*, 56 Cal.2d 583 (1961); *Heyer v. Flaig*, 70 Cal.2d 223 (1969).
[10] *Osornio v. Weingarten*, 124 Cal.App.4th 304 (2004).

Test No. 115

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. The common law rule of testamentary capacity codified in Probate Code §6100.5 requires that a testator demonstrate an understanding of the nature and extent of his or her property, the identity of those persons which society commonly expects to benefit on the death of the testator, and the nature of the plan being put into place by a will.
❑ True ❑ False

2. Testamentary capacity is traditionally a higher standard than contractual capacity.
❑ True ❑ False

3. To have testamentary capacity to sign a will, one must necessarily be literate.
❑ True ❑ False

4. Probate Code §6100.5 is applicable only to wills, not trusts.
❑ True ❑ False

5. California's Due Process in Competency Determinations Act (DPCDA) is used to determine the validity of certain actions taken, including executing a contract, making a conveyance, entering into a marriage, and creating a trust.
❑ True ❑ False

6. A testator's ability to modulate mood and affect is inapplicable to determining his or her capacity to create a trust.
❑ True ❑ False

7. *Anderson v. Hunt* held that Probate Code §6100.5 exclusively governs an individual's capacity to execute a trust.
❑ True ❑ False

8. *Anderson v. Hunt* did not extend the sliding scale of capacity to joint tenancy accounts and beneficiary designations executed by a decedent.
❑ True ❑ False

9. *Lintz v. Lintz* held that the standard of testamentary capacity set forth in Probate Code §6100.5 did not apply to trusts and trust amendments.
❑ True ❑ False

10. The *Anderson v. Hunt* and *Lintz v. Lintz* cases make clear that two different standards of capacity continue to apply to wills and trusts.
❑ True ❑ False

11. The traditional test of capacity set forth in Probate Code §6100.5 is knowledge based; we ask each testator what they know about their family, their assets and their plan.
❑ True ❑ False

12. The contractual capacity test under Probate Code Sections 810-812 now makes it easy for a lawyer to determine capacity to execute a trust without measuring the orientation, reasoning ability, or mood of a client.
❑ True ❑ False

13. Because wills are governed by the lighter standard of Probate Code §6100.5, they are preferable to trusts when a client's capacity is compromised.
❑ True ❑ False

14. Where a trust is deemed necessary for the estate planning of a potentially incapacitated client, it would be a mistake to combine it with a will that includes identical dispositive provisions.
❑ True ❑ False

15. Where there is an existing trust, it might be safer in cases of questioned capacity not to restate the document in its entirety but rather to draft simple dispositive amendments.
❑ True ❑ False

16. Probate Code §6100.5 does not permit a testator to execute a will which exercises a power of appointment found in the trust.
❑ True ❑ False

17. Under Probate Code §811, simple trusts are more likely to survive challenges for testamentary capacity than complicated ones.
❑ True ❑ False

18. Faced with the greater vulnerability of a trust to challenge under §811, it's futile to attempt to divide form trusts into segments, with a stand-alone part that deals just with the dispositive plan.
❑ True ❑ False

19. A lawyer should consider in exceptional cases having the client examined by a medical expert on or near the date of the signing of the documents.
❑ True ❑ False

20. Left unresolved by both the *Anderson v. Hunt* and *Lintz v. Lintz* cases are non-will dispositions, such as joint tenancy and life insurance.
❑ True ❑ False

MCLE Answer Sheet No. 115

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:**

San Fernando Valley Bar Association
5567 Reseda Boulevard, Suite 200
Tarzana, CA 91356

METHOD OF PAYMENT:

❑ **Check or money order payable to "SFVBA"**
❑ **Please charge my credit card for**
$_____.

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Credit Card Number

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CVV code **Exp. Date**

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Authorized Signature

5. **Make a copy of this completed form for your records.**
6. **Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0490, ext. 105.**

Name_____
Law Firm/Organization_____
_____
Address_____
City_____
State/Zip_____
Email_____
Phone_____
State Bar No._____

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

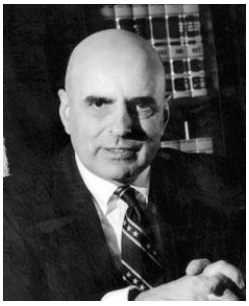
1.	❑ **True**	❑ **False**
2.	❑ **True**	❑ **False**
3.	❑ **True**	❑ **False**
4.	❑ **True**	❑ **False**
5.	❑ **True**	❑ **False**
6.	❑ **True**	❑ **False**
7.	❑ **True**	❑ **False**
8.	❑ **True**	❑ **False**
9.	❑ **True**	❑ **False**
10.	❑ **True**	❑ **False**
11.	❑ **True**	❑ **False**
12.	❑ **True**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

MARCH 23, 2018

The SFVBA Executive Committee took advantage of the clear skies to enjoy a relaxing Friday afternoon lunch while taking care of the business of the Bar. — with **Rosie Soto Cohen, Alan Kassan, Liz Post Friedman** and **Barry Goldberg** at **Gasolina Cafe**.

MARCH 29, 2018

The San Fernando Valley Bar Association is deeply saddened by news of the passing of the **Hon. Armand Arabian.** A former Justice of the California Supreme Court, Armand's distinguished legal career included terms as a Los Angeles deputy district attorney, a judge in both the Los Angeles Municipal and Superior Courts, and as a justice of the California Court of Appeals.



APRIL 14, 2018

The Attorney Referral Service of the San Fernando Valley Bar Association is proud to participate in the 8th Annual Daily News Successful Aging Expo. Visit our booth from 9:00 a.m. to 2:00 p.m. for an opportunity to locate a trusted attorney, especially if you are unsure about the type of attorney you need.

Mandatory Fee Arbitration:
Leveling the Playing Field

By Michael D. White

Mandatory fee arbitration levels the playing field for a client to resolve a fee dispute with their attorney efficiently and economically. Administered by the State Bar of California and local bar associations—including the San Fernando Valley Bar Association—fee arbitration provides the opportunity for the parties to have a neutral arbitrator decide the appropriate amount of attorney's fees for professional services.

Photos by Ron Murray

ONCE ASKED IF HE BELIEVED in arbitration, labor leader Samuel Gompers replied, "I do. But not an arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion."

The road to creating a level playing field where an attorney and a client—the lion and the lamb—can meet and defuse the often onerous process of resolving a fee dispute has been a long and tortuous one.

It culminated in 1978 when the state's Mandatory Fee Arbitration (MFA) Act went into effect, ushering in a streamlined and less expensive way to decide attorney-client fee disputes.

Before enactment of the MFA Act, fee disputes between attorneys and their clients usually wound up in court in a more often than not expensive and time-consuming process of litigation, with arbitration an option only if stipulated in the original attorney-client contract. That process proved to be heavily weighted toward the attorney because the client often had to hire an attorney for the fee dispute.

Four years after it was initially enacted, the MFA was enhanced with the Mandatory Attorney Fee Arbitration statute, which directs attorneys to advise their clients of their right to submit the dispute to the State Bar or another authorized local or regional bar association for a fee arbitration.

Fee Arbitration vs. Litigation

"An arbitration is typically a relatively informal proceeding as opposed to a court proceeding," says attorney David Owen, a certified specialist in legal malpractice law with the Sherman Oaks law firm of Nemecek & Cole.

"It's fairly straightforward. Typically there will be a panel of three arbitrators, two of whom will be an attorney and one a member of the public," he says. "You put on a case depending on what is at issue—hourly or contingency fee case or a case under a written retainer agreement and the arbitrators then issue a decision."

> "My not being an attorney tends to make the client feel a little bit better."
> — Sue Gramacy

One of the lay arbitrators working with the SFVBA MFA Program is Sue Gramacy, a mediator with Valley Mediation Los Angeles, who specializes in family law cases. "My not being an attorney tends to make the client feel a little bit better," she says. "In a fee dispute between a client and an attorney, arbitration is by far a cheaper way to go than litigation."

Arbitration, she says, "presents the public with a way to get justice if they feel that they've been over-charged, or if the attorney is charging for something that he shouldn't."

Another non-attorney involved with the SFVBA program is Susan Carlisle, a certified public accountant, who, like Gramacy, arbitrates primarily in the area of family law.

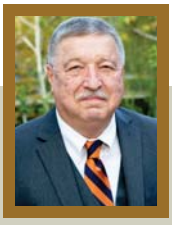
"I feel like I'm the different voice on the panel," she says. "As an accountant, I see the numbers that attorneys tend not to. I try to help reach what is a reasonable resolution and often I have to negotiate with the attorneys after the clients have made their case."

The alternative of going to a "full-blown trial," she feels "puts the clients at a substantial disadvantage in that they're playing in the attorney's sandbox. It's very costly in terms of both time and money. An arbitration setting is much more relaxed and the clients have a way to be heard without the formal environment of a trial or hearing. They get to voice their input and sometimes a payment plan can be crafted rather than a fight over a lump payment."

The decisions rendered depend only on the circumstances and factors presented as evidence at the arbitration hearing. They can include whether there was a written fee agreement; the value of the attorney's services; whether the attorney spent an appropriate amount of time on the case; and whether or not there are any billing errors.

Binding vs. Non-Binding Arbitration

Arbitrations are either binding or non-binding, with the decision as to which left up to the parties involved. A binding arbitration results in an award that is considered final and neither the client nor the attorney can request



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.

a new trial in court and can only be corrected or vacated by a court for very limited reasons.

Fee arbitrations are considered non-binding unless both parties agree in writing—after the dispute arises—to binding arbitration before any evidence is taken by the arbitration panel. If only one of the parties agrees to binding arbitration or if a party fails to respond, the matter will proceed as a non-binding arbitration.

Non-binding arbitration means that after the final arbitration decision is mailed by the program, either party may file an action in court within the next 30 days rejecting the award and requesting a trial in court. The party who files the action to reject the award will become the plaintiff in a lawsuit against the other party. This may entail additional costs and most likely the assistance of an attorney.

If neither party files an action in court rejecting the award and requesting a trial within 30 days after the award is mailed, a non-binding award automatically becomes binding on the parties.

"A full-blown trial puts the clients at a disadvantage in that they're playing in the attorney's sandbox."
— Susan Carlisle

How It Works

If an attorney is claiming that a client owes an outstanding balance of fees or costs, the attorney is required to forward a State Bar-approved *Notice of Client's Right* to Arbitration form to their client prior to filing a lawsuit or other proceeding to collect the amount owed. The client then has the option of requesting an arbitration hearing with the appropriate local bar association program—or the State Bar if there is no approved program in the county or there is a conflict with the local programs—within 30 days of receiving that notice.

If the client fails to request the fee arbitration within 30 days of receiving the notice, he or she has waived their right to arbitration and the attorney is permitted to pursue a legal action or other proceeding to collect the unpaid fees and costs.

Sonia Bernal is the San Fernando Valley Bar Association's MFA Program Administrator with responsibility for the processing of between five and seven fee arbitration requests a month and coordinating 84 volunteer attorneys and lay arbitrators who form the backbone of the 12-year old program.

"It usually takes a good three to five months for our average arbitration to be completed," says Bernal. "After the attorney replies to the arbitration request, I find an arbitrator—or panel of three arbitrators if the amount in dispute is $10,000 or more—making sure that there are no conflicts of interest by outlining selected details of the case such as the names of the parties, what type of law is involved, and how much is in dispute. Then the potential arbitrators will make the decision as to whether they want to participate."

Once she finds arbitrators able to take the assignment and form a panel, Bernal coordinates their dates

"We only have jurisdiction over cases in which a fee dispute is based on their retainer agreement."
— Myer J. Sankary

of availability so a hearing can be scheduled. "Once the hearing is scheduled, the arbitrators study all the documents, the client and the attorney will come together to argue their side of the dispute before the panel, and the arbitrators will make their decision," she says.

A decision will not be made at the hearing. Within a set period of time following the hearing, the arbitrator's *Findings and Award* will be mailed to the client accompanied by a written *Notice of Your Rights after Arbitration*.

The award may provide for a refund of fees and costs from the attorney to the client, a payment of outstanding fees owed to the attorney, or a determination that no money is due either party. The arbitration panel also allocates the program filing fee, regardless of which party initially paid it.

"Once they've finished determining the award, the paperwork comes back to me," says Bernal, who, after checking for errors, sends the written decision to attorney Myer Sankary, chair of the SFVBA MFA

> There are huge advantages to saving both time and money and the client having the opportunity to give their input into the case."
> — William M. Molfetta

Program, who has final approval. It's then mailed to the parties involved and we officially close the file."

Sankary has headed the Bar's MFA program since it became operational in 2006. His duties include making Solomon-like findings covering a broad range of hypotheticals, from dealing with a myriad of issues that can logjam an arbitration proceeding, from repeated requests to delay proceedings, to appeals to extend statutes of limitations.

"If there's a statute of limitations problem, I can rule on that," he says. "Say there is a fee that's been determined by the court in a probate case and for some reason the client wants to challenge it, we would not have jurisdiction. We only have jurisdiction over cases in which it's a fee dispute between a client and their attorney based on their retainer agreement. In those cases, I might be called on to make a decision on the case before it's even heard."

Arbitration's Huge Advantages

A veteran of 33 years of insurance defense work, attorney William Molfetta became involved with the Bar's MFA program after the completion of a semester-long course in alternative dispute resolution at CSUN.

"I feel I have a pretty good sense of dealing with people and being able to assess the credibility of the people involved," says Molfetta.

"These are serious issues and if a client brings an arbitration case against their attorney, it's because they feel they weren't treated fairly, they were overcharged," he says. "With respect to the attorneys, if they bring a case against a client, I can understand that we work really hard on cases and sometimes we don't push too hard during the case regarding fees and then the client doesn't want to pay because they don't like the outcome."

There is, Molfetta adds, "a realization among litigants and some attorneys that there are huge advantages to saving both time and money and the client having the opportunity to give their input into the case."

Sometimes, he's concluded, "the litigants just want to vent and it's like them having their day in court. After a bit of time, they come to see the increased costs in taking a case to litigation. They tend to be a little more satisfied with the result, even if it didn't go exactly the way they were expecting. In arbitration, it's just so much more economical, even in smaller cases. You might have a client have a seven day jury trial and actually arbitrate the case in a day or two."

Arbitration Is Not Arbitrary

Retired attorney Leon Alexander has worked with the SFVBA MFA program since its creation. A GI Bill-graduate of Yale Law School and World War II Navy veteran, Alexander has served as a full-time arbitrator and mediator since the 1980s, following a 30-year career building and maintaining a successful real estate practice.

Alexander's experience includes arbitration and mediation work with the American Arbitration Association, Los Angeles County Bar Association, and the U.S. Bankruptcy Court.

"Nowadays, if you have to pay your own legal fees and costs, you can't afford to go to court," he says. "I enjoy working on problems and reaching what seems a reasonable way out. When I started I learned very quickly that arbitration is not arbitrary. The rules and laws, when you get down to a particular case and particular situation, virtually always lead to something worthwhile to be said by each side that deserves to be heard."

At the heart of any arbitration, no matter the issue, he says, is fairness. "It's not a case of who's the good guy and who's the bad guy, but what is appropriate commercial conduct in trying to do the right thing within the limits of what is considered proper."

> It's not a case of who's the good guy and who's the bad guy, but what is appropriate commercial conduct in trying to do the right thing."
> — Leon J. Alexander

WHY FIGHT TRAFFIC TO GET OVER THE HILL FOR A FEE DISPUTE?

Resolve your matter easily through the San Fernando Valley Bar Association's Mandatory Fee Arbitration Program.

The Mandatory Fee Arbitration Program offers a neutral, efficient and cost-effective forum for resolving attorney-client fee disputes. Through the Mandatory Fee Arbitration Program, your disputes can be resolved quickly and confidentially by local arbitrators.

THE MANDATORY FEE ARBITRATION OFFERS

- Qualified attorney and lay arbitrators
- Confidential hearings
- A quick and less expensive alternative to court

Mandatory Fee Arbitration PROGRAM

San Fernando Valley Bar Association

Visit *www.sfvba.org* for more information.

By Neill A. Levy

What Is Plagiarism (and What It Isn't)

WITH THE ADVENT OF THE internet and copying technology, plagiarism has become both easier to commit and to detect. Authors can find material on the internet as well as in traditional books, making it easy to cut and paste online articles and print material with a few clicks of the mouse.

On the other hand, professors using modern technology can subscribe to internet services that detect plagiarism in their students' papers, while search engines such as Google can help detect plagiarized text like never before.

Several years ago, a law professor in Orange County, California, was accused and found guilty of plagiarizing the *Encyclopedia Britannica*.[1] In 2004, two eminent law professors at Harvard University were accused of plagiarism after it was revealed that one of them, Charles J. Ogletree, had copied verbatim six paragraphs from a textbook written by someone else. The other, Laurence H. Tribe, had not given proper attribution to a book written by Henry J. Abraham and even copied verbatim a 19-word phrase from Abraham's book.[2]

Tribe quickly confessed, apologized, and ascribed the mistake to two student assistants who accidentally deleted attributions and quotes while assisting him in preparing the text of the 380-page work. The professor whose work was copied accepted the apology but termed the plagiarism "inexcusable," saying he felt "betrayed." A legal historian said at the time that the extensive use of assistants by law professors contributed to the problem.[3]

Going further back in time, in 1928, Canadian teacher and historian Florence Deeks accused world-renowned author H.G. Wells of rampant plagiarism of her work in his famous book, *The Outline of History*. The case finally reached the Judicial Committee of the Privy Council in London—which at the time served as the court of final appeal for Canada—which found in Wells' favor after a lengthy proceeding that spanned twelve years. This case revealed a nasty side of Wells' character when he ridiculed and humiliated Deeks.

Why is Plagiarism Wrong?

For several hundred years plagiarism was condoned.[4] In England, by the 16th and 17th centuries, rampant plagiarism (also called "piracy") was curtailed by strict censorship but a relaxation of censorship in the 18th century resulted in booksellers

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lobbying parliament for relief. This resulted in the Copyright Act of Queen Ann in 1709,[5] the first copyright law, upon which ours is based. An analysis by Meghan O'Rourke in *Slate Magazine* on January 11, 2007,[6] distilled the views of various writers on this topic. This distillation placed our disapproval of plagiarism at the door of "a concern about the just distribution of labor" and the fact that people now earn a living from writing unlike past centuries in England when writers were landed gentlemen.

Defining Plagiarism

Quite simply, plagiarism is copying someone else's work and presenting it as your own. Generally speaking, it refers to "verbal" works presented in the form of the written word, but can also exist in the context of artistic, musical and other non-verbal works, although in classical music, plagiarism is sometimes condoned.[7] Some plagiarism can combine both verbal and non-verbal attributes—for example, a song which consists of words set to music.

> "One cannot copy an entire work, give attribution, publish it, and then claim authorship."

To commit plagiarism one does not have to copy an entire work and plagiarism can exist if either large or small portions of another's work are copied. The larger the portion copied, the more obvious the plagiarism is. Similarly, the more you copy from another work, the more serious is the offense. Sometimes plagiarism can exist by copying as little as three words.[8]

As a rule, passages from someone else's work can be copied if attribution is given and the copied material is placed in quotes or it is indicated in some other way that it is someone else's work. The key to avoiding unintentional plagiarism lies in the initial notetaking stage when one must be careful to enclose quotations in clear quotation marks. Some researchers use different colored pens for their own words versus direct quotes.[9] A small passage is best handled by indicating in the text or a footnote who originally wrote it, along with the name of the work in which it originally appeared.

On the other hand there are limitations in copying, with attribution, extensive passages from a work. To take an extreme example, one cannot copy an entire work, give attribution, publish it, and then claim authorship.

The question is where the limit lies. Most editors would probably object if a writer copied intact as few as three pages from a book even though proper attribution was given. The essence of quoting another writer is to use that author's words to assist in enhancing one's own work, not to substitute their authorship for yours. The assistance of another author is to emphasize a point, not to make it.[10]

Quotations also tacitly acknowledge that another author has greater expertise in a particular field, with a quotation giving more authority to the original argument or reasoning.[11] Any field of knowledge builds up gradually over time and everyone who puts pen to paper or fingers to keyboard treads in the footsteps of those who have come before. This applies especially in a law practice.[12]

Plagiarism and Law Practice

It is interesting that plagiarism is usually condoned in the courts and non-forensic legal practice. Lawyers' fees would be sky high if they had to start afresh every time they drafted a court brief, a pleading, or a contract for a client. We all use forms for these documents even if we customize them on each occasion.

However, one cannot go too far and file a brief that is copied from another source without customizing it to the case in hand. Lindsay Lohan's attorney (why does everything seem to go wrong for Lindsay Lohan?) did this in New York in 2013 and enraged the presiding judge. The attorney was sanctioned $1,500 for deceptive conduct. Failure to customize a brief seems to be the sin, not the copying *per se*.[13]

Plagiarism, Copyright Infringement and Fair Use

Plagiarism is frequently confused with copyright infringement, and though the two can coincide in certain circumstances, it is better to bear the differences in mind. Plagiarism can be committed although copyright infringement has been side-stepped. No court can order you to pay expensive damages for plagiarism but the consequences of the latter are often worse—loss of professional reputation or your job.

As stated before, plagiarism is copying the words (verbal) or other creation (non-verbal) of another without giving appropriate attribution. Therein lies the first difference between plagiarism and copyright infringement. If someone else's copyrighted words are copied without permission, their copyright is infringed upon, even if you give attribution. On the other hand, plagiarism does not take place if attribution is given, provided of course that an excessively large portion of their work is not copied.

Sometimes copyright infringement can be defended on the basis that, in some circumstances, it is unfair to hold an author responsible for copyright infringement. This is known as the "fair use" defense and can be used in many circumstances. For example, fair use is more likely to succeed if the infringer authored their work for charitable, non-profit purposes and not for monetary gain. Also, the smaller the portion copied, the more likely that the fair use defense will succeed. Other examples of fair use can be found in section 107 of the Copyright Law, a federal statute. The doctrine of fair use (apart from plagiarism issues) surely applies to legal practice as discussed above.

Unfortunately, the fair use defense does not avail an accused plagiarist. They cannot claim, "I copied it but it was only a short passage." Neither can they protest that the plagiarized portion was part of a work written for charitable, non-profit purposes.

Although ideas can be plagiarized, they are not protected by copyright and are expressly excluded from copyright infringement as laid out in federal law, which maintains that it's only the expression of those ideas that is protected by copyright.

Another limitation to copyright is that some works reside in the public domain and are not protected by copyright. For example, works written by employees of the U.S. government

in their capacity as such are not protected by copyright.

Finally, one can recover money damages in federal court for copyright infringement, but one cannot sue for damages for plagiarism. Of course, where the two coincide, money damages can be recovered for copyright infringement that also proves to be plagiarism.

Consequences

The consequences of plagiarism can be serious and for those of us who earn a living from writing—whether in an academic setting or not—the mere accusation of plagiarism can be irreparably damaging to a career, even if one is eventually exonerated.

It's far better to exercise caution in the form of attribution or quotation rather than risk the profound and haunting impact on your reputation of, however innocently, using another's work and not giving them the credit due them.

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[1] H.G. Reza, "Second Source Calls Law School Dean Plagiarist," *Los Angeles Times*, Aug. 11, 2001.
[2] Marcella Bombardieri, "Law Scholar Admits He Didn't Credit Material in 1985 Book," *Los Angeles Daily Journal*, Sep. 29, 2004.
[3] Bombardieri, *supra*.
[4] H.M. Paull, *Literary Ethics - A Study in the Growth of the Literary Conscience*, Thornton Butterworth Limited, London, 1928.
[5] Paull, *supra*, p. 48.
[6] Meghan O"Rourke, "The Copycat Syndrome Plagiarists at Work," *Slate Magazine*, Jan. 11, 2007, accessed at http://www.slate.com/articles/news_and_politics/the_highbrow/2007/01/the_copycat_syndrome.html on Apr. 11, 2018.
[7] Mark Swed, "Verdict would rock Amadeus," *Los Angeles Times*, Mar. 14, 2015, commenting on the "Blurred Lines" music copyright trial.
[8] U. North British Columbia, Canada, Learning Skills Centre, "Plagiarism" accessed at www.unbc.calsc/writing/Plagiarism.pdf. This was accessed some years ago and seems to be no longer accessible. The latest, amended, version is at https://www.unbc.ca/sites/default/files/assets/academic_success_centre/writing_support/plagiarism_2012_copy1.pdf accessed Apr. 11, 2018.
[9] Sharon Williams, (Hamilton College), "Avoiding Plagiarism," http://academic.csuohio.edu/kleidmanr/AvoidingPlagiarismbySharonWilliams.html.
[10] See endnote 8, latest, amended version.
[11] The writer included this in the original version of this article written many years ago and confesses that he can no longer locate the source of this idea.
[12] Benjamin G. Shatz and Colin McGrath, "Beg, Borrow, Steal: Plagiarism vs. Copying in Legal Writing," *California Litigation*, Vol. 26 No. 3, 2013, p. 14.
[13] Shatz et al., *supra*, at pp. 15, 17.

Bail Reform: Justice or a Get Out of Jail Free Card?

By Michael D. White

LAST OCTOBER, CALIFORNIA Supreme Court Chief Justice Tani Cantil-Sakauye wrote a strongly-worded essay in the *Harvard Law Review Blog*, expressing her support for bail reform.[1] Cash bail generates $308 million every year in California, she wrote, "and produces significant collateral damage for low-income individuals and their families if they don't somehow find a way to raise the cash necessary to pay that non-refundable fee," adding that "an individual's employment, housing, financial stability, and family can all be threatened by just a few days of pretrial detention."

According to the most recent data compiled by a workgroup established by Chief Justice Cantil-Sakauye, between May 2016 and May 2017, defendants in Los Angeles County paid approximately $173 million in non-refundable cash to bail bondsmen and $13.6 million directly to the courts.[2]

Ventura County Superior Court Judge Brian J. Back, the workgroup's co-chair, stated that, "Thousands of Californians who pose no risk to the public are held in jail before trial, while others charged with serious or violent offenses may pose a high risk and can buy their freedom simply by bailing out."

The study's recommendations, if followed, he said, "will help keep Californians safer and preserve scarce jail resources while providing new tools to monitor those released before trial. Importantly, those accused of a crime who pose no risk to the public can keep their jobs, homes and families intact, with profound benefits also to the community at large."

In March of 2017, the Los Angeles County Board of Supervisors voted on a motion by Supervisors Sheila Kuehl and Hilda Solis to explore possibilities for reforming the county's cash bail system. A year later, the Board made public the results of a workgroup study that analyzed the County's current policies and practices surrounding bail and pretrial release, and returned to the Board with a timeline for creating and piloting a new risk assessment tool and other pretrial services.[3]

"Rooted in financial, social equity, and justice considerations, there is a growing acknowledgment that the current money bail system in Los Angeles County deeply needs reform," said Supervisor Solis at the time. "Despite a court's determination that someone is eligible for bail, and therefore poses only a minimal threat to public safety, far too many people remain in jail simply because they cannot afford bail, often losing their jobs, their housing, and in some instances, even their families."

Humphrey Decision

Van Nuys-based criminal defense attorney David Kestenbaum feels that "it's most important to note that they are all presumed innocent, yet our jails are overcrowded mainly with citizens awaiting trial, not convicted felons. In fact, during the nine years I was a prosecutor, it was well known that if you could keep a defendant in jail due to a high bail, they are more likely to plead to something just to get out."

Since the January decision by the First District Court of Appeal in the so-called "Humphrey decision,"[4] before setting bail, "the court must take into consideration a defendant's ability to post bail in addition to other factors. Previously, the courts prepared and followed a bail schedule that was based on the seriousness of the crime and did not look at all at the arrestee's ability to post bail."

The landmark court ruling involved Kenneth Humphrey, a 64-year-old

man charged with stealing a bottle of cologne and $5 from an elderly neighbor at a San Francisco residential hotel. Humphrey's bail was initially set at $600,000, and, though later reduced to $350,000, was well beyond his financial means.

In rendering its decision, the court agreed with Humphrey's counsel and ordered judges in the state to stop relying on the conventional bail schedule for criminal offenses, "especially in cases where a defendant does not pose a substantial safety risk by being freed." The ruling also compels judges to consider bail alternatives like electronic monitoring with ankle bracelets.

The court stated that Humphrey "is entitled to a new bail hearing at which the court inquires into and determines his ability to pay, considers nonmonetary alternatives to money bail, and, if it determines [he] is unable to afford the amount of bail the court finds necessary, follows the procedures and makes the findings necessary for a valid order of detention."

Since the decision, Kestenbaum says, "a bail bondsman told me his business is down 70 percent and that many clients are being released on their own recognizance. Unlike what most prosecutors feel, I do not believe that this will lead to more bench warrants as people now have money to hire a lawyer instead of spending it all on bail."

The reality, he says, "is that bail bond companies are backed by giant insurance companies and we know that their bottom line is profit. It is wrong to have that element involved in an individual's freedom prior to a trial."

Get Out of Jail Free Card

The rhetoric surrounding bail reform and its impact on California's criminal justice system continues to percolate as Senate Bill 10 winds its way through the legislative process. Co-sponsored by Van Nuys State Senator Bob Hertzberg and Oakland Assemblyman Rob Bonta, the bill would largely eliminate the cash bail system in California and have courts instead rely on pretrial assessments of an offender's flight risk and danger to public safety.

> "... if you could keep a defendant in jail due to a high bail, they are more likely to plead to something just to get out."
> — David S. Kestenbaum

In a recent editorial published in the *Sacramento Bee*,[5] crime victim advocate Marc Klaas wrote "SB 10 is a get out of jail free card that ignores constitutional protections guaranteeing crime victims the right to be notified, to be informed, and an opportunity to testify, before an accused defendant can be released from jail."

Klaas is president of the Klaaskids Foundation, which was established after the 1993 kidnap and murder of his daughter, 12-year-old Polly Hannah Klaas. California's bail system, he says, "needs thoughtful, structural reform, not an out of control chainsaw approach that disregards public safety. As currently written, SB 10 only provides consideration of information about the current offense, not a defendant's criminal history. With exceptions, it will

allow 'recommendations on conditions of release for the person immediately upon booking.' In other words, SB 10 will create a catch and release system that allows dangerous criminals back onto the street too quickly, making it impossible to facilitate victim guaranteed rights and protections, as it endangers innocent citizens."

SB 10, Klass concluded, "is an ill-conceived bill that follows the current trend in criminal justice legislation that puts more value on the rights of accused criminals than it does on the health, safety and welfare of crime victims or the greater public at large."

Purpose of Bail

"The Eighth Amendment to the U.S. Constitution provides that 'excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'," says Shep Zebberman, an Encino criminal defense attorney.

In addition, "Article I, §12 of the California Constitution which establishes a person's right to obtain release on bail from pretrial custody prohibits the imposition of 'excessive bail.' *Robinson v. California* held that the 'cruel and unusual punishment' clause of the Eighth Amendment to the United States Constitution has been specifically held applicable to the states through the Fourteenth Amendment."[6]

For non-capital defendants, "the court may neither deny bail nor set it at a sum that is the functional equivalent of no bail."[7]

"The purpose of bail is to assure the defendant's attendance in court when his presence is required, whether before or after conviction," says Zebberman. "Bail was not meant as a means for punishing defendants nor for protecting the public safety. Such objectives are provided for otherwise. Bail is merely a device used to secure the appearance of a defendant who has been released from actual custody."[8]

The court, he says, "has broad discretion to set the actual amount of bail," citing Penal Code §1275(a)(1), which sets forth the following factors to be taken into consideration in setting, reducing, or denying bail: protection of the public, the seriousness of the offense, the previous criminal record of the defendant, and probability of their appearing at trial or at a hearing of the case.

> For poor persons arrested for felonies, reliance on bail schedules amounts to the functional equivalent to a presumption of incarceration."
> — Shep A. Zebberman

"After a defendant has been admitted to bail upon an indictment or information, the court in which the charge is pending may, upon good cause shown, either increase or reduce the amount of bail. The test for excessiveness of bail is not whether defendant is financially capable of posting bond but whether the amount of bail is reasonably calculated to assure the defendant's appearance at trial."[9]

The only requirement in the bail statutes "is that a court considering imposition of money bail take into account the defendant's financial circumstances and also consider

'any evidence offered by the detained person' regarding ability to post bond."[10]

Nothing in the statutes, says Zebberman, requires the court to consider less restrictive conditions as alternatives to money bail.

In *In re Kenneth Humphrey*, "the court held that the trial court erred in failing to inquire into and make findings regarding petitioner's financial ability to pay bail and less restrictive alternatives to money bail. Failure to consider a defendant's ability to pay before setting money bail is one aspect of the fundamental requirement that decisions that may result in pretrial detention must be based on factors related to the individual defendant's circumstances."

Setting bail in the amount prescribed by the bail schedule, he adds, "remains the default position in California and by declining to depart from the bail schedule a court relieves itself of the statutory duty to state reasons. For poor persons arrested for felonies, reliance on bail schedules amounts to the functional equivalent to a presumption of incarceration."

According to Zebberman, "Current proposed legislation seeks to level the playing field for those who would be eligible to be released on bail but cannot afford to post bail by doing away with the requirement posting of a money bail. Proponents of the movement for bail reform contend that money bail is not making us any safer or making sure people come back to court."

Money bail, he asserts, "has created a two-tiered system of justice in California—one for the rich, and one for everyone else by giving those with financial means a chance to buy their way out of jail while the case is pending. Of course, correcting the socio-economic injustices existing in the current system is a noble goal. Of concern to those opposing such legislation are the unanswered questions as to who bears the cost of going after those who are released on their own recognizance but fail to appear in court, i.e., fugitives."

Currently, Zebberman says, "There are financial incentives for those posting bail to actively look for and surrender fugitives; to wit, the loss of the bail posted. Under proposed legislation to do away with bail, the cost to seek out and return fugitives would presumably ultimately be shifted to the taxpayer in one form or another. The other alternative is not to actively seek out fugitives and hope they are picked up in a traffic stop or collateral arrest."

"Kentucky, Oregon, Wisconsin and Illinois have banned the bail-bondsman system and instead allow defendants to deposit ten percent of their bail amounts directly with the court, and to get the money back if they make their court appearances," according to Zebberman. "New Jersey and Washington, D.C. have similarly moved away from a cash-money bail system. The methods and successor—or lack thereof—of these reforms could be a good starting point in analyzing how best to reform our current system of bail."

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[1] Hon. Tani G. Cantil-Sakauye, "Costs of Money Bail to Justice," *Harvard Law Review Blog* (October 17, 2017), https://blog.harvardlawreview.org/costs-of-money-bail-to-justice.

[2] Judicial Branch of California Pretrial Detention Reform Workgroup, "Pretrial Detention Reform—Recommendations to the Chief Justice," (October 2017), https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20179/PDRReport-FINAL%2010-23-17.pdf.

[3] Memorandum from County Counsel Mary C. Wickham to Los Angeles County Board of Supervisors re. Report Back on Your Board's March 2017 Bail Reform Motion (March 22, 2018), http://file.lacounty.gov/SDSInter/bos/supdocs/112299.pdf.

[4] *In re Humphrey*, A152056 (Cal. App., January 25, 2018).

[5] Marc Klass, "California bail reform bill may be trendy, but it would hurt victims' rights," *Sacramento Bee*, March 28, 2018, http://www.sacbee.com/opinion/california-forum/article207085264.html#storylink=cpy.

[6] *Robinson v. California,* 370 U.S. 660 (1962).

[7] *In re Christie,* 92 Cal.App.4th 1105, 1109 (2001).

[8] *Williams v. Superior Court*, 226 Cal.App.2d 666, 673 (1964).

[9] *United States v Beaman,* 631 F2d 85, 86 1980)(emphasis added).

[10] Cal. Penal Code §1270.1(c).

JET: Learning More from the Experts in Less Time

By Hon. Rick S. Brown

JUXTAPOSED EXPERT TESTIMONY, OR JET, is an alternative to the traditional approach of eliciting expert testimony. Rather than having each expert testify at a different time, JET allows all experts to be examined concurrently—a method that streamlines the elicitation of expert testimony and allows the fact-finder to easily compare expert testimony, which reduces litigation time and costs.

JET is a relatively new option and many members of the bar and bench are unaware of its utility. Statutes that require witnesses to testify in succession[1] can be overcome with a stipulation and court approval.

Genesis of JET

JET first arose out of a 1996 civil court trial in Santa Barbara County Superior Court. At issue was whether grading of a hillside had caused a landslide and if so, what remedial measures were necessary to stabilize the hillside in question.

Five expert geologists were present to testify. The judge suggested that the geologists be seated in the jury box and questioned together on each issue, with both parties stipulating to the procedure. After two hours of juxtaposed testimony, one expert requested a recess, telling the court that he believed that the geologists should meet to reach a mutually acceptable solution to remedy the unstable hill. The court granted the request and the geologists agreed on a solution; the parties entered into a stipulation and the case was settled.

Benefits of Juxtaposed Expert Testimony

In the United States, expert witnesses are typically called to testify in succession. An expert's testimony may not be directly followed by another expert's testimony; lay witness testimony is often interspersed between experts' testimony and, as a result, a lapse of hours, days or months between the individual experts' testimony is not unusual.

In many cases, it is difficult for the court or fact finder to compare the experts' testimony on complex matters, especially when testimony is taken at different times. Moreover, when an expert is later recalled to testify in rebuttal, both litigation time and expense increases as does the difficulty of properly evaluating the testimony.

JET procedures allow experts on all sides of an issue to testify before proceeding to the next issue. The experts are grouped together so that their testimony and discussion can be carefully observed and heard by the court or finder of fact.

The benefits of this process have proven to be profound—the judge or jury can easily and immediately compare the experts' testimony as the experts are in full view of the court, attorneys and jury; the experts' individual qualifications, responses and conclusions are in direct, open and distinct contrast; and the dynamic, interactive process eliminates the need to recall experts.

In addition, JET simplifies and makes more efficient the process of taking testimony. All witnesses are sworn at once; one question can be posed to all the experts at once and answered in an agreed-upon order; and referencing previous answers can shorten some answers, e.g., Expert D: "My

Rick S. Brown is an Assigned Judge for the California Administrative Office of the Courts and has handled civil, criminal and juvenile cases throughout California for the past 13 years. In 2003, he retired from the Superior Court after 26 years as a judge in Santa Barbara County. He served four years as a member of the California Judicial Council. Judge Brown can be reached at rbrown@jet-trials.org.

answer would be the same as Expert B, except I would add …"

Limited Direct Examination

When both parties seek to establish the experts' qualifications and essential points of their proposed testimony, the suggested best practice would be as follows:

1. The party having the burden of proof on the issue being examined may introduce his or her expert (or experts) re: (a) the expert's qualifications and (b) the essential points of the expert's opinion.

2. The opposing party may then introduce his or her expert (or experts) re: (a) the expert's qualifications and (b) the essential points of the expert's opinion.

3. The party having the burden of proof on the issue may then ask questions of any of the experts.

4. The opposing party may then ask questions of any of the experts.

Steps 3 and 4 may then be repeated until there are no more questions, or the court sustains an objection to further questions.

This method supports an interaction where experts may answer questions after hearing responses from other experts. Thus, the similarities and differences between the experts on an issue can best be revealed and contrasted.

Traditional Direct/Cross

In cases that require traditional direct and cross-examination of each expert witness testifying alone, the parties may stipulate to traditional direct and cross-examination followed by juxtaposed rebuttal.

At this stage of juxtaposition, questions will be posed to all experts, beginning with the party having the burden of proof. This methodology will provide a JET-specific interactive stage where the similarities and differences between the experts can be revealed and explored in greater focus and depth.

Is JET the right fit? In response to questionnaires, fact-finders in concluded JET matters have expressed a preference for hearing experts testify as a panel, and the opportunity to compare and contrast their opinions and qualifications.

It is expected that often the fact-finder will find JET worthwhile, while one or more attorneys will reject it. For example, if an attorney has an expert with relatively weak qualifications, compared to the other side's expert, or if their case is not as strong on the expert issue(s), that attorney may not stipulate to JET. Or if one attorney has a particularly impressive, charismatic expert, there might be a preference to have that expert testify alone and shine without the comparisons that come with JET.

The cases where all sides would likely to stipulate to JET would be cases with one or more of the following characteristics—the expert issues are close or difficult for the fact-finder to decide; the expert issues are complex; the experts are evenly matched; the attorneys want a good record for appeal; or the attorneys anticipate that JET will shorten the total expert testimony time, thus saving litigation costs.

Scheduling expert witnesses to appear at the same time may present challenges, though if a specific time is blocked-out several weeks in advance of the trial date, usually all of the experts will be able to appear. Technology will also play an increasingly important role in making JET trials possible, allowing expert witnesses from literally around the world to testify via videoconferencing.

Another potential concern is that utilizing JET may increase witness expenses. Experience has demonstrated that the cost of all experts being present at once is mitigated by the reduction of the total time required for their expert testimony.

JET as Settlement and Trial Preparation Tool

In a case with potential juxtaposed expert testimony, the parties may stipulate to the experts testifying concurrently at a JET deposition. The parties may further agree that if the JET deposition is video recorded, the deposition can be used at trial, whether or not the experts are available to testify.

Furthermore, the parties may stipulate to taking the JET deposition during a mediation hearing to further enhance the possibility of settlement. It is anticipated that a JET deposition, as well as other pre-trial events in a JET matter, will reveal the similarities, differences, strengths and weaknesses of the experts' positions and promote an equitable settlement.

Moreover, pre-trial JET can serve as a useful trial preparation tool. The attorney with an expert revealed as weak at a JET pre-trial proceeding may choose to strengthen a case for trial by replacing that expert with another.

By stipulation and court approval, the judicial officer can hear juxtaposed expert testimony at hearings on Evidence Code § 352, 402 or 802(b) trial motions and other motions *in limine.*

www.jet-trials.org is dedicated to introducing and developing the use of Juxtaposed Expert Testimony. The site includes a video demonstration of Jet in Action with members of the Santa Barbara Bench and Bar.

[1] Cal Civ. Proc. Code §607; Cal Penal Code §1093.

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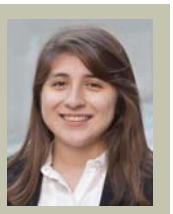

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IN FEBRUARY, WE RECEIVED THE UNFORTUNATE news that long-time panel member Jack C. Glantz had passed away. Jack had served on the Attorney Referral Service panel since 1991 and was an active volunteer for the Senior Citizens Legal Program.

Jack graduated from UCLA School of Law in 1961. He joined the law offices of Gillin & Scott in 1964—which later became Gillin, Scott, Alperstein, Glantz, Simon & Nielsen—before leaving to form his own firm in 2000. Jack focused on estate planning, trust, probate, and taxation law, earning specialist certifications in both areas. He was well known for the lectures he frequently gave on his areas of practice for various organizations in Southern California.

The first ARS case referred to Jack was on July 30, 1991, the last on February 2, just a few days before he passed away. I remember speaking with him about the referral. It was just another ordinary, simple case of a senior looking to get their estate planning in order. He accepted the referral like any other. No one here expected him to pass away so soon.

"Jack was an active member of the SFVBA for more than 30 years," says SFVBA Executive Director, Elizabeth Post. "He was a long-time panelist for our Attorney Referral Service and participated in its Senior Program and Speaker's Bureau. He will be missed."

We would also like to take a moment to remember panel member Richard Alan Fisher, who passed away last November after a short illness. Richard graduated from Southwestern Law School and was admitted to the State Bar in 1973. Like Jack Glantz, Richard had an accomplished legal career in the areas of personal injury and worker's compensation law; he had been with the ARS since 2001, when he took on a personal injury case as his first referral.

All of us on the staff of the SFVBA send our sincere condolences to Jack's and Richard's families and colleagues who mourn the loss of their loved ones and friends.

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HOW DO YOU COMPRESS THE RESOLUTION OF more than 22 complex, high-conflict, and heavily litigated family law cases into just three days? How do you save more than 70 trial days in just three days? How do you help to clear an otherwise over-burdened and backlogged court calendar system?

The answer: Settle-O-Rama! And thanks to the generous support of our donors, the Valley Community Legal Foundation is proud to once again sponsor this necessary and worthwhile community endeavor.

For the sixth year, the Family Law Section of the San Fernando Valley Bar Association, now co-chaired by attorneys Amir Aharonov and Sandra Etue, took on the task to assemble volunteer-neutrals—approximately 45 experienced family law attorneys, former Family Court Services mediators, forensic accountants, child custody evaluators, and mental health professionals.

This past November, the Van Nuys family law bench—spearheaded by Judge Shirley Watkins, Commissioner Alicia Blanco, Judge Firdaus Dordi, and Judge Michael Convey—set the stage by providing access to rooms and resources to give litigants—some represented by counsel and others proceeding *pro per*—which, according to Aharonov, "is the best opportunity to find a resolution to their cases."

Regarding the process, Aharonov explained, "[the] Bench and Bar worked together to assign cases to neutrals after assessing each case's particular needs and issues to be addressed—selecting the best fit of neutrals to each case to maximize the opportunity for resolution."

Settle-O-Rama spanned three entire court calendar days, with judges, lawyers, litigants and staff volunteers working tirelessly to help push through as many amiable settlements as possible. In all, out of 42 cases, 22 were settled completely, while another seven cases had partial settlements, with full settlements anticipated before trial. The result was an estimated net savings to the courts of approximately 70 trial days accomplished in just three days.

Aside from the results, the efforts by the family law community were remarkable. "Van Nuys Settle–O-Rama 2017 continued the tradition of outstanding success in the settlement of cases in family court," Judge Shirley Watkins said. "The participation of family law attorneys, forensic accountants, child custody evaluators, psychologists, and former LASC Family Court Services mediators combined to create an atmosphere of interest, care and concern for all the litigants and counsel."

The Settle-O-Rama volunteers, Judge Watkins said, "were amongst the most dedicated and diligent we've encountered. One volunteer stayed with the parties hours past court closing in order to complete their agreement while seated on the courthouse steps outside. There were some mediators who agreed to assist the litigants without charge in completing their judgments. The volunteers truly provided an outstanding and commendable service to the court. We hope to accomplish even better results next year."

The VCLF is fully committed to service in our community, and we are proud again to have offered our support to the cause by providing funds for refreshments and meals to show gratitude to the program's volunteers.

Incoming VCLF President Mark Shipow and I concur wholeheartedly with Aharonov's sentiment that, "[this] tradition will continue in working together to coordinate efficient and fair resolutions of cases in our family law courts."

Aharonov added, "With the assistance of supportive judicial officers who are generous not only with their time, but in their willingness to find new avenues to assist litigants to find resolutions without their intervention, the SFVBA Family Law Section will pursue its mission of being a partner in justice with our judiciary."

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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Contact SFVBA Executive Director Liz Post at (818) 227-0494 or epost@sfvba.org to sign up your firm today!

Choices, Choices…

Illustration by Gabriella Senderov

I have a small solo practice that's built into quite a business over the past few years. I desperately need some help to handle the load and I'm thinking of taking on a partner. I need some advice. Do I bring in another lawyer and give up the independence that comes with being solo or build office staff by bringing in a paralegal or two? Any ideas?

Signed,

Overloaded

DEAR OVERLOADED: CONGRATULATIONS!

This is a great question and a great problem to have. The first thing you must do is to be completely honest with yourself about how much money you need to make from your business in order to live the lifestyle you desire and how much business (or cases) do you require in order to net out that much money? Also, how much free time away from your work do you desire and in the time you are willing to commit to the work, what is the dollar amount you need to make per hour or day?

Once you have that calculation in mind, you can then analyze the most logical solutions to your problem. Let's consider your options.

You can be more selective about the cases you take. Take the best paying clients in your current configuration. Be willing to turn down business and make valuable referrals to trusted colleagues. Essentially, you will be working smarter for the time and staffing you feel comfortable with.

You can take on a partner. This seems like the most risky and uncertain path. Partners should be people that you would trust with your life and the financial well-being of your family. Going out in search of a partner may end up doubling your stress because a partner presumably will be bringing on workload of his or her own. If you think you were overloaded before, it could get even worse. Also, a partner could be an enormous financial drain if you are simply looking for someone to manage your existing business. While you may have some growth, a partner will expect to be paid up to half of your revenue. This path can be problematic unless you have a great fit and friendship in mind.

The most logical choice is to embrace efficient, well-planned growth which maximizes the utility of each team member. For example, answering phones and making photocopies should be undertaken by an hourly employee. Every time you perform one of those tasks, you are trading your managing partner hourly rate for the much lower rate of support staff.

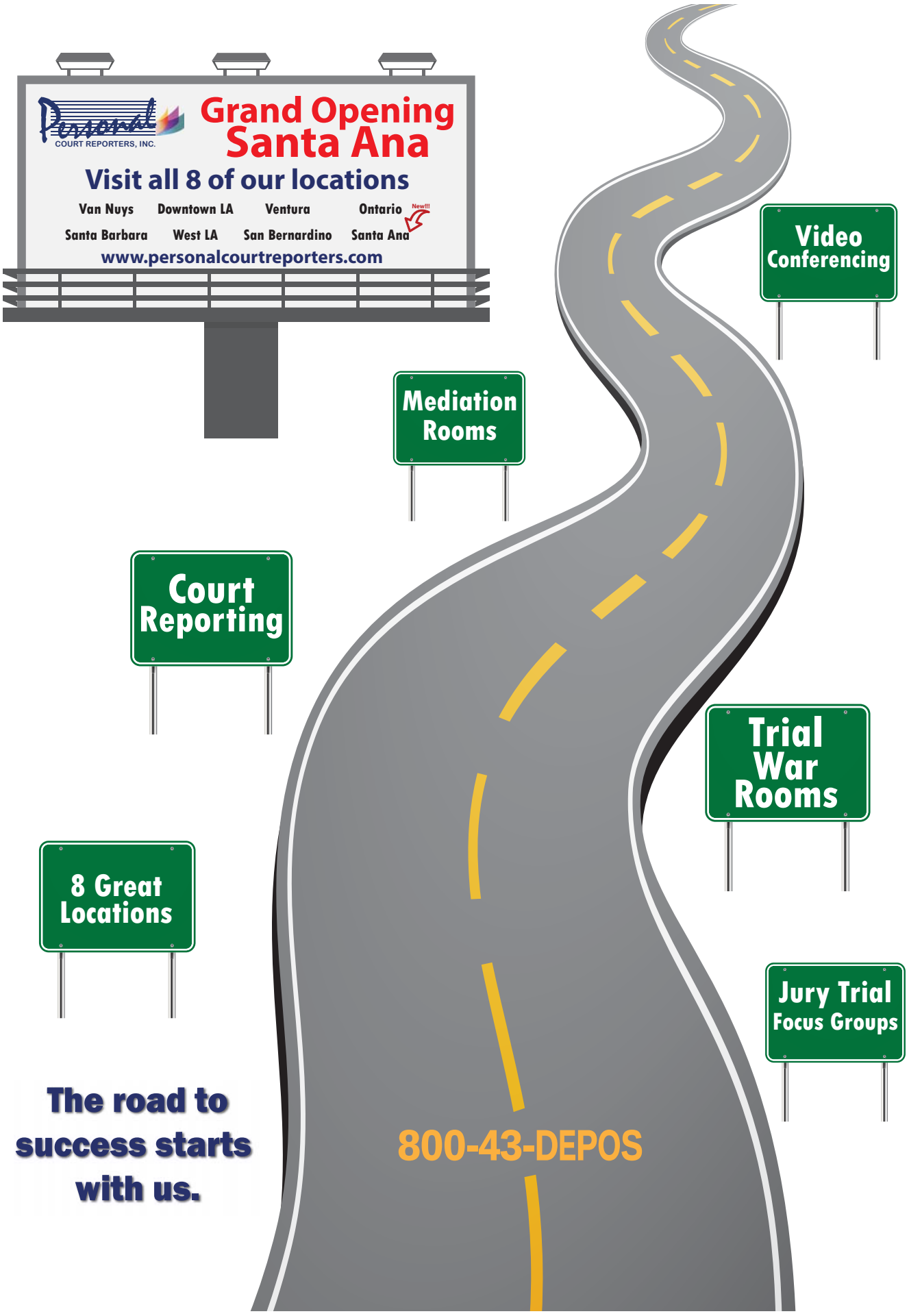
As you expand and grow, consider taking on a type of non-lawyer office manager or administrator. That way you will not end up being overloaded. Managing your office will be done and you'll just have to manage the manager! Remember that implementing written policies and procedures is critical to the growth of your office. That way your team can look at the manual and know exactly how you handle matters without you having to be part of every detail.

Law office management is a growing industry and easily searchable online. The approaches vary and range from single coaches to video series and a management team. They understand that a law firm is a business and can help you implement a plan that will work for you efficiently, at a reasonable cost.

Good luck in your exciting and profitable journey!

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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