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On the cover (left to right): *David W. Fleming, Albert J. Ghirardelli and Roger Franklin*
Photo by Ron Murray

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DEPARTMENTS

VALLEY LAWYER

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Nemo Tenetur Se Ipsum Prodere

ALAN E. KASSAN
SFVBA President

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SO, I RECEIVED A SOMEWHAT excited phone call from my mother-in-law the other night. She was a bit non-plussed—undeniably from watching too much cable news—wondering exactly what "taking the fifth" meant in the context of current political events and why it was even allowed.

As best as I was able, being decades out of law school, I tried to explain. I pointed out how our system of jurisprudence evolved around the proposition that citizens needed to be protected against autocratic rule or overzealous government officials. I feebly went on to comment on my faint recollections about the inherent unreliability of forced confessions and the nexus between such confessions and being forced to testify against one's own self-interests.

Obviously, my explanations were less than compelling, since my mother-in-law just kept asking "why?"—not unlike my boys used to ask when they too were dissatisfied with my answers to their many questions.

Anyway, since criminal law was never my thing, and since my curiosity was piqued, I decided to do a little research. With apologies to all my criminal law peers, I thought I'd share just a little bit about what I learned. For all the non-criminal lawyers out there, think of this as a refresher, even though, obviously, I am only able to here scratch the surface covering hundreds of years of jurisprudence.

A simple reading of the Fifth Amendment quickly reveals it as the repository of so many of our fundamental rights as Americans—the right and nature of grand juries, the protection against double jeopardy, the right to due process, the protection against the governmental seizure of property, and finally, the subject at hand, namely the right not to incriminate one's self. "No person ... shall be compelled in any criminal case to be a witness against himself."

> "A witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

The concept of protection against self-incrimination goes back at least as far as the 13th century. It took a more formal shape in response to the excesses of the British Courts of the Star Chamber and High Commission, which in the 15th and 16th centuries used an inquisitorial method of truth-seeking instead of our now more familiar prosecutorial methods. Under that inquisitorial system, criminal defendants were commonly convicted on the basis of forced confessions.

In the late 1500s, courts began to recognize the Latin maxim of *nemo tenetur se ipsum prodere*, that is, no one should be required to accuse himself. Gradually over time, courts ceased allowing convictions based on confessions obtained by torture, which of course largely eliminated it as a prosecutorial tool. Society at large benefited and that philosophy made its way into our own Constitution.

All this is well and good, but back to my mother-in-law's point. The idea of torture-forced confessions seems far-afield from defendants who, without any coercion, are able to now simply refuse to answer questions under the protection of the Fifth Amendment. Of course, without the right, who knows how our system might devolve. But one of the better responses to that point was articulated by the Supreme Court in *Ohio v. Reiner*, 532 U.S. 17 (2001):

> "A witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

Hopefully my mother-in-law will like that explanation a little better than she did mine.

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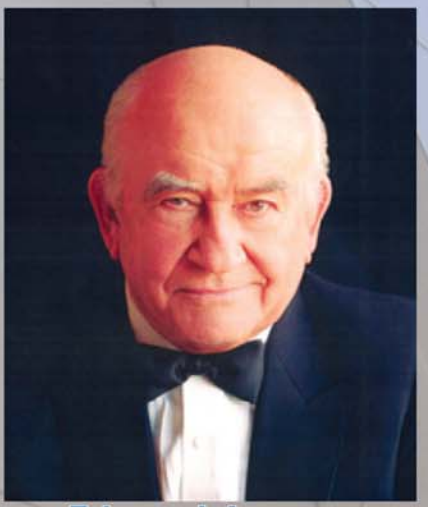

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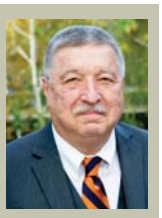
MICHAEL D. WHITE
SFVBA Editor



michael@sfvba.org

I HAD A FEW OF FRIENDS WHEN I was a kid, but though it may seem odd, my best friends, three to be exact, were all a whole lot older than me—my dad, my maternal grandmother and our across-the-street neighbor, Mr. Edward Donnelly.

A quiet gentleman of the old school, Mr. Donnelly was possessed of a shock of white hair and a stature that spoke of his younger days as a lumberjack in the Canadian wilderness, several years as a merchant seaman under sail, and a nightmare time defying the odds by surviving intact the Ninth Circle of Hell that were the trenches of World War I. He taught school for a while after the war, and finally retired to Southern California, a widower, after 30-plus years traversing Canada, from Nova Scotia to British Columbia, selling school textbooks.

He smelled of Prince Albert pipe tobacco; read voraciously; was never seen without a tie and his trademark red cardigan sweater; rarely, if ever, got angry; and could be observed every afternoon, taking his royal constitutional, steaming through the neighborhood like the Queen Mary, cane in hand, waving to one and all in a way that seemed more of a heart-felt blessing than a cursory greeting. It alone was something to see.

We would sit on his front porch and drink lemonade and he would relate stories of the way things were, not in the irritated, bitter way that some bemoan the inevitable passing of time, but in a way that conveyed a joy of living, lessons to be learned, and experiences to be shared and appreciated.

I was eight when my grandmother—the only grandparent I ever knew—died in our home. She'd lived with us for several years and we were very close and it was Mr. Donnelly who, more than anyone else, seemed to understand my loss. He listened to me.

He introduced me to reading anything and everything. I owe to him that I wore out five library cards by the time I was 10. He was a decent, kind and generous man.

> "I discovered how much can be gained from the stories others have to tell and how richer we can be for just taking a moment, perhaps, and listening."

One warm day in May, fifth grade was almost done for good and I was walking, oddly enough, to the local library when, sure enough, Mr. Donnelly appeared around the corner headed my way. He stopped; he smiled and then collapsed on the sidewalk, not 30 feet in front of me. A small crowd gathered. I cradled his head until the ambulance arrived, too late. Two of my three best friends gone in as many years.

It was a hard time, but if I carried anything away from my all too brief time with them, I discovered how much can be gained from the stories others have to tell and how richer we can be for just taking a moment, perhaps, and listening.

CALENDAR

JUNE 2018

SUN	MON	TUE	WED	THU	FRI	SAT
					1 Membership Appreciation Party See Page 33	2
3	**4** VBN Valley Bar Network 5:30 PM	5	**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) See Page 21	**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
		12 Probate & Estate Planning Section 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				
10	11	13		**14** Valley Community Legal Foundation Honoring Marcia L. Kraft: A Celebration of Exemplary Community Service 6:00 PM MAGGIANO'S LITTLE ITALY WOODLAND HILLS See Page 11	15	16
17 Happy Father's Day	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	21	22	23
24	25	**26** Editorial Committee 12:00 NOON SFVBA OFFICES	27	**28** DINNER AT MY PLACE 6:30 PM | Studio City See Page 44	29	30

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

SUN	MON	TUE	WED	THU	FRI	SAT
1	**2** VBN VALLEY BAR NETWORK 5:30 PM	3	**4** Happy 4th! SFVBA OFFICES CLOSED	**5** Membership & Marketing Committee 6:00 PM SFVBA OFFICE	**7** Time to Renew Your Bar Membership! Renew online at www.sfvba.org	
8	9	**10** Board of Trustees 6:00 PM SFVBA OFFICE	11	12	13	14
15	16	17	18	19	**20** fastcase Fastcase Friday 1:00 PM WEBINAR	21
22	23	24	25	**26** DINNER AT MY PLACE 6:30 PM | Granada Hills See Page 44	**28** 6th Annual Seminar Cultural Competency in Family Law Practice 8:30 AM–4:00 PM UWLA LAX CAMPUS Visit http://iala.wildapricot.org/event-2910689 for details. Use registration code CCFP2018-Member for discount.	
29	30	31				

Showing Our Appreciation 24/7

ELIZABETH POST
Executive Director
epost@sfvba.org

MEMBERS ARE THE STRENGTH of the San Fernando Valley Bar Association, the life of our organization, the driving force in everything we do.

As a reminder of our ongoing gratitude, on Friday, June 1, the Bar is hosting our Annual Member Appreciation Party at The Stand in Encino (17000 Ventura Boulevard). Just for members, please join us from 5:30 to 7:30 p.m. for free food and drinks, giveaways, door prizes courtesy of our sponsors and member-benefit providers, and mingling with SFVBA staff and fellow members. Parking is free.

We realize there are endless choices of bar associations to join, with dozens of local, specialty, women and minority associations just in Los Angeles County, a couple of hundred in California, and a seemingly infinite number of national organizations. The SFVBA understands it's incumbent on our Bar leaders and professional staff to demonstrate our Association's worth, and be valuable and useful to you, not just one day a year, but 24/7/365.

This month we launch our Member of the Week initiative. Each week we'll profile an SFVBA member. I can't share too much here, except to say that every member is eligible, and to enhance your chance of being chosen, I recommend joining our social media pages on Facebook, LinkedIn and Twitter.

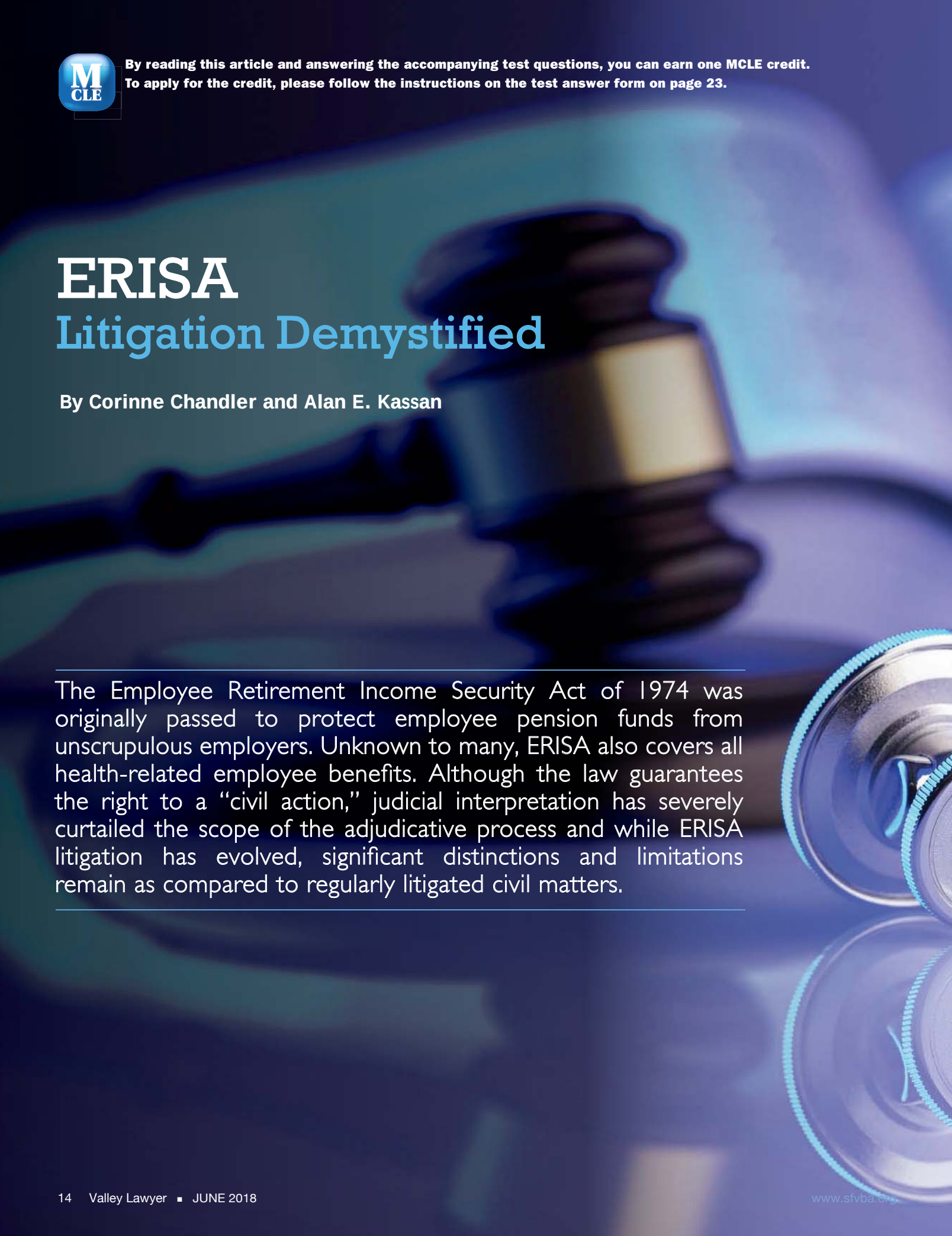
In July, in conjunction with our annual membership dues drive, we will unveil a streamlined dues structure. Changes include reducing and therefore simplifying the number of tiers; free membership to law students, a modest increase in dues for other categories; incentivizing paying dues before the start of our fiscal year (October 1); and introducing our new Premier Membership.

Essential Membership includes all the benefits members have come to expect: Premium Fastcase® online law library; subscription to *Valley Lawyer* magazine (previous winner and nominated again in 2018 for an L.A. Press Club Southern California Journalism Award); sponsored networking events; 10+ hours of free MCLE annually through seminars, webinars and audio programs; and much more.

Our new Premier Membership—open to attorney and associate members—includes all the above benefits, plus:

- Valley Bar Network (VBN) membership ($400 value)
- Section Membership ($135 value)
- Tickets to Judges' Night and Installation Dinner Gala ($350 value)
- Discounts on MCLE and advertising
- Premier listing in *Valley Lawyer* and website ads
- and more

On behalf of the Bar Leadership and professional staff, and on behalf of your professional colleagues here in the Valley, thank you for being a valued SFVBA member.



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

ERISA
Litigation Demystified

By Corinne Chandler and Alan E. Kassan

The Employee Retirement Income Security Act of 1974 was originally passed to protect employee pension funds from unscrupulous employers. Unknown to many, ERISA also covers all health-related employee benefits. Although the law guarantees the right to a "civil action," judicial interpretation has severely curtailed the scope of the adjudicative process and while ERISA litigation has evolved, significant distinctions and limitations remain as compared to regularly litigated civil matters.

AS LAWYERS, WE ALL INEVITABLY HEAR THE question "what type of law do you practice?" For us, it's often rather comical to watch eyes glaze over when we mention ERISA or otherwise hear "ER-what?" The laws under ERISA are challenging, but the practice is rewarding as the law was designed primarily to protect employees.

ERISA is the acronym for the Employee Retirement Income Security Act of 1974.[1] The Act was originally passed to protect employee pension funds from unscrupulous employers. It imposes strict reporting requirements on employers and holds employers and their administrators accountable on the basis of fiduciary standards. Unknown to many, the law also covers all health-related employee benefits and those are the benefits this article addresses.

Nature of ERISA Litigation

ERISA litigation is of a different breed. Although ERISA guarantees the right to a "civil action," judicial interpretation has severely curtailed the scope of the adjudicative process. Further, since ERISA gives a participant the right to "appeal" an initial claim decision, judicial interpretation has directed that an appeal is mandatory, and that a claimant must "exhaust his administrative remedies" prior to initiating any civil proceeding. A pitfall now lurks: if a claimant does not timely appeal an adverse benefit decision, he or she will lose the right to bring a subsequent civil action.[2] Since ERISA has been analogized to trust law and equitable proceedings, judicial rulings have also held that, once filed, a claimant has no right to a jury trial.[3]

ERISA "trials" are almost always handled much more like dispositive motion proceedings.[4] In the vast majority of cases, there is no presentation of testamentary evidence. The evidence the court considers is limited to that contained in the "administrative record," i.e., the insurer's claim file, accumulated prior to the final claim decision. For this reason, and to achieve the expediency and dispute resolution cost reduction goals of the Act, courts have routinely ruled that discovery in ERISA litigation, if permitted at all, should be very limited in scope.

In the same vein, a litigant is usually not permitted to introduce additional evidence regarding the merits of his or her claim during "trial," having already been given the right to provide all support for his or her claim during the "administrative appeal."

These and other judicially imposed rules are procedural landmines. They make it almost imperative for claimants to retain counsel prior to a final claim decision, lest they make a fatal procedural step and find themselves precluded from supplying necessary evidence or from even having the right to file a legal action.

It is quite common for attorneys to assist claimants with an administrative appeal. Counsel should be prepared to immediately familiarize themselves with the timing of the denial(s), plan and ERISA imposed deadlines, the plan terms concerning appeal rights, and the communications between claimant and plan representatives (or claims administrators) before making affirmative representations to prospective clients.

Once retained during the administrative phase, counsel must take immediate steps to accumulate the evidence and prepare the participant's "appeal" as though it was a trial preparation. For health-related employee benefit claims, this includes evidence such as medical records, functional capacity tests, vocational assessments, cognitive evaluations, and personal statements. As explained further in this article, once the insurer issues its final decision, the "record is closed" and the case will later only be tried on the basis of the evidence gathered and supplied during the administrative phase.

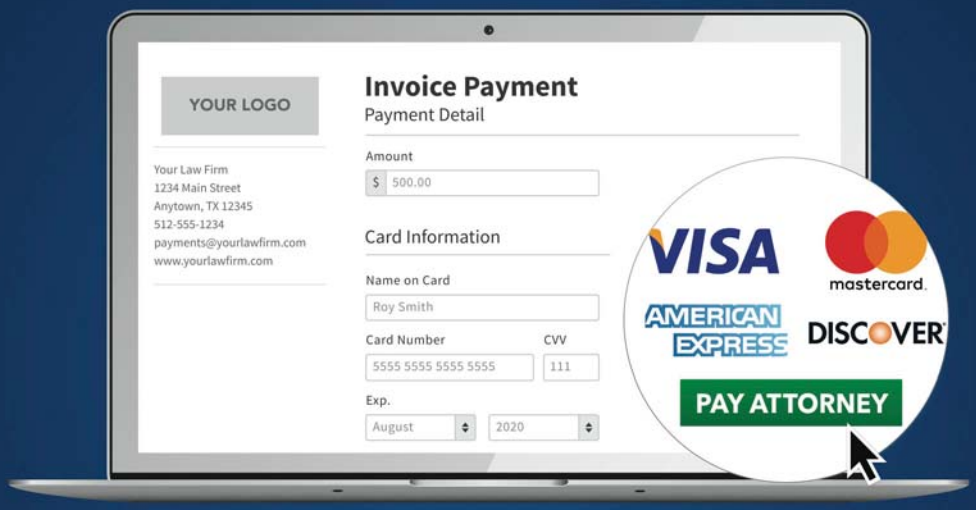
Scope of ERISA Preemption

One of the most significant features of ERISA litigation is that it preempts all state laws which "relate to" employee benefit plans.[5] This invariably means that ERISA practitioners must familiarize themselves with a whole new body of common law, along with procedural and other pertinent law that has developed over the last four decades.

To fully confound practitioners and judicial officers, ERISA also contains a "savings clause," which exempts certain state law from preemption.[6] This section provides that any state law which "regulates insurance, banking or securities" is "saved" from preemption.

During the 1980s, defense practitioners often asserted ERISA preemption as an affirmative defense to bad faith employee benefit actions. Those efforts were largely unsuccessful.[7] That changed in 1987 when the U.S. Supreme Court issued the landmark decision of *Pilot Life Ins. Co. v. Dedeaux*.[8]

Corinne Chandler and **Alan E. Kassan** have collectively practiced in the area of ERISA benefits litigation for over 45 years and are both original partners in the law firm of Kantor & Kantor, LLP in Northridge, one of the nation's leading law firms in the field of plaintiff ERISA benefit claims. They can be reached at cchandler@kantorlaw.net and akassan@kantorlaw.net.



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In that case, the Court held state common law actions for breach of contract and tort claims arising out of the denial of an ERISA governed claim were preempted by the federal law. The Court determined that the Act included a "comprehensive remedial scheme," which provided the exclusive remedies for the denial of an ERISA claim. Unfortunately for claimants, those remedies are far more limited than under most state laws. In the usual ERISA benefit litigation, remedies consist only of insurance benefits due and owing and a possible award of attorneys' fees.[9]

With the *Pilot Life* decision, California's bad faith litigation landscape changed overnight. Previously, insurance claim denials under employer provided group insurance plans were litigated as bad faith claims, with the attendant damages for emotional distress and punitive damages. After the Supreme Court's ruling, a plaintiff's remedies were limited to benefits, plus an award of attorneys' fees only at the discretion of the trial court.

Plaintiffs aggressively tried to challenge the scope of ERISA preemption, but the courts were resolute. Since ERISA benefit claims were not based on originating laws which regulated insurance, they were not saved from preemption by ERISA's savings clause. Thus, common law claims for bad faith, fraud, infliction of emotional distress and general unfair claims practices were, and remain, preempted in ERISA actions.[10]

A Grant of Discretion Could Stack the Deck

Shortly after the Supreme Court decision in *Pilot Life*, insurers began to better appreciate the limited remedies available to an ERISA plaintiff.[11] Pushing even further, plan administrators also began to argue that the "abuse of discretion" standard of review—which gives great deference to the administrator's decisions and is applicable in actions under the Labor Management Relations Act—should be applied in the judicial review of ERISA benefit decisions.

This made the burden to prove a right to plan benefits far more difficult for claimants. In response, plaintiffs would point out that ERISA does not provide for any deference to an administrator's decision nor does it prescribe a standard of review for reviewing courts. Rather, it expressly provides a right of a civil action to aggrieved plan participants. The issue of discretionary review was hotly litigated for years, with the courts offering inconsistent guidance.

Once again, the issue was resolved by the U.S. Supreme Court. In *Firestone Tire and Rubber Co. v. Bruch*,[12] the Court held that while the default standard of review in an ERISA case was that of *de novo*, a grant of discretion in plan documents could transform the review into one for an abuse of discretion. In such a case, the administrator's decision could be overturned by a reviewing court only if it was proved that the administrator abused its discretion in coming to a final claims decision, thus

displacing the ordinary "preponderance of the evidence" measure in a *de novo* review.

As a result of this decision, insurers and plan administrators routinely included "discretionary clauses" in plan documents and insurance policies. An effective clause granted discretion to an administrator or insurer to interpret the plan and decide eligibility for benefits. However, some language—particularly that which only required a claimant to prove his or her claim to the "satisfaction" of the carrier—was held not to be an effective grant of discretion.

Similarly, policy language which merely described the duties of an insurer, i.e., to decide claims, was held to be insufficient.[13] The Ninth Circuit subsequently clarified that there was no "magic language" necessary to grant discretion. Rather, language which stated that an insurer's decision was binding or final, was sufficient to grant discretion and would result in an abuse of discretion standard of review.[14]

Some of the Court's language in the *Firestone* decision raised another issue, namely whether the *de novo* standard of review was appropriate when the ERISA fiduciary was financially conflicted.[15] Unlike a trustee in trust law, ERISA administrators, such as insurance companies, often have a financial interest in the claims they decide. For claimants particularly, this raised the proverbial dilemma of the fox guarding the henhouse. The process of weighing the conflict was not resolved in *Firestone*. Circuit courts grappled with the dilemma for years, resulting ultimately in another trip to the Supreme Court.

Conflict, Conflict, Who Has a Conflict?

As early as 1995, the Ninth Circuit recognized that an administrator's conflict could affect a claim decision and thus impact the equity of using the deferential standard of review in ERISA trials.[16] [17]

Although the premise was recognized in *Atwood*, the application of a conflict analysis was not employed until two years later in *Lang v. Long-Term Disability Plan of Sponsor Applied Remote Technology, Inc*.[18] In that Ninth Circuit case, the court noted that the carrier's claim decision had been affected by its conflict of interest. The carrier had shifted reasons for denial of the claim during the administrative process to suit its own financial interest.

The court held that if a plaintiff provided material, probative evidence that the conflict of interest caused a breach of fiduciary obligations, the standard of review would be changed from that of abuse of discretion to *de novo*. This was subsequently labeled the "bright-line test."

The issue of conflict not only had the potential for changing the standard of review, it also changed the scope of permissible evidence at trial. While cases had previously been "tried" by cross motions for summary judgment based on the administrative record, plaintiffs' attorneys began introducing evidence "outside of the record" to prove that the insurer's

financial motivation interfered with a fair determination of the claim. Plaintiffs sought discovery of incentive compensation paid to claims reviewers, the nature of the relationship between carriers and their reviewing physicians, and internal claims guidelines to show that the claim process was biased in favor of the insurer's financial interest. In *Tremain v. Bell Industries, Inc.*, the Ninth Circuit Court of Appeals approved the use of evidence outside of the record to prove an insurer's conflict of interest.[19]

The Ninth Circuit's bright-line analysis was not utilized by other circuits. The most popular conflict analysis employed by other circuits was the "sliding scale" approach, under which the amount of judicial deference decreased, commensurate with the degree of conflict demonstrated.

Due to the discrepancy in the conflict approaches utilized by the different circuits, the Supreme Court resolved this issue in *Metropolitan Life Ins. Co. v. Glenn*, where it announced its "combination of factors" test. Under this approach, and consistent with the language in *Firestone*, the carrier's conflict and the facts demonstrating its conflict, would be weighed by the trial court.[20] The weight of the conflict would be case specific, dependent upon the facts in the case. Under this approach, the carriers would not lose the advantage of deferential standard of review.

> "In *Tremain v. Bell Industries, Inc.*, the Ninth Circuit Court of Appeals approved the use of evidence outside of the record to prove an insurer's conflict of interest."

It was recognized, however, that any one factor could act as a tie-breaker to arrive at a judicial decision. Practically speaking, the combination of factors test was very close to the sliding scale approach previously utilized by a majority of the circuits. The result was that if there was a valid grant of discretion, the standard of review would be for an abuse of discretion, with the magnitude of discretion adjusted downwards to the extent of the demonstrated conflict.

Litigating under an Abuse of Discretion Standard of Review

After *Glenn* and *Tremain*, it was pretty well recognized that ERISA plaintiffs were entitled to "some discovery" in ERISA actions where the administrator was one that both decided the claims and funded the benefits.[21] However, the scope of permissible discovery was limited. It was rare to obtain approval of more than very simple interrogatories or one to two depositions. In most cases, an ERISA claimant had to initiate motion proceedings to compel the sought-after discovery.

Since most employer-sponsored group plans are funded by insurance, the insurer's conflict of interest became almost the primary focus in ERISA litigation for many years. The Ninth Circuit decisions of *Montour v. Hartford Life & Acc. Ins. Co*. and *Salomaa v. Honda Long Term Disability Plan* exemplified that focal point.[22] [23]

In *Montour*, the court focused primarily on the deficiencies of the carrier in failing to conduct an adequate investigation of the claim, while in *Salomaa*, using the conflict analysis, the court reasoned that the use of criteria which could not exist, i.e., objective evidence for a subjective condition, was evidence of financial bias. In both cases, the Ninth Circuit reversed lower court decisions and directed the trial courts to enter judgment in the plaintiffs' favor.

The notion of granting discretion to a financially motivated administrator was always a troubling one. Despite the analogy to trust law, the fact remains that most ERISA claims administrators of health-related benefits claims are insurance companies which are motivated by profit and paying claims does not reward investors. State regulators began conducting market conduct investigations of various insurers, fines were imposed, and carriers were instructed to change their claims handling procedures and liberalize their policy provisions.

Demise of Discretionary Clauses

To protect against some claim-handling abuses, many state regulators tried to level the playing field by abolishing discretionary clauses in life, health and disability insurance policies. This included then California Insurance Commissioner John Garamendi who, in 2004, attempted to invalidate discretionary clauses with a letter opinion, revoking approval of policies containing such clauses. However, Garamendi's action was challenged in court and was later held by the Ninth Circuit to be an invalid exercise of his power.[24]

Other state regulators had more success—most notably Montana Insurance Commissioner John Morrison, who refused to approve new policies containing discretionary clauses. One carrier, Standard Insurance Company, sued Morrison, claiming, among other things, that his regulatory action was preempted by ERISA's broad preemption provisions. The Ninth Circuit ruled in favor of Montana, holding that the Commissioner's actions were "regulating insurance" and therefore were "saved" from ERISA preemption by the savings clause.[25]

Commencing in 2004, Illinois and several other states followed suit, with regulation and legislation, abolishing discretionary clauses in insurance policies. California enacted its own version of an anti-discretion statute, which took effect January 1, 2012. California Insurance Code §10110.6 states, in pertinent part, that:

(a) If a policy, contract, certificate, or agreement offered, issued, delivered, or renewed, whether or not in California, that provides or funds life insurance or disability insurance coverage for any California resident contains a provision that reserves discretionary authority to the insurer, or an agent of the insurer, to determine eligibility for benefits or coverage, to interpret the terms of the policy, contract, certificate, or agreement, or to provide standards of interpretation or review that are inconsistent with the laws of this state, that provision is void and unenforceable.

(b) For purposes of this section, "renewed" means continued in force on or after the policy's anniversary date.

Initially, insurers fought the ban, claiming variously that it was illegal retroactive legislation,[26] it was a violation of choice of law principles, or was preempted by ERISA.[27] Trial courts, however, overwhelmingly ruled that the statute was a valid regulation of insurance within the province of the California legislature. The preemption issue was finally laid to rest by the Ninth Circuit in *Orzechowski v. Boeing Company Non-Union Long-Term Disability Plan, Plan Number 625*,[28] when the court held that Insurance Code §10110.6 was not preempted as a result of ERISA's savings clause. The *Orzechowski* decision was in line with other circuits that had previously addressed this issue based on similar state regulatory schemes.[29]

Application of §10110.6 to a non-insured ERISA plan, i.e., one which is self-funded by an employer, has also been clarified by the Ninth Circuit. In *Williby v. Aetna Life Insurance Co.*,[30] it was held that §10110.6 was not saved from preemption in the context of a self-funded plan. Since the statute, as applied to a non-insured plan, could not be said to be "regulating insurance," the ban was preempted by ERISA. The fact that an insurer administered the self-funded plan was inconsequential. Thus, claims decisions by administrators of self-funded plans will continue to be given deference by the courts in the absence of some good cause to negate that deference.

Trial under a *De Novo* Standard of Review

With the passage of time, fewer decisions on insured claims remain subject to the abuse of discretion standard of review. In California, any grant of discretion in policies issued or renewed after January 1, 2012, is invalidated by §10110.6 and policies now issued in California do not contain grants of discretion. As a result, more ERISA cases are tried on a *de novo* basis, without giving any deference to the claims administrator's conclusions and without much attention to the issues caused by an administrator's conflict of interest.

Nonetheless, plaintiffs' lawyers continue to maintain that an insurer's potential bias should always be in issue when determining whether the evidence adduced by the administrator is credible, and whether a claim decision was properly decided, or if it was the product of bias. Some courts have started using traditional bias evidence in ERISA *de novo* trials, reasoning that the credibility of an insurer's medical reviewers is a proper consideration in a *de novo* proceeding.[31] Claimants' counsel see this as a positive development as it allows for a more informed evaluation by the court of the evidence presented.

Though ERISA litigation has evolved, and continues to evolve, significant distinctions and limitations remain as compared to regularly litigated civil matters. Understanding the rules and distinctions, along with their historical context, is essential in order for any practitioner in this area to avoid, and to help clients avoid some of the pitfalls that exist on the path to protection under ERISA.

[1] 29 U.S.C. §1001, et seq.
[2] *Diaz v United Agric. Employee Welfare Benefit Plan*, 30 F.3d 1478, 1483 (1995). This is true as to actions under 29 U.S.C. §1132 (a)(1)(B) to recover employee plan benefits.
[3] *Thomas v Oregon Fruit*, 228 F.3d 991 (9th Cir. 2000).
[4] *Kearney v. Standard Ins. Co*., 175 F.3d 1084 (9th Cir. 1999).
[5] 29 U.S.C. §1144.
[6] 29 U.S.C. §1144(b)(2)(A).
[7] *Presti v. Connecticut General Life*, 605 F.Supp. 163 (N.D. Cal. 1985).
[8] *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).
[9] 29 U.S.C.§1332(g).
[10] See also, *Kanne v. Connecticut General Life Ins. Co*., 867 F.2d 489 (9th Cir. 1988) (Then private right of action under Ins. Code, §790.03 was also preempted, as being inconsistent with the "exclusive remedies" provision of ERISA.)
[11] See John H. Langbein, T*rust Law as Regulatory Law: The Unum/provident Scandal and Judicial Review of Benefit Denials Under ERISA* (2007) 101 Nw. U. L. Rev. 1315, 1317–21, cited in *Saffon v. Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 867 (9th Cir. 2008).
[12] *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989).
[13] *Ingram v. Martin Marietta Long Term Disability Income Plan*, 244 F.3d 1109 (9th Cir. 2001).
[14] *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006).
[15] "Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion [citation omitted]. 489 U.S. At 115.
[16] *Atwood v. Newmont Gold Co., Inc.*, 45 F.3d 1317 (9th Cir. 1995).
[17] Overruled by *Abatie, supra*, 458 F.3d 955.
[18] *Lang v. Long-Term Disability Plan of Sponsor Applied Remote Technology, Inc.*, 125 F.3d 794 (9th Cir. 1997).
[19] *Tremain v. Bell Industries, Inc.*, 196 F.3d 970, 977 (9th Cir. 1999).
[20] *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008).
[21] *Welch v. Metropolitan Life Ins.* Co., 480 F.3d 942, 949 (9th Cir. 2007).
[22] *Montour v. Hartford Life & Acc. Ins*. Co., 588 F.3d 623 (9th Cir. 2009.
[23] *Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666 (9th Cir. 2011).
[24] *Saffon*, supra, 522 F.3d 863.
[25] *Standard Ins. Co. v. Morrison*, 584 F.3d 837 (9th Cir. 2009).
[26] *Polnicky v. Liberty Life Assurance Company*, 999 F.Supp.2d 1144 (N.D. Cal. 2013).
[27] *Snyder v. Unum Life Ins. Co. of America* (C.D. Cal., Oct. 28, 2014, No. CV 13-07522 BRO RZX) 2014 WL 7734715.
[28] *Orzechowski v. Boeing Company Non-Union Long-Term Disability Plan, Plan Number 625*, 856 F.3d 686 (9th Cir. 2017).
[29] See, *American Council of Life Insurers v. Ross*, 558 F.3d 600 (6th Cir. 2009).
[30] *Williby v. Aetna Life Insurance Co*., 867 F.3d 1129 (9th Cir. 2017).
[31] See *Yates v Bechtel Jacobs Co.*, 2014 WL 2462840 (E.D. Tenn., 2011) and *Lin v. Metropolitan Life Insurance Company* (N.D. Cal., Aug. 16, 2016, No. C 15-2126 SBA) 2016 WL 4373859.

Test No. 116

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. ERISA is the acronym for "Employee Rights in Special Administrative Matters."
   ❑ True ❑ False
2. In a matter seeking benefits under an ERISA employee benefit plan, an administrative appeal is mandatory prior to initiating a civil proceeding.
   ❑ True ❑ False
3. ERISA claimants are entitled to jury trials just as are other litigants.
   ❑ True ❑ False
4. In ERISA litigation, the "administrative record" is typically the insurer's claim file, accumulated prior to the final claim decision.
   ❑ True ❑ False
5. ERISA administrative appeals should be treated like litigation insofar as developing and collecting evidence.
   ❑ True ❑ False
6. State law preempts the laws of ERISA.
   ❑ True ❑ False
7. The "savings clause" prevents state law from preempting ERISA law.
   ❑ True ❑ False
8. Litigants in ERISA actions are entitled to recover damages for emotional distress and in the appropriate circumstances, punitive damages.
   ❑ True ❑ False
9. The default standard of review for a court in an ERISA matter is *de novo.*
   ❑ True ❑ False
10. The court will review an ERISA matter *de novo* only if the plan documents so provide.
    ❑ True ❑ False
11. At one time it was quite common for insurance companies to attempt to alter the standard of review in ERISA litigated matters by including a clause purporting to give themselves discretion to interpret plans terms and make benefit decisions.
    ❑ True ❑ False
12. Courts would never enforce discretionary clauses in ERISA plan documents.
    ❑ True ❑ False
13. Insurance companies acting as ERISA claims administrators are immune from any conflict of interest concerns.
    ❑ True ❑ False
14. Evidence of an insurance company's conflict of interest is never permissible in ERISA litigation.
    ❑ True ❑ False
15. The "combination of factors" test was rejected in the United States Supreme Court case of *Metropolitan Life Ins. Co. v. Glenn.*
    ❑ True ❑ False
16. Discovery in ERISA litigation proceeds just as it would in other litigation, without any particular limitations.
    ❑ True ❑ False
17. California outlawed discretionary clauses in 2004.
    ❑ True ❑ False
18. State laws attempting to outlaw discretionary clauses are preempted by the laws of ERISA.
    ❑ True ❑ False
19. *Orzechowski v. Boeing Company Non-Union Long-Term Disability Plan, Plan Number 625*, held that California Insurance Code §10110.6 was preempted by the federal laws of ERISA.
    ❑ True ❑ False
20. Some courts have started using traditional bias evidence in ERISA *de novo* trials, reasoning that the credibility of an insurer's medical reviewers is a proper consideration in a *de novo* proceeding.
    ❑ True ❑ False

MCLE Answer Sheet No. 116

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
$_____.

_____
Credit Card Number

_____ _____/_____/_____
CVV code Exp. Date

_____
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.

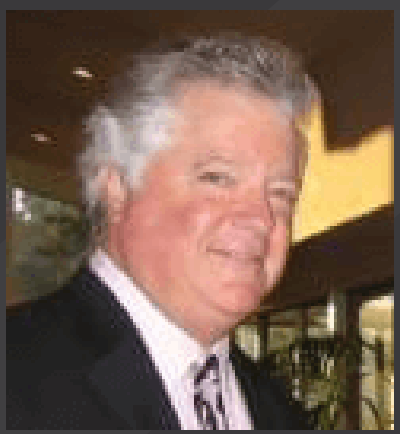
1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
10.	❑ True	❑ False
11.	❑ True	❑ False
12.	❑ True	❑ False
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑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

The Way We Were

Experience through Time and Trial

By Michael D. White

Photos by Ron Murray



Everything, and everyone, changes over time. In this issue, we have the opportunity to glean from the experiences and observations of five long-standing members of the San Fernando Valley Bar Association, who have seen the Valley and their chosen profession change in some better, some worse ways over the past six decades.

BENJAMIN FRANKLIN WAS WRONG. DEATH AND taxes aren't the only things that remain certain. He forgot change—the very act of becoming different over time. For better or for worse, it is inevitable. It happens.

It's true in every phase of life—experiences personal, social, and professional—whereby everyone possesses a storehouse of remembrance of things past, memories—some good, others not so—by which the immediate past and the immediate future are weighed.

The living memories that orbit around the San Fernando Valley Bar Association of the early 1950s and later speak of a past when the Valley was home to slightly more than 100,000 people and was inexorably morphing with tract houses replacing orange groves, and new communities like Canoga Park, Van Nuys and North Hollywood experiencing a building boom, the likes of which had never been seen before.

There are now 2,100 members on the SFVBA roster and the scope of the organization has shown it to be more than capable of molding to fit its times. *Valley Lawyer* talked to five long-time SFVBA members—Albert Ghirardelli, Valerie Vanaman, David Fleming, Bruce Kaufman and Roger Franklin—who each reflect on their more than 50+ years practicing law and offer their counsel to new generations of lawyers.

Everything that Fell Off the Table

Albert Ghirardelli's experience in the law spans 67 years. His formal education began at UCLA and was interrupted at the end of his first year by his entry into military service. A recipient of the Purple Heart for wounds received in action during World War II, he returned to UCLA and continued his education there. Since UCLA didn't have a law school at that time, he enrolled in USC Law School, which he attended as a disabled veteran. He was admitted to the California State Bar in January 1951.

"My cousin was in practice in the Valley and his partner served as the part-time city attorney for the City of San Fernando," he says. "I asked if they had a place for me there and they took me on. In addition to sweeping the floors, I did everything and handled anything that fell off the table…collection work, bankruptcy work, family law, divorces, and criminal prosecutions for misdemeanor crimes committed in the city. I also did defense work for felonies committed outside the city. It was an interesting practice, a mixture of everything."

Both Ghirardelli's cousin, John Varni, and his law partner, Neville Lewis, had previously served as presidents of the San Fernando Valley Bar Association, a post that he himself would fill in 1955.

The partnership blossomed and the firm of Lewis, Varni & Ghirardelli eventually spanned more than 30 years with, at one point, eight attorneys on staff. "That was a pretty good size for a practice in those days. It never got boring." As time passed, his practice expanded more into business, probate and estate planning.

The Valley and the legal community, he recalls, "was very different. Everybody knew everyone else and in those day, you treated each other fairly because if you messed around, it didn't take long to build up a reputation forcing you do things the hard way."

Over the years, Ghirardelli has volunteered much time and effort to community service and has been lauded with several honors for his work. In 2012, the *Los Angeles Business Journal* presented him with its Lifetime Volunteer Award, "recognizing him as a man who has shown unwavering stewardship and community service in his quest to secure quality healthcare for San Fernando Valley." He also played a key role in the establishment of what is now the Providence Holy Cross Medical Center in Mission Hills and the San Fernando courthouse.

Looking back, he says, "There was more of a feeling that you belonged to a group that had a lot in common. It wasn't nearly as adversarial as today. I can remember sitting in court waiting for my matter to be called and one of the older lawyers was sitting next to me. We started talking about the notes on my case and so he offered to take a look. He did and made some suggestions to me about what I might do in the future. Where would you find that kind of thing today? Sadly, not very often."

"It's not easy making a living as a lawyer," adds Ghirardelli. "There are a lot of expectations that you have to shoulder. It's a tough business, but there's a lot of satisfaction in knowing you've helped solve someone's problem. That's a reward of its own."

Particularly Exceptional and Outstanding

The year was 1964 and "it would have been hard to be the first woman sportscaster, so I decided to try to be one of the first women lawyers," says attorney Valerie Vanaman, a partner in the Sherman Oaks law firm of Newman Aaronson Vanaman.

After completing her undergraduate and law school degrees at Ohio State University, Vanaman signed up to work in a national program that was funded by the U.S. Office of Economic Opportunity to provide legal services to those in need. "There were 50 of us in the first class and we got sent out all over the country. I asked to be sent to California."

Asked "Why California?," she responds, "Have you been to Ohio?"

Admitted to the State Bar in 1968, Vanaman worked with several like-minded agencies and, at the same time, taught at both USC and UCLA law schools, serving with the Western Center on Law and Poverty in Los Angeles and the Legal Aid Foundation of Long Beach until 1973. A move to Boston and work at Harvard as a clinical teaching fellow and with the Children's Legal Defense Fund soon followed. But, she admits, several years of record snowfall prompted a decision to return to California.

In 1981, she helped establish the Sherman Oaks law firm of Newman Aaronson Vanaman, which specializes in the field of special education and disability advocacy, and has been with the firm ever since.

In 2015, Vanaman was honored by the Maryland-based Council of Parent Attorneys and Advocates with its Diane Lipton Award for Outstanding Advocacy for her efforts in making a "particularly exceptional and outstanding contribution" to obtaining high-quality educational services for children with disabilities. "I always felt that people who are least able to care for themselves need the highest quality of representation they can get," she says.

The biggest difference between the then and the now? "Looking back, things moved at a slower pace and there was more congeniality then than now," says Vanaman. "It seems like everybody's going after the buck. If you're real aggressive, you're worth the buck; if you're not, you're not worth it. Everyone feels that they need to be more aggressive to survive."

Selectric II Typewriters and Community Service

Born and raised in Davenport, Iowa, attorney David Fleming attended college at Augustana College in Rock Island, Illinois, and worked his way through school as an announcer at the CBS radio station in Chicago, before graduating Phi Beta Kappa with a degree in political science.

"One of the producers said, 'If I had a kid your age, I'd send him to law school and bring him back into management for the network'," he says. "That seemed to be a good idea as my dad was retiring and the question was whether my mom and dad were going to move to

either Florida or California. I had two younger brothers out here, so I figured I'd go to law school and work at KNX in Los Angeles."

Fleming applied and was accepted into UCLA Law School's seventh class. Admitted into practice in 1959, he kicked-off his career clerking for a small law firm in Van Nuys.

"Back in those days, the state of what we had to work with was really different," says Fleming. "It was before Xerox was invented. We did duplicate pleadings with onion paper and carbon paper and IBM Selectric typewriters, the most up-to-date thing we had to work with. It was a different world. Back then, most lawyers did everything…wills and probate to criminal and civil matters, anything that walked in the door."

Today, he says, "lawyers have to specialize because the law has become so precise and involved. There are so many more things you're going to have to worry about. I remember the codes were pretty thin. Today, they're huge because of all the new laws that have been passed. You can't just educate yourself in a few minutes and talk to a couple of other lawyers as to what to do. You really do have to specialize."

Shortly after passing the Bar, Fleming joined the SFVBA and attended his first meeting—a luncheon at the long-defunct Pucci's Restaurant on Ventura Boulevard in Encino. "That's where all the 150 lawyers that practiced in the Valley met along with a few of the municipal court judges," he says.

"We had monthly meetings and everybody knew everybody by their first name. If you wanted a continuance, you just got on the phone and called your friend and say 'I need 30 more days' and that was it. We didn't have to follow up with a letter or anything. It was like practicing law in a small town. It was really great. Everybody knew everybody else."

With an eye on retiring from practice in 1992, Fleming's plans changed when Latham & Watkins talked him into coming on board "as counsel." He spent 23 years with the firm working on land use and environment issues, "so I was interfacing a lot between clients and government, and so I could open some doors and do things for people. I retired from Latham & Watkins in 2015."

Deeply involved in Valley community affairs, Fleming has over the years served as president of the Los Angeles City Board of Fire Commissioners, director of the Los Angeles Police Foundation, a member of the City of Los Angeles Ethics Commission, president of the Valley Industry & Commerce Association, chair of the Los Angeles Area Chamber of Commerce and the Los Angeles Economic Development Corporation, a member of the Metropolitan Transit Authority, and vice chair of the California Transportation Commission.

He also played a key role in former Los Angeles Mayor Richard Riordan's successful efforts to reform the city's cumbersome and outdated charter in the late 1990s, has served on the CSUN Foundation Board since 1995, and was honored by the university with the degree of Doctor of Laws.

Currently, Fleming serves as a senior advisor to State Senator Bob Hertzberg, whom he regards as a "close friend of more than 30 years."

The practice of the law, he says, "has given me a feeling of accomplishment in being able to help people solve problems they can't solve themselves. They need professional advice and they need direction and being able to help them is a great calling and I think every lawyer that has helped clients has that feeling as well. Even with specialization today, you still get that feeling, the same one I've felt over the years. It's a great one to have. It makes life worth living."

> "We did duplicate pleadings with onion paper and carbon paper and IBM Selectric typewriters, the most up-to-date thing we had to work with."
> — David Fleming

Working Both Sides of the Fence

Bruce Kaufman's 53 years of legal practice began with a one-year tour of duty with the Los Angeles City Attorney's Office after graduating from Southwestern University School of Law and passing the Bar in January 1965.

"I left and went to work at the San Fernando-based law firm of Kates & Kates, which was one of the founding law firms in the Valley," Kaufman says. "At the time, the firm was the largest in the area, consisting of six lawyers. When I went to Kates & Kates, they didn't have anyone to do criminal defense work so I did that. I worked there for three years and then opened my own practice. That evolved into a partnership with Ron Rothman, who'd been a Superior Court clerk. I eventually wound up in practice with my brother and now I'm in practice with my brother and my son. I do mostly criminal defense work."

Kaufman was a founder of the San Fernando Valley Criminal Bar before it merged with the SFVBA. Young attorneys today, he says, "have many more tools than we did when we started out and especially with computers and the internet, they can accomplish more in less time. People are people and whether they were born 50 years ago or earlier, I think peoples coming out of law school then were as bright as anyone coming out of law school now. Today, they just have more information readily available to them."

In the litigation field, says Kaufman, "The problem is the cost of trying a case today. To me, it's overwhelming. If you want to try a civil suit for example, there are so many roadblocks to just getting a case to trial because of the things you have to do to jump through the hoops to get a case to the point where it can go to trial. Only the very big

cases typically will get to trial and the result is that most people can't really afford their day in court anymore."

It is, he says, the economics of practicing the law. "Back then, I never thought of my profession as a business. Over time, you become painfully aware of the fact that to run a law office is extremely expensive if you want to survive and I don't like that. It's similar to what doctors have to do to provide a service…they just want to heal people and yet they have to worry about insurance and Medicare payments and significant office expenses. I'm fortunate that I can afford to do a lot of pro bono work. I'm saddened by the fact that we have to worry constantly about the economics and how expensive it is for someone to get their day in court."

A Life-Long Passion

From the time he was ten years old, Roger Franklin wanted to be a lawyer. "I loved watching Perry Mason on television," he says. "It was something I wanted to do and during the summers when I was in college, I'd actually go down to the court building and watch preliminary hearings. I thought it was an exciting profession and it was something I wanted to do."

The first person in his family to attend college, Franklin followed through on his dream, graduating from Cal-Berkeley, attending Loyola Law School, and entering practice in January 1967.

"Right after law school, I was going to spend a couple of years in what was then called VISTA, the domestic peace corps," he says. "I was stationed on an Indian reservation in New Mexico, but the funds ran out and I was sent home. I got a call from the Public Defender's office where I worked for the next four years."

It was "a different world back then. I was THE public defender for Malibu, Santa Monica, and Culver City, with a partner in Beverly Hills and another in West LA. I didn't have an office. I didn't have a secretary. I literally drove to the courthouse and walked in to usually find 75-100 people waiting for me, THE Public Defender. That doesn't happen today," says Franklin.

"For me it was great, because I had the opportunity to try cases for four years. It was fascinating and I have a lot of memories. But I left because I didn't want to be a public attorney for the rest of my life."

He wanted to "learn something else" and in 1970 started his own practice specializing in wills and trusts. "I saw that if I could do a person's will, I'd have a client for life. And it's actually worked that way. To this day, I get calls from people that I did wills for 20 and 30 years ago. They want amendments and they remember me."

How have things changed over the past 50 years? "It's a lot different today. Things are computerized and information is infinitely more accessible. Back in the day, it was carbon paper and it was state-of-the-art if you had a correctable IBM Selectric typewriter. There were no filing fees to speak of. I think it cost $60 to file a complaint and that was it. You got to court and you knew a lot of the lawyers. It was a much smaller community. Today, it's very impersonal, for the most part."

There was, he feels, more of a "spirit of collegiality" in the legal community. "When I started practicing, you didn't need confirming letters. In fact, to this day, I've never asked another lawyer for a confirming letter. You took someone's word and that was it. I wish I could define what's changed. There are more lawyers. I think that's one reason. Society has itself change. There's not as much cordiality as there once was. That's impacted society's approach to the law itself. I'm not saying the way things are now is better or worse, it's just different."

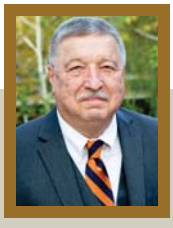
Attorneys today, says Franklin, "are probably a helluva lot smarter than I was when I started out. I have a lot of respect for them. They're tough…part of what I've noticed, though, is that a lot of the younger lawyers want to show how tough they are and that wasn't the way it was when I was practicing. There wasn't that one-upsmanship you tend to see today."

Still, he's quick to add, "I find the young attorneys more prepared and far smarter and knowledgeable than me and those of my generation. Generally, I do still have that excitement about the law. I find it challenging intellectually and very interesting. You meet people in situations that would not meet in any other business or profession."

Since he was a young boy, Franklin "never thought about doing anything else. I like what I do; I can help people and I enjoy it. Obviously there are cases and situations and clients that are upsetting and contentious and worrisome, but those are the exceptions. The vast majority are a pleasure to work with. There really is nothing else I'd rather do."

In his senior years, after a career that resonates to this very day with experience as a soldier, attorney, judge, author, and U.S. Supreme Court Justice, Oliver Wendell Holmes, Jr. observed that "the life of the law has not been logic; it has been experience."

Experience, it needs to be said, that can only be gained over time and trial.



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.

By Philip J. Bonoli

Freelancers and Independent Contractors: Not without Protection

BEING FREE OF THE BALL AND chain constraints of having to clock in and out at specific times and having someone control every aspect of the work day are very attractive incentive for a number of working folks to set their own hours and complete projects on their own time and at their sole direction. As a result, many workers choose to work as freelancers or independent contractors because of this freedom.

This freedom, however, may come with a steep price. Unlike their W-2 brethren who work regular 9 to 5 jobs, people who work as freelancers or independent contractors are generally not entitled to many of the benefits provided to the W-2 employees, such as overtime pay, a minimum wage, meal and rest breaks, and paid time off. In fact, freelancers and independent contractors are typically not protected by the California Labor Code, which provides those protections to the state's W-2 employees.

Similarly, freelancers and independent contractors are typically not covered under workers' compensation insurance and are not entitled to unemployment benefits available through California's Employment Development Department or the protections of anti-discrimination and retaliation laws laid-out in the state's Fair Employment and Housing Act (FEHA).

This lack of compensation, anti-discrimination and retaliation protection may convince a few workers to reluctantly trade their relaxed and casual 1099 working environments for the more regimented world of W-2 conformity.

All is not lost, though, and there is hope on the horizon for the more independent among us.

FEHA Protections

Although FEHA generally will not protect freelancers and independent contractors from discriminatory and retaliatory conduct, it does protect them from workplace harassment, sexual or otherwise.

The recent spotlight on the tragic serial harassment of women by top executives in a number of industries has created a long-overdue dialogue concerning the protection of workers from the predatory nature of those individuals. This spotlight uncovered a source of protection that hasn't drawn much attention over the years—that in California, FEHA protects workers, regardless of classification or gender, from workplace harassment.

Philip J. Bonoli is a litigator with the firm of Brutzkus Gubner in Woodland Hills. His practice focuses on employment matters, including wrongful discharge, discrimination and harassment, tort claims, and contracts. He can be reached at pbonoli@bg.law.

The FEHA ban on workplace harassment applies to an employee, an unpaid intern or volunteer, or "a person providing services pursuant to a contract," i.e., an independent contractor.[1] The Act expressly embraces freelancers and independent contractors by defining "a person providing services pursuant to a contract" as an individual who "has the right to control the performance of the contract for services and discretion as to the manner of performance," "is customarily engaged in an independently established business," and "has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work."[2]

These are the factors that California courts have routinely considered when determining whether a worker is an independent contractor as set forth in the "multi-factor" or "economic realities" test adopted by the California Supreme Court.[3] However, the California Supreme Court recently adopted the ABC Test to determine whether a worker is properly classified as an independent contractor with respect to California wage orders.[4]

Under this test, "a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity."

Protection from Harassment

Freelancers and independent contractors who have been harassed have the ability to file harassment-based claims under FEHA to recover damages—including attorney's fees and punitive damages—against their employers. Individuals may also be personally liable under FEHA for harassment.

Female freelancers and independent contractors are not the only workers entitled to protection. Although the media's recent attention on harassment has focused on victims who are primarily women and the accused who were primarily men, harassment has no boundaries. Just like women who have been victims of serial harassment at the hands of men, so too have men at the hands of women. FEHA makes it known that, in California, all workers are protected from any form of sexual, verbal or physical harassment.

Most companies also provide workers with employee manuals or handbooks that lay out their anti-harassment policies and the procedures to follow if a worker believes he or she is the victim of harassment. Generally, workers are instructed to advise their manager, supervisor and/or human resources director of the alleged harassment. An internal investigation to determine whether or not the alleged harassment had, in fact, occurred and if it did, determine the appropriate course of action.

In California, workers—including freelancers and independent contractors who are victims of harassment—may also file a claim with California's Department of Fair Employment and Housing and request a right to sue letter, which preserves the worker's ability to file a claim under FEHA.

Protection from Violence and Discrimination

The Ralph Civil Rights Act[5] and the Tom Bane Civil Rights Act[6] may also provide protection from discriminatory violence and intimidation to freelancers and independent contractors in the workplace. Section 51.7 states, in relevant part: "All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute…"

Section 52.1 prohibits the interference "by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state…"

In 2006, the Court of Appeal for the State of California, Second District, held that although the Unruh Civil Rights Act did not apply to employment discrimination, Sections 51.7 and 52.1 are not part of the Act and, as a result, may be applied in the employment context.[7] [8] This allows individuals to assert statutory claims for discriminatory violence and intimidation and denial of civil rights by means of threats and intimidation in the workplace.

There has also been a push in both the public and private sectors to ban arbitration agreements for sexual harassment and gender discrimination claims. Many prominent companies have taken the step to eliminate provisions in arbitration agreements that require arbitration of sexual harassment and gender discrimination claims.

Legislative Action

The California Legislature has also introduced Assembly Bill 3080, which would prohibit California employers from requiring applicants to sign arbitration agreements that require arbitration of sexual harassment claims. The bill would also bar an employer from prohibiting an employee or independent contractor from disclosing to any person an instance of sexual harassment "that the employee or independent contractor suffers, witnesses, or discovers in the workplace or in the performance of the contract."

Assembly Bill 1870, which was also introduced during the 2017-2018 regular session, seeks to extend the period to file an administrative harassment-based complaint with the state Department of Fair Employment and Housing from one year to three years. Another bill, Senate Bill 1038, seeks to make an employee personally liable for unlawfully retaliating against a person under FEHA. This proposed bill would increase the scope of personal liability under the Act from merely harassment-based claims to retaliatory-based claims as well.

Under current California law, California employers of 50 or more employees, including those outside California, must provide supervisors with two hours of sexual harassment training every two years. This training is required to include a component regarding the prevention of abusive conduct and must include gender identity, gender expression, and sexual orientation.

Proposed Senate Bill 1300 would require employers (regardless of size) to provide two hours of sexual harassment prevention training to all employees, even if they are not supervisors, within six months of hire and thereafter, once every two years. SB 1300 would also require employers to provide "bystander intervention training" and to provide "information to each employee on how to report harassment and how

to contact the department to make a complaint."

There has also been a boom in misclassification claims in California by workers claiming they were erroneously classified as independent contractors. In such claims, workers typically seek minimum wages, overtime pay, or pay for meal and rest breaks under the minimum wage and overtime protection laws found in the state's Labor Code.

Workers who believe they have been incorrectly classified as an independent contractor may file a civil action or a wage claim with California's Labor Commission Division of Labor Standards Enforcement seeking remedies.

Legal Recourse

The Labor Code also makes it unlawful to willfully misclassify individuals as independent contractors. The penalties for violations of range from $5,000 to $15,000 per violation "in addition to any other penalties or fines permitted by law."[9] Also, if the Labor and Workforce Development Agency or a court issues a determination that a person or employer "has engaged in or is engaging in a pattern or practice of these violations," they can also be subject to a civil penalty that ranges from $10,000 to $25,000 per violation.

Although freelancers and independent contractors may not currently be entitled to assert discriminatory-based claims under FEHA and may not be protected under California's Labor Code minimum wage and overtime laws, they are protected from workplace harassment, while the California Legislature is seeking to expand those protections.

[1] Cal. Gov't Code §12940(j)(1).
[2] Cal. Gov't Code § 12940(j)(5)(A)-(C).
[3] *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, 48 Cal.3d 341 (1989).
[4] *Dynamex Operations West, Inc. v. Superior Court*, S222732.
[5] Cal. Civ. Code §51.7.
[6] Cal. Civ. Code §52.1.
[7] *Stamps v. Superior Court*, 136 Cal.App.4th 1441 (2006).
[8] Cal Civ. Code §51.1.
[9] Cal. Lab. Code §226.8.

Valley Bar Mediation Center: Reviving a Worthy Program

By Michael D. White

FIVE YEARS HAVE PASSED since the Los Angeles Superior Court (LASC) shut down its ADR program after more than two decades in operation.

The end of the original program in June 2013 was met at the time with widespread dismay and exasperation as "an extreme budget shortfall" was blamed for the demise of a program that routinely handled more than 10,000 cases per year, providing litigants with an effective alternative to longer waits to get to trial and increased legal fees.

The result of the shutdown was staggering as caseloads for judicial officers ballooned, courtrooms closed, court costs skyrocketed, and the concept of "justice delayed is justice denied" was almost rendered a pipe dream.

"It was a shock when the original program ended and everyone was asking how it was possible not to have that valuable resource," says Yi Sun Kim, President Elect of the San Fernando Valley Bar Association. "I just couldn't understand how the court system could function without a successful program like that."

Over the past five years, the challenge has grown into a daunting one as Los Angeles County is home to the nation's largest unified trial court system, with the Superior Court serving nearly 10 million residents out of almost 600 courtrooms presided over by 550 bench officers. The system handles unlimited civil matters in 70 courtrooms in 12 locations and files approximately 70,000 unlimited civil cases annually.

The same year as the program's closure, a dedicated group of volunteers from the Valley's legal community—led by attorney Myer Sankary and lay mediator Milan Slama—established the Valley Bar Mediation Center (VBMC) as a non-profit 501(c)(3) tax-exempt charitable organization to fill the gap and keep a scaled-down version of the court program alive, while hoping that the opportunity would arise to fully revive the county's comatose dispute resolution program. Enrique Koenig, another accomplished lay mediator who mediated hundreds of cases for the court program, also joined the Board.

"Our original purpose for creating the Center was to educate the public and those who use the court system to resolve disputes early and effectively by selecting highly trained and qualified mediators who are accessible as an alternative to the high-priced mediation panels that most litigants cannot afford," says Sankary, who has served as President of the Center

VBMC Founders Milan Slama, Deanna Armbruster and Myer J. Sankary

since its beginning. "Many litigants fail to pursue pre-trial or early mediation because they do not have access to qualified mediators at prices they can afford."

Their work has borne fruit as the Los Angeles Superior Court recently granted VBMC a contract to be placed on the Court Civil Mediation Resource List for Civil Mediation Services for all civil cases of limited and unlimited jurisdiction, making it one of only two approved vendors to provide affordable, low-cost, high-quality mediation services for litigants in general civil cases for the county of Los Angeles. "The list will be used by litigants to arrange voluntary mediations on their own without court referral or involvement."

According to the contract, "the Vendor Resource List for Civil Mediation Services will be posted on the court's website, www.lacourt.org, included in the ADR Information sheet served with civil complaints, and provided in hardcopy to litigants. Litigants who voluntarily decide to consider using mediation will make their own choice of vendor and will make all arrangements, including scheduling and payment, without court involvement."

The stated goals and objectives of the new mediation program implemented by the LASC are to "provide user-friendly access to affordable, cost-effective, high-quality mediation for large numbers of LASC's represented and self-represented parties in limited and unlimited general civil cases."

VBMC has agreed, without any expense to the court, "to select, provide, manage and oversee qualified mediators for resource list litigants and to provide reports to the court, as requested."

A Vision and Partnership

Adam D.H. Grant was President of the SFVBA in 2014 and was instrumental in helping forge the bond between the Bar and the VBMC.

"It was the goal of my presidency to find a way to support the Superior Court after its mediation program was shut down," says Grant. "I am so pleased with the work that everybody on the Board has been doing; so pleased that something we started five years ago is now going to be in place and is going to provide that alternative to the community which really needs the services of qualified mediators who charge very nominal rates."

"We are pleased to have the involvement of the leaders of the Bar who have supported our efforts since we began," says Sankary. "With two past SFVBA presidents (Adam Grant and David Gurnick) and an incoming president (Yi Sun Kim) on our Board, we are fortunate to have a close and supportive relationship with the Bar that has made this possible."

SFVBA member William Molfetta, who served for 26 years as managing counsel at the in-house law firm of the Aetna Casualty & Surety and Travelers Insurance Companies, has been a full-time mediator since 2012 and serves on the Center's panel as well as an advisor to the executive committee.

Kim, Grant, Gurnick, and Molfetta, together with Sankary, who is also the Program Director, serve as well on the Center's Quality Control Committee for oversight management of the program.

Partnering with the SFVBA will offer its members two major benefits, according to Sankary. "Attorneys will be able to have access to affordable mediation services that will be available through the Center's mediators who meet the court's rigorous standards. Also, attorneys who meet the court's eligibility requirements will eventually be able to join the VBMC panel and get valuable experience mediating civil cases while getting paid for their services."

When the VBMC was created, "it wasn't just to provide low-cost mediation services to civil litigants, it was to educate the general public on the benefits of mediation," says VBMC Executive Director Deanna Armbruster.

> "Many litigants fail to pursue pre-trial or early mediation because they do not have access to qualified mediators at prices they can afford."
> — Myer J. Sankary

Prior to joining the Center as its founding Executive Director, Armbruster was the Executive Director of the American Friends of Neve Shalom/Wahat al-Salam, and the U.S. Director of Israel's Neve Shalom/Wahat al-Salam World Peace College. She also has extensive experience in designing, implementing, monitoring and evaluating numerous multi-year, multi-million dollar U.S. government funded grant contracts.

By serving litigants throughout Los Angeles County, VBMC "works to increase access to justice by offering professional, experienced mediators to help individuals, businesses and organizations resolve disputes to avoid the burden of lengthy and costly litigation," she says.

Helping relieve the current Superior Court civil caseload is also a major plus as well. If each mediator can mediate only five court cases or more per month—that could amount to 50 cases per year. Extrapolated, with a panel of 100 mediators, the Center has the potential to mediate as many as 5,000

cases annually. More mediators can be added as the need arises.

"Both civil litigants and attorneys can come to us directly seeking a mediator or they can visit our website at www.valleybarmediationcenter.com and select a mediator of their choice based on their area of expertise, their contact information, their CV, and collect additional information on their mediation and legal experience," Armbruster says, adding, "We're really delighted that the Bar Association has been so supportive and is moving forward with us in a collaborative effort."

Experienced Professionals at Affordable Fees

According to Armbruster, VBMC mediators will be selected from hundreds of attorneys, including the SFVBA's 2,000-plus members and those of other bar associations throughout the county, whose credentials meet or exceed the minimum qualifications of Rule 10.781a of California Rules of Court.

Those court-mandated qualifications include at least ten years good standing with the California State Bar, 40 hours of mediation training covering a court-directed curriculum, participation in a continuing education program, references from past clients, and commitment to the highest ethical standards of conduct.

What is critical to understand about those involved in the program, Armbruster says, "is that they are all skilled professionals. The old ADR program was great for new, up-and-coming attorneys with little or no mediation experience, as it gave them a platform to gain experience. In our case, we want to work with mediators who have the expertise and still offer affordable rates, while also offering the training programs to qualify new mediators to join the panel."

Participating mediators "have agreed to accept cases from litigants on a reduced fee basis or, in cases where the court determines a litigant is unable to pay the filing fee, on a pro bono basis," she says.

"I'm pleased that something we started five years ago is now going to be in place and is going to provide that alternative to the community."
— Adam D. H. Grant

The fees must be affordable for all litigants. Mediators will provide the first three hours of service at a reduced rate of $150 for each hour or a total of $450 to be divided among the parties. After the first three hours, if the parties wish to continue the mediation, the mediator will be paid a fee at the mediator's standard rate, not to exceed $390 per hour. There will also be a $50 filing fee paid by each party that goes toward operating the Center.

This rate, says Armbruster, "is significantly lower than fees offered by many in the mediation profession. Also, in appropriate cases where the litigant demonstrates that they cannot afford either the administrative fee or the mediator's fee, such as litigants with filing fee waivers issued by the court, fees will be waived and the mediator will provide services for the first three hours without charging a fee."

For the past five years, the Erich and Della Koenig Foundation has

provided the Center with annual grants of $10,000 thanks to Board member Enrique Koenig, without whose support the Center would not have been able to function.

As a tax-exempt non-profit organization, the VBMC depends on donations from individuals, organizations and foundations. Members of the Bar and their firms are encouraged to offer support for the program by making donations to the Center.

Bottom Line

The prime motivator behind the creation of the VBMC, Armbruster says, is to help litigants resolve cases of all sizes by early mediation to avoid the expenses and delays of extensive litigation and trial. "It's about being able to help people cope with difficult situations and get them to not only share their perspectives, which is always extraordinarily important in any kind of conflict situation, but also to be open to listening to the other side's perspective and, in that, find some common ground."

Los Angeles "has an incredibly diverse community with dozens of languages spoken and immigrant communities made up of people from all over the world," says Armbruster. "We also want to enlist an inclusive panel of native speaking mediators in Spanish, Chinese, Japanese, Korean, Farsi, Armenian and other languages to serve a diverse community."

As an approved vendor for the Court Civil Mediation Resource List, VBMC offers programs representing different multicultural, ethnic, religious, genders, generations, economic groups and lifestyles, "with an emphasis placed on the underserved, underprivileged, and lower income populations," adds Armbruster.

"What I think is important here is that we find ways for people who are dealing with difficult conflicts, in all civil litigated cases, whether it's a personal injury, real estate, contract dispute or an employment case involving a third party, family member, neighbor or business, to find a fair, cost-effective solution and move on."

Civil litigants in the San Fernando Valley and throughout Los Angeles County, Grant says, "really deserve that option. There are cases where the litigants can afford significantly more expensive mediators, but the ones that we have are incredibly well-qualified and will be serving a huge need in the community which will, in turn, help our judicial officers and help clear the backlog of cases that have built up over the past five years."

For those interested in obtaining more information about joining the panel, using the VBMC's excellent low-cost services, or making a donation to the Center, please contact info@vbmc.info or (833) 476-9145.

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IN 1990, PRESIDENT GEORGE H.W. Bush signed into law the landmark Americans with Disabilities Act (ADA), which prohibits discrimination based on disability in the workplace, public accommodations, and telecommunications.

In February 2016, Matthew (a pseudonym)—the owner a family-owned deli in Northridge—received a summons for not having a compliant van-accessible handicap parking space and an insufficient number of handicap parking spaces. He had complied with the original ADA regulations but was out of compliance with the newer, updated ones.

Matthew contacted the ARS and was referred to panel member Lawrence J. Hanna, an experienced attorney who handled one of the first ADA lawsuits in the Central District. While almost exclusively representing plaintiffs in such cases, he occasionally finds himself on the defense side for civil ADA cases.

"Everybody," says Hanna, "is very cognizant of the fact that we want to make sure that people with disabilities are accommodated, that they have access to businesses as everyone else. We just want it done in the right way."

It was not disputed that Matthew was violating ADA regulations; there is a question, however, as to whether he should pay out as much as $14,000 in attorney's fees and punitive damages on top of his own attorney fees. "We did the research and the plaintiff is one of the top filers in the entire country," said Stegman. "We have a current case and that plaintiff literally drove up and down Ventura Boulevard here in the Valley looking for small businesses [in violation]."

Hanna and his partner—Daphne Stegman—believe these situations should provide small business owners like Matthew the opportunity to correct any infractions before having to face a lawsuit, and support Senate Bill 269, which gives businesses in California with less than 50 employees up to 120 days to fix ADA access violations before a lawsuit can be filed against them.

As for Hanna's and Stegman's services, Matthew says, "He and his associate really tried to help and really looked into everything. They are really great and they did a lot of good work."

Valley Community Legal Foundation
of the San Fernando Valley Bar Association

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IN THE MARCH ISSUE OF *VALLEY Lawyer*, I announced that due to the effective restructuring of the Valley Community Legal Foundation over the past three years, as well as the successful resurgence of donor support, the VCLF was able to issue our largest single grant to date, a $50,000 grant to the Anti-Recidivism Coalition (ARC). ARC's mission is to create safe, healthy communities by providing a support and advocacy network for formerly incarcerated young men and women. The grant will establish a Reentry Legal Clinic in Sylmar and fund its Second Chance Union Training Program.

On April 1, ARC announced the hiring of the Reentry Legal Clinic's first staff attorney, Nicole Jeong, who received her J.D. in 2011 from Yale Law School. Prior to her new positon, Jeong served as a staff attorney in the Pro Bono Department at Legal Services New York City, and as a general litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison in New York and Morrison & Foerster in Los Angeles. She also worked as a law clerk to the Hon. Jesus G. Bernal of the Central District of California.

"We are immensely grateful for the support of the SFVBA and the VCLF, as well as the people of the San Fernando Valley for making the Reentry Legal Clinic a reality," said Scott Budnick, ARC founder and CEO.

On March 29, ARC and its partners—the Los Angeles County Federation of Labor, the Miguel Contreras Foundation, the Los Angeles/Orange Counties Building and Construction Trades Council, and Los Angeles Trade Technical College—graduated the fourth class of 23 formerly incarcerated individuals from their Second Chance Union Training Program. The program helps reduce recidivism by creating career opportunities through union apprenticeships.

At this heartfelt graduation event—attended by hundreds of the

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The following joined the SFVBA in March and April 2018:

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Kathryn A. Hayden
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James Wilfred Ernest Hoffmann
Calabasas
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Alan J. Kessler
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Criminal Law, Personal Injury

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Law Student

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Lowry Law Firm
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Madison Law Group
Los Angeles
Personal Injury

Jennifer Maraia CREDS, CPRES
Keller Williams Luxury
Calabasas
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Tess Wolff
Klopert & Ravden LLP
Encino
Family Law

Matthew W. Wolfson
Sherman Oaks

John Michael Yenokian
Sperling Diarian & McAllister
Sherman Oaks
Family Law

graduates' family members—several VCLF Board members were joined onstage by State Senator Henry Stern, Los Angeles County Assessor Jeffery Prang, County Supervisor Hilda Solis, and representatives from State Senator Bob Hertzberg's and County Supervisor Sheila Kuehl's offices to present the $50,000 grant award to ARC.

ARC serves more than 400 formerly incarcerated men and women. While a majority live in Los Angeles County, ARC's work has expanded over the past few years into Orange, Riverside, and San Bernardino Counties, as well as the San Francisco Bay Area and Sacramento. In 2016, it opened a second office in Sacramento County to grow its membership in Northern California and strengthen its policy advocacy efforts in that region.

The success of ARC's model is evidenced by the incredibly low recidivism rate of its members—less than 10 percent—compared to the state's overall recidivism rate of nearly 50 percent. The Coalition's advocacy efforts have also been exceptionally effective, leading to numerous reforms in California's justice system that have affected more than 20,000 incarcerated individuals across the state, including limiting the sentencing of juveniles to life without the possibility of parole, and providing a second chance to convicted juveniles who received adult prison sentences.

The VCLF wishes Nicole Jeong great success in her new position and is proud to support ARC and the 23 graduates of the Second Chance Union Training Program.

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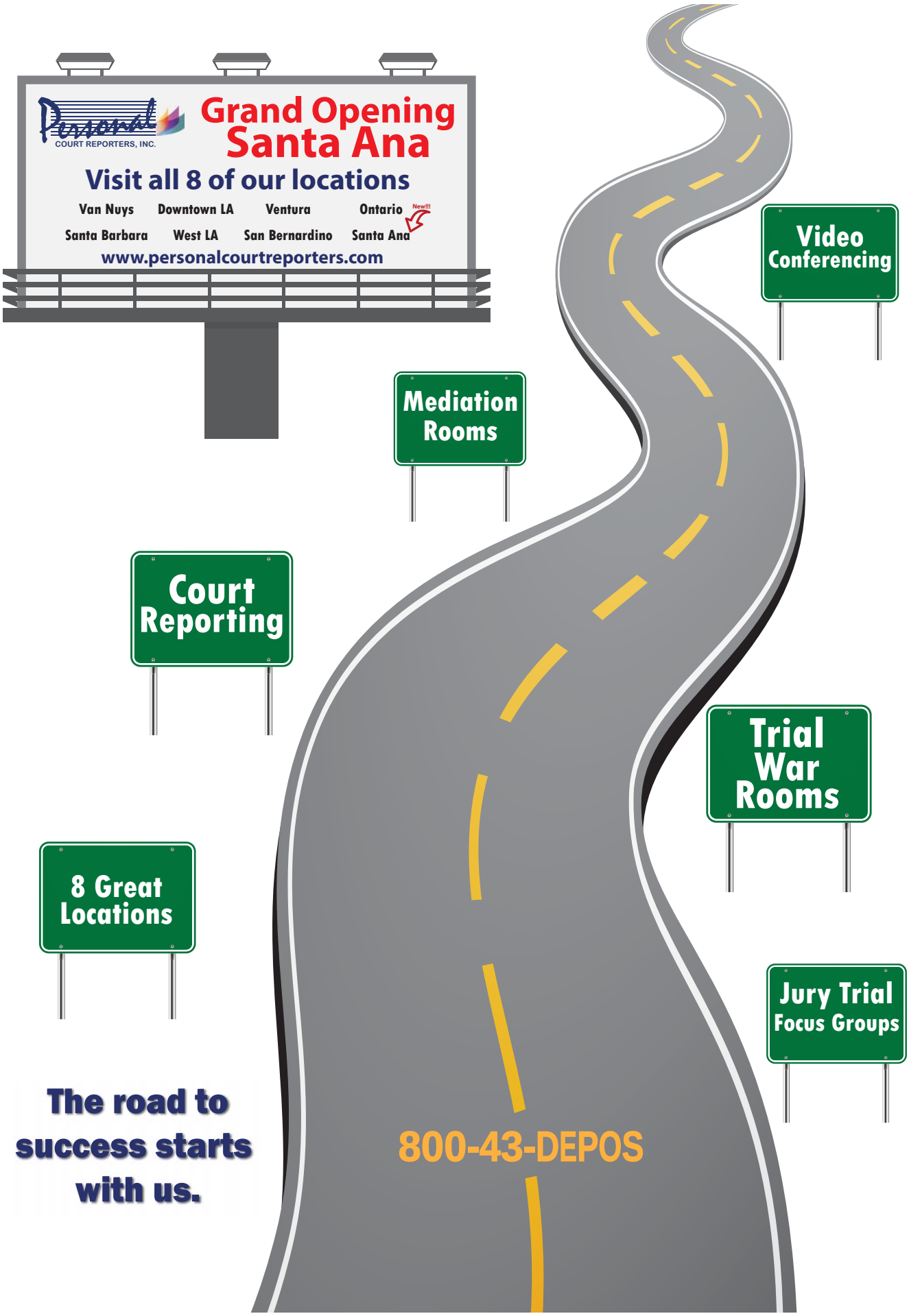
Contact SFVBA Executive Director Liz Post at (818) 227-0494 or epost@sfvba.org to sign up your firm today!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