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A Publication of the San Fernando Valley Bar Association

Meet Incoming SFVBA President Yi Sun Kim



Partnership Agreements: A Cautionary Tale

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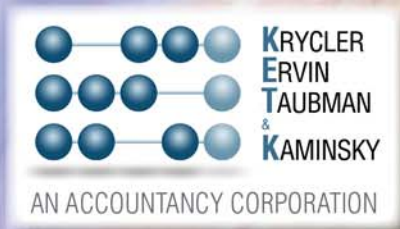
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Photo by Ron Murray

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The Time Has Come...

*The Walrus and the Carpenter
Were walking close at hand;
They wept like anything to see
Such quantities of sand:
If this were only cleared away,'
They said, it would be grand!'*

*If seven maids with seven mops
Swept it for half a year,
Do you suppose,' the Walrus said,
That they could get it clear?'
I doubt it,' said the Carpenter,
And shed a bitter tear.*

IN THINKING ABOUT MY FINAL column as President of the San Fernando Valley Bar Association, the above stanzas from Lewis Carroll's "The Walrus and the Carpenter" came to mind.

Not entirely sure why, but I'm sure it's partly because the words of the poem have been bouncing around in my head ever since my father challenged the 10-year-old me to memorize it (knowing I would rarely turn down a challenge). But more, because in an abstract way it describes the task of heading the board of a professional non-profit association. Not in a defeatist sense, but in the sense that there are so many projects to pursue, so many initiatives to manage, and so many principles to protect, that our work can never really be complete.

Indeed, it was with some faint recognition of that reality—and challenge—that I first became involved with the SFVBA. After becoming ever more aware of all good that our Association does for both members and for our community, I opted to commit to the effort even more, until I was eventually elected President of this remarkable, nearly 100-year old institution in our Valley.

We are clearly living in politically turbulent times. And no matter where on the political spectrum you rest, it is difficult to feel that our national government is as stable or attentive as we would hope to the needs of the populace.

Many feel frustrated and powerless to effect change. But in my mind, there are ways. One is to help where you can help, fix what you can fix, and in all events to reject the animus that politics can engender. To accomplish those objectives, we need to get involved locally.

Obviously, I advocate getting involved with our great bar association as at least one part of the effort. Many do. Our Members volunteer in excess of 2,000 hours a year as fee arbitrators, probate settlement officers, and family law mediators, as well as assist the public at legal workshops and community events.

Our ARS has helped over 58,000 people find lawyers. Our Association, with its ARS and Valley Community Legal Foundation, has donated over \$750K for scholarships and to charitable organizations; and has donated over 41,000 blankets to homeless and impoverished people, and thousands of toys to children who otherwise wouldn't be getting presents for the holidays.

The SFVBA is full of good people, and good people make good places. But some may feel the SFVBA isn't their "thing," which is fine. In which case, look to your local neighborhood council, chamber of commerce, community police council, food bank, rescue mission, or educational assistance program...the possibilities abound. Even small efforts

ALAN E. KASSAN
SFVBA President



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to improve the human condition can have profoundly positive effects on a community.

And there's an added bonus. As I shared in my Installation speech last year, study after study has shown that people actually live happier, healthier, and longer lives when they volunteer to advance a positive cause or to help other people; we help ourselves when we help others!

One of my main objectives as President this year was to spread this message and to encourage as many people as possible to get involved on a local level in our SFVBA, or any organization. I know I've succeeded some since I've personally been a part of bringing people into the SFVBA fold, and because others have shared their stories with me. I can only hope that the message and motivation continues to spread.

I end my tenure as I began, with thanks to Director of Education & Events Linda Temkin; ARS Director Rosie Soto Cohen; Editor of our award-winning *Valley Lawyer* magazine, Michael White; and our office staff Sonia Bernal, Miguel Villatoro and Catherine Carballo-Merino.

And very special thanks to Executive Director Liz Post who, after 24 years with us, has decided to move back to her home state of New York this coming October. Liz has truly worked miracles for our Association and we will miss her!

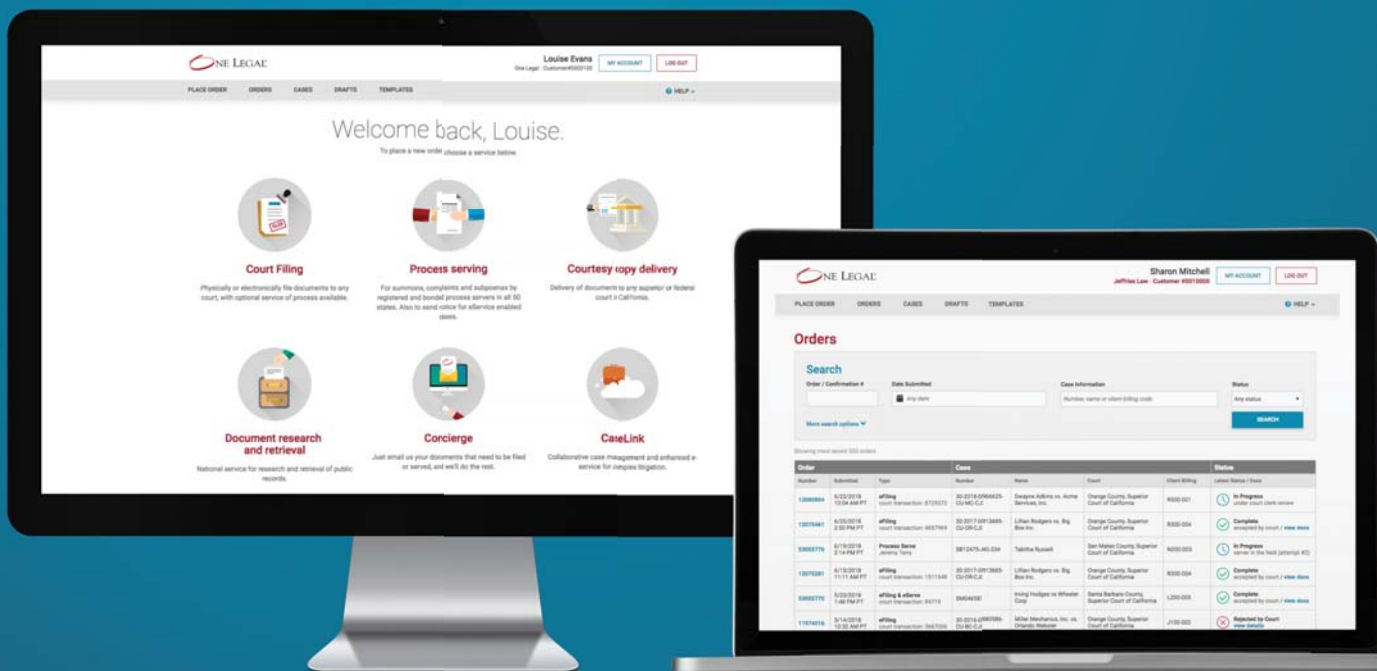
The SFVBA Board will remain in good hands when I hand the gavel to our highly capable incoming President, Yi Sun Kim, on October 1. It's been an honor and a pleasure to serve as your President and I am eternally grateful for all I have learned, and for all the wonderful people I have met along the way. 



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The Sun Rises... The Sun Sets

MICHAEL D. WHITE
SFVBA Editor



michael@sfvba.org

THIS ISSUE MARKS THE THIRD time I've had the honor of introducing an incoming SFVBA President to our readers via the cover story of *Valley Lawyer* magazine.

While three may not, comparatively, seem like a lot, the opportunity to interview and write about each of them has been a revelatory experience. Each sit-down/talk-with presented the opportunity to share a personal side of the individual tasked with leading the Bar through its 93rd year of unavoidable challenges and opportunities to soar.

Next month, Yi Sun Kim will take the reins as President of the San Fernando Valley Bar Association. The daughter of Korean immigrants, she will be the first Asian-American, as well as one of the youngest, to hold the position.

When I asked her about that, I was struck by her response: "It's not about checking off the box and saying, 'Great, now we've got a young Asian-American president!,'" she said. "That shouldn't be done simply for the sake of doing it; it's done for the sake of encouraging anyone and everyone to get involved and be heard, and improving ourselves as advocates and members of this community by getting a more accurate and comprehensive understanding of the different needs, views and life experiences of our community."

I have a strong feeling it's going to be a pretty good year for the Bar.


Nothing in this life is permanent and I've never really been very good at good byes, but I'll do my best here to take a stab at it. I have to say that the news that Liz Post is leaving her station as SFVBA Executive Director and heading back to Long Island, NY came as a bit of a shock.

Simply put, I must share that it has been a genuine privilege working with Liz Post over the past several years.

A real professional in every sense of the word, she has left her lasting mark not only on the Bar, but everyone who's come in contact with her, and, especially, those of us who have had the opportunity to work with her on a day-to-day, face-to-face basis.

Much has been accomplished because of her encyclopedic knowledge of the organization and its inner workings, and her selfless dedication, drive, and commitment to the Bar over the past 24 years.

She has sacrificed much along the way and to say that her legacy will be the respected position the San Fernando Valley Bar Association holds in the community is no exaggeration.

Liz will be sorely missed. We all sincerely wish her "fair winds and following seas" and all the best back in Mets country. 

“
I have a strong
feeling it's going to
be a pretty good
year for the Bar.”



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2	 3	4	5	6 Membership & Marketing Committee 6:00 PM SFVBA OFFICES	7	8
9	10 SFVBA ELECTION DAY 	11	12 Workers' Compensation Section AME Cross-Examination 12:00 NOON MONTEREY AT ENCINO RESTAURANT New date for this month only due to the holidays. Certified Workers' Compensation Specialist Alan Fensten of Silver & Fensten will discuss the risks and rewards of the AME cross-exam. (1 MCLE Hour) Board of Trustees 6:00 PM	13 Business Law & Real Property Section Hot Topics 12:00 NOON SFVBA OFFICES The Real Property Section kickoff meeting. Janice Miller and Polina Ross will update the group on the latest going on with cannabis, drones and the recent California Supreme Court decision, <i>Dynamex Operations West v. Superior Court</i> , on independent contractors. (1 MCLE Hour)	14	15
16	17 Probate & Estate Planning Section Help! The Gardener Is Stealing My Inheritance 12:00 NOON MONTEREY AT ENCINO RESTAURANT New date for this month only due to holidays. Jessica Uzcategui and Mike Brophy will address the various ways "pre-death" trust and estate contests are proceeding through the courts in California and other jurisdictions; recent developments in financial elder abuse, conservatorship and substituted judgments petitions; and Probate Code §17200 trust petitions. (1 MCLE Hour)	18 Taxation Law Section Taxation of Cryptocurrency Transactions 12:00 NOON SFVBA OFFICES Former DOJ Tax Division Attorney Stephen Turanchik will update the group on cryptocurrencies. (1 MCLE Hour) Attorney Referral Service Committee 6:00 PM SFVBA OFFICES	19	20	Fingerprinting Party at the SFVBA FRIDAY SEPTEMBER 21 10:00 am – 4:00 pm SFVBA Conference Room SFVBA Members Only!  Ice cream and refreshments served all day!	
23	24 Family Law Section Domestic Violence 5:30 PM MONTEREY AT ENCINO RESTAURANT Judge Susan Lopez-Giss, Judge Michael R. Amerian and Deputy Public Defender Michael Powell will discuss restraining orders, City Attorney interviews and criminal implications. Approved for Family Law Legal Specialization. (1.5 MCLE Hours)	25	26  Have you renewed your SFVBA membership? Renew online at www.sfvba.org	27 DINNER AT MY PLACE 6:30 PM Studio City  \$25 to attend	28	29
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SUN	MON	TUE	WED	THU	FRI	SAT
LATINO HERITAGE MONTH (SEPTEMBER 15 – OCTOBER 15)						
	 VBN 1 5:30 PM CHABLIS RESTAURANT TARZANA	2	3	Membership & Marketing Committee 4 6:00 PM SFVBA OFFICES	INSTALLATION GALA & SCHOLARSHIP AWARDS 6 <i>El Caballero Country Club Tarzana</i> 6:00 p.m. See page 23	
7	8	Probate & Estate Planning Section 9 12:00 NOON MONTEREY AT ENCINO RESTAURANT Board of Trustees 6:00 PM SFVBA OFFICES	10	11	Bankruptcy Law Section 12 Tales from the Bankruptcy Appellate Trenches 12:00 NOON SFVBA OFFICES Judge Martin Barash and attorneys Whitman Holt and Daniel Bussel of Klee, Tuchin, Bogdanoff & Stern LLP will share lessons learned via several bankruptcy appeals before the Ninth Circuit Court of Appeals and U.S. Supreme Court, including <i>Penrod</i> , <i>Midland Funding</i> , <i>Thorpe Insulation</i> and <i>IndyMac Bancorp.</i> Approved for Bankruptcy Law Legal Specialization. (1.25 MCLE Hours)	13
14	15	Taxation Law Section 16 Tax Planning with Captive Insurance Companies 12:00 NOON SFVBA OFFICES Certified Tax Law Specialist Philip Panitz will discuss how small and middle market businesses can derive substantial tax savings by self-insuring with the use of captive or micro-captive insurance companies. (1 MCLE Hour)	Workers' Compensation Section 17 12:00 NOON MONTEREY AT ENCINO RESTAURANT	18	19	20
21	22	Trivia Night Mixer 23 Sponsored by  Mondragon & Associates Insurance Services 6:00 PM EL PATRON RESTAURANT TARZANA Join us for drinks and appetizers and an exciting trivia match. Free to Current Members! Editorial Committee 12:00 NOON SFVBA OFFICES	24	25 DINNER AT MY PLACE 6:30 PM Porter Ranch  \$25 to attend	26	27
28	29	30	31			



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.

A Long Goodbye

**ELIZABETH
POST**

Executive Director



epost@sfvba.org

IT WAS FEBRUARY 1994, LESS THAN A MONTH after the devastating Northridge Earthquake. Not yet 30, and only two years removed from my move to Los Angeles from New York, I was brought on by then SFVBA President David Gurnick and the Board of Trustees to fill the shoes of recently retired Sue Keating, the Bar's long-time (and until then only) executive director, who had served in that role for 25 years.

Little could I imagine back then that I would serve as the Bar's executive director for almost an identical length of time. But after serving alongside 24 Bar presidents, and working with I would estimate almost 200 Officers and Trustees, it is with mixed emotions that I will step down on October 6 as Executive Director of the San Fernando Valley Bar Association and return to New York, where I will become the chief executive of the Nassau County Bar Association.

While I am thrilled for this new career opportunity, and to move closer to family, I am deeply saddened to leave the members, staff, judges and Bar Leaders who I have worked with for a quarter of a century.

Together, we have accomplished a lot: growing the San Fernando Valley Bar Association from 800 to more than 2,000 members strong; establishing new programs to serve

the profession and our community, like the Mandatory Fee Arbitration Program, Valley Bar Mediation Center, and Blanket the Homeless; creating our award-winning magazine, *Valley Lawyer* and website; and most recently, forming our own professional networking group, the Valley Bar Network.

The saying goes that it takes a village. In our case, it takes a Valley Bar. The SFVBA is certainly more than one person. In addition to hundreds of volunteers, our Bar Association has a small but talented staff who every day serve our members and the public with distinction: Director of Public Services Rosie Soto Cohen, Director of Education & Events Linda Temkin, Editor and Communications Manager Michael White, Member Services Coordinator Sonia Bernal, and ARS Consultants Catherine Carballo-Merino and Miguel Villatoro.

I have had the pleasure of working with Linda since 1999 and Rosie since 2001, sharing our professional accomplishments as well as life's events. Linda, Rosie and the entire Bar team give me the confidence that, when I step down next month, the Bar will be in good hands.

One of my greatest honors as Executive Director has been to work closely with our Valley Bench and supervising judges. I want to thank our local judicial officers—those currently sitting as well as retired—for their support and for bringing




access to justice to our community through innovative programs such as the Valley Associated Settlement Team (VAST) Project, Self-Help Centers, and Pro Bono Probate Settlement Program.

I would be remiss not to acknowledge individually the 24 dedicated and exceptional SFVBA presidents who I have had the privilege of working under. While leaving their mark on the Association, they each selflessly provided to me their wisdom, friendship and encouragement.

David Gurnick	Richard Lewis
Elizabeth Kaufman	Patricia McCabe
Robert Weissman	Sue Bendavid
David R. Hagen	Tamila Jensen
Leon Bennett	Robert Flagg
Fred Gaines	Seymour Amster
Mark Blackman	Alan Sedley
Christine Lyden	Adam Grant
Lyle Greenberg	Caryn Sanders
Steve Holzer	Carol Newman
James Felton	Kira Masteller
Alice Salvo	Alan Kassan

Finally, the other constant during the past two and half decades has been my husband, Gary; we will be celebrating our silver anniversary in November. Along with our daughter Hannah, who has grown up with the Bar, we look forward to taking this journey together.

Thank you for providing us a home away from home for the past 25 years. 



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Partnership Agreements: A Cautionary Tale

By Gary L. Barr and Heidi S. Hart

General partnerships may have none of the formalities or filings associated with other type of business entities, but co-owners should still have an attorney prepare a partnership agreement that will provide the partners with a better understanding of their obligations to the partnership, avoid future disputes and misunderstandings, and give the partners-to-be the opportunity to tailor the agreement to their situation.



WHILE NOT ALWAYS A RECOMMENDED FORM of doing business, general partnerships are certainly the easiest type of entity to form and maintain, and have none of the formalities or filings associated with corporations, limited liability companies, limited partnerships or limited liability partnerships.

It is extremely important that in advising a client on the type of entity to form under the circumstances, that all of these options be considered. If, after such consultation, the client elects to form a general partnership, there are numerous issues to consider.

Although a written partnership agreement is not required to form a general partnership, clients should be encouraged to have one prepared. The process will provide them with a better understanding of their obligations to the partnership and their respective partners, thereby avoiding future disputes and misunderstandings, and give the partners-to-be the opportunity to tailor the agreement to their situation, rather than simply accept the default partnership provisions provided by California law. When advising or drafting an agreement on behalf of multiple partners, the appropriate conflict waivers should, of course, be obtained first.

Uniform Partnership Act of 1994

The Uniform Partnership Act of 1994 (UPA or Act) governs California general partnerships and is codified in California Corporations Code (CCC or Code) §§16100 through 16962.

The UPA also addresses registered limited liability partnerships and foreign limited liability partnerships, but these types of entities are not the subject of this article. California limited liability partnerships are governed by the Uniform Limited Partnership Act of 2008.

The UPA supplies a framework which governs the life of a general partnership from its formation to its dissolution. It defines when a partnership comes into existence and provides a set of “default provisions” which govern a partnership and its individual partners in the absence of provisions in a partnership agreement to the contrary.

In the case of a general partnership, the UPA provides that “the association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership.”¹

Some of the more important default provisions include the establishment of capital accounts, the treatment of partnership property, a partner’s authority to bind the partnership, the relationship between the partners, how the

partnership will be managed, how profits will be shared, how new partners can be admitted, liability to third parties, the dissociation of partners and the dissolution of the partnership.

Despite the comprehensive provisions of the UPA, it is not “one size fits all” and does not eliminate the need for a written partnership agreement. The Act specifically provides that the partnership agreement—whether written, oral or implied—will control.² However, there are certain rights and obligations that a partnership agreement cannot vary or waive entirely.³ For example, as enumerated in the Act, a partnership agreement may not entirely eliminate a partner’s duty of loyalty as defined in CCC §§16404(b) and 16603(b)(3).⁴

As long as it is not “manifestly unreasonable,” however, a partnership agreement may carve out specific types or categories of activities that do not violate the duty of loyalty, or provide a mechanism by which some or all of the partners may authorize or ratify it after receiving full disclosure of all of the facts material to the proposed transaction, even though the transaction would technically violate the duty.⁵

Additionally, the agreement may not unreasonably reduce the duty of care under CCC §§16404(c) or 16603(b)(3).⁶ It also may not eliminate the obligation of good faith and fair dealing provided under Code §16404(d).⁷ However, the partnership agreement may prescribe the standards by which “good faith and fair dealing” is measured, as long as the standards are not “manifestly unreasonable.”⁸ Also, the partnership agreement may not restrict a partner’s obligations to third parties except as provided in the UPA.⁹ Except in limited circumstances, general partners have joint and several liability for the obligations of the partnership, unless otherwise agreed to by the claimant or provided by law.¹⁰

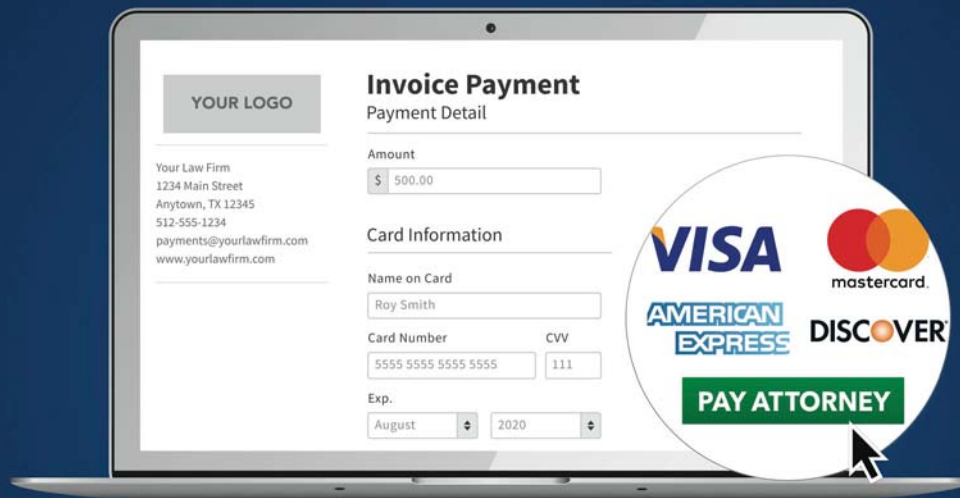
Despite these and the other restrictions imposed by the Act, if the partners agree to have a partnership agreement prepared, the process will hopefully result in the partners focusing on many details they may not have otherwise focused on during the initial phase of their enthusiasm, and potentially avoid disputes after the real work of the partnership begins.

Making a Case for a Written Partnership Agreement: ABC Scooters

Three friends—Al, Bill and Charlie—decided to go into the scooter business. Meeting over drinks after work one evening, they discussed their plan and apportioned responsibilities. Al was tasked with buying some used scooters or leasing new ones; Bill was put in charge of leasing the vans needed to transport the scooters; and Charlie would work on developing



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and maintaining a mobile app to be used to locate and rent the scooters. They agreed to share in the time it would take to gather the scooters at the end of the day and distribute them around town for the next day's rentals.

They pooled their available cash on hand, with Al kicking in \$5,000 and Bill investing \$10,000. Charlie agreed to contribute \$3,000 along with his know-how and the time needed to develop the mobile app, which they valued at \$6,000. Once the business turned a profit, Al and Charlie agreed to increase their initial investments so that each would have invested a total of \$10,000 to start the business.

Al, Bill and Charlie estimated that they would each need to devote between 10 to 15 hours per week to work on the business and agreed to split the profits equally. Everything moved very quickly and since Al, Bill and Charlie were all friends and started the business in their spare time, nobody gave any thought to drafting a written agreement.

Things went well for a few months. It was the summer season and the scooters were in high demand. ABC Scooters was generating just enough in rentals to cover its expenses, but wasn't turning a profit.

Then, unbeknownst to the partners, a glitch in the mobile app resulted in rental fees not being collected, and instead gave customers use of the scooters for unlimited periods of time. Al and Bill only discovered the glitch when they found

that auto-payments for the van and scooter leases weren't being processed. Al and Bill were furious with Charlie, who had busied himself adapting the mobile app for use by a company that rented cars by the hour in the same city.

Everyone agreed they had to inject more money into the business to create a small safety net and make the necessary payments while Charlie worked the bugs out of the mobile app, but they couldn't agree on an exact dollar figure and where the funds would come from. Bill's fiancé offered to make a significant investment in the business if she was made a partner. Al and Bill were on board with the idea, but Charlie, who never got along with Bill's fiancé, refused to agree to her becoming a partner.

In the meantime, Al and Bill, who had started paying the scooters and vans leases out of their own pockets to avoid a default, objected to making any further payments unless Charlie agreed to contribute more money or let Bill's fiancé become a partner. Bill, who had laid out more cash than Charlie to get the business started, felt that he was entitled to a greater say in how to proceed.

Charlie, who had other people interested in the mobile app he'd created, was willing to leave the partnership and walk away from his initial \$3,000 cash investment, but only if he could take the mobile app with him. Al and Bill objected, claiming the mobile app was the property of the partnership. They instead demanded that Charlie turn over the source code for the app and resign. He refused and the partners found themselves at a stalemate while the clock tick on the future of ABC Scooters.

Intention v. Stark Reality

There is no question that Al, Bill and Charlie formed a partnership by virtue of their intention to co-own a business for profit.¹¹ They agreed on their initial capital contributions, the amount of time they would each contribute to the endeavor, and their respective roles in operating the business. However, they did not agree to any terms that addressed critical issues, such as sourcing additional capitalization, how management decisions would be made, what their duty of loyalty to the partnership would require, how new partners would be admitted, or how existing partners might be expelled.

In the absence of an agreement to these terms, what are the partners' respective rights and obligations? How could a formal partnership agreement have provided Al, Bill and Charlie with an easier path forward?

Management of the Partnership; Admitting New Partners

In the absence of contrary provisions contained in their partnership agreement, Al, Bill and Charlie all have equal rights and an equal voice in the conduct of the partnership business.¹² The fact that Bill contributed more cash or its



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equivalent than Al and Charlie does not provide him any extra “votes” or control on the question of how to proceed.

The Uniform Partnership Act does provide that, as to matters that are “in the ordinary course of business of a partnership,” only a majority of the partners need to agree.¹³ However, in the absence of an agreement to the contrary, the Act requires unanimous consent of the existing partners to admit a new partner.¹⁴ It is not uncommon, however, for a general partnership agreement to require something less than unanimous consent for most issues that may arise.

The stalemate between Al, Bill and Charlie could have been avoided entirely if a written partnership agreement had addressed those issues and, for example, required consent of only a majority of the partners to admit a new partner and accept the new partner’s offer of financing.

Providing for Additional Capital

Although it does not appear that the partners of ABC Scooters would have acquiesced in a call for additional capital contributions, a well-crafted general partnership agreement would have addressed whether the partners would be required to contribute capital after making their initial investment.

For example, the agreement could provide that a majority of the partners require that all partners make additional capital contributions when it is in the best interests of the partnership. Should one or more partner refuse to comply, another partner may fund the non-participating partner’s contribution which, at the option of that partner, would either be booked as an additional capital contribution or as a loan to the partnership.

The partners’ respective interests in the partnership could be adjusted accordingly as there is nothing in the Uniform Partnership Act that would prevent partners from including this type of provision in their agreement.

Expelling a Partner

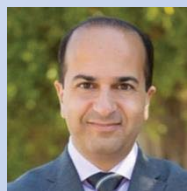
The UPA addresses instances which cause a partner to be “dissociated” from a partnership, including by expulsion—an action that Al and Bill are contemplating.¹⁵

A partner can be expelled in accordance with the terms of the partnership agreement.¹⁶ In the absence of an agreement regarding expulsion, the unanimous vote of the remaining partners can expel a partner—but only in very narrow circumstances, none of which are remotely applicable here.¹⁷ Failing these two options, the default provisions of the Act give the partnership and the partners the ability to seek a judicial determination expelling a partner on any of the following grounds:

- “The partner engaged in wrongful conduct that adversely and materially affected the partnership business.”
- “The partner willfully or persistently committed a material breach of the partnership agreement” or breach of fiduciary duties.



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- The partner has acted in relation to the partnership business in a way that makes it “not reasonable to carry on the business in partnership with the partner.”
- The partner has “otherwise become incapable of performing the partner’s duties under the partnership agreement.”¹⁸

The UPA also provides additional circumstances under which a partner is dissociated without the need for judicial intervention, but none are applicable where the partners simply disagree with each other regarding the management of the partnership and admission of a new partner.¹⁹

Under the ABC Scooters example, it is not clear whether a court would expel Charlie on any of the grounds laid out in the Act. Perhaps, more importantly, it is unlikely that Al and Bill would have the resources needed to file an action seeking Charlie’s expulsion or that the business would survive the ensuing litigation.

This impasse could have been avoided. It is not unusual for a general partnership agreement to provide for the expulsion of a partner by majority vote based on the occurrence of specified conditions. Generally, not only will the partnership agreement provide for the right of expulsion, but also what becomes of the expelled partner’s interest, such as the terms of a buyout and any other factors that need to be considered.

Some partnership agreements may also provide for binding arbitration of all disputes between partners and the partnership in order to avoid the expense and delays of litigation. Since arbitrations have, in many instances, become just as protracted and expensive as court proceedings, discussing the inclusion of a mediation provision with the client as a means to reach a resolution without the need for formal action should be considered.

Partnership Property: Can Charlie Claim the Mobile App as His Own?

The default provisions of the Uniform Partnership Act provide that property “acquired by a partnership is property of the partnership and not of the partners individually.”²⁰ “Property” is defined as “all property, real, personal, or mixed, tangible or intangible, or any interest therein.”²¹

What we know is that Charlie developed the mobile app as part of his agreed-upon capital contribution to the partnership. On its face, the partnership “acquired” the mobile app and according to the UPA, a “partner may use or possess partnership property only on behalf of the partnership.”²² Additionally, a “partner is not a coowner of partnership property and has no interest in partnership property that can be transferred, either voluntarily or involuntarily.”²³

Does this mean that Charlie has no right to modify the mobile app and sell it to other businesses? At first blush, the answer appears simple. Since modifying the mobile app and offering it for sale to third parties is not something within the

ordinary course of operating the scooter business, all of the partners would have to agree to expand the business in that direction.²⁴

In actuality, there are other factors which could impact the answer. For example, what if the mobile app Charlie developed was itself a modification of an app that he had previously created? Did Charlie contribute all of the intellectual property rights associated with the mobile app or did he contribute only the right to use it to the partnership? Although an intellectual property law analyses is beyond the scope of this article, the ABC Scooters scenario highlights the reality that whenever intellectual property is being contributed to a partnership, it is essential that the partnership agreement specifically address exactly what aspect of the intellectual property is to become property of the partnership.

Fiduciary Duties of Each Partner

The Uniform Partnership Act codifies the fiduciary duties that each partner owes to the partnership and to each other, and imposes duties of loyalty, care, good faith and fair dealing on each partner.²⁵ As explained earlier, these duties may be modified in the general partnership agreement in the manner provided by the Act,²⁶ but not eliminated entirely.²⁷

According to the UPA, a partner’s duty of loyalty includes a duty to account to the partnership and hold as trustee any opportunity, benefit, property or profit derived from that partner’s use of partnership property or information, a duty to refrain from having or representing an interest that is adverse to the partnership, and a duty to refrain from competing with its business.²⁸

As discussed above, as long as it is not “manifestly unreasonable,” a partnership agreement may carve out specific types or categories of activity that do not violate the duty of loyalty or provide a mechanism by which some or all of the partners may authorize or ratify it after they have received a full disclosure of all of the facts material to the proposed transaction, even though the transaction would technically violate the duty of loyalty.²⁹

A partner’s duty of care as provided in the Act requires only that a partner refrain from engaging in conduct that is “grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.”³⁰ Assuming that Al, Bill and Charlie resolve their differences and decide to have a partnership agreement drafted, they may need to include language that modifies the duty of loyalty as it relates to the exploitation of Charlie’s mobile app.


For example, assuming Al and Bill concede that Charlie only contributed a version of his mobile app for use by the partnership and not the underlying intellectual property, Al and Bill might argue that by selling a modified version of the app to a short-term car rental company in the same locale, Charlie is breaching his duty of loyalty to the partnership by doing business with a competing enterprise.

Al and Bill may agree, however, that Charlie can modify and sell the mobile app to an entity other than a potential competitor. In short, the rights and prohibitions that Al, Bill and Charlie agree to with regard to Charlie's exploitation of the mobile app should be memorialized in the partnership agreement.

Since Al, Bill and Charlie are not devoting all of their time and energies to the business of the partnership, there may be additional categories of activities that are not "manifestly unreasonable" to identify as activities which will not violate any of the partners' fiduciary duties.

Additionally, it would be a good idea, especially where individual partners possess expertise that can be used in unrelated fields, to include a provision in the partnership agreement using the relevant ratification language of the UPA. Such a provision should clearly state that either all of the partners or a number or percentage specified in the partnership agreement "may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty."³¹

Additional Terms

This article only explores the basics of a general partnership agreement. There are many useful resources which address numerous other options for terms of an agreement to discuss with a client. The clear intent of such discussions, as well as of the agreement itself, is to provide as much guidance and certainty as possible for the partners as they move forward with their business enterprise. 

¹ See, California Corporations Code §16202(a).

² See, Code §16103(a).

³ See, Code §16103(b).

⁴ *Id.*

⁵ See, Code §16103(b)(3).

⁶ See, Code §16103(b)(4).

⁷ See, Code §16103(b)(5).

⁸ *Id.*

⁹ See, Code §16103(9).

¹⁰ See, Code §16306(a).

¹¹ See, Code §16202(a).

¹² See, Code §16401(f).

¹³ See, Code §16401(j).

¹⁴ See, Code §16401(i).

¹⁵ See, Code §16601.

¹⁶ See, Code §16601(2)-(3).

¹⁷ See, Code §16601(4).

¹⁸ See, Code §§16601(5) and (7)(C).

¹⁹ See, Code §§16601(1), (6), and (8) – (10).

²⁰ See, Code §16203.

²¹ See, Code §16101(15).

²² See, Code §16401(g) (Emphasis added.)

²³ See, Code §16501.

²⁴ See, Code §16401(j), "An act outside the ordinary course of business of a partnership ...may be undertaken only with the consent of all of the partners...."

²⁵ See, Code §16404.

²⁶ See, Code §16103(b).

²⁷ See generally, Code §16103.

²⁸ See, Code §16404(b).

²⁹ See, Code §16103(b)(3).

³⁰ See, Code §16404(c).

³¹ See, Code §16103(3)(B).

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Test No. 119

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. General partnerships are one of the most difficult types of entities to form and maintain.
☐ True ☐ False
2. A written partnership agreement is not required to form a general partnership.
☐ True ☐ False
3. A general partnership is formed upon the association of two or more persons to carry on as co-owners a business for profit, but only if the persons intend to form a partnership.
☐ True ☐ False
4. The terms of a written general partnership agreement will supersede all of the "default" provisions of the Uniform Partnership Act.
☐ True ☐ False
5. A partnership agreement may carve out specific types or categories of activities that do not violate the duty of loyalty as long as it is not manifestly unreasonable.
☐ True ☐ False
6. A partnership agreement may prescribe reasonable standards by which a partner's "good faith and fair dealing" is measured.
☐ True ☐ False
7. A general partner is always jointly and severally liable to third parties along with the other general partners.
☐ True ☐ False
8. In the absence of a contrary provision in a partnership agreement, a partner who contributes more capital to the business than his or her other partners does not have any greater say in how the business of the partnership should be conducted.
☐ True ☐ False
9. Admitting a new partner requires only a majority vote of the existing partners because it is a matter that is in the ordinary course of the business of a partnership.
☐ True ☐ False
10. A partnership agreement can never provide that a partner can be expelled from the partnership upon the unanimous vote of the remaining partners.
☐ True ☐ False
11. The "default" provisions of the Uniform Partnership Act of 1994 provide that a partnership can seek a judicial determination expelling a partner based on that partner's willful breach of fiduciary duties.
☐ True ☐ False
12. In the case of intellectual property contributed by a partner to the partnership as part of his capital contribution, the originating partner always becomes a co-owner of the intellectual property along with the partnership.
☐ True ☐ False
13. Regardless of who owned the mobile app developed by Charlie, each of the partners of ABC Scooters had a duty to refrain from competing with the partnership business.
☐ True ☐ False
14. Assuming that Charlie knew the mobile app was not working but decided to ignore the issue, he would have breached the duty of loyalty he owed to the partnership.
☐ True ☐ False
15. A partnership agreement may modify or eliminate a partner's duty of care owed to the partnership.
☐ True ☐ False
16. The Uniform Partnership Act of 1994 applies to registered limited liability partnerships.
☐ True ☐ False
17. In the absence of a partnership agreement, the Uniform Partnership Act of 1994 dictates how the profits of the partnership business are to be shared among the partners.
☐ True ☐ False
18. Despite the absence of a partnership agreement, Al and Bill, as the remaining general partners, could have unanimously voted to expel Charlie as a partner.
☐ True ☐ False
19. If you draft a partnership agreement on behalf of one or more partners, it is important to obtain the appropriate conflict waivers first.
☐ True ☐ False
20. Assuming that ABC Scooters owned the mobile app that Charlie developed, the partnership could have decided to sell a modified version of that mobile app to a non-competing business on the vote of a majority of the partners.
☐ True ☐ False

MCLE Answer Sheet No. 119

INSTRUCTIONS:

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

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ANSWERS:

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

1. ☐ True ☐ False

2. ☐ True ☐ False

3. ☐ True ☐ False

4. ☐ True ☐ False

5. ☐ True ☐ False

6. ☐ True ☐ False

7. ☐ True ☐ False

8. ☐ True ☐ False

9. ☐ True ☐ False

10. ☐ True ☐ False

11. ☐ True ☐ False

12. ☐ True ☐ False

13. ☐ True ☐ False

14. ☐ True ☐ False

15. ☐ True ☐ False

16. ☐ True ☐ False

17. ☐ True ☐ False

18. ☐ True ☐ False

19. ☐ True ☐ False

20. ☐ True ☐ False

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The Fork in the Road: Meet Incoming SFVBA President Yi Sun Kim

By Michael D. White

Bankruptcy and business law attorney Yi Sun Kim has blazed a path that has taken her from Taft High School in Woodland Hills to Incoming President of the San Fernando Valley Bar Association, travelling full circle via Wellesley College in Boston, Loyola Law School in Los Angeles, and a partnership at Greenberg & Bass in Encino. Active in the SFVBA since she began her legal career, Kim will be one of the youngest lawyers, as well as being the first Asian-American ever, to head the Bar when she takes the oath of office on October 6 at the SFVBA Installation Gala at El Caballero Country Club in Tarzana.

THE YOUNGEST OF THREE CHILDREN BORN TO immigrant parents, Yi Sun Kim was raised in the San Fernando Valley, energized by the dream of one day becoming a medical doctor. But her life path wove in another direction that took her from Taft High School in Woodland Hills, to a partnership at the Encino law firm of Greenberg & Bass, via undergraduate work at Wellesley College in Boston, study-abroad programs at University College London and Hong Kong University, and a JD degree from Loyola Law School.

In 2007, Kim joined Greenberg & Bass, where she currently specializes in bankruptcy and business-related litigation and transactions. Six years later, the *San Fernando Valley Business Journal* recognized her as a Women in Business Rising Star. In 2015, she received the prestigious Lasarow Award from Public Counsel for her outstanding pro bono work with Neighborhood Legal Services, and was the subject of a feature article in the June 2017 issue of *Southern California Professional* magazine.

Active in the SFVBA since she began her legal career, Kim was elected to the Bar's Board of Trustees several years ago and was honored as the 2015 recipient of its President's Award for her dedicated service to the organization and the Valley legal community.

Working her way up the Bar ladder from member to Trustee and Section Chair to Officer, Kim will have reached the highest rung next month when she is sworn in as President of the 92-year-old Bar.

Valley Lawyer recently had the opportunity to sit down with Kim for a few minutes and talk about her background, her experience, and her vision for the SFVBA over the next year.

Q: When you are sworn in as the SFVBA's new president, you will be one of the youngest attorneys to hold that post, as well as being the first Asian-American ever to head the Bar. What does that distinction mean for you?

A: That can be such a heavy question. I initially shied away from it because I don't like to attract attention to myself and make grand statements just for the sake of making statements. But I came to see that I was doing a disservice to everyone by doing that. Diversity and inclusion are truly important—in terms of age, gender, ethnicity, and level of experience. That needs to be promoted, and the Bar Association needs to be recognized for understanding that.

My assuming this position is a reflection of our organization's forward momentum because a lot of effort has been put into diversifying our group. It's not about checking off the box and saying, "Great, now we've got a young Asian-American president!" That shouldn't be done simply for the sake of doing it; it's done for the sake of encouraging anyone and everyone to get involved and be heard, and improving ourselves as advocates and members of this community by getting a more accurate and comprehensive understanding of the different needs, views and life experiences of our community.



Photos provided by Yi Sun Kim



Certain voices are not more important than those of others and we need to make sure that the people of the Valley are properly represented. If we don't promote the fact that the Bar has taken this step, we are discrediting the fact that there are underrepresented voices and groups that must be recognized, as well as doing a great disservice to those in the Valley legal profession who have worked so hard to make progress like this happen.

This isn't about me, it's about where we are as a Bar, a community, to take pride in and promote diversity and our efforts to include every person into the discussion.



**Q: Wellesley College is a long way from the Valley.
What made you decide to go there?**

A: I'm a homebody and I really like being around family, so I did not originally intend to go so far away. I wanted to stay in California, but my parents encouraged me to seriously consider Wellesley because they thought it would be good for me. I'm the youngest of three and very well taken care of by my parents and siblings. They felt it would be a good maturing experience for me to go out there. Also, my brother and sister went to UC schools, which is the path I thought I'd take, so I think my parents thought I should try something different. They were very encouraging.

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A family friend was a senior at Wellesley at that time. I connected with her by telephone to ask what it was like at a women's college and would I get the true college experience, what Boston is like. We spoke for about two hours and when I looked at the time difference, it was 3:00 a.m. for her in Boston and it was finals week. She wouldn't get off the phone because she was so excited to tell me about the school and Boston and life there.

I thought it had to be a really awesome place to be if she was willing to spend so much time with me. That clinched it for me and so I decided to go there before I even saw the place. We took a trip out there, spent a day, and then we flew right back.

Q: You entered Wellesley with the intention of pursuing a career in medicine, but you decided to consider other options. Why?

A: I had wanted to be a doctor from the time I was very little. My father is a pharmacist and my mother managed the pharmacy, and they encouraged me to pursue a career in the medical field.

They emigrated here from Korea, own a pharmacy, working as hard as they do six days a week, no vacations. That's why we went to Wellesley and could only spend a day because we had to get back to work.

They worked with doctors who had more flexibility with their time but were still engaged with their patients and appreciated in the community. My parents wanted that for their kids and did whatever they could to encourage me and my education. I grew up thinking that's what I was going to do. I was really interested in science and the medical field in high school, so I went to Wellesley and fulfilled all my pre-med requirements. But I started to have second thoughts.

Q: What made you question your original plan?

A: I came to realize that I just wasn't passionate about medicine and it wasn't something I really wanted to dive into. I saw that if I was just going through the motions, it wouldn't be a good quality of life for me, and I wouldn't do a good job at it.

I have a lot of friends that have gone on to get their MDs or PhDs and they would love talking about these new studies and what was going on in their labs and what they were learning, but for me, I wasn't really that interested in it. I wanted to shut that part off and talk about other things. Over time, I came to see that when it comes to something as demanding as a career in medicine, you have to be totally dedicated to it, it's not something you can only be partly committed to. It's extremely challenging and requires so much from a person.

I loved writing and I ultimately realized that I was really engaged in my English classes, so I decided to major in English while fulfilling the pre-med requirements.

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Q: Why the shift from medicine to the law?

A: I had decided to complete my pre-med requirements before I decided to make such a huge shift in direction. I returned to the Valley and a friend of mine was working as a file clerk at Greenberg & Bass while she was going to law school, so I was able to land a job as a file clerk there.

There was an attorney there who was doing transactional work. At the time, I had this mistaken notion that attorneys just like to argue and I'm not the type of person who likes to debate for the sake of debating. I saw this attorney drafting, negotiating, making deals, not just confronting people and one-upping someone, but working cohesively and collaborating to build something. I thought that's what I'd like to do.

When I wanted to be a doctor, I liked the idea of being a doctor; I had glamorized it and overlooked what was involved day-to-day. So before I went to law school I determined not to think about what a lawyer is, but what they do day-to-day—answering phone calls, talking with opposing counsel, drafting, researching. I decided that if that's something I can do every day and not hate it, then maybe it's a better fit and I'd be willing to put my best efforts into it.

Q: Would you say the dedication of being a doctor is different from that of being a lawyer?

A: They both can be very grueling, but in different ways. There is a physical element to being a doctor. When a doctor is treating a patient, especially with something intensive like surgery, it can be both mentally and physically taxing.

But being an attorney means not letting anything break you down mentally or emotionally. I realized just a year into my law career that it's not about everything going perfectly, it's about how you can fix a challenging problem and not lose your cool. That's the emotionally challenging part if it; people are constantly coming to you with problems that you can't allow yourself to be overwhelmed by. You have to look at things with a level head and figure out the way to fix it.

All the while, you have to have compassion for your clients and maintain civility and respect with opposing counsel. It

takes a lot of internal strength to confront opposing counsel, or not let an emergency situation or some unforeseen problem defeat you, all while putting on a brave face for your client.

Q: How would you sum up your experience at Wellesley?

A: My parents were right—it was the best thing I could have done. I learned so much by going to Wellesley. Just being in Boston, I met so many different people. It was a humbling experience to have Harvard and MIT, and there are some really accomplished people that came from all over the world as well.

But you quickly get past all that, and everyone just gets to know the people underneath it all. It taught me to just focus



on who the person is, and not be intimidated even now if I find myself up against an opposing counsel who went to Harvard Law. I also experienced a lot of personal growth from being in an environment like Wellesley, where the emphasis was on bringing out your individual opinions, passions, and quirks while engaging in discussions, projects and friendships with students of such diverse backgrounds.

Going to a women's college is really special, it goes beyond books and exams. The school and its professors provide a safe space that nurtures creativity and self-discipline, so each person can go down the path of her choosing.

Q: Did you have any idea at the beginning of your legal career that you would be where you are now?

A: None at all. I had absolutely no idea back then that I'd be where I am now. I had this idea that attorneys and leaders had to be very aggressive and love to challenge



people. That's not the case. The most successful attorneys I know collaborate to resolve issues.

I like to hear what everyone has to say before making a decision. I didn't think that being where I am now would fit my personality. That changed once I came onto the Bar's Board of Trustees because every president I've worked with has had their own style. None of them were dictators and all were collaborative.

I say this particularly with [past SFVBA President] Carol [Newman] in mind because she has a soft voice. She inspired me because she was such a strong and passionate leader; she got a lot of things done by the time her term was over. I served as emcee at the installation for the succeeding president and I mentioned that she felt that everyone has a voice and a responsibility to use it.

I learned from that that it's not just about giving people the opportunity to speak, it's that they should speak. I think that's why I'm ready to take this position because of the examples Carol and others set and by knowing that I don't have to be anything but me.

Q: Would you take the same career path if you had to do it all over again?

A: Yes, exactly the way I've done it. I've always felt that every experience you go through, good or bad, makes you better. I'm glad I took the two years off after college to decide what I wanted to do. It gave me a break before law school and I think I took law school much more seriously because of that time off in between.

I've never been at another firm. At one early point, I questioned whether I wasn't challenging myself enough, that I should be venturing out more. But I soon realized that I really loved where I was and what I was doing and the people that I was working with. I realized that I was in something good so I asked myself, "Why risk it? I have a great situation" and so I stuck with it and I'm very, very glad that I did.

Q: Time travel ahead a year. Where would you like to see the Bar a year from now?

A: We have a deeply committed membership that's been with us for a long time and I want to continue to make sure that they stay involved and don't feel as if they've been abandoned.

On the other hand, we also want to encourage new members to come in. A year from now, I'd like us to have a fresh crop of new ideas, new contacts, and new programs; not an overhaul because I want to make sure that we don't forget where we have been and not have anyone think that what we've done over the years doesn't matter anymore.

It's like a TV show where there's a cast change that alters the dynamic that people have enjoyed for years. It doesn't change the underlying theme, but it's refreshing to implement a change that can carry the show forward.

Like any organization, you have to rejuvenate or you go stale. Change is sometimes necessary, but you don't want to lose yourself in the process. I'm hoping that this year, we can inject a little more excitement and energy to build on what we've accomplished in the past. 🛠️

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The “ABC” Test— Not as Easy as 1...2...3 for California Businesses

By Sue M. Bendavid and Amy I. Huberman

IN A RECENT LANDMARK 82-PAGE decision, the California Supreme Court made it much more difficult for California employers to classify workers as independent contractors.

In *Dynamex Operations, Inc. v. Superior Court*,¹ the court considered who was an employee for purposes of the wage orders adopted by California’s Industrial Welfare Commission (IWC). The *Dynamex* court adopted the so-called “ABC” test—already used in several other states—and rejected the “multi-factor” balancing test previously adopted by the court in *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations*.²

Under *Borello*, the court looked at a six-part balancing test to assess whether a worker was an employee or an independent contractor. The primary factor was the extent to which the employer had the right to control the putative employee.

Other factors included the alleged employee’s opportunity for profit or loss

depending on his managerial skill, as well as his investment in equipment or materials required for his task, or his employment of helpers; whether the service rendered requires a special skill; the degree of permanence of the working relationship; and whether the service rendered is an integral part of the alleged employer’s business.”³

In adopting the ABC test, the court shifted the focus and placed the burden squarely on the hiring entity to establish workers are properly classified. Under the ABC test, a worker is considered an employee to whom an IWC wage order applies unless the hiring entity establishes all of the following requirements, with the onus on the alleged employer to establish each element of a three-prong test.⁴

- First, 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.

- Second, the worker performs work that is outside the usual course of the hiring entity’s business.
- Third, 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.⁵

Case Background

Dynamex is a nationwide same-day courier and delivery service that operates a number of business centers in California. The company adopted a new policy and contractual agreement which classified all drivers as independent contractors rather than employees. As independent contractors, drivers were required to provide their own vehicles and pay their own transportation expenses, including fuel, tolls, vehicle maintenance, and liability insurance, as well as all taxes and workers’ compensation insurance costs.

Plaintiff Charles Lee entered into an agreement with Dynamex to provide



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delivery services for the company as an independent contractor. Three months after he left the company, Lee sued on his own behalf and on behalf of all similarly situated Dynamex delivery drivers, claiming that the company's alleged misclassification of its drivers led to its violation of the applicable IWC wage order governing the transportation industry. As a result, Dynamex was found to have violated the California Labor Code and engaged in unlawful business practices in violation of Business and Professions Code §17200.

After extensive motion practice, including denials of class cert and then appellate reversal, the trial court eventually certified the class. In the trial court's class certification order, the court focused on three alternate definitions of "employ" in the wage order and as discussed by the court in *Martinez v. Combs*.⁶ The *Martinez* court held that "to employ" means "to exercise control over the wages, hours or working conditions of the worker; suffer or permit the worker to work; or engage the worker, thereby creating a common-law employment relationship."⁷

Dynamex filed a writ in the Court of Appeal arguing that the second and third alternate definitions articulated in *Martinez* applied to the question of joint employment and did not apply to worker classification analysis.⁸ The company contended that the multi-factor test in *Borello* applies to whether a worker is an employee or independent contractor.⁹

The Court of Appeal rejected Dynamex's contention, concluding that neither the provisions of the wage order nor the court's decision in *Martinez* supported the company's argument that the order's definitions of "employ" and "employer" are limited to the joint employer context and not applicable in determining whether a worker is an employee or independent contractor for the obligations imposed by the wage order.¹⁰ The Court of

Appeal upheld the trial court's class certification order.

As a result, Dynamex filed a petition for review with the California Supreme Court.

California Supreme Court's Decision

California's highest court agreed with the Court of Appeal and held it did not err in concluding the "suffer or permit to work" definition of "employ" contained in the wage order may be relied on in evaluating whether a worker is an employee under a wage order.

The court engaged in lengthy discussion of the tests utilized in *Borello* and in *Martinez*, interpreting the test in *Borello* as calling for the "application of a statutory purpose standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification—either employee or independent contractor—best effectuates the underlying legislative intent and objective of the statutory scheme at issue."¹¹

The court next interpreted the *Martinez* test which, although not directly involving the issues of whether workers were employees or independent contractors, addressed the meaning of "employ" and "employer" as used in the wage orders. It disagreed with Dynamex's argument that the second and third alternate definitions discussed above should be understood as applicable only to the joint employer context,¹² noting that the *Martinez* court took pains to emphasize the importance of not limiting the meaning and scope of "employment" to only the common law definition.¹³

Ultimately, the court determined it was appropriate to interpret the "suffer and permit to work" standard in California's wage orders as "placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's

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coverage; and requiring the hiring entity, in order to meet this burden, to establish each of the three factors embodied in the ABC test, namely that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; that the worker performs work that is outside the usual course of the hiring entity's business; and, that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed."¹⁴

Application of the ABC Test

The court explained each prong of its newly adopted ABC test:

- A. 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. The court concluded that a worker who is, either by contract or practice, subject to the type and degree of control a business typically exercises over employees should likewise be considered an employee under the common law test.¹⁵ Further, it noted that depending on the nature of the work and overall arrangement of the parties, a hiring entity need not control the precise manner or details of the work to be found to have maintained control over the worker.¹⁶
- B. The worker performs work that is outside the usual course of the hiring entity's business. The court looked to whether the individual is providing services to the business in a role that is comparable to that of an employee, rather than an independent contractor.¹⁷ Workers who provide services within the usual course of the business are likely employees.¹⁸ The court provided an example of a retail store

which hires an outside plumber to repair a leak in a bathroom in its store.¹⁹ The plumber's services are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber to work as its employee.²⁰

- C. 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. The court noted that the term "independent contractor" when applied to an individual worker, is ordinarily understood to be an individual who independently made the decision to go into business for himself or herself.²¹ However, when a worker has not independently made the decision to establish a business but is instead designated as an independent contractor by a hiring entity, there is risk the business is attempting to evade the wage order.²² The fact that a hiring entity has not prohibited or prevented a worker from engaging in an independent business is not sufficient to establish the worker autonomously made the decision to go into his/her own business.²³

Other Labor Code Provisions

So what about Labor Code rules that are not mentioned in the IWC Wage Orders, for example, Labor Code §2802? Does the ABC test apply to wage claims that do not arise from a wage order?

Labor Code §2802 requires employers to indemnify employees for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties..." For a driver, this might mean vehicle related expenses. For now, employers will argue the holding in *Dynamex* does not extend to other provision in the Labor Code, like §2802.²⁴ Therefore, these may still be controlled by the *Borello* test.

Decisions Post-Dynamex

One question raised is whether the *Dynamex* ruling will apply to the determination of joint employer status. So far, the answer appears to be no.

In *Curry v. Equilon Enterprises, LLC*, the Court of Appeals concluded the Supreme Court did not intend to apply the ABC test to joint employment issues and that the public policy reasons relied on in adopting the ABC test do not apply to other contexts, such as joint employment.²⁵


Significantly, one possible result is that the alleged employee, not the alleged joint employer, will continue to bear the burden of proving joint employment, while those accused of being “joint employers” of another’s workers may still be able to argue other tests apply.

Dynamex’s Impact on California Businesses

The decision to classify a worker as an employee or independent contractor should not be taken lightly, as the potential for misclassification is great and penalties can be severe.

A hiring entity classifying its workers as employees is required to pay Social Security, payroll taxes, unemployment insurance, and state employment taxes. The hiring entity must also provide

workers’ compensation insurance and comply with the state’s nuanced and ever-changing laws governing employment in California. Thus, misclassification can result in an onslaught of claims and penalties against the hiring entity.

Businesses engaging independent contractors are encouraged to contact legal counsel to review the relationship under the ABC test and determine if its contractors are classified correctly. 

¹ *Dynamex Operations, Inc. v. Superior Court*, 4 Cal.5th 903 (2018).

² *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, 48 Cal.3d 341 (1989).

³ *Id.* at 355.

⁴ *Dynamex Operations, Inc.*, *supra* at 957.

⁵ *Id.* at 916.

⁶ *Martinez v. Combs*, 49 Cal. 4th 35; *Dynamex*, *supra* at 914 (2010).

⁷ *Id.*

⁸ *Id.* at 915.

⁹ *Dynamex*, *supra* at 915.

¹⁰ *Id.* at 944.

¹¹ *Id.* at 934.

¹² *Dynamex*, *supra* at 944.

¹³ *Id.* at 938.

¹⁴ *Id.* at 956-57.

¹⁵ *Dynamex*, *supra* at 958-59.

¹⁶ *Id.*

¹⁷ *Id.* at 959.

¹⁸ *Dynamex*, *supra* at 959.

¹⁹ *Id.*

²⁰ *Id.*


²¹ *Dynamex*, *supra* at 962.

²² *Id.*

²³ *Id.*

²⁴ *Dynamex*, *supra* at 942.

²⁵ *Curry v. Equilon Enterprises, LLC*, 23 Cal.App.5th 289, 314 (2018).



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The Big Business of Small and Solo Law Firm Growth

By Barry P. Goldberg

THE PREMISE IS SIMPLE—great lawyers do not necessarily make great business people.

Many solo and small law firms in the San Fernando Valley have been chugging along for years providing personalized service that larger law firms seem unable to deliver. However, that personalized service comes with a very steep price to the lawyer as, quite often, solo and small firms work weekends and evenings, with no real opportunity for any reprieve.

In addition, cash flow is a constant battle, which causes stress and can detract from the lawyer's ability to provide objective first-class service.

The time-worn advice to “stay small” and to “keep overhead low”

will go just so far with the costs of living and maintaining a law practice continuing to increase. Realistically, solo and small firms must increase revenue year over year or risk making less money, deferring raises to associates or support staff, or take less and less time off.

Solo and small firms usually experience the “roller coaster” effect—holding on for a big settlement in a big case, paying down debt, relaxing for a few minutes, and then waiting for the next one to jump into the boat.

During that down cycle, the lawyer may be tempted to take that less-than-profitable client or case outside the firm's area of expertise, just to make ends meet. But as the file cabinet fills up with “second-class” cases, it

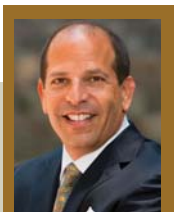
becomes more and more difficult to focus marketing efforts to land that dream case or client. If the lawyer ever does manage to hook that upside client or case, second-tier suits start to become burdensome because they are not as satisfying or profitable. And so on.

While many solo and small law firms have figured out how to balance the practice of law with the business of practicing law, a growing number of firms are ready to acknowledge that, perhaps, having a law degree does not necessarily qualify one to run a law business.

Enter the law firm advisor.

Law Firm Advisory Business

A few years back, specialized law



Barry P. Goldberg has a personal injury practice in Woodland Hills. He is incoming President Elect of the SFVBA and Chair of its Attorney Referral Service Committee. Barry P. Goldberg, APLC was a Law Firm 500 Honoree in 2016 and 2017 and expects to be named again in 2018. He can be reached at bpg@barrygoldberg.com.



firm consultants and coaches began marketing their services to solo and small law firms—usually during “crisis” circumstances such as a visit from the disciplinary wing of the State Bar—wherein it became obvious the small law or sole practitioner firm did not have policies and procedures in place to account for client funds or the proper safeguards for scheduling statutes of limitations.

These consultants also became trusted advisors to aging lawyers and law firms which needed exit and transition planning. Unfortunately, lawyers are a stubborn bunch and tend to doubt that anyone could advise them about their respective practices. Certainly, while they struggle financially, they are reluctant to spend even more money on consultants.

Most recently, larger groups and advisory organizations have appeared on the scene, with the primary focus on teaching willing

solo and small law firms the basics of running a successful law business. Younger lawyers have been joined by “tired and overworked pros” by acknowledging the reality that they could use some sage guidance in running their law offices. Because these companies provide services to a larger number of solo and small law firms, the costs can be substantially less, paid over time and ordered “a la carte.”

Law firm advisory companies are showing up at legal conventions, and make extensive use of email, social media, direct mail, and print advertising. Some of the more prominent names that you may have seen are the Rainmaker Institute, Atticus, Raymond James and How to Manage a Small Law Firm. There are many more and their number is growing.

Interestingly, all the companies occupying this space seem to have a different angle for attracting struggling

lawyers and a different way of presenting the information, procedures and systems. While, some companies use videos and downloads, others organize large seminars, distribute written materials and offer personal coaching to disseminate their message. There is, quite literally, something for every solo or small law firm out there depending on style and price.

Remarkably, all the law firm advisory companies are preaching from the same or similar book. They stress that successful law firms that are run properly create happier lawyers with more free time. That is a good point.

After all, from any perspective, what lawyer doesn’t want more income and more free time?

Basic Curriculum

In order to achieve a successful law firm, they teach that a lawyer must acknowledge the seven main components of any law firm (even for solos) that must all work properly together: marketing, sales, production, people, physical plant, financial controls, and the owner or owners. Advisor companies counsel lawyers how to effectively manage each of those functions.

Not surprisingly, the advisory companies usually start with marketing because a steady flow of desirable cases produces the revenue that fuels the balance of the practice.

Sales is the means of converting a prospective client into a paying client and, depending on the area of practice, the advisory company can help develop a strategy for the law firm to attract more “first-class” clients. It’s no secret that attorneys are traditionally poor at sales and it is a valuable skill that must be learned.

Production is, basically, the process that a law firm uses to deliver the legal services that have been provided. It can consist of the checklists, procedures, and work product that need to be consistently

top quality. It also allows for the creativity and the skill of the particular solo or small firm to stand out from the rest in the legal arena.

People involved in the firm can be separated into two different, but overlapping concepts. First, are the actual people employed in the firm or is it just you? Is it you and a paralegal, or a small firm with an associate, receptionist and lawyer? Regardless of the staff, certain functions must be undertaken by those people—or even the solo.

Every law firm has the following jobs that need to be done: receptionist, secretary, paralegal, associate, rainmaker, manager, CEO, COO, CFO, bookkeeper and owner. Of course, no solo or small law firm has separate employees for each function. In fact, a solo does all of the listed functions. One of the goals should be to have the lowest cost possible for each function.

For example, every time a lawyer answers the phone, he or she is doing the work of a \$15 an hour receptionist.

The physical plant is made up of all the things necessary for each member of the law firm staff to do their jobs—the office, copier, computers and software, and telephone system, for example.

Just as important are the financial controls and accounting. For a law firm to operate profitably, lawyers must know and learn to understand the numbers.


Finally, the owner. How much income is required for the office to operate effectively and what functions should the owner be tasked with and what functions should be delegated?

Celebrating Growth

One way or the other, every advisory company will recommend that a solo or small law firm grow either in size

or revenue or both. Growth will fund the lawyer's lifestyle, keep valuable employees satisfied with raises and benefits, and head off partners fighting over ever decreasing profits.

Because virtually all law firm advisors have the "growth" goal in common, they banded together in 2016 to acknowledge the successful growth of selected solo and small law firms with an event called *The Law Firm 500*, which is modeled after the *Inc. 500*.

To be selected, law firms are encouraged to provide their year over year revenues to obtain a percentage growth rate. The top law firms are listed and given awards based on that growth rate. The event is held in an upscale location with noted speakers and seminars, all culminating with the awards and a famous keynote address. This year's event will be held next month in Las Vegas. 

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RENTING A DWELLING ISN'T always a secure living situation as one never knows when there will be a new landlord or if the dwelling will be sold or even demolished.

Nevertheless, there are laws that protect renters from being evicted without notice or a chance to defend their legal rights. In James' (a pseudonym) situation, those laws helped protect him during a change in his rental unit's ownership.

James had rented a home in the San Fernando Valley for around five years. Unexpectedly, he received a letter stating that his rent was to be paid to an unknown person who had bought the property. Not sure of what to do, James contacted the Department of Consumer Affairs, which advised him not to pay his rent until he was given proof of ownership. This action, or lack thereof, resulted in him receiving an unlawful detainer.

A call to the ARS resulted in James being referred to attorney Atyria Clark, whose practice focuses on immigration law, bankruptcy law and landlord/tenant issues. James' case was nothing out of the ordinary for Clark. "I've come across a number of cases where the landlord passes away and someone else tries to step in and claim that they have the authority to remove someone from the property," she says.


According to Clark, proof of ownership is necessary in these cases because it gives the new landlord legal claim over the property and informs tenants of the claim. Otherwise, anyone could claim to be the new owner and take off with the rent without obligations.

Once the proof was provided, Clark negotiated with the new owner's attorney for the back rent and move out date. "I find that in most unlawful

detainer actions, the landlords are usually willing to negotiate a resolution that is going to be to everyone's mutual benefit," she says. "That avoids having to take the risk of going to trial and to avoid having a lot of post-judgment motions filed."

Unfortunately for James, the house he was living in was not rent controlled and lacking any habitability issues, he wasn't eligible to receive any relocation fees. Nevertheless, Clark arranged to have any back rent waived in exchange for James vacating the premises by a certain date.

Perhaps most importantly, Clark was able to finalize the negotiations outside of court so the case didn't go to trial, with the result being that James avoided having an eviction on his record.

"She [Clark] was very professional," says James. "She helped a lot with the case and I would recommend her to others. I really liked the manner she carried out the case." 

“Landlords are usually willing to negotiate a resolution that is going to be to everyone's mutual benefit.”



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A Fire Burns Within

DUE TO YOUR SUPPORT, THIS year the Valley Community Legal Foundation was honored to recognize nine remarkable scholarship recipients. This month, I am proud to highlight the individual experiences and achievements of Elizabeth Lopez, the Grand Prize recipient of Lewitt, Hackman, Shapiro, Marshall & Harlan's 2018 VCLF Student of Distinction Scholarship Award.

At the age of six, Elizabeth had witnessed her father drag her mother down the hallway of their apartment building by her hair because her mother had taken the car keys to drive her to kindergarten. Crying for him to stop, young Elizabeth was powerless to do anything to help her mother, recalling the shocking event with haunting clarity.

"Seeing my mom in such a vulnerable position continues to shape me to this day," she says.

Soon after, Elizabeth's father deserted them, leaving her mother to take on the role of both parents, just as the young girl's grandmother had done in Colombia after her own husband abandoned his wife and family. As a result, Elizabeth's mother, the oldest of eight children, was forced to drop out of school in the third grade in order to help support the family.

Here in America, due to a lack of education, undocumented status,

and limited English language skills, Elizabeth's mother had to work a seemingly endless series of odd jobs to provide for Elizabeth and her younger sister. Her tireless and unending sacrifices gave Lopez a positive role model and an opportunity that her mother never personally had, an education.

"I have always excelled at school, but I didn't feel challenged until I enrolled in James Monroe High School's Law and Government Magnet," says Elizabeth.



Adjusting to the rigors of the Magnet program over time, she asked a lot of questions, sought tutoring, and worked harder than ever.

Her participation in speech and debate classes since the ninth grade boosted her confidence and helped her develop her legal voice and sharpen her skills.

Her efforts paid off the following year when a legal brief she penned—a

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President



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15-page essay involving three constitutional arguments—was selected as one of the best presented in both her English and law classes.

Her growing interest in the law also motivated her to participate in mock trial for the past three years. In her sophomore year at James Monroe, her team advanced to the semi-finals, with Elizabeth honored as Best Defendant in Los Angeles County.

Representing the respondent's side in moot court, she also successfully defended her first legal argument before a panel of judges that included three practicing attorneys.

Another way Lopez has made a positive difference in her community is by serving on the Superintendent Student Advisory Council of the Los Angeles Unified School District, meeting monthly with the Superintendent to discuss issues such as campus safety, curriculum and other issues impacting the LAUSD.

"I aspire to a career as an attorney, hoping to advocate for women who don't feel strong enough to speak up for themselves when victimized by violence," says Elizabeth. "I want to work to ensure that more young women have the chance to develop their gifts, speak out against injustice, and pursue their dreams."

Reflecting on her mother's sacrifices, "From driving me to tournaments in other cities to buying my suits and dresses for speech and

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debate so that I might look professional, my mother has always put my needs above her own so that I might have a better life."

Elizabeth realized at an early age that some women like her mother remain in unhealthy and often violent relationships for financial reasons. "I want to become an attorney not only to fight for the rights of women and minorities experiencing injustice, but also become independent so that I won't have to rely on someone else to take care of me financially," she says.

In a letter to the VCLF, Elizabeth later expressed her thanks to the Valley Community Legal Foundation and the San Fernando Valley Bar Association for the scholarship.

Eager to attend Smith College in the fall, she wrote, "I can accomplish my dreams now, with people like you believing in me. I hope that in the future I can give back to my own community and possibly practice law here in the San Fernando Valley and help fight for victims of domestic violence."

Before her name was called at the Magnet culmination, Elizabeth wrote: "I remember tearing up as you spoke. A fire burns inside me to excel because of my mom and what happened to her from raising her own siblings to raising her own children despite her lack of means and education. Everyone has their own story, and I thank you for allowing me to share mine and understand how it's motivated me to become a lawyer one day." 

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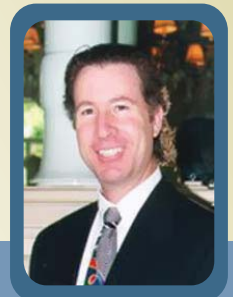
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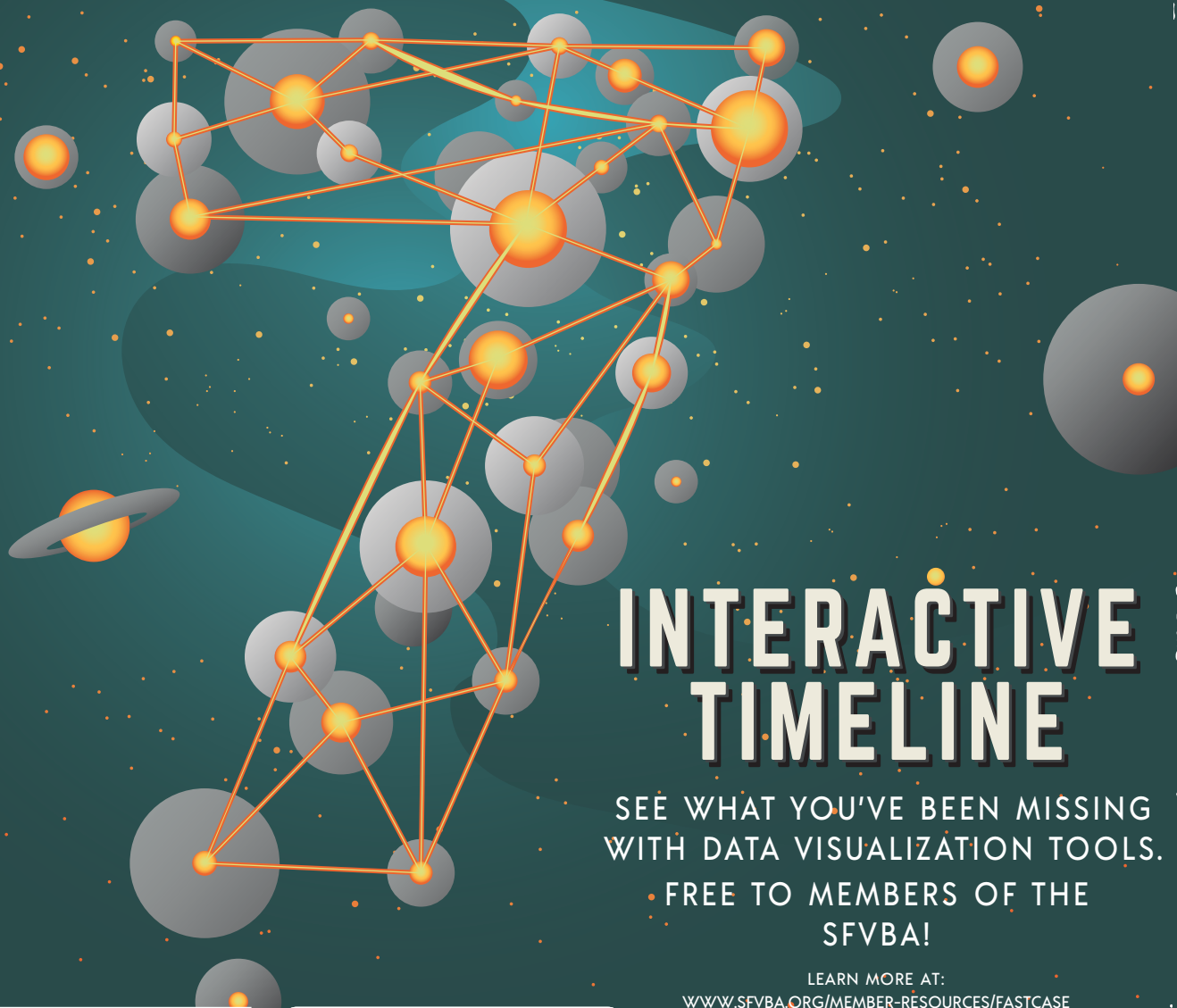
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