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OCTOBER 2018 • $5

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When Catastrophe Strikes: Are You Prepared?

Critical Mass: Representing Disaster Victims

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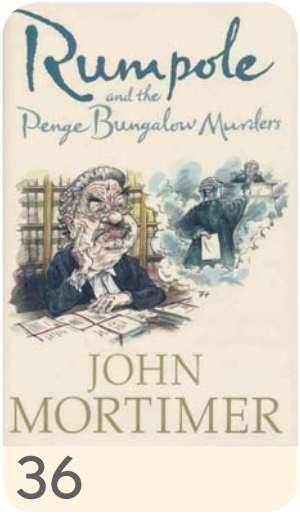

FEATURES

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VALLEY LAWYER

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Civil and Open-Minded

YI SUN KIM
SFVBA President

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MY COUSIN IS EXTREMELY accomplished, having advanced to a high-level government position that is held by few if any other women in South Korea.

I was fortunate to meet with her when she attended a special conference during a break from her Harvard graduate program. She needed quick business cards—nothing fancy to advertise herself or a comprehensive description to justify why she was there. Her accomplishments and position were more than sufficient for people to want to connect with her, and she just needed an easy way for them to know how.

I took her to our neighborhood copy place. As soon as my cousin spoke (in English, which is widely taught in Korea from elementary school on), the employee's exasperation was impossible to ignore. We answered his questions, but due to her accent, his tone was immediately condescending, his speech deliberately faltering, and his eyes rolled while he sighed repeatedly every time she spoke. He could not get rid of us fast enough.

This is nothing new. Many of us experienced that growing pain of having strangers be rude to our parents as they exercised their English pronunciation. We know the moment people stop listening and interrupt to make side comments disparaging them, loud enough to hear, with the assumption that they cannot understand or will not do anything about it if they could. We think we are being the strong ones to not alert our parents, but we know now our parents were the strong ones who perfectly understood, but remained polite in front of us to protect our own pride.

Unfortunately, people continue to associate a person's intelligence with that person's grasp of the English language and ability to communicate effectively, even if English is their primary language. The person's skills may lay elsewhere—in artistic or mathematical matters, for example, rather than putting thoughts in words. The person may have inadequate schooling and support to nurture those skills at critical times in his or her development, suffer from anxiety or other natural inhibitions, or is understandably discouraged after having been silenced and ignored for so long. The bottom line is that one's inability to adequately express his or her thoughts does not make what he or she wants to communicate any less important.

> "We can give speeches and write articles to advertise our own accomplishments and views, but our higher duty is to make sure the views, needs and rights of others are equally represented."

As attorneys, we enjoy a true gift—the luxury of being able to express our thoughts to the extent and manner that we intend. We may be at our best in court, arguing on the spot in front of a judge and jury, or in meticulously writing down our arguments in labored motions. Either way, we experience the relief of releasing our thoughts and getting our point across.

Ours is not a gift that makes us special or better people. It creates a duty on our part to help others. Isn't that what attorneys are supposed to do? Advocate on behalf of others who cannot represent themselves? We can give speeches and write articles to advertise our own accomplishments and views, but our higher duty is to make sure the views, needs and rights of others are equally represented.

It's poetic justice that my parents have a child whose livelihood is based on using words to communicate the needs and thoughts of others. I have been guided by this belief leading up to my tenure as the new President. I believe everyone should be included in the conversation, and there should always be a civility and open-mindedness in the communications.

With that, I intend this year to be a time of growth and decorum, expression and courtesy, acceptance and respect. I welcome everyone's viewpoints and look forward to productive discussions with our Bar's members to promote collective and individual growth.

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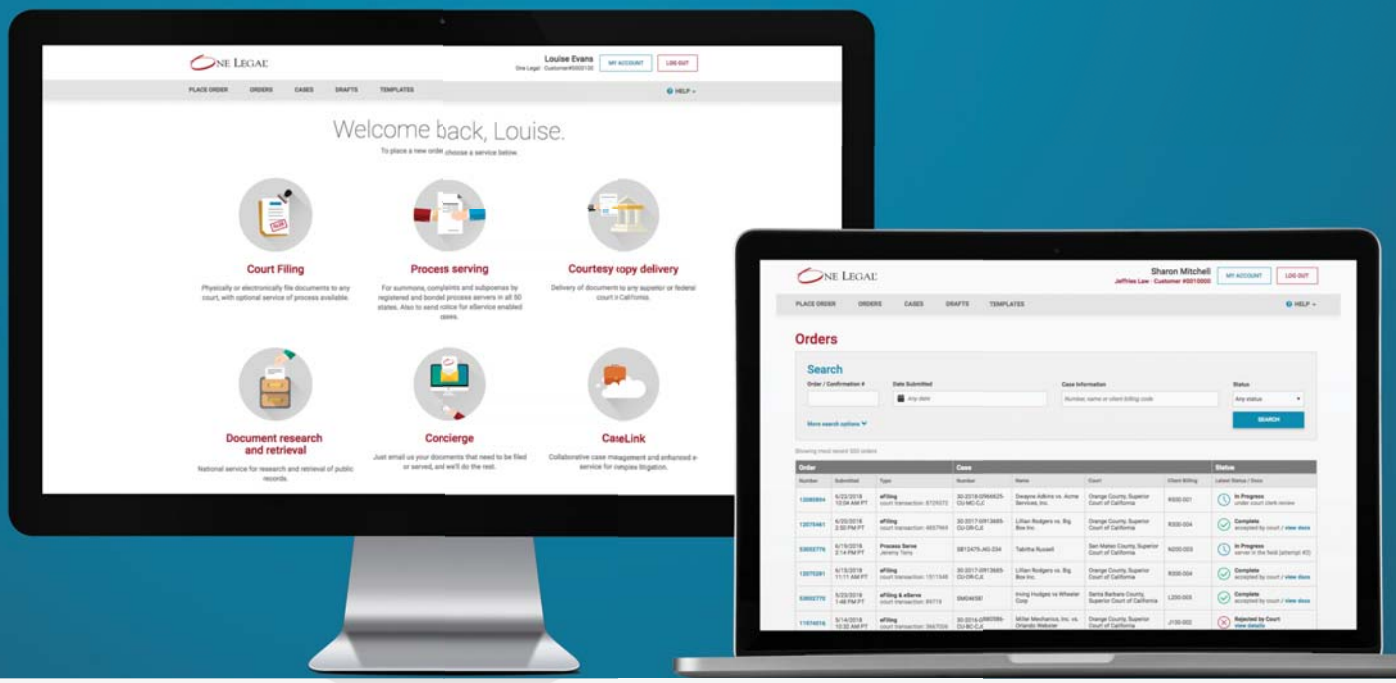

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Semper Paratus

MICHAEL D. WHITE
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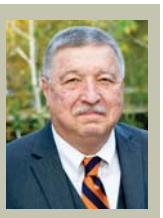


WHENEVER AN EVENT OF either genuine or feigned cataclysmic social impact occurs, it's quite common at post-event parties and other such gatherings to ask, "Where were you when it happened… what were you doing?"

Examples abound: Pearl Harbor, the Kennedy assassination(s), Neil Armstrong's landing on the Moon, Hank Aaron's 775th home run, the dismantling of the Berlin Wall, 9/11, or more locally, the misnamed Northridge Earthquake.

I say misnamed because—like everyone else in the area—my family and I were convinced that the earthquake erupted right under our kitchen and we were living in Burbank at the time. The 6.7 magnitude quake, actually epi-centered about 20 miles underneath Reseda, struck at 4:31 a.m. on Monday, January 17, 1994 and offered most folks ready, and relatively simple, responses to the above questions: "In bed…sleeping."

> "We were convinced that the earthquake erupted right under our kitchen…"

A few days before, I had prepped our two pre-teen sons bedroom for painting by removing the book and trophy-laden bookshelves above their beds. Had I not done so, it would have all come crashing down on them and, I am sure, at the very least, adding two more patients to the crowd of injured and shaken assembled over the next few days at the local hospital's emergency room. Perhaps it was an act of unconscious prescience, but whatever the case, it was my only preparation for the quake.

Several days that followed were punctuated by gut-wrenching aftershocks and a complete lack of basic water, gas and electricity services, as well as shuttered grocery and hardware stores, gas stations and pharmacies, and thousands of homes and businesses that looked as if they're been given the treatment, in grand style, by James Bond's bartender.

Shaken and stirred? Yes to both: a hard lesson learned, which stirred me to vow that never again would my family be caught napping…no pun intended…in such an eventuality.

My wife and I live in earthquake country and so do you. This is reality. We are as ready as we can be with a plan, a page-worn copy of the Boy Scout Handbook, and enough water, canned and dried food, propane, tarps, radios, flashlights, cooking utensils, matches, blankets, candles, batteries, first aid supplies, and more than enough other stuff that need not be mentioned, set aside to equip a squad of Army Rangers in the field for a month. I strongly recommend you consider the same for you and your family. It's quite astounding what a trip to the local discount store can produce.

As my Dad used to say, "It's better to have it and not need it, than need it and not have it."

Semper Paratus—it's the motto of the U.S. Coast Guard. It means "*Always Ready*." The only relevant question is, are you?

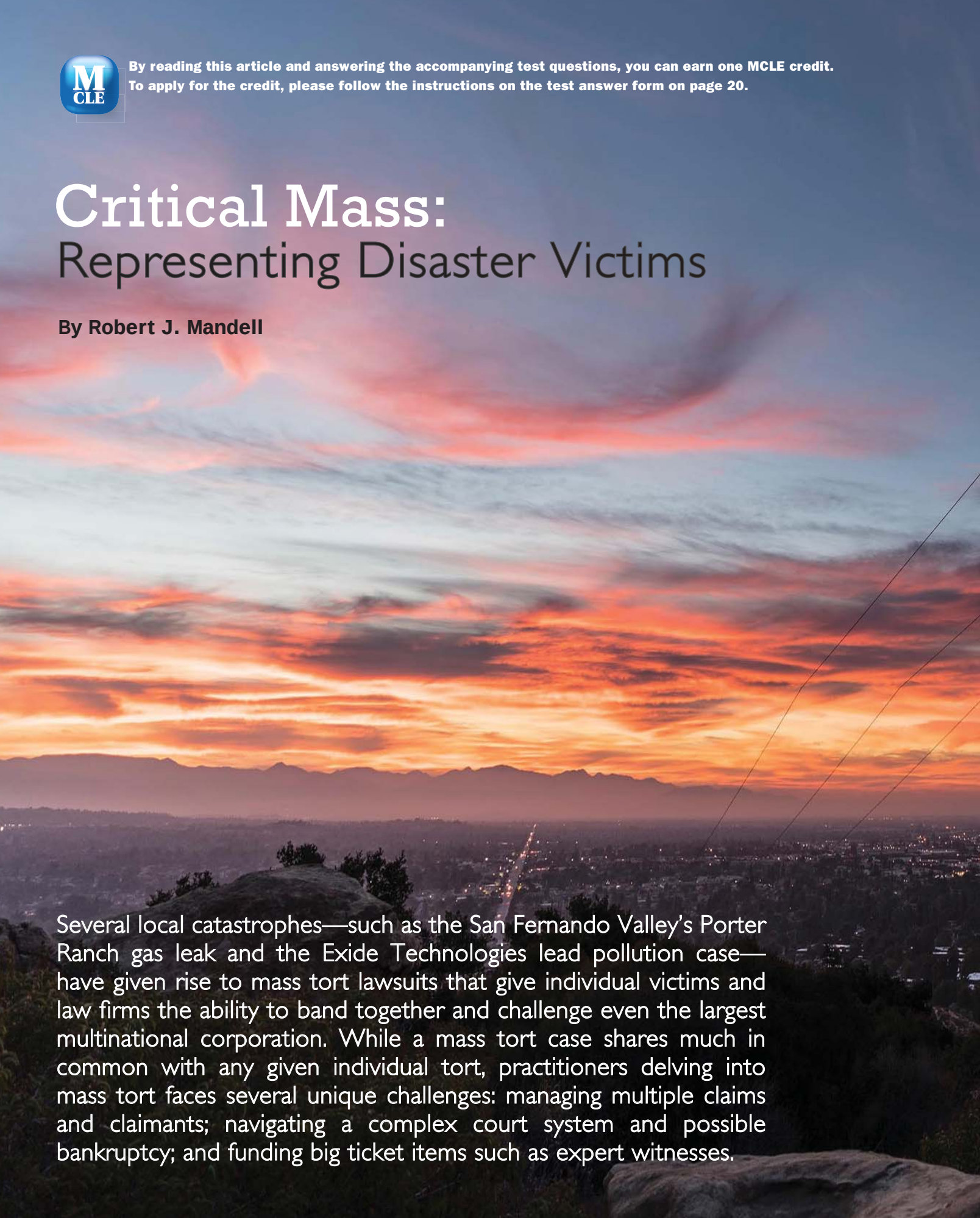
CALENDAR

OCTOBER 2018

SUN	MON	TUE	WED	THU	FRI	SAT
LATINO HERITAGE MONTH (SEPTEMBER 15 – OCTOBER 15)						
		1 VBN VALLEY BAR NETWORK 5:30 PM	**2**	**3**	**4** Membership & Marketing Committee 6:00 PM SFVBA OFFICES	**6** INSTALLATION GALA & SCHOLARSHIP AWARDS El Caballero Country Club | Tarzana 6:00 p.m. See page 21
7	**8**	**9** Probate & Estate Planning Section: What You Need to Know about California's New Decanting Statute 12:00 NOON MONTEREY AT ENCINO RESTAURANT. Kevin Moore discusses the latest decanting statute that became effective in September 2018. (1 MCLE Hour) Board of Trustees 6:00 PM SFVBA OFFICES	**10**	**11**	**12** Bankruptcy Law Section: 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 *Penrod, Midland Funding, Thorpe Insulation* and *IndyMac Bancorp.* Approved for Bankruptcy Law Legal Specialization. (1.25 MCLE Hours)	**13**
14	**15**	**16** Taxation Law Section: 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)	**17** Workers' Compensation Section: Tips and Tricks for Attorneys 12:00 NOON MONTEREY AT ENCINO RESTAURANT. WCAB Judge Sandra Rosenfeld will give the latest ins and outs regarding petitions and trials. (1 MCLE Hour)	**18**	**19**	**20**
21	**22**	**23** Trivia Night Mixer 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! See page 43 Editorial Committee 12:00 NOON SFVBA OFFICES	**24** LACBA and SFVBA Present: Revised Rules of Professional Conduct 5:00 PM REGISTRATION 5:30 PM – 7:00 PM SEMINAR SFVBA OFFICES. Diane Karpman and Rebecca Rosenberg will review the latest changes. Free to SFVBA and LACBA members. Limited Seating. 1.5 Hours MCLE (Legal Ethics).	**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.

SUN	MON	TUE	WED	THU	FRI	SAT
				1 Membership & Marketing Committee **6:00 PM SFVBA OFFICE**	2	3
4	5	6	7	8	9	10
11	**12** 	**13** Probate & Estate Planning Section **12:00 NOON MONTEREY AT ENCINO RESTAURANT** (1 MCLE Hour) Board of Trustees **6:00 PM SFVBA OFFICE**	14	15	16	17
18	**19** Family Law Section Hot Tips **5:30 PM MONTEREY AT ENCINO RESTAURANT** Our must attend annual seminar led by Gary Weyman. Approved for Family Law Legal Specialization. (1.5 MCLE Hours)	**20** Taxation Law Section Update from the California Assembly Committee of Revenue and Taxation **12:00 NOON SFVBA OFFICE** San Fernando Valley Assemblymember Luz Rivas will discuss the latest news regarding the Committee. (1 MCLE Hour)	**21** Workers' Compensation Section **12:00 NOON MONTEREY AT ENCINO RESTAURANT**	22 	23	24
25	26	27	28	**29** DINNER AT MY PLACE 6:30 PM	30	



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 20.

Critical Mass:
Representing Disaster Victims

By Robert J. Mandell

Several local catastrophes—such as the San Fernando Valley's Porter Ranch gas leak and the Exide Technologies lead pollution case—have given rise to mass tort lawsuits that give individual victims and law firms the ability to band together and challenge even the largest multinational corporation. While a mass tort case shares much in common with any given individual tort, practitioners delving into mass tort faces several unique challenges: managing multiple claims and claimants; navigating a complex court system and possible bankruptcy; and funding big ticket items such as expert witnesses.

WHEN THE FIRST WHIFFS OF ROTTEN EGG smell wafted into homes near the base of Aliso Canyon, few could imagine the choking, toxic onslaught of natural gas that would envelop the community of Porter Ranch in the weeks to come.

Fewer still in this upper middle-class San Fernando Valley suburb had any idea that the Southern California Gas Company, owned by energy giant Sempra, operated a large natural gas storage facility right in their back yard or could foresee the mass emergency exodus to hotels and rental homes that followed. But when their throats started to burn and their children's noses began to bleed, whole families packed up whatever would fit in their cars and self-evacuated, leaving behind homes filled with explosive methane and uncertainty.

A Valve Breaks

For years, SoCalGas had pumped more and more natural gas into cavernous wells hundreds of feet below ground level. But one of the valves that had kept the gas from pushing up to the surface and out into the air was old and worn. SoCalGas apparently knew this, but kept filling the well anyway.

On October 23, 2015, the valve finally broke, sending massive amounts of highly explosive methane into the breathing space of neighborhoods for miles around. It was a cataclysmic disaster on a global scale—methane has many times the global warming effects of carbon dioxide—as well as a very individual one. Uprooted and shaken, every Porter Ranch resident suffered his or her own personal loss, while the story of toxic contamination in suburbia took the limelight on the national stage and local lawyers found themselves teaming up with firms from all over the country.

The Porter Ranch Gas Leak—also known as the Aliso Canyon Gas Leak—turned out to be the largest natural gas leak in the nation's history.[1]

Some 30,000 people have joined in several consolidated actions against SoCalGas and Sempra, which, although they provided stipends for temporary housing and other basic needs, have yet to compensate residents for their illnesses, the shock of having to flee their homes, the decline in property values, and the gut-wrenching fear of a repeat performance.

Although each individual story has its own pathos, no one resident could take on a behemoth corporation like Sempra alone. It is the power of joining the many individual claims into a single consolidated action—a mass tort—that gives each affected person a fighting chance. But while the underpinnings of mass tort share much in common with any given individual tort, the practitioner delving into mass tort faces several challenges unique to this setting. Chiefly among these are:

- The pragmatics of managing multiple claims and claimants
- Orienting a mass tort through a complex court system
- Navigating the case amid possible bankruptcy or Chapter 11 reorganization
- Considering other practical considerations such as funding

Mass Tort vs. Class Action

A lawyer thinking of dipping a toe into the murky waters of mass tort must first decide if the matter is truly a "mass" tort, or something else.

A mass tort is defined as "a civil action involving numerous plaintiffs against one or a few defendants in state or federal court. The lawsuits arise out of the defendants causing numerous injuries through the same or similar act of harm, for example, a prescription drug, a medical device, a defective product, a train accident, a plane crash, pollution, or a construction disaster."[2] Thus, for example, the Aliso Canyon Gas Leak, the horrific 2008 Amtrak train wreck in Chatsworth, and the Exide Technologies disaster discussed later in this article, all qualify as mass torts.

A mass tort should not be—though it often is—confused with a class action. While some courts have observed that a "mass action is a form of class action,"[3] the two are very different in both a legal and practical sense.

In a class action, a single class member may serve as the representative plaintiff for multitudes of claimants, and the various harms and losses are determined through that individual. This permits a very streamlined process where "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants."[4]

In a mass tort, however, all the known plaintiffs are generally joined in the suit and the various harms and losses can presumably be individually determined or tried. So while in both a mass tort and class action suit there must be common

Robert J. Mandell is partner in The Mandell Law Firm in Woodland Hills, focusing on catastrophic injury and significant torts. The firm represents several hundred victims of the Aliso Canyon Gas Leak and is co-counsel for all plaintiffs in the Exide lead battery case. He can be reached at rob@mandellaw.com.

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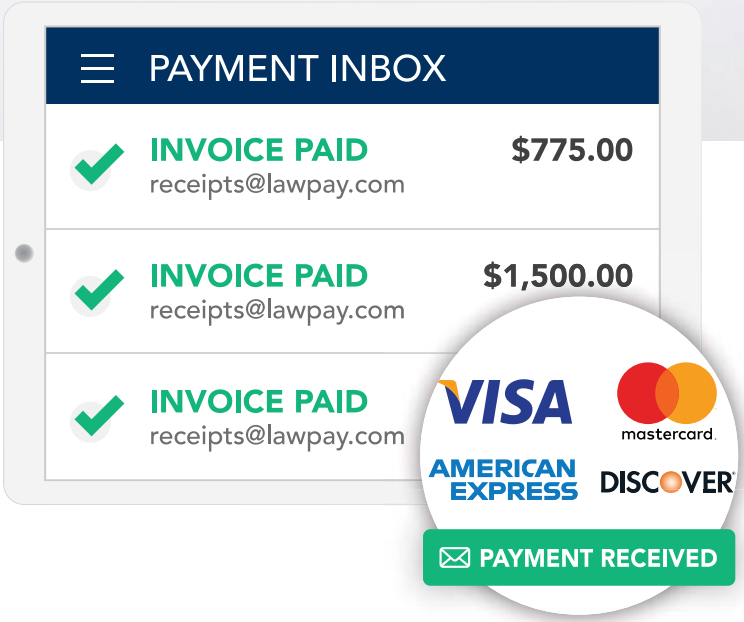

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questions of law and fact, a class action is generally not appropriate where the individual harms vary.

"In general, mass tort actions for personal injuries are not appropriate for class-action treatment…in that the major elements in tort actions for personal injuries—liability, causation, and damages—may vary widely from claim to claim. Reluctance to extend class-action treatment to mass torts governs even those types of claims which necessarily contain common questions of law and fact."[5]

This rule, enunciated by the Second District Court of Appeal in *Rose v. Medtronics, Inc*.[6] and its progeny, effectively carves out an exception from governing law, which provides for a class action. According to the finding in that case, "[When] the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."[7]

There are two prerequisites for a proper class action—an ascertainable class and a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. It is a bit circular, though, that the two requirements are substantially intertwined. "The existence of an ascertainable class depends in turn upon a demonstrated community of interest among the purported class members in common questions of law and fact."[8]

While mass torts would seem to fit these criteria, class certification is not likely for any personal injury actions under the *Medtronics* rule. Instead, mass tort plaintiffs "may be able to have the trial court coordinate their proceedings, thereby allowing the resolution of certain common facts while leaving each plaintiff responsible for proving facts particular to that individual."[9]

Nuts and Bolts of a Mass Tort

In short, a lawyer or lawyers representing mass tort plaintiffs likely cannot pursue a class action even though the clients are victims of a common wrongdoing.

In a practical sense, this means that the lawyer cannot simply select a particular plaintiff and file an action for others. Nor can a victim of a tort that has affected many simply sit back and let another person pursue the rights for the whole. Each mass tort victim must bring an individual claim—ideally through a lawyer—and though these claims may be consolidated, each claim for damages must stand on its own.

The downside is that the mass tort lawyer cannot take advantage of the so-called streamlined process of a class action. Then again, the lawyer is neither burdened by the often daunting task of getting a class certified, or the frequently expensive rounds of court mandated notifications to all the possible class members out there in the ether. Even though reaching out to potential clients in a mass tort setting entails its own expense and must comply with the Rules of Professional Conduct, once the clients have joined up, the case wields the power of the many with each one an ascertainable force.

As a practical matter, too, the courts have become very adept at streamlining mass tort cases involving hundreds, even thousands, of people. A mass tort case is invariably assigned to a complex litigation court where judges have broad leeway to identify and set time limits for phases of the litigation, and adjudicate legal and evidentiary sub-issues before trial. The judge can fashion discovery and other aspects of the case in such a way that duplicate efforts are minimized or avoided altogether.[10]

For instance, complex courts normally order a single set of written discovery on common issues of liability or causation. Instead of numerous sets of interrogatories on damages, individual plaintiffs commonly fill out questionnaires, or fact sheets, where they describe their particular experiences and harms.

In cases involving many law firms and hundreds or even thousands of plaintiffs, such as the Porter Ranch gas leak case, it is common to see a plaintiffs' steering committee (PSC) comprised of a few firms that spearhead the litigation and take responsibility for coordinating discovery, drafting and filing motions, and making court appearances.

This allows small- and medium-sized firms to conserve manpower and pool resources with larger firms on big ticket items such as expert witnesses. Thus, a lawyer representing a relative few mass tort victims can participate with minimal expense, though the lead firms will garner a premium on fees for their efforts and investment.

"The PSC's purpose is to represent the common interests of all plaintiffs. But all that comes at a price."[11] The court will usually allow the PSC a "tax" or assessment from the other participating firms of between four and eight percent. "That assessment is used to compensate those who perform 'common benefit work' and is usually deducted from the attorneys' fees portion of individual recoveries."[12]

Smaller firms can often find funding through several legal funding companies that provide critical-cost money for individual and mass tort actions. But the cost of the money can be expensive, upwards of 25 percent, and if it is a "non-recourse" loan, a substantial part of the case may ultimately go to the lender. Even for a larger, well-funded firm, the price tag of prosecuting a mass tort action can be daunting. Big polluters and other mass wrongdoers tend to be big deep-pocket companies that seem to draw from unlimited funds.

Costs for the Porter Ranch Gas Leak case, which is a relatively young action, already exceed what a single firm might manage alone. In its local action against Shell Oil, Girardi-Keese invested millions in the case, but the multi-national petroleum giant was outspending the firm 10 to 1. "It's like David and Goliath on steroids," says environmental lawyer Bob Finnerty.

Bankruptcy in Mass Tort Claims

Another challenge to mass tort litigators is the very real prospect that the wrongdoer may seek Chapter 11 reorganization or some other bankruptcy protection. This is common where the number of claims for justice seems infinite, as in on-going asbestos litigations.

"At least 15 asbestos manufacturers…have reorganized or liquidated in attempts to address massive numbers of known and unknown asbestos claimants using the Bankruptcy Code."[13] As another author noted, "Bankruptcies caused by mass torts…have already become a permanent feature of modern economic and legal life."[14]

Bankruptcy does not necessarily mean the wrongdoer has insufficient assets to satisfy the victims' claims. The bankruptcies and reorganizations in the Dow Corning breast implant, asbestos, Dalkon Shield and other cases all seem to have set aside adequate compensation funds.[15] But this is not always the case. In the environmental pollution arena, for example, Chapter 11 reorganization—like any bankruptcy protection—wipes the slate clean for the polluter

and may relegate its victims to having to accept fractions of pennies on the dollar. The availability of bankruptcy in environmental torts is, says one observer, "[t]he ultimate in self-insurance."[16]

In bankruptcy, a big polluter can shift the costs arising out of its environmental havoc to its victims, or at least those costs which exceed its ability to pay.[17] This poses an additional hurdle for practitioners battling on two fronts—one in their underlying liability action, and another in a coverage action against insurers hiding behind the tangled language of exclusions and coverage takebacks.[18]

Take, for example, the Exide Technologies lead pollution case in the neighborhoods just east of downtown Los Angeles. Exide's plant in the City of Vernon spewed lead product and other pollutants into the air well beyond allowed limits. Over that same time, the California Department of Toxic Substance Control (DTSC) and other regulators issued multiple warnings concerning the company's flagrant violations of permissible lead and arsenic levels. But the pollution just continued.

The community—which includes neighborhoods in Boyle Heights, Bell, Maywood and East Los Angeles—was none the wiser. Lead particulate is odorless and invisible, a silent poison that enters the bloodstream through inhalation, ingestion or dermal contact and then settles into the bones, blood stream, kidneys or the brain. Children are particularly susceptible, suffering brain developmental disorders, cognitive deficits and learning disabilities.

Some residents living in the area blanketed by the toxins spewed from Exide's Vernon plant have kidney disorders, and liver and lung cancers, while still others a variety of ill effects from the emissions. Parkways and the yards of some 10,000 homes are sown with lead contamination. The cost of the cleanup is expected to top more than $150 million, with California taxpayers footing most of the bill.[19]

When the DTSC temporarily shut down the Vernon plant in 2012, Exide foresaw the wave of claims on the horizon and promptly filed for bankruptcy protection under Chapter 11 in Delaware. By doing so, Exide was able to completely reorganize, while avoiding direct liability to the shareholders and residents impacted by its negligence and left only with applicable insurance.

Now the Vernon tort claimants wage a consolidated campaign against Exide in the Complex Litigation Unit of the Los Angeles Superior Court[20] and its insurers in two federal court actions.[21] In order to escape federal criminal charges, Exide agreed to permanently shut down the Vernon plant in 2015.[22]

But sometimes, as in Exide's case, Chapter 11 reorganization is almost a business model as the company had sought Chapter 11 protection several times previously, at least once while facing pollution claims.[23]

To companies that follow the Exide model, the costs beyond their assets are inconsequential as it never has to carry those costs. One industry observer calls this the "deterrence trap," where companies simply ignore dealing with their violations of environmental law because the legal price of their actions would, invariably, exceed the value of their combined assets. "When companies are permitted to file for bankruptcy to escape liability, the public or the injured parties will bear the costs that exceed polluters' assets."[24]

For this reason, a number of legal scholars suggest that public policy should require that courts minimize the weight of pollution exclusions written into insurance policies purchased by entities proven to be historical polluters. "A corporation will be indifferent between enormous liability and lesser liability if both would bankrupt it."[25] By insuring a known polluter, the insurer is already receiving premiums for the risk of pollution, despite exclusionary clauses to the contrary.[26] Granting coverage, then, makes it more likely that insurers will inspect policyholders and insist upon precautions to prevent contamination damage prior to the issuance or renewal of a policy.[27]

> "Public policy should require that courts minimize the weight of pollution exclusions written into insurance policies purchased by entities proven to be historical polluters."

From a practical perspective, however, relying on public policy arguments may not be all that impactful. Although California recognizes narrow construction of coverage exclusions, and the broad duty to defend which, as a practical matter, can encourage some insurers to pay claims, the coverage issues are typically nuanced and difficult to navigate.[28] The mass tort practitioner facing a bankrupt wrongdoer with recalcitrant insurers is well advised to bring insurance coverage counsel into the fold.

The Importance of Mass Torts

Despite the various challenges, mass torts bring a powerful tool to reshape public opinion and change corporate behavior.

For instance, attorney and author Jeb Barnes notes how the failure of legislative remedies have left asbestos-related mass tort actions to effectuate vast social and institutional changes—from our collective perception of the product itself and corporate culpability to laws and regulations enacted

because of the revelations coming out of those actions.[29] While the process may seem inefficient or inequitable to some—"elephantine" as U.S. Supreme Court Justice David Souter once said—those social, political and economic changes have principally emanated from the courts.[30]

According to attorney and author Anne Bloom, "Studies suggest that the potentially vast radiating effect of torts extend well beyond deterrence. Not only have legal actors in tort cases provided politically important normative validation for the views of the litigants, but the normative messages articulated in tort law have also found a receptive audience in key institutional actors, such as Congress and federal regulators."[31]

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[1] Abram, Susan, and Brenda Gazzar. "2 Years after a Gas Leak Filled the Air over Porter Ranch, What's next for Aliso Canyon?" *Los Angeles Daily News*, October 23, 2017. https://www.dailynews.com/2017/10/23/2-years-after-massive-gas-leak-porter-ranch-residents-wonder-whats-next-for-aliso-canyon-field/.
[2] "Mass Tort." Wikipedia. July 30, 2017. Accessed September 17, 2018. https://en.wikipedia.org/wiki/Mass_tort.
[3] *Koral v. Boeing Co*., 628 F.3d 945, 947 (7th Cir. 2011).
[4] *Collins v. Rocha*, 7 Cal.3d 232, 238 (1972).
[5] *Rose v. Medtronics, Inc*., 107 Cal.App.3d 150 (2nd Distr.1980).
[6] *Id.* at 155.
[7] *California Code of Civil Procedure* §382.
[8] *Bartlett v. Hawaiian Village, Inc*., 87 Cal.App.3d 435, 438 (1978).
[9] *Bennett v. Regents of University of California*, 133 Cal. App. 4th 347, 359 (2005).
[10] *California Rules of Court* Rule 3.400(c)(5).
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[12] *Id.*
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[15] See e.g. *In re Johns-Manville Corp*., 68 Bankr. 618, 628-29 (Bankr.S.D.N.Y.1986) aff'd in part, rev'd in part on other grounds, 78 Bankr. 407 (S.D.N.Y.1987), aff'd sub nom. *Kane v. Johns-Manville Corp*., 843 F.2d 636 (2nd Cir.1988); *In re A.H. Robins Co., Inc*., 88 Bankr. 742, 743 (E.D.Va.1988) aff'd, 880 F.2d 694 (4th Cir.), cert. denied sub nom. *Menard-Sanford v. A.H. Robins Co., Inc*., 493 U.S. 959, 107 L. Ed. 2d 362, 110 S. Ct. 376 (1989).
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[21] *Jalbert v. XL Ins. America, et al. Case No. 1:16cv 00710 GMS; and Allied World Natl. Assurance Co. v. Bloch, et al*. Case No. 2:17cv 07167.
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Test No. 120

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. A mass tort is a civil action involving numerous plaintiffs against one or a few defendants in state or federal court.
❑ True ❑ False

2. A mass tort is the same thing as a class action.
❑ True ❑ False

3. Both mass tort and class action involve common questions of law and fact.
❑ True ❑ False

4. Mass tort actions for personal injuries are not appropriate for class-action treatment.
❑ True ❑ False

5. Elements of a class action are: (1) an ascertainable class, and (2) a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented.
❑ True ❑ False

6. Mass torts cannot be brought as a class action because the individual harms vary.
❑ True ❑ False

7. In a mass tort, the lawyer can select a particular plaintiff to represent the other plaintiffs.
❑ True ❑ False

8. Each mass tort victim must bring an individual claim and the claims are joined together and consolidated.
❑ True ❑ False

9. A mass tort case is invariably assigned to a complex litigation court where judges have broad leeway to identify phases for the litigation and set time limits on those phases, and adjudicate legal and evidentiary sub-issues before trial.
❑ True ❑ False

10. Complex courts normally order numerous sets of written discovery on issues of liability or causation.
❑ True ❑ False

11. In very large mass tort cases, a plaintiffs' steering committee (PSC) made up of a few firms run the gist of the litigation.
❑ True ❑ False

12. A PSC normally receives a premium assessment of 25 to 30 percent of the attorneys' fees.
❑ True ❑ False

13. Mass torts are usually less expensive than other tort actions.
❑ True ❑ False

14. Practitioners can obtain funding through legal funding companies which provide low interest loans.
❑ True ❑ False

15. Mass tort litigators need not be concerned that the wrongdoer may seek Chapter 11 reorganization or other bankruptcy protection.
❑ True ❑ False

16. Chapter 11 reorganization always means there will be inadequate funds for victim compensation.
❑ True ❑ False

17. The availability of bankruptcy in environmental torts can supplant self-insurance.
❑ True ❑ False

18. In bankruptcy, a big polluter can shift the costs arising out of its environmental havoc to its victims, or at least those costs which exceed its assets.
❑ True ❑ False

19. Even where there are insurance issues involved in the mass tort action, it is not necessary to consult with an insurance coverage specialist.
❑ True ❑ False

20. Mass torts can effectuate "vast radiating changes" in social, political and institutional systems.
❑ True ❑ False

MCLE Answer Sheet No. 120

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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Tarzana, CA 91356

METHOD OF PAYMENT:

❑ Check or money order payable to "SFVBA"
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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.

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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

SAN FERNANDO VALLEY BAR ASSOCIATION *and*
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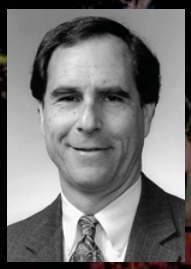
INSTALLATION GALA & SCHOLARSHIP AWARDS

10.06.18

El Caballero Country Club, Tarzana | 6:00 pm

Dinner and Hosted Cocktail Reception Under the Stars

Incoming SFVBA President
Yi Sun Kim



Incoming VCLF President
Mark S. Shipow

Installing Officer
Judge Huey P. Cotton

Special Farewell
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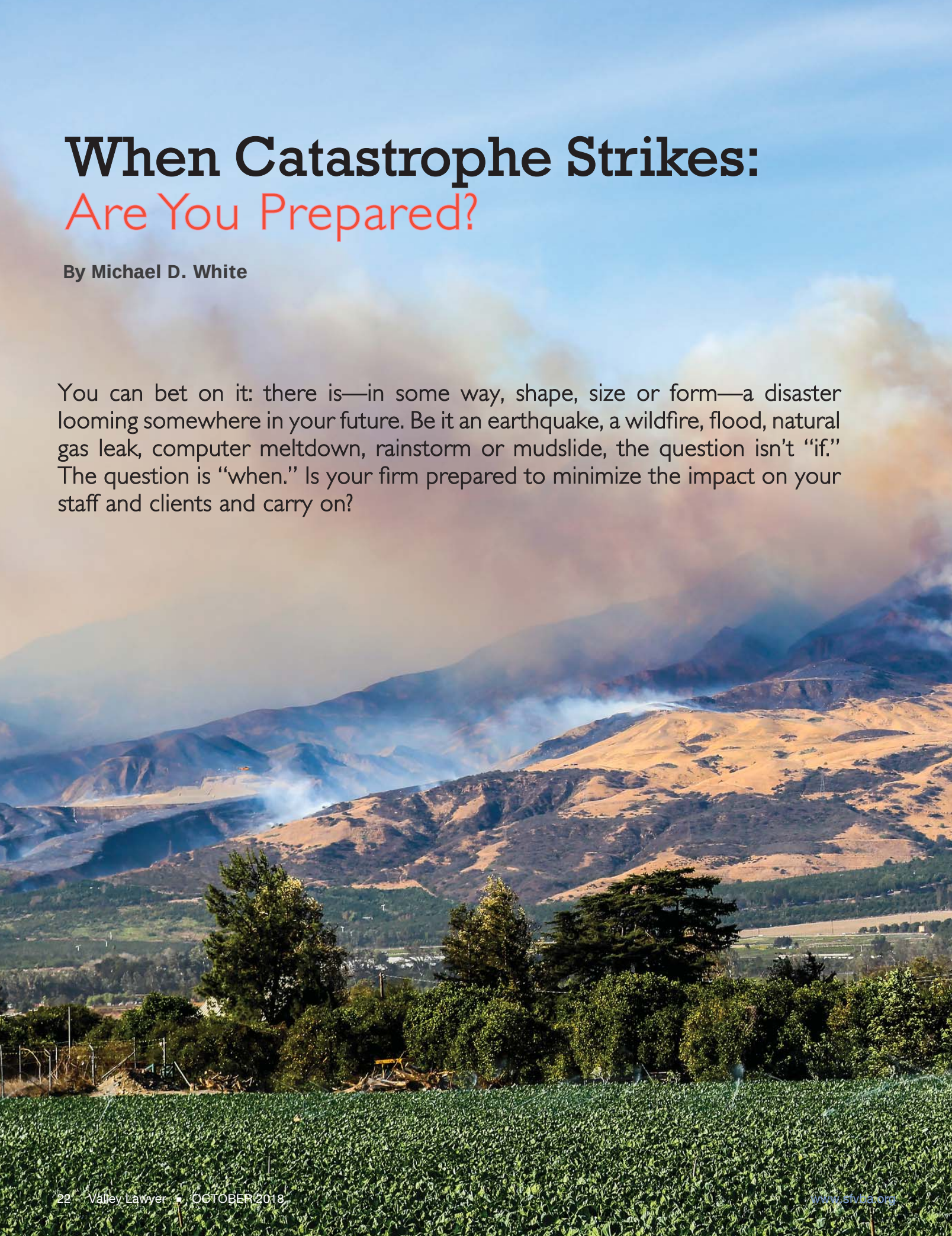
When Catastrophe Strikes:
Are You Prepared?

By Michael D. White

You can bet on it: there is—in some way, shape, size or form—a disaster looming somewhere in your future. Be it an earthquake, a wildfire, flood, natural gas leak, computer meltdown, rainstorm or mudslide, the question isn't "if." The question is "when." Is your firm prepared to minimize the impact on your staff and clients and carry on?



DISASTER CAN REAR ITS UGLY HEAD IN AN ALMOST limitless number of forms, at any time of the day or night, 24/7. In fact, according to the U.S. Federal Emergency Management Agency (FEMA), the United States is struck by at least one natural disaster every week—earthquakes, floods, hurricanes, wild fires, tornados, wind storms, and torrential rain.

The list is sobering, even more so when non-natural calamities such as power outages, computer hack attacks and meltdowns, natural gas leaks, and civil unrest are thrown into the cauldron. While surviving the event is, of course, the first priority, what follows afterwards is the daunting challenge of making sure that a firm is operational after the dust settles.

Earth, Fire and Water

No San Fernando Valley resident who was around that unseasonably warm January 1994 day can ever forget that pre-dawn wake-up call—a gut-wrenching, shattering 6.7 magnitude earthquake that, for almost 20 seconds, seemed to throw the whole world into a roaring, slow-motion industrial dryer.

Although commonly known as the "Northridge Earthquake," when it was over, the Reseda-epicentered temblor cost 72 people their lives, injured some 11,800, and left in its wake property and infrastructure damage estimated at up to $50 billion.

The patch of earth that we lived on moved, literally. In fact, the tectonic shift in the region's physical composition was so profound that, months following the temblor, the U.S. Geological Survey and the City of Los Angeles Engineer's Office was tasked with re-surveying the entire Valley.

In the simplest of terms, it was one of the costliest natural disasters in U.S. history and, tragically, while we all knew it was coming, few businesses were prepared for the consequences.

Attorney David Gurnick was President of the San Fernando Valley Bar Association when the quake hit. "At the time, we were between executive directors," he recalls. "The professional staff handled the cleanup of the Bar office [then on Balboa Blvd.] and had us up and running with only minimal disruption. We were able to coordinate a team of Valley lawyers to help residents in seeking to obtain full benefits from their earthquake insurers."

Gurnick remembers having completed preparing a complaint to be filed with the court just a few days before the quake and discussing with another lawyer in the office whether to file that day, or attend to it the following week. "I recall saying let's get it filed today because you never know what may interrupt us next week,"

Earlier this year, the Santa Ana Wind-swept Thomas Fire cut a swath through the rugged Santa Ynez Mountains, threatened several small communities along the coast of Ventura County and spread into the Los Padres National Forest before raging northward to Santa Barbara, becoming the largest wildfire in modern California history.

It took all of five weeks to contain the inferno, but not before it had blackened over 440 square miles—an area larger than New York City, San Francisco, and Washington, D.C., combined—and destroyed at least 1,063 structures, damaged 280 others; and caused more than $2.2 billion in damage. "It created havoc for us," says Steve Henderson, Executive Director of the Ventura County Bar Association. "We didn't have to evacuate, but 25 judges and lawyers, one of whom was the Bar president at the time, lost their homes in the fire."

The VCBA was caught without a plan, "but it didn't take us long to coalesce," he says. "We created a number of disaster-related clinics where people could show up unannounced, meet with an attorney, some of whom had lost their own homes, and get help dealing with their insurance companies."

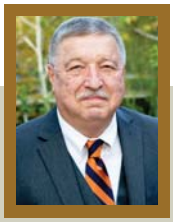
Henderson credits the State Bar with organizing weekly telephone conference calls with bar associations across the state that helped pool crisis management ideas gleaned from similar experiences. "We had to learn on the go, but those calls really helped us improve our ability to serve the community and our own members at the same time," Henderson says.

This past January, on an otherwise quiet Saturday afternoon, a two-inch water pipe running over the jury room of Department U on the fourth floor of the Van Nuys East Courthouse ruptured.

Within minutes, untold thousands of gallons of water per minute cascaded into three lower floors flooding 15 courtrooms, the offices of the District Attorney and the Court Clerk, the Self-Help Center, and the jury assembly room.

To add to the grief, once the water flow was checked, an initial survey revealed that substantial portions of the east side of the building below the fourth floor—the basement and an elevator shaft, included—were completely under water.

As a consequence, court operations—more than 150 employees, computers, telephones, and office equipment—



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.

had to be relocated next door to the West Courthouse, fast and with as little disruption to the public or the Bar as possible.

The task was, to say the least, daunting. The second busiest court complex in Los Angeles County, the East and West Van Nuys courthouses handled a significant percentage of the more than 2.2 million cases filed with the Los Angeles Superior Court in 2015 alone, with some 60,000—100,000 traffic cases handled annually, and more than one million people passing through its doors.

Somehow, it got done. By Monday, the court's operations were up and running.

"It's been a logistical stroke of genius as to how we've managed to squeeze three family law courtrooms into a single one here without sacrificing the time needed to fairly adjudicate those matters, including the domestic violence restraining order court," said Los Angeles Superior Court Supervising Judge Huey Cotton at the time.

"We've merged two criminal arraignment courts and we're processing well in excess of 250 cases a day in one courtroom. The miracle is how we've managed to relocate all of these operations and all of these people into the creases of the West building and keep everything functioning so that it's almost transparent to the public. We're very keen on making sure that we minimize the inconvenience to the Bar."

Prepare for Continuity

Attorney Megan Timmins currently serves as an Associate Director at the University of Maryland's Center for Health and Homeland Security. Several years ago, she partnered with fellow attorney Amy Lynn Major to write *Surviving a Disaster: People and Records, Protecting Your Most Vital Assets*.

In their book, they state that "it's important for firms to have a clear succession plan in an emergency. These can take two forms. First, there can be an order of succession, in which an entire position is filled by a backup person. The second form is the delegations of authority for specific tasks.

They suggest that if a continuity plan has an order of succession, each key position be three deep, and to avoid the mistake of only arranging replacements for leadership positions and not for key support personnel.

The advantages of developing an order of succession, they wrote, include the ability to prepare for planned departures, such as vacations, with a clear backup. It also reduces stress during an emergency since the new role is no surprise to the successor.

With the delegation of authority, the organization needs to be aware of tasks requiring legal or signatory authority. There also needs to be a clear schedule for when the authority kicks in and for how long.

Some authorities would only involve the immediate emergency situation, but others, such as hiring and firing authorities, would have lasting effects on the company. That

limited authority concept could also be adopted in an order of succession plan.

The Right People at the Right Time

Reflecting on the Van Nuys courthouse flood several months after the event, Judge Cotton said, "Simply put, we had the right management team in place and everyone worked together to get the job done."

That's a lesson underscored by the American Bar Association's Committee on Disaster Response and Preparedness (CDRP), which advises law firms to "place the right people in the right positions as you need to have the most important essential functions covered by the people with the necessary experience, background and authority."

The Council recommends assembling a team and determining who should participate in putting together an emergency plan. "Include co-workers from all levels in planning and as active members of the emergency management team. Consider a broad cross-section of people from throughout your organization, but focus on those with expertise vital to daily business functions. These will likely include people with technical skills as well as managers and executives," the CDRP says.

A firm's staff "is your most important organizational asset and any successful continuity plan will be dependent on them. Invest in training and development. This way, when an emergency hits, people can step right into their new roles without losing time."

How to determine who's the right person for the job?

"Capitalize on existing skills and ensure all employees know their role in an emergency," counsels the Committee. "It's great to have a written plan, but you need to make sure people read it and know exactly what to do if an emergency happens."

A firm's employees and co-workers are its most important and valuable asset, therefore two-way communication is central before, during and after a disaster. The CDRP advises including emergency preparedness information on the company intranet, in newsletters, periodic employee emails, and other internal communications tools.

Preserve, Protect and Defend

The future of information technology has involved a steady, unrelenting tectonic shift from over-stuffed, color-coded manila folders jammed into countless, dun-colored file cabinets to banks of binary computer servers and hard drives capable of holding hundreds of billions of data bytes.

While not altogether unrealized and contrary to the rosiest forecasts, the latter has not eclipsed the former as office supply stores still do a good business selling notebooks, waste paper baskets, paper clips, and paper shredders.

As it is, both paper and hi-tech continue to be equally utilized methods of maintaining and preserving vital business and client records that, if lost or damaged, would materially impair an organization's ability to carry out essential functions or require considerable expense to replace.

Case in point: Prior to the 1973 fire at the National Personnel Records Center, no duplicate copies or indexes of millions of military service records had been maintained, nor were microfilm copies produced prior. In addition, millions of documents had been lent to the Department of Veterans Affairs before the fire occurred, making it almost impossible to determine precisely what records had been lost.

In 2018, 45 years after the fire, technicians at the St. Louis facility are still working to restore the relatively few files that were recovered, singed and water damaged, from the debris.

According to the ABA Committee on Disaster Response and Preparedness, no matter how large or small a business is, "a vital records program should be part of any continuity plan and needs to be assigned to people and reviewed regularly. Every vital record should have a recovery point objective (RPO), which is basically the age of the data your company needs to recover." For example: If there is a need to reboot the computer system after an emergency, do you go back 10 minutes, 10 days or to the end of the last fiscal quarter?

In addition, any vital records program, the ABA says, also needs to contain a recovery time objective (RTO), which spells out how quickly access to the vital records will be needed after a catastrophe strikes.

"There should be a proactive approach to securing vital records that includes more frequent backups of information, regular assessments and, possibly, even keeping a record recovery professional on retainer," the ABA advises.

Protecting sensitive data and information technology systems may require specialized expertise as cyber security for law firms can be very complicated. However, even the smallest firm or solo practitioner can be better prepared by simply:

- Utilizing anti-virus software and keeping it up-to-date
- Ignoring email from unknown sources
- Using hard-to-guess passwords
- Installing effective firewalls to protect the office computer network from internet intruders
- Backing up your computer data on off-site servers or external hard drives
- Regularly downloading security protection updates known as patches
- Making sure staff knows what to do if the office computer system becomes infected by a virus or malware

Plan Ahead…Plan Ahead…Plan Ahead

The key to post-catastrophe survival is to have a strategic plan in place that takes into account all facets of your firm's operations, who does what, and how it will all function when everything goes sideways.

One study conducted several years ago by the Department of Labor found that most—two out of three—businesses of all sizes and descriptions, including law firms, did not have a plan in place to deal with a disaster and its aftermath.

The following are some points to consider when crafting a comprehensive plan for your firm:

- Carefully assess how your firm functions, both internally and externally, to determine which staff, materials, procedures and equipment are absolutely necessary to keep the business operating.
- Review your business process flow chart, if one exists, to identify operations critical to survival and recovery. Include emergency payroll, expedited financial decision-making and accounting systems to track and document costs in the event of a disaster.
- Draft an evacuation plan for employees designating escape procedures from your building.
- Prepare emergency kits for every employee. The typical kit should contain a flashlight, whistle, extra batteries, packets of water, bandages, space blanket, etc. Ready-to-go emergency kits are readily available from suppliers online.
- Be prepared to provide employees with information on when, if and how to report to work following an emergency.
- Provide top company executives with all relevant information. It may also be important to update the general public. Inform your customers about whether and when products will be received and services rendered.
- Make a list of your clients and proactively plan ways to attend to them both during and after a disaster.
- Detail how your organization plans to communicate with employees, local authorities, clients and others during and after a disaster. Consider setting up a telephone calling tree, a password-protected page on the company website, an email alert or a call-in voice recording to communicate with employees in an emergency. Designate an out of town phone number where employees can leave an "I'm Okay" message.
- Assemble a document "go kit" containing contact information, an inventory of vital records that includes the offsite physical or digital location of back-up files kept on external hard or thumb drives, as well as passwords, codes and duplicate keys.
- Protect your computerized files daily on offsite servers and external hard drives. Create effective firewalls; install anti-virus software; and restrict access to confidential files only to those whose work requires access.
- Review the plan every six months and revise if necessary.

Be it a fire, a burst pipe, a computer hack or the iconic "Big One," it's inevitable. Embrace the fact that there is a catastrophe—large or small, no matter—looming in your future.

Ask yourself how extensive will the scope of its impact affect you, your firm, and your clients. That depends solely on how you do, or don't, prepare in advance.

ROUNDTABLE:
Class Action Lawsuits

CLASS ACTION LAWSUITS TRACE THEIR ROOTS BACK TO THE FEDERAL EQUITY Rules of 1820 that were mandated by the U.S. Supreme Court and amended 17 times since then. Now under the purview of the Federal Rules of Civil Procedure, over the years such suits have been put into motion by a wide variety of litigants, from craft beer makers and smokers, to pizza delivery drivers and shipyard workers, combining numerous claims of individuals into one action brought before a single judge to seek a legal remedy for all members of the class.

They have involved the broadest possible range of claims dealing with defective consumer goods, faulty pharmaceuticals, lemon motor vehicles, counterfeit medical devices, consumer fraud, corporate misconduct, securities fraud, and employment practices.

In this roundtable article, three experienced SFVBA Members offer their perspectives on class action suits—how they should be conducted, and how they are both used, and sometimes abused, in today's legal and social environment.

Sue M. Bendavid
Lewitt Hackman, Encino

Consult Early On

"Over the past few years, we have seen a significant increase in class action litigation," says attorney Sue Bendavid.

So, what is a class action? A class action, she says, "is a procedural tool which permits one individual to file a lawsuit on behalf of him/herself and all others similarly situated."

The process for an employee to start a class action against an employer, adds Bendavid, "is relatively easy. The individual need only file a complaint designating the case as a class action. That's it. After that, the difficulty begins. The process is long, expensive and can have a negative impact on your workforce and profitability."

As the potential penalties stack up and as the laws tend to favor employees and limit defenses, "you can see why these cases are so prevalent these days," she adds. "For many companies, employees will learn fairly early in the process about the case, which as you can imagine, will lead to questions and disruptions, impacting productivity and performance."

According to Bendavid, the most common employment class actions assert claims for missed meal and rest breaks, overtime, minimum wage, off-the-clock work, pay stub violations, waiting time penalties, expense reimbursements, misclassification and other wage claims. After the complaint is filed, plaintiffs' attorneys typically seek contact information for current and former employees.

"Though companies can object on privacy grounds to disclosing names, addresses and phone numbers, our courts held this information may be discoverable after employees receive notice and opportunity to object," she says. "This means plaintiffs' attorneys may try to directly communicate with employees about their personal experiences, such as through phone calls or questionnaires. A happy and loyal workforce can help, but in contrast, disgruntled employees can cause real headaches.

Once hit with a wage and hour class action and before responding to the complaint, employers should use the time wisely. The employer should promptly conduct a thorough audit of the employer's pay practices:

- Did you correctly classify workers as exempt/non-exempt, employee/independent contractor?
- Are you accurately recording all work time for your non-exempt employees?
- Do you provide required meal and rest breaks?
- Are you paying overtime and break premiums at the correct regular rate of pay?

- Do you pay employees in a timely fashion during employment and upon separation?
- Do your pay stubs contain all required information?
- Do your policies comply with all federal, state and local laws, as well as all pertinent regulations and court decisions?

If errors are found, she says, "fix them as soon as possible to stop the bleeding and minimize potential liability."

In defending a class action, consider whether you can obtain input from employees that support you—statements that employees in fact received proper breaks or did not work off the clock, says Bendavid. "Do not resort to cookie cutter declarations, as often the court will disregard these as inherently unreliable."

Once the case is in the active litigation stage, "do the legwork to prepare an effective opposition to class certification. This means, taking depositions, gathering written evidence, obtaining statements, or retaining experts and considering the financial cost of defending against the suit or possibly paying any judgment that may result," she says, advising that, if liability exposure exists or if defense costs are simply too much for the company to bear, considering early mediation may be the best option.

And, she adds, "See if there are any procedural steps you can take to reduce exposure, such as arbitration, individual settlements and the like. Take note that some claims cannot be compelled to arbitration, like Private Attorneys General Act (PAGA) penalty claims."

As with other employee matters, consult early on with legal counsel, who can help you walk the minefield of employee wage and hour claims and class action litigation.

Sue M. Bendavid is the Chair of Lewitt Hackman's Employment Practice Group. She can be reached at sbendavid@lewitthackman.com.

Alyson C. Decker
Lowthorp Richards, Oxnard

Providing Group Justice

From the perspective of a member of the plaintiffs' bar, says attorney Alyson Decker, "Successfully litigating a class action case can be a very rewarding experience. It remains one of the best ways to help provide justice to a large group of individuals who would be otherwise unable to litigate their cases on an individual basis due to the economic constraints imposed by the ever increasing costs and expenses of litigation."

However, she adds, "Class action litigation is not something that one can simply pick up and treat like other types of civil, or even complex, litigation. For example, certifying the putative class can become a mini-case within a case, and while both state and federal courts in California have similar certification rules, the different jurisdictions and districts sometimes follow vastly differing procedural rules."

One such instance is Local Rule 23-3 of the U.S. Central District of California. This local rule requires the filing of a motion for class certification with 90 days after service of the complaint. Failing to do so generally results in the case moving forward solely on an individual basis. And while some Central District judges will sign off on a stipulation and order to set a different date for the certification motion, that is not guaranteed.

"Unfortunately, discovery does not commence right away in federal courts and is mostly stayed until the Rule 26(f) conference, which is based off of the initial scheduling conference, which may be set out farther than 90 days from service of the complaint," she says.[1]

"As class certification is fact specific, it can be challenging to move forward with such a motion without the benefit of formal or class specific discovery," says Decker. "Now, often, defense counsel will agree to some form of limited discovery and stipulate to a more reasonable date for the motion for class certification because they too will want to gather evidence, conduct interviews, get supporting declarations, etc. and all that takes time, even if they have better access to this information directly through their client."

But, once again, she adds, "You cannot always rely on a cooperative opposing counsel. This means that before you file a class action case you need to have some hard evidence to support the class or classes you are describing. It also means that your class definition needs to be narrowly tailored and constructed, with a focus on how you will bolster and defend this definition in your class certification motion."

According to Decker, "One of the main pitfalls is describing a class in the broadest way

possible to try and capture the largest number of putative class members. This can make it very easy for defense counsel to find dissimilarities between large groups of putative class members."

As a result, there are, she says, a few questions that need to be asked before putting together a class definition:

- Are the injuries of all the putative class members the same?
- Did all putative class members do the same kind of work?
- Were all putative class members governed by the same contract?
- Did policies change over time so that different putative class members were treated differently at different points in time?
- Could some of the putative class members be considered exempt employees and others not?

"Based on your answers, you then try to narrow your defined class to make it as straight forward as possible, uncomplicated, and well supported by the pre-litigation evidence that you have already obtained," says Decker. "And this is just one of the many unique issues that can arise when working on a class action case."

Given this, she concludes, "It is important to check both the relevant rules of civil procedure and the local rules during all stages of the litigation to make sure that you are developing your case in a manner that works with the rules and not against them. Because, remember, you are responsible for getting justice for all of the putative class members that you are seeking to represent."

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Ascertainability in Class Actions

Over the past few years, federal circuit courts have split over ascertainability, a non-statutory element of class actions, with Rule 23 of the Federal Rules of Civil Procedure governing a motion for class certification in federal court and listing "two distinct sets of requirements" for class certification.

In such a case, says attorney Daniel Germain, the plaintiff must first demonstrate the following set of prerequisites:

- **Numerosity.** The proposed class must be so numerous that joinder of all members is impracticable.
- **Commonality.** Common questions of law or fact exist where the class members have suffered the same injury by showing their claims depend upon a common contention.
- **Typicality.** The named plaintiff's claims are typical of those of the other class members.
- **Adequacy.** The named plaintiff will fairly and adequately protect the interests of the class.

In a typical class action, says Germain, the plaintiff must satisfy two additional requirements—first, predominance, or questions common to the class predominate over those affecting individual members and superiority, when a class action is superior to other available methods for the fair and efficient adjudication of the controversy. To prevail, the plaintiff "must make a substantial evidentiary showing as to each requirement."

Recently, a contentious issue in class action litigation has revolved around an element not mentioned in Rule 23: ascertainability. In other words, can the identity of members of the proposed class be ascertained?

This issue first came into view when the Third Circuit issued its decision in *Carrera v. Bayer Corp.*, which involved claims of false and deceptive advertising concerning Bayer's One-A-Day Weight Smart diet supplement.[2] After the District Court certified a class, the Third Circuit reversed, finding that plaintiff could not provide an "administratively feasible" method of identifying class membership.

While recognizing that ascertainability is not a listed requirement under Rule 23, the

court in *Carrera* largely justified the decision as necessary to ensure that compliance with the procedural requirements does not compromise efficiencies Rule 23 was designed to achieve. In the Third Circuit, *Carrera* has effectively ended low-dollar consumer class actions where consumers are unlikely to maintain purchase receipts.

In January 2017, the Ninth Circuit came to a starkly different conclusion. In *Briseno v. ConAgra Foods, Inc.*, a case involving claims of false or misleading labeling, the court found that Rule 23 does not list ascertainability as a requirement for class certification and it certainly does not require a plaintiff to establish an "administratively feasible" method of identifying putative class members.[3] Instead, the court found that the goal of mitigating administrative burdens is already protected by the manageability criterion of the superiority requirement under Rule 23.

Further, the court found that neither Rule 23 nor the due process clause requires actual notice to each individual class member, only the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Thus, according to the court, class membership can usually be determined through a properly tailored claims process.

And in regard to the defendants' contention that without the requirement of ascertainability, individuals will submit false claims and dilute the recovery of legitimate claimants, the court asked "[w]hy would a consumer risk perjury charges and spend the time and effort to submit a false claim for a de minimis monetary recovery?" Lastly, the court found that even where it is impossible to identify all class members, a court can always resort to Cy Pres remedies in which damages are redirected to a related charity or non-profit.

The Sixth, Seventh and Eighth Circuits have also rejected the Third Circuit's requirement of ascertainability. Thus, because a clear circuit split exists, it is likely the Supreme Court will eventually resolve the issue. But for now, in the Ninth Circuit, there is no ascertainability requirement for class certification.

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[1] *See FRCP* 26(d)(1).
[2] *Carrera v. Bayer Corp.*, 727 F.3d 300 (3rd Cir. 2013).
[3] *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017).

10 tips FOR A HOT APPELLATE WRIT:

When (and When Not) to Seek Emergency Appellate Relief

By Herb Fox

A SUCCESSFUL APPELLATE writ petition can be a genuine game changer. By preventing a prejudicial, adverse interlocutory order from taking effect, a well-crafted writ can reshape the trajectory of a case from quashing a summons and disqualifying a judge to protecting an evidentiary privilege and guaranteeing the right to a jury trial.

At the same time, it is extraordinarily difficult to shake loose a writ from an appellate court. Indeed, the California Constitution labels writ relief as "extraordinary," and Ninth Circuit case law follows suit.[1] In addition, whether to consider the merits of the petition is discretionary, and appellate courts rarely exercise that discretion.[2]

Appellate courts frequently view a writ petition as an attempt to cut in line ahead of litigants awaiting adjudication of their appeals, with about 94 percent of all civil writ petitions in the California Courts of Appeal summarily denied.[3] Making matters worse, the terminology, procedures, and standards for obtaining a writ are frustratingly arcane and byzantine.

There are many different types of writs strewn throughout California and federal civil, criminal, and administrative law, of which appellate writs are but one category.

In that one category, there have been five California Supreme Court opinions since 1984 that explain what an appellate court can and cannot do in response to a writ petition.[4] As one appellate court put it, those who have tried to extract a coherent set of rules on writs "have found it easier to comprehend a 'washing bill in Babylonic cuneiform.'"[5]

Far be it, then, for this article to fully meet that challenge; however, there are some basic concepts and standards that all civil trial lawyers ought to know.

Here are ten quick tips to help determine whether, when, and how to pursue a "hot writ."[6]

❶ What, Exactly, Is a Writ?

A writ is simply a court order commanding the addressee to do or refrain from doing a specified act.[7] There are dozens of different kinds of writs.[8]

Among the more common writs in modern legal practice are writs of administrative mandamus that seek judicial review of administrative proceedings;[9] writs of execution and possession that enforce a judgment;[10] and writs of habeas corpus which challenge unlawful detention.

But there is a more narrow set of writs, called "prerogative" or extraordinary writs, which seek an order from a higher court to enjoin or restrain the order of a lower tribunal. Those include writs of mandate, prohibition, and certiorari (also called "review").[11] Of these, there are two kinds in the state court—common law writs and statutory writs.

❷ Know Your Statutory Writs

As a general rule, most interlocutory orders are preserved for review upon an appeal from the final judgment, and the failure to seek immediate review by way of a writ petition is not a waiver of the right to that appellate review.[12] [13]

However, there are specific state court civil proceedings where the exclusive appellate recourse is an immediate writ petition, and there is no right to appellate review after judgement.[14] Failure to pursue such a statutory writ petition is a waiver of a client's right to later challenge the order on appeal.[15]

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Thus, if one is on the losing end of such an order, it is imperative to weigh the merits of a petition and make a reasoned calculation whether to pursue a writ. Such statutory writs include orders such as contempt;[16] the disqualification of a judge;[17] the expungement of a lis pendens;[18] granting a change of venue;[19] denying a motion to quash service of summons;[20] a good faith settlement;[21] the granting or denial of a motion for reclassification A;[22] and the granting of a motion to coordinate cases.[23]

❸ Know Your Deadlines

In addition to knowing whether writ review is the sole appellate remedy, trial lawyers must be aware of the mandated deadlines. Statutory writs are governed by notoriously strict and fleeting filing deadlines, sometimes as short as ten days. (Refer to the chart on statutory writ deadlines on page 35.)

For non-statutory writ petitions, the general rule is that the petition should be filed within 60 days of the ruling.[24] But be wary as appellate courts expect extraordinary effort from parties who are asking for extraordinary relief. The sooner the petition is filed, the more convincing will be the argument that the situation is a legitimate emergency.

Dispatch is especially important if there is a need to stay an imminent deadline such as responses to discovery or a trial date. The writ petition itself does not stay the trial court proceedings, and there will be no stay unless the appellate court orders one. If obtaining the stay is critical, the petition should be filed early enough to give the Court of Appeal a reasonable amount of time to assess the situation and avoid a possible laches problem.

❹ What Is a Writ-Worthy Petition?

Because there is no "right" to appellate court review by way of a writ petition, it is useful to understand the criteria employed by the appellate courts in deciding whether to entertain a petition on its merits.

The worthiness of a writ petition boils down to whether the petitioner would suffer substantial prejudice—such as the loss of a significant right or privilege—that cannot be corrected later in an appeal from a final judgment, and/or whether the case presents a burning question of law that cries out for immediate resolution. The leading opinion on writ-worthiness sets forth the following criteria:

- Is the issue of widespread interest or does it presents a significant and novel constitutional issue?
- Does the trial court's order deprive a client of an opportunity to present a substantial portion of his or her cause of action?
- Does the issue invoke conflicting trial court interpretations of law that requires resolution?
- Is the order clearly erroneous as a matter of law and does it substantially prejudice a client's case?
- Does the client lack the adequate means, such as a direct appeal, to attain relief?
- Will the client suffer harm or prejudice in a manner that cannot be corrected in an appeal from a final judgment?[25]

Writ relief is described as a "drastic and extraordinary remedy reserved for really extraordinary causes," and "only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of this extraordinary remedy."[26]

The factors applied by the Ninth Circuit in assessing whether to consider the writ petition on its merits are quite similar to those applied in the state court.[27]

❺ Choose Your Writ Petitions with Care

Choosing your battles carefully is good

policy when applied to writ petitions. A losing petition is a waste of time and money, while a frivolous writ petition can result in sanctions.[28]

Sometimes writ petitions are filed in order to show-up judges who are hostile or careless in their rulings. But that strategy can easily backfire, given the low probability of success. A thin-skinned trial judge may take offense at such an effort and be emboldened by the implicit blessing of the appellate court, thus making matters worse in the courtroom.

All of these factors should be taken into account before deciding to pull the trigger on a writ petition. Some of the more common flash-points that lead to writ petitions are also the least likely to succeed. For example:

- Discovery orders are rarely successful candidates for writ petitions unless the issue involves a Constitutional right,[29] privilege issues,[30] or interpretation of statutes or judicial council forms.[31]
- The denial of a request for trial continuance is in the discretion of the trial court and usually withstands writ review except in extreme cases, such as where a continuance was denied even though plaintiff's counsel died prior to trial.[32]
- Rulings on motions *in limine* or the admissibility of expert opinion are usually best reserved for appeal after the rendering of a judgment, except, for example, where the issue is one of first impression and prejudice is apparent.[33]

On the other hand, egregiously erroneous rulings that interfere or ignore a client's rights and privileges, especially those based on Constitutional guarantees, are more likely to receive careful consideration by the appellate courts.

Examples include the denial of the right to a jury trial;[34] the granting or denial of a motion to disqualify counsel;[35] and the right to privacy.[36]

❻ Get the Trial Court on Your Side

One obscure way to get traction on a writ petition is to persuade the trial court to urge immediate appellate review, as allowed by Civ. Pro. §166.1.

This section entitles the trial court to state in its order that there is a "controlling question of law as to which there are substantial grounds for a difference of opinion" and that interlocutory appellate review "may materially advance the conclusion of the litigation."[37]

However, while this little-used statute does not guarantee that the appellate court will take up the writ petition, applying it could help meet the burden of establishing writ worthiness.[38]

❼ Don't Forget to Ask for a Stay of Proceedings

Unlike the filing of a Notice of Appeal,[39] the filing of a writ petition does not deprive the trial court of jurisdiction over the case or the issues being challenged. Thus, if a deadline is approaching—such as the date to respond to discovery or the commencement of trial—it is imperative to first request that the trial court issue a stay pending the determination of the writ petition. If that fails, ask the appellate court to issue a stay until it has either denied the petition or reached a decision on its merits.

That request for a stay—and an explanation for the urgency—must be set forth in the petition itself. The cover of the petition must prominently include the words "STAY REQUESTED" and identify the nature and date of the proceeding or act in question.[40]

❽ Know the Rules for Writs

Appellate writ petitions in state court are governed by their own Rules of Court, specifying the contents and the format of the petition.[41] The more common errors that are made when filing a writ petition in state court include:

- Failure to file a verified petition that sets forth the procedural facts
- Failure to state on the cover of the petition that a stay of trial court proceedings is being requested and the date by which that stay should be ordered
- Failure to include a reporter's transcript of the proceedings from which from which relief is being sought
- Failure to include declaration explaining why a transcript is not available and summarizing the proceedings
- Failure to include a transcript or a declaration can alone be grounds to deny the petition[42]

Be advised that writs submitted to the Ninth Circuit are also governed by their own set of rules.[43]

❾ Draft a Crisp, Compelling Introduction

In drafting the petition, remember that establishing trial court error is only one piece of the equation. It is equally important to justify your plea to step ahead of the many other parties awaiting an adjudication of their appeals. It's imperative to demonstrate the critical and extraordinary nature of the client's situation.[44] If the petition doesn't grab the Court of Appeal's attention by the second page, a summary denial is more than likely.

❿ Specify the Relief Sought

In order to maximize the value of the petition, be as specific as possible about the relief that the client needs, and if possible offer the appellate court a choice of various outcomes if a full reversal of the challenged order is unpalatable. The appellate court can issue a writ that reverses or modifies the challenged order, or remands the cause to the trial court for further proceedings.[45]

Each of these possible outcomes will have different consequences to the client and to the case, not the least of which is whether a decision on the merits will result in the right to a peremptory disqualification of the trial judge.[46]

Don't Be Proud: Ask for Help

Above all, remember to ask for help if you need it. If one thing is clear, obtaining extraordinary relief by way of a writ petition is a difficult task that requires careful assessment, time, and attention, as well as a thorough understanding of the rules and standards by which such petitions are considered by the appellate court.

Seeking knowledgeable assistance in putting an effective writ petition together can save all concerned a great amount of time, as well as the cost of seeking otherwise unobtainable relief.

[1] Cal.Const., Art. VI, §10; *Bauman v. United States Dist. Court*, 557 F. 2d 650, 654 – 655 (9th Cir.1977).
[2] California Civil Writ Practice (4th ed., Cal CEB, 2017) at §14.1.
[3] *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal. 4th 1233, 1241, at fn. 3 (2010).
[4] *Palma v. U.S. Industrial Fasteners, Inc*., 36 Cal. 3rd 171 (1984); *Ng. v. Superior Court*, 4 Cal. 4th 29 (1992); *Alexander v. Superior Court*, 5 Cal. 4th 1218 (1993); *Lewis v. Superior Court*, 19 Cal. 4th 1232; and *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (supra) 47 Cal. 4th 1233.
[5] *Omaha Indemnity Co. v. Superior Court, 209 Cal. App. 3d 1266, 1272* (1989).
[6] Writ petitions with merit are sometimes called "hot writs" by the Court of Appeal's research staff or clerks.
[7] Black's Law Dictionary (Garner, 10th Ed., 2014).
[8] The Tenth Edition of Black's Law Dictionary lists 118 different kinds of writs.
[9] Civ. Pro. §1094.5.
[10] Civ. Pro. §712.010 et seq.; §699.510 et seq.
[11] 8 Witkin, Cal. Proc. 5th Writs §1 (2008); Civ. Pro. §1067 et seq.; `1084 et seq., and 1102 et seq.
[12] See, e.g., Code of Civil Procedure §904.1(a)(1): An appeal may be taken from a judgment "except an interlocutory judgment…"
[13] This general rule does not apply in proceedings governed by the Probate Code, where there are dozens of interim orders that must be immediately appealed or the right to appeal is waived. See Probate Code §§1300 et seq.; *Estate of Gilkison* (1998) 65 Cal. App. 4th 1443, 1450 at fn. 5: orders made appealable by the Probate Code must be appealed timely or they become final and cannot be attacked in an appeal from the final order of distribution.
[14] There is no analogous set of "statutory writs" in the Federal courts.
[15] See, e.g., *PBA, LLC v. KPOD, Ltd*. (2003) 112 Cal. App. 4th 965, 971.
[16] Civ.Pro. §5904.1(a)(1)(B), 1222.
[17] Civ. Pro. §170.3(d); see *Brown v. America Bicycle Group LLC*, 224 Cal.App. 4th 665 (2014).
[18] Civ. Pro. §405.39.
[19] Civ. Pro. §400.
[20] Civ. Pro. §418.10(c).
[21] Civ. Pro. §877.6(e).
[22] Civ. Pro. §403.080.
[23] Civ. Pro. §404.6.
[24] *Cal West Nurseries v. Superior Court,* 129 Cal.App. 4th 1170, 1174 (2005).
[25] *Omaha Indemnity Co. v. Superior Court* 209 Cal.App. 3d 1266, 1273 (1989).
[26] *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010).
[27] *Bauman v. United States Dist. Court*, (supra) 557 F.2d at 654 – 655.
[28] Rule of Court 8.492; *Mooney v.* Superior Court (2016) 245 Cal.App. 4th 523, 537.
[29] See, e.g., *Raef v. Superior Court*, 240 Cal.App. 4th 1112 (2016), First Amendment issue.
[30] See, e.g., *Titmas v. Superior Court*, 87 Cal.App. 4th 738 (2001), attorney-client privilege.
[31] See, e.g., *Mitchell v. Superior Court*, 243 Cal.App. 4th 269 (2015), construing Form Interrogatory 12.1.
[32] *Hernandez v. Superior Court*, 115 Cal.App. 4th 1242 (2004).
[33] See, e.g, *Apple v. Superior Court*, 19 Cal.App. 5th 1101 (2018), where the issue was the applicability of standards governing the admissibility of expert opinion evidence to a class certification motion.
[34] See, e.g. *Owens-Illinois, Inc. v. U.S. District Court for Western District of Washington, at Tacoma*, 698 F.2d 967, 969 (9th Cir. 1983): Where the constitutional right to a jury trial is in question, mandamus is an appropriate remedy.
[35] See, e.g., *Castaneda v. Superior Court*, 237 Cal.App. 4th 1434 (2015).
[36] See, e.g., *Rancho Publications v. Superior Court*, 68 Cal.App.4th 1538 (1999).
[37] Civ. Pro. §166.1.
[38] *Bank of America v. Superior Court*, 198 Cal.App. 4th 862 (2011).
[39] Civ. Pro. §916.
[40] Cal. Rules of Court 8.487(a)(7)).
[41] Rules of Court 8.485 – 8.493.
[42] Rule of Court 8.487.
[43] Federal Rule of Appellate Procedure 21.
[44] *Four Point Entertainment, Inc. v. New World Entertainment, Ltd*. 60 Cal.App.4th 79, (1997).
[45] See Civ. Pro. §43.
[46] Civ. Pro. §170.6; *Overton v. Superior Court*, 22 Cal. App. 4th 112 (1994).

Deadlines for Statutory Writs

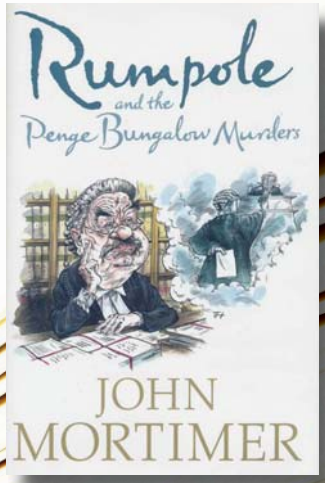
Order/Judgment	Statute	Deadline to File	Possible extension
Denying motion to disqualify a judge	Civ. Pro. §170.3(d)	10 days	None
Granting or denying motion to expunge lis pendens	Civ. Pro. §405.39	20 days	10 days
Denying motion for summary judgment	Civ. Pro. §437c(m)(1)	20 days	10 days
Granting change of venue	Civ. Pro. §400	20 days	10 days
Denying motion to quash service of summons	Civ. Pro. §418.10(c)	10 days	20 days
Determination of good faith settlement	Civ. Pro. §877.6(e)	20 days	20 days
Granting or denying motion to reclassify case from limited to unlimited or vice versa	Civ. Pro. §403.080	20 days	10 days
Granting motion to coordinate cases	Civ. Pro. §404.6	20 days	10 days

Book Review

Rumpole and the Penge Bungalow Murders

A Novel by John Mortimer

Reviewed by Neill A. Levy



THE IRREPRESSIBLE HORACE Rumpole is my favorite fictional lawyer. A product of the fertile mind of English barrister and author, the late Sir John Mortimer, Rumpole is an iconoclast who always concentrates on the facts, regards legal learning as an impediment to the barrister in court rather than an advantage, and works only for the defense, never submitting to the Crown, which used to sometimes hire private barristers to prosecute.

He is a brilliant cross-examiner and disregards warnings from the Bench to stay on topic. To him, judges "down the Old Bailey" are tiresome nuisances who interfere with his attempts to persuade the jury to find his clients not guilty of the breaking and entering, gross indecency, or whatever transgression is in question.

His disdain is reflected in his nicknames for two particular judges who show a marked partiality for the prosecution—His Honour Judge Roger "The Mad Bull" Bullingham, a tyrant who routinely threatens to report him to the Bar Council, and Mr. Justice Gerald "The Gravestone" Graves, a gloomy and dismissive pessimist. Despite these handicaps, he usually achieves a verdict in his client's favor.

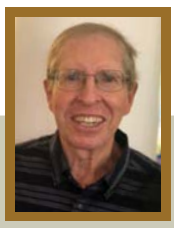
After forty years of slog at the London criminal bar, Rumpole realizes that his chamber's new generation of barristers is ignorant of his crowning achievement—a not guilty verdict in his first major trial. He decides, then, that a chronicle of the landmark event in his career—the Case of the Penge Bungalow Murders—should be penned for posterity.

Set in an austere post-war Britain, the trial involved a 21-year-old Simon Jerold, who lived in a dreary bungalow in Penge, a borough of South London, with his widowed father, an RAF bomber pilot and war hero. The father holds a tedious job at a bank, occasionally getting together with his war-time buddies to at a local pub to relive past glories.

One night after dinner and a night at the London Palladium, the elder Jerold and his buddies congregated at the Penge bungalow. In a semi-drunken state, the father pulls his son Simon out of bed to serve drinks to his fellow former airmen. During the course of the evening, the young man is ridiculed and tormented for his anti-war views. The situation slides downhill rapidly. In a rage, Simon grabs a Luger pistol, a war trophy, and threatens to shoot his father. The situation is supposedly defused when ex-RAF Pilot Officer Harry Daniels gently removes the pistol from Simon's hand and the party, chastened, quiets down.

The next morning, Simon's father and his wartime tail-gunner, Charlie Weston, who occupies the bungalow next door, are both found shot to death with, as forensic tests indicate, the same Luger that Simon had used to threaten his father the previous evening. The son is immediately arrested for the double murder and lapses into a passive, depressed state, while awaiting trial in the cells at the Old Bailey. The only possible penalty for the crimes is death by hanging.

Enter Horace Rumpole, a callow, neophyte barrister in the chambers headed by C.H. Wystan, Q.C. Rumpole



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is "briefed" on legal aid as defense counsel by Simon's solicitor. (Being briefed is to be instructed by a solicitor to appear in a case by means of written instructions, or "briefs." A "QC" is a Queen's Counsel, a barrister awarded senior, exalted status by the Lord Chief Justice. Rumpole, however, is fond of calling them "Queer Customers.")

In English legal practice, a QC is required to have a junior barrister to assist in any trial, so Wystan's daughter, Hilda—who has her eye on Rumpole as husband material, thinking that he, like he father, will bow to "the finest traditions of the bar"—persuades her father to request his instructing solicitor to brief Rumpole as junior barrister for the murder trial. Of course, the easily pliable Wysten complies with her wishes. Rumpole is told that, as junior barrister, he may not "think about the case" and only confine himself to taking "a full note" of the evidence.

Rumpole's tentative suggestion that they actually mount a viable defense is not enthusiastically received. Instead, Wystan and his solicitor tell the unfortunate Simon that his denial of the murders will not be believed because the night before the killing, he had threatened to shoot his father with the murder weapon. He rejects the QC's suggestion that he perjure himself and assert that his father had attacked him after the guests had gone home and was forced to shoot his father in self-defense.

Rumpole, glumly wondering how Wystan's perjurious suggestion is "in the finest traditions of the Bar," convinces Simon to fire Wystan as his barrister for the trial and name Rumpole in his place.

The story balances on how Rumpole, assisted by a diligent solicitor's clerk, investigates the wartime activities of Simon's father and his RAF mates who attended the reunion that fateful night, skillfully cross-examines prosecution witnesses, and eventually saves the day by winning an acquittal alone and without a leader.

In *Rumpole and the Penge Bungalow Murders*, we are introduced to Rumpole's lifelong clients, the Timsons of South London, a "clan of minor villains," who in reality are a vast tribe of boobish and largely incompetent petty criminals who eschew violence and confine themselves to such crimes as warehouse burglaries, receiving stolen property, and, in one memorable case, fencing a load of frozen Thai dinners that miraculously fallen off a delivery truck. Over the course of Rumpole's career, the hapless Timsons provide him with a caseload that, in a sense, formed a reliable foundation for his career.

The story will be much more enjoyable and satisfying if new readers are introduced to Rumpole by enjoying a few of the earlier short stories that paint a broader, more illustrative account of the character's experiences at the London criminal Bar.

In those earlier works, Sir John Mortimer deftly paints a fuller portrait of what makes the inimitable and idiosyncratic Rumpole, well, Rumpole—his satisfaction with starting the day with an egg and bacon on a fried slice at the local Tastee Bite and ending them with a glass (or several) of "Chateau Thames Embankment" at Pomeroy's Wine Bar, his beloved inexpensive cheroots, an occasional steak and kidney pudding, poking fun at pompous stuffed shirts (on the Bench and off), quoting his beloved William Wordsworth, and, of course, sparring with his fearsome and overbearing wife (yes, he did marry her), Hilda—aka "She Who Must be Obeyed."

Collections of the stories are easily obtainable online, while episodes of the PBS Masterpiece Theatre's *Rumpole of the Bailey* (with the perfectly-cast Leo McKern as Rumpole) are available on DVD.

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SOCIAL SECURITY BENEFITS can be difficult to understand. The most commonly recognized benefits cover retirement (SSI) and disability (SSD), but few potential recipients are aware of widower's and children's insurance benefits, which can help surviving spouses like Edna (pseudonym) care for surviving heirs.

Edna's husband passed away when their son, Thomas (pseudonym), was a child. She had applied for dependent and survivor's benefits and had received them for years, but once Thomas turned 18, the dependent benefits ended. Thomas, suffering through the challenges of autism, applied for social security disability but was denied.

For two years, Thomas appealed the decision to no avail. Edna had heard about social security attorneys, but didn't know where to look for one. She eventually called the ARS, which referred her to attorney Irene Ruzin, who has focused her practice almost exclusively on social security law since 1986.

"As with most social security cases, the biggest obstacle to overcome are the opinions of the SSA consultative examiners," says Ruzin.

The Social Security Administration (SSA) sends claimants to the appropriate professional to confirm their disability. In Thomas' case, a psychologist asserted that Thomas didn't have autism.

> "All of the evidence and data gathered by Ruzin helped Edna get a favorable decision…"

According to Ruzin, Thomas' educational background played a major factor in proving his disability—he had an individual educational plan in high school and relied on an independent living skill service when he graduated.

Additionally, she obtained reports from Thomas' treating psychologist and a psychiatrist regarding his work-related mental limitations, as well as statements from the independent living skill service about his need for supportive employment services.

All of the evidence and data gathered by Ruzin helped Edna get a favorable decision from the Social Security Administration.

During an ARS survey, Edna stated she was a bit worried that she would have to pay an attorney on an hourly basis and was glad that social security cases were taken on a percentage basis.

But, all in all, she was satisfied with attorney Irene Ruzin's performance and professional demeanor.

Valley Community Legal Foundation
of the San Fernando Valley Bar Association

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Valley Community Legal Foundation

San Fernando Valley Bar Association
founded in 1926

Help the VCLF Do Good

Mark S. Shipow
President

mshipow@socal.rr.com

IT IS WITH A GREAT DEAL OF pride and excitement—and, frankly, a little bit of trepidation—that I assume the presidency of the Valley Community Legal Foundation of the San Fernando Valley Bar Association after playing a supporting role as a VCLF Board member for about four years. During that time, Laurence Kaldor, our outgoing president, has provided us with tremendous leadership and inspiration. Now it's time for me to spearhead our continuing efforts to have a positive impact on the San Fernando Valley community.

I am a former partner of Holland & Knight, a national law firm. While I was with the firm, I was fortunate to get to know one of its founders, Chesterfield Smith. Mr. Smith was an icon of the Florida bar, and was nationally recognized for his leadership of the American Bar Association during the Watergate era. He gained fame—and no small degree of respect—for his statement following President Richard Nixon's "Saturday Night Massacre" that "no man is above the law."

Smith was also well-known as a strong advocate for giving back to the legal community. His outlook and his insistence that people in his firm "do good" were, and continue to be, strong influences on how I approach the practice of law and my responsibilities as a member of the legal profession.

The central purpose of VCLF is to do good. As the charitable arm of the San Fernando Valley Bar Association, the Foundation's mission is multi-fold: to promote education in the law, provide scholarships to qualified students pursuing law-related studies, support the courts, increase access to justice, and assist families in conflict and victims of domestic violence with their legal needs.

With that mission in mind, the VCLF organized and funded a number of good deeds over the past year. Most significantly, we were instrumental (along with the S. Mark Taper Foundation) in establishing an attorney position at the Southern California Reentry & Advocacy Project, a partnership between the Anti-Recidivism Coalition and Root and Rebound.

As a result of our contribution, Nicole Jeong was hired as the Project's Reentry Attorney and Manager of Southern California Partnerships.

In her new position, Jeong arranges for high-quality legal services to help individuals recently released from incarceration re-integrate into society and break the cycle of poverty and despair by living healthy, fulfilling lives.

ABOUT THE VCLF OF THE SFVBA

The Valley Community Legal Foundation is the charitable arm of the San Fernando Valley Bar Association, with the mission to support the legal needs of the Valley's youth, victims of domestic violence, and veterans. The Foundation also provides scholarships to qualified students pursuing legal careers and relies on donations to fund its work. To donate to the Valley Community Legal Foundation or learn more about its work, visit www.thevclf.org.

NEW MEMBERS

The following joined the SFVBA in August 2018:

Veronica Alcalde
Pearlman, Brown & Wax LLP
Glendale
Paralegal

Marilyn Weiss Alper
Sherman Oaks
Appellate

Benjamin Alvarado
Pearlman, Brown & Wax LLP
Encino
Paralegal

Julia H. Azrael
Nemecek & Cole
Encino
Civil Litigation

Annette Marie Barber
Sherman Oaks
Labor and Employment Law

Regina Beveridge
Nemecek & Cole
Encino
Paralegal

Gina Ann Bibby
Brutzkus Gubner
Woodland Hills
Fashion Technology

Timothy Ceperley
Stone | Dean LLP
Woodland Hills
Business Law

Justin R. Cohen
Nemecek & Cole
Encino
Paralegal

Peter Lewis Ente
Lewitt Hackman
Encino
Taxation

Heather Lynn Frimmer
Calabasas
Estate Planning, Wills and Trusts

Tiffany Gadbury
Pearlman, Brown & Wax LLP
Oxnard
Paralegal

Ani Ghazaryan
Pearlman, Brown & Wax LLP
Glendale
Workers' Compensation

Armen Gukasyan
Gukasyan Law Firm
Encino
Immigration and Naturalization

Andrea Rose Herman
Pearlman, Brown & Wax LLP
Encino
Workers' Compensation

Alan M. Insul
Law Office of Alan M. Insul
Westlake Village
Real Property

Marissa John
Oldman, Cooley, Sallus, Birnberg, Coleman & Gold LLP
Encino
Paralegal

Darren Burke LeMontree
DBL Law Group
Woodland Hills
Insurance Bad Faith

Michael Lichtenfield
Pearlman, Brown & Wax LLP
Orange
Paralegal

Michael Bruce Luftman
Parker Milliken et al.
Los Angeles
Probate

Arya Mansour
Encino
Law Student

Kenneth Miller
Parker Milliken et al.
Los Angeles
Commercial Transactions

Jonathan D. Ogden
Pearlman, Brown & Wax LLP
San Diego
Workers' Compensation

Sayuri Candice Shikai
Parker Milliken et al.
Los Angeles
Probate

Jared W. Slater
Nemecek & Cole
Encino
Labor and Employment Law

Nadine Shu Rong Tan
Parker Milliken et al.
Los Angeles
Litigation

Lalo Vasquez
Sherman Oaks
Law Student

Katherine Leah Wallman
Lewitt Hackman
Encino
Franchise

In addition, the VCLF organized and hosted a presentation of Defamation, The Play, a courtroom drama that explores issues of race, religion, class and the law in the context of a trial. Your donations made it possible for several hundred high school students to attend the play and participate in a vigorous discussion of race and related issues.

The VCLF also awarded scholarships to nine deserving Valley high school seniors to recognize their academic achievements and help them pay for college, and also helped sponsor the Settle-O-Rama program at the Van Nuys courthouse as part of our continuing efforts in the area of family law.

In the upcoming year, I want the VCLF to continue—and hopefully even expand—our efforts to do even more good. I envision a major campaign to increase our commitment to education-related activities such as scholarships and presentations such as "Defamation."

To this end, the VCLF Board has formed an Education Committee to explore ways the organization can be more involved in introducing interested students to the legal profession and to law-related issues. Kids are our collective future and I believe we need to do whatever we can to help them become effective and respected community leaders.

We also want to continue to support anti-recidivism efforts and, while law enforcement and appropriate punishment are necessary, we ultimately need to help people re-enter society and become productive citizens. The VCLF can play an important role in that effort.

Here's the challenge. We can accomplish these goals only if we have your support. The Foundation relies on volunteers and donations to carry out its mission and we can provide scholarships, grants and programs only if we have the people and the money to do so. We therefore need you to join our Board, participate in running the organization, and organize programs. We also need your donations.

At the very least, please include a $20 donation to the VCLF when you renew your SFVBA membership. If you can donate more, we can do more. It's really up to you.

Please contact me at mshipow@socal.rr.com if you want to sign on or have any questions.

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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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