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Contracts and the International Sale of Goods

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On the cover: *Photo courtesy of the Port of Long Beach*

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VALLEY LAWYER

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What's In a Name

YI SUN KIM
SFVBA President

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THANK YOU TO ALL THE judicial officers, SFVBA members and guests who made our annual Judges' Night Dinner so special. It felt like a happy reunion of good friends. A new attorney to the Valley said how much he enjoyed the evening specifically because of the sense of community that night engendered.

The event was remarkable due to the meaningful speeches by each presenter and award recipient. One comment selfishly stood out for me, though. Presiding Judge Kevin C. Brazile mentioned me and said, "I want to say this name correctly—Yi Sun Kim."

I cannot convey how important that comment was. I am regularly asked where I was born and when I immigrated to the United States, likely because of my name. I was born in Los Angeles, California, as were all my siblings. We all share Korean names because that was what was familiar and meaningful to our parents.

I spent years from adolescence to adulthood trying to think of a new name, spelling, or pronunciation of my name so I could blend in and make it easier for other people. I could never find one that I could truly identify with and commit to for the rest of my life—my birth name was, and is, the only one that really fit me.

I recently saw a familiar face at an event and was confused because his name tag bore a different name from the one I knew him by. He explained that he had decided to go by his middle name to make things easier professionally. I completely understood his decision. But, I could not help feeling his new identity was like that of Clark Kent, and I was privileged to know his true Superman identity. Clark Kent is respected and appreciated, but Superman—he is the hero.

I applaud my friend for taking his identity into his own hands, determining how he wants to represent himself, and taking ownership of his identity. I also decided to take ownership of my identity by keeping my birth name. It has become a useful tool. I relate to those who have a hard time pronouncing or remembering my name and I draw a notable difference between them and those who do not even try which provides a revealing insight into that person.

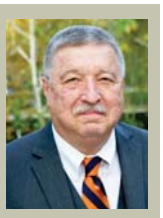
My installation as President of SFVBA reinforced my decision. I honored my parents who were there when my birth name was stated in the oath of office that I swore to. My parents invested so much time and thought into selecting a name that would bring me good luck and fortune, they were proud to hear it spoken out at such an event.

Their selection of my name has taught me a lesson I take through every facet of my practice of law. I have tried to be an aggressive litigator, a smooth-talking negotiator, and an over-confident lawyer in court, but it never works if it overshadows my true identity.

I sincerely hope that we are at a place where every new attorney is confident of his or her own identity so they can focus on what is truly important—the administration of justice for all people, no matter their names or where they came from.

No Time for Fighting or Fussing

MICHAEL D. WHITE
SFVBA Editor



michael@sfvba.org

ONE CAN SAFELY IMAGINE that the only legal element that could be tagged to the Beatles' 1965 classic hit, "We Can Work It Out," orbited at the time, almost assuredly, around the Fab Four's desire to get paid for their efforts.

Paul McCartney and John Lennon wrote it. They, along with George Harrison and Ringo Starr recorded it at the storied EMI Studios in London, and the rest, as they say, was cha-ching. The song, a Gold Record awardee, and the scores of others written and recorded by the "Fab Four" earned them…well…a whole lot of money.

A different tack to be sure on the song's evocative title emerges from this month's story on the work of the Mediation Center of Los Angeles (MCLA).

The Center, one of only two court-certified mediation centers operating in the entire county, is buoyed by the efforts of a dedicated handful of volunteers who continue to help hundreds of litigants "work it out" by talking their differences through, rather than going to court and adding to the load of an already chronically over-burdened Los Angeles County Superior Court system.

McCartney and Lennon wrote, "Life is very short, and there's no time for fighting or fussing, my friend." A worthy thought and one that MCLA aspires to put into play every day.

It may be hard to believe, that while more than 4,000 businesses of all sizes and descriptions in the San Fernando Valley—retailers, wholesalers, manufacturers—are directly involved in international trade, virtually every business in the SFV is in some way impacted by their activity.

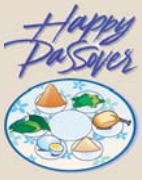
Goods and services produced in the Valley are exported to more than 180 countries worldwide, while products of every description from the same trading partners are shipped in and sold at giant retailers and small mom-and-pop shops from San Fernando to Calabasas.

This month's MCLE by international business attorney David J. Habib takes a deep dive into the complexities of international business contracts and how critically important it is to make sure that all the "t's are crossed and all the i's are dotted" before a successful global business deal can be concluded.

Many big-ticket cross-border business transactions have wound up in the dumper because of incomplete documentation or something as simple as a missing signature. Lesson: Do your homework and be prepared. Selling a product to a buyer in Rhode Island is not like exporting the product to an end-user in Estonia.

CALENDAR

APRIL 2019

SUN	MON	TUE	WED	THU	FRI	SAT
	1 VBN VALLEY BAR NETWORK **5:30 PM**	**2** Editorial Committee **12:00 NOON** **SFVBA OFFICES**	**3**	**4** Membership & Marketing Committee **6:00 PM** **SFVBA OFFICES**	**5** Bankruptcy Law Section Dude! How to Litigate Cases Under 11 U.S.C. § 727 **12:00 NOON** **SFVBA OFFICES** Judge Barry Russell and J. Scott Bovitz will discuss the latest re discharge. Approved for Bankruptcy Law Legal Specialization. (1.25 MCLE Hours)	**6**
7	**8**	**9** Probate & Estate Planning Section 7 Deadly Sins of Estate Planning **12:00 NOON** **MONTEREY AT ENCINO RESTAURANT** Attorney Bill Kruse discusses what not to do! (1 MCLE Hour) Board of Trustees **6:00 PM** **SFVBA OFFICES**	**10** Business Law and Real Property Section 1031 Exchanges **12:00 NOON** **SFVBA OFFICES** Sponsored by OLD REPUBLIC EXCHANGE The discussion will include an overview of the basics of 1031, types of exchanges, seller carry back and FSBO issues and more! Free to SFVBA Members. (1 MCLE Hour) See ad on page 36	**11**	**12**	**13**
14	**15**	**16** Taxation Law Section Taxation of Cryptocurrency Transactions **12:00 NOON** **SFVBA OFFICES** Former DOJ attorney Stephen Turanchik will lead a discussion on the taxation of cryptocurrencies. (1 MCLE Hour) ARS Committee **6:00 PM** **SFVBA OFFICES**	**17** VCLF Board Meeting **6:00 PM** **SFVBA OFFICES**	**18**	**19** 	**20**
21 	**22**	**23**	**24** Workers' Compensation Section Apportionment per LC 4663: The Doctor's Opinion **12:00 NOON** **MONTEREY AT ENCINO RESTAURANT** **Speaker:** J. Scott Ferris, Esq Laughlin Falbo Levi Moresi (1 MCLE Hour)	**25** DINNER AT MY PLACE 6:30 PM Woodland Hills See Page 36	**26** Inclusion & Diversity Committee **8:15 AM** **SFVBA OFFICES**	**27**
28	**29**	**30**				

SUN	MON	TUE	WED	THU	FRI	SAT
			1	2 Membership & Marketing Committee 6:00 PM SFVBA OFFICES	3	4
5	6 VBN VALLEY BAR NETWORK 5:30 PM	7	8	9	10	11
12 	13	14 Probate & Estate Planning Section Be Careful of Boilerplate: Pitfalls of Standard Estate Planning Language 12:00 NOON MONTEREY AT ENCINO RESTAURANT Attorneys Sarah Broomer and Stefanie Cutler give the litigator's point of view and discuss how boilerplates can lead to unwanted litigation. (1 MCLE Hour) Board of Trustees 6:00 PM SFVBA OFFICES	15 VCLF Board Meeting 6:00 PM SFVBA OFFICES	16	17	18
19	20 Family Law Section Using Dissomaster For Support Under the New Tax Laws 5:30 PM MONTEREY AT ENCINO RESTAURANT Judge Jonathan L. Rosenbloom, attorney Dan Davisson and Lynda Schauer, CPA will outline the latest changes. Approved for Family Law Legal Specialization. (1.5 MCLE Hours)	21 Taxation Law Section Taxation Issues in Forensic Accounting Examinations 12:00 NOON SFVBA OFFICES Certified Fraud Examiner Chris Hamilton will discuss examination of books and records to uncover tax motivated irregularities. (1 MCLE Hour)	22 Business Law and Real Property Section Office Leasing—The Tenant's Perspective Sponsored by MAZIROW COMMERCIAL, INC. Tenant Representation and Trusted Advisor 12:00 NOON SFVBA OFFICES Sheryl Mazirow sponsors and leads the discussion. Free to SFVBA members! (1 MCLE Hour)	23	24	25
26	27	28 Editorial Committee 12:00 NOON SFVBA OFFICES	29	30 DINNER AT MY PLACE 6:30 PM Valley Village		

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) 227-0495 or events@sfvba.org. Pricing discounted for active SFVBA members and early registration.

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How Is It Going?

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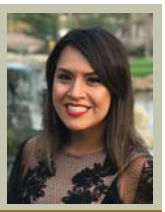


TWO AND A HALF YEARS ago my husband and I had our first and only child, a daughter. I recall most visitors, and how oftentimes the first question they asked us was, "how is it going?" Like most people, my instinctive response was always "great". Internally, I suspected that they really didn't want to hear about the trials and tribulations. They were there to meet and see the baby after all.

Six months into our fiscal year, and like my guests, Bar members, friends and family want to know, how is it going [at the Bar]? I won't give you the polite answer, I won't just say "great".

The Bar's deep-rooted and nurtured programs, like Installation Gala, Judges' Night and even our MCLE marathon were successful in attendance and enjoyable thanks to the tremendous work of the Bar's leadership, volunteers, and staff, the support of our sponsors, and the great turnout by members and bench officers.

The Bar's Section Chairs understand that our members have many options when it comes to CLE programs. Chairs continue to work on timely, pertinent programming, including sponsored CLE at the new Bar office to create a greater sense of camaraderie across sections and amongst all members. Additionally, we can't thank bench officers enough as they continue to be remarkably supportive of our sections.

This year's work with Neighborhood Legal Services of Los Angeles on disaster preparedness has been particularly special for the Bar, whose mission includes educating and serving our community. If you look now, you will see a magical sight of green grass and colorful wildflowers covering the recently burned land in the Santa Monica Mountains. This serves as a colorful reminder that there is more work to be done to help the Woolsey and Creek fire victims. The Bar needs attorney volunteers now, and in the future, as we prepare for the next disaster that our community will face.

In addition to our summer Membership Appreciation event, another exciting program Bar members can expect this summer is a great opportunity to meet select and renowned professionals that are committed to serving the legal community. The event will feature a festive atmosphere where old friends and new can get together, enjoy giveaways, drinks and good food. Contact SFVBA Treasurer, Christopher P. Warne at cw@warnelaw.com, if you have a trusted vendor or professional in their field who does not want to miss an opportunity to partake in the Bar's upcoming summer event.

In retrospect, the first six months of nurturing our newborn was amazing and by no means easy. Similarly, despite being a 93-year-old association, ensuring success for the Bar these last six months has been like raising my daughter. It requires a fair mind, clear guidance, consistency and most importantly "It takes a village…", as the African proverb states.

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

Crossing Borders:

Contracts and the International Sale of Goods

By David J. Habib

Photo courtesy of the Port of Long Beach.

Every country is interested in, and regulates, what goods enter its ports, where those goods are sourced, and whether those goods meet its own standards and other international requirements.

YEARS AGO, A SEASONED INTERNATIONAL banker and mentor addressing a group of lawyers said, "I know people always ask you for a 'standard contract'. You should tell them that asking for a standard contract is like asking for a standard suit. They might get one with pants and a jacket, but that doesn't mean it will fit!"

The cross-border sales of goods involve all the same functions as domestic sales, and then some, as the international character of the transaction raises issues and responsibilities not present in a domestic sale.

For example, every country is interested in, and regulates, what goods enter its ports, where those goods are sourced, and whether those goods meet its own standards and other international requirements. For us in the United States, the government also pays keen attention to what goods leave our shores, what country and to whom they can be sent, and what their intended use will be.

You're Not in Kansas Anymore

Thus, in every transaction involving the international sale of goods, applicable laws include those of both the exporting and the importing country. Moreover, the U.S. and more than 80 other countries are parties to the United Nations Convention on the International Sale of Goods (CISG).[1]

CISG is a treaty intended to "harmonize" the approach of signatory countries to the global sale of goods for commercial purposes, by providing rules to minimize the misunderstandings that can often result from issues arising from the conflict of laws. While not applying to personal sales to consumers, among other things, it is intended to provide a guide as to which nation has the greater interest in applying its laws in the resolution of contract disputes.

Transactions involving the international sale of goods between parties of signatory countries are automatically subject to CISG, unless the underlying contract explicitly "opts out." As it is a treaty, disputes involving CISG are afforded concurrent federal jurisdiction.[2]

Understanding these things must necessarily influence how agreements are prepared concerning the international sale of goods, and how the various compliance responsibilities are allocated between both buyer and seller. While it may seem obvious that other countries' laws applicable to these transactions are often different than ours, sometimes it can be disconcerting how different they actually are.

This article will address some, but by no means all, of the major issues of concern in drafting agreements involving the international sale of goods, primarily goods being exported from the U.S. to overseas trading partners.

Some of the issues to address are relatively obvious. For example, regarding goods such as food products, vitamins, and cosmetics, many if not most countries require that the primary ingredients be disclosed on the products' labels and/or packing materials in the local language. Some countries in the Middle East prohibit the importation of any product containing alcohol or pork in any form whatsoever, even, for example, as the component of the outer capsule containing a vitamin.

Many countries require that documents such as certifications and inspection reports accompany the shipment of certain goods. Typical documents in this regard include Certificates of Origin stating the origin of the goods, and "free sale certificates" confirming the goods are freely and legally available in the country of origin (the U.S., for example), and approved by the appropriate regulatory authorities.

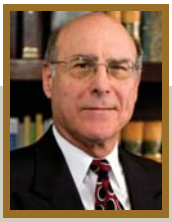
Other certificates depend on the country or countries that apply and include phytosanitary certificates, non-GMO certification, as well as other necessary documents. Aerospace materials must typically be accompanied by special test reports detailing content, origin and production processes. The cost of such certifications and reports can sometimes be significant and a subject of negotiation between the parties.

Considerable information concerning the importation requirements of many countries is available online from the U.S. Department of Commerce (USDOC).[3] There are also firms—export management companies, for example—that specialize in identifying foreign import requirements and facilitating the appropriate compliance documentation.

Contract Formation

Under the mandates laid out in CISG, an offeror may withdraw an offer before it reaches the offeree, and may revoke an offer after it reaches the offeree unless the offer states it is irrevocable or the offeree has relied upon it.[4]

Under CISG, a party may withdraw or modify a communication by a second communication that overtakes the first. Regarding acceptance, the Uniform Commercial Code (UCC) adopts the common law 'mail box rule'—i.e., acceptance is effective when mailed. CISG, on the other hand, adopts a 'receipt' rule—i.e., acceptance is effective



David J. Habib is an attorney based in Westlake Village practicing in the areas of risk management and dispute resolution in complex commercial and international business transactions. He is Vice Chair of the District Export Council of Southern California and can be reached at davidh@habiblaw.com.

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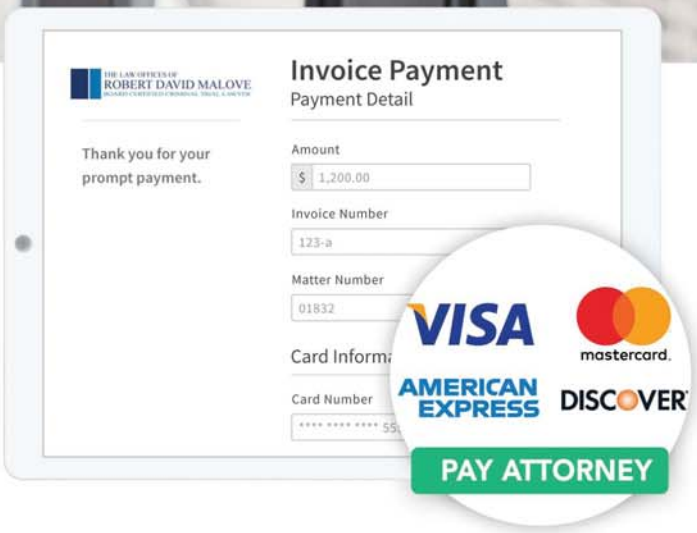

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"at the moment the indication of assent reaches the offeror," e.g., when the offeree makes a statement or demonstrates conduct indicating assent.[5]

Thus, in *Solae, LLC v. Hershey Canada, Inc*., a U.S. seller's attempt to assert a U.S. forum selection clause four months after confirming the Canadian buyer's order and accepting the buyer's partial performance was deemed ineffective. As a result, jurisdiction over the Canadian firm was denied.[6]

In *Filanto S.p.A. v. Chilewich Int'l. Corp*., an Italian seller's attempt after three months and the U.S. buyer's commencement of performance to accept the buyer's purchase order, except for the arbitration clause, was ineffective to avoid the arbitration clause. In each case, the court essentially ruled that the parties' contract had been made months earlier.[7]

The result in *Filanto* might have been different under UCC, as UCC Article 2-207 may treat conflicting correspondence between the parties during the contract formation process as an acceptance and proposal for modification, whereas CISG Article 19(1) treats it as a rejection and counteroffer.

UCC Article 2-205 states that an offer is not revocable if "by its terms [it] gives assurance that it will be held open." While UCC places a three-month time limit on the irrevocability of firm offers made without consideration by a merchant, CISG provides that when no time for acceptance is fixed, acceptance must, under the circumstances, occur within a "reasonable time."[8]

While some contracts under UCC require a "writing" or a "record" to be effective, Article 11 of CISG provides that a contract may be proved by any means, including witnesses, even if it contradicts or varies from the terms of a written contract.

Thus, in *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A*., the court held that, under CISG, parol evidence of the subjective intent of the parties must be considered to interpret their preprinted forms. The forms did not contain a merger clause, which might have produced a different result.[9]

Non-Conforming Delivery/Failure to Perform

UCC Article 2-601 basically states the so-called "perfect tender rule" under which a buyer is generally entitled to reject goods that do not precisely conform to the contract. With few exceptions, a buyer may reject goods and cancel the contract, even if the non-conformance is not particularly serious and the buyer would receive substantially the goods it bargained for.

According to CISG Article 49, however, a buyer may cancel the contract only if the delivery of the non-conforming goods constitutes a "fundamental breach" of the contract; that is, if it substantially deprives the buyer of what he is entitled to expect under the contract.

Under UCC Article 2-513, a buyer is allowed a "reasonable place and time" to inspect goods and provide notice of non-conformity, while Article 38 of CISG requires a buyer to inspect the goods "within as short a period as is practicable under the circumstances." Article 39 provides that a "buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it."

What is a "reasonable time" depends on the facts and circumstances of the transaction, including the type of goods in question. If perishable goods are involved, the acceptable period of time can be quite short. What is "practicable" under the circumstances is a factual question distinguishable from what is "possible" under the circumstances.[10]

Faced with a potential failure of the other party to timely perform, CISG Articles 47 and 63 enable the buyer and seller, respectively, to fix an additional reasonable period of time for the other party to perform "without waiving the right to recover damages for the delay in performance."

> "In every transaction involving the international sale of goods, applicable laws include those of both the exporting and the importing country."

Delivery and Risk of Loss

Trade terms specifically allocating delivery and risk of loss responsibilities between buyer and seller are extremely important in international sales transactions. Unlike in a domestic transaction, goods traveling abroad are, for example, subject to international common carriers protected by statutory damages limitations, international packaging requirements, foreign customs clearance, import duties, and various insurance issues.

The documents generated in these transactions are arguably more important than the goods involved, as they will be reviewed at the foreign port of destination prior to release of the goods. Typical documentation includes:

- A full set of "clean onboard" Bills of Lading.
- A Certificate of Origin stating the origin of the goods.
- A Commercial Invoice.
- A Packing List.

The information on these documents must be consistent. Inspection or other reports, as mentioned above, and insurance certificates may also be required.

A Bill of Lading (BOL) is perhaps the most important document in international sales as it contains virtually all relevant and material information concerning the transaction other than price of the goods. It identifies the nature and quantity of the goods, the shipping party, the consignee, the carrier, the shipment route, etc. It functions as a delivery receipt for the goods, a contract of carriage with the carrier, and, perhaps most importantly, a title document reflecting ownership. A negotiable BOL is akin to the "pink slip" for a vehicle.

Absent proper use of trade terms, the party responsible to produce the various documents and accomplish the various tasks must be determined by the available facts.

Under CISG, if the parties' contract does not state where the seller should deliver the goods, but requires delivery to a carrier for transport to the buyer, Article 31 requires delivery to the carrier.

If the contract does not require the seller to assume transport responsibility, delivery is accomplished at the place where the goods originate, if specified in the contract, or at the seller's place of business.

Proper delivery does not in itself transfer risk of loss, and is separate and distinct from the transfer of title.

Under CISG, and absent agreement otherwise, risk of loss passes to the buyer when the goods are handed over to the first carrier for transport to the buyer if the contract involves carriage. If it does not involve carriage, the risk of loss passes when the buyer takes or should have taken possession of the goods.

To avoid uncertainty in this regard, allocation of delivery-related responsibilities and risk of loss in international sales transactions are commonly addressed through use of Incoterms, which are published by the Paris-headquartered International Chamber of Commerce (ICC) to provide rules for interpreting the most commonly used trade terms in foreign trade. Effective use of *Incoterms* is critical in international sales transactions. While, unlike UCC, CISG does not contain trade terms as such, at least one U.S. case has decided that Incoterms are essentially incorporated into CISG via Article 9(2).[11]

Agents, Distributors, Sales Representatives

Many U.S. companies sell products to and/or through local intermediaries in foreign countries.

For the most part, in the United States, there is a difference between an "agent," a "distributor," and a "sales representative." In particular, the term "agent" has a very special meaning. In some countries, however, these terms are used almost interchangeably in local conversation and/or in the law. No supplier wishes to inadvertently confer actual

"agency" or other rights on a foreign representative. Yet, this is an area fraught with problems, largely due to faulty assumptions, a failure to conduct due diligence, and a lack of attention to detail. In short, contracts between U.S. suppliers and foreign representatives require research, careful planning, thoughtful drafting, and regular monitoring.

The rights of local representatives *vis-à-vis* foreign principals can be significant, and often fly in the face of generally accepted principles of contract law in the U.S. In some countries, these rights are codified and relatively easily discoverable. In others, they are not.

For example, EC Directive 86/653 provides very specific rights to local representatives of foreign firms in respect of compensation and termination.[12]

Particularly noteworthy are the Directive's provisions restricting a foreign party's right to terminate the parties' contract, and guaranteeing the local party's right to compensation for business received by the foreign supplier after termination. This latter benefit is termed an "indemnity", and is deemed so fundamental that courts in the European Union (EU) have refused to enforce U.S. 'choice of law' clauses that would frustrate that right.[13]

In the United Arab Emirates, local representatives can register these agreements with the Ministry of Economy. Registration provides significant protections for the local party with respect to compensation and termination, and can be used to prevent others from importing the subject goods.[14] This can present significant problems for the foreign supplier in the event of a less than amicable parting of the ways. The supplier can become tied to the local company indefinitely, with costly consequences, unless a carefully drawn "exit clause" is included in the parties' contract—for example, lawful term limit and/or termination rights based on a clear standard of good cause. Even then, in at least one country, a discriminatory burden of proof is placed on foreign suppliers attempting to prove "good cause" for the termination of a local representative.[15]

In addition to facing statutory rights protecting local representatives, the foreign supplier's own conduct can create problems it never anticipated. For instance, in some countries, the failure to enforce or modify performance criteria or termination provisions can result in a waiver of such provisions. Some countries entertain the concept of "dependent v. independent" agents, a concept somewhat akin to differentiating between an employee and an independent contractor.

However, the consequences of a mistake can be much more severe. Briefly stated, if a foreign supplier clothes its local representative with the trappings of a formal affiliation that leads a reasonable person to conclude the two firms are affiliated, the foreign firm can be found to be doing business in the local country. The consequences of such a finding could include being bound to pay the taxes and/or

social welfare benefits normally enjoyed by employees of a local firm.

While such consequences may be extreme, they are avoidable by carefully drafting, monitoring, and enforcing contracts with foreign representatives—for example, by clearly defining and limiting the representative's right to use intellectual property, refraining from providing work facilities or cost advances, refraining from controlling work schedules, managing product pricing, and generally treating the representative as an "independent contractor."

Some countries, including the U.K. and countries in the European Union, are particularly concerned about what they believe are anti-competitive clauses in distributor contracts. Contracts requiring a distributor to sell products at certain prices, or prohibiting a distributor from handling products of competitors, or limiting an EU-based distributor's right to sell products within the greater economic bloc, can be deemed unenforceable and/or void. Creative drafting is required to address these concerns and still give the principal/supplier-client as much of what it desires as possible.

Export Controls and Reporting

The U.S. takes the position that all goods are regulated for export control purposes. The Export Administration Regulations (EAR) is the primary means by which the export of commercial products is regulated. Administered by USDOC Bureau of Industry & Security (BIS), EAR lays out a comprehensive procedure for determining whether export of a particular product requires a validated export license.

Regulation is based on the product, the destination country, the consignee and end-user, and the intended use.[16]

An export is basically the transfer of technology to a foreign national. No physical transfer is necessary. No delivery outside the U.S. is necessary. Consider the common situation of defense contractors who frequently receive foreign visitors at their facilities. These contractors go to great lengths to ensure whatever information is disclosed to such visitors is made in compliance with U.S. export control laws. Disclosures under these circumstances are called "deemed exports," and are regulated the same as physical exports.

Moreover, the concept of "deemed re-exports" applies to those situations where a supplier exports technology to, for example, its foreign representative or foreign customer, and the technology is then re-exported. These transactions are also covered by EAR.

Appropriate due diligence is required in making the decision to export, and appropriate language should be included in any contract with foreign representatives and customers requiring their compliance with U.S. export regulations. The party responsible for compliance is termed

the U.S. Principal Party in Interest, or USPPI.[17] USPPI is also responsible for filing Electronic Export Information (EEI) reports with the U.S. Census Bureau. These reports facilitate the compilation and tracking of export statistics, and are filed with the Automated Export System (AES).[18]

Suffice it to say that the U.S. government is unforgiving when it comes to violation of the export control laws. While the good news is that the overwhelming majority of proposed export transactions do not require a validated export license, all transactions require export controls compliance.

Attend to Detail

Preparing contracts covering the international sale of goods is complex and rewarding, requiring close attention to the details of the specific transactions involved. The parties' intentions and the legal requirements applicable to packaging, documentation, licensing, transportation, risk of loss, transfer of title, customs duties, and a myriad of other details must all be fleshed out and correctly addressed.

Contracts should be clear as to which party is assuming what responsibilities; the proper use of *Incoterms* is critical. As these transactions are essentially "document driven," all documents must be in correct order, properly authenticated, and contain consistent information.

If foreign intermediaries, such as agents or distributors, are involved, contract language should clearly set forth the nature of the parties' proposed relationship. It should also include the appropriate parameters governing the foreign party's conduct, all with an eye to the legal environment in the foreign country in which the relationship will certainly be valued and judged.

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[1] C 1 52 Federal Register 6262, 6264-6280 (March 2, 1987); 15 U.S.C.A. Appendix (Supp. 1987). *http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html*.

[2] See *Assante Technologies, Inc. v. PMC Sierra, Inc.*, 164 F. Supp.2d 1142 U.S.D.C. (N.D.Cal., 2001).

[3] See *www.export.gov*.

[4] CISG Article 16.

[5] CISG Article 18.

[6] *Solae, LLC v. Hershey Canada, Inc.*, 557 F.Supp.2d 452 (U.S.D.C. D.Del., 2008).

[7] *Filanto S.p.A. v. Chilewich Int'l. Corp.*, 789 F.Supp 1229 (U.S.D.C. SDNY, 1992).

[8] CISG Article 18.

[9] *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F3d 1384 (11th Cir., 1998).

[10] See, e.g., *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp.2d 702 (U.S.D.C. N.D. Ill., 2004).

[11] See *St. Paul Guardian Ins. Co. v. Neuromed Medical Systems & Support Gmbh*, 2002 U.S. Dist. LEXIS 5096, United States District Court (S.D.N.Y.). *http://cisgw3.law.pace.edu/cases/020326u1.html*.

[12] *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31986L0653*.

[13] See, e.g., *Ingmar v. Eaton Leonard; European Court of Justice*, Case C-381/98; *https://curia.europa.eu/en/actu/communiques/cp00/aff/cp0083en.htm*.

[14] See U.A.E. Federal Law 18 of 1981, as amended. *https://www.tlg.ae/source/uploads/ck_files/1548054590.pdf*.

[15] See, e.g., *Electra-Amambay S.R.L. v. Compania Antartica Paulista Ind.*, Brasileria de Bebidas E Conexos Order No. 827, Paraguay Supreme Court of Justice, November 12, 2001.

[16] 15 C.F.R. §730 et seq.

[17] *https://help.cbp.gov/app/answers/detail/a_id/1721/~/u.s.-principal-party-in-interest-%28usppi%29*.

[18] *https://www.cbp.gov/trade/aes*.

Test No. 126

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. "Conflict of Laws" in an international setting refers to which nation has the greater interest in applying its laws in the resolution of contract dispute cases.
❑ True ❑ False

2. The Contracts for the International Sale of Goods (CISG) was signed by the United States to give U.S. businesses an advantage over other countries in international sales contract.
❑ True ❑ False

3. The UCC and the CISG have virtually identical rules concerning the formation of contracts.
❑ True ❑ False

4. Under a device known as *nachfrist* notice, the CISG allows either party—buyer or seller—to fix an additional period of time, beyond the date called for in the contract, for the other to perform, without waiving any right to claim damages for late delivery.
❑ True ❑ False

5. The sale of consumer goods is excluded from coverage by the CISG.
❑ True ❑ False

6. A U.S. company sends a purchase order to an Italian shoe company. The Italian shoe company sends a letter confirming the purchase order. Under the CISG, the Italian company can withdraw the acceptance if its withdrawal reaches the U.S. company before its acceptance does.
❑ True ❑ False

7. The CISG disfavors use of parol evidence to establish the terms of a contract.
❑ True ❑ False

8. An ocean bill of lading is a contract of carriage between the shipper of goods and the ocean carrier.
❑ True ❑ False

9. A negotiable ocean bill of lading is a title document covering the goods it describes.
❑ True ❑ False

10. The "indemnity" provided by EC Directive 86/593 is intended to protect local representatives from liability for the torts of their foreign principals.
❑ True ❑ False

11. The concept of "dependent agent" can be used to find a foreign principal is present and doing business in the country of its local representative.
❑ True ❑ False

12. A U.S. company sends one of its products to its foreign subsidiary, who resells the product to a local firm in that country. The sale by the subsidiary is not covered by the Export Administration Regulations (EAR).
❑ True ❑ False

13. If a Chinese company purchases goods from a U.S. supplier "FAS Vessel Los Angeles" (*Incoterms 2010*), the Chinese company is the USPPI.
❑ True ❑ False

14. In the transaction described in problem #13 above, the U.S. supplier is the "exporter".
❑ True ❑ False

15. Simple products such as paper and pencils are not subject to U.S. export controls.
❑ True ❑ False

16. Export Administration Regulations do not apply to sales of goods within the United States.
❑ True ❑ False

17. *Incoterms* are used to determine when title to goods is transferred from the seller to the buyer.
❑ True ❑ False

18. An "indemnity" under EC Directive 86/653 is a type of compensation guaranteed to a local distributor.
❑ True ❑ False

19. The terms "Exporter" and "USPPI" are interchangeable and mean the same thing.
❑ True ❑ False

20. The Automated Export System (AES) facilitates the reporting of export transactions to the U.S. government.
❑ True ❑ False

MCLE Answer Sheet No. 126

INSTRUCTIONS:

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

San Fernando Valley Bar Association
20750 Ventura Blvd., Suite 140
Woodland Hills, CA 91364

METHOD OF PAYMENT:

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

_____
Credit Card Number

_____ / /
CVV code Exp. Date

_____
Authorized Signature

5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0495.

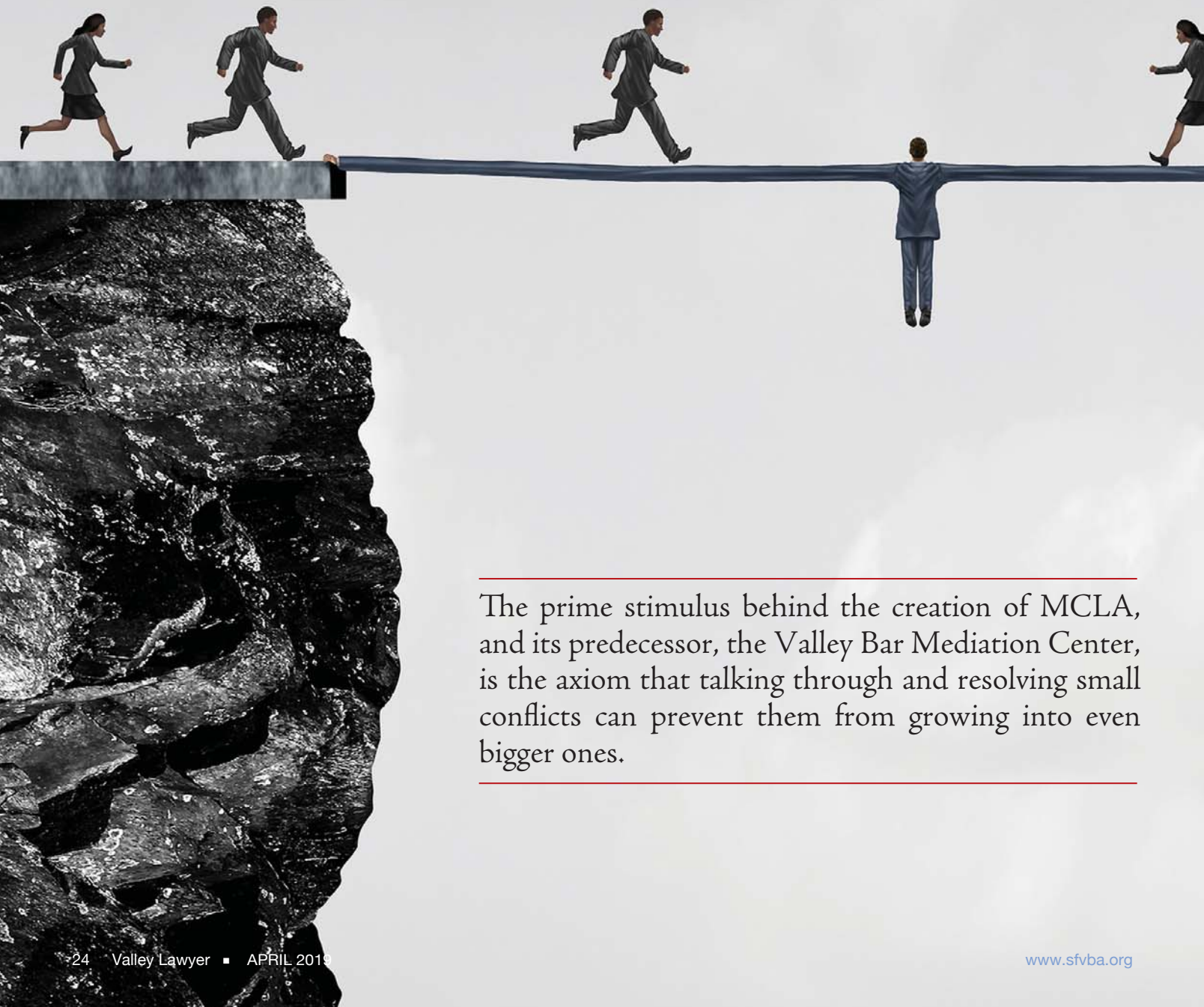
Name _____
Law Firm/Organization _____
_____
Address _____
City _____
State/Zip _____
Email _____
Phone _____
State Bar No. _____

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

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

We Can Work It Out:
Mediation Center of Los Angeles

By Michael D. White



The prime stimulus behind the creation of MCLA, and its predecessor, the Valley Bar Mediation Center, is the axiom that talking through and resolving small conflicts can prevent them from growing into even bigger ones.

THE DECISION STRUCK LIKE A lightning bolt. It was March 2013 when the Los Angeles Superior Court announced what the *Los Angeles Times* called "a state-wide fiscal hangover from the Great Recession" was forcing it to shutter 10 county courthouses, close 56 courtrooms, lay off 25 percent of its staff, including all court reporters in civil courtrooms, and impose a host of what the paper called "problematic organizational changes."

One of those changes was the dismantling of the court's Alternative Dispute Resolution (ADR) program, which at the time the most extensive and successful mediation program in the country.

In one fell swoop, the court stopped accepting referrals not only to its pro bono mediation program, but for any arbitrations, mediations, neutral evaluations, and voluntary settlement conferences from civil, family, and probate courtrooms, as well. The following month, mediation was terminated for any civil harassment, small claims, and unlawful detainer calendars, and, by the end of June, the entire program was shuttered for good.

The result was devastating as ADR routinely handled more than 10,000 cases per year, easing the strain on an over-burdened court system and providing litigants with a highly effective alternative to taking a case to trial and avoiding onerous legal costs. In FY 2011-2013, the program had successfully closed a record 12,906 cases.

Low Cost and Effective

"The court's mediation program was low cost and effective," says attorney David Gurnick. "Lawyers could go in the courthouse to a mediation office, and choose a mediator from a computerized list. Often lawyers would do this together on a day when lawyers for adverse parties were in court. Many mediators served at an incredibly low rate, including first three hours at no charge."

Closing the program down "took away a program that helped clients resolve many cases, saving money for clients and freeing courtrooms for cases that did no settle. But the reality was the court system faced lowered budgets, and had less money for the program."

Attorney and mediator William M. Molfetta was an ADR mediator panel member, successfully overseeing about 10 pro bono mediations per month.

"The program was an excellent way to get exposure to the legal community, as a mediator, and gain mediation experience," he says. "I had joined the panel in 2012 and was disappointed when the program closed. My impression is that most other mediators, both attorney and non-attorney, were disappointed as well."

Before the program closed, says Molfetta, "The LASC's civil judges actively managed their calendars and ordered or referred almost all of the cases to mediation and encouraged the litigants to utilize the court's mediator panel. It was a very cost-effective way to resolve cases."

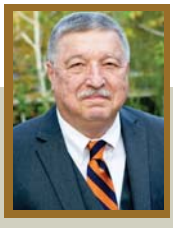
According to Molfetta, "many questioned the reasoning behind the court's decision, since the program was very effective in resolving cases and reducing the court's backlog."

Filling a Vacuum

A gaping legal vacuum was created in a county-wide judicial network—the largest unified trial court system in the country—that serves 10 million residents and handles more than 70,000 unlimited civil cases annually. With funding reduced to a trickle, then-Gov. Jerry Brown told the *Daily Journal* that the state's trial courts would need to find "more elegant ways to do business."

Perhaps, not so elegant, but a worthy effort, nonetheless, just a few months after ADR closed down, a group of dedicated volunteers from the San Fernando Valley legal community—led by attorney Myer J. Sankary and lay mediator Milan Slama—

Myer J. Sankary (center), flanked by Judges Samantha P. Jessner and Zaven V. Sinanian, respectively, Supervising Judge and Assistant Supervising Judge of the LASC Civil Division.



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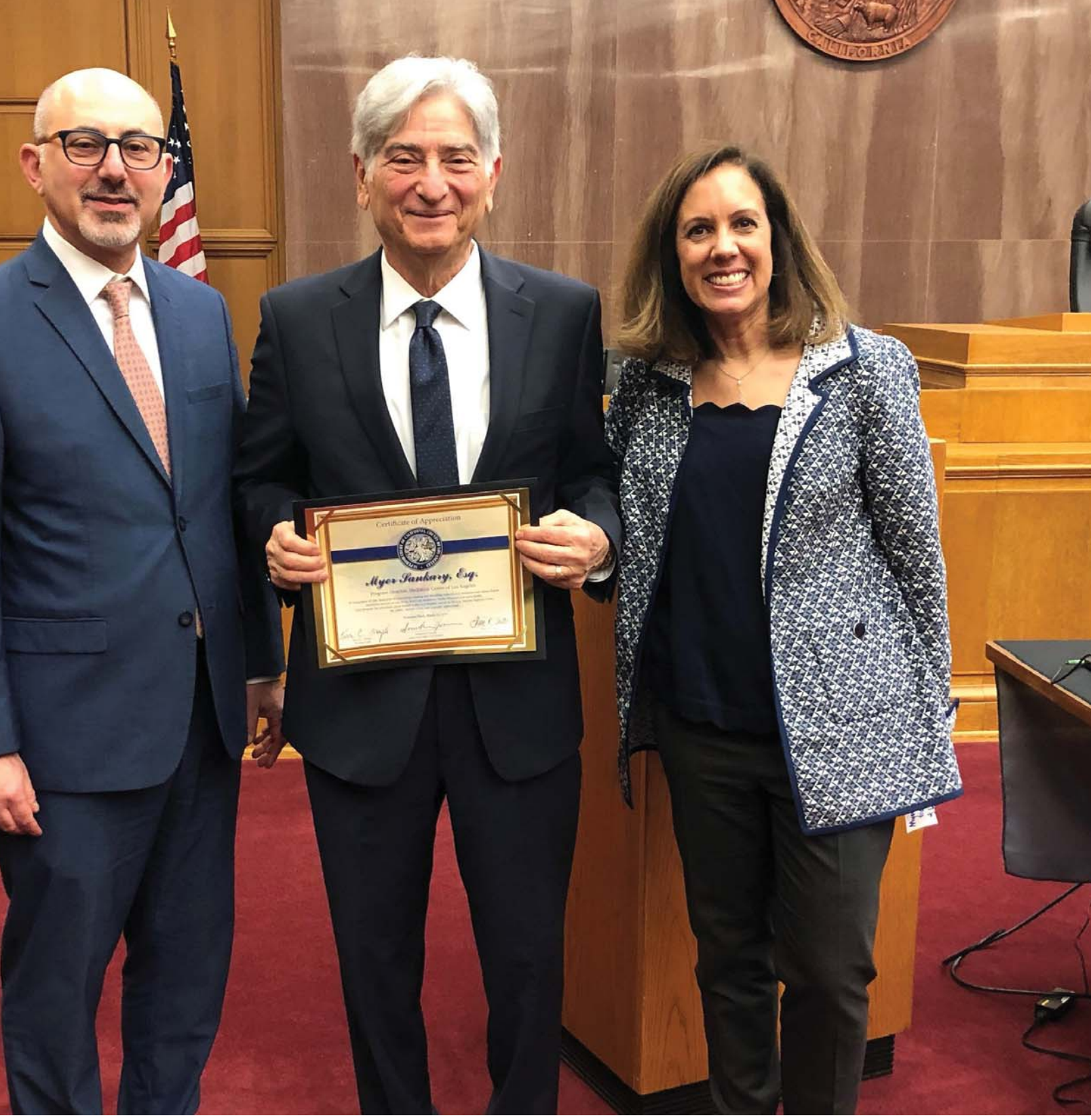


formed the Valley Bar Mediation Center to provide litigants with a scaled-down version of the moribund court mediation program.

The group soldiered on for five years as a non-profit 501(c)(3) tax-exempt charitable group and, in 2017, received a request for a proposal from the Los Angeles Superior Court to outsource its mediation program. "We submitted a bid and the court granted us the first contract in April 2018," says Sankary. "With that, we became a court-approved civil mediation resource vendor, one of two in all of Los Angeles County, and the only one with an online dispute resolution (ODR) contract."

The contract gave the Center the go-ahead "to serve as a resource vendor for the mediation of civil cases, limited and unlimited, for the court." In November 2018, the Valley Bar Mediation Center officially changed its name to become the Mediation Center of Los Angeles (MCLA) to indicate its county-wide scope and dispel any

impression that its operations were limited to the San Fernando Valley.

The reins of the San Fernando Valley Bar Association-sponsored MCLA are held by veteran founders Sankary and Slama, SFVBA President Yi Sun Kim, former SFVBA presidents David Gurnick and Adam D.H. Grant, attorney-mediator Enrique Koenig, and volunteer administrator Wendy Berman.

Currently, about 17 volunteer attorney-mediators staff MCLA, each of whom is mandated by the court to have logged at least ten years of experience in an area of legal specialization, is in good standing with the State Bar of California, participated in a continuing mediation education program, collected references from past clients, and received 40 hours of training in mediation.

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

Whatever fees are charged "must be affordable for all litigants," says Sankary, adding that mediators provide the first three hours of service at a reduced rate of $150 for each hour or a total of $450 to be divided by and among the parties involved. After the first three hours, he says, if the parties wish to continue the mediation, the mediator will be paid a fee at the mediator's standard rate. MCLA itself receives $50 per mediation.

Every case—from unlawful detainers and tenant issues to personal injury and employment termination—is reviewed in detail with potential mediators contacted to assess their availability.

Listening and Understanding, Online and Off

According to David Gurnick, who has served with the Center since it was first created, mediation "involves communication, mediated by a neutral, to help the parties listen and understand each other and come up with creative solutions. It is a powerful tool in our legal process and one that empowers parties because it lets parties fashion their own solution, rather than being subject to court-imposed outcomes."

Mediation, William Molfetta agrees, "is a surprisingly effective process to resolve disputes. Of course, direct negotiation can work, however, I have found that many litigants lack effective negotiation skills, and the utilization of a good mediator is usually needed.

"It is very satisfying that we have a program that can provide attorneys and litigants with an excellent alternative to going to court."
— Myer J. Sankary

Litigants and their lawyers seek out and value the input and opinions of mediators that they trust."

Myer Sankary shares the recent example of a woman in the South Bay who had been struck at an intersection by a police vehicle. "She couldn't afford an attorney. We handed the case over to one of our personal injury mediators and he traveled down to Long Beach and got the case settled in three hours. It didn't cost her a thing and she got double what was originally offered."

According to Sankary, one of the MCLA's most effective tools is its Online Mediation capability, which "improves access to justice for litigants who can't spend the money or time to come to an office and can't take off work for the mediation."

In a candid, first-hand evaluation of the Mediation Center's online services, an attorney recently wrote that "the circumstances leading up to my use of MCLA's online mediation services was a result of luck, as I did not, at the time, realize services were available at all, let alone in this instance. Rather, mediation in this case was mandated by the court, and I came to be in charge of this suit late in its development. Indeed, the parties had been in serious settlement discussions for the four months leading up to mediation, and nearly settled, but that fell through when third party funding for the settlement dropped out a few weeks before the mediation deadline."

As a result of a miscommunication between counsel, he continued, "the original deadline for mediation came upon us too soon to schedule, and the court granted the parties a brief extension to complete mediation. Due to defense counsel's trial schedule and her pre-paid vacation to Hawaii in the intervening two weeks, our only feasible day to mediate was on Friday, August 3, 2018 for the following Monday, August 6, 2018 post-mediation hearing. As such, we did not have much time to find a mediator, nor were we in a position to be discerning as to cost in lieu of availability. I contacted both of the recommended mediation outlets on the court's website, and while representatives from both organizations initially returned my inquiries, only MCLA followed through beyond that, and offered to take our case."

The suit was complicated by the fact that the attorney's firm is based in San Diego, the plaintiff is located in New York, the defense counsel is in Orange County, and the defendants are in Los Angeles.

"The prospect of online mediation allowing all those involved to eliminate travel costs and time by appearing online was highly desirable, not to mention the flexible availability of the mediator and the incredibly low rate for the first three hours pursuant to the court's discount for mandated mediation," he wrote.

A self-described "tech-savvy millennial," the attorney wrote that "with years of experience with these kinds of software programs from the barely usable to the professional maximum. In my experience, this particular mediation platform used by MCLA offered simple installation and login instructions, the user interface was sleek and simple, and I didn't have to waste any time with microphone settings or endure intermittent/pixelated video streams."

"Mediation involves communication…to help the parties listen and understand each other and come up with creative solutions."
— David C. Gurnick

The program, he continued, "worked as intended right from the get-go. Additionally, the bandwidth appeared to be more than sufficient to handle all of our video and audio streams without any interruptions or disconnects. While it is not always the case that everyone's microphone and camera are always working at the same time, my mediation session did not encounter any such disruptions."

Upon logging into the assigned online chat room, he continues, "Mr. Sankary was already there waiting, and he and I were able to sort out the way to mute/unmute microphones and use the group chat window feature within seconds. My client, who did not have a computer equipped with a webcam and a microphone at his office was able to use the Zoom application on his phone, and he conducted mediation that way for the entire time we were online. I didn't notice that my client had any issues utilizing the features offered by the software, and he seemed comfortable using the app, despite it being his first time doing so."

A Google Doc was then created which allowed everyone to see what was being typed in real time, and everyone could edit the document in the same manner.

"When defense counsel and I reached an agreement as to the general terms of settlement (a feature previously thought to be improbable by my firm and client), I input a general statement of the date/time of the final edits into Google Docs and took a screenshot of the web browser which included my computer's date and time. I then sent that screenshot to defense counsel for us both to reference in any potential future litigation related to this agreement, if necessary, and then copied/pasted the text version of the terms from the Google Docs file into a Word document that I turned into a settlement agreement."

MCLA's Online Mediation capability, the attorney says, "is highly flexible, simple, lacks all of the usual stressors accompanied by travel and time constraints, and was altogether a seamless, enjoyable experience—to the extent mediation is enjoyable."

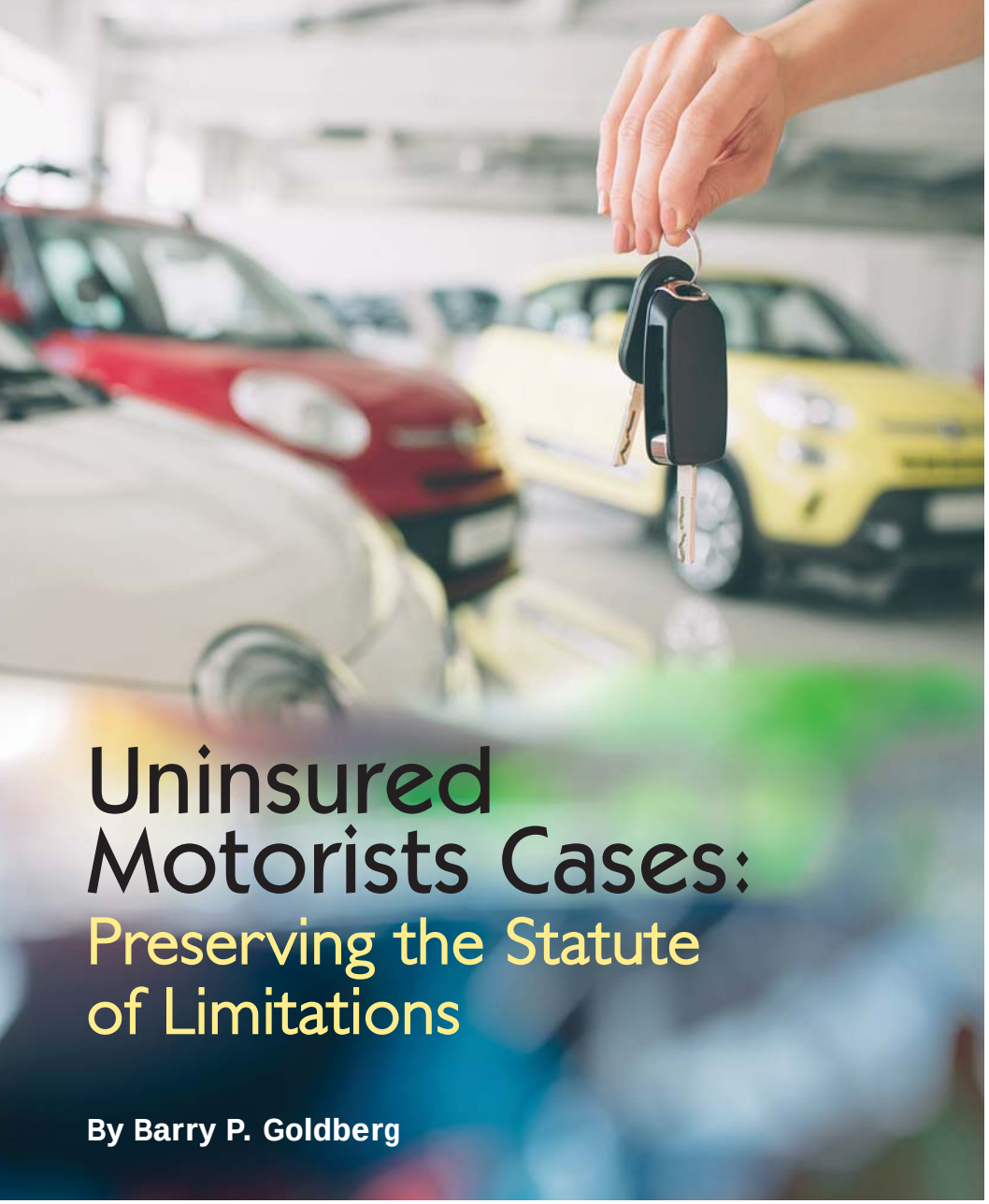
It is "a very cost-effective method of conducting mediation, it allowed everyone to feel comfortable in their own environments, and Mr. Sankary is very effective, as his input enabled the case to settle in less than three hours where four months of settlement negotiations had previously failed," he said.

Concluding his evaluation of MCLA and its capabilities, he wrote, "I would love to see online mediation made a staple of the legal industry. The ease and privacy with which I could communicate with my client was in no way impaired by our being over two thousand miles apart. If we needed more time to discuss privately, it was easy enough to request time to do so, and the platform performed well with regard to audio and video, so there was no difficulty in communicating with anyone."

Finding Common Ground

The prime stimulus behind the creation of MCLA, and its predecessor, the Valley Bar Mediation Center, is the axiom that by talking through and resolving small conflicts can prevent them from growing into even bigger ones, and that through shared perspectives, both sides of any dispute can learn by listening and finding some common ground.

"I have derived so much from my work over the past 20 years," says Sankary. "It is very satisfying that we have a program that can provide attorneys and litigants with an excellent alternative to going to court. It is very satisfying that we can administer a critical program for the courts. We view it as a great opportunity and a great responsibility to serve the court in this way."



Uninsured Motorists Cases:
Preserving the Statute of Limitations

By Barry P. Goldberg

ALTHOUGH THERE ARE NO precise statistics, it is estimated that some 15-20 percent of all drivers in California are uninsured. That is in excess of two million financially irresponsible drivers on the road and disproportionately involved in motor vehicle accidents.

Chances are that any Valley lawyers that handle automobile accident cases will eventually encounter an uninsured motorist claim. Because insurers are attempting to pay less and less on third-party auto claims, that culture has spilled over to the first-party uninsured motorist claims.

It is not uncommon for an attorney, who was used to better first-party settlements, to refuse to settle for an insurer's low offer. As a result, the case sits longer than is customary to see who will budge first. However, the longer the case sits, the insurers actually stiffen up to see if the attorney will either drift beyond the statute of limitations or succumb to a low offer rather than preserving the statute. Even the most experienced personal injury attorneys have been known to struggle with the two-year uninsured motorist statute of limitations.

Fulfilling the Requirements of the Insurance Code

The California Insurance Code requires bodily injury liability policies in the state to include insurance for sums recoverable from the owner or operator of an uninsured motor vehicle.[1]

If a dispute concerning an uninsured motorist claim arises, the Code provides that, "No cause of action shall accrue to the insured under any policy or endorsement provision issued pursuant to this section unless one of the following actions have been taken within two years from the date of the accident:

- The suit for bodily injury has been filed against the uninsured motorist, in a court of competent jurisdiction.
- An agreement as to the amount due under the policy has been concluded.
- The insured has formally instituted arbitration proceedings by notifying the insurer in writing sent by certified mail, return receipt requested.[2]

That is, one of the three actions specified in the Code must be taken as a condition precedent to the accrual of a cause of action against the insurer.[3] [4]

Even in the face of apparently clear language, when the limitation date approaches, it becomes increasingly confusing how to guarantee that the statute date has been fully complied with.

File a Lawsuit

Of course, it should not be difficult to file suit against the uninsured motorist within two years and provide an insurer with such notification within a reasonable time thereafter. However, such an option is more expensive with rising filing fees and the fact that such a payment makes it even more difficult to settle a claim when the amount offered is too low.

Filing a lawsuit is also somewhat perilous in these days of mandatory e-Filing. The Los Angeles Superior Court says that initial filings are completed within 24 to 48 hours—but these are

work hours—not contiguous hours. In addition, it is quite possible that one may not actually know if their initial filing was accepted or rejected. Sometimes court filings are rejected for reasons that cannot be anticipated. The Superior Court has said that notifying counsel of a rejection could take as much as three weeks.

Depending on how close the limitations date is to the filing, it may not be possible to learn of the rejection, fix it, and get it refiled on time. Filing a lawsuit to merely preserve the statute of limitations is not desirable.

Settle the Case?

There is scant authority available to interpret what "conclusion" of an agreement for the agreed amount due means and questions abound. Specifically, is there a signed and binding settlement agreement? Have both parties signed off on a binding contract before the statute date?

Why would anyone "sign off" on an uninsured motorist claim? A release is not required in an uninsured motorist claim and the insurer's never sign release agreements for an ordinary uninsured motorist claim.

Perhaps more importantly, an insured's attorney cannot take the chance that an "agreement" is "concluded" before the limitations date, unless money is already received and deposited. Besides, the insurer has no interest in making it clear and easy as the limitation date approaches. In fact, the closer to the limitation date, the less likely that a settlement can be "concluded."

The prudent course is to effectively preserve the statute of limitations so that there is no pressure to conclude a settlement by the limitation date.

Formally Institute Arbitration

Most practitioners opt to make an "unequivocal demand" for arbitration within the two years as the formal institution of arbitration proceedings.[5] Surprisingly, though, there are no clear guidelines in the statute as to what constitutes "instituting" arbitration. Mentioning arbitration or threatening arbitration in correspondence has been found to be insufficient.

Since most insurers will readily discuss settlement without a formal institution of arbitration proceedings, many practitioners may be lulled into a false sense of security that the code section need not be formally complied with. Moreover, many unsuspecting lawyers may think that a quick last minute email or facsimile to the claims adjuster stating that the communication is a "request to arbitrate" will suffice to protect that statute of limitations. They are wrong. It will not.

Not only is it unclear whether you can institute arbitration proceedings directly with an adjuster, but the demand for arbitration must be more "formalized."[6] In that case, the attorney in *Allstate Ins. Co. v. Gonzalez* wrote the insurance company that Gonzalez was making a claim for uninsured motorist benefits and stated, "We would like to proceed with an uninsured motorist arbitration in this matter."[7]

Among other reasons, the court held that such an informal statement was insufficient as a formal institution of arbitration proceedings because "any demand or petition for arbitration shall contain a declaration, under penalty of perjury, stating whether:

- The insured has a workers' compensation claim.
- The claim has proceeded to findings and award and, if not, what reasons amounting to good cause are grounds for the arbitration to proceed immediately.

In view of what the statute requires, the attorney's letter was found to not be a proper demand.[8]

It is absolutely imperative that every demand for arbitration be accompanied by a proper declaration

under penalty of perjury even though the adjuster obviously knows workers compensation is not implicated and has been actively discussing settlement. Otherwise, the demand is not in compliance with what the statute requires.

Many lawyers freeze when trying to make a demand for arbitration because they either do not want to go immediately into arbitration or the case is simply not ready for arbitration. The unequivocal demand must be made in any event. Thus, an effective demand can still be made with a postponement of scheduling the arbitration to see if the case can be settled.

In *Santangelo v. Allstate Ins. Co*., the insured's attorney sent a letter to the insurer demanding arbitration pursuant to section 11580.2 to protect the insured's uninsured motorist claim while the parties awaited an independent medical examination.[9] The letter indicated the attorney's intent to postpone scheduling the arbitration hearing, pursuant to the parties' agreement, until after the examination. As a result, the court held the letter constituted formal institution of arbitration pursuant to the Insurance Code.[10] [11]

What About an Underinsured Motorist Statute of Limitations Period?

The statute of limitations for filing uninsured motorist claims does not apply to underinsured motorist claims. This is because underinsured motorist benefits are not payable until bodily injury liability policies have been exhausted by payment of judgments or settlements and proof thereof provided to the insurer.[12]

The reason for the difference is that the insurer has subrogation rights on uninsured motorist cases and the insurer has no subrogation rights on underinsured motorist cases.

In the typical case, there is a two-year personal injury statute of limitations in which an injured party must initiate a lawsuit. If that party waits until almost two years before filing, a lawsuit in Los Angeles County might take up to year or two to conclude. Then, there could be post-trial motions and appeals which could go on infinitum before "bodily injury liability policies have been exhausted by payment." In a not so typical case involving a minor, the statute of limitations is tolled at least until the child's age of majority.

"In the typical case, there is a two-year personal injury statute of limitations in which an injured party must initiate a lawsuit."

There are several limitation periods to be aware of when handling an underinsured motorist claim. The most common defense in the underinsured motorist cases that have been around for a while is Laches. An unreasonable delay in demanding arbitration may "waive" or "forfeit" the insured's right to arbitration and thus bar his or her uninsured or underinsured motorist claim.[13]

Also, the statute of limitations on proceedings to compel arbitration does not expire until four years after either party refuses to arbitrate.[14] Thus, attention must be paid to an underinsured motorist case even without a two-year limitations period.

Making a Demand for Arbitration

The unequivocal demand is ready to go out. Now, the question is where to send it, in writing, certified return receipt requested. The easiest way is to obtain clear permission, in writing from the handling adjuster, to send the formal demand to the appropriate party and assure that the statute will be deemed satisfied.

After receipt of the permission, it is wise to confirm that permission, in writing, and state that the insured is reasonably relying on the adjuster's representation by not serving any other insurance representative or the agent for process. Planning ahead is critical here as, sometimes, it is difficult or impossible to obtain permission at the last minute.

Accordingly, as to providing proper notice, the policy itself will have a contact for all formal notifications, usually the home office. This can be problematic because there is no actual person, or sometimes actual street address, to send the written notice to receive a signature.

Section 11580.2 of the California Insurance Code also allows the written notice to be sent to the agent for process designated by the insurer filed with the department. This person is relatively easy to find. Go to the department of insurance web site and look up the agent for service of process for the appropriate company.[15]

Make certain that the exact name of the insuring company is provided as many insurers have multiple companies that sound very similar and, sometimes, different company names have different agents for process designated by the insurer with the department.

In addition, there is still some question as to whether complying exactly

Barry P. Goldberg is a trial attorney practicing in the area of personal injury litigation with an emphasis on insurance coverage. He is SFVBA President-Elect, based in Woodland Hills and can be reached at bpg@barrypgoldberg.com.

with the code is sufficient to preserve the statute of limitations.

For example, it is possible to send a fully compliant written demand for arbitration to the correct party before the limitations date. It is also possible for the insurer to receive and sign for that fully compliant written demand for arbitration after the limitations date. Under that circumstance, it is justified to question whether that letter is "notifying the insurer within two years of the date of the accident." Clearly, the notification is after two years as will be evidenced by the signature on the return receipt.

To solve this anomaly, it is recommended that the insurer be further "notified" notwithstanding receipt of the actual written demand. This can be done by sending a copy of the demand for arbitration by facsimile before the limitations period expires. In addition, it is recommended to additionally notify the insurer by sending a facsimile of the post mark on the certified mail receipt showing that the demand was sent before the limitation period expired.

Given the holding in *Allstate Ins. Co. v. Gonzalez*, and given the Insurance Code's precise language, practitioners must be especially careful to properly and "formally" institute arbitration proceedings "within two years of the date of the accident."[16] [17]

[1] Cal. Insurance Code § 11580.2.
[2] Cal. Insurance Code § 11580.2 (i)(1).
[3] Cal. Insurance Code § 11580.2 (i).
[4] *Spear v. California State Auto. Assn*. (1992) 2 Cal.4th 1035, 1039.
[5] Cal. Insurance Code § 11580.2(i)(1)(C).
[6] *Allstate Ins. Co. v. Gonzalez* (1995) 38 Cal.App.4th 783.
[7] *Ibid.* at 791.
[8] *Ibid.* at 792.
[9] *Santangelo v. Allstate Ins. Co.* (1998) 65 Cal.App.4th 804.
[10] Cal. Insurance Code § 11580.2 (i).
[11] See Santangelo, at pp. 807, 811-12.
[12] Cal. Insurance Code § 11580.2(p)(3).
[13] *Allstate Ins. Co. v. Gonzalez* (1995) 38 Cal.App4th 783.
[14] *Spear v. California State Auto. Assn*. (1992) 2 Cal.4th 1035, 1044.
[15] *www.insurance.ca.gov/.*
[16] *Allstate Ins. Co. v. Gonzalez* (1995) 38 Cal.App.4th 783.
[17] Cal. Insurance Code § 11580.2.

Annual Judges' Night Dinner

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Angad Singh

Singh & Associates
Encino

Angad Singh focuses his practice on partnership taxation, state and local taxation, and real estate taxation issues with the firm Singh and Associates in Encino. He also provides guidance on tax advisory and consulting issues on a variety of tax topics.

Completing his undergraduate degree at USC, Singh graduated from the UCLA School of Law in 2015 where he focused his course selection on all aspects of taxation and real estate. He also earned an LL.M. in Taxation from Loyola Law School with an emphasis on business and real estate taxation issues.

In addition to handling real estate and tax-related cases, Singh has worked with clients in a variety of fields including construction, medical, retail, and high technology, and especially enjoys working with entrepreneurs.

Fluent in both Spanish and Punjabi, he is also a Content Editor for the American Bar Association's (ABA) Young Lawyers Division Taxation Section with responsibility for editing the tax section newsletter and providing input on upcoming ABA tax events.

He also serves as a board member of the USC Alumni Real Estate Network and is also active with a number of organizations including the UCLA Ziman Center for Real Estate, the USC Alumni Association, the UCLA School of Law Alumni Association, the Los Angeles County Bar Association, and the San Fernando Valley Bar Association.

William D. Koehler

Attorney at Law
Studio City

Like so many young college students, William D. Koehler started out as a business administration major before he remembered a Christmas gift given to him by a family friend when he was in junior high school.

"It was a book called, *So You Want to Be a Lawyer*," he recalls. "I can remember my mother saying that if she had to do it over again, she would have become a lawyer. That and the book started me thinking about going to law school, so I changed my major to political science."

Looking back though, he recommends that any young person thinking of a legal career take courses to improve their writing and oral communications skills. "What you learn from those is much more useful than political theory."

The first lawyer in his family, Koehler "always had an interest in real property," adding that earlier experience working for a real estate management company laid the foundation for his current area of practice.

Over the years, Koehler has served as a planning commissioner for the City of Agoura Hills, as well as a multi-term City Councilman and Mayor.

"Every lawyer from time to time thinks about what it would be like to do something else," says Koehler. "But, I've always been lifted by being able to help people during difficult times in their lives."

Darren B. LeMontree

Attorney at Law
Woodland Hills

Attracted to the analytical and strategic sides of the legal field since he was a teenager, Darren Le Montree didn't know what area of law he would fall into, but he knew that he wanted to be an attorney who could use his abilities to solve cases and help individuals and business owners with their legal problems.

He began his career by receiving a Bachelor's of Arts in Political Science from the UCLA before receiving his law degree from Southwestern Law School. Although LeMontree always imagined himself in a small law firm, his first position as a lawyer was with Wilson Elser, and over the following 13 years, learned the ropes of insurance defense law.

In 2013, LeMontree left Wilson Elser. "I always felt like there was a need to apply what I've learned from handling insurance matters, [but] from the standpoint of the needs of small businesses and individuals."

After five years, LeMontree took a leap of faith and decided to become a solo practitioner and a member of the SFVBA's Attorney Referral Service.

He took the leap after his mother passed away. "You kind of reevaluate what's important in life," he says. "For me, it was family and feeling good about what I do. Feeling like I want to help and do good work with everything that I've learned."

Nancy Reinhardt

Attorney at Law
Encino

Nancy Reinhardt arrived in California at the age of nine when UPS transferred her father to Los Angeles. "He was Vice President of Personnel and the company gave him the choice of moving to either either California or San Juan, Puerto Rico," she says, recalling the decision of where to move as a simple one, but actual transition as "hard."

Over time, though, she discovered that "the people in California are a lot more engaged and involved with others. I love New York City, but I love even more coming back here."

Reinhardt says she "always knew" she wanted to be a lawyer. It was one of those things, but I always just knew that I'd be making the law my career."

After earning a degree in finance at Loyola Marymount, she attended law school in San Diego before joining a firm in San Francisco. There she met her future husband and fine-tuned her skills practicing probate, tax and estate planning law.

Following a move back to Southern California, Reinhardt continued her work in the estate planning area, eventually establishing her own practice in Encino.

Becoming a lawyer, she says, "gave me an unequaled opportunity to become involved with people and help them find solutions to their problems at challenging times in their lives. That's very, very rewarding."

Fastcase: The Smarter Alternative for Legal Research

AVAILABLE FREE TO SAN FERNANDO VALLEY Bar Association members, Fastcase is a comprehensive, nationwide, online law library that provides ready access to both federal and state case law, statutes, and regulations, as well as state attorneys general opinions, court rulings, specialty courts, state constitutions, state administration regulation codes and orders, law review articles and more.

Created in 1999 by Washington, D.C.-based attorneys Ed Walters and Phil Rosenthal, Fastcase has expanded to become the one of the most widely used legal research resources in the country. In fact, many new Bar members cite the access to Fastcase to be one of the primary reasons for joining the organization.

It's popularity—and utility—is in the figures. In 2018, SFVBA members logged into Fastcase 3,168 times and conducted 10,655 searches that resulted in 17,020 documents being viewed and 29,008 transactions being concluded.

Fastcase currently employs a staff of 120 reference attorneys, product specialists, software developers and content specialists who work out of offices directly across the street from the National Archives and attend to more than 800,000 subscribers worldwide.

The research tool is effective, says Walters, "in a 'work smarter, not harder' sort of way. We use really powerful software technology to make the search and comprehension process much easier and affordable."

> "In **2018**, SFVBA members logged into Fastcase **3,168** times and conducted **10,655** searches that resulted in **17,020** documents being viewed and **29,008** transactions being concluded."

Last year, Fastcase enhanced its research toolbox to provide an expanded collection of treatises, handbooks, and other secondary sources to legal researchers, and offer access to federal and state docket alerts, legal news and data analytics markets. The company also acquired the Law Street Media legal news platform, to evolve its online news platform into an enhanced daily news and analytics hub. When that site is relaunched in late 2019, the retooled platform will highlight national and state docket litigation, regulatory developments, state bar news, and offer analytics and insights powered by Fastcase's growing suite of legal information products, such as Docket Alarm and Fastcase 7, the latest version of the company's hallmark research platform.

Attorney Benjamin E. Soffer "loves using Fastcase for legal research in my litigation practice. It covers statutes and case law for all U.S. jurisdictions and offers tools to help me zero-in on the cases that are statistically most relevant to the issue I am researching based on the Boolean, or natural language, search terms I enter."

Fastcase also gives Soffer the ability to download cases to Word and cut and paste quotes into briefs. "It's a real timesaver," he says. "And it's all included under my SFVBA membership dues, so I like that I don't have to pay extra for online legal research."

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A Great Loss

CATHERINE CARBALLO-MERINO
ARS Referral Consultant

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SADLY, THE ATTORNEY Referral Service has experienced the passing of another long-time panel member, Marcia L. Kraft.

Kraft had been with ARS since 1991 and was, at the time, one of the few female attorneys who lead their own multi-associate law firms.

Kraft also served on the Attorney Referral Service Committee from 2001 to 2014. She was an active participant, looking to grow access to justice and the availability of quality legal services for the Valley community. Her work included volunteer work in the community through the Legal Grind program, American Bar Association and FEMA Bar Association pro bono assistance project. She brought many fresh ideas to help promote and market the great services and programs of ARS, and she particularly felt it was important to reach out to the Latino community and provide information about appropriate legal services.

The first ARS case referred to Kraft was in June 1992, the last in January of this year. ARS staff recalls speaking with her in January about a potential referral for a family law case. Admittedly, for ARS, the intake process can be a bit confusing, but Kraft's counsel often helped to make sense of things.

Her depth of knowledge of both family and probate law was encyclopedic. Truly gracious with her knowledge and time, she was always willing to accept referrals and speak with potential clients, regardless of their level of income.

Last year, the community service arm of SFVBA, the Valley Community Legal Foundation (VCLF), honored Kraft for her "Exemplary Community Service" that included a term as president of VCLF. During her acceptance for the award, she commented that receiving the honor was "like being awarded for something you enjoy. Like I just ate a hot fudge sundae and now I'm receiving a great prize for it."

It wasn't surprising to learn of all the organizations Kraft was actively involved with—service as an arbitrator for the Ventura County Superior Court, for example—but it was inspiring to learn that she chaired the development and installation of the Children's Waiting Rooms at the Van Nuys and San Fernando courthouses.

Kraft was instrumental in securing support and funding from ARS for that vital project. For ARS, it was important to support Marcia and VCLF. ARS contributed significantly towards the Children's Waiting Rooms because it is the mission of ARS to sponsor programs designed to support public service.

Marcia's legacy will live on through her attorney daughter, Joy Kraft Miles, who has taken the role of leadership of their firm.

Charitable donations in Kraft's honor should be made to the Valley Community Legal Foundation.

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OF THE SAN FERNANDO VALLEY BAR ASSOCIATION

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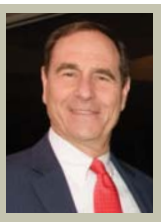
Tribute To A Pillar of VCLF

Mark S. Shipow
President



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THE SAN FERNANDO VALLEY legal community, and VCLF in particular, were saddened by the recent passing of Marcia L. Kraft. An icon of our legal community, and a pillar of VCLF's charitable work for years, she will be sorely missed.

Marcia was instrumental in my becoming involved in VCLF. About five years ago, I was invited to a VCLF Nominating Committee meeting. Marcia was the Chair, and there were about half a dozen other people there. I didn't really know anyone, but Marcia was warm and inviting and I was impressed by her obvious dedication to the organization, and the dedication that she clearly had instilled in others. I didn't quite know what I was getting into at the time andcertainly had no thought of eventually becoming president of the organization. But Marcia made me feel welcome, and her description of the great things the organization did sounded very appealing. She encouraged me to help the organization continue its mission of doing good, so I figured I would give it a try.

Over the next few years, VCLF had its organizational ups and downs. But until fairly recently when Marcia's health declined, Marcia was a constant supporter and inspiration. She had a good heart, and always made sure that VCLF was pointed in the right direction and was promoting activities of benefit to the Valley community. She constantly worked hard to help make our events a success, and to ensure VCLF was having a positive impact.

As you know from my recent columns, VCLF has embarked on an ambitious high school program: *The Constitution & Me*. The program fosters and guides student conversations on constitutional questions revolving around the use of social media in the schools.

Although Marcia was no longer able to serve on the Board by the time the program was developed, she obviously passed on her legacy of charitable giving and community involvement to her daughter, VCLF Director Joy Kraft Miles, who has been heavily involved in developing and implementing the program. Joy has lived up to both her name and her legacy and her mother would be extremely proud of her.

Last year, VCLF hosted a dinner to honor Marcia and her decades of good work. It was an enjoyable evening of camaraderie and nostalgia with a large group of people paying tribute to Marcia's influence in VCLF for so many years. I am pleased we were able to do that for her while she was able to enjoy it.

Over the years, I have experienced the passing of a number of people close to me. My consistent approach is to enjoy the good memories of the person, and use those memories to urge myself and others to move forward and live a full life. Marcia's passing is no different. She showed us how to be gracious and caring, and generous and kind to others. She was an outstanding role model for all of us, particularly for the directors of VCLF.

I hope you will help in any way you can as VCLF continues the

good work that Marcia inspired us to accomplish. We have established the Marcia Kraft Memorial Fund, which, under the direction of Marcia's family, will be dedicated to doing charitable work on behalf of VCLF. Please help continue Marcia's legacy by visiting www.thevclf.org and making a donation.

I also want to acknowledge the tremendous financial support we have been receiving for our scholarship programs, including for the *Constitution & Me* program.

Thus far, our Sponsor-Level donors include the following. Please join this distinguished group who believe in the importance of VCLF. We thank them and we thank you.

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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.

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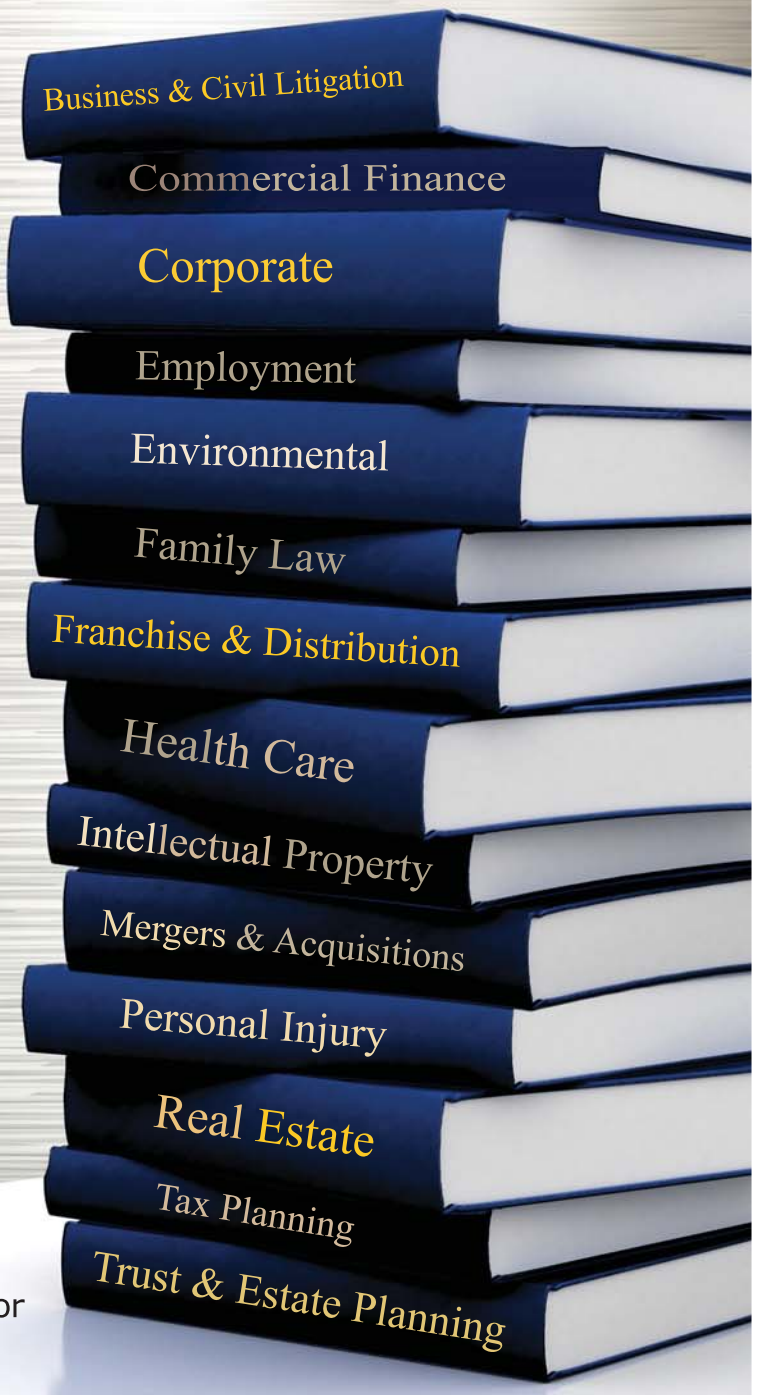

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