

# VALLEY LAWYER

SEPTEMBER 2019 • \$5

A Publication of the San Fernando Valley Bar Association

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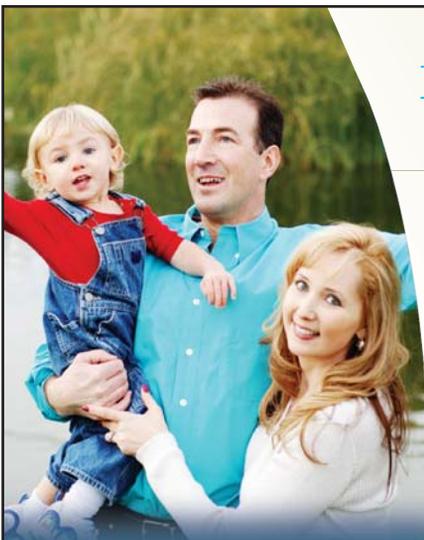
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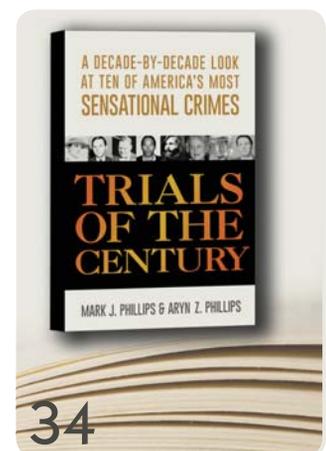


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On the cover: *San Fernando Valley Bar Association*  
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## FEATURES

- 12** Securing Client-Friendly Reps In Mergers & Acquisitions | BY NATELA SHENON AND STEPHEN M. RILEY  
MCLE TEST NO. 131 ON PAGE 21.
- 22** The Roots Go Deep: Meet Incoming SFVBA President Barry P. Goldberg | BY MICHAEL D. WHITE
- 30** Burned By Your Broker? | BY JONATHAN W. EVANS AND MICHAEL S. EDMISTON
- 34** The Trial of Charles Manson: Fifty Years Later | BY MARK J. PHILLIPS AND ARYN Z. PHILLIPS

## DEPARTMENTS

- 7** President's Message
- 9** Editor's Desk
- 10** Event Calendars
- 33** Member Focus
- 39** Attorney Referral Service
- 42** Photo Gallery
- 43** Valley Community Legal Foundation
- 45** Santa Clarita Valley Bar Association
- 46** Classifieds



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## A Look Back with Gratitude

**E**VERY DAY IN GRADE school, I sat in the grass outside the front gates waiting to be picked up. I enviously watched the surge of parents scooping up my classmates to take them to after school programs or home for snacks and play.

Eventually, there would be only a few of us left scattered about, sitting on our backpacks, twisting the blades of grass around us to pass the hour. We knew we had a long wait but still held our breath each time a car drove by just in case it was for us.

We understood that our parents worked and tried their best to get to us. But that did not stop us from stomping to the car when they finally came, unleashing our fury at the easiest target as we slammed the door behind us.

I thought about this a lot recently. I felt guilty and apologized to my mom, acknowledging how difficult it must have been to work full time, drive through traffic to get me home safe, go back to work, and be home again in time to make dinner for our family and grandparents. She didn't deserve my fury—she deserves my praise and gratitude every day.

This is how I feel when I look back on this year. I have been fortunate to see behind the curtains of this organization and the dedication put forth by many people whose efforts go unnoticed.

This year, Rosie assumed tremendous responsibilities as the Executive Director, oversaw the Attorney Referral Service, and

**YI SUN KIM**  
SFVBA President



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facilitated our move into the new Woodland Hills office, while still being the best mom to her new baby. Linda ensured our programs ran smoothly even as she dealt with health concerns. Michael expanded the content, reach and influence of our publication and online presence, achieving more accolades in recognition of that quality. Marina's skillful creativity revitalized our brand through her graphics and design. Miguel's enthusiasm earned him a promotion and improved the stature of both the SFVBA and ARS. Sonia is a true asset and instrumental in every aspect of the SFVBA's operations. And Favi immediately embraced and excelled in her new role with ARS.

Our Trustees selflessly volunteered their time to provide valid, thoughtful input, chair committees, develop new programs, and made sure the SFVBA advances the goals of our Mission Statement. Our Section and Committee Chairs similarly devote significant time and personal resources in sustaining our most valuable programs and benefits.

This is the time I should look back and reflect on my term to highlight particular achievements. All I remember is that any achievement gained during this year was due to the contributions and hard work of others.

My final request I leave you with now is to be kind and recognize those who endeavor to make this organization work for you and take the opportunity to work as cohesively with them as I have had the privilege to do. 

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### RECENT VICTORIES:

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- Murder: Not Guilty by Reason of Insanity, Jury (Van Nuys)
- Medical Fraud Case: Dismissed, Preliminary Hearing (Ventura)
- Domestic Violence: Not Guilty, Jury Finding of Factual Innocence (San Fernando)
- \$50 Million Mortgage Fraud: Dismissed, Trial Court (Downtown, LA)
- DUI Case, Client Probation: Dismissed Search and Seizure (Long Beach)
- Numerous Sex Offense Accusations: Dismissed before Court (LA County)
- Several Multi-Kilo Drug Cases: Dismissed due to Violation of Rights (LA County)
- Misdemeanor Vehicular Manslaughter, multiple fatality: Not Guilty Verdict (San Fernando)
- Federal RICO prosecution: Not Guilty verdict on RICO and drug conspiracy charges (Downtown, LA)
- Murder case appeal: Conviction reversed based on ineffective assistance of trial counsel (Downtown, LA)
- High-profile defense: Charges dropped against celebrity accused of threatening government officials



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# Connections Both Good and Bad

**MICHAEL D. WHITE**  
SFVBA Editor



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**FIRST INTERVIEWED BARRY P. Goldberg** about three years ago, intrigued by the notion of a practicing attorney devoting some of his precious free time to performing as an accomplished musician. The resultant article on both Goldberg and fellow attorney-trombonist Marc Sallus appeared in the August 2016 issue of *Valley Lawyer*.

By the time I interviewed Barry back then, I had only chalked up a single issue of the magazine as editor, and I was in the middle of the 'getting to know you' introductory phase of my work with the Bar.

What struck me then was the same thing that struck me during our last, and most recent, sit-down talk—Barry's sense of humor. On both occasions, our time was punctuated by laughter, much of it self-deprecating.

Just ask him about his first personal injury case and you will know exactly what I mean. It is very illuminating and very entertaining.

What could you expect from one in a family of six kids whose father, Jerry, an entrepreneur and all-around "interesting guy" in his own right, gave them names that rhyme—(oldest to youngest) Terri, Larry, Gary, Shari and Cary. Barry, it just so happens, was wedged in between Shari and Cary.

Like father like son.

Last month marked the passage of 50 years since Charles Manson and his drugged-out cult followers stunned the world with an

unspeakably murderous rampage that chilled an unusually hot summer of 1969.

Anyone around then remembers the horror, but for those that don't or can't, we've excerpted, with edits, a chapter on the events leading up to the trial and conviction of Manson and several of his followers from the acclaimed book *Trials of the Century* by SFVBA member Mark J. Phillips and Aryn Z. Phillips.

It's a genuinely tragic tale of evil and needless barbarity and one I personally have an oblique connection to. One of the so-called Manson 'Family' was a young man named Steve Grogan.

Known as Clem, he was convicted of the brutal murder of Hollywood B-grade actor and stuntman Donald "Shorty" Shea.

Grogan's death sentence was later commuted and, deemed reformed, he was paroled in 1985.

The connection? Grogan sat in the desk next to me in our high school freshman homeroom. I can't remember him ever uttering a word the entire year, but I remember his dead eyes and his 'vibe.' It was not one of goodness and light.

He dropped out—or was kicked out, the reasons are murky—at the end of the year and eventually drifted to the Spahn Ranch where he was later taken in by Manson and radicalized by his deranged, drug-addled fantasy of cataclysm and race war.

The rest, as they say, is history. 

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<b>LATINO HERITAGE MONTH (SEPTEMBER 15 – OCTOBER 15)</b>						
1	2	3	4	5	6	7
 <p><b>HAPPY LABOR DAY</b></p>		<p><b>Editorial Committee</b> 12:00 NOON SFVBA OFFICES</p>		<p><b>Membership &amp; Marketing Committee</b> 6:00 PM SFVBA OFFICES</p>		
8	9	10	11	12	13	14
		<p><b>SFVBA ELECTION DAY</b></p> <p><b>Probate &amp; Estate Planning Section</b> Are Assisted Reproduction Children Included as Grandchildren or Descendants in Your Old Dynasty Trust? 12:00 NOON MONTEREY AT ENCINO RESTAURANT In today's world, same-sex couples and those who have fertility issues often use donated gametes to procreate; are their children, who are not genetically related to the settlor, included in these trusts? Professor Kris Knaplund will discuss. (1 MCLE Hour)</p> <p><b>Board of Trustees</b> 6:00 PM LOCATION TBA</p>	<p><b>Business Law and Real Property Section</b> Helping Clients Navigate Relationships with Resident Managers 12:00 NOON SFVBA OFFICES</p> <p>Sponsored by <b>PARKER MILLIKEN</b> <small>100 YEARS - EST. 1913</small></p> <p>Gary Ganchrow leads the discussion regarding how to avoid legal fallout when the relationship between clients and resident managers sours. Free to SFVBA members! (1 MCLE Hour)</p>		<p><b>Bankruptcy Law Section</b> Woodland Hills Bankruptcy Court Tentative Opinions 12:00 NOON SFVBA OFFICES Yi Sun Kim, Andy Goodman and Jeremy Rothstein head up the panel for this annual seminar, always a lively and informative discussion. Approved for Bankruptcy Law Legal Specialization. (1.25 MCLE Hours)</p>	
15	16	17	18	19	20	21
	<p><b>Mock Trial Committee Meeting</b> 6:00 PM SFVBA OFFICES</p>	<p><b>Taxation Law Section</b> Should You Comply with Subpoenas for Tax Returns? 12:00 NOON SFVBA OFFICES Attorney Mark Sharf will discuss why blindly complying with a valid subpoena may subject tax lawyers, CPAs and other tax preparers to criminal prosecution under 26 U.S.C. 7216. (1 Hour Legal Ethics) Live attendance &amp; lunch \$30 NEW! Zoom Webcast \$20</p> <p>See page 38</p>	<p><b>Workers' Compensation Section</b> Vocational Evidence to Prove and Rebut Disability 12:00 NOON MONTEREY AT ENCINO RESTAURANT Enrique N. Vega, MS, CRC, CDMS and WC Judge Clint Feddersen and attorney Jeff Swartz will discuss LC 4062 (b) in Accordance with the Fact, and Fitzpatrick &amp; Kite. (1 MCLE Hour)</p>			
23	23	24	25	26	27	28
	<p><b>Family Law Section</b> Cultural Issues and Family Law Cases 5:30 PM MONTEREY AT ENCINO RESTAURANT Abbas Hadjian, C.F.L.S. and Judge Firdaus Dordi lead the panel for an important discussion on how cultural differences and issues impact your family law cases. Approved for Family Law Legal Specialization. (1 Hour Elimination of Bias; 0.5 General MCLE)</p>	<p><b>Attorney Referral Service Committee</b> 6:00 PM SFVBA OFFICES</p>	<p><b>25</b></p>  <p>Have you renewed your SFVBA membership?</p> <p>Renew online at <a href="http://www.sfvba.org">www.sfvba.org</a></p>	<p><b>26</b></p> <p><b>DINNER AT MY PLACE</b> 6:30 PM   Studio City</p>  <p>\$25 to attend</p>		
29	30					

SUN	MON	TUE	WED	THU	FRI	SAT	
<b>LATINO HERITAGE MONTH (SEPTEMBER 15 – OCTOBER 15)</b>							
					4	5	
6	7	 <p>SAN FERNANDO VALLEY BAR ASSOCIATION AND VALLEY COMMUNITY LEGAL FOUNDATION</p> <p><b>INSTALLATION GALA PARTY UNDER THE STARS</b></p> <p>THURSDAY, OCTOBER 3, 2019 5:30 PM – 8:30 PM SKIRBALL CULTURAL CENTER</p> <p>See page 29</p>				11	12
	 <b>5:30 PM</b>				<b>Bankruptcy Law Section</b> BAP Year in Review <b>12:00 NOON</b> <b>SFVBA OFFICES</b> Judge Deborah J. Saltzman, Roksana D. Moradi-Brovia and Jessica Bagdanov will discuss the Bankruptcy Appellate Panel's important decisions. Approved for Bankruptcy Law Legal Specialization. (1.25 MCLE Hours)		
13	14	15	16	17	18	19	
		<b>Taxation Law Section</b> Update on IRS Foreign Enforcement Programs <b>12:00 NOON</b> <b>SFVBA OFFICES</b> Lydia Turanchik will discuss the IRS' recent focus on international tax enforcement including foreign bank accounts, Form 5471/5472, Form 1042/1042-S and other international compliance matters. (1 MCLE Hour)	<b>Workers' Compensation Section</b> <b>12:00 NOON</b> <b>MONTEREY AT ENCINO RESTAURANT</b>	<b>Inclusion &amp; Diversity Committee of the SFVBA</b> Joint Mixer <b>LOCATION TBA</b>			
20	21	22	23	24	25	26	
	<b>Mock Trial Committee Meeting</b> <b>6:00 PM</b> <b>SFVBA OFFICES</b>						
27	28	29	30	31			
				 <p><b>DINNER AT MY PLACE</b>                      6:30 PM   Porter Ranch</p> <p>\$25 to attend</p>			



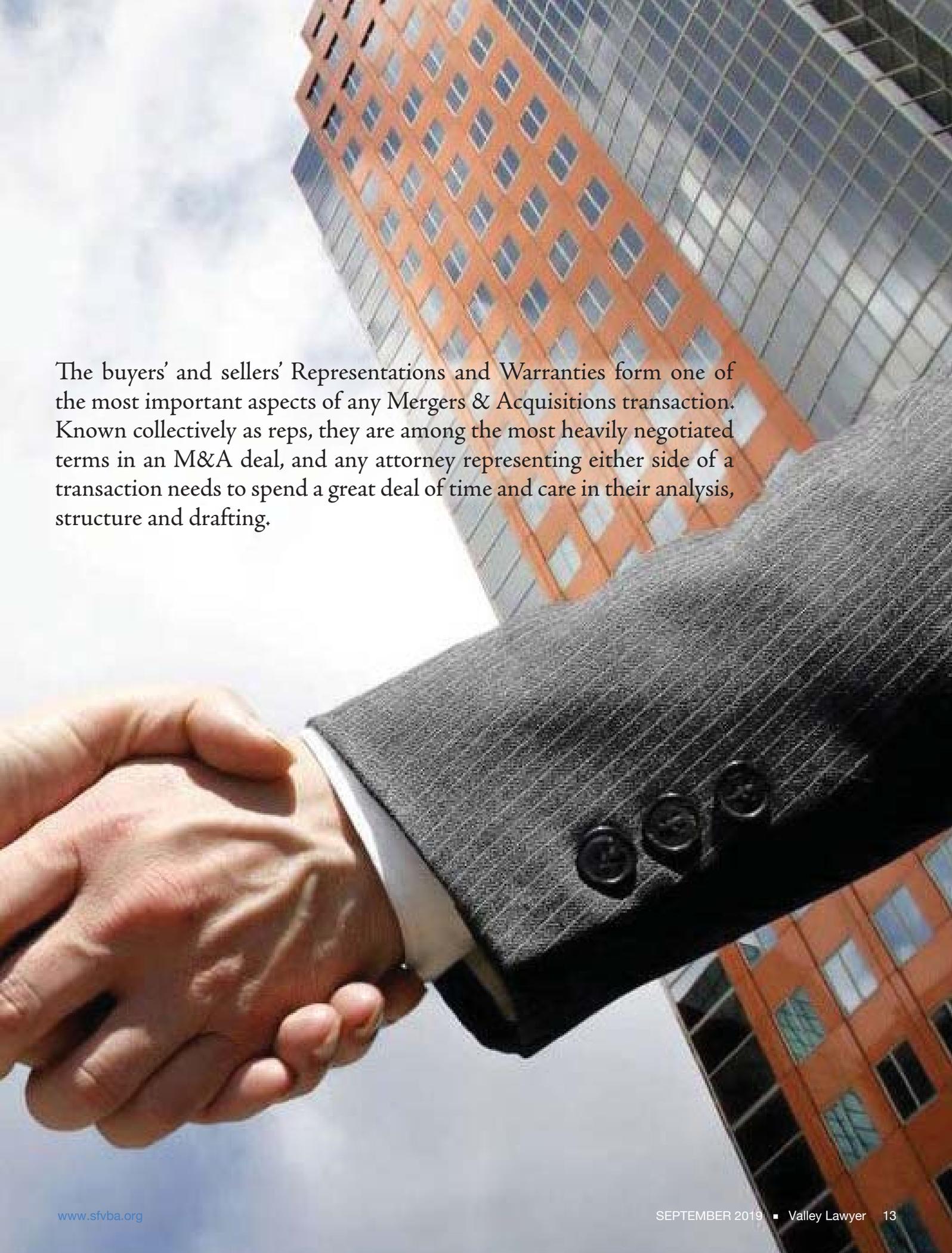
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By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 21.

# Securing Client-Friendly Reps In Mergers & Acquisitions

By Natela Shenon and Stephen M. Riley



The buyers' and sellers' Representations and Warranties form one of the most important aspects of any Mergers & Acquisitions transaction. Known collectively as reps, they are among the most heavily negotiated terms in an M&A deal, and any attorney representing either side of a transaction needs to spend a great deal of time and care in their analysis, structure and drafting.

**O**NE OF THE MOST IMPORTANT ASPECTS OF any Mergers & Acquisitions (M&A) transaction are the buyer's and seller's representations and warranties.

These are often referred to collectively as reps. Reps are, by necessity, among the most heavily negotiated terms in an M&A deal, and an attorney representing either side of a transaction needs to spend a great deal of time and care in their analysis, structure and drafting.

Even so, a novice attorney or one inexperienced in large-scale transactions can be effective in representing their client in an M&A deal through a clearer understanding of how to effectively manage and implement client-friendly reps.

### **Purpose of Reps**

At the most basic level, reps serve the purpose of outlining the seller's promise to the buyer about the state of the seller's business (the target) before it is acquired or the buyer's ability and/or authority to purchase.

They also, at times, provide the basis for a remedy in the event of a breach of such promises, in the form of indemnification, usually for a period of at least one to two years following the closing of the deal.

Reps are often thought of as a single unified concept within the context of an M&A deal. Courts generally do not distinguish between the two. It may be helpful, however, to separate the two terms for a clearer understanding of their relative purpose.

A representation tends to speak to promises made as to the current state of a business; a warranty provides a future forecast for various aspects of the business, subject to a time limit after the deal closes.

Beyond that distinction, reps typically serve four key functions:

- **Due Diligence**—The process of defining reps serves the function of allowing the buyer to gather as much information as possible about the target business. The buyer is usually at an obvious informational disadvantage as to the seller regarding the target business. A buyer who pursues comprehensive reps will necessarily make meaningful discoveries about the target business during the negotiation process.
- **Shifting Risk**—The buyer, aside from being saddled with an informational disadvantage regarding the target

business, also bears a significant risk of monetary loss after a deal closes. If the seller makes misrepresentations about the affairs or the condition of the target business, the buyer can be left in a lurch. A comprehensive set of reps, supported by indemnity provisions, will help alleviate this risk imbalance.

- **Deal Termination**—If a party discovers that the other has breached their covenants or made material misrepresentations, the party may be able to terminate the transaction on that basis. This may be considered a companion to the risk-shifting function, but it nevertheless illustrates how thoughtfully crafted reps can serve client interests at all stages of an M&A deal.
- **Indemnification**—In any M&A transaction, money can speak louder than even the most aggressive attorney. Indemnification provisions provide protection for the promises made in the reps. They provide the incentive for the promisor to assess its position fully, accurately and in good faith, and they provide the other party incentive to trust the promise. In short, without adequate indemnification, an M&A deal might not be worth much more than the paper it is printed on.

### **Common Types of Reps**

The seller will typically provide many more reps than the buyer. The seller's reps will typically include organization and good standing, capitalization and ownership, financial records, intellectual property, assets and real property, material contracts, employment matters, legal compliance, data privacy and security, customers and suppliers, and related transactions.

Though not an exhaustive list by any means, it is clear how these reps are material and consequential. A seller who makes misrepresentations about, for instance, the target business' compliance with the law or performance on large contracts is essentially selling a huge liability.

For the buyer's part, a cash acquisition will require fewer reps, such as organization and good standing, governmental consent, financing, absence of conflicts of interest, and the authority to enter into the specific transaction.

### **Which Reps to Include**

The type of reps included or emphasized in an M&A deal



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depends on a number of different factors and the target business' industry is a good place to begin.

If the industry involves natural resources, chemicals or waste, then reps focusing on compliance with environmental regulations are crucial. Has the target conducted adequate or required testing on its products? Are products in development likely to conflict with federal or state regulations? Are all the proper licenses and permits in place? Have there been any government inquiries into the operations of the business?

If the target is involved in tech, entertainment or biosciences, then reps regarding intellectual property (IP) are vitally important. Does the target adequately own or control the IP it needs to? Are there any looming legal challenges regarding patents, copyrights or trademarks? A buyer's attorney must anticipate the common thorny legal issues in a given industry and tailor his or her approach accordingly.

Another factor affecting the scope and detail of reps in a given M&A deal relates to the due diligence conducted before the deal commences. In some situations, more time spent on due diligence prior to crafting reps may allow for fewer reps to be included in the deal. First-hand knowledge of the intimate details of the business can alleviate the buyer's need for the inclusion of unnecessary or duplicative reps.

Additionally, pre-deal due diligence can help conclusively identify which reps require extra focus and attention. If problems, deficiencies or opportunities are identified at an early stage, a buyer's attorney can concentrate on securing adequate reps related to the more volatile aspects of the business.

Further, a full disclosure provision may provide an adequate catch-all for unforeseen or unexpected material misrepresentations or omissions. Either party may try to attach such a provision to a set of reps by including language such as, "Nothing you have told me is untrue or misleading and you haven't failed to tell me anything that would make what you told me untrue or misleading."

This type of provision, similar to a Securities and Exchange Commission Rule 10b-5 disclosure letter in a public security offering, can serve to limit attempts at any bad faith behavior from all sides.

### When Do Reps Need to Be True?

Common sense dictates that reps need to be true at the signing of a deal. But, do they need to be true at closing as well, assuming the two are not one and the same? From the buyer's perspective, the answer is a resounding "yes."

Buyers, investors and lenders all base their decision to acquire a target business on the seller's representations made at the time of signing. That same logic applies to the closing of a deal. If a buyer relied upon the reps at signing, its reliance would not wane in the gap period before closing.

As stated above, a rep's failure to hold true until closing may provide adequate justification for the buyer to terminate the entire deal. To that end, a buyer's attorney should include a provision providing that reps, which are true and correct at signing, shall also be true and correct at closing.

### Strategic Use of Qualifiers

When representing the seller of a target business, it is important to include as many qualifiers as possible within the drafted reps. One of the most common qualifiers relates to materiality. A smartly qualified rep can prevent the seller from facing liability from any number of relatively minor, immaterial issues.

A rep can be qualified by materiality in a number of ways—for example, "The Company is not party to any material legal action" or "The Company is not involved in any proceeding which could have a material adverse effect or cause a material adverse change to the Company or its business."

The Material Adverse Effect qualifier is particularly common and generally refers to any fact or circumstance that is materially adverse to the assets, liabilities or financial condition of the target business or materially delays or prevents the deal from closing.

What is materially adverse is, of course, open to a precise definition. One might define it as being triggered by a certain dollar amount of loss, or relative to a certain condition known to alter conditions in a particular line of business.

Furthermore, there are standard exceptions to what can be considered materially adverse, like unforeseeable political conditions, acts of terrorism or war, changes in national or global financial markets, or changes in the law after the agreement date. These factors are generally considered well beyond the control of either party to the point where contracting for them is impracticable.

Another common qualifier relates to knowledge. A rep can be phrased, "To the Company's knowledge, the Intellectual Property owned by the Company has not been infringed upon by third parties," or, "To the Company's knowledge, there are no pending or threatened lawsuits against or affecting the employees, officers or directors of the Company."

The definition of knowledge can also be subject to negotiation. The buyer may push to define knowledge as constructive. This broadens the scope and includes knowledge that any individual would be expected to learn after some reasonable level of diligence, or what that individual would be expected to know given his or her position in the business.

By contrast, a seller may push to define knowledge as actual knowledge. This level of knowledge requires the relevant individual to actually know of a particular disputed



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fact or event, rendering imputed or constructive knowledge insufficient.

In addition to defining what knowledge is, the reps should address who is in the knowledge group. In other words, if there is knowledge to be had, who are we defining as the people tasked with having such knowledge? A buyer may push to include anyone in the knowledge group having any level of control over the business unit discussed in any given rep.

For example, in a rep concerning material contracts, the buyer would want to apply the knowledge qualifier to as many people as possible, including the CFO, COO, supply chain managers and so on. Conversely, the seller would want to limit the knowledge group to a select few individuals.

A final common qualifier worth noting relates to specific time periods. To be sure, many M&A deals include uniform survival and release periods for all reps. However, designating a specific time period relative to specific reps can be useful as well.

For example, “As of the date of this agreement, there is no litigation pending against the Company.” As such, this rep would be accurate even if the target company was hit with a massive lawsuit a few months after signing. If the

buyer’s attorney successfully negotiated for removal of the time-qualifier, the buyer may be entitled to indemnification for the costs of the suit.

Aside from the three discussed qualifiers, a savvy attorney can alter the effect of reps through common limiters like “would” or “could,” or by adding “reasonableness.”

For example, a seller may draft a rep such as, “The Company is licensed in all states where licensure is required, except where the failure to maintain a license would not have a materially adverse effect on the business.”

A buyer may push to replace, in the foregoing sentence, the phrase “would not have” with more inclusive language such as “could” not have.

In this example, the seller wants to limit the rep’s scope to present and past conditions. The buyer, on the other hand, is looking to the future—where licensing is not currently advantageous, but may become so at a later date. If this precise issue costs the buyer money before the reps expire, the buyer will want to be indemnified for the seller’s failed foresight.

In addition, a seller may want to add a reasonableness standard into its reps, “The Company is licensed in all states except those where the failure to maintain a license is not reasonably likely to have a materially adverse on the business.”

Given that reasonableness is an eminently litigable term, its strategic use on either side can provide enough cover for clients in a close-call situation.

### Indemnification

Indemnification is a critical element in an M&A deal because it imposes incentives on both buyers and sellers to go through with the deal. The seller is incentivized to make accurate promises, while the buyer is incentivized to trust those promises.

Because of the nature of typical M&A deals, the seller is usually the party who will indemnify the buyer for any misrepresentations or breached covenants. Of course, the buyer is also capable of breaching his own covenants and misrepresenting facts and therefore may be forced to indemnify the seller on such occasions.

The law allows broad flexibility in negotiating indemnification. The parties may choose to limit the scope of indemnity or can expand the scope of recovery to cover losses such as attorney fees, incidental, consequential or special damages. Because of the potentially broad nature of indemnification, the seller’s goal is to limit the amount and duration of its obligations.

Another point of contention is the survival period of the indemnification provisions. Buyers favor longer survival periods for obvious reasons—they would prefer for the

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seller to bear the risk of loss for as long as possible. Sellers, on the other hand, prefer a situation where the deal closes with a metaphorical washing of the hands as to any future obligations toward the buyer.

After all, the seller is likely eager to utilize the proceeds of the sale without concern for any issues that may arise in its former business. Typically, however, most rep survival periods range from 12 to 24 months.

Because an indemnification survival period is to be expected, buyers and sellers often negotiate a basket and cap to establish certain boundaries.

A basket represents the threshold amount that must be reached before the indemnifying party is obligated to cover losses. A basket can be structured as a true deductible where the indemnifying party is only obligated to cover for losses exceeding the threshold amount. A tipping basket is one in which the indemnifying party must cover all losses incurred to that point once the threshold amount is reached. In other words, once the basket is tipped, everything falls out.

An indemnification cap is simply the maximum liability amount for the indemnifying party. A buyer would prefer the cap be set as high as possible because once the cap is reached, it will be responsible for all future losses.

In addition to baskets and caps, the parties might set aside as much as 10 percent of the purchase price to be held in escrow to cover indemnification obligations for a mutually agreed upon time period. This is known as a holdback.

The seller will be entitled to this amount once the time period passes, less any amount paid as indemnity to that point. An alternative to a holdback is the purchase of representation and warranties insurance, or reps insurance.

### Representations and Warranties Insurance

Reps insurance is largely similar to other common forms of insurance, yet modified to match the realities of M&A transactions.

To begin with, an insurer will charge a premium for issuing the policy, typically two to three percent of the coverage limits. The coverage is typically equal to 10 percent of the purchase price, which tends to match the amount of a holdback. Similar to the basket described above, there is usually a deductible amount that is excluded from coverage.

Because reps insurance serves a similar function to basket, cap and holdback provisions in uninsured deals, it can eliminate or dramatically reduce the need for such provisions. The elimination of a holdback is especially attractive to sellers, as it allows them to exit the deal with the proceeds of the sale and the confidence that future indemnification obligations are covered.

Reps insurance can provide benefits to buyers as well. By bringing insurance to the table, the buyer can show the seller

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a holdback will not be required and that the seller can close the deal with the full deal consideration. This can increase the attractiveness of the buyer's bid for the target business. An insurer may also be willing to extend the survival period of indemnity provisions beyond the 12 to 24 months typically envisioned in an uninsured deal, providing further protection for the buyer.

Finally, the buyer benefits from the seller's willingness to forgo extensive qualifiers. The buyer can make simple claims to the insurer without jumping through knowledge and materiality hoops.

In essence, the reps insurer absorbs risk on both sides of the deal so that the transaction can be based on business considerations, and less contingent on the fraught trust between two parties with competing interests.

Of course, reps Insurance is not a perfect, one-size-fits-all solution to closing an M&A deal. If the policy only covers 10 percent of the deal consideration, the buyer may still be at risk for huge losses. Insurance policies also tend to exclude coverage pertaining to a seller's

breach of which the buyer had actual knowledge, and include other carve-outs and exceptions.

That being said, there are a number of large insurers entering the market, so there is room for negotiating tailored, favorable policies.

### Conclusion

In any business transaction, there are inherent risks, which are dramatically amplified in M&A deals due to the volume of interrelated moving parts and potential for loss embedded in every business operation. As such, negotiations regarding representations and warranties boil down to allocating the risks of the transaction among the parties, in both the present and the future.

An attorney's job, on behalf of the seller or the buyer, is to allocate as much risk as possible to the other side

while minimizing as much risk for his or her client. But with foresight, an abundance of due diligence and assistance from useful language and exact qualifiers, it is possible to secure a very positive outcome. 

“

The buyer can make simple claims to the insurer without jumping through knowledge and materiality hoops.”



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# MCLE Test No. 131

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 warranty is a promise based on a past condition.  
 True  False
2. A buyer is at an informational disadvantage in an M&A deal, but bears little risk compared to the seller after signing the deal.  
 True  False
3. The seller will set forth many more reps than the seller.  
 True  False
4. Full disclosure provisions in M&A deals are not enforceable.  
 True  False
5. Buyers rely on reps at both the signing and closing of an M&A deal.  
 True  False
6. The definition of the phrase material adverse effect varies widely depending on the M&A deal.  
 True  False
7. In M&A deals, buyers prefer to define knowledge as actual knowledge.  
 True  False
8. Sellers prefer larger knowledge groups, that is, the group of people tasked with knowledge of the event or condition being represented or warranted.  
 True  False
9. Buyers benefit from strict time-period qualifiers.  
 True  False
10. Indemnity provisions incentivize both buyers and sellers to enter into and close M&A deals.  
 True  False
11. A buyer can never be obligated to indemnify a seller for breaching a rep.  
 True  False
12. Indemnity provisions are largely open to negotiation and not subject to strict legal limitations.  
 True  False
13. After an M&A deal closes, sellers are free from any indemnity obligations towards the buyer.  
 True  False
14. A tipping basket functions like a deductible in an insurance policy where only losses exceeding a threshold amount are covered.  
 True  False
15. An indemnification cap represents the maximum for which an indemnifying party can be liable.  
 True  False
16. An escrow holdback of 20 or 30 percent of the entire deal consideration is common.  
 True  False
17. A representations and warranties insurance policy will cost a premium of two to three percent of the coverage limit.  
 True  False
18. Only buyers benefit from reps insurance. That is why most reps insurance policies are purchased by buyers.  
 True  False
19. A reps insurer will not cover reps past the usual survival period of 12 to 24 months after closing.  
 True  False
20. Reps insurance policies do not cover losses associated with breaches where the breaching party had actual knowledge of an event or condition leading to the breach.  
 True  False

## MCLE Answer Sheet No. 131

### INSTRUCTIONS:

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

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### ANSWERS:

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

1.  True  False

2.  True  False

3.  True  False

4.  True  False

5.  True  False

6.  True  False

7.  True  False

8.  True  False

9.  True  False

10.  True  False

11.  True  False

12.  True  False

13.  True  False

14.  True  False

15.  True  False

16.  True  False

17.  True  False

18.  True  False

19.  True  False

20.  True  False

# The Roots Go Deep: Meet Incoming SFVBA President Barry P. Goldberg

By Michael D. White



*Photo by Ron Murray*

A scenic view of a valley at sunset. In the foreground, a hand in a dark suit sleeve reaches out towards the landscape. The background shows a valley with greenery, buildings, and mountains under a warm, orange sky. A tree branch is visible in the upper right corner.

*Valley Lawyer* recently had the opportunity to sit down with incoming SFVBA President Barry P. Goldberg to talk about his family, his decision to become an attorney, his approach to leadership and management and his vision for SFVBA. Born and raised in the San Fernando Valley, Goldberg has been practicing law there for 35 years. It is a place, he “loves. It’s been my family’s home for years and I care very much for it. The Valley is where my roots are.”

**P**RACTICING IN THE INTERESTING AND challenging area of personal injury law, incoming SFVBA President Barry P. Goldberg joined the Bar's Board of Trustees in 2015 after previously serving for six years as Chair of its Attorney Referral Service Committee.

Married with two grown daughters, Woodland Hills-based Goldberg graduated from Loyola Law School in 1984 after completing his undergraduate degree from the University of California, Los Angeles (UCLA), the only period in his life not spent in the San Fernando Valley.

"I was born, raised and work in the Valley," says Goldberg. "I love it. It's been my family's home for years and I care very much for it. The Valley is where my roots are."

His father, Jerry, he says, tilled the soil. "My Dad was a visionary coming to the Valley," he says. "He was from New York and served in the military, lived in San Francisco and read all the press clippings about the suburbs of Los Angeles and so came here in the early '50s to stake his claim and make his fortune."

And make his fortune, he did. "He was a jack-of-all-trades and larger than life...an insurance executive...real estate agent for Oakdale Realty here in the Valley... professional musician...real estate developer with his own office in Encino...private pilot with his own plane. In fact, his company built two of the hangars at Van Nuys Airport. He was a very interesting guy."

The fifth of six children—all of whose names rhyme: Terri, Larry, Gary, Shari, Barry and Cary—Goldberg developed an early interest in music, which manifested itself in an uncontrollable urge to march around the house to The Music Man's iconic '76 Trombones'. Responding accordingly, his father marched him down to the local music store where he was told that his arms were too short to play the trombone and that it might be better if he concentrated on the trumpet or the flute.

"Nothing came of that," he recalled in a 2016 interview with *Valley Lawyer*. "Then out of the blue when I was about 12 years old, my dad bought me a trombone and I took to it right away. I was in several music groups in junior high, took lessons and that was my instrument. It was great because there wasn't that much competition. All the great players were playing the saxophone and trumpet, so I got to play lead throughout high school."

From Taft High School in Woodland Hills, Goldberg entered UCLA where he was the only freshman in the UCLA jazz band "with a bunch of guys who are basically professional level players now."

But a career as a professional musician was not in the cards as the obligations of raising a family and law school led to a self-imposed, three-decades-long "retirement" from music. With a little time on his hands, Goldberg dusted off the original trombone that his dad had bought him and

started playing again. With the muse of music pushing him on, he practiced hard and was rewarded with positions with both the Los Angeles Lawyers Philharmonic Orchestra and its swing and jazz revival group, the Big Band of Barristers.

"I've always found it interesting that there seems to be a large number of musicians that are lawyers," said Goldberg. Music is cooperative, by its very nature. When you play in a musical group, you have to take direction and you have to be part of a section or a team. You have to work together. It's non-adversarial.

*Valley Lawyer* recently sat down with Goldberg to talk about his family, his decision to become an attorney, his approach to leadership and management and his vision for SFVBA.



**Q: What is it about the law that attracted you to the profession?**

**A:** A combination of things led me to the law. My father worked with many lawyers when he was in the real estate business. He held them in high regard and I saw that when I was growing up. He encouraged me to become a lawyer.

When I graduated from UCLA in 1980, the economy was flat and I had given up my hopes of becoming a professional musician. I was good, but not amazing; and that's what you need to be to make it in that business. I wasn't at the top of my class where I could get a job with IBM or one of the other big companies that were recruiting out of UCLA. I found

myself going into a job market without any idea of what it was I wanted to do. I gave it a lot of thought and decided on the law, fairly certain I was going to be an entertainment attorney.

At UCLA, I had served as the Commissioner of Cultural Affairs on the Student Council, along with former SFVBA presidents Fred Gaines and David Gurnick. I produced a lot of the music and comedy acts at UCLA, and before I graduated, I was working almost full time putting together comedy acts at the Coffee House, working with comedians like Jerry Seinfeld, Arsenio Hall, George Wallace, and Kevin Nealon. We gave them a platform to perform when they were younger. So it seemed natural for me to go into entertainment law.



*Photos provided by Barry P. Goldberg*



*With fellow attorney and trombonist, Marc L. Sallus*





When I was in law school, though, entertainment law became less interesting to me and there weren't a lot of jobs in that area. I didn't have the connections at a firm or an entertainment company. I had excelled in all of the litigation-type classes. I got high grades in insurance law, of all things, and that led to several job interviews. My first clerking experience was with Lewitt Hackman during the summer of my first year in law school. I also clerked for Tom Girardi, the very famous plaintiff's attorney. I went to work for a big defense firm and then wound up taking a job with a spin-off from that firm with one of the partners. I discovered I liked litigation, going to court, filing motions, all that stuff.

**Q: You have been practicing law for three decades now. Has that attraction changed over the years?**

**A:** What attracts me to the law now is a lot different from what attracted me back then. I've always enjoyed the intellectual challenge, so I dreaded the notion that I might go to some job somewhere, doing the same thing over and over again without there being any intellectual challenge and development.

The law is just ripe with change. There are new case law and statutes almost every day and I've always kept up on changes. As a young lawyer, I got in the habit of reading all the advance sheets every morning that had to do with the topics of law that I covered. I still do that today. I like to be very, very up to date on the law.

As a young lawyer, I thought it was so exciting that I could be entrusted with a case to take to court and argue in front of a judge. I loved the travel involved. Going to San Francisco to argue a motion; what more exciting thing can a 25-year-old do?

**Q: Why practice in the area of personal injury law?**

**A:** As a personal injury lawyer, I love representing clients, meeting people, understanding their issues, and solving them. I've always been a problem solver. I was a chess player

when I was a kid. I enjoy solving tactical and strategic issues and I've always approached the law that way. Here are people who need your help and how are we going to get them a positive result.

I was very interested in insurance law, insurance bad faith those types of areas. My older brother Larry had a practice in Beverly Hills. He convinced me, after doing about three years of defense work, to come over and work on the plaintiff's side. I worked with him for 17 years, learned the business, and still confer with him on cases.

**Q: You have spent almost your entire personal and professional life in the Valley. How do you think that experience will help you as you assume the role of SFVBA president?**

**A:** I was only out of the Valley while attending UCLA, living on the Westside. I really know the Valley from a real estate standpoint, as I've lived in several different neighborhoods, probably driven every street. My kids grew up here and I've seen the changes that have occurred. My first memories of the Valley are of a pretty rural place. There has been a lot of change, some of it very good, some of it, like the widespread urbanization, is kind of sad. That dovetails into what I'm going to focus on as Bar President.

I'm going to do everything I can to have SFVBA help in the effort to eliminate or mitigate homelessness in the Valley. That is something we see on a daily basis and it's something that we shouldn't accept and just look away. There are people out there who have plans and ideas to address the issue. I love the Valley. It's our home and blight is not good for anyone.

**Q: What is your management style?**

**A:** I make decisions quickly only after considering everyone else's point of view. I like the idea

of making a decision and going with it; if it happens to be wrong, then making a corrective change. Too much discussion can sometimes hinder getting things done that need to be done.

In my practice, I don't have the luxury of machinating for hours and hours. In my practice, we have to look at the facts of the case, take into consideration all the legal issues involved, make a decision and move on. There's no other way to approach them and, otherwise, I wouldn't be able to.

**Q. Has practicing law as a personal injury attorney influenced your leadership and management style?**

**A:** PI lawyers do work based on contingency fees. They get paid when they get results and, therefore, are less conservative when it comes to managing an organization and introducing innovative and effective ways to increase membership, revenue and impact.

Being a PI attorney calls for a completely different mindset. I served as Chairman of the Bar's ARS Committee for six years long before I was a Trustee. [Past SFVBA President] Alan Sedley drafted me to head the committee because he felt that it would be good to have a PI attorney head up the effort to get more referrals.

We sometimes operate negatively for months and months, but we know that there's going to be a big case coming down the pipe. I am willing to take a risk as long as it's reasonably calculated. Good PI attorneys don't just take risks willy-nilly; they take well-thought-out risks knowing there's going to be a positive result.

I was very excited about the recent SFVBA Meet the Experts event because it was an opportunity to, not only provide our members with an opportunity to network, but create revenue. Every event we put on has to maximize

attendance, deliver the goods, and have great sponsors. It all works together.

**Q. How has the Bar changed in the years since you first joined?**

**A:** We need to credit the work of past presidents and boards to see where we are today. Because of them, today we're seeing a tremendous surge in enthusiasm and attendance at events.

I feel that I'm riding a wave. Different presidents have each added something that was necessary to make that surge occur. I hope to be able to carry that forward. When I first got involved, I feel the Bar was really struggling for an identity. It was at a time when people were wondering about its relevance.

We've come a long way with the Bar growing in size and impact. Now, we've got a record number of great candidates seeking a position on the Board and that alone shows how far we've advanced over the past several years.

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

**A:** No. Actually, I thought I'd be retired and wildly wealthy. In the real world, the legal world, it's much harder than it looks. The law has been wonderful to me and there are new things every day that make the law even more exciting to me today than yesterday. My family has never missed a meal; both girls have been able to graduate from college. I am nowhere near close to retiring.

**Q. Where would you like to see the Bar a year from now?**

**A:** That's easy. I would like to see the membership and revenue to be up and the Bar to have a higher profile in the community and I think we're headed in that



Enjoying a UCLA football game at the Rose Bowl with wife, Maribel



Daughters Julia (left) and Samantha



*With award-winning Hollywood composers Charles Fox (left) and Richard Sherman*

direction. Whatever is accomplished during the upcoming year will be built on the shoulders of a lot of hard-working people.

As President of SFVBA, I will be the head cheerleader and help utilize more technology such as social media to get the Bar's message out. I can remember at one of my first meetings as a Trustee finding out that less than one-third of the membership had a social media account. We were talking about sending out postcards to members to inform them of events. That wasn't that long ago. We saw that we had to implement new technology to reach our members. We realized that to move forward and attract younger members, we have to be relevant.

**Q: What more can the Bar do to effectively reach out to younger attorneys?**

**A:** Everyone agrees on two things: younger attorneys want to be mentored and they want access to top lawyers and judges.

One of the things I've always believed is that when we have events, the older, more established attorneys should always connect and interact with the younger ones. We also need to show that on social media so younger lawyers can see the organization as one that they should be involved with. It's a combination of mentorship and access.



**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.

**Q: What do you see as the key to the Bar's success over the next year and beyond?**

**A:** The Bar has a magazine, different committees, charitable outreach, and educational programs. All that is great and necessary, but, first and foremost, we need to remember that we are a trade organization. We need to make sure that lawyers in the Valley are successful and ultra-competent, and that the community here doesn't feel it needs to go elsewhere for legal services. In the last year or two, the search for lawyers on the internet has seen the term 'near me' go up 900 percent.

People want their lawyers to be close by and accessible. So what we need is for every member of this Bar association to say, 'I want to be active in the Bar because I want to be more successful as an attorney, and provide the expertise and service to clients, colleagues and everyone in the community.'



*With California Supreme Court Justice Tani G. Cantil-Sakauye*



*Friends since Loyola Law School: David F. Glassman, California Senior Deputy Attorney General (center) and attorney Chris Maile, Senior Partner at Tharpe & Howell*

The success of law firms located in the Valley is our goal and everything we do helps achieve that goal. When potential clients see us involved in charitable activities, they see us as relatable, the people they want to do business with, and members are more inclined to renew their membership and be more involved. I am a real proponent of law firm growth and I want every lawyer I come in contact with to be better and more successful. 🏛️

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By Jonathan W. Evans and Michael S. Edmiston

# Burned By Your Broker?<sup>1</sup>

**T**OWARD THE END OF A ROUTINE business meeting, your client pulls out an envelope, hands it to you and asks, “Can you help me with this?”

Opening the envelope, you see a monthly account statement from a brokerage firm. Your client explains that her stockbroker talked her into purchasing several investments which have done nothing but lose money and the broker is dodging her phone calls.

Greetings! You have just been pitched head-first into the securities arbitration rabbit hole.

## A Regulatory Patchwork Quilt

Securities regulation in the United States is a federal, state and self-regulatory patchwork quilt with brokerage firms and stockbrokers regulated by the Securities and Exchange Commission (SEC) as laid out in the Securities Exchange Act of 1934.

The SEC has delegated much of its responsibility to the Financial Industry Regulatory Authority (FINRA), a self-regulatory organization, which has responsibility for the regulation of broker-dealer operations, the licensing of stockbrokers or associated persons, regulatory examinations and the disciplining of the parties and individuals under its jurisdiction.

In addition, FINRA also runs the only national securities dispute resolution arbitration forum.<sup>2</sup>

In 1987, the U.S. Supreme Court held that customer disputes with brokerage firms and their brokers could be subject to mandatory pre-dispute arbitration clauses.<sup>3</sup>

Today, buried deep in almost every brokerage firm’s new account agreement is a clause requiring arbitration of any disputes between the customer, firm and its stockbrokers.

Virtually all arbitration clauses name FINRA as the arbitration provider.

## FINRA Arbitration

FINRA provides its Code of Arbitration Procedure, as well as a pool of 7,888 arbitrators in 70 venues in the nation, in addition to case administration services.<sup>4,5</sup>

In any given year, FINRA receives between 3,000 to 5,000 arbitration filings, with surges of filings usually following large market losses.<sup>6</sup> On average, about 85 percent of all cases filed settle or otherwise resolve prior to a hearing.<sup>7</sup> Of the 15 percent, tried claimants win about 40 percent of the time.<sup>8,9</sup>

Getting a hearing takes, on average, 17 months.<sup>10</sup>

To commence an arbitration, FINRA requires a claimant to file a Submission Agreement—an agreement to arbitrate—and “[a] statement of claim specifying the relevant facts and remedies requested.”<sup>11</sup>

With no set pleading standard and since FINRA arbitration is an equitable



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**Michael S. Edmiston** of Jonathan W. Evans & Associates is a securities litigator with 20+ years of experience. He can be reached at [msedmiston@stocklaw.com](mailto:msedmiston@stocklaw.com).

forum, statements of claims range from handwritten letters to detailed pleadings worthy of a federal securities litigation practice with claims running the gamut from equitable arguments to the causes of action seen in court pleadings.

According to FINRA, the most frequent claims asserted are breach of fiduciary duty, negligence, failure to supervise, misrepresentation, breach of contract, suitability, fraud, the omission of facts, the violation of blue-sky laws, manipulation, unauthorized trading, elder abuse, churning, margin calls and errors-charges.<sup>12</sup>

Damages calculations vary widely, too, with the same remedies available in court also available in arbitration.<sup>13</sup>

For the defense, the statement of answer focuses on factual arguments that the claimant wanted the security and the trading, had the ability to suffer the loss and was willing to assume the risks involved.

The new account documents the client signed when opening the account are often attached or excerpted into the answer to support the defense, in addition to any communications showing any assent by the claimant to making the investment(s) at issue.

Additional defenses can focus on the timeliness of the claim, that FINRA rules do not create a private cause of action, provision of prospectuses and damages.

#### **Arbitrator Selection**

Arbitrator selection in FINRA arbitration is the most important part of the case with FINRA appointing a panel of three arbitrators for claims in excess of \$100,000.<sup>14</sup>

Arbitrators are divided into two groups, public and non-public.

Public panelists are those with no affiliation with the securities industry, while non-public panelists have some current or prior affiliation with the securities sector.

For customer cases, the arbitration panel will consist of a majority of public

panelists or if selected by either side, all public panelists.<sup>15</sup>

FINRA uses a strike-list process for the parties to select arbitrators. FINRA sends the parties identical lists of arbitrators and their disclosures.

Each side is given a set of strikes for the proposed arbitrators. Once a side exhausts its strikes, it must rank the remaining arbitrators in order of preference. When the parties submit their confidential strike lists, FINRA appoints arbitrators based on the merged rankings, and the panel is constituted from least-objectionable arbitrators.

Following arbitrator appointment, the agency schedules an Initial Pre-Hearing Conference (IPHC) with counsel and the arbitrators.

At the IPHC, the parties and the panel schedule the hearing dates, pre-hearing motion practice, discovery cut-offs and any other work due prior to the hearing.

#### **Limited Discovery**

Discovery in FINRA arbitration is limited to an exchange of documents and limited Requests for Information.<sup>16</sup>

The agency provides a Discovery Guide which provides a list of baseline, presumptively discoverable documents to be exchanged by each side, and allows for parties to propound their own document requests.<sup>17</sup>

From the defense perspective, the fewer documents produced, the better. With no mandatory disclosure requirement and no meaningful enforcement by FINRA to halt discovery gamesmanship, respondent brokerage firms frequently object to every category in the Discovery Guide, slow-roll their production and resist producing presumptively discoverable supervisory, regulatory examination and compensation documents.

From the claimant's list, however, private documents such as tax returns, brokerage account statements and financial statements such as those in a mortgage application are considered



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presumptively discoverable, while knowing what has not been produced, serving tailored discovery requests and pursuing production through aggressive motion practice can actually be more valuable than whatever documents were voluntarily produced.

### Pre-Hearing Motions

FINRA permits pre-hearing motion practice.<sup>18</sup>

The hearings and decisions, based on the type of motion, are left to either the chairperson or a full arbitration panel.

Discovery motions are the most common, while dispositive pre-hearing motions have fallen into disfavor due to a FINRA rule change curbing their abuse.<sup>19</sup>

Efforts to resolve cases usually come after discovery is concluded and mostly take the form of mediation prior to the final hearing. Anecdotally, it is the odd case in which the parties do not try to mediate.

If a case makes it to a hearing, the process looks and acts similar to a trial, following the traditional phases of opening arguments, direct and cross-examination of fact and expert witnesses and closing arguments. The key differences are that the arbitrators act as both judge and jury, the hearing takes place in a conference room and there are no rules of evidence.<sup>20</sup>

Following the close of the hearing, the arbitration panel issues its award. Unless jointly requested by the parties, or unilaterally decided by the arbitrators, FINRA awards are bare-bones and, after a recitation of facts, claims, and defenses, will state whether the claims are denied or if liability is found, the parties responsible and the amount of damages to be awarded.

The losing party has 30 days from the date of service of the award to pay any damages.

### Decisions Are Binding

FINRA arbitration is binding and there is no appeal process. A party may seek *vacatur* of the award, but the grounds, mainly related to arbitrator misconduct, are narrow and challenges rarely succeed.<sup>21</sup>

Conversely, a winning party may seek to confirm an award and with courts required to give great deference to arbitration awards, confirmation is the usual result.

Since FINRA is a self-regulatory organization, it has the ability to activate a special enforcement mechanism to require its member firms or associated persons to pay awards.

If there is a failure to pay, the claimant may request FINRA commence expedited suspension proceedings against the non-paying party, and, unless the losing party pays, files for bankruptcy or timely files a motion to vacate, FINRA will suspend the party from operation until the award is paid.<sup>22 23</sup> 

<sup>1</sup> 'Burned By Your Broker?' is a registered trademark of Jonathan W. Evans & Associates.

<sup>2</sup> <https://www.finra.org/arbitration-and-mediation> (last visited July 25, 2019).

<sup>3</sup> *Shearson/American Express v. McMahon* (1987) 482 U.S. 220.

<sup>4</sup> <http://www.finra.org/arbitration-and-mediation/code-arbitration-procedure>.

<sup>5</sup> <http://www.finra.org/arbitration-and-mediation/dispute-resolution-regional-offices-and-hearing-locations>.

<sup>6</sup> <http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics#historicalarbstats>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> FINRA, Rule 12302.

<sup>12</sup> <http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics#historicalarbstats>.

<sup>13</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52.

<sup>14</sup> FINRA, Rule 12401.

<sup>15</sup> Statistically, claimants who select a full public panel win more often. In the first six months of 2019, of the 74 cases decided by a full public panel, claimants won 41 (55 percent). Of the 31 cases heard with a non-public arbitrator, claimants won only nine (29 percent). <http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics#historicalarbstats>.

<sup>16</sup> FINRA, Rule 12507.

<sup>17</sup> FINRA, Rules 12506, 12507, and FINRA Discovery Guide.

<sup>18</sup> FINRA, Rule 12503.

<sup>19</sup> FINRA, Rule 12504.

<sup>20</sup> FINRA, Rule 12604.

<sup>21</sup> 9 U.S.C Section 10, Cal. Civ. Proc. § 1286.2.

<sup>22</sup> FINRA, Rule 9554.

<sup>23</sup> *Id.*

# Member Focus



Without its individual members no organization can function. Each of the San Fernando Valley Bar Association's 2,000-plus members is a critical component that makes the Bar one of the most highly respected professional legal groups in the state. Every month, we will introduce various members of the Bar and help put a face on our organization.

## Carol L. Newman



**Law School:** George Washington

**Area(s) of Practice:** Palimony, cohabitation agreements, business litigation, real estate litigation

**Years in Practice:** 42

**Firm:** Alleguez Newman Goodstein LLP, Woodland Hills

**What was your very first job?**

"Assistant Director of Personnel at the Washington Hilton Hotel in Washington D.C."

**Your proudest professional accomplishment?**

"President of the San Fernando Valley Bar Association 2015-16 and Top 50 Women Lawyers, Super Lawyers 2017, 2018."

**Your favorite cuisine?** "Pizza."

Carol L. Newman has been an attorney for 42 years.

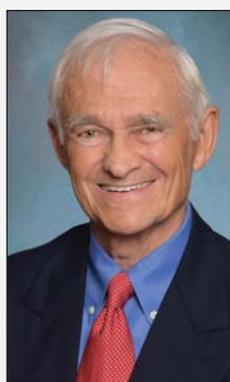
After having her own law firm for 18 years, Newman became a partner in the law firm of Alleguez & Newman, LLP in 2012. Her practice focuses on real estate litigation, business litigation, and legal issues relating to unmarried couples. "I began practicing law as an antitrust prosecutor with the U.S. Department of Justice in 1977, and spent three years in that position in Washington, D.C. and Los Angeles before going into the private sector."

Before opening her own law firm in 1994, she was a partner in two law firms, Rosen, Wachtell and Gilbert and the national law firm Keck, Mahin & Cate.

Newman is a past President of the San Fernando Valley Bar Association and is currently co-chair of the Neighborhood Council Budget Advocates.

A summa cum laude and Phi Beta Kappa graduate of Brown University with a BA and MA in English and American Literature, she attended Harvard Law School and is a graduate of George Washington University Law School, where she was awarded the Order of the Coif and served as an editor of the Law Review.

## Leon Lewitt



**Law School:** University of San Diego

**Area(s) of Practice:** Mergers and acquisitions, corporate, general business transactions

**Years in Practice:** 56

**Firm:** Lewitt Hackman, Encino

**What's your favorite movie?**

"An American in Paris."

**What is your proudest professional/personal accomplishment?** "Founding Lewitt, Hackman, Shapiro, Marshall & Harlan/being married to Barbara for 55 years."

**Favorite Valley Restaurant:** "Panzanella."

Leon Lewitt was born in Paris and immigrated to the United States in 1947 at the age of 10. He spoke no English then, but later graduated from The Ohio State University with a BA in finance, minoring in accounting.

"I moved to Los Angeles in 1960 and earned my JD in 1963. My brother Maurice and I practiced law for six years in Beverly Hills and then moved to the Valley where Lewitt Hackman was founded in 1969."

Lewitt has represented clients in hundreds of different enterprises. "That's been both satisfying and intellectually stimulating, as I have served as counsel to, as well as a member of, many corporate boards of directors." He has also served as an expert witness in corporate litigations.

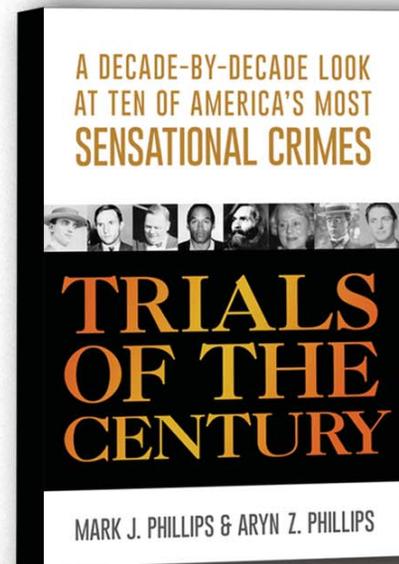
"I am very proud of watching Lewitt Hackman grow over the past 50 years. I have been married to it almost as long as I have been married to my lovely wife, Barbara. But I am most proud of my family," he says.

"Barbara and I have two wonderful daughters and four terrific grandchildren with whom I enjoy spending time. Also grateful for being able to spend time with fantastic friends, golfing, traveling and enjoying good food and wine."

# The Trial of Charles Manson: Fifty Years Later

By Mark J. Phillips and Aryn Z. Phillips

Writers, attorney Mark J. Phillips and Aryn Z. Phillips, are co-authors of the highly-regarded book, *Trials of the Century: A Decade-by-Decade Look at Ten of America's Most Sensational Crimes*, published by Prometheus Books in 2016. This article is a book excerpt, edited for space requirements and to comport with *Valley Lawyer* guidelines.



**L**AST MONTH MARKS FIFTY years since the sensational Tate/LaBianca murders and the passage of time has not diminished the place they occupy in the American psyche, even for those too young to have experienced it firsthand.

The summer of 1969 had been blisteringly hot in Los Angeles, the kind that most residents would prefer spending at the beach, laying by the pool, or sitting beneath blasting air conditioning units.

Among those just trying to beat the heat were young Hollywood starlet Sharon Tate, entertaining a few friends at her posh home in the hills above

Hollywood, and Leno and Rosemary LaBianca, a Los Feliz couple returning home from a day spent at Lake Isabella, a popular vacation spot 150 miles outside the city.

Less concerned with the heat were their killers, who invaded their homes and murdered them in the strangest and most grotesque of ways. This cabal of youths, no older than local college kids, lived on a ranch not far from the city as members of a cult calling themselves the “Family.”

## Enter Charlie Manson

They had been sent to kill innocent strangers by the persuasive,

mysterious, and terrifying Charles Manson, whose apprehension and trial combined into a grotesque milestone event of the 20<sup>th</sup> Century.

In 1969, Charles Manson was in his mid-thirties. He was small, only 5’2” and slim, with petite facial features and dark brown hair that he wore long and wild, down to his shoulders. His face would soon become one of the most recognized in America.

Born November 12, 1934, in Cincinnati, Ohio to sixteen-year-old Kathleen Maddox, he never knew his birth father; the name Manson was adopted from one of Kathleen’s later husbands. He spent his early years



**Mark J. Phillips** is a partner at Goldfarb, Sturman & Averbach in Encino. **Aryn Z. Phillips** is a graduate of the Harvard School of Public Health and a Ph.D. candidate at UC Berkeley. They are the co-authors of *Trials of the Century* (Prometheus, 2016).

bouncing around different foster facilities and getting in trouble.

Paroled and rearrested several times, Manson was thirty-two years old when he was finally released in the spring of 1967. He had been institutionalized for a total of 17 years.

He had missed out on the birth of the counterculture movement while he was locked up, but he liked what he saw when he was released. Moving north to Berkeley, he sang, played guitar, and panhandled on the streets.

His darkly unique brand of thinking combined Beatles lyrics, passages from the Bible and Dianetics, and, being a persuasive orator, he explained it all in a charismatic and dramatic fashion.

Before long, he had attracted many willing followers, both women and men in their late teens and early twenties, and the Family was born.<sup>1</sup>

He packed his followers into an old bus and took to the road. Eventually, they settled at the Spahn Ranch, a decrepit and isolated spread outside L.A. that had, in its former days of glory, been a filming location for movies and television shows.

His philosophy, while still loosely based on Beatles lyrics and the Bible, had grown and developed over the years. He believed that the world was on the brink of an apocalyptic race war, which he called Helter Skelter. Blacks would win the this war, he claimed, and wipe out the white race. They would hand over the reins of power and Charles Manson would rule the world.<sup>2</sup>

The revolution was supposed to start with blacks committing heinous crimes in wealthy white neighborhoods of Los Angeles, but no such crimes were occurring. Manson became anxious, upset at Helter Skelter's slow progress, and decided to get the revolution started himself.

### The Evil Assignment

On the night of Friday, August 8, 1969, Manson gathered some of his most loyal followers and instructed them to

dress in dark clothing and find their knives. Among those chosen was twenty-one-year-old exotic dancer Susan Atkins, twenty-one-year-old Patricia Krenwinkel from Los Angeles, and twenty-three-year-old Charles Watson, called Tex, a former high school athlete, college dropout, and Manson's right-hand man.

The final member of the cabal was twenty-year-old Linda Kasabian, a relative newcomer to the Family; she had only been living with Manson for a month, but was asked to join the mission because she was the only member of the Family with a valid driver's license.

The four set out from Spahn Ranch and drove to a home on Cielo Drive in Benedict Canyon, the area above Hollywood and Beverly Hills. The house belonged to Rudi Altobelli, and was being rented by movie director Roman Polanski and his beautiful wife, twenty-six-year-old actress Sharon Tate.

The Polanskis had spent much of the summer in Europe, so the house was being tended to by their friend, twenty-five-year-old Abigail Folger, heiress to the Folger coffee fortune, and her boyfriend, thirty-two-year-old Wojciech "Voytek" Frykowski.

Tate had returned from Europe a few days prior and was staying at the house with Folger and Frykowski until Polanski returned home. Manson had been to this house before, and chose it because he knew it would be isolated.<sup>3</sup> The group arrived at the house after midnight, cut the telephone lines, climbed the gate, and slaughtered everyone inside. Afterwards, they got back in the car, changed clothes, tossed their bloody garments and knives over the side of the canyon, and drove back to Spahn Ranch.

The murders were not discovered until the next morning when the housekeeper, Winifred Chapman, arrived and telephoned the police. The arriving officers found themselves at a crime scene unlike any other they had seen before.<sup>4</sup>



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News of the murders spread quickly, and investigations began immediately, but back at Spahn Ranch, Manson was unhappy with how the events of the previous evening had unfolded, and prepared his team to strike again that night. This time, they were joined by Leslie Van Houten and by Manson himself. He settled on a home in Los Feliz belonging to Leno and Rosemary LaBianca. Manson entered the home alone, tied up the couple, and returned to the car. Watson, Krenwinkel,

and Van Houten then entered, murdered the LaBiancas, and hitchhiked back to Spahn Ranch. Manson, on his way home, stopped for milkshakes.<sup>5</sup>

The bodies of the LaBiancas were discovered the following evening. The police, upon arrival, found a scene equally, if not more shocking than the one at the Tate residence.<sup>6</sup>

It took a long time for Los Angeles Police Department to connect the two murders to the Manson Family, or even to each other. The Tate murders were

believed to be a drug deal gone bad.

The LaBianca detectives were operating under the suspicion that the murders had been the result of an upset robbery. Two months after the murders, neither set of investigators had made much headway.

### Arrest and Trial

Manson had since moved the Family to Barker Ranch, a remote and isolated homestead near Death Valley. The ranch was raided in early October and twenty-four Family members, including Manson, were arrested on a wide variety of charges and were being held in jail in Inyo County, about five hours outside of Los Angeles, still unconnected to the Tate and LaBianca murders.

During the raid, Inyo County law enforcement had come across two young girls attempting to flee the Family, one of whom implicated Susan Atkins in the murders. Atkins was questioned, booked for suspicion of murder, and moved to Sybil Brand Institute. Talkative in jail, Atkins told her cellmates about life with Manson and eventually that she had killed Sharon Tate and her guests, and that her friends had killed the LaBiancas.<sup>7</sup>

Interviews with Atkins exposed the involvement of Watson, Krenwinkel, Kasabian, Van Houten, and Manson. When a grand jury returned after deliberating for only twenty minutes, they delivered indictments for murder against all five. The prosecution would have to prove not only that the accused had committed the murders but that Manson, indicted under conspiracy laws, had used his powerful control over his followers to get them to perpetrate the murders for him.<sup>8</sup>

The trial of Manson, Atkins, Krenwinkel, and Van Houten began on June 15, 1970, at the Hall of Justice in downtown Los Angeles before Judge Charles Older (Watson fought extradition from Texas where he had fled, and was tried separately the following year). Jury selection took

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five weeks. Over the next twenty-two weeks, Prosecutor Vincent Bugliosi called 80 witnesses and introduced 320 exhibits. Witnesses included Family members and neighbors of the victims, the Polanski's maid who first discovered the carnage, representatives from the Medical Examiner-Coroner's Office and various branches of law enforcement.

The star witness was Linda Kasabian, who had not entered the residences or participated in the murders, and who testified under an agreement of immunity. For 17 days she gave an account of life with the Family.

She made it clear that Manson was in charge and dictated much of daily life, stating that "the girls worshiped him, just would die to do anything for him." She spoke at length about Manson's feelings on race, his belief in Helter Skelter, his obsession with the Beatles, and gave a very detailed account of the two nights of carnage.

Through the testimony of witnesses, Bugliosi matched the knives and guns used at the crime scenes to those at Spahn Ranch, connected the bloody clothes found on the hillside to the defendants, verified the fingerprints found at the Tate residence as belonging to Watson and Krenwinkel, and established the whereabouts of the defendants on that fateful August weekend, all of which corroborated Kasabian's testimony. He elicited details of Manson's philosophy, connected him to the words written at the crime scenes, established that Manson felt he had to take Helter Skelter into his own hands, and introduced countless examples of his domination over the Family members.

Finally, on Monday, November 13, 1970 the prosecution rested.<sup>9</sup>

To the astonishment of all present, the defense rested immediately, declining to call any witnesses or present any evidence. Atkins, Krenwinkel, and Van Houten instantly

stood, shouting and insisting that they be allowed to testify. Judge Older called a conference of the defense attorneys, who informed him they had rested because they feared that if they called their clients to the witness stand, they would take full responsibility for the murders in order to save Manson.

Before they were given the opportunity, Manson insisted on speaking himself. Older removed the jury before allowing him to do so, and Manson gave a rambling, incoherent,

two-hour speech. When asked by Older if he wanted to repeat his statement in front of the jury, he declined.

After a brief suspension, closing arguments, and jury instruction, the jury began deliberation on January 15, 1971. After nine days, it returned and announced that it had found Manson, Atkins, Krenwinkel, and Van Houten guilty on all counts.<sup>10</sup> After another eight weeks of testimony, the jury sentenced all four defendants to death on March 29, 1971.

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In addition to being the longest and most costly criminal trial in American history up to that time, the Manson trial was also one of the strangest. Family members held a vigil outside the courthouse for the duration of the trial, passing out flyers and shouting at passersby. Manson behaved bizarrely through the entire trial.

On the first day, he arrived at the courthouse having carved an "X" into his forehead and his followers outside explained that he had "X'd himself from your world" (he later turned the X into a swastika).<sup>11</sup> He interrupted witnesses and made wild outbursts to the judge, jury and spectators. He threatened people and once lunged at Older with a sharpened pencil. Older constantly had

him removed from the courtroom and placed in a side room where he could hear, but not interrupt, the proceedings.

His followers were equally outrageous. When they saw the X carved on his forehead, they did the same to theirs. During the penalty phase, Manson shaved his head and the girls followed suit.

### The Stuff of Nightmares

The antics of Manson and his followers might have been laughable had they not been truly frightening.

Bugliosi began getting hang-up phone calls at home, even after he changed his unlisted phone number, and he was followed by Family members when he left the courthouse. He had an

intercom system installed in his home that would instantly connect him to the nearest police station and had a bodyguard accompany him for the remainder of the trial.<sup>12</sup> Judge Older had a driver-bodyguard and wore a revolver under his robes.<sup>13</sup>

The trial was also one of the most ardently followed and highly publicized trials of all time. Not only Angelinos but people nationwide obsessively listened to, read up on, and talked about the case, the victims, the defendants, the attorneys, and the trial proceedings.

The reasons for this obsession were manifold. The case exuded celebrity. At every turn there was a nationally identifiable name. The crimes were some of the scariest in recent memory, perhaps in the last century. They were the stuff of nightmares.

On top of everything else, there was Manson, who by himself was a terrifying character who had warped the minds of America's youth and convinced them to kill for him.

So afraid were people of Manson that the case was commonly referred to as "the Manson case" rather than "the Tate case" or "the LaBianca case" or any other victim, as most cases are.

Until his death in prison in 2017, Manson remained as outrageous as he was at his trial. He never apologized nor showed remorse.

Laurie Levenson, professor at Loyola Law School, aptly said "I think Manson will haunt us forever."

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<sup>1</sup> Jeff Guinn, *Manson: The Life and Times of Charles Manson* (New York: Simon & Schuster, 2013) 95 -96.

<sup>2</sup> Bradley Steffens and Craig Staples, *The Trial of Charles Manson: California Cult Murders* (San Diego: Lucent Books, 2002), 50-51.

<sup>3</sup> Vincent Bugliosi, *Helter Skelter* (W. W. Norton, 1974) 24, 55-60.

<sup>4</sup> Bugliosi, 27, 61.

<sup>5</sup> Bugliosi, 358.

<sup>6</sup> Bugliosi, 68-70.

<sup>7</sup> Bugliosi, 117-127.

<sup>8</sup> Steffens, 40-45.

<sup>9</sup> Bugliosi, 412-503.

<sup>10</sup> Steffens, 87.

<sup>11</sup> Bugliosi, 412.

<sup>12</sup> Bugliosi, 473-474.

<sup>13</sup> Bugliosi, 404, 487.

## A Look Back, A Look Forward

**T**HERE'S NO NEED FOR those winter blues, summer said when it finally arrived this year! As the days began to get longer and the temperatures started to climb, you realized what this season would bring. Without a doubt, summer is the most anticipated time of the year, and whether or not it is your favorite, there are countless things to love about it.

As June approached, we were ecstatic to set our community outreach events in motion. The San Fernando Valley Bar Association prides itself on being able to connect beyond a simple phone call. We love and enjoy connecting with the Valley's constituents, which allows us to build a more personal connection with them, and, at the same time, provide them with access to much-needed legal assistance.

For instance, as a service provider invested in community outreach, we seek out and participate in local summer events such as the summer concerts and July 4<sup>th</sup> Fireworks Extravaganza at Warner Center Park, coordinated by the Valley Cultural Foundation. These opportunities to interact with the community have allowed us to nurture a much closer relationship between SFVBA and our Valley neighbors.

The number of people at each event was extraordinary. Miguel and I interacted with well more than 1,000 people. Both Miguel and I were

**FAVI GONZALEZ**  
ARS Referral Consultant



[favi@sfvba.org](mailto:favi@sfvba.org)

energized by the questions we were asked, the requests for assistance, or simply by lending an ear.

We wanted to be present, we were there to engage, and we made it fun.

It has been said that the giving of one's time to others is the best gift one can give as time is seen by many as their most valuable resource. Having families ourselves, we understand that time is a valuable commodity, which is why we seek these interpersonal engagements during the summer time where the days are longer and our community is most accessible.

“  
We wanted to  
be present, we  
were there to  
engage, and we  
made it fun.”

In my introductory column, I stated how excited I was for the resources and tools the SFVBA's Attorney Referral Service would provide me to help our community. At this summer's community events, I witnessed what we as an organization can offer to the public. I was able to exercise the tools and resources provided to me by relaying prime information to those who sought it. We were able to give them the attention they needed, make them feel better, and provide referrals.

The desire to help is shared by everyone in SFVBA and the ARS. It is what sets us apart, but most importantly, it is what has allowed us to be a trusted resource to our community for so long. This will continue to fuel our success in the years to come. I cannot wait to see what opportunities lie ahead! 

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<sup>1</sup> Full-time law professors and attorneys employed by nonprofit and government agencies receive 50% discount on Essential and Junior membership dues.

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<sup>3</sup> Qualified attorney members pay additional dues of \$250 to join ARS; non-member ARS dues are \$550.

<sup>4</sup> Non-Premier Members pay additional dues of \$400 to join VBN; VBN not open to non-SFVBA members.



PHOTO GALLERY

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## Thanks for the Year

**MARK S. SHIPOW**

President



[mshipow@socal.rr.com](mailto:mshipow@socal.rr.com)

**A**S YOU READ THIS COLUMN, MY TERM AS VCLF President will be nearing its end. It has been a privilege to serve VCLF, and I have appreciated the opportunity to help VCLF continue its good work.

Over my career, I have been involved in a number of leadership roles. I also have been a follower to other leaders and, based on my experience, have a theory about leadership—surround yourself with competent, dedicated people, provide some guidance and support, and then mostly get out of their way.

I know this approach doesn't always work, and other approaches may be equally or more effective. But it is how I try to operate, and it is the approach I tried to use this past year with VCLF. Thanks to our Board members and other supporters, I think this approach ended up working quite well.

For example, our *Constitution & Me* program that explored the constitutional issues surrounding social media and bullying in a high school context was a huge success due to the hard work of so many people. Judge Firdaus Dordi was our inspiration and guiding light, and carried the laboring oar to prepare an extensive and interesting collection of written materials for the students. Anngel Benoun worked diligently on the complicated logistics involved in running the program by coordinating with five classes at three separate high schools. Joy Kraft Miles contributed her teaching and legal experience to set up and lead training sessions for the lawyers and judges who conducted the program, while Kira Masteller made sure there was office space to run the training programs and pizza to keep everyone going!

And, of course, the program could not have been a success without the help of so many lawyers and judges who devoted many hours to preparing for and conducting the program.

VCLF Board members worked hard on many other projects during the year. Deborah Chodos and Alan Kassan have greatly improved our website and are continuing to work on enhancing our marketing efforts. Judge Virginia Keeny, with the help of several other Board members, continued our tradition of providing scholarships to deserving students pursuing law-related careers. Patricia McCabe has

continued to lead our efforts to provide grants to worthy charitable organizations and David Nadel devoted substantial time and effort to maintaining our financial records and filing tax returns.

Laurence Kaldor provided the Board and me with advice and counseling based on his several years as VCLF President, as did long-time Board member Stephen Holzer. And Rosie, Linda and Sonia at the Bar were a great help on logistics and other support.

That I have not mentioned all of our Directors by name is not an indication of any lack of dedication and support. All of our Directors made significant financial donations to VCLF to help fund our various programs, and took time out of their busy schedules to attend meetings and help with various tasks. VCLF could not have succeeded as it did without our full team working together. They made my job a relatively easy one.

As we move on to a new year, I am very pleased to announce that our leadership will be shared among a very talented and committed triumvirate—Kira Masteller, Terri Agnew (Peckinpaugh) and Joy Kraft Miles, who will work together as Co-Presidents.

Any one of them could have replaced me and done a great job. Each of them has significant experience in leadership positions, and they each have a long and productive history with VCLF. Having the three of them working together for our Foundation will make it stronger and more viable than ever before.

Please join me in welcoming and congratulating them. Our full slate of new officers will be announced soon and available on our website.

Finally, VCLF could not have succeeded this year without the dedication and financial contributions of supporters like you. We continue to need your help. We need new Board members, volunteers to work on specific programs, and your continuing financial support. Please help in any way you can.

You can contact us at [mshipow@socal.rr.com](mailto:mshipow@socal.rr.com), [kmasteller@Lewitthackman.com](mailto:kmasteller@Lewitthackman.com), [tpeckinpaugh1@hotmail.com](mailto:tpeckinpaugh1@hotmail.com), or [joy@kraftlawoffices.com](mailto:joy@kraftlawoffices.com), if you are interested in finding out more. You can also donate to VCLF by check, or directly on-line at [www.thevclf.org](http://www.thevclf.org). Thank you for your support. 

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# Goodbye, Summer Hello, Fall

**A**LTHOUGH IT MAY NOT FEEL like it, the seasons are changing. The last waves of summer heat will fade (eventually, we hope) and we will begin to embrace the crisp of fall and with it the familiar sights, sounds, and feelings as we slide into the last quarter of the year.

While we may still have a few more months left in the year, both the San Fernando Valley and Santa Clarita Valley Bar Associations are in their last month of the fiscal year and are working hard behind the scenes, gearing up for a new year that starts October 1.

Hopefully, with another year in closing, we will have grown, learned and evolved. Perhaps we've gained that new skill or perspective we adamantly committed ourselves to at the start of the year; if not, there's still time. Change is around us and within us.

SFVBA's peer bar associates to the North will see some change soon as well—new ideas, new attorneys and new outreach.

We are currently seeking candidates for our 2020 Board of Trustees. If you would like to share your fresh ideas and contribute to the growth and future of our organization, we would love to hear from you!

Also, as we enter our 15<sup>th</sup> year as an Association, we will be unveiling a new (and long overdue) website refresh at the end of the year!

Congratulations to those who have passed the California Bar Exam earlier this year and best of luck to those awaiting results from the July exam. Attorneys in their first year of

practice can enjoy the benefits of being a member of the SCVBA, at no cost. Plus, a new bonus starting this October. In addition to the first year at no cost, the SCVBA membership dues for an attorney's second and third year in practice will only be half the regular fee.



SFVBA's peer bar associates to the North will see some change soon."

Believe it or not, one in five students enrolled in community colleges in Los Angeles County is homeless. Since August and through this month, we are hosting our first ever backpack and

school supply drive in partnership with the College of the Canyons' Project: Backpack.

These backpacks filled with supplies, snacks and notes of encouragement are available on campus for those students that are homeless, in hopes of alleviating a small amount of the stress and worries as they continue to work hard towards their successful future.

If you feel compelled to support this worthy project, more information can be found in the Community Outreach section of our website.

Thank you for your involvement in the SCVBA and your commitment to make the upcoming year an even more productive, and community-committed, one. 

**SARAH HUNT**  
SCVBA Executive Assistant



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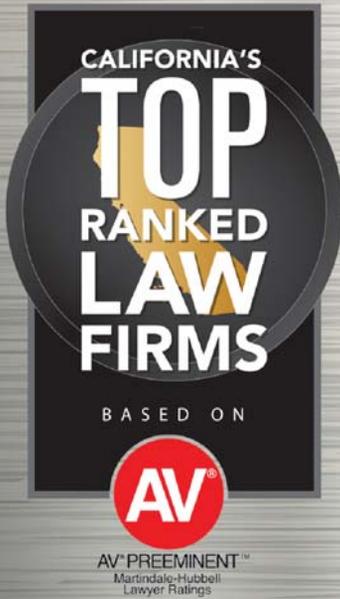
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