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Building New Bridges of Communication: From Both Ends

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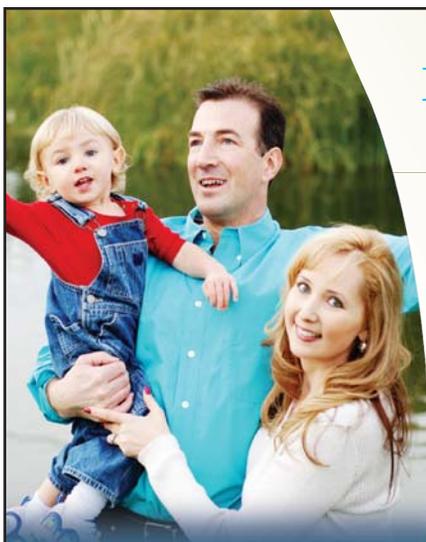
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Fax (818) 227-0499
www.sfvba.org

EDITOR

Michael D. White

GRAPHIC DESIGNER

Marina Senderov

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Raising the Bar...Literally

BARRY P. GOLDBERG
SFVBA President



bpg@barrypgoldberg.com

I AM VERY EXCITED TO GET STARTED AS THE incoming President of the San Fernando Valley Bar Association as I will be calling on our Executive Committee, Board of Trustees, staff and members to accomplish more than ever before by the Bar.

Before we get started, I am appealing to everyone to strip away any ill-feelings, frustrations and disappointments with their past Bar experiences and open up to my aggressively positive outlook for our Association.

It will take some faith and a little energy as we enter a new and challenging era for the Bar, but we can have some fun along the way.

I stand on the shoulders of the immediate past presidents whose visions and accomplishments set the stage for a fantastic upcoming year. We are on an upswing with a boost in members, sold-out events, and valuable community partners. As a kicker, we have a new Executive Director, Rosie Soto Cohen, and, as she finds her stride, she will imprint her young, energetic style on our organization. Our new Bar offices are changing everything with our members proud to visit our venue and attend events there. Trust me, our SFVBA is going places!

First and foremost, my responsibility is to our membership. Essentially, we are a trade organization. I want to increase the competency and visibility of all our members and want the public to hire Valley lawyers. Everyone's association with our Bar should be a financially profitable one with all of our sponsors and providers having access to our members. Since my election to the Board of Trustees several years ago, I have been working as hard as possible for our organization and our trustees to become more social media literate. The goal is not for everyone to share photos of their latest meal, but because we risk becoming irrelevant as practicing lawyers if we are not tech-savvy and relatable.

By participating in Bar and charitable events, SFVBA lawyers can do good and, at the same time, let the world know that they did good by posting on social media.

It's relatable— lawyers get more clients. The more times young lawyers see SFVBA members giving back to our community, the Bar's great programs, and our efforts to interact with judges and mediators, the more likely it is that they will understand the Bar's value and relevance and join up.

SFVBA benefits from active social media, as well. With our programs and events scrolling across social media pages, our lawyers are reminded over and over again of the Bar's educational and social events they would like to attend. It is not surprising that attendance at our events is up and interest in the work that

SFVBA does and the benefits that membership provides are at an all-time high. If trustees and members 'like, share, or comment,' SFVBA posts will reach just about every lawyer in the Valley! So...are you in? Don't answer. Just click a 'thumbs up'!

It is also not surprising that we had a record number of highly qualified trustee candidates this year as our increased visibility has attracted great lawyers to the Board

who understand the benefits to themselves and the legal community. The energy of active legal minds is sure to bring positive change to the legal community and our community at large.

In my term as President, I promise to do everything in my power to end homelessness in our beloved San Fernando Valley. One of my priorities is to support initiatives by our local politicians and non-profit organizations to reduce and eliminate it. Two thousand lawyers working together should be able to create positive change, and we will start by accepting donations for LA Family Housing at every Bar meeting and function.

I also want to take this opportunity to thank my mentors, past Presidents, and friends for placing their trust in me to carry out the Bar's mission. Fully committed, we will raise our Bar's profile and, together, accomplish great things for SFVBA and the Valley! 



It is not surprising that attendance at our events is up and interest in the work that SFVBA does and the benefits that membership provides are at an all-time high."



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Back in the Day

A FEW WEEKS AGO, I CAME across a college paper that I cobbled together 'back in the day' when I entertained thoughts of becoming a naval architect. One year of engineering convinced me that my career goal was in desperate need of some serious re-calibration. But, I must say, I could take some degree of pride in the paper—a tome on the building of New York's Verrazano Narrows Bridge that earned me a 'B' in the class.

Virtually all of what I learned from piecing the paper together has faded into obscurity over the years, but one thing I remember is that, like just about every major bridge ever built through the ages, it was built from both opposite sides at once.

That's the lesson of this month's cover article—building bridges of communication between the Valley's older and younger generations of attorneys.

For a divide, particularly a generational one, to be successfully traversed, both parties have to make the effort and put in the time, SFVBA Past President Kira Masteller told me. Effective, two-way communication can be created only if we build bridges of communication that, she said, "are transformational in building long-term success and reaching shared goals by leveraging the experience of the older generation with the energy of the younger."

A major challenge, a wide divide to be sure; but one that can be

MICHAEL D. WHITE
SFVBA Editor



michael@sfvba.org

negotiated to everyone's benefit with a little mutual effort.

Speaking of 'back in the day,' Justice Arthur Gilbert, Presiding Justice of Division 6 of the Second District Court of Appeal, was kind enough to pen a piece for this issue looking back at the experience of practicing law in the San Fernando Valley in the 1960s.

Justice Gilbert, a highly respected jurist and gifted concert pianist, is known not only for his wisdom, but for his wit, rooted in 40-plus years in the legal profession, which he unloads in a regular satirical column he pens for the *Los Angeles Daily Journal*.

Eight years of his weekly columns have been compiled, and updated in two books. Volume II is available on Amazon.com, which describes the good Justice as "the avuncular, down-to-earth, gentle curmudgeon so many have come to love. His penetrating insights into life and law, expressed in memorable imagery, transform everyday occurrences and seemingly unremarkable experiences into hilariously quippy stories peppered with sage advice."

The word is that Justice Gilbert donates all of the profits from the sale of the book to Pro Counsel, the national pro bono law firm. Quite a legacy for an avuncular curmudgeon.

Kudos to Nancy Reinhardt, Sarah Broomer and Mark Lester for their outstanding MCLE on Certificates of Independent Review, and thanks to Barry Kurtz for his article on accidental franchising. As always, enjoy. 

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- \$3 Million Fraud Case: Dismissed, Government Misconduct (Downtown, LA)
- 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)
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		<p>6</p> <p>7</p> <p>Probate & Estate Planning Section Not Your Father's Estate Plan 12:00 NOON MONTEREY AT ENCINO RESTAURANT Mishawn Nolan leads the discussion regarding owning, controlling and transferring intellectual property and digital assets for estate planning attorneys. (1 MCLE Hour)</p>	<p>8</p> <p>Bankruptcy Law Section BAP Year in Review 12:00 NOON SFVBA OFFICES 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)</p>				
		<p>13</p> <p>14</p> <p>Taxation Law Section Update on IRS Foreign Enforcement Programs 12:00 NOON SFVBA OFFICES Lydia B. 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)</p>	<p>15</p> <p>16</p> <p>Workers' Compensation Section 12:00 NOON MONTEREY AT ENCINO RESTAURANT</p>	<p>17</p> <p>19</p> <p>Inclusion & Diversity Committee of the SFVBA <i>Bowling Social with Eight Diverse Bar Associations</i> 5:30 PM Registration 6:00 PM Bowling and Socializing PINZ BOWLING CENTER 12655 VENTURA BLVD. STUDIO CITY Space is Limited. Free to SFVBA Members!</p> 			
	<p>20</p> <p>21</p> <p>Mock Trial Committee Meeting 6:00 PM SFVBA OFFICES</p>						
				<p>31</p> <p>DINNER AT MY PLACE Porter Ranch 6:30 PM</p> 			

SUN	MON	TUE	WED	THU	FRI	SAT
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3	 <p>4 5:30 PM</p>	5	<p>6 Criminal Law Section 6:00 PM SFVBA OFFICES Sponsored by VIP Alternative Sentencing Free to Current Members! (1 MCLE Hour)</p>	<p>7 Litigation Section When Your Clients Get Divorced: The Litigator's Guide to Staying Neutral 12:00 NOON SFVBA OFFICE Sponsored by BGF BROT · GROSS FISHBEIN · LLP ATTORNEYS AT LAW Attorney Mark Gross, founding and managing partner of Brot-Gross-Fishbein LLP will discuss the financials of divorce, the most common approaches to business valuation, and how litigators can work with forensic accountants to make valuations efficient. He will also discuss the consequences of pending divorces encroaching on ongoing civil litigation and how to remain neutral in client conversations and avoid being pulled into litigation. Free to SFVBA Litigation Section members! (1 MCLE Hour)</p> <hr/> <p>Membership & Marketing Committee 6:00 PM SFVBA OFFICES</p>	8	9
10	<p>VETERANS DAY</p> 	11	<p>12 Probate & Estate Planning Section 12:00 NOON MONTEREY AT ENCINO RESTAURANT</p> <hr/> <p>Board of Trustees 6:00 PM SFVBA OFFICES</p>	13	14	15 16
17	<p>18 Mock Trial Committee Meeting 6:00 PM SFVBA OFFICES</p>	19	<p>19 Taxation Law Section Dynamex, A.B. 5 and the Future of Employment Taxes in California 12:00 NOON SFVBA OFFICES Attorney Haleh Naimi will address some of the legal and employment tax issues affecting business owners in the states of California, Mass. and New Jersey following the California Supreme Court decision in <i>Dynamex Operations West v. Superior Court (Dynamex)</i>. This decision has far reaching consequences for business owners in California in various industries that have relied upon independent contractor workers to operate their businesses. (1 MCLE Hour)</p>	20	21	22 23
24	<p>25 Family Law Section Hot Tips 5:30 PM MONTEREY AT ENCINO RESTAURANT Gary Weyman leads his annual seminar, a must attend for all family law attorneys. Approved for Family Law Legal Specialization. (1.5 MCLE Hours)</p>	26	27		28	29 30



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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.

Certificate of Independent Review: A Must-Have Protection

By Nancy A. Reinhardt, Sarah S. Broomer and Mark A. Lester

A close-up photograph of a document, likely a will, with the words "LAST WILL AND TESTAMENT" written in large, blue, hand-drawn capital letters. The background is blurred, showing other parts of the document and a wooden gavel.

Last Will and Test
YOUR NAME, Testator



A Certificate of Independent Review is strongly recommended in any instance in which a gift is intended to a non-family member who might be found to be the donor's care custodian. In addition to carefully documenting any advice given to a client in the case file, only by recommending the Certificate can the risk of discipline and/or a charge of malpractice be avoided.

THE STATUTES GOVERNING GIFTS TO A prohibited transferee in the California Probate Code (PC) apply to instruments, which became irrevocable on or after January 1, 2011.¹

For purposes of these sections, an instrument that is otherwise revocable or amendable is deemed to be irrevocable if, on or after January 1, 2011, the transferor by reason of incapacity was unable to change the dispositive provisions and did not regain capacity prior to his or her death.²

Instruments that became irrevocable prior to that date are governed by PC § § 21350 *et seq.* which contains the predecessors to the current statutes. They apply to instruments which became irrevocable between September 1, 1993 and January 1, 2011.³

Under PC § 21350(a)(6), no provision of any instrument shall be valid to make any donative transfer to a care custodian of a dependent adult who is the transferor.

Refer to *Bernard v. Foley*, which is one of the seminal opinions in the area of prohibited transfers.⁴ That 2006 California Supreme Court decision found that the statutes then in effect did not have a “substantial personal relationship” or a “no compensation for services” exception to the definition of a “care custodian” as seemingly found in prior lower court decisions and therefore invited the Legislature to correct those omissions in PC § § 21350 *et seq.*, if that had in fact been intended. That invitation was clearly accepted and the omissions corrected in the current statutes.

Presumption of Fraud or Undue Influence

If the instrument containing the transfer was executed during the period in which the care custodian provided services to the transferor or within 90 days before or after that period, a donative transfer to the care custodian of a dependent adult is presumed to be the product of fraud or undue influence.

Once applicable, this presumption can be rebutted if the beneficiary can prove, by clear and convincing evidence, that the donative transfer was not the product of undue influence or fraud.⁵

Several key terms are critical to the analysis.

The first term that is important to understand is “care custodians”—the persons who provide health or social services to dependent adults. Excepted from that definition are persons who provided those services without remuneration if they had a personal relationship with the dependent adult...

- At least 90 days before providing those services;
- At least six months before the dependent adult’s death; and,
- Before the dependent adult was admitted to hospice care, if the dependent adult was admitted to hospice care.⁶

Remuneration does not include the donative transfer at issue under this chapter or the reimbursement of expenses.⁷

In *Estate of Shinkle*, which was decided before enactment of the current statutory scheme, the Court of Appeal determined that a person with a genuine, pre-existing personal relationship with the donor can provide health and social services without being a care custodian “if the services naturally flow from the relationship.”⁸

Under the current statutory scheme, the result might differ if the donee is compensated. The result might also differ if the services are provided because of the donor’s dependent condition or as a result of the personal relationship.

The second important term to understand is health or social services—services provided to a dependent adult because of his or her dependent condition, which may include activities such as administration of medication, medical testing, care of wounds, help with personal hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances.⁹

Several cases decided under the former statute may prove insightful, though not determinative, when considered under the current statute.

In *Conservatorship of Davidson*, for example, the Court of Appeal concluded that cooking, gardening, driving the transferor to the doctor, running errands, grocery shopping, purchasing clothing or medication, and assisting the transferor with banking, where the service providers were not being compensated, did not qualify as health or social services.¹⁰

But, compare that case with the *Estate of Odian*, in which a paid live-in caregiver providing similar services was found to be providing health and social services.¹¹ In yet another case, *Estate of Austin*, the court concluded that driving the transferor to doctor’s appointments and meal preparation were not substantial ongoing health or social services qualifying the donee as a care custodian.¹²

The third important term in the analysis is dependent adult.

A dependent adult is a person who, at the time of execution of the instrument, is either 65 years of age or older and has “difficulty managing his or her own financial resources



Nancy A. Reinhardt practices in Encino. She can be reached at nancy@reinhardtllaw.com. **Sarah S. Broomer** practices with the firm of Rutenberg Cutler LLP in Los Angeles. She can be reached at sbroomer@rutenbergcutler.com. **Mark A. Lester** is a partner at Jones & Lester in Camarillo. He can be reached at mlester@joneslester.com.

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or resisting fraud or undue influence, and is unable to provide properly for his or her personal needs for physical health, food, clothing or shelter, or due to one or more deficits in the mental functions listed in paragraphs (1) to (4), inclusive, of subdivision (a) of Probate Code Section 811”; or, is 18 years of age or older and has “*substantial difficulty*” managing the same activities for the same reasons as described above.¹³

Rendering Probate Code § 21380 Moot

There are a number of ways to render PC § 21380 inapplicable or to rebut the presumption that the transfer was the product of fraud or undue influence.

A review by an independent attorney that results in the execution of a Certificate of Independent Review (CIR) is the primary methodology to help ensure that a gift to a care custodian does not fail as a result of applying the statutory provisions discussed above. But, if there isn’t a CIR, can the transfer be salvaged?

In such a case, a presumptively disqualified donee may rebut the presumption where the court determines on clear and convincing evidence that the transfer was not the product of fraud, menace, duress, or undue influence.¹⁴ That burden of proof requires the care custodian to persuade the court that it is “highly probable” that the fact is true.

Setting Aside or Defending the Prohibited Transfer

If you are the party attacking the donative transfer as being the product of undue influence, there are several evidentiary hurdles to overcome before the burden of proof shifts to the proponent of the document to establish that it was not the product of undue influence, each of which must be established by a preponderance of the evidence.

The first is that there was a “donative transfer” involved. In *Jenkins v. Teegarden*, a transfer is “donative” if it is for inadequate consideration.¹⁵ The transfer can still be donative even if good consideration is given that would otherwise be sufficient to support a contract.¹⁶

Next, the attacking party must prove that the recipient was a care custodian at the time of the execution of the instrument or donative transfer. A careful examination of the definition of care custodian in PC § 21362(a) reveals that there is an exclusion for persons who provide care services without remuneration. Though remuneration is not defined as compensation nor does it include either the donative transfer at issue or the reimbursement of expenses, existing records should be carefully examined to see if others are being paid for “caregiver” services on a regular and substantial basis.

Also, what is the effect of the forgiveness of debt on the applicability of this section? Is the forgiveness of indebtedness remuneration?

Another element that should be established by the attacking party is that the services actually provided constitute health or social services. This element raises issues of the

timing and nature of the relationship, whether payment was involved, what was the nature of the services provided, and whether or not the services provided were the result of the dependent adult's condition.

When considering how to attack the transfer, one must carefully examine the definition of what makes an individual an dependent adult.

The key is the PC § 811 mental function deficit criteria and/or inability to provide for his or her personal needs for physical health, food, clothing or shelter. To establish those criteria or lack thereof, medical records will be needed. In addition to medical records, it will be important to identify witnesses with observational information current with the time of the execution of the documents containing the donative transfer.

Further, an examination of whether or not the deficits are isolated and temporary incidents such as might be caused by a UTI, a medication or other brief illness from which the transferor has or will recover, is important. In the unreported decision of *Stover v. Padayao*, because the decedent was not shown to be a dependent adult, his friends, by definition, did not qualify as care custodians.¹⁷

Rebutting When Attacking the Gift

Probate Code § 21380(b) provides that the presumption is one which affects the burden of proof. It may be rebutted "by proving, by clear and convincing evidence, that the donative transfer, was not the product of fraud or undue influence."¹⁸

Probate Code § 86 provides that undue influence has the same meaning as in Section 15610.70 of the Welfare and Institutions Code.¹⁹ The intention of the Legislature is that this Section supplement the common law meaning of undue influence without superseding it or without interfering with the operation of that law.

Undue influence means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity.²⁰

When determining whether a result was produced by undue influence, all of the following need to be considered: vulnerability of the victim; the influencer's apparent authority; actions or tactics used by the influencer; and equity of the result.

When considering the first factor, evidence includes such things as incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.

Evidence of apparent authority includes status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual advisor or other expert, while evidence of actions or tactics.

Evidence of actions or tactics used may embrace controlling the necessities of life, medication, the victim's

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interactions with third parties, access to information or sleep; use of affection, intimidation or coercion; and, initiation of changes in personal or property rights, use of quick changes or secrecy in making those changes, making changes at inappropriate times and places, and claims of expertise in making those alterations.

Evidence of the equity of a result may include the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, and the appropriateness of the change in light of the nature and length of the relationship.

Evidence of an inequitable result, without more, is not sufficient to prove undue influence.²¹

Clear and Convincing Evidence Standard

The proponent of a valid gift to a prohibited transferee having been unsuccessful in defeating his or her client's classification as a care custodian of a dependent adult has one final chance to save the gift, namely, to show by clear and convincing evidence that the donative transfer was not the product of undue influence.

The function of the standard of proof is to instruct the fact finder concerning the degree of confidence society deems necessary in the correctness of factual conclusions

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for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the ultimate decision.²²

Here, the Legislature decreed that protecting our most vulnerable adults is so important that only if a care custodian can show by clear and convincing evidence that a donative transfer was not the product of undue influence will that gift be valid.

In *In re the Conservatorship of Wendland*, the California Supreme Court stated that, "The 'clear and convincing evidence' test requires a finding of high probability, based on evidence""so clear as to leave no substantial doubt' [and] 'sufficiently strong to command the unhesitating assent of every reasonable mind'"²³

So, given this extremely high threshold of proof required to validate the donative transfer to a care custodian, the appellate courts—in the only reported case and two unreported cases—have yet to find a care custodian who has been able to meet this stringent level.

The following three cases are illustrative of the difficulty in meeting this level of proof.

Estate of Odian

Estate of Odian was decided under a former statute that dealt with a paid live-in caregiver who became the primary beneficiary of a decedent's estate.²⁴

The donor had never married, had no children or family within three degrees that she knew of, and had been preceded in death by her only sibling several years earlier. Both the decedent and her sister had identical wills, both prepared by an attorney they never met, that left their estates to the surviving sibling and then to charities neither sister had had any contact with, but had been recommended by their financial adviser.

Several years after her sister died, Ms. Odian hired a caregiver who lived with her and provided cooking, cleaning, assistance with paying bills, driving to appointments, and other services that fell under the health or social services umbrella.

During her final years, however, and as described by her longtime friend and dance companion of twenty-plus years, Ms. Odian emerged from her previously depressed and isolated state, becoming completely integrated into the caregiver's family and life, attending weddings and birthday parties, hosting holiday meals, re-engaging with old friends, and regaining a zest for life.

The decedent then prepared her own will that left her estate to the caregiver or her children if she failed to survive. When the charities under the prior will contested decedent's last will, the court still found that the caregiver had not demonstrated by clear and convincing evidence that the will was not the product of undue influence.²⁵

Estate of Savic

In *Estate of Savic* (unreported), a friend who provided social services including daily visitations, the control of finances, and taking care of other daily needs was found to be care custodian under former statute.²⁶

Again, the caregiver didn't meet the clear and convincing threshold. Instead, the decedent's son, who had lived out of the country and hadn't seen the decedent in years, prevailed under the terms of a will executed 13 years earlier.

Estate of Schmitt

Finally, in *Estate of Schmitt* (also unreported), the caregiver/beneficiary who worked five days a week for 17 years for a decedent was found to meet the definition of a care custodian.²⁷

The care custodian didn't meet the clear and convincing threshold despite evidence from the longtime financial adviser that the decedent executed the beneficiary designation without claimant around or even being aware of the gift; instead, the account went to the estranged half-brother of the decedent.

It likely didn't help that the claimant tried admitting into evidence as the decedent's will a handwritten letter allegedly signed by decedent that bequeathed the house to her.

As it later turned out, it was revealed in a separate sub-trial that the signature on the document was not that of the decedent, but was likely a forgery.

The Impossibility of Proving a Negative

There is no published or unpublished case in which a person who has been found to be a care custodian has met the "clear and convincing evidence" burden of proof that the gift/transfer to that person was not the product of presumed undue influence.

In *Estate of Odian*, the only published case focusing on this specific issue, a paid caregiver who had become essentially the only family the decedent knew could not show by clear and convincing evidence that her designation as primary beneficiary—instead of charities the decedent was unaware of and to which she had never made a lifetime gift—was not the product of presumptive undue influence.²⁸

In all other similar cases, most of which are unpublished decisions—*In re Estate of Pryor*,²⁹ *Estate of Winans*,³⁰ *Estate of Clementi*,³¹ *Stover v. Padayao*, *Estate of Savic*, *Estate of Barrow*,³² *Estate of Schmitt*, *Hernandez v. Kieferle*,³³ *In re Estate of Wisner*,³⁴ *Halverson v. Vallone*,³⁵ and *Silicon Valley Community Foundation v. Beltran*³⁶—the appellate court avoided finding that the proponent of the donative transfer proved that the gift was not the product of undue influence; instead they found either that decedent was not a dependent adult, that the nature of the services did not make the beneficiary a care custodian or that some other exception applied.

The takeaway from all of these cases is that there has never been a set of facts where a care custodian beneficiary overcame the presumption of undue influence, because proving a negative is simply impossible.



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Therefore, unless it can be shown that a client is not a care custodian, that the donor was not a dependent adult or that some other exception applies, it is highly unlikely that you will prevail in protecting the donative transfer.

Given the apparent impossibility of “proving a negative” (i.e., no undue influence was involved in the donative transfer), the authors of this article strongly recommend securing a Certificate of Independent Review in any instance in which a gift is intended to a non-family member who might be found to be the donor’s care custodian.

In short, in addition to thoroughly documenting any advice given to a client in the case file, only by recommending the Certificate of Independent Review can the risk of discipline and/or a charge of malpractice be avoided.³⁷ 

The authors would like to thank and acknowledge Yevgeny L. Belous not only for his contributions to “Gifts to Care Custodians and Certificate of Independent Review” which was published in the April 2017 edition of Valley Lawyer but more importantly for his friendship.

¹ CAL. PROB. CODE § § 21360 – 21392.

² CAL. PROB. CODE § 21392(a).

³ CAL. PROB. CODE § 21350 *et seq.*

⁴ *Bernard v. Foley* (2006) 39 Cal.4th 794, See also Reinhardt, Nancy and Belous, Yevgeny L. “Gifts to Care Custodians and Certificate of Independent Review.” *Valley Lawyer*. April 2017.

⁵ CAL. PROB. CODE § 21380(b).

⁶ CAL. PROB. CODE § 21362(a).

⁷ *Id.*

⁸ *Estate of Shinkle* (2002) 97 Cal.App.4th 990.

⁹ CAL. PROB. CODE § 21362(b).

¹⁰ *Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035.

¹¹ *Estate of Odian* (2006) 145 Cal.App.4th 152.

¹² *Estate of Austin (2010)* 188 Cal.App.4th 512.

¹³ CAL. PROB. CODE § 21366. It is important to note the addition of the term

“substantial” when comparing the “difficulty” necessary to find a person 18 to 64 years of age “dependent” as opposed to the “difficulty” required of someone 65 years of age or older.

¹⁴ CAL. PROB. CODE § 21380(b).

¹⁵ *Jenkins v. Teegarden* (2014) 230 Cal.App.4th 1128.

¹⁶ *Id* at 1131.

¹⁷ *Stover v. Padayao*, 2016 WL 5092760, Unreported in Cal.Rptr.3d (September 20, 2016).

¹⁸ CAL. PROB. CODE § 21380(b).

¹⁹ CAL. PROB. CODE § 86.

²⁰ CAL. WELFARE AND INSTITUTIONS CODE §15610.70(a).

²¹ CAL. WELFARE AND INSTITUTIONS CODE §15610.70(b).

²² *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487; accord, *Addington v. Texas* (1979) 441 U.S. 418, 423.

²³ *Conservatorship of Wendland* (2001) 26 Cal.App.4th 519 at 552 (quoting *In re Angelia P.*, supra, 28 Cal.3d 908, 919). Accord, *Sheehan v. Sullivan* (1899) 126 Cal. 189).

²⁴ *Estate of Odian* (2006) 145 Cal.App.4th 152.

²⁵ *Id.*

²⁶ *Estate of Savic*, 2018 WL 2214714, Unreported in Cal.Rptr.3d (May 15, 2018).

²⁷ *Estate of Schmitt*, 2012 WL 4498447, Unreported in Cal.Rptr.3d (October 2, 2012).

²⁸ *Estate of Odian* (2006) 145 Cal.App.4th 152.

²⁹ *Estate of Pryor* (2009) 177 Cal.App.4th 1466.

³⁰ *Estate of Winans* (2010) 183 Cal.App.4th 102.

³¹ *Estate of Clementi* (2008) 166 Cal.App.4th 375.

³² *Estate of Barrow*, 2015 WL 5610453, Unreported in Cal.Rptr.3d (September 24, 2015).

³³ *Hernandez v. Kieferle*, 2014 WL 1338100, Unreported in Cal.Rptr.3d (April 3, 2014).

³⁴ *In re Estate of Wisner*, 2010 WL 3769806, Unreported in Cal.Rptr.3d (September 29, 2010).

³⁵ *Halverson v. Vallone*, 2009 WL 1101240, Unreported in Cal.Rptr.3d (April 24, 2009).

³⁶ *Silicon Valley Community Foundation v. Beltran*, 2008 WL 2737428 (July 11, 2008).

³⁷ *Osornio v. Weingarten* (2014) 124 Cal.App.4th 324.



Test No. 132

MCLE Answer Sheet No. 132

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

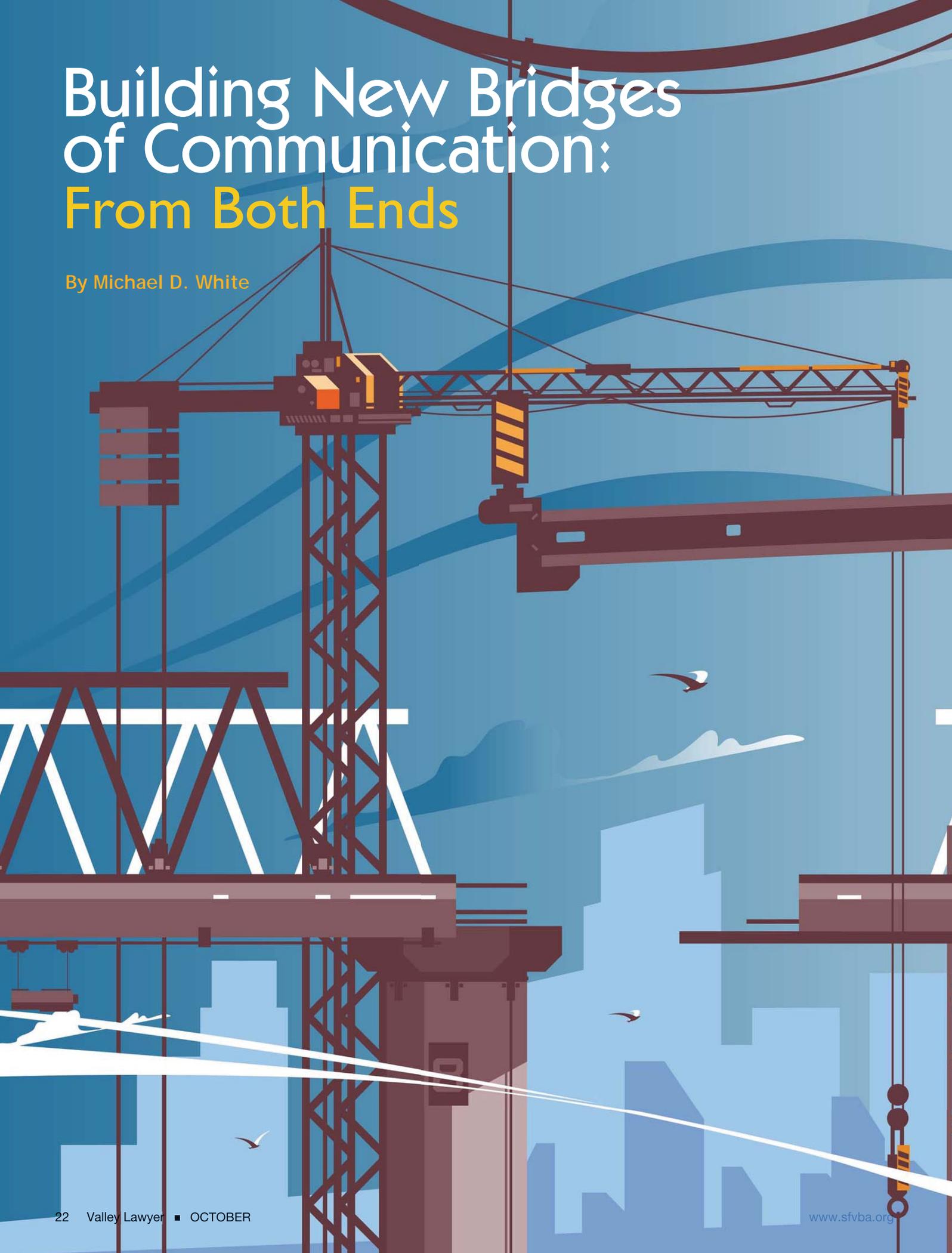
20. True False

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. Milton became Judith's care custodian due to her diagnosis of dementia. Judith's family wishes to challenge the validity of the donative transfer from Judith to Milton by establishing that the transfer was the result of undue influence. Milton has the initial burden of proving that the donative transfer was not the product of undue influence by a preponderance of the evidence.
 True False
2. An individual may only be considered a "dependent adult" if he or she is 65 years or older, and unable to properly provide for his or her own personal needs for physical health, food, clothing or shelter.
 True False
3. In *Conservatorship of Davidson*, the Court concluded that cooking, gardening, driving the transferor to the doctor, running errands, grocery shopping, purchasing clothing or medication, and assisting the transferor with banking, did not qualify as health and social services if the service were provided without compensation.
 True False
4. Courts shall consider the following in determining whether a donative transfer was the product of undue influence: 1) The vulnerability of the victim; 2) The influencer's need for the donative transfer; 3) The actions or tactics used by the influencer; and, 4) The equity of the result.
 True False
5. A review of a donative transfer from a dependent adult to a care custodian by an independent attorney who prepares and executes a Certificate of Independent Review helps to ensure that the donative transfer does not fail.
 True False
6. If an individual provided health and social services to a dependent adult and was only compensated by the donative transfer at issue after the dependent adult's death, they fall within the exception of *Probate Code* Section 21362(a) for those persons who provide care services without remuneration.
 True False
7. Margaret is a personal assistant to Howard. Margaret shops for and provides assistance with finances to Howard, who is over the age of 65 years. Howard is able to perform the tasks himself, but prefers to delegate the work. Margaret is providing health or social services to Howard under *Probate Code* Section 21362(b).
 True False
8. The party challenging the validity of a donative transfer and alleging that the transfer is the product of undue influence must establish their case by a preponderance of the evidence.
 True False
9. If an instrument includes a gift to a prohibited transferee and became irrevocable on June 1, 2011, *Probate Code* Sections 21360 – 21392 apply.
 True False
10. Jacqueline is classified as a care custodian because she provided health or social services to her maternal aunt Gladys, who was a dependent adult receiving hospice care, and was not paid for said services.
 True False
11. In *Estate of Odian*, a paid live-in caregiver who was cooking, cleaning, assisting with paying bills, and driving to appointments, among other services was deemed to be providing health and social services.
 True False
12. An individual is not considered dependent adult if their deficits are isolated and temporary incidents such as might be caused by a medication or other brief illness from which the individual has recovered.
 True False
13. In order to establish the vulnerability of a victim for undue influence, evidence may include the victim's isolation and dependency, as well as whether the influencer knew or should have known of the alleged victim's vulnerability.
 True False
14. The donative transfer to an individual who is classified as a care custodian of a dependent adult is invalid even if the individual shows by clear and convincing evidence that the donative transfer was not the product of undue influence.
 True False
15. Tony is a 50-year-old man who is unable to provide for his own personal needs. Tony also has deficits in mental function as a result of a rare neurological disorder. As a result, he has substantial difficulty managing his own financial resources, and is unable to resist fraud or undue influence. Tony is a dependent adult.
 True False
16. *Probate Code* 21350 et. seq., which are the predecessors to the current statutes, control all instruments that became irrevocable prior to January 1, 2011.
 True False
17. Undue influence means the application of excessive persuasion by one individual against another person which causes the latter to act or refrain from acting by overcoming the latter's free will, and results in inequity.
 True False
18. *Probate Code* Section 86 provides that undue influence has the same meaning as the definition provided in *Welfare and Institutions Code* Section 15610.70, and the Legislature intended *Probate Code* Section 86 to supplement the common law meaning of undue influence without superseding it or without interfering with the operation of that law.
 True False
19. On January 15, 2009, Carrie began to care for Edward, who had been diagnosed with advanced Alzheimer's. Edward paid Carrie \$20 per hour for eight hours of work, five days a week. Carrie was to provide companionship, assist with medication, transportation, cooking, cleaning, and hygiene. Carrie provided these services for two months before Edward died on March 17, 2009. After Edward's death, Edward's children discovered that Edward had amended his trust to leave 1/3 of the trust estate to Carrie. *Probate Code* Sections 21360 – 21392 apply.
 True False
20. The standard by which to rebut the presumption that a donative transfer to a care custodian of a dependent adult is the product of fraud or undue influence is by a preponderance of the evidence.
 True False

Building New Bridges of Communication: From Both Ends

By Michael D. White



An illustration of a bridge under construction. A large crane with a yellow and black striped counterweight is positioned on the left. The bridge's steel framework is visible, including a tall tower and various beams. Silhouettes of workers are scattered across the bridge deck. The background features a stylized city skyline with blue buildings and a bird flying in the sky.

Bridges are built from both ends at once. Successful organizations span generational chasms by creating bridges of communication that guarantee long-term success for shared goals by leveraging the experience of the older generation with the energy of the younger.



The Golden Gate Bridge during construction in 1935

THERE ARE MANY DIFFERENT TYPES OF bridges—truss, cantilever, suspension, arch, cable-stayed, and others—employing different approaches to meeting the same challenge, that is, for example, spanning an obstacle be it a road, a valley or chasm, or a body of water.

The New York City's Brooklyn Bridge, the Sydney Harbour Bridge, Japan's Akashi-Kaikyo Bridge, or, take, for example, California's own iconic Golden Gate Bridge.

Spanning the mile-wide Golden Gate strait between San Francisco Bay and the Pacific Ocean, the massive span links the City of San Francisco with Marin County and ranks as the longest and tallest suspension bridge in the world, towering 746 feet at its highest point, and stretching some 8,981 feet—abutment to abutment.

Deemed “impossible” to build by critics, many political and financial obstacles were finally overcome before construction began and, after four years of intense work, the bridge was dedicated in May 1937 and opened to the public.

The construction of great bridges has undergone immense transformation since the beginning of time with new technologies put to use involving precise planning and vast resources, and, though different they may be in design, all have another characteristic in common—they were all built from both ends at the same time.

Dual Commitment

Building from both ends. Like successful organizations that have



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.

overcome perceived generational chasms by creating “bridges of communication” that “are transformational in building long-term success and reaching shared goals by leveraging the experience of the older generation with the energy of the younger,” says SFVBA Past President Kira S. Masteller.

Building the bridge of communication, she says, “is a gradual and experimental process because there have been so many dramatic developments in how we communicate with one another. We used to pick up the phone and talk to one another or have in-person meetings; then we went to faxing, then to emailing, then to scanning, then to texting.”

Now, she says with a laugh, “I think we’re close to communicating telepathically.”

In reality, says Masteller, it’s a give and take on both sides of the generational gap. “Younger attorneys, she says, “need to be encouraged to help older attorneys understand and utilize new communication technology, but, at the same time, younger attorneys have to be willing to step out and take advantage of the experience that older attorneys have accumulated over the years.”

That, she adds, “can only help them deal more effectively with judges, arbitrators, and other attorneys because they are going to have to have those face-to-face meetings, speak publically in court, and get comfortable with those experiences.”

Perhaps Easier Said Than Done

“I’m a bit on the shyer side, so it can be difficult for me to network,” says attorney Jeanne M. Sarmiento.



It is a give and take on both sides
of the generational gap.”
—Kira S. Masteller

A self-described “older, younger attorney, Sarmiento graduated from Southwestern School of Law in December 2015, 25 years after “officially” beginning her legal career while in high school as a file clerk at Klass, Helman & Ross.

After a stint as a secretary, she qualified as a paralegal prior to law school, and currently practices at the Encino-based firm in the areas of civil litigation and criminal defense.

Sarmiento considers herself lucky being able to practice in the same firm she has worked with for the past 25 years.

“I’m very fortunate in that my mentors are right here in the same office, she says. “A lot of people don’t have that and I know that a lot of the people I went to law school with are looking to communicate with older attorneys who are willing to share from their experience. Face it, in law school, you learn about the law, but when you first start out, you learn very quickly that you really don’t know much about the craft of being a lawyer.”

Sarmiento lauds the SFVBA’s Valley Bar Network (VBN) program as creating the “right environment” for the generations to connect. “I remember everyone had the opportunity to share a bit about themselves and that started the conversation. It was very helpful to see who was willing to become a mentor.”

Launched in 2016 by SFVBA Past President and VBN Chair, Alan E. Kassan, the VBN meets regularly has grown to a dynamic group of more than 50 attorneys and other professionals. The group was formed to provide a low-key structure to facilitate networking and information exchange.

VBN meetings “provide a great opportunity to visit, exchange leads, share anecdotes and hear guest speakers,” said Kassan in an interview published earlier this year in *Valley Lawyer*.

Most people, he says, “don’t realize that networking is a ‘long game.’ You can’t just show up to a few networking events and hope people will suddenly start sending you all kinds of business. It takes time to build trusting relationships, and to get to know

people well enough that you feel comfortable referring business to them.”

Collaborative Communication

The importance of collaborative communication isn’t lost on attorney Megan I. Braun, who has practiced in the area of probate law at the Law Offices of LeAnne E. Maillian, in Encino, since December 2015.

Braun, a first generation college student and the first lawyer in her family, graduated from Southwestern University School of Law and was admitted to the Bar in December 2015.

“It’s critical in probate law that everyone works together to reach a solution, and two-way communication is key to reaching that goal,” says Braun, who graduated from Southwestern School of Law’s intense two-year program.

It is important, she says, “to create a dialog between older, more experienced attorneys and law students. That would go a long way in helping prepare the students for the realities they will face when they start their careers. Law school teaches you the law; it doesn’t teach you how to be an attorney. That’s where experience is invaluable.”



It is important to create a dialog
between older, more experienced
attorneys and law students.”
—Megan I. Braun

SFVBA President Elect David G. Jones was admitted to the Bar in 1996. A graduate of the Whittier College School of Law, he is a partner at Santiago & Jones in Woodland Hills and practices in the area of employment and civil litigation. He has served as an Adjunct Professor of Law at his alma mater, teaching a course on employment law.

“The senior members of the Bar today are more personable and accessible than they were when I started



out,” he says. “I think they’re more open now to bridge that communication gap. The question is what can we do better to bridge it; but I really feel we’re starting from a better place.”

“It’s always easier when you can get people who are in the same area of practice or interest together because they have a common ground to build a relationship on. It’s sometimes difficult to relate to up-and-comer lawyers starting to practice in an area other than your own.”

The impetus, says Jones, “is on firms that have younger attorneys that are coming up to make sure that they are taken under a collective wing. It’s about creating a community where up-and-coming attorneys have more immediate access to a networking group that allows for the transfer of the wisdom gained from experience that can be shared generation to generation much more easily.”

In the past, says Jones, “a young attorney would be in a very insular situation within the four walls of his own firm with little opportunity to be advised by anyone outside his immediate environment. I think it’s loosened up now in a way where there are opportunities to meet and learn from more experienced attorneys in other firms who are willing to share some of their wisdom.”

Working Smarter, Not Harder

It is “invaluable” to take advantage of those opportunities “no matter how scary it might be,” says attorney Megan Braun. “I’ve always believed that it’s best to work smarter, not harder.”

Younger attorneys, Braun says, “need to understand the scope of what they don’t know, while older lawyers need to recognize the obligation they have to share from their experience. There’s tremendous energy on one side and a mine of knowledge on the other. There’s a lot to be learned out there and it’s critical to learn from someone else’s experience. I would much rather learn from someone else’s mistakes than make them myself.”

The key, she’s quick to add, is that it’s “critical to inform younger attorneys of worthwhile opportunities that

are out there to learn. They can’t take advantage of what’s available if they aren’t informed.”

Those opportunities include events that are designed to connect younger attorneys with each other, says SFVBA Immediate Past President Yi Sun Kim.

The Bar’s New Lawyers Section, she says, was formed “so that new lawyers can get to know each other, learn from others who are facing similar challenges and feel like they’re being lost in a larger organization. I think, too, that it’s important that meetings on specific legal topics include practice pointers and advice on practicing the law, rather than just case law.”



The Horse to Water

While a goal to be attained, developing an effective and sustainable two-way communication mindset can have its own set of challenges.

“I don’t know if it’s because people are working more intensely and have less time on their hands,” says Kira Masteller. “People are spending more time in court, at their desks and on the freeway, so they are increasingly possessive of their time.”

One idea, she says, “is to get the younger attorneys more involved in the actual planning of events for their peers, so that they feel more a part of how the Bar operates and what it has to offer.”

But, she adds, “Even the best-planned program or event can’t guarantee that the people attending will develop closer professional relationships. That’s entirely up to them.”

Yi Sun Kim agrees.

Developing proactive ‘bridge’ programs, she says, “are often difficult to pull off because you can put people in the same room, but, in the end, it’s up to the mentor and the person being mentored to sustain it. You can’t force people to participate. It can work, but it’s entirely up to the people involved to maintain the energy to keep it going effectively.” 

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Accidental Franchises: What You Don't Know Can Hurt

By Barry Kurtz



FRANCHISING CAN BE A HIGHLY effective expansion strategy with ambitious entrepreneurs achieving success by joining proven, well-managed franchise systems in lieu of taking on the risk of creating their own independent businesses.

Developing a franchise can have many advantages for both franchisors and franchisees. Creating a franchise system allows franchisors to expand already successful business concepts, attain greater brand recognition, and diversify risk through the investments of its franchisees.

In all, franchisees enjoy many notable benefits from the franchisor-franchisee relationship, including access to a proven business system, a wider customer base, greater brand name recognition, and a stronger market presence.

In addition, franchisees can also enjoy group purchasing discounts; professional marketing assistance, research and development benefits; continuing education and training; and

support from their franchisor and other franchisees with similar goals, needs, and challenges.

Situational Awareness

Why should all business attorneys be aware of, or even concerned with, franchises and the laws that affect them? Because both businesspeople and attorneys often are unaware that franchise laws can impact a wide variety of business relationships.

Under federal law, as well as in California, it does not matter whether you call a business arrangement a partnership, license, dealership, distributorship, joint venture or something else when you draft the agreement, or whether the agreement disclaims the existence of a franchise. If all the elements of a franchise are present, the business is, in fact, a franchise.

A highly complex area of the law that lends itself to specialization, knowing the basics of franchising can help identify potential arrangements and prevent business clients from becoming

accidental franchisors or inadvertently contracting with an accidental franchisor.

What is a Franchise Under California Law?

Under California law, a business relationship is considered a franchise if the business will be substantially associated with the franchisor's trademark; the franchisee will directly or indirectly pay a fee to the franchisor for the right to engage in the business and use the franchisor's trademark; and the franchisee will be operated under a marketing plan or system prescribed in substantial part by the franchisor.

The state's Department of Business Oversight (DBO) regulates the offer and sale of franchises in California, and interprets the three elements of a franchise broadly.

If a business uses another company's trademark to identify itself, or in its advertising, it can be argued under existing law that the business is substantially associated with the franchisor's trademark.



Barry Kurtz is Chair of the Franchise and Distribution Practice Group at Lewitt Hackman in Encino. A Certified Specialist in franchise and distribution law, he is also a Certified Franchise Executive as designated by the International Franchise Association. Kurtz can be reached at bkurtz@lewitthackman.com.

Broad Interpretation

Courts have broadly interpreted the “substantial associated” element.

In the case of *Kim v. ServoSnax*, for example, the court held that the trademark element was satisfied in a licensing arrangement even though the licensor’s trademark was not communicated to the public or to customers.¹

The fee element is also easily satisfied. Just about any payment to the licensor or its affiliate for licensing or distribution rights can fulfill the fee element, regardless of what the parties may label it in their agreements.

However, payments that do not exceed the bona fide wholesale price of inventory for resale are excluded from the definition of a franchise fee, if there is no accompanying obligation to buy excessive quantities.

Further, ordinary business expenses are not franchise fees. Most product distribution relationships are structured by using this exclusion.

The third element, which requires that the franchisee operates the business under a marketing plan or system prescribed in substantial part by the franchisor, is known as the control element, which is so broadly interpreted that the mere promise of assistance, even if unfulfilled, will satisfy it.

If the three elements of a franchise exist, then the relationship is a franchise, no matter what the parties call it.

Franchise laws cannot be waived. Including terms such as “franchise laws shall not apply,” or “the arrangement between the parties is not a franchise” will not work, and will not prevent a business from satisfying the definition of a franchise.

Likewise, redefining a franchise relationship by labeling it a license, distributorship, dealership or joint venture will not remove an otherwise qualifying relationship from falling under the scope of franchise laws.

Risks of Mischaracterizing

California courts have little compassion

for trademark owners that claim they did not know the law or argue that there was no intent to create a franchise.

For example, in *Boat & Motor Mart v. Sea Ray Boats*, the court found that a dealership agreement between a boat dealership and the manufacturer was a franchise despite the manufacturer’s argument that it did not prescribe a marketing plan to its dealers.²

In another case—*Gentis v. Safeguard Business Systems*—the court ruled that a sales agent’s role in occasionally distributing goods, guaranteeing customer payments, and setting the price on certain items was enough to make the relationship a franchise.³

The DBO closely monitors franchisor-franchisee arrangements and may assess penalties of \$2,500 per violation of the California Franchise Investment Law.

The agency also has the authority to require franchisors to provide its franchisees with written notice of the violation, offer rescission of the franchise, and refund payments made by the rescinding franchisees—all unexpected consequences that can prove painful to the accidental franchisor.

Attorneys representing business owners must be able to spot the telltale signs of a franchise, or a potential franchise, to avoid unwittingly assisting their clients in becoming accidental franchisors, as well as inadvertently contracting with accidental franchisors.

What Makes Franchises Different

Licensing, distributorship, and dealership arrangements are not franchises because they do not include at least one of the three elements that define a franchise.

For example, under a typical licensing arrangement, one company licenses another to sell its products or services in exchange for a specified amount of the proceeds without any additional involvement of the licensor.

However, if the licensor provides additional support, such as training or



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promotional assistance that amounts to sufficient control, the licensor has become a franchisor.

In dealership and distributorship arrangements, independent businesses operate under their own trade names and usually buy products or services from another party at wholesale prices, and then resell them to the public.

Neither party is substantially involved in the business affairs of the other, while, generally, distributorship arrangements do not constitute franchises because the definition of a fee is not met.

As discussed above, a fee does not include payment for the purchase of initial and ongoing inventory at bona fide wholesale prices. If the distributor sells items not intended for resale—displays, sales kits, or advertising, for example—the fee element may be triggered.

Further, marketing and training assistance could trigger the control element and inadvertently turn the relationship into a franchise.

Pre-Sale and Ongoing Legal Compliance

Franchise Registration: Non-franchise trademark licenses are private contracts in which licensors do not have to make public any information regarding their financial condition or other sensitive business information.

Franchising, however, is an industry highly regulated by federal law and by-laws in many states.

Under California's Franchise Investment Law, it is unlawful to offer or sell a franchise unless the offering has been registered with the DBO or it is exempt from registration.

If a business relationship satisfies the elements of a franchise under California law, the franchisor must:

- File a franchise disclosure document with the DBO outlining the franchise opportunity in detail and providing information regarding the franchisor's own background and business experience before entering into any discussions with potential franchisees;

- Disclose potential franchisees with its registered disclosure document and wait at least 14 full days before having the franchisee execute any franchise documents or accepting any payments; and,
- Obtain DBO approval for any material modifications to its registered franchise documents before presenting them to franchisees.

These burdens are not imposed in licensing, distributorship, and dealership relationships.

Franchise Relationship Laws

The regulation of a franchise relationship does not end once the franchise disclosure document is registered and the franchise agreement is signed.

Twenty-four states, including California, have enacted franchise relationship laws that aim to limit franchisor abuses of the franchise relationship.

These laws regulate what the franchisor can contractually do under the franchise agreement. They include enforcement of system standards, renewal, and termination of franchise rights and noncompetition covenants. These relationship laws will apply throughout the life span of the franchise.

Analyze and Understand

The determination of whether a license, distribution or dealership arrangement should be treated as a franchise must be made after a thorough analysis of a client's business structure.

Understanding the basics of franchising will allow you to better advise a client and, when necessary, help in seeing when it is time to contact a franchise law specialist to render assistance in leading all involved through a potential minefield of unintended consequences. 

¹ *Kim v. ServoSnax*, 10 Cal.App.4th 1346 (1992).

² *Boat & Motor Mart v. Sea Ray Boats*, 825 F.2d 1285 (9th Cir. 1987).

³ *Gentis v. Safeguard Business Systems*, 60 Cal.App.4th 1294, 1297 (Cal.App.2 Dist. 1998).

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.

Karine Karadjian



Law School: Pepperdine University School of Law

Area(s) of Practice: Bankruptcy law, debt Settlement, mediation

Years in Practice: 7

Firm: Solo Practitioner, Van Nuys and Irvine

If not the law, what would be your second career choice?
"Book editor."

What's your favorite fast food? "In-N-Out cheeseburger with animal-style fries."

What do you do in your free time? "Travel, cook, and go on hikes with my dog Sheldon."

Did you have a 'hero' when you were growing up? Who and why. "My hero growing up was my mother. She taught me perseverance and strength. She was a cardiologist in Armenia. When we came to the U.S., she had to start from scratch. She taught herself English in her 40s, worked a full-time job, took care of us—my dad joined us in the U.S. a few years later—and spent weekends and evenings attending a rigorous nursing program and internship to obtain her license as a Registered Nurse here. We were in the midst of financial struggle, health issues, cancer scares, and the unexpected tragic loss of my uncle—my mother's much younger brother. Through this, she always remained positive and strong in front of my brother and I. She taught me to be resilient, to look past dark times and challenges, and to find my inner strength."

Karine Karadjian graduated from University of California, Los Angeles in 2008 with a B.A. in History and International Development Studies and her J.D. and Master of Dispute Resolution degrees from Pepperdine University School of Law in 2011.

Karine's practice currently focuses on consumer bankruptcy, debt settlement, and mediation.

Her interest in bankruptcy law developed during her second year of law school when she served as an extern for the Honorable Kathleen Thompson and the Honorable Geraldine Mund at the Central District of California Bankruptcy Court in Woodland Hills.

Karine completed an internship with Public Counsel's Debtor Assistance Project and went on to work at a bankruptcy firm in the San Fernando Valley, where she managed the post-filing Chapter 13 Department for several years.

She opened up her own practice in July 2015 and has "loved every minute of it."

Karine is fluent in Armenian and Russian, she is also conversant in Spanish.

Asya Ovsepyan



Law School: Western State University College of Law

Area(s) of Practice: Criminal defense, appellate law, juvenile dependency, educational rights

Years in Practice: 2

Firm: Sole Practitioner, Encino

Favorite Valley Restaurant:
"Katsu-ya in Encino."

What influenced you to become an attorney: "My love for learning influenced my desire to become an attorney. My experience with social injustice influenced my desire to become a criminal defense attorney."

What was your first job?: "Sales representative at Macy's department store."

Memories of your first car? "I've had my driver's license since I was 15. I do recall the first car I purchased on my own and I felt like I was now a productive member of society, paying monthly payments. It felt like a huge responsibility, yet very fulfilling."

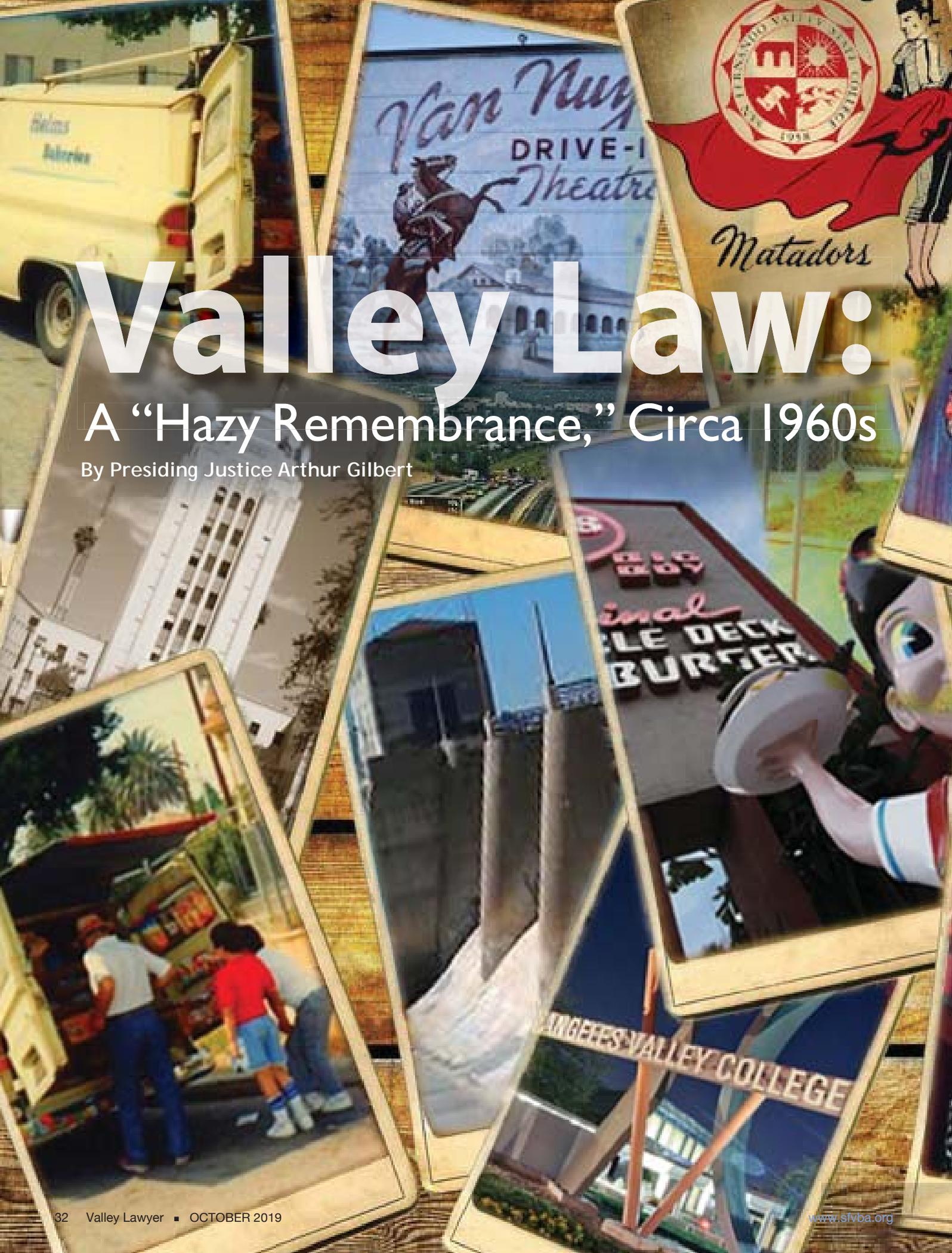
How did you react when you learned that you'd passed the Bar exam? "When I found out I passed the Bar, I fell to the ground screaming and crying. My daughter, who was almost four years old, started crying; I'm assuming she was terrified from my screaming. I held her and cried. My dreams had come true."

Asya's practice focuses on criminal defense, both in trial litigation and post-conviction relief, and juvenile dependency.

She received her B.A. from the California State University, Northridge, graduated from Western State College of Law, Irvine, with scholastic merit and recognition of her more than 100 hours of public service. She interned for the Orange County Public Defender's office. She also clerked for an appellate attorney.

As a practicing attorney, Asya has defended criminal cases both at the state and federal level and has successfully handled appeals and writs of habeas corpus before the California Second District Court of Appeals.

Asya is licensed to practice before California state courts and the California Central District Court.



Valley Law:

A “Hazy Remembrance,” Circa 1960s

By Presiding Justice Arthur Gilbert



In 1965, the average annual income was \$6,450; a new Ford Mustang cost \$2,734; the minimum wage was \$1.75 per hour; and a Bob's 'Big Boy hamburger cost .55¢.

DID YOU KNOW THAT distinguished attorney Barry Goldberg, your newly elected San Fernando Valley Bar Association president, is an accomplished musician? He plays trombone in the celebrated Big Band of Barristers. The band rehearses almost weekly at my house. If I were not a member, you can bet they would rehearse elsewhere.

At breaks, musicians in a normal jazz band talk about chord changes or melodic lines, while sharing a hand-rolled cigarette from which they take long drags. Not this band. At breaks, the musicians talk about their cases and troublesome judges.

Of course, I shut my ears and do not participate in these unseemly topics. But I did have a conversation with Barry about the pride he takes in the San Fernando Valley Bar Association.

Did I...? Oh, yes, I did mention he is your new president. I then informed him that, decades ago, I was a member of the San Fernando Valley Bar Association. Barry asked me to write an article about what the bar was like in those bygone days.

Imagine my astonishment when I learned that I, in fact, was never a member of the Association. My dear friend Judge Michael Harwin, who wasn't even around these parts in the 1960s, told me I had been a member of the San Fernando Valley Criminal Courts Bar Association, a separate entity with its own board of directors. I believe the two associations had a joint meeting. But once the San Fernando Valley Bar Association met us, they probably decided to forgo future meetings.

But what might be of interest is what it was like practicing law in the Valley in the

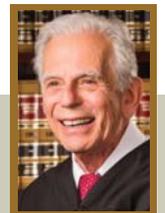
60s. No one says the "San Fernando Valley," do they? OK, Bing Crosby and Roy Rogers were the exceptions.

Dateline 1965

I was a young, callow Deputy City Attorney running the misdemeanor criminal courts calendar with Johnny Cochran. It wasn't until the following year that President Lyndon Johnson signed into law the Voting Rights Act. And can you believe we were prosecuting civil rights demonstrators who were blocking entrances to business establishments while singing "We Shall Overcome"?

Julian Dixon—the bailiff who became a highly respected member of Congress—and I had no idea of the trajectories our careers would take. As a Deputy City Attorney, after bringing to court gay people for soliciting 'lewd acts' in public places, I never dreamed that when I became a judge a decade later, I would rule the legislation making this a crime unconstitutional. And our Supreme Court agreed.

The events referenced in *Once Upon a Time...in Hollywood* were a long way off. And the tensions that led to eruption of the Watts riots occurred in 1965, the year I joined a small law firm in Canoga Park. As far as I can determine, there was no correlation between the two. Outside my office was a pasture where roosters crowed and cows mooed...in that order. Up the street was a lone practitioner who was a buddy, Harry Pregerson. Don't think he



Judge Arthur Gilbert serves as the Presiding Justice of the California 2nd District Court of Appeal's Division 6. He is a prolific writer and his humorous columns regularly appear in the *Los Angeles Daily Journal*.



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knew then that he would be on the Ninth Circuit Court of Appeals. Nor at that time did he ever dream that an on-ramp of the Century Freeway would be named after him. Do you think that his decision allowing the Century Freeway to be built had anything to do with it?

I wrote a decision in favor of the City of Beverly Hills—*Friedman v. City of Beverly Hills* (1996) 47 Cal. App.4th 436. So far, lobbying efforts to have the City of Beverly Hills name a passenger loading zone after me have gone nowhere.

Practicing law in those days in the Valley was different than what I see occurring throughout

other parts of the county today. We had no detailed rules concerning civility, compelled meet-and-confer sessions, and discovery. Noticed motions were rare. We extended courtesies to one another over the phone. Agreements for extensions were seldom confirmed in writing. Stipulations were accomplished with a verbal handshake. When dealing with the few jerks who everyone knew, we resorted to written stipulations.

One of the most accommodating and loved attorneys was Thaxson Hanson, a partner in a well-known insurance defense firm. He had been appointed to the Superior Court in 1968 by Ronald Reagan. He decided a controversial obscenity case in 1972 involving some 62 films, which he screened in his courtroom. As I recall, the Ninth Circuit became involved in the case. As a consequence, he reluctantly ruled the films had to be returned to the defendants.

The next year, Governor Reagan appointed him to the Second District Court of Appeal and we later became colleagues in different divisions...thank goodness. Read *People v. Arno* (1979) 90 Cal.App.3d 505, and you will understand.

The Criminal Courts Bar

The members of the San Fernando Valley Criminal Courts Bar Association were a colorful group who enjoyed rich and enduring friendships. Armand Arabian was a feisty criminal defense attorney who fought hard for his clients. I

doubt he thought then he would become a justice on the California Supreme Court.

During that time, I had an interest in Indian music and studied tabla drums with Ravi Shankar and Alla Rakha, who was a sensation with the younger generation. Come

to think of it, at that time, I was the older half of the younger generation. During the daytime, I was the professional lawyer wearing monogram shirts and silk suits to look successful. But in the evening, I was the counter-culture tabla player. I kept the dual identities separate until my cover was blown when a TV program showed me playing at Ravi Shankar's cultural center. My friends at the bar association were impressed when they learned I spent some time with another Shankar fan, George Harrison of the Beatles.

I do recall appearing in the Van Nuys Municipal Court. I think it had been built in 1955 by an agricultural student. My guess is that the city managers were confused by the

“
I kept the dual identities separate until my cover was blown when a TV program showed me playing at Ravi Shankar's cultural center.”

spelling and thought they had hired an architectural student to save money. I recall the realism of the post-World War II Italian cinema, and the shots of damaged buildings that had suffered from artillery fire—the model apparently followed in the construction of this courthouse.

But a short-lived hooray when ‘they’ built the Van Nuys Courtroom East in 1964 where I tried many high stakes cases...well, they were high stakes to me. I often wonder who are the persons who make up the collective ‘they’ that so often mess up everything. The well of the courtroom was so cramped that lawyers and witnesses were constantly bumping into one another. Short digression for some unsolicited advice: when building courthouses, always consult judges and the bar before submitting the final architectural plans.

I fondly remember the interesting programs sponsored by the San Fernando Valley Criminal Courts Bar Association held at the Sportsmen’s Lodge. Members of the San Fernando Valley Bar Association often attended. Active member Roy Carstairs, who became a municipal court judge in Van Nuys, brought in some high-profile speakers. Judge Harwin reminded me the speakers included Danny Thomas and Liberace, who elected not to play the Lodge’s out-of-tune piano. I remember one evening when the speaker was E. Howard Hunt, a mastermind of the Watergate break-in. Think it strange he devoted a good part of his talk excoriating Judge Sirica who sentenced him to federal prison?

I recall one program featuring the ‘Coroner to the Stars,’ Thomas Noguchi. What was the program about? I swear under penalty of perjury the following is true and correct.

The program featured a series of slides showing photographs of corpses in the morgue. What else would you like to talk about immediately after dinner? And guess who was selected to hold the device that one clicked to show the next slide when given the nod by Noguchi? I got the hang of it quickly and only threw up twice. It was an audience participation program. After viewing a particular slide, we were asked to guess the cause of death. I won’t go into details,

but Jeopardy is a piece of cake in comparison.

It’s been fun for me to look back over 50 years and think about my road taken and the fond memories I have had traveling along it. The San Fernando Valley Bar Association has grown into an impressive organization that serves the community and the legal profession well. And congratulations to my good friend Barry who will lead the association next year. 🏛️

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Everybody's An Expert: Practicing in the Age of Google Law

By David Mercy



WHETHER YOU'RE BRAND new in the profession, having found an upwardly mobile spot in a good law firm, or you've been a mainstay in the local legal scene for many years, you've done a lot to get where you are.

After all the blood, sweat, and tears, you find yourself on an initial consultation, and sitting across from you is a client who honestly feels like your equal in the realm of law. He has a phone and it's got Google on it. He is an online expert.

So instead of taking down his information and beginning your procedure of strategizing how to help him with his case, and sorting out all of the legal ramifications you will have to assess and wend your way through, you spend the next hour fending

off his Googled 'expertise' with one explanation after another of why it's just not that simple.

You have a dilemma. How much time should you allow your client to waste? Most attorneys would agree that even though he's prattling away billable hours, you are doing a disservice to your client by allowing him to place you in a reactive rather than proactive mode. In the most diplomatic way possible, you have to take the reins back or this party wagon is heading over the cliff.

Too Many Cooks

The old saying that 'Too many cooks spoil the broth' was never more true than it is today, except for the fact that most of these lay cooks are akin to wannabe chefs who never set foot in a culinary school, but somehow gained their questionable expertise by watching

someone else sweat over the stove through a window.

What Google provides are little snapshots of a much larger picture, that is why it is critical to explain that, while one statute does have merit on its own, it only applies if the condition is satisfied as set forth in another.

The fact is that while gamesmanship is often a necessary component to any competition, the law itself is not a game. Law, like many professions, is both an art and a science. Those who know the science can perform the art.

We all know the quote: "He who represents himself has a fool for a client", attributed to Abraham Lincoln, and in effect isn't that what 'Google Lawyers' are attempting to do in a certain respect?

They retain your services, but if they think their 'click knowledge' enables them to be the captain of the ship, they will be heading for the rocks. Like a captain with navigational charts, and above all, 'sea time,' so is a lawyer with a degree and access to a law library.

This is a very basic fact that they need to accept and understand, lest your dealings with them degenerate into a series of freerfall 'debates' on every single aspect of every applicable law.

You are certainly not alone in having to address and correct the presumptions your clients have about the law after clicking a few websites.

Every profession is subject to this now. Doctors, certainly, most especially with all those TV spots aimed at getting the patient grill them about every unpronounceable drug and treatment under the sun. A small amount of knowledge can, at best, be



David Mercy is the Business Development Director of IT Support LA, an IT Managed Services Provider and technology concierge. He can be reached at: david@itsupportla.com.

annoying, but, at worst, a very dangerous thing.

How Did We Come To This?

It was Aristotle who noted in the 4th Century B.C. that “(young people) are high-minded because they have not yet been humbled by life, nor have they experienced the force of circumstances. They think they know everything and are always quite sure about it.”

When you consider the snowball effect over time, wherein each successive generation has been relieved of a few more of the tasks necessary to simply stay alive, it's a wonder we're still here at all. Yet still we prevail.

Enter Google. Just as technology begets faster technology, Google seems to be hastening the devaluation of learning, interpretive thought and creative problem solving. Couple that with the Dunning-Kruger Effect, which essentially posits that the more dense someone is, the brighter they think they are, and you find yourself in an ever expanding world of dealing with tedious, yet well meaning, unlicensed pseudo-attorneys.

And now here he is sitting across from you in your conference room, doing his best to show you that he really doesn't need an attorney, but getting one frees up more of his brilliant time for loftier pursuits, like telling research scientists that finding a cure for cancer really couldn't be that hard.

How To Get Them To Listen

When confronted with a client's inner Perry Mason, it may well serve you to adopt a variation of the techniques retail salespeople use in answering objections from edgy customers—don't argue; listen patiently; respond with softening statements; reiterate your mutual goals; and clarify why the legal information they supplied you may or may not be suitable in the successful resolution of their case.

Strengthen their trust in you as their advocate and that you and your team will do your level best to help them advance their case and arrive at just the legal decision they desire. 

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NEW MEMBERS

The following joined SFVBA in August 2019:

Yasha Daniel Ahoulim
Woodland Hills
Law Student

Jared Antman
Calabasas
Law Student

Maneh Arakelyan
Neighborhood Legal Services of LA County
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Rochelle C. Binns
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Melissa Centeno
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Righting an Egregious Wrong

WHEN IT COMES TO MONEY, people get into all sorts of arguments and disagreements. Families are no exception—from fighting over an inheritance to clashing over bad debts owed to each other.

This was the case for our client Rasheed [a pseudonym] who reached out to our office for help in recovering funds he had loaned to his cousin’s husband.

Speaking with him, he shared that a few years prior he had loaned his cousin’s husband nearly \$20,000, with the understanding that it would be repaid within 48 months with 30 percent interest added.

Rasheed had a promissory note drafted that supported his claim and not only facilitated collection of the debt, but also established the validity of his claim to the balance of the loan still owed.

Following our interview, we were able to communicate the details of the case to SFVBA member and ARS attorney Robin Paley. He connected with Rasheed, discussed the case with him and devised a detailed strategy based on the new revelations that that the promissory note had been drafted in Iran in the Farsi, or Persian, language.

FAVI GONZALEZ
ARS Referral Consultant



favi@sfvba.org

A translator was called in and, while the translation of the promissory note did not precisely mirror an English version, it was sufficient to enforce payment.

In the course of his interactions with both parties, Paley learned that the loan had drained all of Rasheed’s life savings and that the relative who had asked for the loan was of a higher social class than Rasheed.

More importantly, his inability to collect the debt had seriously impacted not only his financial, but emotional, well-being.

Paley was determined to do his best to protect the rights of his client and correct an egregious situation.

He did, the case was settled and a release was issued. While the total balance of \$20,000 was not recovered, Paley successfully recovered a significant percentage of it.

Rasheed could not be more satisfied.

“I believed I would not get one penny, but the attorney saved me,” he said. “I will refer anyone that needs help to you guys.” 

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WELCOME MEMBERS OF THE SAN FERNANDO Valley Bar to our 2019 Board year commencement and we greet all of those future participants in the activities that assist our community organized by the Valley Community Legal Foundation.

VCLF serves as the charitable arm of the San Fernando Valley Bar Association to assist with law-related programs and projects and provide help for children in need, victims of domestic violence and veterans in the San Fernando Valley. We also take great pride in providing support and opportunities, as well as scholarships, to students considering careers in either law or law enforcement.

VCLF is especially pleased to share that we presented scholarships totaling \$9,000 to recognize seven James Monroe High School and John Burroughs High School students for their outstanding academic achievements and community involvement in 2018. This year, we are including Pierce College in our academic achievement award opportunities and, in the past, have honored award recipients from the University of West Los Angeles School of Law.

Our *Constitution and Me* program sends judges and attorneys into local high school classrooms to promote active participation and prompt students to think about difficult constitutional issues that they can be exposed to in their daily school experiences.

Over the years, VCLF has funded many worthy Valley projects and organizations including CASA, which provides court-appointed advocates to assist children in the dependency court system; Haven Hills, a nationally recognized organization providing shelter, support and assistance to victims of domestic violence; Blanket the Homeless, an annual project to provide blankets to homeless

individuals and families; and the Teddy Bear Program, which provides stuffed animals to comfort children during court proceedings.

VCLF also sponsors local high school students to attend *Defamation*, a professional play that gives students the opportunity to serve as the jury in a courtroom drama that touches on the serious issues of race, religion and class in the context of a modern civil lawsuit.

The next time you are in either the Van Nuys or San Fernando courthouses, please take note of the children's waiting rooms. VCLF was instrumental in the creation of these safe spaces for children whose parents are involved in criminal, family law or domestic violence

proceedings. In the past, children often had to wait in the hallway while proceedings dragged on, or remain with their parents in the courtroom, either a stressful environment for any child.

Thanks to the children's waiting rooms, parents can now leave their children in a secure, supervised place with games and projects to occupy them while their parents are engaged in legal proceedings—a great assistance to families going through difficult circumstances.

VCLF has three co-presidents this year working to keep the mission of the VCLF alive by striving to help SFVBA reach both its goals and our community's needs.

VCLF is a registered 501c(3) organization that raises funds to provide these philanthropic programs and raises funds to maintain meaningful charitable programs in the San Fernando Valley through its members and local businesses.

Support your VCLF. Please contact us to share your creative ideas on how to raise funds to support VCLF's community work in the Valley, or if you want to participate in any of our fundraising or scholarship opportunity programs. 



We take great pride in providing support and opportunities, as well as scholarships, to students considering careers in either law or law enforcement.”

ABOUT THE VCLF OF THE SFVBA

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

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Introducing Our New SCVBA President

IN ADDITION TO CELEBRATING ITS 15th anniversary this November, the Santa Clarita Valley Bar Association welcomes Taylor F. Williams as its incoming President.

A partner with Donahoe & Young LLP, Williams directs her practice toward civil litigation, real estate, business transactions and bankruptcy matters, as well as probate, estate planning, and landlord/tenant issues.

She was admitted to the California Bar in 2011 and is admitted to practice before the U.S. District Court (Central and Eastern Districts of California), Ninth Circuit Court of Appeals and the U.S. Supreme Court. She is an active member of the American Bar Association, the Los Angeles County Bar Association, and the San Fernando Valley Bar Association.

Williams also serves as the Santa Clarita Valley Bar Association Representative on the San Fernando Valley Bar Association's Board of Trustees.

She graduated with honors from the University of Texas at Austin in 2008. While completing her undergraduate studies, Williams studied abroad at the Mediterranean Center for Arts and Sciences in Sicily, Italy, focusing on an analysis of the workings of the Italian mafia.

Fulfilling her elementary school vision of becoming an attorney, she clerked for the Governor of Texas, served as Associate Editor of the *Journal for Business, Entrepreneurship and the Law* while attending Pepperdine University School of Law, and received her J.D. in 2011.

Prior to joining Donahoe & Young LLP in September 2012, she practiced civil litigation with another firm in Los Angeles.



In addition to celebrating its 15th Anniversary this November, SCVBA welcomes Taylor F. Williams as its incoming President."

Williams volunteers with Reading to Kids, a nonprofit organization dedicated to inspiring underserved children with a love of reading. She also volunteers

monthly with the West Los Angeles Animal Shelter under the parameters set by Flynn and Felix, her wild but beloved rescue terriers.

Since the age of 14, Williams has been a certified scuba diver and, if you can't find her sailing or diving in nearby Southern Pacific waters, you are be sure to find her active off the Caribbean Islands at least once a year. And if you can't find her in or on the water, then she is most likely studying wine—a perk of being a member of several California vineyard wine clubs.

We invite you to raise a glass with us as we give cheers to Taylor Williams at the Santa Clarita Valley Bar Association's 15th Annual Awards & Installation Gala. The Gala will be held at The Oaks Club in Valencia on Thursday, November 14th. 

SARAH HUNT
SCVBA Executive Assistant



info@scvbar.org

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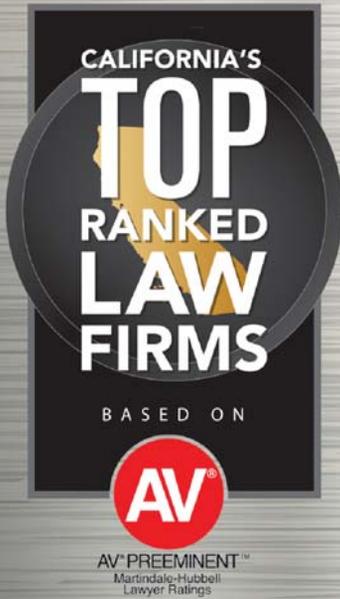
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