VALLEY LAWYER

NOVEMBER 2019 • $5

A Publication of the San Fernando Valley Bar Association


# Sharing and Learning: California Jurists Visit South Africa

## Nursing Home/Assisted Living Arbitration Agreements

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# VALLEY LAWYER

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# A Gold Medal Operation

**BARRY P. GOLDBERG**
SFVBA President

bpg@barrypgoldberg.com

I AM THANKFUL FOR SO MANY THINGS AND IT occurs to me that I spend too much time worrying about problems. Maybe that is the fate of lawyers. We are paid handsomely to worry about and solve our clients' problems, while we should carve out some time out to actually count our blessings. For me, my family and my co-workers are at the top of the list.

I am also thankful for SFVBA—the staff, our Executive Board, our Gold Medal class of Trustees and each and every member of our Bar. This year more than ever, I am thankful to SFVBA sponsors and supporters. You make us great! You see, at the time of writing this column, I know stuff the rest of you do not. Allow me to explain.

The SFVBA is not merely on a slight bump upwards. We are setting records in everything—a record number of candidates ran for trustee; a record number of ballots cast in our election; a record number of social media posts and involvement; and our programs are selling out and our sponsorships are at record levels.

Our recent Installation Gala drew a record number of sponsors and attendees and I am humbled and grateful for all those who attended what was a great event.

Last year, Yi Sun Kim set a record for both sponsorships and attendance for her Installation Gala. Record Galas two years in a row. I was mortified that I could not possibly live up to her standards and that only a very few would show up to the 2019 Gala. I was wrong because, like in every project and work it undertakes SFVBA is building on the great work of previous presidents and boards that laid the foundations for our current success.

This upward trajectory will continue because we have a Gold Medal class of Trustees this year. Their talent is pervasive, their ideas are abundant and their enthusiasm is overwhelming! This election cycle demonstrated that these trustees are ready to rock! The way each trustee campaigned for votes online was very exciting. I saw a post from a law firm throwing a congratulations party for its candidate and another post of a happy couple toasting a Trustee election victory with champagne.

Last year, I commissioned a graphic Gold Medal that showed that I was a proud elected SFVBA Trustee. I use it in my email signature and it is front and center on the first page of my website. This year, many of our trustees have jumped onboard and are using the same SFVBA Gold Medal with pride.


These Gold Medal Trustees make up the most online-savvy group SFVBA has ever seen. The time has come for you to get online and follow the example of your colleagues. You will see them linking with top judges and mediators; volunteering to end homelessness; interacting in MCLE and becoming better and more skilled lawyers.

Studies have shown that you will also see these lawyers increase their number of clients and revenue because they are doing good. Millennials will relate and greatly improve their chances of being hired.

It really means something to be elected to the SFVBA Board of Trustees and we will continue to attract the best talent the Valley has to offer.

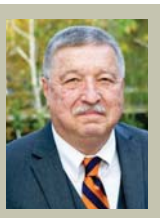
For those lawyers reading this, the time is now to get on a committee or find another activity with SFVBA. I assure you, this SFVBA is different from the SFVBA you knew only a few years ago. Still skeptical? Come to our next event and meet our new Executive Director, Rosie Soto Cohen. Visit our beautiful SFVBA offices with open spaces for quality events and meetings.

But, most importantly, meet our Gold Medal class of SFVBA Trustees!

For all of the above, I am thankful.

# What the Fly Has Seen

**MICHAEL D. WHITE**
SFVBA Editor



michael@sfvba.org

THERE IS AN EXPRESSION that is not used very much as of late. In fact, it has been quite a while since I have heard someone say, referring to some famous—or infamous—event, that "I sure wish I'd been a fly on the wall…"

Everyone, I think, has the fantasy of wanting to have 'been in the room,' perhaps not as a fly, but hiding under a table when, say, President Abraham Lincoln penned his second Inaugural Address, or perhaps watching as the master Michelangelo laid the finishing touches to the ceiling of the Sistine Chapel.

Maybe to have been in the VIP's box and taken no small degree of satisfaction at the look on Hitler's face when Jesse Owens crossed the finish line to win the 100-meter Gold at the 1936 Olympics. Or, scary perhaps, à la *Back to the Future*, being there when your parents first met.

My own time machine moment is to have been an invisible observer when the members of the Second Continental Congress gathered in the Pennsylvania State House that sweltering, humid Philadelphia day in July 1776 to vote on whether or not to sign-off on the Declaration of Independence and forward a copy on to George III.

As history shows, they did. What a life-altering experience it would have been just to have witnessed the albeit tentative first step of a yet-to-be nation on a course of events that would progressively change world history over the following 243 years.

An interesting point in passing—24 of the 56 men who signed the Declaration of Independence were lawyers or jurists.

When talking with Judges Huey P. Cotton and Paul A. Bacigalupo for this month's cover story, I couldn't help but think of the timeless opportunity they and their fellow jurists had during their recent visit to South Africa to actually meet with several of the individuals who actually played a role in the creation of that country's Constitution and the ongoing development of its vibrant, fledgling democracy.

> "Everyone, I think, has the fantasy of wanting to have 'been in the room,' perhaps not as a fly, but hiding under a table when, say, President Abraham Lincoln penned his second Inaugural Address."

I admire them their opportunity and I know, after talking with both of them, that the unique experience was neither wasted nor undervalued. They, and the other participants in the visit to South Africa, have come home having shared, listened and learned.

Thanks to the Orange County Bar Association for permission to reprint an outstanding article on Ex Parte Relief that appeared in their latest edition of *Orange County Lawyer*, as well as to Steven C. Peck for his MCLE on Nursing Home/Assisted Living Arbitration Agreements, Ronald P. Abrams for a concise look at Patent Trolls and their Texas connection, and photographer Ron Murray for his outstanding work at the recent SFVBA Gala Installation.

Thanks for reading and regards.

# CALENDAR

## NOVEMBER 2019

| SUN | MON | TUE | WED | THU | FRI | SAT |
|---|---|---|---|---|---|---|
| **3** DAYLIGHT SAVINGS TIME ENDS | **4** VBN VALLEY BAR NETWORK 5:30 PM | **5** | **6** Criminal Law Section Alternative Sentencing 6:00 PM SFVBA OFFICES Sponsored by **VIP Alternative Sentencing** The seminar will offer new information on how to keep your client out of jail even with mandatory jail time in LA County. (EMP) Electronic Monitoring Program Alternative to custody LA County. Free to Current Members! (1 MCLE Hour) | | **1** | **2** |
| **10** | **11** Brown Bag Lunch Commissioner Application Process 12:00 NOON SFVBA OFFICES Judge Ruth Ann Kwan, Chair of the Court Commissioner Selection Committee and Assistant Supervising Judge of the Civil Division will explain the process and answer attendees' questions regarding the Court Commissioner application process. VETERANS DAY | **12** Probate & Estate Planning Section The Attorney General's Oversight of Charitable Trusts 12:00 NOON MONTEREY AT ENCINO RESTAURANT Joseph N. Zimring, Deputy Attorney General, Charitable Trusts Section, Calif. Dept. of Justice, will discuss the circumstances where the Attorney General becomes involved in the administration of the decedent's estate. (1 MCLE Hour) Board of Trustees 6:00 PM SFVBA OFFICES | **13** Business Law and Real Property Section Zero Equity Properties in a Good or Bad Economy 12:00 NOON SFVBA OFFICES Sponsored by EXETER 1031 EXCHANGE SERVICES LLC How to defer capital gains and recapture depreciation with No Equity. Bill Exeter will be the scheduled speaker. Free to Current Members! (1 MCLE Hour) | **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. Free to SFVBA Litigation Section members! (1 MCLE Hour) See ad on page 42 Membership & Marketing Committee 6:00 PM SFVBA OFFICES **14** | **15** | **16** |
| **17** | **18** Mock Trial Committee Meeting 6:00 PM SFVBA OFFICES | **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 *Dynamex Operations West v. Superior Court (Dynamex)*. 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) | **20** Workers' Compensation Section Alcohol and Marijuana Effect on the Brain 12:00 NOON MONTEREY AT ENCINO RESTAURANT Nachman Brautbar, MD, will discuss how alcohol and marijuana consumption affect brain activity. Qualifies for 1 Hour Competence Issues MCLE. | **21** | **22** | **23** |
| **24** | **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) | **26** Editorial Committee 12:00 NOON SFVBA OFFICES | **27** | **28** Happy Thanksgiving | **29** | **30** |

| SUN | MON | TUE | WED | THU | FRI | SAT |
|---|---|---|---|---|---|---|
| 1 | **2**<br>VBN VALLEY BAR NETWORK<br>5:30 PM | 3 | 4 | **5**<br>All Members<br>Economic Damages in Personal Injury and Wrongful Termination Matters<br>12:00 NOON<br>SFVBA OFFICES<br>Sponsored by BRG<br>This seminar will be instructive for both plaintiff and defense attorneys! Free to Current Members! (1 MCLE Hour)<br>Membership & Marketing Committee<br>6:00 PM<br>SFVBA OFFICES | 6 | 7 |
| 8 | 9 | **10**<br>Probate & Estate Planning Section<br>Winter is Coming – Stretch Out is Going<br>12:00 NOON<br>MONTEREY AT ENCINO RESTAURANT<br>Speaker Steven Trytten. Please bring an unwrapped toy for our Giving Tree. (1 MCLE Hour) | 11 | 12<br>Join us!<br>HOLIDAY OPEN HOUSE<br>TUESDAY, DECEMBER 10<br>5:30 PM \| SFVBA OFFICES<br>See ad on page 43 | **13**<br>Bankruptcy Law Section<br>The New Small Business Act<br>12:00 NOON<br>SFVBA OFFICES<br>Special two-hour MCLE program. Panelists Judge Alan M. Ahart, Ret., attorneys Lewis Landau and Jeremy Rothstein will discuss the implications of the new small business reorganization act. Approved for Bankruptcy Law Legal Specialization. (2 MCLE Hours) | 14 |
| 15 | 16 | **17**<br>ARS Committee<br>6:00 PM<br>SFVBA OFFICES | 18 | 19 | 20 | 21 |
| 22<br>Happy Hanukkah | 23 | 24 | 25<br>  | 26<br>  <br>KWANZAA | 27 | 28 |
| 30 | 29 | 31 | | | | |

**The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. Visit www.sfvba.org for seminar pricing and to register online, or contact Linda Temkin at (818) 227-0495 or events@sfvba.org. Pricing discounted for active SFVBA members and early registration.**

By Steven C. Peck

# Nursing Home/Assisted Living Arbitration Agreements: Legal Issues and Enforcement

In California, nursing home/assisted living arbitration agreements contain many different and complicated legal theories and procedures that make it highly improbable, if not entirely impossible, for anyone, especially mentally impaired elders, to really understand them.

**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 19.**

LONG TERM CARE IS A MULTI-BILLION DOLLAR industry in the United States with large national health and assisted living corporations dictating the process of how disputes are resolved.

Some have been known to persuade prospective residents, as well as their heirs and those with powers of attorney, to sign facility arbitration agreements, then petition courts to enforce them to deny the unwary consumer their Constitutional right to trial by jury.

In California, nursing home/assisted living arbitration agreements contain many different and complicated legal theories and procedures that make it highly improbable, if not entirely impossible, for anyone, especially mentally impaired elders, to really understand them.

Under the law, the moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement.[1]

Although California has strong public policy in favor of arbitration, there is no preference for the arbitral forum when the parties involved have not agreed to arbitrate.[2]

**MICRA or not MICRA**

One of the key issues in any petition to compel arbitration is whether a nursing home/assisted living resident is actually legally bound by the arbitration agreement.

Often the resident is physically incapable of signing the arbitration agreement or may lack the mental competency to understand it. The arbitration agreement is then signed by someone else, a third party, a family member, or spouse, for example.

If the third party, family member, or spouse obtained a valid, signed legally effective Power of Attorney from the resident, the arbitration agreement may be enforced against the resident on an agency theory.

If the plaintiff's claim alleging elder abuse is against the nursing home/assisted living facility and the complaint also includes a wrongful death cause of action, the defense will argue that the wrongful death claim, brought by the wrongful death claimant(s) solely in their personal capacity, is also subject to arbitration pursuant to the California Code of Civil Procedure (CCP), Section 1295, which is a component of California's Medical Injury Compensation Reform Act (MICRA).[3]

It creates certain requirements for arbitration agreements of "any dispute as to professional negligence of a health care provider."[4]

It defines professional negligence as "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital."[5]

Though an exception to the general rule that arbitration agreements must be the subject of consent rather than compulsion, the California Supreme Court held in *Ruiz v. Podolsky* that CCP Section 1295 permitted patients who have consented to arbitration to bind their heirs in actions brought for a claim of wrongful death.[6]

The Court concluded that "all wrongful death claimants are bound by arbitration agreements entered into pursuant to Section 1295, at least when the language of the arbitration agreement manifests an intent to bind wrongful death claimants."[7]

> "One of the key issues in any petition to compel arbitration is whether a nursing home/assisted living resident is actually legally bound by the arbitration agreement."

Defense litigants almost always claim that *Ruiz* is controlling in order to compel the arbitration agreement against non-signatory personal claims of the wrongful death heirs.

However, the court in *Ruiz* was "persuaded that California Code of Civil Procedure § 1295 was designed to permit patients/residents, who sign facility arbitration agreements to bind their non-signatory heirs in wrongful death actions."[8]

Not only did the California Code of Civil Procedure § 1295, subdivision (a) contemplate arbitration "of any dispute as to professional negligence of a health care provider, including wrongful death," but that it "was part of MICRA's efforts to control the runaway costs of medical malpractice…by promoting arbitration of malpractice disputes…".

**Daniels v. Sunrise Senior Living, Inc.**

In *Daniels v. Sunrise Senior Living, Inc.*, the plaintiff sued a residential care facility, as distinguished from a health care facility, alleging the facility had failed to properly care for her 92-year-old mother and filing causes of action for elder abuse and wrongful death.[9]

**Steven C. Peck** is Principal Attorney and Founder of the Peck Law Group, APC in Van Nuys. The firm focuses on personal injury law including nursing home abuse and neglect and elder abuse. He can be reached at info@thepecklawgroup.com. The author thanks attorneys **Adam J. Peck** and **Spencer E. Peck** for their help in the preparation of this article.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The defendant in *Daniels* unsuccessfully petitioned to compel arbitration under a clause in the residency agreement, while the plaintiff signed on her mother's behalf pursuant to a durable general power of attorney.

The arbitration clause purported to bind the patient's non-signatory wrongful death heirs.[10]

The Court of Appeal affirmed *Daniels*, rejecting the argument that *Ruiz* required arbitration of the independent wrongful death claim.

*Ruiz*, the Court ruled, "is based squarely on California Code of Civil Procedure § 1295, which governs agreements to arbitrate professional negligence or medical malpractice claims in medical services contracts with health care providers."[11]

The defendants argued that *Daniels* is irrelevant because the defendant in that case was not a licensed health care provider.

The Court of Appeal disagreed ruling that what matters is not the license status of the defendant, but the basis of the claims as pleaded in the complaint. If the primary basis for the wrongful death claim sounds in professional negligence as defined by MICRA, it found, then California Code of Civil Procedure § 1295 applies.

If, on the other hand, the primary basis falls under the mandates of the Elder Abuse and Dependent Adult Civil Protection Act, then Code of Civil Procedure § 1295 does not apply and neither does *Ruiz's* exception to the general rule that one who has not consented nor signed the arbitration agreement shall be compelled to arbitrate.[12]

The Court went on to say that, plaintiffs, "within the limits of established law, are essentially free to plead their case as they choose. The fact that they could have also pleaded a claim for medical malpractice, had they wished to do so, is irrelevant."

The Appellate Court concluded that the plaintiffs' claim is not one within the scope of Section 1295, and therefore, *Ruiz's* holding does not apply, thus denying the compelling of arbitration agreements against people that have not signed them.[13]

Note that the gravamen of the complaint is in elder abuse and, therefore, was not subject to the Code of Civil Procedure § 1295 (MICRA) that binds non-signatory third party claimants.

In California, a wrongful death claim is an independent claim. Unlike some jurisdictions wherein wrongful death actions are derivative, Code of Civil Procedure § 377.60 "creates a new cause of action in favor of the heirs as beneficiaries, based upon their own independent pecuniary injury suffered by loss of a relative, and totally distinct from any the deceased might have maintained had he survived."[14]

In *Daniels*, the court rejected any claim that signing an arbitration agreement as agent gave the agent's consent to arbitrate independent claims, including a claim for wrongful

death. "Because Daniels signed the residency agreement solely as agent and not in her personal capacity, there is no basis to infer that Daniels agreed to arbitrate her personal wrongful death claim," the court ruled.

In context, the provision making the arbitration clause binding on heirs means only that the duty to arbitrate the survivor claims—such as Elder Abuse—may be binding on persons who would assert survivor claims.

*Daniels* relied on *Fitzhugh v. Granada Healthcare & Rehabilitation Center*.[15]

In that case, the court rejected the defense contention that signing an arbitration agreement as an agent also constituted an agreement to arbitrate in a personal capacity.

In that case, Ruth Fitzhugh was admitted to a health care facility. Her husband George, her legal representative/agent, signed two arbitration agreements, each of which stated that "This arbitration agreement binds the parties hereto, including the heirs, representatives, executors, administrators, successors, and assigns of such parties."[16] [17]

After Ruth died, George sued the facility for wrongful death, among other causes of action.[18]

The court held that George was not required to arbitrate his wrongful death cause of action. "It is irrelevant to the wrongful death cause of action whether George Fitzhugh may have signed the arbitration agreements as the decedent's legal representative/agent. Because there is no evidence that George Fitzhugh signed the arbitration agreements in his personal capacity…there is no basis to infer that [he] waived [his] personal right to jury trial on the wrongful death claim."[19]

In most California nursing home arbitration agreements there is simply no evidence that the wrongful death claimant, who may have signed the arbitration agreement as an agent, either for a living resident/deceased resident, had any specific intent to waive their personal right to a jury trial for any of their personal claims such as wrongful death.[20]

**Code of Civil Procedure § 1281.2(c)**

Even if the decedent and his heirs are bound by the arbitration agreement for survivor claims, courts may exercise their absolute discretion to refuse to enforce the arbitration agreement.

Compelling arbitration of the survivor claims such as elder abuse would unreasonably risk "conflicting rulings on a common issue of law or fact."[21]

According to state law, Code of Civil Procedure § 1295—the MICRA statute—makes section 1281.2, subdivision (c) inapplicable, but that is not always the case.

At the court's discretion, section 1281.2, subdivision (c), permits a stay if "a party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party…arising out of the same transaction or series of

related transactions" and…"there is a possibility of conflicting rulings on a common issue of law or fact."[22]

All three requirements must be satisfied before section 1281.2, subdivision (c), may be used to deny a motion to compel arbitration.[23]

If survivorship claims were arbitrated at the same time the wrongful death claim was litigated, there is a strong possibility of inconsistent rulings. The courts in *Daniels* and *Fitzhugh*, each reached the same conclusion.[24] [25]

As a result, courts thus may use their absolute discretion in denying arbitration petitions in situations wherein Section 1295 (MICRA) does not apply.

The Code of Civil Procedure has been used to successfully oppose petitions to compel arbitration when there are third party defendants and/or wrongful death claimants that have not signed the arbitration agreement in their personal capacity.[26]

Nursing Home/Assisted Living arbitration agreements now may contain clauses which specifically state that each party waives their right to oppose the petition to compel arbitration based on the CCP.

**Delegation Clauses**

Some California Nursing Home Arbitration agreements have a clause that delegates the question of the existence, scope, or validity of the arbitration agreement to the arbitrator. Some courts are upholding these delegations clauses, a typical example of which follows:

> *"The arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any Dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including, but not limited to, any claim that all or any part of this Agreement is void or voidable."*

Although the scope of an arbitration clause is generally a question for judicial determination, the parties may, by clear and unmistakable agreement, elect to have the arbitrator, rather than the court, decide which grievances can best be resolved through arbitration.[27]

**Conclusion**

The above are just some, but not all, of the legal issues encountered when opposing California nursing home and assisted living arbitration agreements.

Space restrictions limit an examination of the many more legal issues that apply as the laws are frequently changing, and the long-term care industry is constantly crafting new arbitration agreements that can make it that much more difficult and costly to deny the unwary consumer their Constitutional right to trial by jury.



[1] *Cruise v. Kroger Co*. (2015) 233 Cal.App.4th 390, 396-397, 399-400; *Graphic Arts Int'l Union v. Oakland Nat'l Engraving Co*. (1986) 185 Cal.App.3d 775, 781; see also *County of Contra Costa v. Kaiser Foundation Health Plan, Inc*. (1996) 47 Cal.App.4th 237, 245; *Marsch v. Williams* (1994) 23 Cal.App.4th 250, 255.
[2] *Freeman v. State Farm Mut. Auto. Ins. Co*. (1975) 14 Cal.3d 473, 481; *Cione v. Foresters Equity Services, Inc.* (1997) 58 Cal.App.4th 625, 634.
[3] California Code of Civil Procedure § 1295.
[4] California Code of Civil Procedure § 1295, subd. (a).
[5] California Code of Civil Procedure §1295, subd. (g)(2).
[6] *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 849 [114 Cal. Rptr. 3d 263, 237 P.3d 584] (*Ruiz*).
[7] Id. at P. 841.
[8] Id. at p. 849.
[9] *Daniels v. Sunrise Senior Living, Inc*. (2013) 212 Cal. App 4th 674.
[10] Id. at p. 678.
[11] Id. at 212 Cal.App.4th at p. 682; see also *Herbert v. Superior Court* (1985) 169 Cal.App.3d 718 [215 Cal. Rptr. 477].
[12] Welf. & Inst. Code, § 15600 et seq.
[13] *Daniels and Avila v. Southern California Speciality Care, Inc.* 20 Cal. App. 5th 835 (2018).
[14] *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 283 [87 Cal. Rptr. 2d 222, 980 P.2d 927].
[15] *Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC* (2007) 150 Cal. App.4th 469 [58 Cal. Rptr. 3d 585] (*Fitzhugh*).
[16] Id. at pp. 471–472.
[17] Id. at p. 472.
[18] Id. at pp. 471–472.
[19] *Fitzhugh*, at 150 Cal.App.4th at p. 474.
[20] See *Fitzhugh, Daniels and Avila*.
[21] *Acquire*, 213 Cal.App.4th p. 971; Daniels, at 212 Cal.App.4th p. 680.
[22] Id. at pp. 967–968.
[23] Id. at p. 968.
[24] 212 Cal.App.4th at p. 680.
[25] 150 Cal.App.4th at p. 476.
[26] California Code of Civil Procedure § 1281.2(c)
[27] *AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, 649 [89 L. Ed. 2d 648, 106 S. Ct. 1415].

# Test No. 133

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. The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement.
❑ True ❑ False

2. California prefers arbitration of nursing home disputes.
❑ True ❑ False

3. Third parties can bind a nursing home resident to arbitration.
❑ True ❑ False

4. If the third party, family member, sibling and/or spouse obtained a validly signed legally effective Power of Attorney from the nursing home/assisted living resident, the arbitration agreement may be enforced against the resident on an agency theory.
❑ True ❑ False

5. *California Code of Civil Procedure* § 1295 is part of California's Medical Injury Compensation Reform Act (MICRA).
❑ True ❑ False

6. MICRA created certain requirements for arbitration agreements of "any dispute as to professional negligence of a health care provider."
❑ True ❑ False

7. The exception to the general rule is that arbitration agreements must be the subject of consent rather than compulsion.
❑ True ❑ False

8. In *Ruiz v. Podolsky* (2010) *(Ruiz)*, the California Supreme Court held that section 1295 permitted patients who consented to arbitration to not be able to bind their heirs in actions for wrongful death.
❑ True ❑ False

9. In order to bind wrongful death claimants to arbitration, the language of the arbitration agreement must manifest an intent to bind wrongful death claimants.
❑ True ❑ False

10. California Code of Civil Procedure § 1295, was not designed to permit patients/residents, who sign the facility arbitration agreements to bind their non-signatory heirs in wrongful death actions.
❑ True ❑ False

11. MICRA was implemented to control the runaway costs of medical malpractice verdicts against health care providers.
❑ True ❑ False

12. Non-signatory wrongful death heirs can never be compelled to arbitrate their disputes.
❑ True ❑ False

13. *California Code of Civil Procedure* § 1295, governs agreements to arbitrate professional negligence or medical malpractice claims in medical services contracts with health care providers.
❑ True ❑ False

14. A party who has not consented nor signed the arbitration agreement may not be compelled to arbitrate.
❑ True ❑ False

15. Plaintiff's pleading might determine whether the MICRA statute applies to nursing home arbitration agreements.
❑ True ❑ False

16. In *Daniels v. Sunrise Senior Living, Inc.* the court compelled the arbitration agreements against people that had not signed them.
❑ True ❑ False

17. Signing an arbitration agreement as an agent could give the agent's consent to arbitrate independent claims, including a claim for wrongful death.
❑ True ❑ False

18. An agent may bind persons to arbitration who assert survivor claims.
❑ True ❑ False

19. If there is no evidence that an individual signed the arbitration agreement in their personal capacity … there is no basis to infer that the individual waived the personal right to jury trial on a wrongful death claim.
❑ True ❑ False

20. According to California Law, *California Code of Civil Procedure* § 1295 (the MICRA statute) makes section 1281.2, subdivision (c), inapplicable.
❑ True ❑ False

## MCLE Answer Sheet No. 133

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

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|---|---|---|
| **1.** | ❑ **True** | ❑ **False** |
| **2.** | ❑ **True** | ❑ **False** |
| **3.** | ❑ **True** | ❑ **False** |
| **4.** | ❑ **True** | ❑ **False** |
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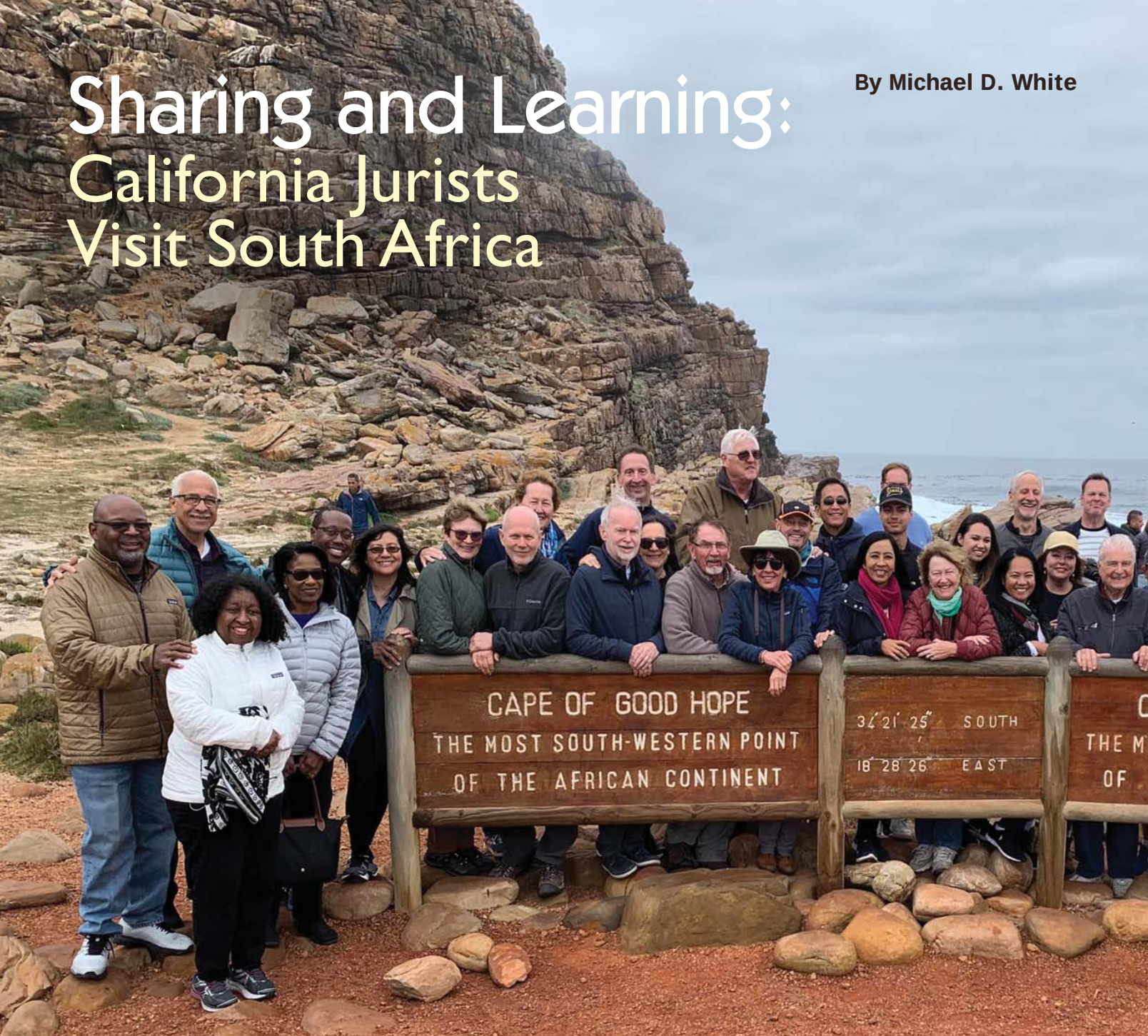
| **19.** | ❑ **True** | ❑ **False** |
| **20.** | ❑ **True** | ❑ **False** |

# Sharing and Learning: California Jurists Visit South Africa

By Michael D. White

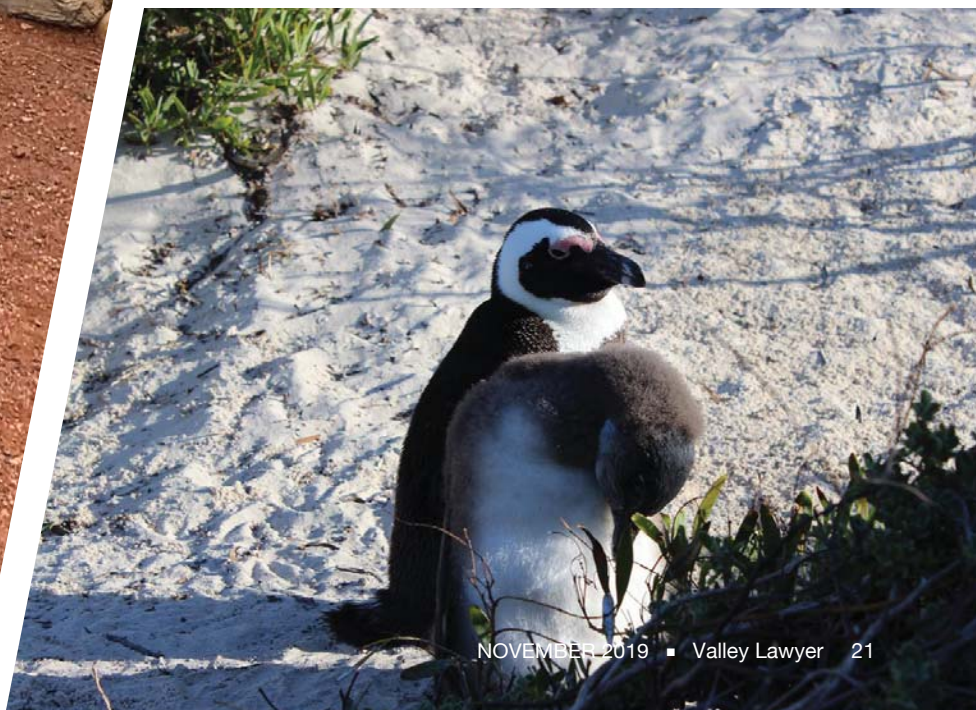



**In July 2019, a group of 40 California jurists and others traveled to South Africa to learn how the legal system has progressed since the end of apartheid and what the country's legal system has done to guarantee justice in a historically divided society.**

*Images courtesy of Judges Huey P. Cotton, Paul A. Bacigalupo, and CJA Executive Director Nicole V. Bautista.*


APE OF GOOD HOPE
OST SOUTH-WESTERN POINT
THE AFRICAN CONTINENT


Alexandra
Heritage Site
Mandela's Place
46 7th Avenue
When Nelson Mandela first arrived in Johannesburg in 1941 from his birthplace in the Eastern Cape, he rented this room for a short while. At that time Mandela, now a global icon, was working as a clerk at a law firm in Johannesburg.
Joburg



IT IS A LONG, LONG WAY FROM California to South Africa.

The journey covers some 10,238 miles and while the political, social and economic differences—and surprising similarities—between both locales are legion, they proved more than engaging enough for the California Judges Association (CJA) to organize a study group in July of 40 judges and bench officers, both active and retired, and others who visited South Africa to learn about the development of and challenges facing a nation whose legal system is seen by many as the benchmark for the rest of the African continent.

"We wanted to provide the participants with the opportunity to learn about South Africa's history, culture and legal system," says Nicole V. Bautista, Executive Director and CEO of the CJA. "This was the second trip to South Africa by members of our association. A group went in 2012 and the recent visit offered a chance to see the changes in the country over the past seven years."

Much of the time during the visit, she says, "was invested in learning what the country is like as a 25-year-young democracy, what changes have taken place since the end of apartheid, and what the country has done to unify."

Among those participating in the visit to South Africa were Los Angeles Superior Court Judges Paul A. Bacigalupo and Huey P. Cotton, both of whom serve out of the Van Nuys Courthouse. Judge Cotton serves as Supervising Judge of the Court's Northwest District.

Both Judges have extensive experience in multi-cultural legal matters.

Early in his legal career, Judge Cotton successfully convinced a trial judge to allow a Zulu cultural expert to testify in a criminal case concerning the use of a machete in self-defense and, in 1988, he joined the national law firm of Cozen O'Connor in Philadelphia, the first minority attorney to join the firm. While in private practice in Philadelphia, he successfully tried one of the first cases in the country using the battered woman self-defense, helped initiate a comprehensive study of cultural conflict and bias in the courts, and litigated cases in Barbados, Canada and Mexico.

Judge Bacigalupo is the Immediate Past President of the Sacramento-headquartered CJA and serves as an appointed Special Master with the Commission on Judicial Performance and is the appointed Chair of the Judicial Council Access, Ethics and Fairness Curriculum Committee. He also sits as Co-Chair of the Los Angeles Judicial Appointment Support Committee of the California Latino Judges Association.

**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.

**The South African Legal System: A Hybrid**

South Africa's legal system differs from that of the United States in that it is a 'hybrid' or 'mixed' legal system, formed by the interweaving of a number of distinct legal traditions: a civil law system inherited from the Dutch, a common-law system inherited from the British, and a customary law system—known as African Customary Law—which is inherited from indigenous Africans and varied depending on tribal origin.

According to LexisNexis Butterworths, the system has "a complex inter-relationship" with the country "following English law in both criminal and civil procedure, company law, constitutional law and the law of evidence; while Roman-Dutch common law is followed in South African contract law, law of delict (tort), law of persons, law of things, family law, etc."

The organization of South Africa's court system was laid out the nation's Constitution, which took effect in February 1997.

- The Constitutional Court: The highest court in the country with 11 judges, the Constitutional Court is situated in Johannesburg. It hears appeals that relate to the Constitution only after a judgment has already been handed down. No other court can overturn a ruling made by the Constitutional Court and all other appeals must go to the Supreme Court of Appeal.

- The Supreme Court of Appeal: This Court deals exclusively with appeals against rulings. No other court, except for the Constitutional Court, can change a decision made by the Supreme Court of Appeal.

- Provincial, High and Circuit Courts: There are ten provincial and three local high courts in South Africa. Each presides over a different jurisdiction and can hear cases that can't be handled by the magistrate's courts. Circuit courts are mobile and can move around the country in order to serve more rural areas.

- Magistrate's Courts: Located at the lower level in South Africa's system of courts, these courts are divided into two jurisdictions—District Courts, which handle civil matters and less serious criminal cases, involving offenses other than rape, murder or treason, and Regional Courts that may also hear civil matters, including divorce cases, and can deal with criminal cases involving any offense except treason.

- Specialist Courts: A number of specialist courts have been established to deal with matters in specific areas of law. These include the Labor Court, Land Claims Court, Electoral Court, Tax and Military Courts. All except the Tax Courts have a status similar to the high courts.


"We were able to spend four days in Johannesburg and six days in Capetown, where we met with members of the High Court, which is comparable to our Court of Appeal, and attended a luncheon with members of the Magistrate Court [similar to the L.A. County Superior Court], and members of the Pan-African Bar Association of South Africa," says Judge Bacigalupo. "It was a very productive and interactive event."

The goal "was to create long-term interaction with South Africa's judicial officers and leading lawyers, have an informational and educational exchange, and build relationships with members of the judiciary and the Bar," he says, adding that, "We want to continue the conversation with judges and lawyers from South Africa [about] visiting here, as there is strong interest, from jurists and lawyers there, to come to California."

**The Growing Popularity of Mediation and Arbitration**

Resolving commercial disputes by domestic arbitration is the preferred choice by commercial parties and avoids the long waiting time for a trial date in a High Court. Arbitrations are referred to the independent arbitration institution, the Commission for Conciliation Mediation and Arbitration.

"We had a specific request to meet with their Constitutional Court," says Judge Bacigalupo. "We met with him and we wanted to meet with a member of their Truth and Reconciliation Commission, which is no longer in existence, but was 25 years ago. Initially, we wanted to meet with a leading jurist, and we were also able to meet with an individual who is a pioneer in the development of the country's alternative dispute resolution system and was the director of the national mediation program."

According to Judge Cotton, there is a definite "synergy" between the development of mediation in South Africa and mediation in the United States.

"Most of those who had been early proponents of mediation there were interested in learning how our mediation process works in the development stages of JAMS and ADR," he says. "They shared with us what their experience had been in developing mediation to address some of their cultural differences such as interacting with tribal leaders and expanding into different tribal or ethnic groups and communities that didn't have mediation as part of their cultural experience."

> "They wanted to talk about Bar association development and how they serve their members and how they can serve their own lawyers."
>
> —Judge Huey P. Cotton

There also was "great interest in learning about our experience with labor unions, and because we're so many years ahead, they wanted to be able to anticipate

problems and work through their growing pains."

**Differences and Similarities**

On the trial court side, as opposed to the constitutional and appellate side, Judge Cotton adds, "There were frank exchanges. The things we take for granted, such as court security, research attorneys, caseload management, the real 'day-to-day how do you get stuff done' issues. We shared our own experiences and frustrations and theirs, as well."

It all came down to the issue of "how do you keep the lights on?", he says. "Basic facilities-related issues, for example. It was amazing how many similarities we have, but differences in how we address them based on what resources are available. Capital resources for the country are generally so different. The things that we can lobby for and put as a line item, they struggle as a country to classify it as a line item."

The group, he says, "saw several examples of where they've taken what would be a lead position on something that we can learn from, such as the establishment of a Court for Women that deals with all aspects of assaults against women, whether they be economic, physical or sexual. That was a powerful, powerful statement by the country at the time and the President was not as progressive as both the Constitution and the people were."



*Judge Paul A. Bacigalupo with Advocate Dumisa Ntsebeza, Commissioner of the South African Truth and Reconciliation Commissioner.*

The Court for Women has since been eliminated, but, says Judge Cotton, "we had very serious discussions as to whether they should bring it back and how we can learn new, more holistic approaches to justice. If there's a criminal case, an eviction case and a family law case all involving a single family, why can't it be handled under a single umbrella. Why can't we address

those broader issues for women under a broader umbrella? What statement as a country does that make if you do, or don't do that?"

The group, Judge Cotton says, "had very engaging discussions on issues like having an organized Bar and the influence that has on how justice is rendered. They wanted to talk about Bar association development and how they serve their members and how they can serve their own lawyers."

Because the development of Bar associations is somewhat more developed than that on the rest on the continent, "they are very interested in making their ongoing Bar experience truly pan-African and helping make it as successful as it is here in the United States."

**Teaching and Learning**

"South Africa's legal history is rooted in both English common law with a very strong Dutch influence, so that in many ways it's legal system is unique from what you find in other former British colonies like Canada or Australia," says Judge Bacigalupo.

"When you look at the policy of apartheid and the influence it ingrained in the country's politics, social structure, courts and entire legal system," he says, "the country's struggle to democracy is truly unique with obstacles that haven't really existed in that scope elsewhere.

> "We want to continue the conversation with judges and lawyers from South Africa [about] visiting here, as there is strong interest, from jurists and lawyers there, to come to California."
>
> —Judge Paul A. Bacigalupo

We met with individuals who played a role in the actual development and design of their current system of governance."

Judge Cotton recalls a meeting with a member of the South African Constitutional Court and talking about Albert 'Albie' Sachs, an anti-apartheid activist and current sitting member of the Court.

Now 84, Sachs lost an arm and the sight in one eye in an car bomb assassination attempt due to his opposition to apartheid. He was appointed to the Constitutional Court by Nelson Mandela in 1994 and was a drafter of the South African Constitution.

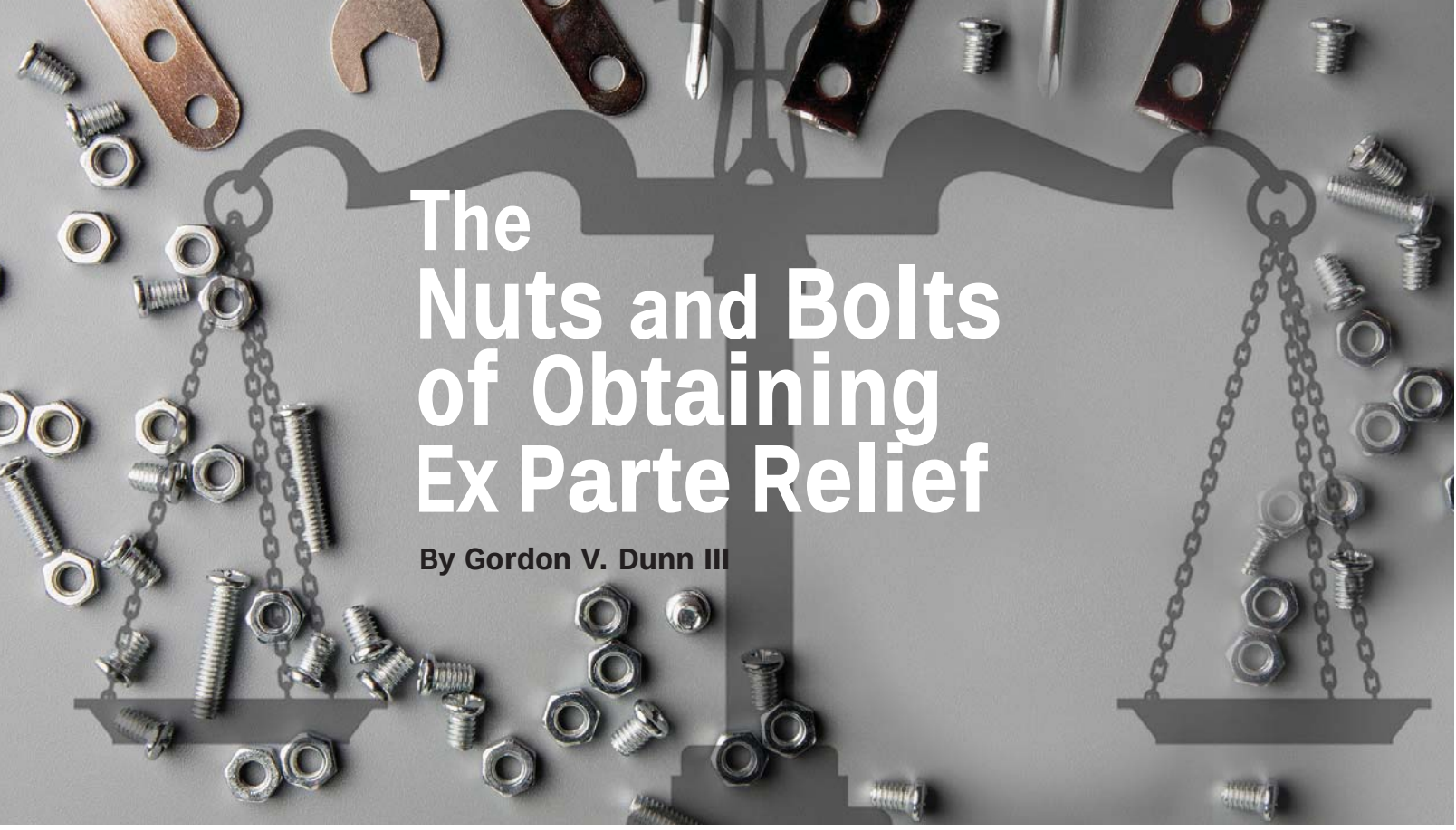
"He was sharing with us that in joking moments, judges and lawyers in South Africa had the advantage of knowing exactly what at least one of their Founding Fathers meant. That might have changed Judge Scalia's view of originalism."

"The South African judiciary and legal community is anxious to share ideas and experiences. They aren't looking for guidance as they have a very firm idea of where

they want to get to. They want to be informed and they invite these kinds of dialogues, as do we," says Judge Cotton.

One of the things that encouraged him to take the trip, "was hearing U.S. Supreme Court Justice Anthony Kennedy comment that we can learn much from the South African constitutional experience. It made me trade my teaching cap for a learning cap. Our civil rights experience and their post-apartheid experience is fertile ground for us to learn from each other's mistakes and accomplishments, avoid future breakdowns in our respective societies, break away from a violent past, and let the rule of law take hold."

The biggest "takeaway" from the visit to South Africa, says Judge Cotton, "is that it's critical to go in with an open mind and listen to the heartbeat of the country. Whether it's from the truth and reconciliation experience, it was life altering to hear stories of how the sense of justice and fairness has come out of their own experience. All of that has come together to tell us that we have to be less parochial and experience other cultures."



# The Nuts and Bolts of Obtaining Ex Parte Relief

**By Gordon V. Dunn III**

*The views expressed herein are those of the author. They do not necessarily represent the views of the Orange County Lawyer magazine, the Orange County Bar Association, The Orange County Bar Association Charitable Fund, or their staffs, contributors, or advertisers. All legal and other issues must be independently researched.*

INEVITABLY, ALL LITIGATORS will face an issue that arises in your case that needs the judge's attention right away. It could be a last-minute trial continuance, problems getting discovery responses from a difficult opposing party, adding a party to the action, or amending the pleadings. You look at the judge's motion calendar and the next available date is four months from now. Maybe you have trial in three months, maybe your client just cannot wait that long.

What follows is a primer on what to do when you need ex parte relief and how to avoid annoying the judge in the process.

**What Constitutes an Emergency?**

Before spending the time and effort researching the technical requirements of filing your ex parte application, drafting your application, preparing your declaration, and everything else that comes with seeking ex parte relief, first ask yourself, "Why do I get to cut in line?"

Too often, attorneys come into court with their ex parte application and cannot give a good reason why the court could not hear the motion on regular notice. If your application wastes too much time and space getting to the emergency, it might not be an emergency.

So before filing that ex parte application to immediately compel a corporate person-most-knowledgeable deposition, consider how your motion compares to ex parte applications for temporary restraining orders in domestic violence and home foreclosure cases that your judge might use as its standard for "emergency."

Sometimes, the court's calendar makes getting a hearing tough or impossible. Judges want to work with the parties where their calendar has "created the emergency." When this happens, the best course of action is to file the motion, get the hearing date, and come in ex parte to advance the date.

It helps to show that you were diligent in trying to get the motion filed timely. Although the parties may have agreed to a trial continuance just weeks

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before the trial, tell the court what specific issues arose necessitating a last-minute trial continuance. Do not just show why the relief is necessary, show why you need relief on an ex parte basis and why a regular noticed motion will not suffice.

**What Relief Can You Realistically Hope to Achieve on an Ex Parte Application?**

Judges have said it is much easier to maintain the status quo than it is to force a party to do something on such short notice. For this reason, judges can be hesitant to grant a form of mandatory relief. Not only does this encompass your motion to compel document production, but this can include more "mundane" applications like *pro hac vice* admissions or motions to be relieved as counsel.

An easy way to invite the court's scrutiny is to seek substantive relief. If your ex parte application involves asking the court to decide something on the merits, the judge will likely be more sensitive to the notice requirements and other rule-driven provisions (more on this below) before considering any substantive arguments in your application. Specifically, the judge will consider whether the moving party is trying to gain an advantage using the ex parte process. If it seems like you are, your ex parte application is likely to fail.

But regardless of what kind of relief you are seeking, the best advice is to ask for it in the first sentence of your application. No judge wants to read a twenty-page ex parte application only to find at the end it is still not clear what relief is sought. And be specific with the relief requested. If you want a trial continuance, give the court an exact date. If your ex parte application is unopposed, say so up front. Clearly and concisely stating what relief is sought and whether the parties agree is an easy way to boost your chances of success.

**Complying With the Technical Requirements**

California Rules of Court 3.1200 *et seq.* provide the rules for ex parte applications.

Before you prepare your application, be sure to read these rules in full and consult the Rutter Guide or another treatise to avoid missing anything. Some courts have local rules governing ex parte applications and some judges have their own specific preferences. You should review the department's posted procedures and consult with the court clerk to check if there are more particular rules you need to follow before going in ex parte.

The most important technical requirement is the declaration showing compliance with the notice requirements. For some judges, failure to include a factual showing that you gave sufficient notice or made a good faith effort to inform the opposing party (and specifying the efforts you made) in your declaration is a "deal-killer."

The first thing some judges look at in reviewing an ex parte application is who is bringing the application, the procedural history of the case, and the evidence showing the other parties were notified.

Absent exceptional circumstances, you must give all parties notice no later than 10:00 a.m. the court day before your ex parte appearance. Judges have denied relief for failing to give all parties notice, even if your application only affects a subset of the multiple plaintiffs or defendants in your case. Service of the papers must be made "at the first reasonable opportunity." Check with your court to see if more specific deadlines apply.

The notification may be either in writing or oral, but some judges will consider the nature of the case and the relationship between counsel before accepting your representation that notice was given orally. The declaration must state whether opposition is expected. If your application will be unopposed, let the court know in your caption, in the first sentence, and as often as you can to let the court know the parties agree.

> "When in doubt, consult the California Rules of Court, your local rules, and the court itself, following the rules to a 'T.'"

Although "parties agree" is not, by itself, good cause and the court can still deny or modify the requested relief, it certainly helps reassure the judge that your application will not prejudice the other side.

Along with the declaration of notice, the application must also include the following: an application containing the caption and relief requested; a declaration showing factual basis for emergency or other statutory basis for ex parte relief (which may be combined with the declaration of notice); points and authorities; and a proposed order. The application must identify the opposing counsel or party by name, address, email address, and telephone number and include a "full disclosure" of any prior applications previously refused in whole or in part.

Regarding the points and authorities, be prepared to have as close to a complete memorandum as possible. In some instances, especially in applications involving substantive issues or for temporary restraining orders, the ex parte application becomes your moving papers. Do not file an ex parte application expecting to get another opportunity to fully brief the issues.

In most cases, an applicant must appear, either in person or telephonically, to have their application considered. Failing to appear could lead to a denial of your application under California Rules of Court 3.1207. If you prefer appearing telephonically, determine if telephonic appearance is acceptable. Per California Rules of Court 3.670(h)(3), if the moving party is appearing by telephone, the papers must be served no later than 10:00 a.m. two court days before the hearing. The application should also have the phrase "Telephone Appearance" below the title.

There are many intricate details and rules to follow. Failing to follow any one of them may constitute grounds to deny relief. When in doubt, consult the California Rules of Court, your local rules, and the court itself, following the rules to a "T."

**Opposing Ex Parte Applications**

By the very nature of ex parte applications, opposing an ex parte application can be difficult. If at all

possible, write an opposition. Some judges will hand you a piece of paper to handwrite your opposition on the day of the hearing if you have not filed one.

But outside of this procedure, if you are going to file a written opposition, file it sooner rather than later. Always deliver a courtesy copy to the court and always e-file the opposition, regardless of whether you bring a copy to the hearing. The court will read the opposition even if the judge is seeing it for the first time at the hearing. That said, it is best to give the judge ample time to review your written materials.

Another reason to file a written opposition is because you are not guaranteed an oral argument. While it often depends on the relief requested, judges can—and do—issue rulings from chambers. *See* Cal. Civ. Proc. Code § 166(a)(1) (West). If your judge wants to modify the relief requested, especially for scheduling issues, the judge is more likely to invite the parties to appear to discuss the exact form of relief. But before relying on seeing the judge for argument, check the court's calendar. When the courtroom is busy with trial (especially jury selection), you are less likely to see the judge. Plan accordingly.

**Avoiding Serial Ex Parte Applications**

As discussed above, you must disclose prior ex parte applications filed in the case. If the court denied your last ex parte application and you are seeking the same relief again, treat it like a motion for reconsideration. Provide the court with new law or facts that warrant a different decision now. Do not just renew your ex parte application that the duty judge denied last week. This is guaranteed to draw your assigned judge's ire.

It really comes down to how well the judge knows your case. If the judge has only ever seen the parties at the initial case management conference and believes the parties are cooperating, you are more likely to succeed. But if the judge knows the attorneys on a first-name basis because you are in court on an ex parte application every other week, do not expect to have the same leeway you had previously.

**If Nothing Else, Take Away These Main Points**

First and foremost, notice everyone properly and ascertain if they will oppose. Second, be clear about what you want the court to do and state this information up front. Third, have a backup plan. For example, if you want a motion date advanced, be prepared for the possibility the court will continue trial instead. Fourth, understand what factual showing of good cause is required and what evidence you will need to have to make that showing.

Last, but not least, do not assume the court knows all pertinent facts in your case. Rather than citing a declaration from a motion a while back, give the court all the information and all the specific issues raised in your application. By design, ex parte applications are hard to grant and easy to deny. Following these tips may not guarantee success in your application, but at least you will have cleared the preliminary hurdles without alienating the judge.

*The Nuts and Bolts of Obtaining Ex Parte Relief*, Gordon V. Dunn III, *Orange County Lawyer*, October 2019 (Vol. 61, No. 10), p. 53.

# 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.**

## James R. Felton

**Law School:** University of California–Los Angeles School of Law

**Area(s) of Practice:** Business, commercial and real estate litigation, alternative dispute resolution, and insolvency-related matters

**Years in Practice:** 31

**Firm:** G&B Law, LLP, Encino

**What was your favorite activity in high school?** "Going to high school football games."

**What would you be doing if you weren't an attorney?** "Floundering on the PGA Senior Tour."

**What's your dream vacation location? Why?** "Cabo–beautiful weather and great golf."

**What's your favorite book genre?** "Autobiographies by comedians."

**Why did you decide to go into the law?** "I suspect that my father's law practice probably had the most effect on me wanting to become a lawyer. Before I knew what they were or why they were, I was replacing the pocket parts in his CA Code books. I watched him interact with clients and now scratch my signature on documents like he did. You don't often realize how much you mirror your parents and then one day wake up and realize that you are just like them. I started my legal career in a firm that specialized in municipal law but later branched out to commercial and real estate litigation."

Felton grew up in Woodland Hills, attended El Camino Real High School there, and graduated from Brandeis University in Waltham, Massachusetts, before attending law school at UCLA.

Admitted to the California Bar in 1988, his legal career began with a firm that specialized in municipal law.

"I joined Greenberg & Bass [now G&B Law] in 1991," he says. "Over my years at G&B, my practice has evolved to include commercial litigation and now bankruptcy work. At present, I would say that about 50 percent of my time on legal matters is spent on commercial litigation cases and roughly the other half on bankruptcy."

In addition to his work at G&B Law, Felton has been appointed on numerous occasions as a state court receiver, primarily in family law matters.

## David B. Simpson

**Law School:** University of California–Los Angeles School of Law

**Area(s) of Practice:** Mediation, employment law

**Years in Practice:** 35

**Firm:** Wolflick, Simpson, Khatchaturian & Bouayad, Glendale

**Who was your childhood hero?** "Willie Mays."

**What is your earliest memory?** "Being falsely accused by my mother of ransacking her purse, when I'd caught my younger sister doing it and I was just trying to put everything back. My first taste of injustice!"

**Your favorite Valley restaurant?** "Follow Your Heart—a favorite meet-up with my youngest daughter. The banana/peanut butter shakes kill!"

**Favorite past times?** "I enjoy golf, writing (fiction and nonfiction), NASCAR, and playing poker.

A Northern California transplant, Simpson received his undergraduate degree in economics from UCLA, before graduating from UCLA Law and deciding to start his legal career in the Southland.

He is married with three adult children and has spent most of the 35 years since graduating from law school filing "lots of appeals" and working primarily in employment law, representing both employees and employers.

Much of his legal work now revolves around conducting private and court-ordered mediations.

Simpson also has served as both an Adjunct Professor at the Glendale University College of Law, teaching captive audiences of law students the nuances and strategies of civil litigation and employment law.

I've taught employment law, pretrial and trial practice using the examination of Santa Claus in *Miracle on 34th Street* as a teaching tool.

He recently competed in the 2012 World Series of Poker, Seniors No-Limit Hold'em Championship, and "threatens" completion of his first nonfiction book, *Detecting Lies in Legal Proceedings: An Attorney's Guide to Human Lie Detection.*

# Installation Gala
## Party Under the Stars


# Thursday, October 3, 2019
## Skirball Cultural Center

## PHOTO GALLERY
Photos by Ron Murray





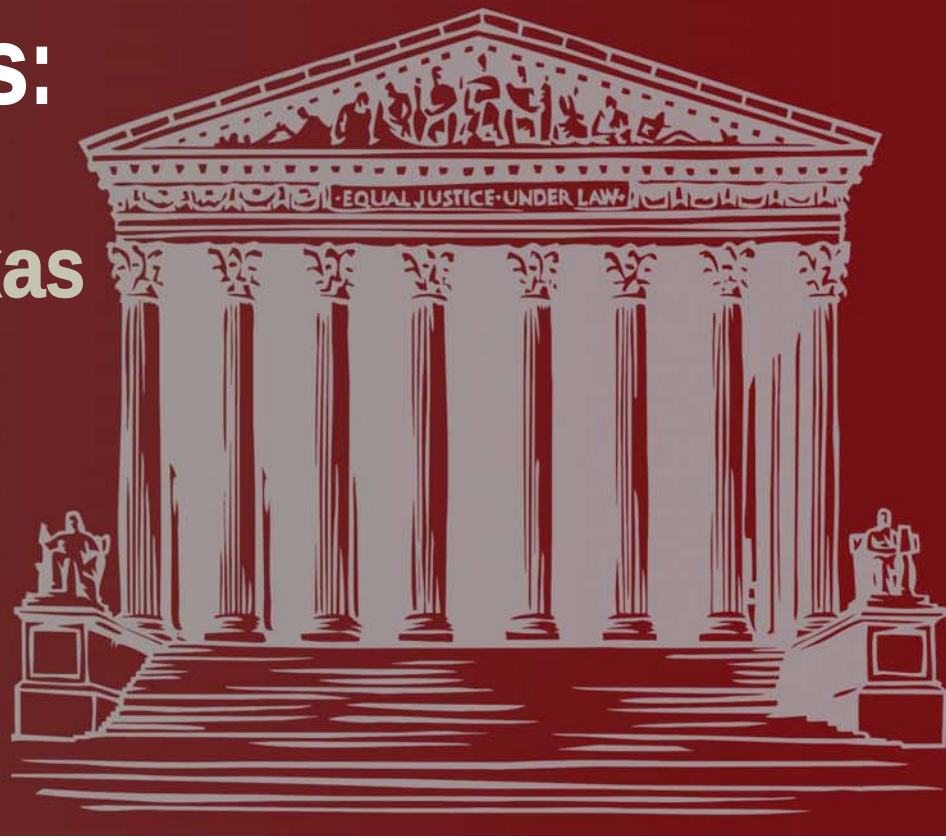






# Patent Trolls:

## Supreme Court Rules on the Texas Fast Track




By Ronald P. Abrams

EARLIER THIS YEAR, THE U.S. SUPREME COURT handed down a pro-business, pro-innovation decision that severely limits the federal district(s) in which a domestic company can be sued for patent infringement.

The decision was applauded by tech firms, large and small, and is sure to drastically reduce the total number of patent infringement cases filed each year in the U.S.

It should substantially reduce the often-baseless cases filed by "patent trolls" that buy-up bogus patents and use costly patent litigation, or the threat of costly patent litigation, to bully companies into settlements.

The unanimous decision in *TC Heartland v. Kraft Foods*[1] dealt with the patent venue statute that determines where a patent holder may file suit.[2] That statute provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

The decision dealt with the "where the defendant resides" prong of the statute in reversing the Federal Circuit.

**A Broad Interpretation**

For decades, District Courts interpreted the phrase "where the defendant resides" very broadly, effectively allowing patent holders to file suit in practically any district court in the United States.

Such broad interpretation resulted in extreme forum shopping by patent holders, who often chose to file infringement cases in plaintiff-friendly districts, such as the Eastern District of Texas.

Over the years, many small Texas towns within the district, such as Marshall and Tyler, benefited from the steady flow of patent litigation traffic—local restaurants, shops, hotels and IP litigation attorneys, for example. The Eastern District of Texas has been a particularly popular filing venue for patent trolls because of the district's fast-track litigation procedures, favorable jury awards to patent holders and relatively remote location. Forcing a company to defend far from its headquarters and resources often resulted in lucrative settlements for patent trolls, no matter how weak the patent asserted or specious the infringement claims.

More than 40 percent of all patent cases are filed in the Eastern District of Texas and one District Judge in Marshall,

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Texas, is estimated to handle one-fourth of all patent cases filed nationwide. In the *TC Heartland* decision, the Supreme Court held that the phrase "where the defendant resides" as applied to domestic corporations, refers only to the State of incorporation.[3]

Thus, a patent infringement action may not be brought against a corporation in a judicial district in which it is not shown to have committed any of the alleged acts of infringement and which is outside the state where it was incorporated, even though the company may have a regularly established place of business in that district.

The Supreme Court determined that its 1957 decision in *Fourco Glass Co. v. Transmirra Products Corp.* remained controlling.[4]

In that case, the Supreme Court concluded that for purposes of 28 U.S.C. § 1400(b) a domestic corporation "resides" only in its state of incorporation, rejecting the argument that the section incorporates the broader definition of corporate "residence" contained in the general venue statute.[5]

In the decision, the Supreme Court pointed out that Congress has not amended 28 U.S.C. § 1400(b) since *Fourco*, but has twice amended § 1391, which now provides that, "[e]xcept as otherwise provided by law" and "[f]or all venue purposes," a corporation "shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question."[6]

The Supreme Court concluded that because Congress has not amended § 1400(b) since *Fourco* and because Congress did not indicate an intent to change the meaning of "reside," as used in § 1400(b) when amending § 1391, its decision in *Fourco*—and the implicit state of incorporation qualification of § 1400(b) is controlling.

Only cases against domestic corporations are affected by the Supreme Court decision in *TC Heartland*, apparently leaving patent holders free to choose where to file against accused infringers that are not domestic corporations.

Nonetheless, after *TC Heartland*, patent infringement filings by patent trolls should be greatly reduced because they can no longer simply file and maintain cases against domestic corporations in plaintiff-friendly districts such as the Eastern District of Texas.

Unfortunately for Marshall, Tyler and other East Texas towns, the torrent of lucrative patent litigation-related business traffic may slow to a trickle.

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[1] *TC Heartland v. Kraft Foods* (Case No. 16-341, May 22, 2017).
[2] 28 U.S.C. § 1400(b).
[3] *Id.*
[4] *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U. S. 222, 226 (1957).
[5] 28 U.S.C. § 1391(c).
[6] 28 U.S.C. §§ 1391(a),(c).

# Referring the Best Attorneys Since 1948

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# Goodbye Summer, Hello Fall!

**FAVI GONZALEZ**
ARS Referral Consultant

favi@sfvba.org

THE DAYS ARE LONGER and the nights come quicker as we say goodbye to summer. Here at the Attorney Referral Service we are already preparing for the new year and hope to implement some new, innovative ideas to enhance the way we provide services to our Valley community.

The ARS is a long-time sponsor of several events hosted throughout the Valley and this year we were fortunate enough to partner with ONEgeneration to have one last hurrah for the summer.

ONEgeneration serves as an affiliate of the San Fernando Valley Bar Association. The two groups partner together to provide legal assistance and resources for our local senior citizens. Given our ongoing relationship, we are happy to have recently participated in ONEgeneration's Sunday Farmer's Market.

As a public service organization, we feel it is important to provide our community with ready access to the necessary resources and legal assistance, whatever the unique situation may be. We also understand that oftentimes important information is not easily accessible, so we look for ways to inform the community and, at the same time, highlight the services we provide to ensure that our citizens know we are available to them.

The ONEgeneration Farmer's Market was an excellent opportunity for us to not only try something new, but to engage more extensively with young and old alike.

The Market was host to well over 1,000 people, including, coincidentally, attorney Stewart Zimring, an SFVBA member and Vice-Chairman of ONEgeneration's Board of Directors.

"I am happy to see the Bar actively involved with ONEgeneration," he said, welcoming us with open arms.

As the day passed, we learned that the Market is often frequented by several other attorneys who practice in the San Fernando Valley. The engagement was phenomenal as we were able to assist the general public, as well as neighboring vendors by providing them with on-the-spot guidance to help remedy their legal problems.

> "Given that 2020 is fast approaching, we are actively seeking new events and venues to add to our outreach calendar!"

The ARS encourages SFVBA member attorneys to submit any outreach ideas or opportunities they feel would help in our efforts to effectively engage the public.

If you are involved or acquainted with a public service organization that you feel may benefit from our services, please contact us with more information.

Given that 2020 is fast approaching, we are actively seeking new events and venues to add to our outreach calendar!

We will need your help this coming year as we hope to put into action a more extensive and proactive approach to partner with new, like-minded organizations to continue to build strong long-lasting relationships in our Valley community.

VALLEY COMMUNITY LEGAL FOUNDATION
OF THE SAN FERNANDO VALLEY BAR ASSOCIATION

# EDUCATING OUR KIDS BEGINS WITH YOU

## SHARE YOUR LEGAL EXPERIENCE

1. Be a part of the legal team that will engage high school students in thinking about constitutional issues concerning free speech.
2. A bench officer and two attorneys will moderate discussions over three class sessions between February and April 2020, ending in a student mock appellate argument. An Essay Contest will follow where students can receive scholarship awards.

**The Valley Community Legal Foundation of the SFVBA Needs Attorneys to Work With Judges and High School Students in the Classroom!**

## "The Constitution and Me"

***True Threats v. Pure Speech: Drawing the Line between Safety and Freedom***

**CONTACT:**
Laurence Kaldor at laurencenkaldorlaw@gmail.com or
Anngel Benoun at anngel4RE@earthlink.net to volunteer. Training will be provided.

**Whether or not you volunteer, please make a tax deductible donation to VCLF to support this and other scholarship programs presented to San Fernando Valley students throughout the year.**
**Go to: thevclf.org/donate.**

San Fernando Valley Bar Association
*founded in 1926*

# Help Reduce Chronic Stress

**KIRA S. MASTELLER**
Co-President

kmasteller@lewitthackman.com

OVER THE LAST DECADE, THE rising tide of the stress we all face every day tells a story that we are all very much aware.

In 2011, the American Psychology Association (APA) conducted a national survey that found that "chronic stress—the stress that interferes with your ability to function normally over an extended period—is becoming a public health crisis."

According to the survey, "Millennials on average reported the highest level of stress at 5.7 out of 10, while mature and older adults, on average, reported the lowest stress level at 3.3."

In November 2018, the Advisory Board issued a paper stating that, "Younger U.S. adults are reporting higher levels of stress than older U.S. adults and are more likely to have received care from a mental health professional."

Earlier this year, *Everyday Health* magazine stated that "Our research shows that chronic stress is a national epidemic for all genders and ages, particularly those who are 25 to 35 years old.

Here is the hard truth: The causes and solutions to chronic stress are a complex mixture of socioeconomic, environmental, genetic, physical, and spiritual factors."

All this is no surprise to those in the legal field. Lawyers and legal professionals are busier than ever working with individuals and businesses concerning every facet of the law and have to manage stress 24/7 in their own practices.

But what about our health? Each of us needs to be aware of chronic stress in our homes, workplace, school, and in all areas of our lives. Taking action to keep children and adults off the couch, away from video games, devices, social media, and 24/7 news programs will make a difference in the quality of our lives, relationships, mental and physical health.

> "Taking action to keep children and adults off the couch, away from video games, devices, social media, and 24/7 news programs, will make a difference in the quality of our lives, relationships, mental and physical health."

A few APA tips to reduce stress: limit time watching or listening to the news; practice mindfulness; focus on the parts of your life that you can control; find support and take action if you need to; and, lastly, be of service to others.

The last tip is critically important as being of service to others lets you practice all four of the other pointers to decrease stress while teaching, learning, having fun, and giving someone else a gift of your time and knowledge.

For example, attending a court tour with high school students; being a speaker in a high school or middle school classroom; helping prepare a high school class for a mock trial or moot court competition; working with judges and other lawyers in classrooms as a teacher for VCLF's *Constitution and Me* program; writing a prompt for an essay competition with the Scholarship Committee; or finding a grant opportunity for VCLF to donate to.

Chaperoning students attending the play *Defamation*, and participating with the SFVBA and VCLF in finding opportunities where the legal community can bring members together for fellowship and raising donations to provide needed resources to our burgeoning legal community.

SFVBA members are professionals who work in stressful careers and, by default, are experienced managers of stress. Members have an abundance of experience to share with others, such as managing educational goals, building careers, starting and maintaining families, finding and keeping friends, and fostering meaningful participation in worthy neighborhood and the legal projects and programs.

Participating at functions with a new Bar member or student and sharing your experience could make a major positive difference in the direction that person's life will take.

How you manage stress is a very important part of that story. Each of us can make a difference in reducing the chronic stress that weighs on the people who make up our community by investing our time and attention in them and by sharing our knowledge and experience with them.

The VCLF serves as the community service arm of SFVBA and would like to give you the opportunity to de-stress while you help us help others. Contact us at theVCLF.org or reach out to any Board member to discuss how you can get involved.

### 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.

# Dropping Off and Giving Back

**TAYLOR F. WILLIAMS**
SCVBA PRESIDENT

info@scvbar.org

IT IS AN EXCITING TIME AT THE Santa Clarita Valley Bar Association. On November 14, 2019, the SCVBA will host its 15th Anniversary Awards & Installation Gala. We are excited to usher in our new board members!

The evening will begin with a cocktail hour and live music followed by dinner. Commissioner Martin Gladstein will be addressing our guests as the keynote speaker. The Honorable David Gelfound will swear in our new board members at what is sure to be an exciting event.

This month, SCVBA is hosting its annual Toy Drive.

During the holiday season, many local charitable groups have difficulty providing toys and new clothing items to the young boys and girls who live in the Santa Clarita Valley.

To help offset the shortages these groups often face, SCVBA hosts a toy/clothing drive at its annual Installation Gala. All of the items that are donated will be distributed to the underprivileged by various local charities.

If you would like to donate but will not be able to attend the Installation Gala, please contact Sarah Hunt at info@scvbar.org to coordinate a monetary donation or a toy/clothing drop off.

On January 16, 2020, the SCVBA will host a networking mixer at the Salt Creek Grille in Valencia. The event is free for members and is a great way to meet new associates, connect with current members, and have some fun!

We cordially invite members of the San Fernando Valley Bar Association to check out our events calendar, find referrals, and more at our website—www.scvbar.org.

As this year comes to an end, I look forward to filling my role as President of the SCVBA for the next two years.

We live and work in a fast-growing community and the ability of the SCVBA to benefit Santa Clarita's residents in both a legal capacity and charitable capacity has never been greater.

I look forward to working with the new SCVBA board and our members to grow the group and give back to the community in a big way.

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- **SFVBA membership for every firm attorney and paralegal**
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- **Recognition and 5% discount on tables at Bar-wide events, including Judges' Night**
- **Invitations to President's Circle exclusive events with bench officers, community leaders and large firms**

Contact SFVBA Member Services Coordinator Sonia Bernal at (818) 227-0032 or sonia@sfvba.org to sign up your firm today!

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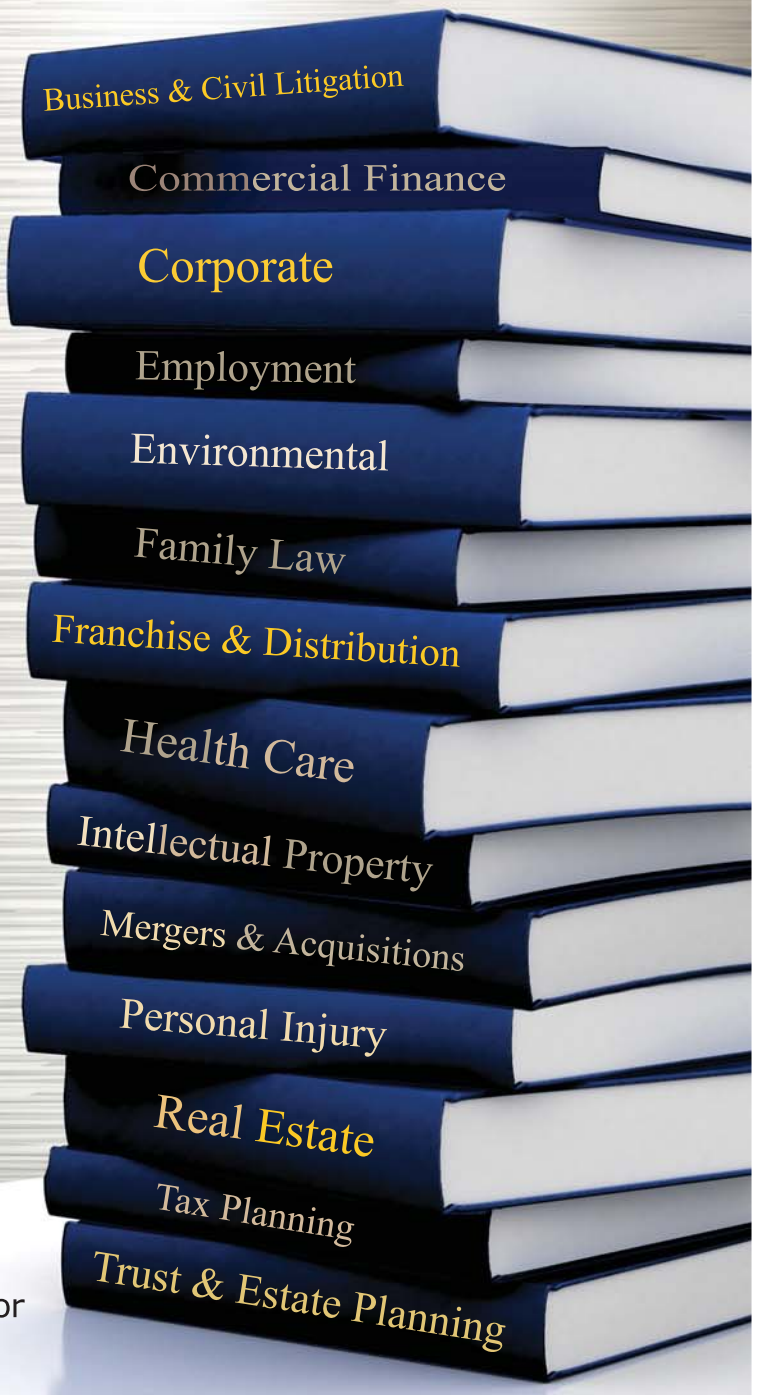


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