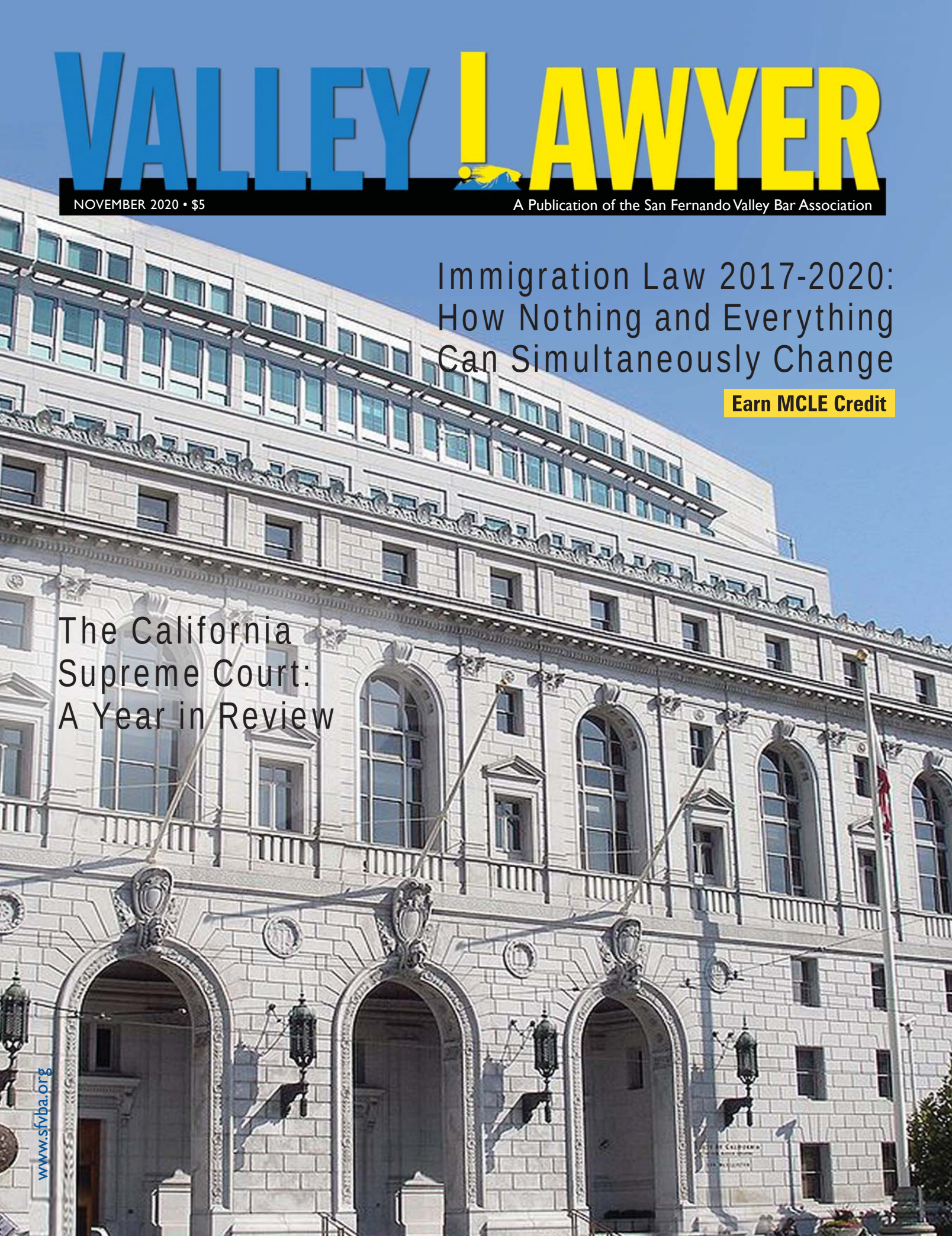
VALLEY LAWYER

NOVEMBER 2020 • $5

A Publication of the San Fernando Valley Bar Association



Immigration Law 2017-2020: How Nothing and Everything Can Simultaneously Change

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VALLEY LAWYER

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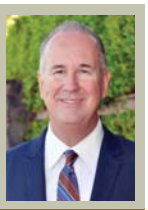
Printing Southwest Offset Printing

2020: Reflections on the Past and What Will Surely Follow

DAVID G. JONES
SFVBA President



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THE COMMON REFRAIN TODAY, almost everywhere you turn, is that 2020 has been a very tough year.

It is hard to dispute that, with COVID-19 and all of the societal upheaval that has arisen as we slide into election season and beyond.

Certainly, many lawyers and their families have been negatively impacted, often in deeply significant ways.

As we go through our remote work lives and deal every day with the stress caused by this difficult time, it is easy to lose perspective and feel like the walls are closing in and that the issue we face are insurmountable.

So, the question is: How can we combat the gnawing feeling that 2020 will be a never-ending stream of challenges?

I strongly believe we can win the battle by refusing to isolate ourselves and being unwilling to fall prey to darker thoughts.

We all have colleagues that are open to discussing professional matters. Call them to discuss legal strategy or test arguments. We all have friends that we can call to brighten our days, listen to our concerns or even to grab an outdoor, socially-distanced drink with.

So, call them, text them and reach out. It will immediately change your mood and, perhaps, your outlook on the overall.

Another option is to simply get outside. Walk the dog, exercise or do some safe charitable work. Go shopping. Seriously, maintaining a balanced mental attitude and working to create positive approaches will prove to be the difference as we try to shoulder through this toughest year of all.

Navigating through social media recently, I noted that someone shared that after the Spanish Flu came the Roaring Twenties—perhaps an apt historical reference for where we stand today.

> "We can make that happen if we simply hang in there."

We have a long way to December 31, 2020, as it sometimes feels like every day is a week, and every week a month. But it all starts with a small commitment to make it through this as best we can.

As Chinese philosopher, Lao Tzu said, "a journey of a thousand miles begins with one step."

That first step becomes much easier if we all believe that this difficult, challenging time will fade away, and that on the other side, there will be a party, or perhaps, just a return to simple normalcy.

We can make that happen if we simply hang in there.

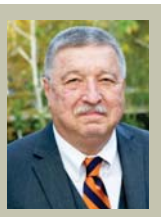
It has been a difficult year for me, so I can certainly relate to all of our members who have had their routine struggles magnified over the past year.

I will do my best to walk the walk and follow my own advice moving forward. This has been a tough message to write, under the circumstances. But I believe it and think you should too.

On a final note, I love you, Dad, and I miss you.

Random Musings

MICHAEL D. WHITE
Communications Manager

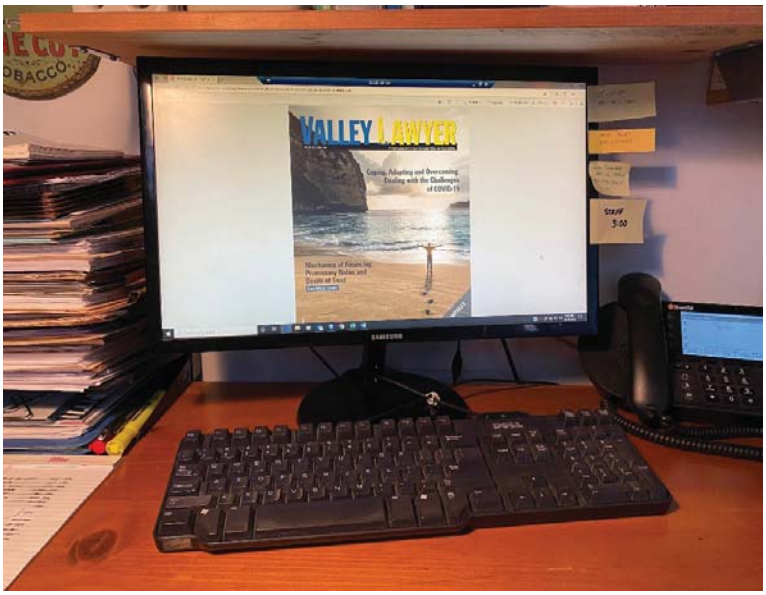


michael@sfvba.org

WE ARE UNVEILING TWO new departments in this edition of *Valley Lawyer*—a 'Retrospective' page to blow the dust off of selected gleanings from the Bar's copious historical archives; and a 'Bar Notes' page to spotlight member news and general information of interest.

Regarding Bar Notes, please send along bits of newsworthy information, press releases you might have regarding your firm, your practice, or other development you'd like to share.

Please forward what you'd like to publicize directly to me at michael@sfvba.org or give me a call at (818) 227-0493.



Back in the day, I would routinely do what I do in 'my' comfortable bunker at the SFVBA headquarters in Woodland Hills. But, since March, I—like most of you, I presume—have been working from home.

Since this column is called the 'Editor's Desk,' I thought it might be of interest to actually show you, at least, part of the desk and the steam-powered computer at which I have been doing what I do for the past seven months. Hence, the photo.

As I stitch this column together, I'll have you know that on this very day—and indeed, it is a very special one—someone, somewhere across our great land, is—depending on personal or professional inclinations—celebrating National Make A Difference Day, National Internal Medicine Day, or, perhaps most significant of all, National Chocolate Day.

Tomorrow holds even greater promise.

When the clock strikes 12:01 a.m., I can elect to do a 'Snoopy Dance' making merry on what is, again officially, a super-special day set aside to celebrate one, or, maybe, a combination of several such individuals/things as hermits, oatmeal, cats, candy corn, pharmacy buyers, breadsticks, publicists, and, most curiously, Frankenstein.

It's all official and there's a lot more; a whole lot more, and it's all very entertaining. In fact, there's even a National Day Calendar organization—based in Mandan, North Dakota—that boasts a website, special recipes, and much, much more, promoting the 'National Day' concept.

Take a moment or two and check it out at www.nationaldaycalendar.com.

CALENDAR

NOVEMBER 2020

SUN MON TUE WED THU FRI SAT

AMERICAN INDIAN HERITAGE MONTH

1 **2** **3** **4**

5

WEBINAR
Business Law and Real Property Section
From Panic To Profit
12:00 NOON
Sponsored by
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1031 EXCHANGE SERVICES LLC
Brooke Lively leads the discussion. Free to All Members! (1 MCLE Hour)
See ad on page 39

ZOOM MEETING
Membership and Marketing Committee
6:00 PM

6

WEBINAR
SFVBA Co-Sponsor
LACBA Environmental Law Fall Symposium: Climate Crisis in California
12:00 NOON
SFVBA members will receive LACBA member rates. Must register via LACBA link https://customers.lacba.org/Interactive/Event_Display.aspx?EventKey=110620ENV&WebsiteKey=d1ad4c15-b0de-4a6e-9a08-bebf7733938b. (1.5 MCLE Hours)

7

8 **9**

10

WEBINAR
Probate and Estate Planning Section
The Impact of Recent Trust & Estate Case Law Being Developed in Non-Probate Court Forums
12:00 NOON
Speaker Adam L. Streltzer, Esq. will highlight the impact of several recent case rulings on subjects important to Trusts and Estates practitioners. (1 MCLE Hour)

ZOOM MEETING
Board of Trustees
6:00 PM

11

VETERANS DAY

12

WEBINAR
Litigation Law Section
Futuristic Law Firm: New Technology, Virtual Set-ups, and Maximizing YOU!
2:00 PM
Sponsored by
ELLIS BAKH LLP
Trial Lawyers
THE SIMON LAW GROUP JUSTICE TEAM
Free to all members. (1 MCLE Hour)
See ad on page 43

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14

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UBS Financial Services Inc.
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THURSDAY
NOVEMBER 12
AT 5:30 PM
See ad on page 21

15 **16**

17

WEBINAR
Taxation Law Section
Year-End Tax Planning Ideas and Strategies
12:00 NOON
Attorney/CPA Hratch Karakachian will discuss various tax planning ideas and strategies taxpayers should consider and implement before December 31, 2020. (1 MCLE Hour)

18

19

ZOOM MEETING
Inclusion and Diversity Committee
12:00 NOON
This critical committee reconvenes now chaired by Amanda Moghaddam and Jessica Rosen.

20 **21**

22 **23** **25** **26** **27** **28**

29 30

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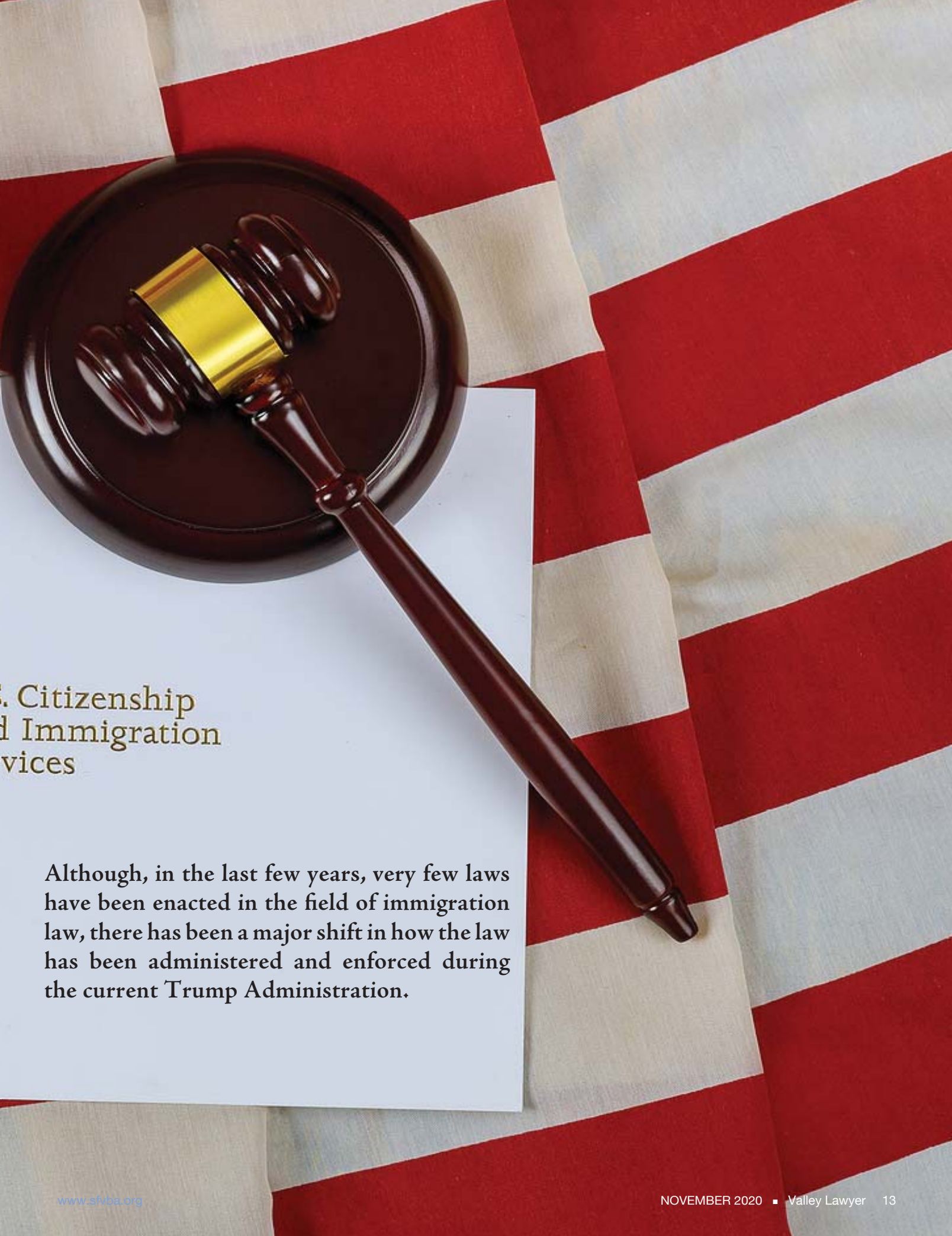
By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 20.

By Ron Tasoff

2017-2020 Immigration Law: How Nothing and Everything Can Simultaneously Change



Although, in the last few years, very few laws have been enacted in the field of immigration law, there has been a major shift in how the law has been administered and enforced during the current Trump Administration.

AN ARTICLE ON THE TOPIC OF IMMIGRATION law—*Immigration Law, Past, Present and Future*—by the writer appeared in the January 2017 issue of *Valley Lawyer* magazine that presented an overview of U.S. immigration law and what proposed revisions to the law might, and might not, take place during the then-incoming Trump Administration.[1]

Like many areas of administrative law, the executive branch has considerable latitude in interpreting the law through the use of the regulatory process and policy directives, such as executive orders.[2]

Thus, although very few laws have been enacted in the field of immigration law in the last few years, there has been a major shift in how the law has been administered and enforced during the Trump Administration.

This article will not discuss the complex area of law involving the procedures utilized by the government when it seeks to remove a non-citizen from the U.S. or bar them from entry at a port of entry (e.g., airport or land border), the rights of non-citizens to defend themselves in those proceedings, appeals from the decisions of immigration judges or other administrative officers, the limited rights of judicial review and other related issues.

A Short Overview of Immigration Law[3]

The Immigration and Nationality Act has four primary goals: family unification; allowing skilled individuals to work in the United States while protecting the jobs of American workers; refugee/asylee relief; and diversity.[4] [5]

With obvious simplicity, the Act divides all of humanity into U.S. citizens and non-citizens. Under the 14th Amendment of the U.S. Constitution, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[6]

Congress has additionally provided citizenship for certain children of U.S. citizens born abroad.

The Act then subdivides the class of non-citizens into immigrants and non-immigrants. Immigrants are people who are allowed to live and work in the United States permanently although there are a myriad of ways to lose that status.

The Act refers to such individuals as Lawful Permanent Residents (LPRs), and, as such, they are issued a non-citizen registration, also commonly known as the iconic "Green Card".[7]

Non-Immigrants

Non-immigrants are individuals who are allowed to legally enter the United States for a temporary period of time to pursue specific goals or activities.

Non-immigrant categories include visitors for pleasure or business, professional workers, treaty investors, intra-company transferees and crime victims and their family members who have suffered substantial mental or physical injury, such as victims of domestic violence, who are willing to assist law enforcement.

Although then-Senator Jeff Sessions served only 23 months as President Trump's Attorney General—Stephen Miller, who was on his staff when he was a Senator, went on to being the President's longest serving senior aide and is credited with being the architect of the Administration's immigration policy.[8]

As a result, there currently is a ban on the issuance of new H-1B visas and denial rates have increased by over 20 percent.[9] [10]

Refugees and Asylees, Deferred Action and Temporary Protected Status

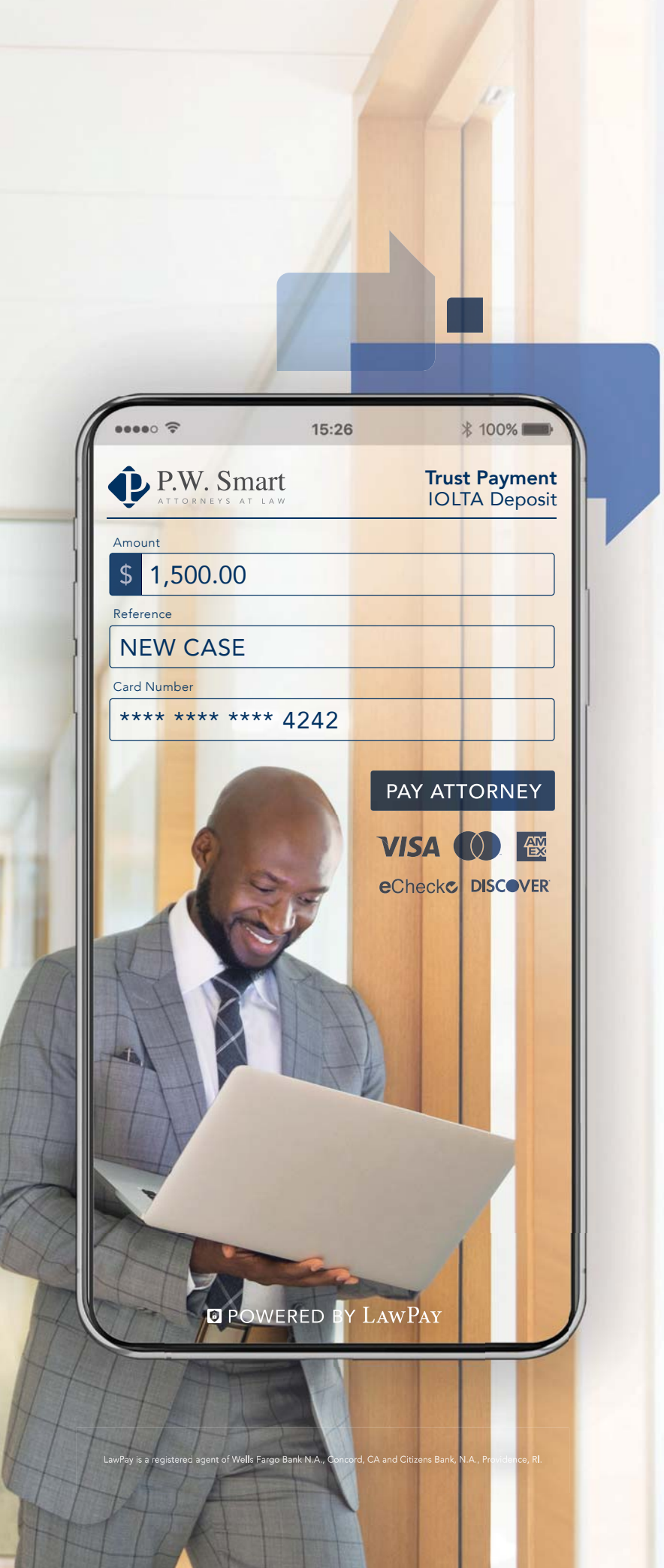
Since 1968, when the United States ratified the Convention Relating to the Status of Refugees, the United States has been bound by certain international rules, procedures and guidelines in regard to refugees and individuals applying for asylum in the United States.[11]

International and U.S. domestic law defines a refugee as a person who:

- Is outside his or her country of nationality or habitual residence;
- Has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and,
- Is unable or unwilling to avail themself of the protection of that country, or to return there, for fear of persecution.

During the Obama Administration, the U.S. government and the courts expansively interpreted the law—especially as to how "membership of a particular social group" was defined—to include LGBTQ individuals and victims of domestic violence from countries that did not offer protection to such individuals.

Ron Tasoff is a California State Bar-Certified Specialist in Immigration Law. He is a partner in the Law Firm of Tasoff and Tasoff in Encino and can be reached at ron@tasoff.com.



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THE BASIC RIGHTS OF NON-CITIZENS IN THE U.S.

- The right to remain silent when questioned by the authorities.
- The right to refuse to speak to an ICE agent or answer questions regarding place of birth, immigration status, or how entrance to the U.S. was achieved.
- The right to demand a warrant before granting access to a residence.
- The right to speak to a lawyer and the right to make a phone call.
- The right to refuse to sign any document or show any documents before you talk to an attorney.

The Trump Administration has enacted policies to curtail the ability of individuals to apply for asylum status and has drastically reduced the number of individuals allowed to enter the U.S. from abroad. Several of these controversial policies have been challenged and enjoined by the courts.[12]

Over the past few years, a third category of non-citizens has become prominent, namely those legally allowed to temporarily stay in the United States for humanitarian reasons. This category includes Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA) status.

The Administration has also attempted to cancel TPS for hundreds of thousands of people from a number of countries, many of whom have lived in the U.S. for decades.

Deferred Action Status

A form of prosecutorial discretion—deferred action status—has long been a component of immigration law and has been applied by past presidents from Eisenhower to Obama for various groups of non-citizens, including people who were able to escape from Cuba, as well as El Salvadorians and Guatemalans, who came to the United States after Hurricane Mitch devastated those countries in 1998.

However, the number of DACA recipients—also known as dreamers—has topped more than 750,000. By definition, dreamers are non-citizens that came to the United States before they turned 16 years old, have lived here since June 15, 2010, and have no serious criminal record.

> "Like many areas of administrative law, the executive branch has considerable latitude in interpreting the law through the use of the regulatory process and policy directives, such as executive orders."

Recipients are given employment authorization documents and their status can be renewed. Since this program was created by an Executive Order signed by President Obama in 2012, it could just as easily have been negated by an Order issued by President Trump.

However, an attempt to rescind Obama's executive order creating DACA was thwarted by the Supreme Court for not complying with the Administrative Procedures Act (APA) by failing to supply the requisite 'reasoned analysis' for the recission.[13]

The Trump Administration has indicated that it will again try to rescind the DACA program, this time in compliance with the APA.

Quantitative and Qualitative Restrictions on Legal Immigration

There are two barriers stopping the masses from legally immigrating to the United States:

- First, there are quantitative restrictions, or quotas, which limit the number of people who can come to the United States in any one category of eligibility or from a specific country; and,
- Second, there are qualitative restrictions such as individuals who Congress has determined should not be allowed to reside in the United States due to a myriad of reasons ranging from criminal convictions and health issues to membership in a terrorist organization.[14] [15]

Although there are waivers for some grounds, most require a showing of extreme hardship to a U.S. citizen or Lawful Permanent Resident parent, spouse or child.

The various categories of non-citizens that Congress has given a path to LPR status can be broken down into five groups: family-based immigration; employment-based immigration; refugees/asylees; investors and successful applicants to a diversity lottery selection process.

There are a multitude of ways that a non-citizen, including an LPR, can become subject to "removal"—formally called deportation—or barred from re-entering the United States after a trip abroad.

The most common reason is a criminal conviction. A sub-specialty of immigration law is "crimmigration," which deals with the often contradictory laws and court decisions dealing with the intersection of criminal and immigration law.

However, some of the grounds of removal found in Section 237 of the Immigration and Nationality Act that apply

IMMIGRANT VISA—"GREEN CARD"—CATEGORIES

FAMILY-BASED

There are no quota restrictions for immediate relatives: spouse, child (unmarried and under 21) of a U.S. citizen or parent of adult (over 21) U.S. citizen son/daughter.

The Preference System—subject to a quota limit of 226,000—is broken down as follows:

- **FB1:** Unmarried adult son or daughter of a U.S. citizen.
- **FB2:** Spouse or child (under 21) of a Legal Permanent Resident.
- **FB3:** Unmarried adult son or daughter of a Legal Permanent Resident;
- **FB4:** Married son or daughter of a U.S. citizen.
- **FB5:** Brother or sister of an adult U.S. citizen.

EMPLOYMENT-BASED

This category is subject to quota limit of 150,000 and broken down into the following classifications:

- **EB1:** Non-citizens of extraordinary ability; outstanding professors/researchers; multinational executives or managers.
- **EB2:** Advanced degree or exceptional ability professionals.
- **EB3:** Baccalaureates, skilled workers, and needed unskilled workers (such as housekeepers).
- **EB4:** Special immigrants (religious workers, abandoned children, etc.).
- **EB5:** Employment creation investor ($1.8 million or $900,000 in targeted employment area (TEA) and creation of 10 new jobs).

REFUGEES AND ASYLEES

This category is subject to a quota set each year by President. It is currently 15,000 per year. The Diversity Visa Program, or Green Card lottery is subject to quota limit of 55,000 individuals.

to activities that are not considered so egregious, especially for crimes involving controlled substances—marijuana, for example—firearms possession, and domestic violence.

For instance, the violation of a civil protective order is considered a removable offense and even the act of remaining abroad for over one year continuously may result in the abandonment of Long-Term Permanent Resident status and confiscation of a non-citizen's green card.

For Lawful Permanent Residents, the discovery of a removable offense might occur when the person is arrested and booked for any offense and a fingerprint check reveals a criminal record, while others, after traveling abroad without incident for many years, find out during a routine inspection at an airport that Customs and Border Protection personnel have access to new databases. Still others are caught when applying for naturalization or renewal of their green cards which, like passports, expire every 10 years.

Several years ago, the Trump Administration created a special unit in U. S. Citizen & Immigration Service to review previously granted naturalization applications for possible fraud which could result in denaturalization and removal for the former U.S. citizen and derivative dependents involved.

It is to be noted that the Immigration Courts and Board of Immigration Appeals, which issue and review orders of removal, are part of the Department of Justice which, currently at least, has unfettered ability to use the immigration courts to set immigration policy.[16]

The Three and Ten Year Bars

In addition to the quantitative and qualitative limitations stated in the Act, regulatory policy and procedures can also create obstacles in the path of legalization.

A classic example is the dilemma discovered by undocumented immigrants who marry U.S. citizens.

SELECTED NONIMMIGRANT VISAS

B-1: Temporary visitor for Business

B-2: Temporary visitor for Pleasure (Tourist Visa)

E-1: Treaty Trader, spouse and children*

E-2: Treaty Investor, spouse and children*

F-1: Student Visa (* possible)

H-1B: Work Visa for Specialty Occupations (professions), however subject to a quota that allows less than half of qualified applicants to be granted status*

J-1: Visas for exchange visitors*

K-1: Fiancée and Fiancé Immigration Visa*

O-1: Extraordinary ability in sciences, arts, education, business, or athletics*

P-1: Individual or team athletes or entertainment groups*

R-1: Religious workers*

U: Victims of specified crimes who assist law enforcement.

T: Victims of human trafficking.

TN: Trade NAFTA visas for citizens of Canada and Mexico in enumerated professions.*

* Designates Employment Authorized

Note: Citizens of certain countries do not need visas to come to the U.S. for business or pleasure. The Visa Waiver Program enables foreign nationals from most developed countries to visit the United States for up to 90-day visa-free.

Many of these individuals came to the U.S. as children. Not allowed to adjust their status in the U.S. because of their illegal entry, they must apply abroad at an American Consulate in their country-of-birth for an immigrant visa to enter the U.S.[17]

However, upon their departure, they immediately become subject to the three- or 10-year bar of Section 212(a)(9)(B) of the Act.

Basically, if a person is in unlawful status for more than 180 days, but less than one year, they cannot return to the U.S. for three years; if more than a year, 10 years.[18]

Although eligible for a waiver, prior to the Obama Administration's policy to allow applicants to receive their

waivers before they attend their interviews abroad, many applicants were required to spend months waiting for their waivers to be processed while living abroad.

Naturalization

Thus, being a lawful permanent resident in the U.S. is not, in actuality, all that permanent with only one thing that can halt the possibility of the loss of legal immigration status—naturalization.

Once a person has held Legal Permanent Resident status for five years—three, if married to a U.S. citizen—they are eligible to apply to become a naturalized U.S. citizen.

The applicant must also show that during that period he or she has been a person of good moral character, and has spent at least half the period physically in the United States.

The applicant must also pass a citizenship and a U.S. American history test, and be able to speak and read basic English, although exceptions exist for the physical and mentally disabled and long-term LPR's who reach a certain age.

---

[1] https://sfvba.org/wp-content/uploads/2017/03/VL-Jan-2017-Lowres-1.pdf.
[2] See Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), in which the United States Supreme Court set forth a two part test for determining whether to grant deference to a government agency's interpretation of a statute which it administers.
[3] The author recommends that those interested in learning more about U.S. immigration law and policy consult the websites of the American Immigration Lawyers Association at https://www.aila.org/ and the American Immigration Council at https://www.americanimmigrationcouncil.org/.
[4] Title 8 of the U.S. Code (8 USC), sets out the statutory scheme for regulating immigration in the U.S.
[5] The Citizenship and Immigration Services (CIS) administers the benefits side—the adjudication of petitions and applications for various immigration classifications and the naturalization process. Customs and Border Patrol (CBP) enforces the law along U.S. land borders and ports of entry, while Immigration and Customs Enforcement (ICE) is responsible for enforcement in the interior of the country, including investigations, the arrests and detention, and the prosecution of removal cases.
[6] Lately, anti-immigrant groups have advocated repealing this provision by a Constitutional amendment. However, the original purpose of the citizenship clause—to prevent the creation a politically disenfranchised underclass of former slaves – is still relevant.
[7] The current version of the card, USCIS Form I-551, is a high security document white and bluish green in color, that is machine readable and contains the alien's photograph, fingerprints, and signature as well as optical patterns to frustrate counterfeiting.
[8] See https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession.
[9] https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-aliens-present-risk-u-s-labor-market-following-coronavirus-outbreak/.
[10] https://www.forbes.com/sites/stuartanderson/2020/08/31/h-1b-visa-denials-continue-to-mount-for-companies/#61a1637e1262.
[11] https://www.unhcr.org/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html.
[12] https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy.
[13] *Department of Homeland Security v. Regents of the University of California*, Slip Op. No. 18-587 591 U.S. ____(2020).
[14] The quota for total Family Based immigration is set at 226,000 not including "immediate relatives" of U.S. citizens for which there is no numerical limitation. Employment Based is set at 150,000. These visa numbers are allocated in unequal proportions set by law to the various subcategories. No single country can be issue more than 7 percent of the total of 26,366 visa numbers.
[15] See Section 212 of the Act for the grounds of inadmissibility—the rules that prevent noncitizens from receiving visas and/or entering the U.S. Similar but different in significant ways, is Section 237 of the Act, the grounds of removal, which gives authority to the DHS to remove people who are already in the U.S.
[16] Immigration Courts are not Article III courts. A very current and interesting analysis of the immigration courts can be found at http://immigrationcourtside.com/ the blog of Paul Wickham Schmidt, retired Immigration Judge and Chairman of the Board of Immigration Appeals.
[17] There is an important exception for non-citizens who are beneficiaries of an immigrant relative petition or labor certification application filed before April 30, 2001 and certain non-citizens related to such individuals, see Section 245(i) of the Act.
[18] Unlawful status is a defined term that amongst other things includes people who entered the U.S. without inspection, that is illegally, overstayed the authorized period they were legally allowed to remain in the U.S.—overstayed tourists, for example—or violated their non-immigrant status—such as students who work without authorization.

2017-2020 Immigration Law: How Nothing and Everything Can Simultaneously Change
Test No. 145

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. Some of the goals of the Immigration and Nationality Act are to reunite families and protect American workers.
   ❑ True ❑ False
2. A child born abroad with at least one U.S. citizen parent may be able to claim U.S. citizenship.
   ❑ True ❑ False
3. Non-citizens who enter on B-1 Business visas are allowed to work in the U.S.
   ❑ True ❑ False
4. There is no quota for parents of U.S. citizens who are over 21 years old.
   ❑ True ❑ False
5. There is no quota for the spouse of a Lawful Permanent Resident (LPR).
   ❑ True ❑ False
6. The current green card is not green.
   ❑ True ❑ False
7. An LPR can be removed for violation of a civil protective order.
   ❑ True ❑ False
8. An LPR could lose his or her green card if they remain abroad for over 12 months.
   ❑ True ❑ False
9. Naturalized U.S. citizens can be deported from the U.S. if they commit aggravated felonies.
   ❑ True ❑ False
10. ICE officers are in charge of protecting America's borders from noncitizens attempting to enter the U.S. without inspection.
    ❑ True ❑ False
11. The spouse of a U.S. citizen who entered without inspection and lives in the U.S. for more than one year cannot return to the U.S. for three years even if they qualify for an immigrant visa unless they are granted a waiver.
    ❑ True ❑ False
12. A lawyer in a criminal matter should always know his client's immigration status because a plea to a lesser offense that might be beneficial to a U.S. citizen could result in removal if the person is a non-citizen, unless the client is a permanent resident of the U.S.
    ❑ True ❑ False
13. A non-citizen here illegally can never become a naturalized U.S. citizen.
    ❑ True ❑ False
14. LPR's married to U.S. citizens can naturalize two years before those who are not married to U.S. citizens.
    ❑ True ❑ False
15. Both U.S. Citizenship and Immigration Services (CIS) and the Immigration Courts are parts of the DHS.
    ❑ True ❑ False
16. If an undocumented non-citizen is married to a U.S. citizen they can apply for their green card in the U.S. if a penalty fee of $5,000 is paid.
    ❑ True ❑ False
17. According to the Immigration and Naturalization Act all people are either U.S. citizens or non-citizens.
    ❑ True ❑ False
18. A non-citizen can get a green card if they win a lottery.
    ❑ True ❑ False
19. Immigration judges are Article III judges like Bankruptcy Court judges.
    ❑ True ❑ False
20. The Trump Administration attempted to rescind President Obama's executive order creating DACA, but the Supreme Court held that the rescission was improper since the attempt did not comply with the APA.
    ❑ True ❑ False

2017-2020 Immigration Law MCLE Answer Sheet No. 145

INSTRUCTIONS:

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

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

METHOD OF PAYMENT:

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

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Credit Card Number

_____ _____/_____/_____
CVV code Exp. Date

_____
Authorized Signature

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

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

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

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

SFVBA Valley Bar Network

Virtual Trivia night

San Fernando Valley Bar Association
founded in 1926

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THURSDAY NOVEMBER 12 AT 5:30 PM

THIS EVENT IS FREE TO VBN MEMBERS AND INVITEES!

Grab a drink and join us for an evening of fun and games.

Become a member of VBN and reap the rewards of networking with your peers in this outstanding professional group.

Join us!

VBN
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First-time guests welcome to participate in this special event!

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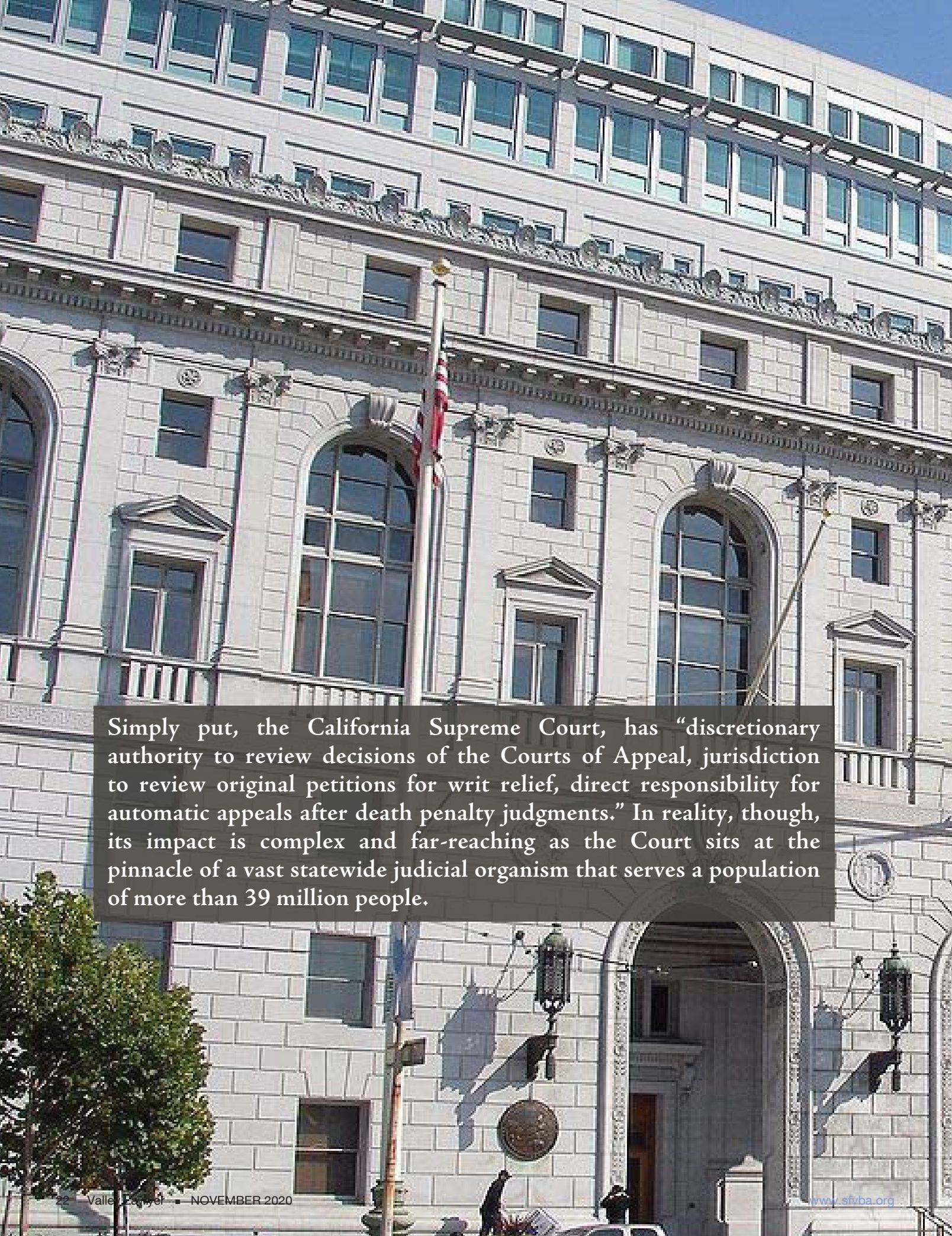


Simply put, the California Supreme Court, has "discretionary authority to review decisions of the Courts of Appeal, jurisdiction to review original petitions for writ relief, direct responsibility for automatic appeals after death penalty judgments." In reality, though, its impact is complex and far-reaching as the Court sits at the pinnacle of a vast statewide judicial organism that serves a population of more than 39 million people.

The California Supreme Court: A Year in Review

By Michael D. White

ON THE SURFACE, THE mandate of the California Supreme Court, simply stated, is quite straightforward.

According to the state Constitution, the Court, has "discretionary authority to review decisions of the Courts of Appeal, jurisdiction to review original petitions for writ relief, direct responsibility for automatic appeals after death penalty judgments."

In reality, though, its impact is complex and far-reaching as the Court sits at the pinnacle of a vast statewide judicial organism that serves a population of more than 39 million people—about 12.1 percent of the total U.S. population—and processed about 5.9 million cases in fiscal year FY 2018–19.

The Beginnings

On February 2, 1848, Mexico officially ceded California to the United States in exchange for $15 million. Just nine days previous, gold was discovered by a New Jersey-born carpenter named James Marshall near remote Sutter's Creek at the foot of the Sierra Nevada mountains.

The result was spectacular—a cascade of people of all walks of life from all over the nation and the world who changed the face of what had been a quiet backwater of a fading Spanish empire into a test bed of manners, mores, and law, much of which would result in issues decided by the California Supreme Court.

Under Article VI of the original California Constitution—drafted at Monterey in 1849—the Court was established with a chief justice and two associate justices. The legislature appointed Serranus Clinton Hastings as California's first Chief Justice, an attorney and former Iowa representative to Congress who had resigned his position as Chief Justice of the Iowa Supreme Court to come to travel west to San Francisco.

Interestingly, Hastings later founded what would later become the University of California Hastings College of Law in San Francisco.

Thirty years later, a new Constitution ushered in major changes to the state's judicial system including an expansion of the Supreme Court to a Chief Justice and six associate justices with terms of office increased from 10 to 12 years. The categories of cases that the Court was authorized to hear were once again augmented, and all opinions were required to be in writing.

Cases focusing primarily on issues such as gold mine claims quickly gave way to the Court ruling on agricultural, manufacturing, maritime and other commercial concerns as the state's population exploded—from 100,000 in 1849 to 1.5 million in 1900.

Over the years, much occurred that has molded the Court of today. In the 1870s, the state's Courts of Appeal were created and, in 1905, a constitutional amendment created the State Bar, a public corporation which now boasts some 266,000 members and to which all attorneys practicing in California must belong.

Two decades later, an amendment to Article VI of the state Constitution that established the Judicial Council of California.

Chaired by the Chief Justice, the Council was, and still is, tasked with improving the administration of justice and enacting rules of court practice and procedure.

A Streamlined Operation

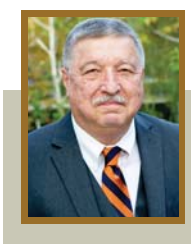
More recently, in a move to streamline judicial branch operations statewide, California voters amended the Constitution in 1998 to allow trial judges in every one of the state's 58 counties to unify their courts, if desired, into a single countywide superior court system. Until then, separate municipal courts in each county had handled the less serious matters, such as misdemeanors, infractions, and minor civil cases.

In FY 2019-2019 alone, the Supreme Court issued 68 written opinions during the year, while filings totaled 6,917, and dispositions totaled 6,816.[1]

With the onset of the ongoing COVID-19 pandemic, the state Supreme Court has issued more than three dozen directives affecting day-to-day court operations throughout the state, establishing protocols, and developing guidelines "to help court management respond and adapt court operations to COVID-19-related events, including issues related to employees, the public, jurors and support services."

On March 16, 2020, the Court issued its first pandemic-related directive—an order suspending all in-person oral argument "in light of the current public health emergency caused by the COVID-19 pandemic, to protect the health and safety of the public."

Despite pandemic-related limitations over the past year, the Court has managed to maintain a high level of activity, ruling on a caseload that touched on a wide variety of issues from workers' compensation to wildfire damage, as well as act on a number of issues including a provisional licensing program for 2020



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.

law school graduates and creating a working group to study how laws, court services, technology, and judicial branch property could be better utilized to address the state's growing homeless crisis.[2] [3]

For example, according to the *National Law Review*, "On November 3, 2020, while the rest of the country is focused on the 2020 election, the California Supreme Court will hear oral arguments in *Vazquez v. Jan-Pro Franchising Int'l, Inc*. to address an unanswered question stemming from the Court's 2018 decision in *Dynamex Operations West, Inc. v. Superior Court*[4] Cal. 5th 905 (2018) – does the *Dynamex* decision apply retroactively?

"In *Dynamex*, the California Supreme Court adopted the ABC Test for determining whether an individual is an employee or independent contractor under the state Industrial Welfare Commission Wage Orders, drastically changing the standards in California for the classification of workers as independent contractors.

"The Court declined, however, to address whether the decision would apply retroactively to independent contractor classification decisions made prior to the case being decided. It appears that the Court is now ready to answer that question.

"After Dynamex, the California legislature adopted and expanded the Court's holding in Assembly Bill 5. While AB5 specifically states that certain aspects of the law apply retroactively, the decision in Vasquez could affect the retroactive application of AB5 as well."[4]

Selected 2020 Cases: A Review[5] [6]

People v. Jimenez

Docket Number: S249397

"The Supreme Court reversed the judgment of the court of appeal concluding that a felony for misuse of personal identifying information under Cal. Penal Code 530.5, subdivision (a) can be reduced to misdemeanor shoplifting under Proposition 47, holding that a conviction for misuse of identifying information is not subject to reclassification as misdemeanor shoplifting.

"Defendant was convicted of two felony counts of misusing personal identifying information in violation of section 530.5, subdivision (a). Defendant later moved to reclassify his felony convictions to misdemeanors under Proposition 47. The trial court granted defendant's motion. The court of appeals affirmed.

"The Supreme Court reversed, holding that misuse of personal identifying information is not a "theft" offense under Cal. Penal Code 459.5, subdivision (b)."

Gund v. County of Trinity

Docket S249792

"The Supreme Court held that when Norma and James Gund suffered a violent attack after being asked by law enforcement to check on a neighbor who had called 911 requesting help, the only remedy available to the Gunds was through workers' compensation.

"When members of the public engage in "active law enforcement service" at the request of a peace officer, California treats those members of the public as employees eligible for workers' compensation benefits. However, workers' compensation becomes an individual's exclusive remedy for his or her injuries under state law.

"At issue in this case was whether the Gunds were engaged in "active law enforcement service" when they assisted law enforcement by checking on a neighbor who had called 911, walked into an active murder scene, and had their throats cut.

"The Supreme Court held that the Gunds engaged in active law

enforcement under California Labor Code 3366 even though the peace officer allegedly misrepresented the situation, and therefore, their only remedy was through workers' compensation."

People v. Perez

Docket Number: S248730

"The Supreme Court reversed the judgment of the court of appeal concluding that a defense counsel's failure to object at trial, before *People v. Sanchez*, 63 Cal.4th 665 (2016), was decided, forfeited a claim that a gang expert's testimony related case-specific hearsay in violation of the confrontation clause, holding that a defense counsel's failure to object under such circumstances does not forfeit a claim based on Sanchez.

"Sanchez held that an expert cannot relate case-specific hearsay to explain the basis for her opinion unless the facts are independently proven or fall within a hearsay exception.

Defendants in the instant case were each convicted of two counts of first-degree special circumstance murder and other crimes. Before defendants' appeals were resolved, the Supreme Court issued its opinion in Sanchez. On appeal, one of the defendants argued that a gang expert testified to case-specific hearsay in violation of the confrontation clause.

"The court of appeal held that the defendant's failure to object to case-specific hearsay in expert testimony at trial forfeited any Sanchez claim on appeal.

"The Supreme Court reversed, holding that the court of appeal erred in finding that the defendant forfeited his claim on appeal based on Sanchez by failing to object at a trial that occurred before Sanchez was decided."

People v. Veamatahau

Docket Number: S249872

"The Supreme Court affirmed the judgment of the court of appeals concluding that the admission of expert testimony did not violate the prohibition against communication of case-specific hearsay set forth in *People v. Sanchez*, 63 Cal.4th 665 (2016) and that sufficient evidence supported defendant's conviction for possession of alprazolam, holding that the court of appeal did not err.

"Sanchez held that an expert cannot relate case-specific hearsay to explain the basis for his or her opinion unless the facts are independently proven or fall within a hearsay exception. In the instant case, an expert told the jury that he identified the controlled substance defendant was charged with possessing by comparing the visual characteristics of the pills seized against a database containing descriptions of pharmaceuticals.

"On appeal, defendant argued that the expert related inadmissible case-specific hearsay. The court of appeal affirmed.

"The Supreme Court affirmed, holding the expert related no inadmissible case-specific hearsay in testifying to the contents of a drug identification database; and substantial evidence supported defendant's conviction."

Left to right (standing): Justice Leondra R. Kruger, Justice Goodwin H. Liu, Justice Mariano-Florentino Cuéllar, and Justice Joshua P. Groban. Left to right (seated): Justice Ming W. Chin, Chief Justice Tani G. Cantil-Sakauye, and Justice Carol A. Corrigan.

People v. McKenzie

Docket Number: S251333

"The Supreme Court affirmed the court of appeal's judgment ordering four of defendant's sentence enhancements stricken, holding that a convicted defendant who is placed on probation after imposition of sentence is suspended, and who does not timely appeal from the order granting probation, may take advantage of ameliorative statutory amendments that take effect during a later appeal from a judgment revoking probation and imposing sentence.

"In three separate cases, defendant pleaded guilty to drug-related offenses and admitting having sustained four prior felony drug-related convictions for purposes of sentence enhancement under Cal. Health & Safety Code former 11370.2. The trial court later revoked probation

and imposed a prison sentence that included four three-year prior drug conviction enhancements under former Section 11370.2(c).

"Thereafter, the governor signed Senate Bill No.180, which revised Section 11370.2 so that defendant's prior drug-related convictions no longer qualified defendant for sentence enhancement.

The Supreme Court remanded the case for reconsideration in light of the revised statute. On remand, the court of appeal concluded that defendant could take advantage of the revisions to the statute that rendered the sentence enhancements inapplicable to defendant's prior drug-related convictions.

"The Supreme Court affirmed, holding that the Legislature must have intended Section 11370.2's ameliorative changes to operate in cases like this one."

Scholes v. Lambirth Trucking Co.

Docket Number: S241825

"The Supreme Court affirmed the decision of the court of appeal affirming the trial court's grant of defendant's demurrer and dismissing Plaintiff's complaint alleging that defendant negligently allowed a fire to spread from defendant's property to Plaintiff's property, harming some of Plaintiff's trees, holding that Plaintiff could not rely on Cal. Civ. Code 3346's extended statute of limitations and that his complaint was otherwise untimely.

"Section 3346 provides enhanced damages to plaintiffs suffering wrongful injuries to timber, trees, or underwood. The relevant statute of limitations where a plaintiff seeks such damages is five years. In this case, Plaintiff alleged that Section 3346's enhanced damages and five-year statute of limitations applied to property damage from a fire negligently allowed to escape from defendant's property.

"Defendant filed a demurrer, arguing that Plaintiff's claims were time-barred. The trial court granted the demurrer. The court of appeal affirmed, concluding that the three-year statute of limitations in Cal. Code Civ. Proc. 338(b) applied to this action for trespass upon or injury to real property. The court of appeal agreed.

"The Supreme Court affirmed, holding that Section 3346 is inapplicable to damages to timber, trees, or underwood from negligently escaping fires and that Plaintiff's complaint was otherwise untimely."

In re G.C.

Docket Number: S252057

"The Supreme Court affirmed the decision of the appellate court dismissing a minor's appeal challenging the juvenile court's neglect of its mandatory duty under Cal. Welf. & Inst. Code 702 to declare a wobbler offense to be a misdemeanor or a felony, holding that the minor may not bring such a challenge in an appeal from a later dispositional order after the time to appeal the original disposition expired. "Two wardship petitions were filed against G.C. alleging that G.C. committed three wobbler offenses. G.C. admitted all three allegations. The court, however, did not declare on the record whether the offenses were felonies or misdemeanors. Thereafter, G.C. was adjudged a ward and placed on probation. G.C. did not appeal the disposition.

"After G.C. violated the terms of her probation the juvenile court maintained G.C. in her mother's custody under the supervision of the probation department with various conditions. G.C. appealed, arguing that the court failed expressly to declare whether the offenses were misdemeanors or felonies. The appellate court determined that the issue was not timely raised.

"The Supreme Court affirmed, holding that although Section 702 is mandatory, noncompliance did not make the original dispositional order

an unauthorized sentence that could be corrected at any time."

In re Gay

Docket Number: S130263

"The Supreme Court granted Petitioner habeas corpus relief, holding that Petitioner was denied his constitutional right to the assistance of competent counsel at the guilt phase of his criminal trial, and trial counsel's deficient performance undermined the reliability of the jury's guilty verdict.

"Petitioner was convicted of the first degree-murder of a police officer and sentenced to death. While his appeal was pending, Petitioner filed his first petition for a writ of habeas corpus, arguing that the judgment should be vacated because he had received constitutionally ineffective assistance of counsel.

"During the habeas proceedings, the Supreme Court found that Petitioner's trial counsel had defrauded Petitioner in order to induce Petitioner to retain him instead of the public defender. Counsel went on to commit serious errors during the penalty phase undermining the reliability of the death verdict.

"The Supreme Court granted the petition and ordered a new penalty phase trial. Petitioner later filed this petition for a writ of habeas corpus challenging his convictions. The Supreme Court granted the writ and vacated defendant's conviction for first-degree murder, holding that Petitioner was denied the effective assistance of counsel at the guilt phase of his trial."

K. J. v. Los Angeles Unified School District

Docket Number: S241057

"The Supreme Court reversed the decision of the court of appeal dismissing an appeal of an order directing an attorney to pay sanctions because the notice of appeal identified the attorney's client as the appealing party but other indicia made it clear that the attorney was the party seeking review, holding that, under the circumstances of this case, the notice of appeal should be construed to include the omitted attorney.

"Attorney represented K. J. in a negligence action against the Los Angeles Unified School District. During the litigation, LAUSD filed an application seeking sanctions from attorney. The trial court awarded sanctions based on its finding that attorney had violated discovery statutes.

"A notice of appeal was filed by K. J.'s attorney. The court of appeal dismissed the appeal for lack of jurisdiction, holding that when a sanctions order is entered against an attorney, the right of appeal is vested in the attorney and not the attorney's client.

> "Despite pandemic-related limitations over the past year, the Court has managed to maintain a high level of activity, ruling on a caseload that touched on wide variety of issues from workers' compensation to wildfire damage."

"The Supreme Court reversed, holding that when it is clear from the record that the omitted attorney intended to participate in the appeal and the respondent was not misled or prejudiced by the omission, the rule of liberal construction requires that the notice be construed to include the omitted attorney."

United Educators of San Francisco, AFT/CFT v. California Unemployment Insurance Appeals Board

Docket Number: S235903

"In this case, addressing whether the limitation under Cal. Unemp. Ins. Code 1253.3 that public school employees are not eligible to collect unemployment benefits under certain circumstances applies to substitute teachers and other public school employees during the summer months; the Supreme Court held that a summer session does not fall within the period of unemployment benefits ineligibility mandated by 1253.3 if the summer session constitutes an 'academic term.'

"Under Section 1253.3, public school employees are ineligible to collect unemployment benefits during "the period between two successive academic years or terms" if the employees worked during "the first of the academic years or terms" and received 'reasonable assurance' of work during "the second of the academic years or terms."

"Each claimant in this case filed for unemployment benefits for the period between May 27, 2011 and August 15, 2011. The court of appeals concluded that summer sessions are not 'academic terms' under Section 1253.3, and therefore, the claimants were not eligible for benefits.

"The Supreme Court reversed, holding that a summer session is an 'academic term' within the meaning of the statute if the session resembles the institution's other academic terms based on objective criteria such as enrollment, staffing, budget, instructional program or other objective characteristics."

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[1] https://www.courts.ca.gov/documents/2020-Court-Statistics-Report.pdf.
[2] https://newsroom.courts.ca.gov/news/california-supreme-court-approves-provisional-licensing-program-2020-law-school-graduates.
[3] https://newsroom.courts.ca.gov/news/california-chief-justice-launches-work-group-homelessness.
[4] https://www.natlawreview.com/article/california-supreme-court-to-hear-oral-arguments-retroactive-application-dynamex.
[5] https://law.justia.com/cases/california/supreme-court/.
[6] https://www.courts.ca.gov/opinions-slip.htm.

Retrospective

The San Fernando Valley Bar Association has been an active participant in the annual, national observance of Law Day for many years. On Law Day 1989, the article below appeared in the Wednesday, May 1, edition of the Los Angeles Daily News.

Frustrated citizens get free legal advice at mall

By Beth Laski
Daily News Staff Writer

WEST HILLS — Harriet Anton of Tarzana has waited more than a year to receive a judgment she won in small claims court against a mechanic who overcharged her for work.

She contacted a consumer affairs office, sued the North Hollywood mechanic and won in small claims court. She has sent letter after letter asking for the $128 payment.

Not knowing what else to do, Anton, 64, joined with nearly 100 people at the Fallbrook Mall on Saturday to ask for free legal counseling during Law Day in the San Fernando Valley.

"I've done everything I can, and I still don't have the money," Anton said. "So here I am trying to get this resolved."

About two dozen attorneys from throughout the Valley volunteered to spend their Saturday afternoons at shopping malls in Panorama City, Northridge and West Hills to offer free legal advice to the public.

"Three things make a lawsuit," said Alan Sivota, an attorney for nearly 30 years who has participated in Law Day for the past five years. "Liability, damages and someone to collect from."

> *'Three things make a lawsuit. Liability, damages and someone to collect from.'*
>
> **— Alan Sivota**
> participating Law Day attorney

During 10-minute consultations, which routinely ran over, the lawyers answered questions about divorce and child custody, bankruptcy, immigration, personal injury, landlord-tenant agreements and breach-of-contract cases.

Eric Callagher and Marissa Polizzotto of Canoga Park said the information they received about child custody laws during their free session was better than that which they received after paying a lawyer $200 for a consultation.

"The attorneys here are not trying to sell anything," said Callagher, 26. "We were told that we can at least get things started and do some of the paperwork ourselves. I'm trying to do it on my own and this is one way to save some money."

By Carí Jackson Lewis

Charitable Lead Trusts:

Consider A Year-End Estate and Income Tax Strategy

"Tis impossible to be sure of anything but Death and Taxes."—Christopher Bullock

IN ADDITION TO THE GLOBAL coronavirus pandemic, racial reckoning and social unrest, massive employment and economic uncertainty, the presidential election cycle has presented taxpayers with additional issues to consider when reviewing estate and charitable planning actions to complete by the end of the year.

Potential Tax Policy Changes

The 2017 Tax Cuts and Jobs Act and other legislation may be subject to changes if a new administration is installed in 2021.

As a result of the economic problems generated by the global pandemic and other factors, the new administration is likely to consider raising funds for the Treasury by implementing a number of revenue-raising measures.

According to the Tax Foundation, Democratic Presidential nominee Sen. Joseph R. Biden's proposed tax policy changes include, but are not limited to, the following:

- Income Taxes: Reversing the 2017 Tax Cuts and Jobs Act's individual income tax cuts for those earning over $400,000 by restoring the top marginal income tax rate to 39.6 percent. Currently, the current top marginal income tax rate is 37 percent.

- Capital Gains Taxes: Increasing long term capital gains rates for those earning over $1 million to ordinary income tax rates up to 43.4 percent—39.6 percent, plus a 3.8 percent net investment tax. Now, only short term capital gains—those under 12 months—are taxed as ordinary income.

  Long term capital gains rates range from 0 percent, 15 percent, and 20 percent for a top rate of 23.8 percent—20 percent, plus a 3.8 percent net investment tax.

- Tax Basis: Eliminating the step-up in basis for inherited assets with capital gains; instead, implementing a carryover basis and, potentially, designating death as a triggering event for imposition of capital gains tax.

Currently, capital gains assets that are inherited by a beneficiary at death are transferred to the beneficiary at the item's fair market value as of the date of the decedent's death. This step-up in basis ensures that the beneficiary does not carry over the basis that the decedent had in the asset.

- Charitable Deductions: Capping the value of itemized deductions to 28 percent for those in higher marginal tax brackets and restoring the Pease limitation on itemized deductions for those with taxable income above $400,000.

  Currently, the Pease limitation, which was suspended in 2018 through 2025, generally reduced the amount of the charitable income tax deduction that individuals with taxable income over $400,000 could take for charitable contributions.

- Estate and Gift Taxes: Reducing the estate and gift tax exemption to anywhere from $1 million – $5 million individual and up to $10 million per couple, indexed for inflation.

  Current estate and gift tax exemption amounts are $11.58 million per individual and $23.16 million per couple, indexed for inflation. Also proposed is an increase in the top estate tax rate from 40 percent to up to 80 percent.

  Now, estates with assets exceeding the above amounts are taxed at a rate of up to 40 percent.

Other contemplated actions being considered by candidate Biden include raising the corporate income tax from 21 to 28 percent, and imposing limitations to the discounts applied to the valuation of interests in closely-held businesses upon transfer, such as lack of control and lack of marketability valuation discounts.

These potential tax changes, if enacted, may well be made retroactive to January 1, 2021.

Why Consider a Charitable Lead Trust Now?

Importantly, the 2019 anti-clawback regulations issued by the Internal Revenue Service established that if a taxpayer makes taxable gifts and utilizes a $11.58 million exemption prior to December 31, 2020, those gifts will not be subject to transfer tax later, even if the increased exemption expires.

For that reason, it makes sense for high net worth clients to consider transferring assets by year-end if they are in a financial position to do so.

Accordingly, advisors may wish to recommend lifetime gifting strategies that will allow their clients to take advantage of today's historically high estate and gift tax exemption limits, historically low interest rates, and low capital gains tax rates in order to transfer real property, closely held stock, or other complex assets that are currently depressed in value, but that are likely to appreciate in the future.

Some recommended charitable planning opportunities to consider prior to year-end are qualified charitable distributions, gifts of real estate or other complex assets to donor advised funds, cash gifts to public charity initiative funds, and Charitable Lead Trusts (CLTs).

How CLTs Take Advantage of Current Tax Law

If a client named Selena has a bubble year of capital gain income and wishes to take advantage of the current market conditions described above, all prior to a potential change of administration and the concomitant tax laws, she may wish to consider a Grantor Charitable Lead Unitrust (CLUT) or a Grantor Charitable Lead Annuity Trust (CLAT).

A Grantor CLUT or Grantor CLAT is an income tax strategy that allows the grantor to take advantage of a sizeable charitable income tax deduction to mitigate the impact of capital gains taxes in the current year without having to suffer the permanent loss of the assets contributed to the trust.

In contrast, if Selena does not need a charitable income tax deduction but, rather, has an asset with currently depressed values that she wishes to transfer to her children without using up all of her unified credit, she may wish to establish a non-Grantor CLUT or a non-Grantor CLAT, both of which could help her accomplish her estate and income tax planning goals.

How does a Charitable Lead Trust Work?

A Charitable Lead Trust is a split interest gift, meaning that the gift is split into two types of interests—a lead interest and a remainder interest.

The lead part of a Grantor CLT indicates that the charity receives the trust payout first, while the remainder interest is comprised of the trust assets remaining at the end of the trust term to be distributed back to the non-charitable beneficiary—in this case, Selena, the Grantor.

If Selena chooses to establish a CLUT, this means that during the term of the CLUT, the trustee invests the CLUT's assets and pays a fixed percentage of the CLUT's current value, as revalued annually, to the charity.

If the CLUT's asset value goes up

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from one year to the next, its payout to the charity increases proportionately.

Likewise, if the CLUT's value goes down, the amount contributed to the charity also decreases.

Alternatively, Selena might choose to establish the trust as a CLAT, in which the trustee invests the CLAT's assets and the payout to the charity is a fixed annuity amount—for example, five percent per annum—which will not change during the term of the CLAT.

A CLUT/CLAT can operate either for a term of years, Selena's lifetime, or a combination thereof.

The Differences Between Grantor CLTs and Non-Grantor CLTs

In a Grantor Charitable Lead Trust scenario, Selena would establish the CLUT or the CLAT as a Grantor Trust, meaning that she could take a personal charitable income tax deduction for her contribution to the trust.

The Grantor CLUT or CLAT is usually constructed in such a manner as to zero out the Grantor's capital gains tax liability for that year and, depending upon her adjusted gross income and other factors, for up to five years after the year of the contribution.

Importantly, when establishing a Grantor Charitable Lead Trust, donors should be aware that the legal structure that allows a Grantor to claim the charitable tax deduction on her personal income tax return also requires that she be taxed on both the income earned in the trust and the capital gains realized in the trust each calendar year.

For federal income tax purposes, Selena would be treated as the owner of the trust because of certain powers that she, the Grantor, will retain over the trust.

Selena would be taxed on all the income of the trust even though she would never actually receive the income from the trust. This is why the Grantor Charitable Lead Trust structure is only recommended for those Grantors who have had an unusual and significant windfall of taxable income in a particular year.

In contrast, a Non-Grantor CLUT or CLAT is both an estate planning and lifetime gifting strategy that could allow Selena to transfer a significant portion of the trust assets to her children, including closely-held C-corp stock, and leverage both her estate and gift tax exemption amounts to do so in a tax-efficient manner.

Particularly for business owners or private equity holders, a Non-Grantor CLUT or CLAT is a useful wealth-transfer mechanism in low-interest-rate and depressed asset value environments because a low 7520 Rate—an interest rate that the Internal Revenue Service publishes monthly—makes it easier for the assets in the trust to appreciate above that rate.

The 7520 Rate is determinative in calculating the value of the prospective lead gift to the charity. The October 2020 7520 Rate is .4 percent, the lowest rate in the history of the country.

The lower the 7520 Rate—also called the hurdle rate—the lower the lead gift to the charity and the higher the potential gift to the trust's remainder beneficiaries, usually the Grantor's children.

Accordingly, the better the trust's investment performance, the greater the gift to Selena's children.

A Non-Grantor Charitable Lead Trust can help a donor leverage their estate and gift tax exemptions when contributing closely-held stock to the trust. When obtaining a qualified appraisal of the closely-held stock by a qualified appraiser, the value of the privately held C-corp stock may be eligible for substantial discounting upon the transfer of the stock to the trust, based on the stock's lack of marketability and lack of control—for transfer of a minority interest in the entity.

A Non-Grantor Charitable Lead Trust will pay taxes on both the income earned in the trust and the capital gains realized each calendar year,

but it will also be able to deduct each annuity or uni-trust payment made to the charity. Importantly, a Non-Grantor Charitable Lead Trust does not provide the Grantor with a charitable income tax deduction because the trust would be a stand-alone taxpayer.

In addition, in order to ensure that the assets contributed to the trust are completely removed from the Grantor's estate, the Non-Grantor Charitable Lead Trust must be drafted so that the Grantor does not retain any incidence of ownership in the trust.

Finally, the transfer of the closely-held C-corp stock to a Non-Grantor Trust necessitates a consideration of self-dealing, unrelated business income tax, excess business holdings and jeopardy investment issues, among others.

Carefully crafted, the non-Grantor CLUT or Non-Grantor CLAT would reduce for gift tax purposes the value of Selena's gift of the stock to her children; remove the value of the stock from her estate, thereby reducing the estate tax due upon her death; and allow Selena to preserve more of her unified credit amount.

Utilizing a Donor Advised Fund

Selena can also supercharge her Charitable Lead Trust—whether a Non-Grantor or a Grantor Charitable Lead Trust—by opening and naming a CCF Donor Advised Fund as the lead charitable income beneficiary of her trust.

An explanation of non-charitable wealth transfer strategies, such as grantor retained annuity trusts, intra-family loans, outright gifts to family members, and IRA to Roth conversions —combined with a cash charitable donation to take advantage of the 100 percent AGI limitation cap—are beyond the scope of this article.

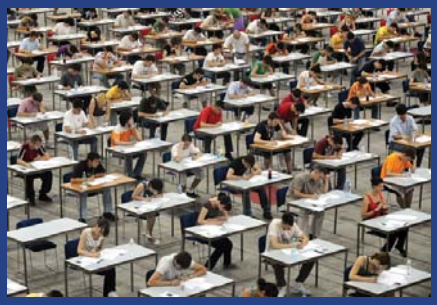
This article is not intended to be inclusive of all the rules and regulations that govern charitable lead trusts, and should not be considered legal or financial advice.

Our most sincere condolences to SFVBA President David Jones and his family on the recent death of David's father.

The SFVBA Valley Bar Network was established in 2016 under the chairmanship and loving guidance of Past President Alan Kassan. The VBN was created to enhance SFVBA membership with a dedicated, consistent networking program to promote new and ongoing professional relationships, and to facilitate collaboration and reciprocal business referrals. It has thrived in the ensuing years as many VBN members will attest. VBN members have not only benefited from valuable referrals, they have grown to appreciate the friendships and business relationships that have developed over the course of each year. 2020-2021 will very likely present a year of unprecedented challenges for all. To assist our members, as we all navigate this uncharted territory, the SFVBA has reduced the VBN membership rates to make our outstanding VBN program even more accessible. With newly reduced VBN annual dues to only $200, SFVBA attorneys can now avail themselves of all that VBN has to offer and for $300 SFVBA non-attorney professionals may do the same. During COVID-19, the VBN meets via Zoom on a monthly basis and members enjoy a collegial get together with special guests often on hand to educate and entertain. Don't miss out on this opportunity to enrich your professional and personal life, there couldn't be a better or more urgent time. Sign up today!

The Reape-Rickett Law Firm has announced that Rand E. Pinsky, Esq., Of Counsel, has joined the firm at its office in Valencia. Pinsky received his J.D. from Southwestern University School of Law in 1974 and established the Law Office of Rand E. Pinsky. As a sole practitioner, he focused on family law matters with an emphasis on custody, parenting agreements, support, mediation, and real property title issues. At Reape-Rickett, he will continue his focus on mediation services, enhancing the firm's Alternative Dispute Resolution options for families seeking solutions outside of the courtroom.

According to the 2020 Law School Student Debt Survey Report published by the American Bar Association's Young Lawyers Division, new and young attorneys are facing "substantial and widespread levels of student debt and its effects." Of the 1,000 recent law school graduates surveyed for the report, more than 75 percent of respondents had at least $100,000 in student loans at graduation; more than half had more than $150,000 in student loans; and more than 1 in 4 has $200,000 or more in student loans. The survey data also revealed that all law school graduates are impacted by student loan debt, with few exceptions; for many, law school debt grows after graduation; while student loans deeply impact their personal and social lives and professional goals.



Criminal Defense and Dependency Attorney and SFVBA member, Asya Ovsepyan and her husband welcomed their second daughter Emily Avery, born in Tarzana on September 6, 2020. Emily was born 7 lbs and 19 1/2 inches at birth. According to Asya, "Big sister Jaiden has happily surrendered her reign as our only child."

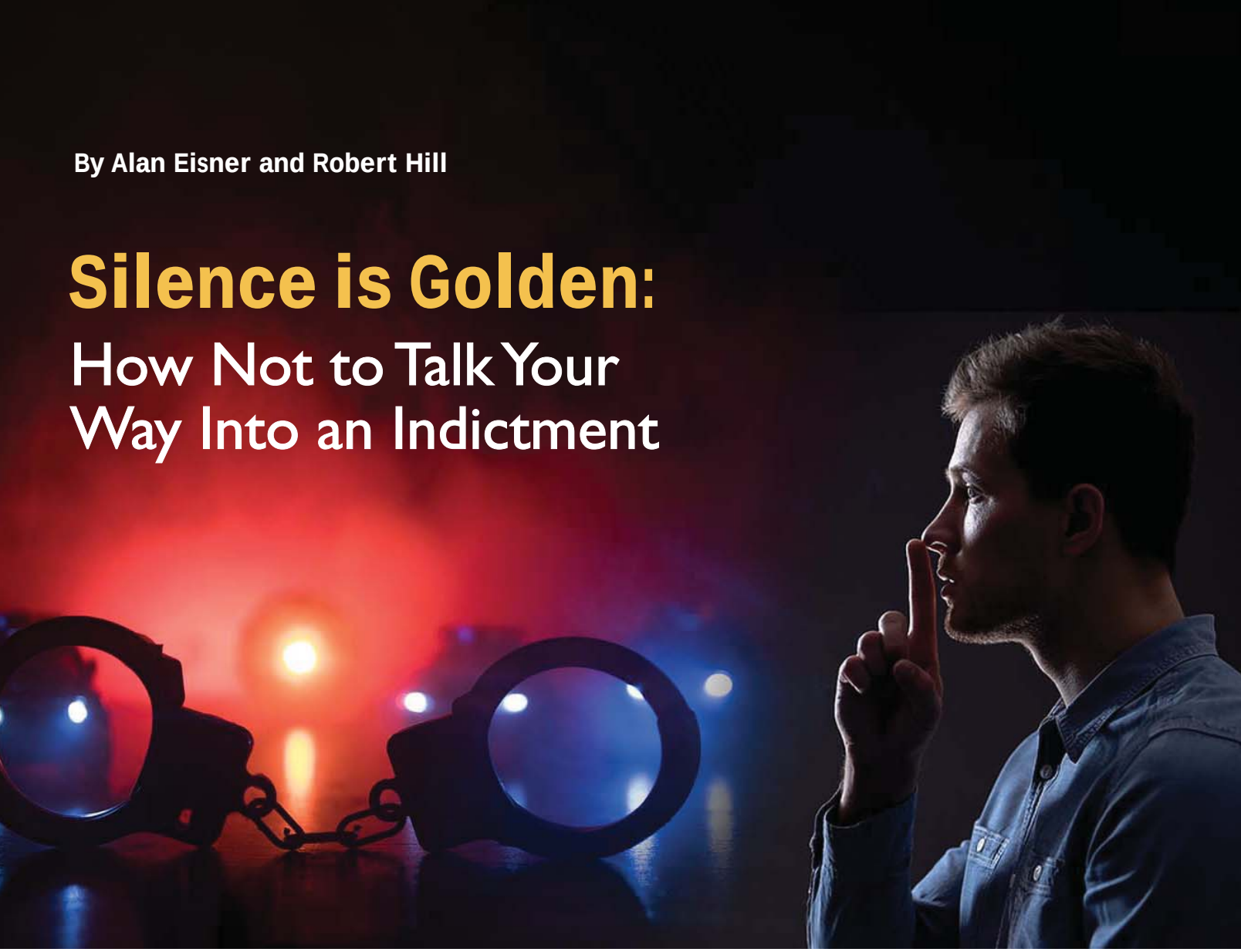
The Los Angeles Superior Court has issued a revised mandatory face mask order that prohibits the use of face masks with valves in all Los Angeles County courthouses. The new General Order also requires that face masks be worn beneath face shields except as required by a physician. Children under the age of two are exempt from the Order. Persons with a medical condition, mental health condition, or disability that precludes them from wearing a face mask, are exempt from the Order. For complete details of the new face mask order, please go to

https://sfvba.org/wp-content/uploads/2020/10/20-NTA_GO_Face-Masks_Revised-Order.pdf

By Alan Eisner and Robert Hill

Silence is Golden:

How Not to Talk Your Way Into an Indictment



AS A CRIMINAL DEFENSE ATTORNEY, IT IS almost a cliché that the most prudent advice an attorney can give to a client is to remain silent.

In other words, if a client does not discuss their case, especially with government investigators or prosecutors, the client cannot make incriminating statements and thereby assist the government in securing a conviction.

As with all rules of thumb, however, this advice is not absolute as, in some scenarios, a proffer session will be held in which criminal defense attorneys, particularly in federal practice, advise their clients to sit down with government agents and prosecutors to discuss facts surrounding a criminal investigation.

As several well-publicized cases have shown, however, while agreeing to participate in a proffer session may be beneficial to the client's interests, such participation is far from risk-free.

Proffer Sessions

By definition, a proffer session is an opportunity to speak with law enforcement about an individual's knowledge of a crime, with the supposed assurance that the individual's words will not be used against them in a criminal proceeding.

This assurance is often reduced to writing in a proffer letter, which specifically lays out the government's obligations.

From law enforcement's perspective, a proffer session is an important investigatory tool.

From the defense attorney's client's perspective, though, it provides an opportunity to either clear the client's name or, if an indictment is a foregone conclusion, gain valuable consideration such as cooperation credits in sentencing or even complete immunity.

Why would a client facing indictment, much less one who has already been indicted, agree to a proffer session?

A major factor is the substantial discretion enjoyed by prosecutors in choosing which charges to file, offering plea deals that are typically accepted by courts. In the case of federal prosecutions, offer cooperation credits at the time of sentencing.

On the other side of the table, the government's motives for agreeing to a proffer are straightforward. The government is hoping to gain information it does not currently possess.

This could be information that implicates unindicted co-conspirators or co-defendants in additional conduct, which the government previously possessed insufficient evidence.

Before agreeing to a proffer session, the competent criminal defense attorney must determine how the government looks at the client to establish if the client is a pure witness, a pure suspect, or some combination of the two, and, regardless of the client's status in the government's investigation, what level of safeguards can the lawyer obtain for the client.

It is important to remember that under the Fifth Amendment to the U.S. Constitution, a grant of immunity is required before a witness can be compelled to testify either at the grand jury or at trial over a witness' assertion of the right against self-incrimination.

'Queen for a Day Immunity'

The immunity granted in a proffer session—often called Queen for a Day Immunity—is less extensive. The proffering client will generally be immunized to the extent that their statements during the proffer session cannot be introduced by the government in its case in chief against the client.

This, however, leaves many pitfalls for the client as the proffer statements can still be used by the government on cross-examination should the client later testify inconsistently.

More importantly, perhaps, proffer session immunity does not usually provide derivative use immunity, meaning the government can use the proffer statements to develop other investigative leads and ultimately use that derivative information to prosecute the client.

For these reasons, in many cases, a safer procedure is to first agree to a reverse proffer, during which the government does the talking and puts its evidence on the table for the client and lawyer to review before the decision to cooperate is made.

Several well-publicized case studies illustrate the potentially disastrous consequences of sharing information during a government investigation, even in cases where the lawyer and client reasonably believe that the client will not make incriminating statements.

Martha Stewart et al.

In 2001, noted lifestyle guru Martha Stewart was friends with Sam Waksal, founder of ImClone, a New York-based biopharmaceutical company that had developed Erbitux, a potential cancer-curing drug.

At the time, an application was pending with the FDA, but, shortly before news of the FDA's rejection of Erbitux became public, Stewart sold her shares in ImClone, thereby avoiding a $51,000 loss.

Stewart and Waksal shared the same stockbroker, Peter Bocanovic. The government's investigation into this potential insider trade revealed that Bocanovic's assistant had called Stewart's assistant when he got word that Waksal was selling his stock in ImClone.

However, a federal judge ultimately dismissed the securities fraud charges against Stewart prior to jury deliberations for insufficient evidence. She was sentenced to five months of federal prison time, five months of house arrest and two years of probation.

Why? Her only crime was obstruction of justice by making false statements to government investigators. Put another way, had Stewart simply remained silent rather than choosing to speak to the government, and lying, she could not have been convicted of any crime.

Former Assistant for National Security Affairs to Vice President Dick Chaney, Scooter Libby, was indicted on five counts by a federal grand jury during the investigation of the leak of the true identity of CIA officer Valerie Plame.

Libby was convicted of four counts—one count of obstruction of justice, two counts of perjury, and one count of making false statements.

> "While agreeing to participate in a proffer session may be beneficial to the client's interests, such participation is far from risk-free."

The case was based on false and misleading statements Libby had made to FBI agents and the grand jury investigating the leak of Plame's identity. After a failed appeal, President George Bush commuted Libby's sentence of 30 months in prison, leaving the other parts of his sentence intact.

As a consequence of his conviction, Libby's law license was suspended until it was reinstated in 2016. President Donald Trump granted Libby a full pardon in 2018.

As with Stewart, the only provable crime against Libby was the making of false statements. Had he simply asserted his Fifth Amendment right by refusing to speak with the FBI, and forcing the government to immunize him to compel his grand jury testimony, he likely would have avoided conviction.

Disgraced former Los Angeles County Sheriff Lee Baca was initially brought to trial on charges of obstruction of justice and conspiracy to obstruct justice.

The jury returned an 11 to 1 vote to acquit, and a federal judge declared a mistrial. On retrial, the government strategically added a charge of false statements, of which Baca was ultimately convicted and sentenced to 36 months in prison.

When he was interviewed by the FBI, Baca had denied knowledge of the Sheriff's plot to impede a federal investigation into corruption and civil rights abuses at Los Angeles county jail facilities.

In other words, the government could not convince a jury that Baca had himself obstructed justice or conspired with others to do so, but it could prove that he lied to the FBI about the state of his knowledge.

The recent high-profile litigation surrounding former National Security Advisor Michael Flynn perhaps illustrates best the pitfalls of speaking with the government, even when the client believes he or she is merely a witness.

Flynn was interviewed by the FBI shortly after beginning his tenure regarding the bureau's investigation into potential 2016 election interference.

The record is disputed as to whether the FBI intentionally led Flynn into a perjury trap; however, what followed from Flynn's conversation with investigators is clear.

During the meeting, Flynn had falsely stated that he did not ask the Ambassador of Russia to refrain from escalating the situation in response to sanctions that the U.S. had imposed against Russia. He also falsely stated that he did not remember a follow-up conversation where the Ambassador stated that Moscow had chosen to moderate its response to those sanctions as a result of Flynn's request.

In addition, he made false statements about calls he made to Russia and other countries regarding a United Nations Security Council resolution submitted by Egypt regarding Israeli settlements.

Finally, Flynn made false statements in his Foreign Agent's Registration Act (FARA) filings, on behalf of his company—the Flynn Intel Group, Inc.—regarding his contacts with Turkey and other foreign governments.

Flynn's guilty plea has been subject to voluminous litigation. His new counsel moved to withdraw his guilty plea, partly on the basis that the prosecutors had improperly withheld evidence from him that should have been produced during the plea discussions, including the FBI memorandum of interview.

The Justice Department has since moved to dismiss the case. The trial judge appointed his own counsel to litigate

the trial judge's right to decide whether he has the authority to decide to dismiss the indictment, or whether he must agree with the Justice Department's decision to dismiss.

A three-judge appellate panel held that the judge did not have the authority to decline to dismiss, but an en banc D.C. Circuit Court of Appeals held that he did.

The case is now back before the trial judge who is tasked with evaluating the motives of the Justice Department in their decision to dismiss the indictment.

Silence is Golden

Whatever an observer's view of the political wranglings surrounding Flynn's prosecution, the lesson for defense counsel is clear: Had Flynn remained silent, there would have been nothing to charge him with or prosecute him for.

The conduct would not likely have constituted a crime, but for the lies to investigators. Flynn considered himself a witness, rather than a target, and believed the investigators questioning him were, so to speak, batting for the same team.

What is the takeaway from these case studies for the criminal defense practitioner?

Proffer sessions remain a valuable tool for securing cooperation credit at sentencing or avoiding the filing of more serious charges. In the case of a client who is clearly guilty and facing a prosecutorial agency in possession of overwhelming evidence of that guilt, proffer may be the best, or even the only, option for mitigating the consequences to the client.

In many other cases however, the state of the government's evidence is more ambiguous.

Such a case calls for competent counsel to balance the potential benefits of proffer with the very real possibility that the client, by being less than completely truthful, will talk his or her way into an indictment which might otherwise have been avoided completely.

Silence, indeed, can often be golden.

Alan Eisner is a Certified Specialist in Criminal Law, Certified by the State Bar of California, and is a Partner in the law firm Eisner Gorin, LLP. He can be reached at alan@egattorneys.com.
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DRIVEN BY THE REALITIES of the ongoing COVID-19 pandemic, a lot of us in the legal community are searching for different avenues to attract new business.

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> "Joining the SFVBA's Attorney Referral Service should be at the top of the list of possibilities."

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For more information about joining the ARS, contact SFVBA Associate Director of Public Services Miguel Villatoro at (818) 227-0498 or miguel@sfvba.org.

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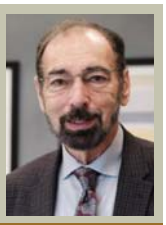

michael@kaplanforensices.com

AT THE OCTOBER 21 VCLF board meeting, we were joined by three champions for building communities that are humane and caring for all their residents.

We at the Valley Community Legal Foundation are exploring the various ways that we can support these efforts to better our community.

I am a member of Congregation Or Ami in Calabasas and have spent some time traveling cross-country filming and interviewing people experiencing homelessness.

At a recent meeting, I had the opportunity to introduce Or Ami Rabbi Julia Weisz, Pastor Kathy Huck and community leader Steve Keleman, who presented the challenges facing the Valley's unhoused community and how our community and governmental agencies are working together to facilitate the transitioning of unhoused individuals to both temporary and permanent residences.

Rabbi Weisz leads the social justice committee called Sukkat Shalom, literally "the dwelling of peace," while Pastor Huck is the founder and Executive Director of About My Father's Business Homeless Outreach Ministry (AMFB), and Steve Keleman actively participates in both organizations.

At the meeting, they shared how they, together with the members of their respective organizations, work tirelessly to advocate for dignity and humanity of persons experiencing homelessness.

The AFMB primarily serves Los Angeles City Council Districts 3 and 12, which include the Valley communities of Chatsworth, Canoga Park, West Hills and Woodland Hills with volunteers who provide for the unhoused's immediate needs with loving compassion—food and water, tents, sleeping bags, seasonal clothing, and personal hygiene and sanitation supplies.

While risking COVID-19, it is critical for the unhoused to learn how to protect themselves and others in the community. The AMFB addresses those needs by providing personal protective equipment, information, and resources.

Rabbi Weisz underscored the critical need to solve the problem of housing at its source and transition these individuals from their tents and blankets and their temporary existences, to permanent supportive housing with social work services and job training.

That, she shared, would diminish or perhaps even eliminate many of the resulting challenges of living on the streets.

Examples of current projects including holding drives within the Valley community to collect and distribute the basic necessities of life, funding and locating shower/bath/laundry units, working with state and local representatives and community agencies to find properties for constructing temporary or permanent housing.

For example, as an interim step, a Sukkat Shalom team member—a real estate developer—recently built yurt-like popup structures, that are more sturdy, protective, safe and secure than tents or cardboard boxes. Six are now housing individuals who, previously, had been living on the streets.

It is important to acknowledge, however, that any permanent housing needs to be integrated into the greater community, while the planning process must involve input from and coordination with the members of the already-established community.

Steve Keleman summed up our combined efforts when he said that there is a "hole that needs to be filled…a human need to be satisfied."

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