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A Publication of the San Fernando Valley Bar Association

Social Media and Common Ethical Problems

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One Law Firm's Story

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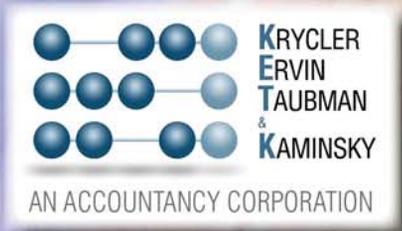
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A Positive Glimmer

THE YEAR-END HOLIDAYS—a time when many of us look outside of ourselves to help and support the communities around us that are in need.

Whether it be spending a day helping at a soup kitchen, rounding up gifts for a toy drive, or simply helping families struggling with the day-to-day, each of us can find a way to help.

Through those efforts comes the gratification of helping others, and an appreciation for what we cherish in our own lives that allows us to help those with often desperate needs in special ways.

As you may recognize as a theme in my past columns, this year has proven especially difficult as the COVID-19 pandemic has impacted the health, both physical and emotional, and economic well-being of our communities.

While a vaccine—a potential end to the pandemic—and an end to these uniquely trying times may well be on the horizon, as we drift into holiday season 2020, we need to remember that people are hurting and in need, truly more than any time in our collective memory.

The San Fernando Valley Bar Association has a long history of supporting the local community by providing pro bono legal advice in times of crisis—the 1994 Northridge Earthquake, the Aliso Canyon natural gas leak, and most recently, the devastating fires that cost so much in terms of lives lost and property destroyed.

Our Bar is very proud to work with its charitable arm, the Valley Community Legal Foundation (VCLF), which, headed

by dedicated lawyers and bench officers, is able to extend its work deep into local communities by promoting and supporting education in the law, presenting scholarships to qualified students interested in entering the legal profession, offering access to justice, and assisting families in conflict and victims of domestic violence with their legal needs.

And, of course, our flagship program, Blanket the Homeless, which is celebrating its 25th anniversary this year.



The giving spirit of our Bar is just one of the things that sets this organization—now approaching its centennial anniversary—apart.”

I can count as some of my very favorite memories the opportunity to help with the distribution of those much-needed blankets to the homeless.

I recall the hours working with community partners such as LA Family Housing and Meet Each Need with Dignity (MEND), a food bank offering support to the most vulnerable members of our community, and is considered one of the most comprehensive poverty relief agencies in the greater Valley.

I am a proud member of the MEND Board of Trustees and have seen, firsthand, the work the organization does

DAVID G. JONES
SFVBA President



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in distributing a vast amount of food to those in need during these difficult times.

Their partnership with the SFVBA has been a long and productive one, and I strongly encourage every member of our Bar to look into these organizations, and others, and seek out any and all opportunities to help support their worthy work in our Valley community.

Finally, the Bar's Women Lawyers Section recently conducted a very successful donation drive in support of Haven Hills, the Canoga Park domestic abuse refuge center, which offers victims shelter, crisis intervention, counseling, advocacy, and activities in support of improved economic opportunities.

The drive resulted in 25-plus volunteers providing donations of both time and funds to the facility, which opened its doors in 1977.

As you can see, your Bar has, is, and will always be active in our Valley community helping those in need, when they need it most. That serves as a testament to the year-round 'holiday spirit' of the SFVBA's members and its leaders.

Even if we remain homebound and shelter this holiday season, we can still keep those in need in our hearts, and support those amazing organizations with our donations and our time.

The giving spirit of our Bar is just one of the things that sets this organization—now approaching its centennial anniversary—apart.

Whatever these challenging times and circumstances may come, a positive glimmer will help us through. Happy Holidays! 

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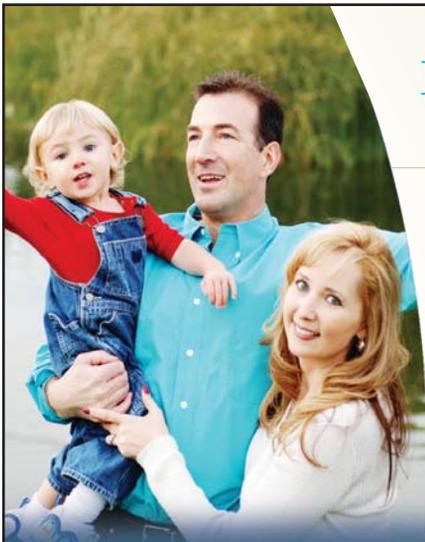
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Long-Standing Relationships

MANY, MANY YEARS AGO, a very wise man told me, "Everybody, absolutely everybody, has a story."

The wise man was my dad sharing the distilled essence of an event-filled life that took him from poverty in pre-Depression Fall River, Massachusetts, though World War II as a combat medic, a post-war move to the San Fernando valley, raising a family here, and some 42 years as a bartender.

"You can learn a lot just by listening to people; why they are the way they are and how what they do molds them."

He had quite a story to tell and, this month, we have the opportunity to listen for a bit to attorney Barry Pearlman, who, 36 years ago, founded the Encino-based law firm of Pearlman, Brown & Wax, which is firmly planted in the San Fernando Valley. A genuine Valley native, the firm's offices are three miles from his home and four miles away from the hospital where he was born.

He founded the firm with a loan from his parents and the dream of helping business owners navigate the rocks and shoals of California's complicated workers' compensation law.

It was seeing first-hand the issues his father and two brothers had to deal with while running a small family business that fueled his decision in law school to shift his focus from criminal law to workers' comp. "I saw a lot of the struggles they went through and I thought it would be a good way to assist them and others finding themselves in the same situations."

Recognized for his acumen in the field, Pearlman has served twice

as president of the California Workers' Compensation Defense Attorneys' Association. In 2008, he became one of only eight individuals since 1913 to be honored with the presentation of the organization's Warren L. Hanna Lifetime Achievement Award "for his contributions to the profession and the organization."



Everybody, absolutely everybody, has a story."

The firm, he told me, is based on relationships. "We have long-standing relationships with our clients, some for as long as 30 years and continue to this day," he says, while he wants, now and in the future, the attorneys

MICHAEL D. WHITE
Communications
Manager



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and support staff at the eight PB&W offices that dot the state to see the firm as "the last place they ever work."

Special recognition goes to SFVBA Past Presidents Christine C. Lyden and Mark S. Blackman for their commitment to the Blanket the Homeless program, which is celebrating its 25th year of dedicated service to the Valley's homeless.

And thanks to attorney Kate Wallman of Lewitt Hackman for her outstanding MCLE on Social Media and Common Ethical Problems and the other contributors to this 'end of the year' issue of *Valley Lawyer*.

Merry Christmas, Happy Hannukah, happy holidays and sincere wishes for a Happy New Year to all! 🪄



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3		4	5	6 WEBINAR All Members Professional Responsibility and Technology Sponsored by  12:00 NOON This seminar will cover attorney professional responsibility obligations around the use of technology by surveying key ABA rules and state regulations. Free to members. (1 MCLE Hour of Legal Ethics)	7 ZOOM MEETING Membership and Marketing Committee 6:00 PM	8	9
10	11	12 WEBINAR Business Law and Probate and Estate Planning Sections Unlawful Detainers 12:00 NOON David Almaraz addresses the group. (1 MCLE Hour)	13	14	15	16	
17	18	 19 WEBINAR Taxation Law Section Litigation Tax Cases in the Federal Court 12:00 NOON Attorney, CPA & Certified Tax Law Specialist Michael Blue will present a primer on litigating tax cases in the federal courts. (1 MCLE Hour)	20	21	22	23	
24	25	26 WEBINAR All Section/New Lawyers How to Start a Law Practice 5:30 PM Morvareed Salepour (transactional), Sona Tatiyants (estate planning), Zein Obagi (litigation/employment) and Sharen Ghata (criminal law/personal injury) will discuss starting and/or reinvigorating your law firm. Participants are welcome to network before the webinar. (1 MCLE Hour)	27 WEBINAR Family Law Section New Laws 5:30 PM Attorneys Lionel Levin and Robert Schibel will review the latest that every family law attorney should know. (1 MCLE Hour)	28	29	30	
31	SFVBA COVID-19 UPDATES sfvba.org/covid-19-corona-virus-updates/						



LINKEDIN. AVVO. FACEBOOK. TWITTER. THESE are just a few of the many social networking websites in today's digital world that provide professionals with a variety of new avenues for communication, networking and marketing.

Today, attorneys have the unprecedented ability to grow their presence in the legal field, make a name for themselves in the blogosphere, and market their practices to potential clients as social media traverses old barriers such as time and distance and allows new relationships to be built and fostered.

Though the advantages of social media and the digital age are seemingly limitless, this new world also comes with a minefield of hazards for unprepared attorneys, while the ever-changing digital landscape raises ethical questions attorneys must address before reaping its benefits.

For example, how can attorneys make sure their websites and blog posts comply with their state's advertising requirements? How should they monitor their online presence so they do not disclose privileged client information? How do they avoid the unauthorized practice of law when blog posts are sent across the world? Or, how can attorneys avoid inadvertent attorney-client relationships when they answer postings in online chat groups?

This article discusses these social media quandaries and tries to provide some guidance for attorneys to monitor their presence in the social media sphere.

Legal Advertising

The California Rules of Professional Conduct govern attorney and law firm content published on the internet and attorney or law firm advertising or marketing websites. These rules state the general requirements all lawyers and law firms must abide by in advertising and solicitation.

The rules for websites and advertisements maintained by California attorneys were revised on November 1, 2018, when the state's new Rules of Professional Conduct became effective.¹

The California State Bar's regulation of attorney advertisements and solicitation, previously under Rule 1-400, were reorganized under Rules 7.1 through 7.5.²

However, the fundamental principle of Rule 1-400 remain unchanged. Both Rule 1-400 and new Rule 7 focus on ensuring that attorney advertisements or solicitations are truthful, not misleading, clearly identifiable as advertisements, and ensure the advertiser's accountability.

The Rules also prohibit lawyers from making any false or misleading communication, regardless of the medium.

This prohibition includes statements which are simply untrue, as well as statements which may be intentionally deceptive or misleading due to omitted facts.³

In 2012, the State Bar's Standing Committee on Professional Responsibility and Conduct issued a formal ethics opinion with guidelines and ethical restrictions on California attorneys when using social media advertising.⁴

The opinion states that Facebook and other social media advertising is subject to the same California Bar Rules as traditional advertising and those rules prohibit false and misleading advertising.⁵

In California, "material posted by an attorney on a social media website will be subject to professional responsibility rules and standards governing attorney advertising if that material constitutes a 'communication' within the meaning of Rule 1-400 (Advertising and Solicitation) of the Rules of Professional Conduct of the State Bar of California."⁶

The same is true under new Rule 7 of the Rules of Professional Conduct.⁷

A communication is defined as "any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present or prospective client."⁸

Further, a "communication or solicitation shall not contain any untrue statement or any matter, or present or arrange any matter in a manner or format which is false, deceptive or which tends to confuse, deceive, or mislead the public; omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, nor misleading to the public; fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be, that is in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct."⁹

The State Bar has considered several hypothetical online postings. For example:

- 1 "Case finally over. Unanimous verdict! Celebrating tonight."
- 2 "Another great victory in court today! My client is delighted. Who wants to be next?"
- 3 "Won a million-dollar verdict. Tell your friends and check out my website."



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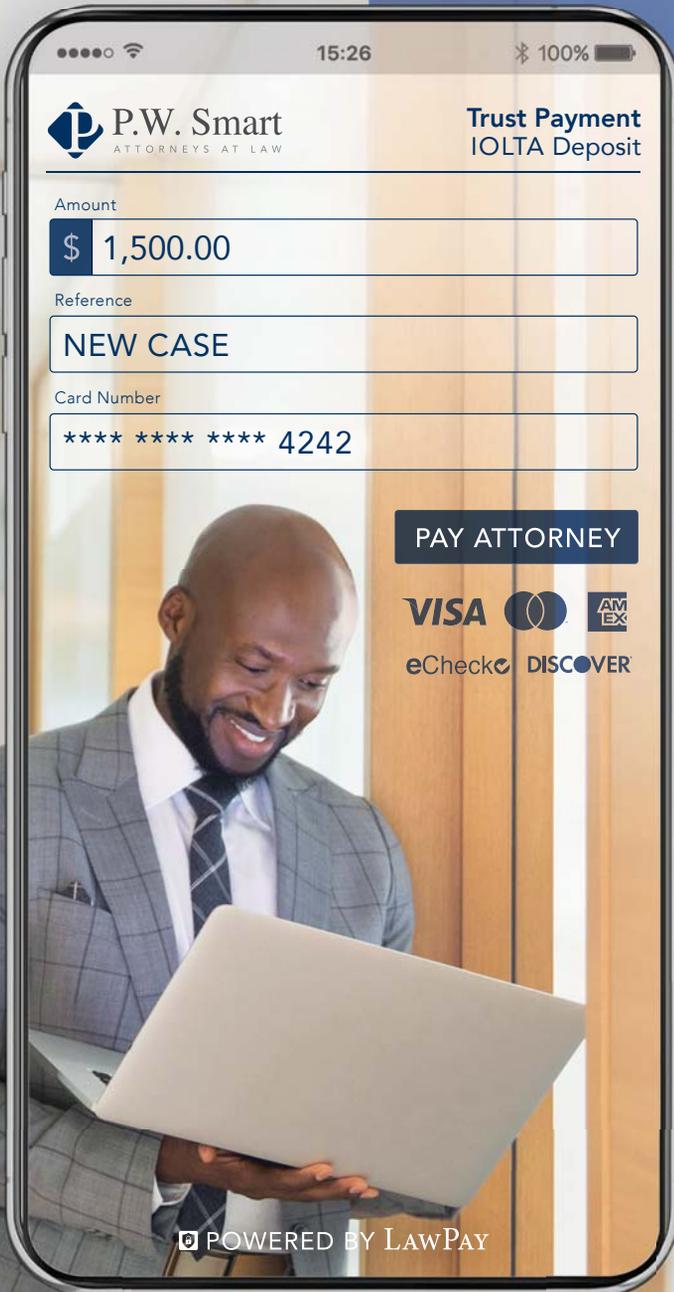
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- 4 “Won another personal injury case. Call me for a free consultation.”
- 5 “Just published an article on wage and hour breaks. Let me know if you would like a copy.”¹⁰

In an opinion, the Bar found that examples one and five were not communications under Rule 1-400(a) because they did not contain a message or offer “concerning the availability for professional employment.”¹¹

Therefore, those postings were not advertising and did not have to comply with the standards of Rule 1-400(E).

Examples two, three, and four however, contained explicit language suggesting the availability for professional employment. As a result, those posts are seen as communications, subject to Rule 1-400’s standards for attorney advertising.¹²

The Bar found several problems with examples two, three, and four under California’s rules for attorney advertising.

Example two violates the restrictions on client testimonials. A California attorney cannot publish communications that contain testimonials for that attorney unless the communication also contains an express disclaimer, while all three examples fail to explicitly state that they are advertisements.^{13 14}

Finally, example two offers an improper guarantee or prediction of winning.¹⁵

Formal Opinion 2019-199

In 2019, the State Bar Standing Committee on Professional Responsibility and Conduct issued Formal Opinion 2019-199, which details an attorney’s obligations concerning third-party website profiles advertising on the attorney’s behalf and concludes that the rules governing attorney advertising apply to an individual who adopts any such profile.^{16 17}

All media attorneys use to promote their professional legal services are regulated by Rules 7.1 and 7.2 of the California Rules of Professional Conduct (RPC) and are subject to the limitations laid out in the Business and Professions Code, Sections 6157.2 through 6258.3.¹⁸

Attorneys licensed to practice in California should be aware of the advertising rules when posting anything online—simply, if an attorney’s post meets the definition of a communication, the attorney must comply with California’s rules regarding advertising.

For example, Business and Professions Code section 6157.1 prohibits any false, misleading or deceptive statement in an advertisement, while section 6157.2 prohibits the

inclusion of any “guarantee or warranty regarding the outcome of a legal matter.”¹⁹

New Rules 7.1 through 7.5 of the RPC lay out even more detailed requirements. Rule 7 explains that even statements which are true, but misleading, may violate an attorney’s ethical obligations.²⁰

Comment 3 to new Rule 7.1 notes that a truthful statement may be misleading if it “omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading,” or if it creates a “substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.”²¹

Similarly, Comment 4 to new Rule 7.1 explains that even a truthful statement regarding the lawyer’s achievements on behalf of clients or former clients, or a testimonial or

endorsement, may be misleading and thus a violation, if “presented so as to lead a reasonable person to form an unjustified expectation” that they could obtain the same results.²²

Most attorney advertisements in California must identify at least one attorney, by name, who is responsible for placing the advertisement even if a firm is identified.

Under Rule 7.2(c), both the name and address of at least one responsible attorney must be identified.²³



Though the advantages of social media and the digital age are seemingly limitless, this new world also comes with a minefield of hazards for unprepared attorneys.”

Confidential Information

One of an attorney’s most sacrosanct duties to a client is confidentiality. The ease of sharing information through social media, and the inherent informality of social media websites, however, increases the danger of breaching that trust.

Disclosure of confidential client information can occur in a variety of ways.

Though websites, blog posts, LinkedIn and Facebook status updates, and Tweets all allow instant publication and dissemination of information, the informal setting of a social media website does not excuse an attorney’s improper disclosure of confidential information.

Furthermore, understanding how these websites work to assess their security is critical for monitoring ethical compliance. The State Bar has stated that if an attorney “lacks the necessary competence to assess the security of the technology, he or she must seek additional information or consulted with someone who possesses the necessary knowledge.”²⁴

California’s broad duty of confidentiality is found in § 6068(e)(1) of the Business and Professions Code, and in the California Rules of Professional Conduct, Rule 1.6, which requires attorneys practicing in the state to “maintain inviolate

the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”²⁵

The sole exception permits revealing confidential information relating to the representation of a client to prevent a criminal act likely to result in death or substantial bodily harm.²⁶

In addition to not intentionally disclosing confidential client information, a lawyer’s duty of competence under California Rule 1.6 requires that reasonable precautions be taken to safeguard against unintended disclosure.²⁷

Ethical Risks

The Los Angeles County Bar Association’s Professional and Ethics Committee published an opinion on the ethical risks in social media. It noted that online communications present particular risks for attorneys and for protection of confidential client information.^{28 29}

The Association discussed an example of an attorney at a conference with a client during which the client revealed facts that were detrimental to the client or the client’s case.³⁰

After the conference, the attorney disclosed those facts online when discussing a client whose name the attorney did not reveal.

The Bar Association noted that although the attorney might believe the facts could not be associated with the particular client, an opposing party or third person might be able to infer the client’s identity from the context of the disclosure.³¹

The Bar also found that the disclosure by the attorney would likely not constitute waiver of the privilege, but that the opposing party could use the underlying facts that were disclosed during the attorney-client communication to the client’s detriment or embarrassment.³²

Attorneys must protect client information diligently and carefully. Posting seemingly casual information about an attorney’s day or meeting with a client may have greater consequences than an attorney can imagine.

Further, attorneys should be aware that the duty of confidentiality does not end with termination of a professional relationship and even may apply even when the facts are already part of the public record.³³

In addition, an attorney must always comply with the duties regarding confidential client information and an attorney’s online postings or other activities do nothing to negate this responsibility.

Ultimately, using client information in social media is best done very sparingly with extreme caution, or, perhaps even better, not at all.

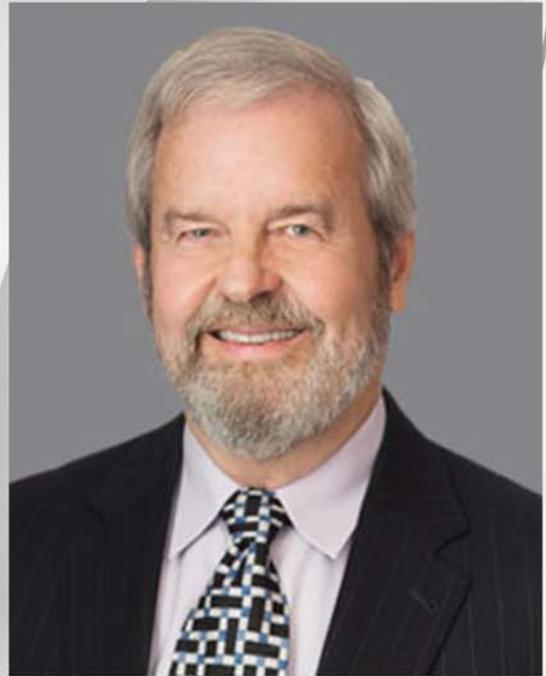
Unauthorized Practice of Law

A basic tenet of legal practice is that attorneys can practice law only in jurisdictions where they are licensed, with a few exceptions. Social media, however, knows no geographic boundaries as people can access an attorney blog or website from anywhere in the world.

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While this ease of access is one of the most powerful benefits of the internet and social media, it poses ethical problems regarding the unauthorized practice of law.

In California, unauthorized practice is more than a disciplinary violation; it is also a misdemeanor, while a physical presence in the non-licensed jurisdiction is not required to trigger a violation.^{34 35}

Facebook comments, interactive Tweets, and blogs with comment features are examples of situations where attorneys might find themselves interacting with non-lawyers, inadvertently and unethically providing legal advice to someone who does not live in the state where they are licensed to practice.

The State Bar has recommended its attorneys add the following content to their websites to avoid any confusion that they are advertising in other jurisdictions:

- An explanation of where the attorney is licensed to practice law,
- A description of where the attorney maintains law offices and actually practices law,
- An explanation of any limitation on the courts in which the attorney is willing to appear; and,

- A statement that the attorney does not seek to represent anyone based solely on a visit to the attorney's website.³⁶

Also, when posting online, attorneys should avoid answering specific legal questions and should instead focus on providing generalized information.³⁷

Attorneys can also turn off comments on a posting or not respond to a comment—two simple, but effective, techniques that can help prevent interactive communications that could lead to an unintended attorney/client relationship.

Inadvertent Attorney/Client Relationships

There is a serious risk of inadvertently forming attorney-client relationships through online actions.

The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion 2003-161 examined such a circumstance—a communication made in a non-office setting by a person seeking legal advice may be entitled to protection as a confidential communication when the attorney makes no agreement of confidentiality and does not accept the case.

The Bar concluded that the communication may be entitled to protection under two circumstances—first, if an attorney-client relationship is created by the contact or, second, the attorney's words or actions induce in the speaker a reasonable belief that the speaker is consulting the attorney, in confidence, in his professional capacity to retain the attorney or to obtain legal services or advice, even if no attorney-client relationship is formed.³⁸

To avoid creating an inadvertent attorney/client relationship, attorneys must consider whether information they post on a social media website would create the reasonable belief by a website visitor that they are consulting an attorney to obtain legal advice or services.

It is an attorney's responsibility to make clear to the website visitor that an attorney/client relationship either has or has not been created.³⁹

When using social media, attorneys should always speak in generalized terms and post explicit disclaimers stating that any interaction does not automatically form an attorney/client relationship.⁴⁰

This is in order to inform the user and ultimately rebut any reasonable belief that one exists.⁴¹

Disclaimers are, of course, not bullet-proof, but it is better to have one than not have one at all. Compounding the risk that attorneys could inadvertently create an attorney/client relationship—if they provide legal advice in a jurisdiction where they are not licensed—they could be considered as engaging in the unauthorized practice of law.

Conclusion

The introduction of social media to the practice of law

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provides attorneys with increased opportunities to market services and advance their professional personas.

But it is critical to remember that technologically advanced online communication also creates the possible risk of ethical mishaps.

Attorneys must be aware of their existing ethical obligations and apply those obligations to new situations that may arise from utilizing the latest advances in social media. 

¹ Cal. State Bar Rules of Prof'l Conduct ("Cal. Rules").

² *Id.* at R. 7.1 to 7.5.

³ *Id.*

⁴ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2012-186 (2012).

⁵ *Id.*; see also Cal. Bus. & Prof. Code §§ 6157-6159.2; Cal. Rules R. 1-4100(A).

⁶ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2012-186 (2012).

⁷ Cal. Rules R. 7.1.

⁸ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2012-186 (2012).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Standard 2 in former Rule 1-400 notes that a communication which contains a testimonial or endorsement of the lawyer must contain an express disclaimer that such communication is not a guarantee or prediction of results, otherwise it is a presumed violation. Comment 4 to new Rule 7.1 explains that even a truthful statement regarding the lawyer's achievements on behalf of clients or former clients may be misleading and therefore a violation, if "presented so as to lead a reasonable person to form an unjustified expectation" that they could obtain the same results. Although the comments to new 7.2 do not require including a disclaimer, the comments note that a disclaimer "often avoids creating unjustified expectations." Cal. Rules R. 7.2.

¹⁴ Cal. Rules R. 1-400(E), Std. 5; Cal. Rules R. 7.3(c).

¹⁵ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2012-186 (2012); Cal. Rules R. 1-400(E), Std. 1.; Cal. Rules R. 7.1, Comment 2; Cal. Bus. & Prof. Code § 6157.2.

¹⁶ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2019-199 (2019).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Cal. Bus. & Prof. Code, §§ 6157.1 and 6157.2; see also Cal. Rules R. 1-400, Std. 1.4.

²⁰ Cal. Rules R. 7.1.

²¹ *Id.* at Comment 3.

²² *Id.* at Comment 4.

²³ Cal. Rules R. 7.2(a).

²⁴ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2010-179 (2010).

²⁵ Cal. Bus. & Prof. Code, § 6068(e)(1); Cal. Rules R. 1.6.

²⁶ Cal. Bus. & Prof. Code, § 6068(e)(2); Cal. Rules R. 1.6.

²⁷ See Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2010-179 (2010) ("An attorney's duties of confidentiality and competence require the attorney to take appropriate steps to ensure that his or her use of technology in conjunction with a client's representation does not subject confidential client information to an undue risk of unauthorized disclosure").

²⁸ L.A. County Bar Assoc. Prof'l Responsibility and Ethics Comm., Opinion No. 529 (August 2017).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See *Dixon v. State Bar* 32 Cal.3d 728 (1982) (suspending attorney from practice of law for five years for violating client confidentiality, among other violations, when attorney disclosed confidential information about a former client); *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811 (2011) (after termination of representation, "a lawyer must: ... (d) take no unfair advantage of a former client by abusing knowledge or trust acquired by means of the representation." See *In re Johnson*, 4 Cal. State Bar Ct. Rptr. 179 (2000) (finding an attorney's revelation in confidence that his client had served time for a felony conviction violated the duty of confidentiality because, even though the conviction was public record, it was not easily discovered).

³⁴ Cal. Rules R. 5.5 prohibits the unauthorized practice of law and aiding and abetting the unauthorized practice of law; Cal. Bus. & Prof. Code, § 6126.

³⁵ See *In The Matter of Lenard*, 5 Cal. State Bar Ct. Rptr. 250 (2013) (physical presence is not the litmus test for identifying or establishing that a lawyer has committed unauthorized practice of law).

³⁶ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2001-155 (2001).

³⁷ Julie Tappendorf, *Attorney Ethics and Social Media*, American Bar Assoc. (2015).

³⁸ Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2003-161 (2003).

³⁹ Jessica Weltge and Myra McKenzie Harris, *The Minefield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology*, American Bar Assoc. (March 24, 2017).

⁴⁰ Michael E. Lackey Jr. & Joseph P. Mintz, *Attorneys and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 *TOURO L. REV.* 149, 164.

⁴¹ *Id.*

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Social Media and Common Ethical Problems

Test No. 146

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 California State Bar is silent on guidelines for California attorneys using social media. True False
- 2. Online attorney advertising is governed by the same California Bar Rules as traditional advertising. True False
- 3. The California Rules of Professional Conduct regarding rules for attorney websites and advertisements were last revised in November 2017. True False
- 4. A communication within the meaning of the Rules of Professional Conduct of the State Bar of California contains a message or offer concerning the availability of professional employment. True False
- 5. A communication posted online by an attorney must comply with California's Rules of Professional Conduct for attorney advertising. True False
- 6. A communication can contain a guarantee or prediction of winning. True False
- 7. A communication cannot contain false and misleading information. True False
- 8. An attorney who posts "Another great victory in court today! My client is delighted. Who wants to be next?" to her blog is not in violation of the California Rules of Professional Conduct. True False
- 9. There are four exceptions to California's duty of confidentiality under the California Business and Professions Code and in California's Rules of Professional Conduct. True False
- 10. A California attorney has a duty to take reasonable precautions to safeguard confidential client information against unintended disclosure. True False
- 11. Ignorance of technology is an excuse for the disclosure of confidential information. True False
- 12. An attorney's online post about their work day with information about a client but not the client's name can never breach the attorney's duty of confidentiality. True False
- 13. The duty of confidentiality can be applied to facts that are already in the public record. True False
- 14. The duty of confidentiality ends at the termination of the professional relationship with the client. True False
- 15. An attorney must be physically present in the unlicensed jurisdiction to trigger a violation of the rule against unauthorized practice of law. True False
- 16. In California, the unauthorized practice of law is an ethical violation and a felony. True False
- 17. California recommends attorneys put disclaimers on their websites to avoid confusion that the attorney is advertising or practice law in another jurisdiction. True False
- 18. An attorney-client relationship can be created by an attorney's online interaction with a person. True False
- 19. Disclaimers are useful for attorneys to post in their online activities stating that any interaction does not form an attorney-client relationship. True False
- 20. It is the attorney's responsibility to make clear to the website visitor that an attorney-client relationship has or has not been created. True False

Social Media and Common Ethical Problems MCLE Answer Sheet No. 146

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
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METHOD OF PAYMENT:

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

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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.

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ANSWERS:

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

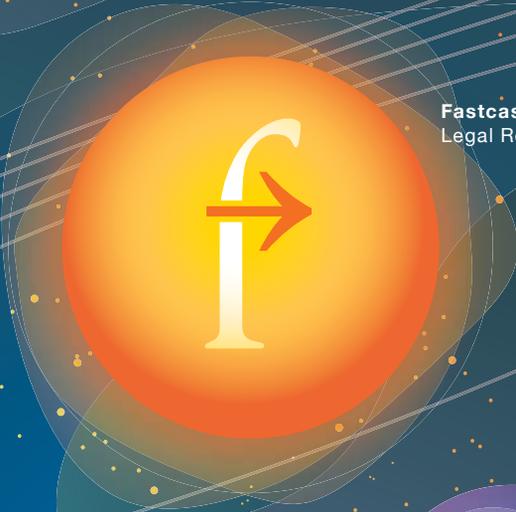
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A WORLD OF DIFFERENCE

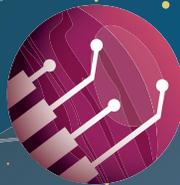
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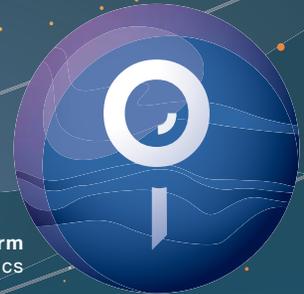
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By Michael D. White

From Small Things, Big Things Grow: One Law Firm's Story

Over the past 36 years, the small practice that became Pearlman, Brown & Wax, LLP has grown into a giant in the field of employment litigation and workers' compensation with 54 attorneys and support staff in eight offices stretching from San Diego, CA to Sacramento, CA.

Photos by Ron Murray





IT ALL BEGAN WITH A LOAN FROM HIS PARENTS.

In May 1984, after three years with the firm of Rose Klein & Marias in Los Angeles, newly minted attorney Barry S. Pearlman needed the financial wherewithal to start his own law practice. But without a line of credit, he did what many young people with a dream do: he asked his parents for a loan.

“I told my Dad that I wanted to start my own practice,” says Pearlman. “With his help, I was able to start the firm, start my own line of credit, and generate enough income to pay him back.”

More than three decades later, the small practice that became Pearlman, Brown & Wax, LLP has grown into a giant in the field of employment litigation and workers’ compensation with 54 attorneys and support staff in eight offices stretching from San Diego, CA to Sacramento, CA.

After graduating from the University of California, Los Angeles, Pearlman’s original goal was to become a Federal Bureau of Investigation agent, which required a law degree. But, at Southwestern Law School, his interest shifted from criminal to employment law.

A First-Hand Lesson

Seeing first-hand the issues his father and two brothers faced running a family business he recognized the importance of counseling businesses.

“I saw the struggles they went through, and I thought learning employment law would be a good way to assist them and others in the same situations.”

Pearlman initially envisioned a small boutique practice, one that would ensure time for both work and family.

“I got married the same year I opened my practice and I wanted to make sure I could balance the personal and the professional.” But the firm continued to grow. “Success doesn’t happen on its own. It requires the energy and skill sets of more than one individual.”

According to Pearlman, his equity partners—attorneys Steven H. Wax, Dean S. Brown and Yvonne E. Lang—brought the perfect balance of temperament, experience, and talent to ensure the firm’s growth, helping him to position the firm as a leader throughout the state and local communities. The strength of the firm has only grown with the addition of each and every partner.



Attorney Barry S. Pearlman



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.

A true San Fernando Valley native, Pearlman's Encino office is five miles from his home and four miles from the hospital where he was born.

In his role as managing partner, he is not only the caretaker of the day-to-day operations of the firm but also oversees the burgeoning employment law and sports litigation departments.

Scale and Scope

The scale and scope of the work that Pearlman and his associates faced when the firm opened have changed significantly over the years.

California Workers' Compensation law is a no-fault system for injuries arising from an employee's work, whether they are specific injuries, a disease, or a disabling condition. It is one of the most complicated areas of law. It is constantly morphing, with a dizzying barrage of new rules, regulations and mandates appearing on an almost daily basis.

"The issues have become much more complicated," says Pearlman.

"California is ground zero for employment and workers' compensation litigation. For employers, the law is difficult to navigate. Much of what we do is counsel our clients how to steer through all that and warn them about cross-over issues existing between employment and workers compensation laws."

Pearlman also manages the firm's sports team practice, defending many sports teams including the

National Football League and Major League Soccer from claims made in California.

"We handle injury litigation for several professional sports teams and their insurance carriers."

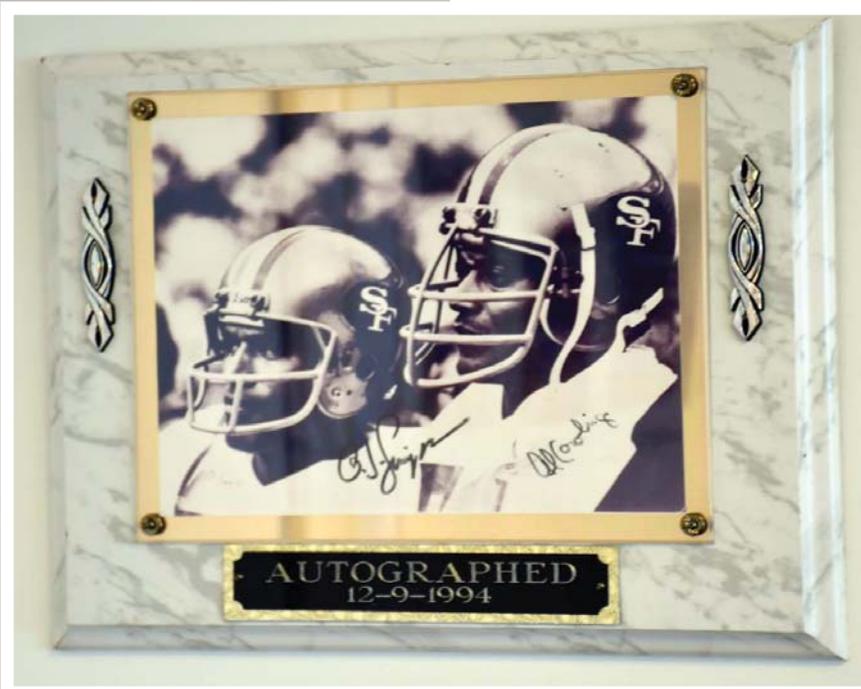
Over the years, clients have included the Oakland Raiders,

Los Angeles Kings, Anaheim Ducks, San Francisco Giants, and the San Diego/Los Angeles Chargers.

Most recently, the firm's nine attorneys who practice sports litigation have been assisting several teams with COVID-19 issues, helping them comply with the various regulations and mandates associated with the on-going pandemic.

“

Success doesn't happen on its own. It requires the energy and skill sets of more than one individual.”





that they don't take advantage of the system. By making sure injured employees receive what they are entitled to, and only what they are entitled to, we are serving the best interests of not only our clients but the workers' compensation system."

The Elements of Success

Pearlman has served twice as president of the California Workers' Compensation Defense Attorneys Association and in 2008, became one of only eight individuals to receive the association's Warren L. Hanna Lifetime Achievement Award "for his contributions to the profession and the organization."

He was also honored with the Most Influential People in California Workers' Compensation Award.

Pearlman has served on the Governor's Workers' Compensation Community Task Force and the Administrative Director's Committee on Permanent Disability and Medical Provider Networks. He is certified by the Division of Workers' Compensation Medical Unit and the California Department of Insurance as a continuing education instructor.

He is a frequent lecturer, speaker, and instructor on current trends in workers' compensation law and its

Navigating Complicated Laws

These issues are affecting many of the firm's clients as the pandemic has complicated an already complex area of the law. "Employers not only have to comply with California state law, but they may have to comply with local county and city ordinances that sometimes conflict," says Pearlman.

"Clients have asked us to create COVID-19 policies and procedures for their employee manuals. We've educated our employer clients on new legislation requiring employers to identify outbreaks of the virus and the consequences of positive virus testing in the workplace.

"We handle virtually all aspects of employment law for our clients."

That covers a lot of legal ground. "Our work not only covers employment litigation, but workers compensation defense. There are complicated 'leave of absence laws' that exist in California that may be triggered by a work injury. We are capable of handling our clients' legal needs from all angles. That's one of our specialties. We not only work with our employer clients, but also with their insurance carriers. When our clients change carriers, they often bring us along, so we have many long-standing and continuous relationships."

California's workers' compensation system, says Pearlman, "is a benefit delivery system that was not intended to be an adversarial system. However, over time it has become one of the most heavily litigated areas of the law. It is important that injured employees receive the benefits to which they are entitled, but it is also important



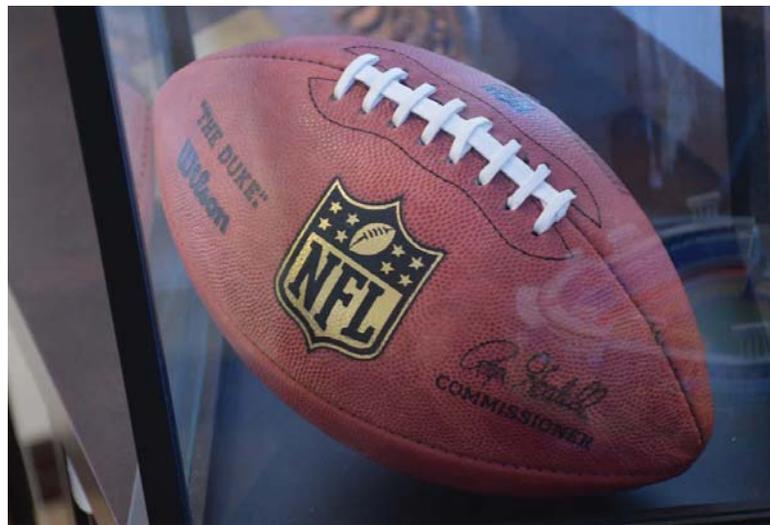
applications and has also served as an arbitrator for the State Bar of California for more than ten years.

The firm's success, says Pearlman, is based on relationships. "We have long-standing relationships with our clients, some for as long as 30 years."

Relationships and loyalty are important not only with clients, but with the firm's staff. "Part of our success is because of the dedication of our staff. We take care of the people who have dedicated their work lives to our firm.

"We want attorneys who intend to make PB&W their home," he adds, noting that several employees have been with the firm for more than 30 years. "We invest in our attorneys by providing them with training, giving them an opportunity to be successful, and making them stronger and better at what they do."

Partners Steven Wax and Yvonne Lang serve as the "deans" of "PB&W University," an in-house education program. Associate "professors" include a retired judge, the former managing partner of a law firm, and medical lecturers. "Our young associates are assigned partner mentors to offer advice and support."



Pearlman credits his three equity partners for helping the firm look to the future while keeping its solid foundation.

"My daughter is a lawyer with our firm and I have two equity partners who are younger than me, so when it comes time for me to retire, I'm sure that they will lead the firm in a way that best serves our clients, our employees and our community." 🏴



BLANKET THE HOMELESS

A Project of the San Fernando Valley Bar Association and the Valley Community Legal Foundation of the SFVBA



**Share the spirit of the holidays.
Help Blanket the Homeless when they need it most!**

Since 1995, the SFVBA has delivered more than 50,000 blankets to homeless and battered women shelters in the San Fernando Valley. SFVBA members are invited to assist with donations. With your support, numerous organizations that deliver much-needed assistance to the Valley's homeless, such as MEND, North Valley Caring, Bridge to Home, Loaves & Fishes, and LA Family Housing, will receive hundreds of much-needed blankets. Due to COVID-19 restrictions, blanket distributions will be coordinated directly with each partner organization.

Thank you for supporting Blanket the Homeless!

A \$75 donation buys 10 blankets. Please accept my donation for \$_____.

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Expiration Date _____ Signature _____

Make checks payable to VCLF of the SFVBA. The Valley Community Legal Foundation (VCLF) of the SFVBA is a registered 501(c)(3) organization (Tax ID No. 95-3397334). Your contribution is tax-deductible to the extent allowed by law.

Mail donation to VCLF, 20750 Ventura Blvd., Suite 140, Woodland Hills, CA 91364.

Online donations can be made at <http://thevclf.org/blanket-the-homeless-fund>.

For more information, please call (818) 227-0490.



By Christine C. Lyden and Mark S. Blackman

Blanket the Homeless: Making a Difference for 25 years

WHEN ROBERT WEISSMAN WAS INSTALLED AS President of the San Fernando Valley Bar Association in 1995, he stated that it was his goal to encourage every member of the SFVBA to make a difference in our community.

He challenged all of us who were serving at the time as members of our Board of Trustees to commit to improving the public image of the legal profession through community outreach.

Under Bob's leadership, to reach that goal, several new programs, including Blanket the Homeless, a unique program that was specifically created to enable members of the SFVBA to support the growing number of local homeless shelters serving the San Fernando Valley.

When we first started the program, it was our intention to obtain 'gently used' blankets which we hoped to have donated by local hotels. But, we soon learned that there were

companies that manufactured and sold emergency blankets which could be purchased for about \$5.00 each.

A call went out for donations from Bar members suggesting that for just \$25.00 the donor could supply blankets to 5 people living on the streets. The first year, about 500 blankets were purchased and distributed to local homeless shelters from the SFVBA parking lot.

It is wonderful to note that many of the first-year donors have contributed their support every year since the program began.

Blanket the Homeless has expanded to include numerous organizations that generously deliver much-needed assistance to the Valley's homeless. They include MEND, North Valley Caring, Bridge to Home and Loaves & Fishes, all of which provide invaluable services to assist people in finding

The writers of this article, SFVBA Past President's **Christine C. Lyden** and **Mark S. Blackman** have been involved with the 'Blanket the Homeless' program for the past 25 years. Their dedication to the program has never wavered and they partner to direct the operation of the program to this day.



temporary housing, counseling, mental health treatment, clothing, food, and employment.

In the late 1990s, distribution of the blankets was moved from the SFVBA's offices to the North Hollywood facility operated by LA Family Housing, which offers temporary transitional, as well as permanent, housing and numerous support services for families in need.

As part of the Blanket the Homeless program, occupants of the LA Family Housing have been given access to a free legal clinic, staffed by SFVBA members who have been incredibly generous in volunteering their time and legal skills to provide legal consultations to the facility's residents.

The legal clinic has provided invaluable assistance to numerous individuals on a broad range of issues, including government benefits, housing, landlord-tenant disputes, bankruptcy, family law and criminal law.

For example, a past member of the SFVBA Board of Trustees, attorney Gerald Fogelman, agreed to go beyond a free ten-minute consultation and agreed to represent a resident pro bono and successfully filed a petition for expungement

of a misdemeanor offense that enabled the client to find employment.

Though Blanket the Homeless is managed outside of the SFVBA offices and, as such, has had no financial impact on the SFVBA, the impact on the Valley community has been substantial.

Since 1995, more than 50,000 blankets have been distributed, and countless clients have been given much-needed access to helpful legal advice.

For the past 25 years, as a result of the contributions made possible by the generosity of its members, the San Fernando Valley Bar Association has committed to making a difference in our community, just as Bob Weissman asked us to at his installation.

Blanket the Homeless continues today, even in the face of COVID-19. With a greater number of homeless on the streets and a continuing housing crisis which pre-dated the COVID-19 pandemic, the need is greater now than it has ever been.

Please donate what you can to Blanket the Homeless and help us make a difference in our San Fernando Valley. 



The legal clinic has provided invaluable assistance to numerous individuals on a broad range of issues."



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Retrospective



In 1993, longtime Valley resident, Judge Armand Arabian, the first judge from the San Fernando Valley to be named to the California Supreme Court, was presented with the SFVBA's first-ever Lifetime Achievement Award for his dedication to "justice tempered with mercy" by then-California Gov. George Deukmejian. To the right is SFVBA President Thomas Trent Lewis.



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Referral fees subject to California Bar rules.

By Tamila C. Jensen and David Gurnick

Showdown Over the Pronoun

“On this issue, our court has gone both ways”¹

SINCE WRITING BEGAN WITH the ancient Sumerians, the 15th Century invention of the printing press and, near in time, the advent of English-language dictionaries, languages have faced ever increasing tensions between standardization and change.^{2,3}

Standardization enables people to understand each other; that is to say, we speak the same language. Change means language evolves—allowing talk about the world as it exists in the present. But, at the same time, tensions also exist between the speech of different classes of people.

In England, after the conquest by William of Normandy in 1066, three languages prevailed: English, of course; French, introduced by William; and Latin, which became the dominant written language, particularly for English law.⁴

For the government, courtly and elite the official language was French, while the common people spoke the vernacular language, English.⁵

Vernacular—the language of the common people—has, over time, proven to be the kind of language most prone to change and most reflective of the real lives of the greatest numbers of people.

For example, after the breakup of the Roman Empire, the Italian peninsula was a hodgepodge of principalities and city states. So many dialects were in use that people in Florence could hardly understand people from the Kingdom of Naples.

In the 13th Century, along came the poet Dante Alighieri (1265–1326), who gave the world *The Divine Comedy*—*The Inferno*, *The Purgatorio*, *The Paradiso* and is often credited as the Father of Italian Literature, having written in the vernacular and standardizing Italian.^{6,7}

Two centuries later, Geoffrey Chaucer had a similar role choosing to write in vernacular English at a time when French and Latin were the more sophisticated languages spoken in England.

Tensions Made Evident

Chaucer and Dante exemplify the tensions between the elite and the common people.

In their times, only a handful of people were educated, and they wrote in Latin. Commoners spoke various dialects of the vernacular and were generally not literate. The structure by which uniformity is established, passed on and enforced—higher education—was totally absent.

And yet, it was with the rise of the vernacular that the world began to dramatically change politically, socially, spiritually, and economically.

With the invention of the printing press in the early 15th Century, books



Tamila C. Jensen is 2020-2021 President and **David Gurnick** is Assistant Vice President of the Los Angeles County Bar Association. Tamie and David are both Past Presidents of the San Fernando Valley Bar Association.

and other printed material became much more widely available than in earlier times when books had to be painstakingly transcribed by hand. Ideas, thus, spread ever more rapidly.

Jacques Barzun, in his book, *From Dawn to Decadence—500 Years of Western Cultural Life 1500 to the Present*, argues that the 95 Theses of Martin Luther (1517) had their profound effect because they were easily disseminated in common languages thanks to Gutenberg's movable type and to development of better quality paper and ink, giving a craftsmen the tools to produce new books and pamphlets quickly and disseminate them broadly.

Reading, writing, and the more critical thinking these skills engender, were forever no longer limited to the elite and clergy.

Tension between the standardization and change in language was discussed at length by the writer and student of languages, H. L. Mencken, in his three-volume work, *The American Language* (1919, 1921, 1923, 1936); *The American Language: Supplement One* (1945); and *The American Language Supplement Two* (1948).

Mencken addresses the tension between English as spoken in Britain and English as spoken in America, which was—and, perhaps, still is—considered by British intellectuals and American Brahmins as uncouth and even unintelligible. It moved rapidly away from the mother tongue, oddly enough and, to some extent, retained words and structures that had become archaic in the England of several centuries ago.

Explaining the American love of novelty and lack of conformity, Mencken wrote:

"They have acquired that character of restless men, that impatience of forms, that disdain of the dead hand, which now broadly marks them. Thus, the American on the linguistic side, likes to make his

language as he goes along, and not all the hard work of the schoolmarm can hold the business back.⁸

According to Mencken, the American is notable for his "revolt against conventional bonds and restraints" especially in common speech.⁹

To bolster his argument, in a later edition of his work, he devotes several pages to discussing pronouns then in common usage and shares with us this delightful poem, now curiously quaint:

Whatever is our ain't theirn.

If it ain't hisn, then whosn is it?

I like thish bettern thathn.

Let him and her say what is hisn and hern,

Everyone should have what is theirs.¹⁰

A Contemporary Challenge

This brings us to a contemporary challenge in the English language and particularly in the language of the law.

Our language lacks grammatical gender, with the exception of pronouns—English does not have a gender-neutral pronoun in general usage.¹¹

Historically, he was considered gender neutral in formal speech. But Americans long ago moved away from using he as gender neutral and adopted he/she.

Meanwhile, people are asking, sometimes insisting on being referred to according to their gender identity.¹²

The challenge was illustrated this year, in the decision quoted at the start of this article. In *U.S. v. Varner* the Court of Appeals for the Fifth Circuit faced a question of litigants, judges, court personnel and others using and potentially being required to use pronouns matching a litigant's gender identity.¹³

Changing and Evolving

English, like all living languages, is always changing, ever evolving.¹⁴

In light of today's active movements seeking social justice it has been noted that language is a mechanism "by which



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gender is constructed and reinforced,” and that our words used to describe others or objects can be biased, now including binary gender bias.¹⁵

Recognizing this, contemporary writers and speakers often consider use of “they” to be an acceptable gender neutral pronoun, even when used to refer to a single individual.

Lack of a gender-neutral pronoun has been a source of increasing frustration for members of the LGBTQ community and others who are sensitive to such concerns.

The University of California San Francisco (UCSF) LGBTQ Resource Center lists the following pronouns as being in common usage:¹⁶

Subject	Object	Possessive	Possessive Pronoun	Reflexive
He	Him	His	His	Himself
"He studied"	"I called him"	"His pencil"	"That is his"	"He trusts himself"
She	Her	Her	Hers	Herself
"She studied"	"I called her"	"Her pencil"	"That is hers"	"She trusts herself"
They	Them	Their	Theirs	Themselves
"They studied"	"I called them"	"Their pencil"	"That is theirs"	"They trust themselves"
Ze (or Zia)	Her	Hir	Hirs	Hirself
"Ze studied" ("zee")	"I called hir" ("heer")	"Hir pencil"	"That is hirs"	"Ze trusts hirself"

UCSF suggests including one’s preferred pronouns in their email and asking people which pronouns they prefer.¹⁷

At a recent Zoom conference, each person’s name appeared with their preferred pronoun stated.

In fact, the authors of this article have seen email with the lawyer’s signature presented as follows:[Attorney’s Name] Partner (Pronouns: he/ him/ his). This has potential to become an increasingly used, potentially standard practice.

The University of Southern California (USC) LGBTQ Center lists the following commonly used gender-neutral pronouns:

they, them, their, theirs, themself sie, hir, hir, hirs, hirself zie, zir, zir, zirs, zirself

so instead of...	you may use...	which is pronounced...
he/she	sie zie	see zie
him/her	hir zir	here like sir with a “z”
his/hers	hirs zirs	here’s like sirs with a “z”
himself/herself	hirself zirself	here-self like sir-self with a “z”

In 2014, Professor Marshall Thatcher of the University of South Dakota published an article proposing to create gender neutral third person pronouns.

In the article, Thatcher noted the workarounds that writers currently use to avoid using gender specific pronouns. These methods included repeating the noun rather than substituting a pronoun.

But, he found this method is not always ideal because it may lengthen the text and sound contrived, omitting the pronoun, using passive rather than active voice, pluralizing nouns so that plural rather than gender specific third person singular pronouns may be used, and achieving gender neutrality by using the word “one” as a generic referent rather than masculine pronouns.¹⁸

Professor Thatcher’s proposal is to adopt the following:

- ee—use as a gender neutral third person singular pronoun; this would substitute for he or she.
- eet—use as a gender neutral third person singular pronoun to refer to a person of unspecified sex or to an inanimate actor; he, she, or it.
- herim—use as a third person singular object of a sentence to use in place of her or him (such as, “an officer shall assist herim).
- hermit—use as a third person singular object of a sentence to refer to a person of unspecified sex or a non-human entity in place of him, her, or it.

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- herimself—use as a third person singular reference to in place of herself or himself.
- herimself—use as a third person singular reference for a person of unspecified sex or a non-human entity, in place of herself, himself, or itself.
- hisers—use as a possessive pronoun in place of his or hers.
- hiser—use as a pronoun in place of his or her.
- hiserts—as a pronoun in place of his, her, or its.

Thatcher argues that incorporation into English of such new pronouns can be expected to achieve results comparable to the adoption into the language of the term Ms. in place of Mrs. and Miss and that adoption of these pronouns would end the clumsy or inaccurate workarounds that have

been adopted in writing to avoid gender specific pronouns.¹⁹

As Martin Luther King famously said, “the arc of the moral universe is long, but it bends toward justice.”²⁰

Today, it is increasingly recognized that ever-evolving language too, even at the granular level of our pronouns, can be a force for that justice. 

¹ *US. v. Varner*, 948 F.3d 250, 255 (5th Cir. 2020).
² See e.g., Rickie Sonpal, *Old Dictionaries and New Textualists* 71 *Fordham L. Rev.* 2177, 2181 (2003) (describing earliest English dictionaries in 1400s and 1500s).
³ See e.g., Wayne M Senner (editor) *The Origins of Writing* (U. of Nebraska Press 1989) p.6 (noting Sumerians were the inventors of true writing).
⁴ David Mellinkoff *The Language of the Law* (Little Brown & Co. 1963) 71, 95.
⁵ See, Britt Hanson, *A (Mostly) Succinct History of English Legal Language* 48 *Ariz. Attorney* 28, 32 (2012). (noting that judges and lawyers spoke the language of the court and nobility: Norman French).
⁶ See discussion in John M. Stefano III, *On Literature as Legal Authority* 49 *Ariz. L.R.* 521, 527, 527n.38 (2007).
⁷ See e.g., Asher Salah, *A Matter of Quotation: Dante and the Literary Identity of Jews in Italy* (chapter in *The Italia Judaica Jubilee Conference* (Shlomo Simonsohn and Joseph Shatzmiller, editors, Leiden: Boston: Brill, 2013) 168 (noting, Dante is considered to be the spiritual father of literature written in Italian vernacular).
⁸ H.L. Mencken, *The American Language* (Alfred A. Knopf, 1919) p.22.
⁹ H.L. Mencken, *The American Language* 4th Edition (Alfred A Knopf, 1962) p. 95.

¹⁰ H.L. Mencken, *The American Language, Supplement Two* (Alfred A Knopf, 1948) p. 36.
¹¹ C. Marshall Thatcher, *What Is “EET”? A Proposal To Add A Series of Referent-Inclusive Third Person Singular Pronouns and Possessive Adjectives to the English Language for Use in Legal Drafting*, 59 *S.D. L. Rev.* 79 *S.Dak. L. Rev.* (2014) (“Like all living languages, the English language is an evolving work in progress.”).
¹² See e.g., *Privacy Matters v. U.S. Dept. of Education*, 2016 WL 6436658, at *1 n.1 (D. Minn., 2016) (Plaintiffs’ court filings referred to defendant Doe as male and used masculine pronouns, but did not ask Court to adopt that pronoun usage. Doe referred to herself as female, used feminine pronouns and asked Court to do the same. Court granted Doe’s request, referring to her as female and using feminine pronouns in referring to her.)
¹³ *U.S. v. Varner*, supra note 1 at 254-255. Illustrative of a time of transition, the Court noted courts sometimes do and sometimes do not use parties’ preferred pronouns; and the Fifth Circuit “has gone both ways.” *Id.*
¹⁴ Thatcher, supra note 7 at 79 (“Like all living languages, the English language is an evolving work in progress.”); see also e.g., Rudi Keller, *On Language Change, The Invisible Hand in Language* (Routledge, 1994) 3 (“Languages are always changing. Twenty generations separate us from Chaucer. If we could board a time machine and visit him in the year 1390, we would have great difficulties in making ourselves understood – even roughly.”) and 4 (“we find in newspapers printed about 40 years ago a wide range of expressions that would be inappropriate nowadays in a similar context”).
¹⁵ Heidi K. Brown, *Get With the Pronoun*, 17 *Legal Communications & Rhetoric* 61, 67 (Fall 2020) (quoting Nat’l Council of Teachers of English, *Statement on Gender and Language* (Oct. 25, 2018), <https://ncte.org/statement/genderfairuseoflang/>).
¹⁶ See website of University of California Lesbian, Gay, Bisexual, Transgender Resource Center, <https://lgbt.ucsf.edu/pronounsmatter> (last visited Nov. 21, 2020).
¹⁷ *Id.*
¹⁸ Thatcher, supra note 11 at 81.
¹⁹ Thatcher, supra note 11 at 87.
²⁰ See e.g., *Shelby County, Ala. v. Holder*, 570 U.S. 529, 581 (2013) (Ginsburg, dissenting).



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By Roberta L. Tepper

The Flexible Lawyer: Promoting Agility and Innovation

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IT IS NO SECRET THAT THE practice of law is changing at light speed. Unsurprisingly, the proliferation of law-related technology continues to create both challenges and opportunities.

Using that technology to create self-service products for consumers, and the corresponding impact on the practice of law, has started a sea change that shows no signs of slowing or abating.

Add to that the increasing “threat” that artificial intelligence (AI) will make lawyers obsolete and you have the perfect storm, leading pessimists to predict the demise of lawyering as a profession.

Lawyers and law firms, however, are not on the way to extinction. The tidal wave of change seen in recent

years does mean that lawyers need to cultivate agility and embrace innovation and technology to succeed. They need to become *flexible* lawyers.

Why Lawyers Should Care

The plethora of DIY legal service products in the online market gives consumers the opportunity to avoid a trip to, or the expense of, a lawyer. Searches of studies and surveys of these products reveal that while less expensive, these services may not adequately or fully serve their users.

Some lawyers anecdotally report that they are building entirely new clienteles by fixing the less-than-desirable products resulting from these DIY options.

Notwithstanding these risks, these services are like catnip to consumers—they’re “easy,” fast and affordable. They’re available 24/7/365. Fees and costs are a known quantity; they may be accessed from any computer or mobile device in any location. For the unwary consumer, the lure of DIY—keeping control of their legal matter and saving money, at least in the short run—seems irresistible.

There’s also been a lot of discussion about AI taking lawyers’ jobs. Much of the “competition” for the consumer market is not yet supersophisticated and consists of expensive AI. The tools on which these services are based, however, are ones that lawyers can easily adopt, including automation,

document assembly, decision trees and expert systems.

Yes, some AI as well. In fact, the best use of AI in law is, at this specific time, the combination of AI and a lawyer. So let's stop wringing our hands, planning for or dreading the demise of the legal profession and confidently step forward into the future armed with the skills and abilities lawyers offer—combined with a plentiful, yet judicious, helping of change and innovation.

Tech Competence—Combating the Fear

Lawyers are smart and resourceful, yet many have failed to keep pace with technology. It isn't just lawyers though—it's the whole justice system. Why is that? Some have opined that the reasons include the fact that, by and large, lawyers both fear and lack competence in technology.

Lawyers, even those who have grown up in a world replete with technology, may not feel comfortable with implementing it in their practices.

Being a knowledgeable end user does not automatically translate into the ability to effectively select and implement technology, nor to be innovative in doing so. Choosing appropriate and cost-conscious technology can be a challenge, particularly for solo and small-firm lawyers who may not have IT assistance.

Lawyers who panic, or who do not fully educate themselves about the best available options, may end up with technology that they do not fully implement, that does not effectively or efficiently interconnect, or that they do not understand. But lawyers do not have the luxury of going old school and avoiding technology, particularly if they want to remain relevant in today's market.

The good news for lawyers is that help is available.

Of course, the ABA's annual Techshow is an amazing resource for lawyers at all levels of tech competence. The ABA Law Practice Division (LP) offers a wide variety of CLEs, as do local and state bars like the State Bar of Arizona. LP publications are another rich source of information, in particular the "*In One Hour*" series of books that demystify many products and put valuable tools into lawyers' hands.

Many bar associations have in-house advisers, commonly known as practice management advisers, available at no cost as a member benefit. These folks provide consultations, recommendations and referrals to technology products that best suit the individual lawyer or practice.

Checklists and guides to assist lawyers in selecting practice management and other software, or cloud providers, are available from a variety of sources, including state and local bar practice management advisers.

There are dozens, perhaps hundreds, of blogs, Facebook groups and other online resources focused on legal technology as well. Even the most tech-friendly lawyers should not hesitate to rely on the expertise of professionals in making selections of the right software and vendors for their purposes.

Predictable Fees/Unbundled Legal Services

One of the attractions of DIY services is the predictability of fees. Consumers know that for 'x dollars' they will get a specific product or end result. This is consistent with many other professional services in the marketplace; for example, consumers know the cost they will bear when purchasing vision care.

A consumer choosing a pair of prescription eyeglasses will have a variety of choices and will know in advance the cost of each choice. DIY, or low-touch, legal services offer much the same certainty. Consumers know up front what their cost will be for that option, including low-cost, price-certain options for help from a lawyer. It's no surprise that this certainty appeals to consumers, yet how many lawyers offer a fee schedule on their websites?

This is a low-touch version of a legal representation, although there may be a lawyer "on call" online or some kind of chatbot to answer very basic questions.

The fact that contact with a lawyer is not a primary part of these options clearly appears not to dissuade consumers from using them; it's apparent that consumers do not crave the touch of a lawyer if the price is high.

The flexible lawyer will not consider closing up shop but instead will revamp their representation design to respond to this persistent trend.

Lawyers were latecomers to the concept of alternative, or predictable, fees; however, embracing predictable alternative fees is becoming a necessity.

For example, consider the flat fee. In terms of pricing the flat fee comes with some degree of risk to both the lawyer and the consumer. The lawyer risks that the scope of representation will require more work than anticipated, decreasing their net gain.

On the other hand, the client risks paying the lawyer more than he or she might if the representation takes less time than anticipated.

At the financial bottom line, successful implementation of flat fees depends on integrating technology into a lawyer's practice. Determining the

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appropriate flat fee requires an analysis of the time that will be necessary to successfully accomplish specific tasks to permit the lawyer's calculation of the fee. The successful use of timekeeping software makes this process driven by facts rather than by guesses.

Equally essential is automating routine tasks, routine documents and internal processes, including utilizing paraprofessionals and staff as well as maximizing other time-saving solutions. To successfully compete with a DIY service, streamlining processes and reducing or eliminating repetitive work is vital.

Technology provides essential tools to help in this endeavor, as there are a variety of stand-alone document automation tools and process automation tools in addition to practice management software suites that incorporate them.

An increasing number of practice management platforms offer features such as rules-based calendaring, client portals and more—providing the tools to provide quality service while minimizing routine labor-intensive tasks. Software specific to individual practice areas is also available.

In addition, workflow automation tools like Zapier and IFTTT make it easier than ever to connect software and apps, thereby eliminating much “busy” work and allowing lawyers to focus on work only they can provide.

The partner of successful automation is limited scope representation, often called “unbundled legal services.” Permitting consumers to opt in on legal services for specific aspects of their cases and opt out for tasks they have the ability to accomplish on their own is key to providing value for service. This is the hallmark of the flexible lawyer—to understand that the old model of taking over the litigation in full is no longer what consumers either desire or can afford.

Equally important is the ability to clearly articulate to the client the

services they are opting for and the associated prices. “Scope creep,” the slow and insidious increase in the amount of work to be handled for the same fixed price, is the downfall of both flat fees and unbundled legal services.

Project Management

Project management is a relatively new concept in the legal world, but it has caught on like wildfire. Even in law firms still billing hourly, project management has become essential to provide the certainty and extra value consumers demand. For larger firms, or for larger litigation, it may be impossible to unbundle or to adequately predict and charge a fixed fee.

Even in those circumstances, however, project management is a tool by which a combination of technology and cost containment may produce a representation that is consumer-focused and frugal. Tools like Asana and Trello are useful to manage specific tasks within the project and coordinate virtual teams, thereby utilizing the best possible talent regardless of their location.

Bespoke Legal Services

Offering unique legal services, from scratch, is another option. This might include crafting one-of-a-kind contracts or legal services created for clients with unique needs. Creating this kind of niche practice may be the result of focused networking and marketing or it may simply be serendipity, falling into a narrow, specialized area of practice. Either way, it's an option to consider when considering providing unique value in the marketplace.

Another bespoke variety of legal service offers personalized client service balanced by the kind of high-touch/high-volume made possible by successfully implementing technology. Clients get face-to-face lawyer contact with the one-on-one attention they

want. The lawyer balances these time-intensive interactions by minimizing redundant work through process and document automation and leveraging technology, including some of the tools mentioned above.

Filling the Legal Gap

Much attention has been focused on access to justice and the gap in legal services, resulting in part of the proliferation of DIY products. Pro bono legal services have been the frequent target of this focus, but the legal service gap is much larger.

Consumers—that is, potential clients—who do not qualify for pro bono legal services and yet cannot afford traditional full-freight legal services comprise a large and largely underserved population. These are the consumers who are more likely to either access DIY solutions or represent themselves pro se.

Lawyers seeking traditional lawyer fees and salaries are missing a great opportunity. Reimagining a legal practice can address the representation gap and enable a visionary, flexible lawyer to build and grow a thriving practice.

Key to this reimagining is, as one might anticipate, leveraging technology to provide efficient and cost-effective services and embracing limited scope representation and unbundled legal services.

Add to that flexibility about physical location and venue, with an agile and consumer-friendly website, and you have a recipe for a vibrant practice.

Office? Where and When?

Lawyers reimagining their practice must consider where, or whether, to have a physical office. If a physical office is necessary, what specific needs must be met? Is there a need for meeting space or is an office set up for just the lawyer all that is required? Technology makes virtual offices possible, perhaps augmented with some on-demand meeting space.

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A true home office may be an option if you have the means to have an entirely separate space that you can secure from the rest of your household.

Office sharing, on-demand or office co-ops and home offices all bear some ethics-related thought, particularly concerning confidentiality. The need to be able to protect the confidentiality of clients and all information relating to their representation may guide some of a lawyer's decisions on this front.

For example, having a shared receptionist to intake clients may seem ideal, but having a shared receptionist who also serves other lawyers who may handle cases adverse to yours may be problematic.

A call to your bar's practice management adviser will help you work through these issues. Or try an ethics lawyer or take advantage of some of the self-help options available through the ABA and other online entities.

Even those flexible physical office options may not necessarily meet the demands of prospective clients, including but certainly not limited to millennials. Have you noticed the number of professional services located in malls, in big-box stores and other less traditional settings? This doesn't involve whether the argument for or against non-lawyers having shares in legal practices is interesting or acceptable.

What about having a law office in a local Target, WalMart or other store or strip mall where legal-gap consumers may be found? Having office hours other than 8:00 a.m. to 5:00 p.m., Monday through Friday, could be effective in reaching the underserved who might need to work during regular business hours.

It isn't necessary to have a practice that is available 24/7/365. In fact, in consideration of the work-life balance and wellness lawyers should achieve, that kind of schedule isn't advisable. But having a practice that makes help available when clients have time to attend to their own personal matters



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should be an option. For example, a lawyer specializing in defending charges of driving under the influence may be well advised to be available in the overnight hours.

Consumer-Friendly Websites

It's vital to have an agile and well-designed website. It is no longer sufficient to have a site that looks great on a desktop computer but is the electronic version of a print ad in other formats. Today's websites need to be mobile-friendly and have responsive design.

The flexible lawyer will look at their web design from the consumer's point of view and plan accordingly.

Consumers want added value, so the website must convey that message. The added value may be a short video explaining a specific topic that will help clarify that point of law or process to the consumer.

While it is a good practice to avoid creating conflicts by allowing potential clients to submit their confidential information at their option, the website should allow a potential client to ask for an appointment or to fill out some very basic intake information.

Other Services and Productizing

The example set by some forward-thinking lawyers across the country in "productizing" their legal services can help in making a practice flexible. It is necessary to do some groundwork and research, and speaking with a lawyer who focuses on professional responsibility (i.e., ethics) or your local practice management adviser or ethics hotline is a must. Deciding what services to offer and what prices requires that the lawyer assess their abilities and infrastructure.

A number of lawyers have entered into the document preparation arena as an adjunct to their legal practice. There are ethical considerations to be resolved, depending on the individual jurisdiction, but this option brings the flexible lawyer directly into the DIY

environment. Clients accessing this mix-and-match type of practice have the advantage of opting to spend their limited funds effectively while assuring themselves of a local, knowledgeable lawyer as an on call option.

Giving some products or tools away may serve as effective advertising, build loyalty with existing clients or generate leads for future business. For example, offering a child support calculator or a spousal maintenance estimator to prospective domestic relations clients may be a positive course to follow.



In fact, the best use of AI in law is, at this specific time, the combination of AI and a lawyer."

Ethics and Cloud Computing

It's no longer practical, or even possible, to avoid the cloud while practicing law. Having practice data in the cloud offers myriad benefits, including mobility, scalability and flexibility, while creating new challenges that need to be addressed and resolved.

Above all, security and privacy are key to maintaining client confidentiality. In addition to general cybersecurity considerations, lawyers with client/practice data in the cloud must be mindful of the specific security needs of individual clients, in addition to the type of law practice information they maintain.

For example, clients with special security clearances may have specific requirements, and practices that handle medical reports and information need

to seriously consider of any HIPAA requirements that affect them.

The cloud-based practitioner also must pay attention to the access and permissions of staff and outsourced workers. Those who use virtual services, such as virtual receptionists, must determine the degree of access to individual client data permitted by the local variant of the Rules of Professional Conduct.

Tomes have been written about basic cybersecurity, including password integrity, avoiding ransomware, phishing and scams; some of this reverts to our earlier discussion about lawyers and their need for technical competence.

Do these concerns mean that a cloud-based practice is inadvisable? Of course not; these are merely issues to be considered and challenges to be resolved. Having a cloud-based practice is essential in meeting the needs of clients and lawyers.

The flexible lawyer's practice requires the agility that the cloud provides, not the least of which are the automation of your practice and processes and the continual automatic updating of the products you are using.

It's not possible to consider flexible locations and hours, and lowering cost by effectively using technology and outsourcing administrative functions without safe use of the cloud.

Becoming Flexible

It's a brave new world out there. Despite the glum predictions of some, it isn't the beginning of the end for lawyers or for law as a profession.

What is necessary for lawyers to remain relevant, though, is taking a fresh look at the practice of law and how it is conducted. Legal technology continues to evolve at a rapid pace and provides the tools by which flexible lawyers—or those seeking to become flexible—may reimagine and reinvigorate their practices to meet the needs of their future clients and the profession. 



Our most sincere condolences are extended to SFVBA Past President Christine C. Lyden on the recent passing of her mother and long-time SFVBA member Mark Blackman on the passing of his mother-in-law.

Connecticut-born defense attorney David Kestenbaum chose to pursue a career in the law after completing his undergraduate studies at Boston University. Having grown tired of shoveling snow, he moved to California to attend Southwestern Law School, graduating in 1978 and was admitted to legal practice the following year. "I grew up watching Perry Mason on TV. He was my idol and he always seemed to be the one who unraveled the case by turning the witness on the stand," he remembers. "I actually had a 'Perry Mason moment' case where I got a prosecutor to admit that he had denied contacting and threatening a witness in the case. If she didn't testify, he'd have her children taken away. He denied that he had said that and I just so happened to have a tape recording of him saying just that." A rabid baseball fan, Kestenbaum's office in Van Nuys is a museum dedicated to the game with memorabilia ranging from bobble-head dolls and autographed baseballs to team photos and a pair of seats from Boston's storied Fenway Park. Criminal law, says Kestenbaum, "is a lot like baseball. There's always hope until the last out."



California Gov. Gavin Newsome has named ten individuals to serve on the Los Angeles County Superior Court bench. Nine of the new judges fill the vacancies left by several retirements, while the tenth replaces Judge Stanley Blumenfeld, who resigned upon confirmation as a judge of the United States District Court for the Central District of California. For more details, go to www.metnews.com/articles/2020/Appoint11162020.htm

Should bar exams have multiple choice questions and essay questions—and if not, what should replace them?



According to a new report from the Institute for the Advancement of the American Legal System, multiple choice questions should be used sparingly, if at all, and that ideally, essay questions should be replaced with performance tests. The study also recommends that any multiple choice and essay questions that are given should be open book, with more time for completion than is currently allowed, and that supervised clinical work should be required for licensure.

Members of the SFVBA's sister Bar, the Santa Clarita Valley Bar Association, recently elected a new Executive Board Officers and Trustees who will lead the group through the upcoming year. Congratulations go to President, Taylor F. Williams-Moniz; President-Elect, Jeffrey D. Armendariz; Secretary, Christine Reynolds Inglis; and Treasurer, Lucas Rowe. The new Trustee Board will consist of Corey Carter, Robert Castillo, John Noland, and Cody Patterson. SFVBA President-Elect Christopher Warne will serve as Liaison between the two organizations.



TIP: Justia Daily Opinion Summaries—<https://law.justia.com>—is a free on-line service with 68 different newsletter covering federal appellate and state high court opinions on a daily basis. Justia also offers weekly newsletters in 63 different areas of legal practice including criminal, employment, environmental, labor, property, probate, product liability, transportation, trust and estate, and zoning and land-use law.

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Adapting to Generate New Business

DURING THESE HARD TIMES, many businesses are trying to figure out creative ways to keep their firms afloat and generate revenue.

Everywhere, we can see restaurants putting tents in their parking lots in order to serve their customers, while business owners are utilizing app-based delivery services to get their goods delivered to clients. It seems that more and more businesses, every day, are forging ahead and adapting to changing times and circumstances.



Attorney Barry M. Rodich

Law practices are adapting too. Attorneys serving on the San Fernando Valley Bar Association’s Attorney Referral Service panel continue to generate revenue above and beyond that produced by routine marketing and word-of-mouth referrals. Attorneys are working with ARS to accommodate potential clients, such as senior citizens that are sheltering in place due to the pandemic, landlords/tenants, business owners/employees, and families facing unique problems due to the pandemic.

Attorney Barry M. Rodich joined the ARS just two months ago. His practice focuses on workers’ compensation, representing workers injured on the job.

“I heard about SFVBA attorney referral service from a friend,” he says. “We practiced in the same field together and

we developed a mutual respect for one another throughout our years of practice. He suggested that I look into SFVBA Attorney Referral Service and see if I would be interested in joining.”

What compelled him to sign-up with the Referral Service? “After talking with my friend and researching more about the Bar Association, I saw that it was a great organization and immediately joined. They really want to help the community and I am fortunate to be a part of it.”



Attorney William Koehler

Veteran attorney William Koehler has been an active part of the Attorney Referral Service for almost two decades in general practice with an emphasis on real estate, business, and family law.

“Obviously, it’s a good relationship since I’ve stayed involved for 20 years,” he says. “It has proven to be a great

MIGUEL VILLATORO
ARS Associate Director
of Public Services



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source of acquiring new clients that I otherwise would never have been exposed to.”

In addition to the revenue generated by ARS attorney panel members, the reasonable referral fees garnered by the ARS help maintain a unique service to the community that supplies much-needed assistance provided by qualified and experienced legal professionals to those seeking legal help, often in times of professional or personal crisis.

“I would encourage interested attorneys to join,” says Koehler. “It is an effective avenue to new referrals and it helps the ARS. It’s a good mutual relationship.”

Attorney and best-selling author Elizabeth Edwards once wrote, “Resilience is accepting your new reality, even if it’s less good than the one you had before. You can fight it, you can do nothing but scream about what you’ve lost, or you can accept that and try to put together something that’s good.”

It may seem that the times ahead are uncertain, but, every day, we need to remind ourselves that we must remain resilient and adaptable. 

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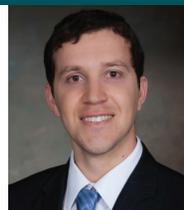
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Learning from 2020's Wild Ride

THIS YEAR HAS BEEN A whirlwind ride between the COVID-19 pandemic, compelling social issues, the recent elections and their post-election goings-on. And it seems like there are more ready questions than answers floating around.

What can we—as citizens of our country, our state, our city, and our local community—learn from this hectic and complicated year so that we can actively play a part in crafting the solutions we all seek vs. furthering “causes” that divide and pit us one against the other?

Do individuals really want division for their own ends, or do we all want to see progress for the common good in the form of solutions to the issues that affect all of us day in and day out?

The issues are legion—COVID-19, discrimination, economic problems, living wages, affordable housing, mental health treatment, preventing homelessness, and genuine leadership vs. political gamesmanship.

Can we come to the table to rationally discuss difficult issues with the goal of finding workable solutions? Can we listen to each other? Can we be open to discussing solutions “we” or “our side” did not think of? Is it possible to consider that what we “know for sure” just may not be the answer? Is it possible that we are more invested in being “right” than we are in reaching a solution?

Can we in the San Fernando Valley legal community use our mediation skills, gained from years of experience working with clients to help our community sensibly work through these divisions?

The answer: Yes, we can.

How? Start the conversation. Start

it in conversation with family members; start it with your friends, your colleagues and even with strangers.

What are some of your hot button issues? How has discrimination affected you or a family member? What need is not being addressed in your neighborhood? Or at work?

Bring it up. Talk about the issue and ways for all of us to learn about how and whom it affects.

How can we each learn more about one another? Hear from and listen to every person you discuss the issue with; identify the differences and then identify the similarities.

Is there a solution? Ask each person you converse with about what they see as ways to resolve the problem and listen to what they think would help, especially if it differs from what you think. This is the only way we can learn from each other.

It is how we start down the path to finding the answers to the problems we all face. As with so many things we all face every day, there is usually more than one answer. We do not have to try

KIRA S. MASTELLER
VCLF Co-President



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to get everyone we know to agree to one way to do something as there will may be four ways to do something that distributes the concerns of all among the possibilities.

Take a few minutes. Think it through. What are you personally concerned with? Education issues? Student debt? Civil rights, poverty, and access to affordable housing? The environment, climate change, the ethics of scientific research.

Write them down. Start with one item and keep going until you get through your list. Your list can be the catalyst of an article, a letter to your local representatives, to your state representatives, to our national leaders. You will not be heard if you do not speak up.

Start the conversation. It will make a difference. From every difference, we can all learn to everyone's benefit.

TIP: Consider ordering the book, *Believe in People*, by Charles Koch and get a surprising take on how you can play a role in tackling the seemingly overwhelming issues facing our society and our nation. 

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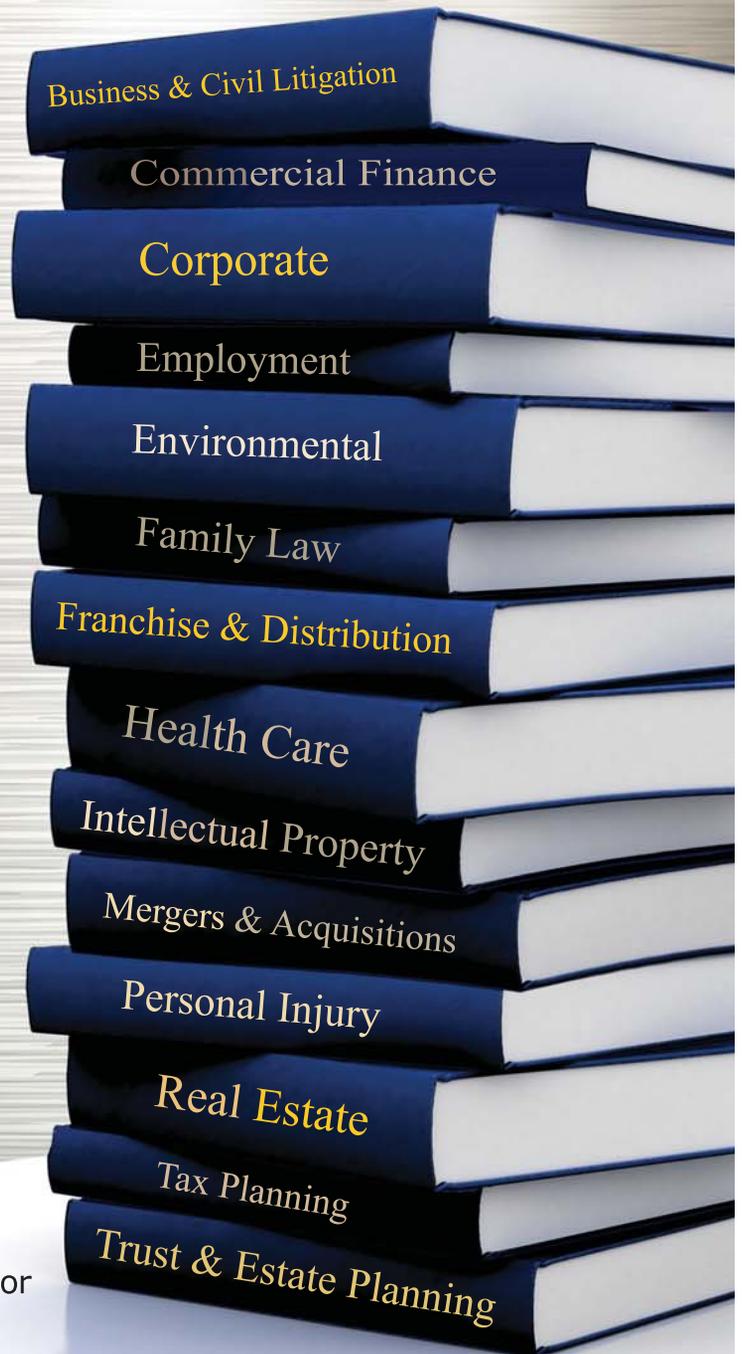
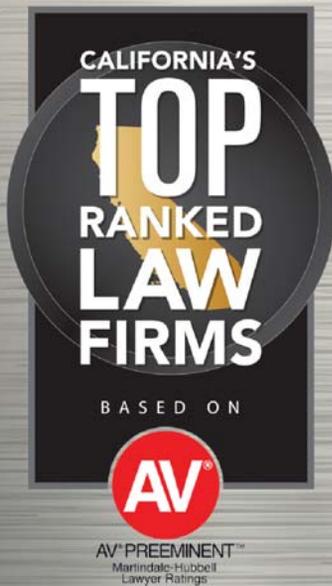
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