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JANUARY 2021 • $5

A Publication of the San Fernando Valley Bar Association

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Contract Law: The Old, The New, and the Complicated

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CONTENTS

JANUARY 2021

VALLEY LAWYER
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FEATURES

12 Contract Law: The Old, The New, and the Complicated | BY ILANA M. KAUFMAN
MCLE TEST NO. 147 ON PAGE 20.

22 Different Paths, Same Destination: New Leadership at the Los Angeles Superior Court | BY MICHAEL D. WHITE

30 Zero Out: Finding Coverage For COVID-19-Related Business Losses | BY JOSEPH G. BALICE

36 Ride On! Bicycle Safety and the Law | BY LAURENCE H. MANDELL

40 Correct Tech: Choosing the Right Technology for Your Firm | BY DAVID MERCY

On the Cover: LASC Presiding Judge Eric C. Taylor and Assistant Presiding Judge Samantha P. Jessner
Photo by Ron Murray

DEPARTMENTS

7 President's Message

9 Editor's Desk

10 Event Calendar

39 Bar Notes

43 Retrospective

45 Valley Community Legal Foundation

46 Classifieds

VALLEY LAWYER

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Across The Board

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SFVBA President

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EXPECTATIONS ARE A WEIRD thing. No matter how one's brain anticipates a certain outcome in life, we can always be surprised.

Our Bar Association and this term are no different. Despite my optimism and efforts to infuse positive energy into this tough year, there was, I admit, a faint, gnawing worry that I, and by association, our Board wouldn't be able to achieve what we desired to accomplish due to some seemingly insurmountable roadblocks—obstacles both above and below the surface.

But why the doubt? Unquestionably, we have one of the most talented and diverse Boards in recent memory with the perfect mix of experienced and motivated veterans and an infusion of future leaders and energetic newcomers.

It turns out that I couldn't have been more wrong when I felt some doubt about what our Board will achieve this upcoming year.

We have already established an agenda of projects and initiatives which will propel the Bar into the new year with the near certainty for impactful results.

So, who are the Trustees for this term? Maybe it is unorthodox to call them out by name, but they deserve due recognition—Christopher Warne, Matthew Breddan, Heather Glick-Atalla, Barry Goldberg, Michael Cohen, Alan Eisner, Kyle Ellis, Gary Goodstein, Alex Hemmelgarn, Erin Joyce, Alexander Kasendorf, Minyong Lee, Joy Kraft Miles, Amanda Moghaddam, Jessica Rosen, George Seide, Steven Sepassi, Benjamin Soffer, Taylor Williams and Yuri Aberfeld.

Each and every one of them has contributed in a way that enhances our Bar and helps to set us up for a clear path to a productive 2021 and beyond.

For example, we have a new Associate Trustee, Yuri Aberfeld, who is serving as Chair of our Technology Committee. He is working to create a blueprint for the upgrade of the technological automation of our Bar operations to benefit the members.

> "We have almost total engagement from every one of our Trustees this year, each doing their small and large parts to create some magic in what has been a challenging year."

Yuri will be conducting a comprehensive review of Bar systems to help with activities such as improving the process of registering and paying for events, handling invoicing, coordinating the access to and delivery of necessary information to members, and improving the overall experience of interacting with Bar staff.

Our award-winning Inclusion and Diversity Committee, with new co-chairs Amanda Moghaddam and Jessica Rosen in the lead, has significant new events planned with outstanding support from judicial officers from the Valley and beyond.

Joy Kraft Miles and leaders of the Valley Community Legal foundation—the charitable arm of our Bar—have implemented incredible educational programs and fostered scholarships for law connected students, but importantly, membership and energy has increased in a way not seen in the recent past.

As the Bar continues to increase its outreach directly into our community, Minyong Lee, of Neighborhood Legal Services, has stepped up to help the Bar fill gaps in administering its outreach and community programs, committing all her skill, experience and depth of knowledge to the effort.

But it is more than just amazing people achieving incredible things.

What every member of our Board offers is more intangible than that. It is a collective, infectious desire to engage and do their part in improving our community in every area possible. We have almost total engagement from every one of our Trustees this year, each doing their small and large parts to create some magic in what has been a challenging year.

Who needs New Year's resolutions when you take the initiative now and make special things happen right now. Our Board has and we know our members have, too.

Near, and Yet Afar

MICHAEL D. WHITE
Communications Manager

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I THOUGHT THAT I'D BREAK FORMAT and share an excerpt from an interesting article I found on CNN Lite during a recent sojourn through the vast expanse of the world wide web.

It is very sobering and thought-provoking and compels consideration.

It follows…

Some people whose values still align with those of their friends have found their relationships suffering during the pandemic.

Jeff Guenther, a Portland, Oregon-based therapist, made the decision to stay home for Thanksgiving rather than travel to see his family in Los Angeles. He joined his family's holiday gathering via Zoom.

"We felt this certain amount of pressure because we couldn't get together at all this holiday season. So we might as well try to do it online—which only caused even more rupture and problems," he told CNN. "All of our family issues that are always kind of under the surface are even more apparent on Zoom—and during a pandemic on top of everything else." During the call, he said he and his sister got into an argument over whether "to vaccinate or not to vaccinate."

"'I feel right and she feels right and it's made us less close, in an already sort of, long distance relationship," Guenther said. "This argument has caused the rest of my family to take sides."

Still, Guenther, who has been a therapist for about 15 years, said there are some ways to repair relationships that end up tarnished as a result of conflicting views.

It's important to identify whether each of you have the same goal, he said. For example, he and his sister know they want to keep their parents safe, and they don't want to spread the coronavirus.

"If we can both find things that we agree on at the start, then we can both talk about it in these curious ways," he said.

> "Some people whose values still align with those of their friends have found their relationships suffering during the pandemic."

He also emphasized that people must acknowledge everyone has to come up with safety plans that make sense to them, even if it doesn't make sense to you.

As for Zoom fatigue, Guenther suggests making the calls shorter, turning the video off or stepping outside while on the phone to get a break from the screen.

"My advice would be to really check in and see if you have the capacity to be on these Zoom calls," he added. "If you don't have enough capacity, you might need to cancel that meeting."

Ultimately, relationships "may be affected forever" after the pandemic, he said. "If that's the case…that's one of the many traumas to come out of 2020 that we don't even fully know about yet."

Some thoughts—and suggestions—to ponder as we shoulder-through the challenging year that unfolds before us.

CALENDAR

JANUARY 2021

SUN	MON	TUE	WED	THU	FRI	SAT
				2021 HAPPY NEW YEAR 1 SFVBA OFFICES CLOSED		2
3	4	5	**6** **WEBINAR** **All Members** **Professional Responsibility and Technology** **Sponsored by** trellis LEGAL INTELLIGENCE **12:00 NOON** This seminar will cover attorney professional responsibility and obligations concerning the use of technology by surveying key ABA rules and state regulations. Free to members. (1 MCLE Hour of Legal Ethics) See ad on page 29	**7** **ZOOM MEETING** **Membership and Marketing Committee** **6:00 PM**	8	9
10	**11** 	**12** **WEBINAR** **Business Law and Probate and Estate Planning Sections** **Guidance for Renters and Landlords During COVID-19** **12:00 NOON** Speaker: David Almaraz, Esq., Partner, Alpert Barr & Grant will discuss local eviction moratoriums and how commercial landlords and tenants should work together to come to an agreement before rents become due. Also a review of AB 3088 and how it affects residential landlords. (1 MCLE Hour) **ZOOM MEETING** **Board of Trustees** **6:00 PM**	13	14	15	16
17	18  SFVBA OFFICES CLOSED	**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 federal courts. (1 MCLE Hour)	**20** **WEBINAR** **All Members** **Elimination of Bias** **Sponsored by** ADR SERVICES, INC. Your Partner in Resolution **12:00 NOON** The Hon. Michelle Rosenblatt, Ret. will headline this important webinar. Free to All Members! 1 MCLE Hour (Recognition and Elimination of Bias in the Legal Profession and Society) See ad on page 35	21	22	23
24 31	25	**26** **WEBINAR** **All Section/New Lawyers** **How to Start a Law Practice** **5:30 PM—Networking** **6:00 PM—Program** Morvareed Salepour (transactional), Sona Tatiyants (estate planning), Zein Obagi (litigation/employment) and Sharen Ghata (criminal law/ personal injury) will discuss starting and 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 developments in family law. (1 MCLE Hour)	28	29	30

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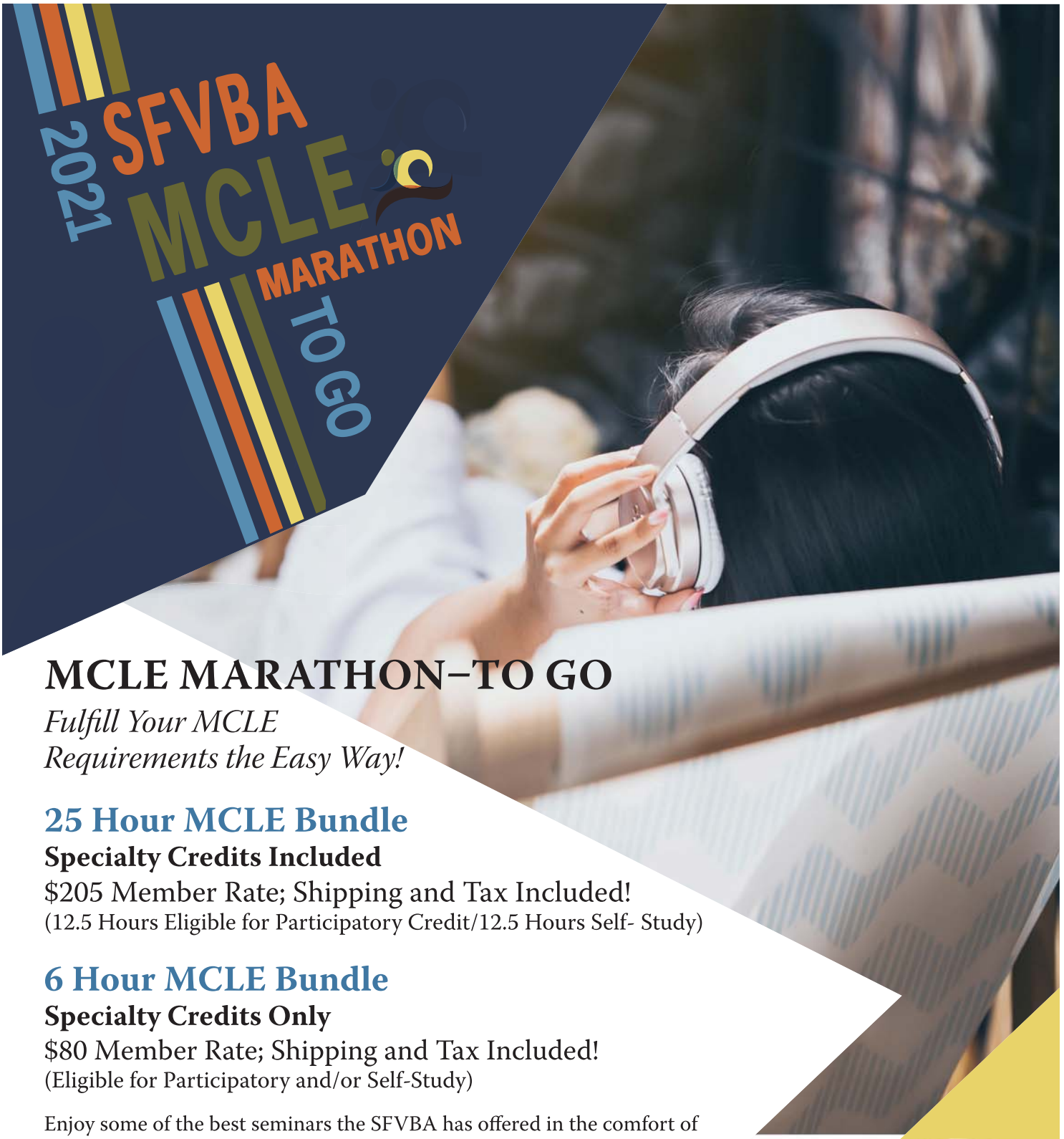

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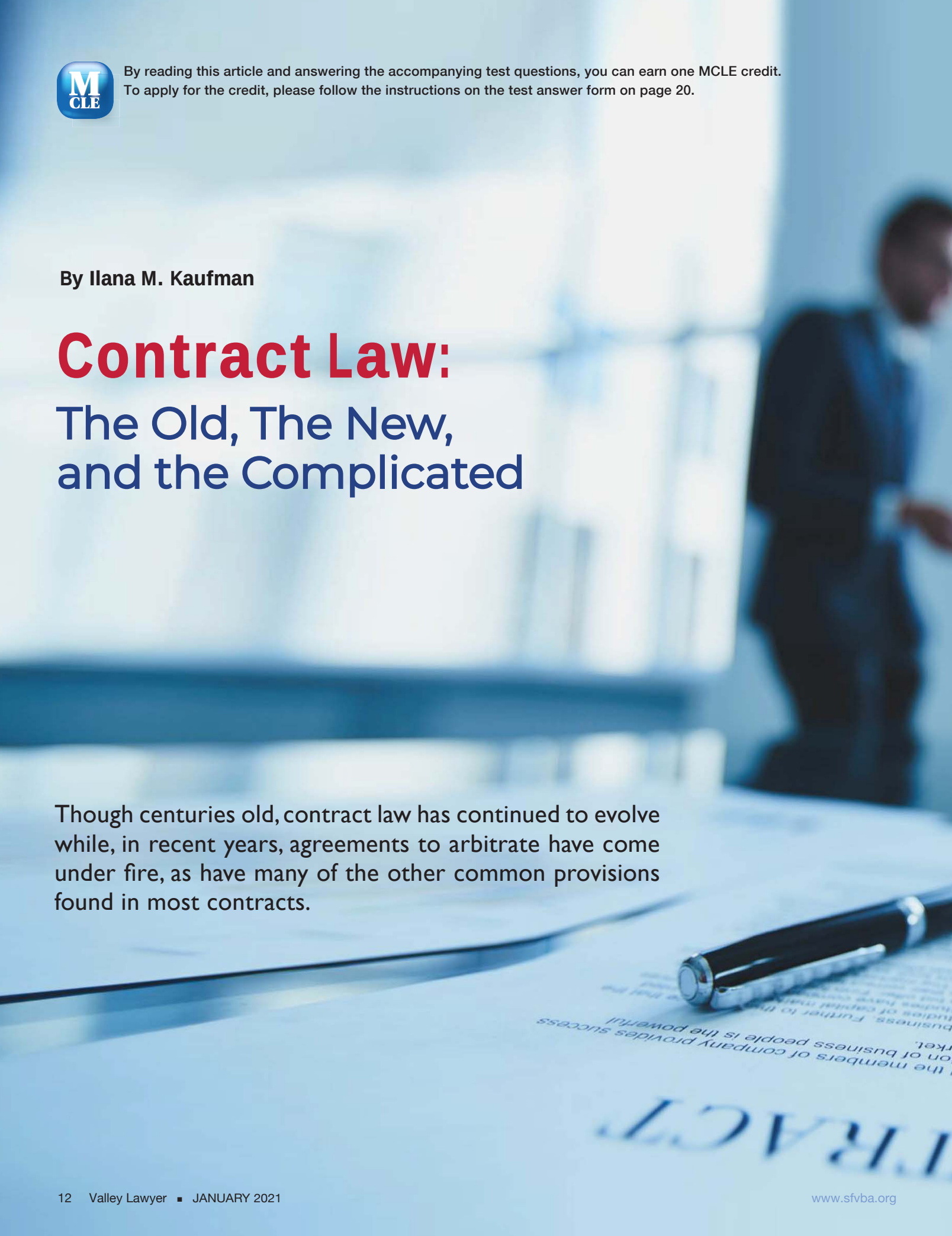
By Ilana M. Kaufman

Contract Law:

The Old, The New, and the Complicated

Though centuries old, contract law has continued to evolve while, in recent years, agreements to arbitrate have come under fire, as have many of the other common provisions found in most contracts.



THIS PAST YEAR WAS A BUSY ONE, FOR MANY reasons, particularly in the area of contract law. Though centuries old and laced with certain seemingly archaic principles, contract law has evolved while, in recent years, agreements to arbitrate have come under fire, as have many of the other common provisions found in most contracts.

It is critical, then, for those drafting contracts to stay abreast of the law in order to avoid unintended legal missteps, uncertainty, or worse.

In this article, we will review some of the more important changes in contract law that took place over the course of the last year; review the current status of independent contractor agreements, in particular, the business-to-business exemption of the ABC Test; provide an update on California arbitration and commission agreements; and, summarize some of the basic tenets of contract law.

2020 Round-Up

▪ Limitations on Mandatory Arbitration Agreements: In October 2019, California Governor Gavin Newsom signed Assembly Bill 51 (AB 51) into law, which, effective January 1, 2020, bans most employment arbitration agreements in California.

Under this new law, which adds a new Section to the California Labor Code, it is unlawful "for any person to require a job applicant or any employee to waive, as a condition of new or ongoing employment, any right, forum, or procedure established by the California Fair Employment and Housing Act (FEHA) and the Labor Code. The law also prohibits retaliation against an employee who refuses to sign an arbitration agreement."[1]

Notably, AB 51 does not apply to negotiated severance agreements or post-dispute settlement agreements and does not invalidate any written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (FAA).

It also remains to be seen whether the new statute applies only to new agreements, or to existing ones as well. By its own terms, AB 51 applies only to arbitration agreements "entered into, modified, or extended on or after January 1, 2020."

However, AB 51 does not explain what it means for an agreement to be extended after January 1, 2020, which begs the question as to whether any attempt to enforce an arbitration agreement that was entered into before January 1, 2020 is prohibited by the law.

Prior to the law taking effect, however, the U.S. Chamber of Commerce filed a lawsuit in federal court challenging the constitutionality of the law and seeking to strike it down to the extent it conflicts with the FAA.

In response, on December 30, 2019, a federal district judge granted a temporary injunction halting AB 51 from going into effect on January 1, 2020.

Subsequently, the court issued an order enjoining the State of California from enforcing AB 51 as to arbitration agreements covered by the FAA.

The State of California has appealed the court's decision and the matter remains pending before the Ninth Circuit. The ultimate status of the law is still in limbo, but the district court's injunction stands for now.

Employers should be cautious and, to the extent the employer's arbitration agreements are not voluntary or are not covered by the FAA and are encouraged to seek the advice of experienced employment counsel prior to requiring its employees and applicants to sign an arbitration agreement.

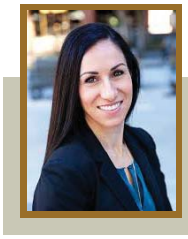
▪ Failure to Timely Pay Arbitration Costs Can Constitute a Waiver of Arbitration: In an employment or consumer arbitration that requires the drafting party—i.e., the employer—to pay certain fees and costs, such as administrative costs and arbitrator's fees, before the arbitration can proceed.

The failure to pay costs and fees associated with an arbitration within 30 days of the due date is a breach of the arbitration agreement, thereby waiving the right to compel arbitration.

The new law, AB 707, provides that the employee—or consumer, as applicable—would, in turn, be able to withdraw the claim from arbitration and prosecute his or her claim in court.[2]

Accordingly, employers should ensure that they timely pay all fees and costs associated with arbitration, otherwise they risk having to defend themselves in court.

▪ Prohibition of No Rehire Provisions in Settlement Agreements: Employers who enter into a settlement agreement with an employee often wish to completely cut ties with the employee at the conclusion of the dispute and include a "no rehire" provision in the settlement agreement.



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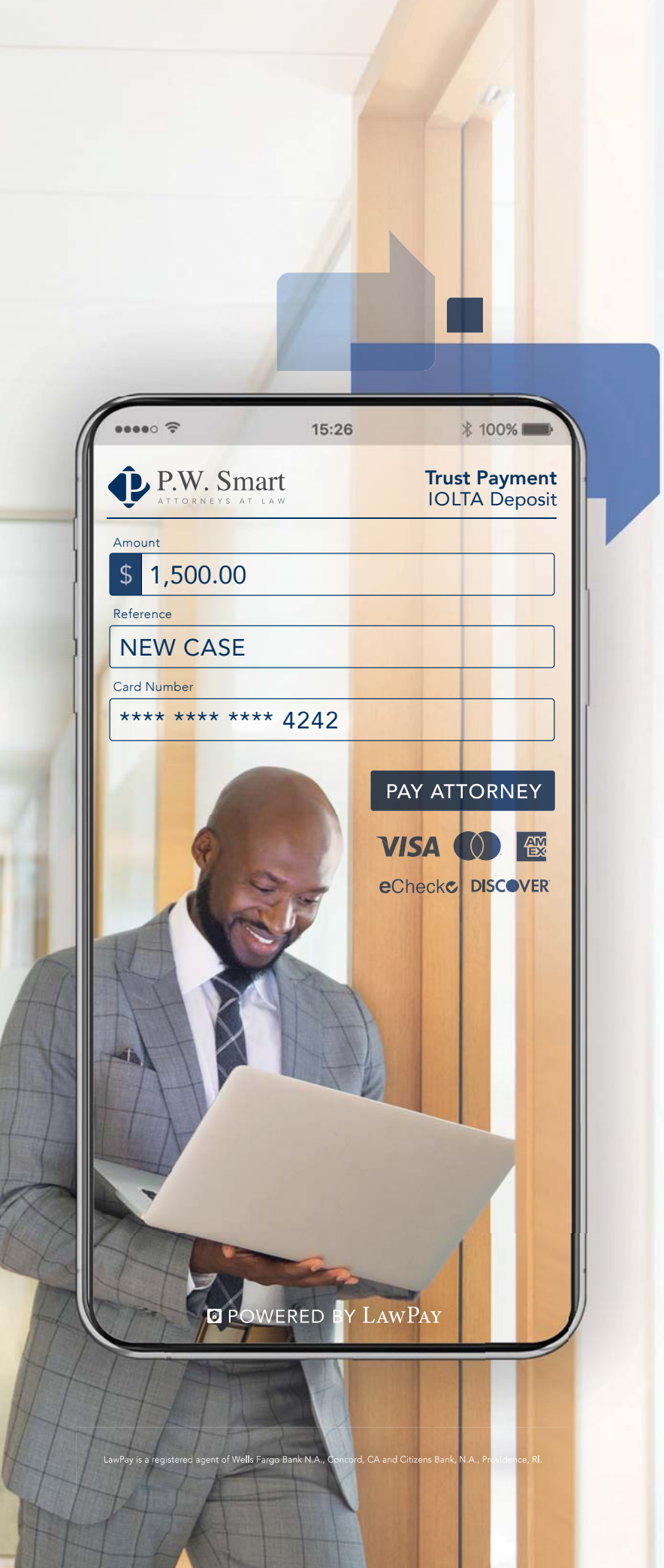

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However, AB 749 now prohibits and voids no rehire provisions in settlement agreements entered into on or after January 1, 2020. The law does have some exceptions, including situations where the employer has made a good faith determination that the individual engaged in sexual harassment or assault.[3]

An employer is also not required to rehire an individual if there is a legitimate non-discriminatory or non-retaliatory reason for terminating employment or refusing to rehire.

However, AB 2143, effective January 1, 2020, amends Section 1002.5 of the California Labor Code to specify that an employer's determination that the individual engaged in sexual harassment or assault must be documented; made before the aggrieved individual filed the claim that is the subject of the settlement agreement against the employer, and filed in good faith.

Further, the scope of conduct included in the employer's determination justifying the no rehire provision is expanded to include sexual harassment or assault, and any criminal conduct.

What to Expect: The ABC Independent Contractor Test…Again

On January 1, 2020, California enacted AB 5, legislation that codifies the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*.

In a nutshell, AB 5 makes the independent contractor classification test established in the *Dynamex* decision the legal standard to be used when determining whether a worker should be properly classified as an employee or an independent contractor.

However, AB 5 does establish several exemptions, including a business-to-business exemption.

Business relationships and workers falling under this exemption to the ABC Test are evaluated under the former, more flexible, Borello Test instead of the ABC Test. The business-to-business exception is intended to apply to bona fide business relationships wherein one business hires another business to perform services for the hiring entity.

AB 5 codified the ABC Test as Labor Code Section 2750.3. However, a new law that goes into effect on January 1, 2021—AB 2257—makes significant changes to Section 2750.3, including repealing that code section entirely and enacting new sections of the Labor Code at Sections 2775-2787 instead, thus essentially separating each subsection of former Section 2750.3 into its own Labor Code section.

Although AB 2257 makes many changes to the current law, this article will focus on the contractual impact of those changes, specifically pertaining to the business to business exemption.

In pertinent part, effective January 1, 2021, in order to be exempt from the ABC Test, business to business relationships must be in writing and meet the following 12 criteria, some of which have been expanded since first enacted one year ago:

- The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

- The provider is furnishing services directly to the contracting business rather than to customers of the contracting business. This subparagraph does not apply if the business service provider's employees are solely performing the services under the contract under the name of the business service provider, who regularly contracts with other businesses.

- The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services.

- If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the provider has the required license or business tax registration.

- The business service provider maintains a business location, which may include the provider's residence, that is separate from the business or work location of the contracting business.

- The provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

- The business service provider can contract with other businesses to offer the same or similar services and maintain a clientele without restrictions from the hiring entity.

- The provider advertises and holds itself out to the public as available to deliver the same or similar services.

- Consistent with the nature of the work, the business service provider makes available its own tools, vehicles, and equipment to perform the services, not including any proprietary materials that may be necessary to perform the services under the contract.

- The provider can negotiate its own rates.

- Consistent with the nature of the work, the business service provider can set its own hours and location of work.

- The provider is not performing the type of work for which a license from the Contractors' State License Board is required.[4]

When preparing a service contract for a business to business relationship, it would behoove the contract-drafter to ensure that the required criteria for the exemption are addressed within the terms of the service contract, and to evaluate the relationship of the parties in reality in order to ensure that the foregoing criteria are satisfied in practice, as well.

Taking care to ensure that a business relationship meets the exemption to the letter of the law provides yet another line of defense for business relationships that seek to qualify under the business to business exemption of the ABC Test.

> "Contract law is complicated and, especially in the employment context, is constantly changing."

Employment Contract Refresher

- Arbitration Agreements: Many employers choose to adopt arbitration policies with respect to disputes that arise in the context of employment situations.

Employers should practice caution to ensure that arbitration agreements are carefully crafted to withstand judicial scrutiny and avoid litigation—particularly in light of the restrictions laid-out in AB 51.

Employers are advised to seriously consider having a stand-alone arbitration agreement rather than one embedded in another document or an employee handbook in order to avoid any question as to the employee's acknowledgment and acceptance of the agreement.

Employers should also be sure to include provisions in the arbitration agreement that provide for a neutral arbitrator and clearly written arbitration procedures, including the arbitration rules that will apply—i.e., AAA or JAMS—and the website's url address for such rules; discovery sufficient to adequately arbitrate the employee's statutory claims; a written arbitration award; and all types of relief that would otherwise be available in court.

A statement should also be included stipulating that the employer bears the expenses of arbitration, save for any

costs the employee would otherwise incur if the case were pending in court.

Employers are also encouraged to consider including a class action waiver in the arbitration agreement, taking particular note that not all representative actions are legally waivable—specifically, claims under the California Private Attorneys General Act (PAGA) that may not be compelled to arbitration.

Additionally, claims for workers' compensation benefits, unemployment compensation benefit claims, or claims brought under the National Labor Relations Act also may not be compelled to arbitration. All such non-arbitral claims should be expressly excised from the arbitration agreement.

An employer should also beware when entering into arbitration agreements with employees while a class action is pending to which the employees might be included.

In such instances, post-dispute arbitration agreements risk unenforceability unless specific procedural safeguards have been implemented.

- Commission Agreements: One common method of compensation, primarily for salespeople, is the commission-based compensation plan.

A commission payment is based on the amount or value of the product that was sold, such as a percentage of sales or profits made from sales, or the number of sales made. Commissions are not discretionary—rather they are considered compensation earned by the employee.

Although widely used, this method is also widely misunderstood as unwitting employers often fail to meet the requirements of the California Labor Code, which, as of January 1, 2013, sets forth various requirements for such plans.[5]

California employees whose pay involves commissions must be provided with a written commission plan and employers must obtain a signed receipt for the contract from each employee.

Commission agreements must include a method for calculating and paying the commissions, and employers are strongly advised to draft a commission compensation plan that is detailed and specifically defines all aspects of the calculation, including when and how commissions are earned, advanced, and paid.

Employers are also strongly advised to include specific commission forfeiture language upon termination—for example, the employee must be employed on the date commissions are earned in order to be paid commissions or to include well-defined post-termination trailing commission language.

Without it, the terminated employee could potentially lay claim to significant post-termination commissions well into the foreseeable future, notwithstanding their termination,

despite the fact that other employees may have shepherded those post-termination sales from start to finish, or that those sales do not come to fruition for years into the future.

The Labor Code also clarifies that, in the event a commission plan expires and the parties nevertheless continue to work under the terms of the expired contract, the contract terms are presumed to remain in full force and effect until the contract is superseded or the employment relationship is terminated by either party.[6]

With these precautions in place, employers will be more readily able to defend the terms of their commission plans should an issue ever arise.

Back to Basics

A critical reminder for contract-drafters and parties to a contract alike is to remain aware of the elements of a valid contract in order to ensure that a contract's validity is not compromised.

Looking back to the basics, a valid contract requires an offer, an acceptance, and a bargained for exchange of promises—i.e., consideration. A contract can be express or implied. An express contract may be oral or written, and an implied contract is implied by the conduct of the parties.

Importantly, the terms of a contract must be sufficiently clear and unambiguous for a court to enforce them.

Written contracts should be drafted carefully to document the intention of the parties and dispel any ambiguity or contradiction within the four corners of the document.

Contract drafters and parties to a contract should also be aware of contract defenses that may ultimately invalidate an agreement that one or more parties ultimately seeks to enforce. If a valid defense to a contract exists, the contract may be voidable, either in part or in its entirety.

The Takeaway

Contract law is complicated and, especially in the employment context, is constantly changing.

Because of that, it is critical that those who draft contracts, including employers, stay as current as possible on the latest developments in the law, the do's-and-don'ts of contract writing, and the legal status of certain, even customary, provisions.

[1] California Labor Code § 432.6.
[2] California Code of Civil Procedure §§ 1281.97-1281.99.
[3] *Id.* 1002.5.
[4] California Business and Professions Code, Chapter 9, Division 3 § 7000.
[5] California Labor Code § 2751.
[6] *Id.* § 2751.

Contract Law: The Old, The New, and the Complicated
Test No. 147

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. AB 51, limiting the reach of employment arbitration agreements, only applies to job applicants.
   ❑ True ❑ False
2. AB 51 prohibits employers from including mandatory arbitration provisions in negotiated severance agreements or post-dispute settlement agreements.
   ❑ True ❑ False
3. AB 51 is currently unenforceable as to arbitration agreements covered by the FAA.
   ❑ True ❑ False
4. An employer's failure to pay arbitration costs and fees within 30 days of the due date does not waive the employer's right to compel arbitration.
   ❑ True ❑ False
5. No rehire provisions are legal in all employer/employee settlement agreements
   ❑ True ❑ False
6. No rehire provisions are legal in employer/employee settlement agreements where the employer has made a good faith determination, prior to the employee filing his/her claim against the employer, that the employee engaged in sexual harassment or assault, or criminal conduct.
   ❑ True ❑ False
7. The Labor Code sections that codify the ABC Test for determining whether a worker is an employee or independent contractor do not include any exemptions to the law.
   ❑ True ❑ False
8. Where a worker qualifies for an exemption under the ABC Test as codified in the Labor Code, the former Borello Test applies instead.
   ❑ True ❑ False
9. The business-to-business exemption of the ABC Test requires business to business relationships to be in writing.
   ❑ True ❑ False
10. To qualify for the business to business exemption of the ABC Test, the contract must specify the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services.
    ❑ True ❑ False
11. To qualify for the business-to-business exemption of the ABC Test, not all of the 12 requirements need to be met.
    ❑ True ❑ False
12. To avoid challenges to an arbitration agreement, employers should consider having a stand-alone arbitration agreement as opposed to one embedded in another document or employee handbook.
    ❑ True ❑ False
13. Claims under the Private Attorneys General Act (PAGA) may be waived and should be included in a class action waiver in an employment arbitration agreement.
    ❑ True ❑ False
14. Arbitration agreements may not be entered into with employees while a class action is pending against the employer and to which the employees might be included in the class.
    ❑ True ❑ False
15. Employee commission agreements should, but are not required to, be in writing.
    ❑ True ❑ False
16. Employee commission agreement must include a method for calculating and paying commissions.
    ❑ True ❑ False
17. Commission forfeiture provisions in an employee commission agreement are enforceable.
    ❑ True ❑ False
18. Commission payments are discretionary.
    ❑ True ❑ False
19. A valid and enforceable contract may be written, oral, or implied by the conduct of the parties.
    ❑ True ❑ False
20. Not all contracts require a bargained for exchange.
    ❑ True ❑ False

Contract Law
MCLE Answer Sheet No. 147

INSTRUCTIONS:

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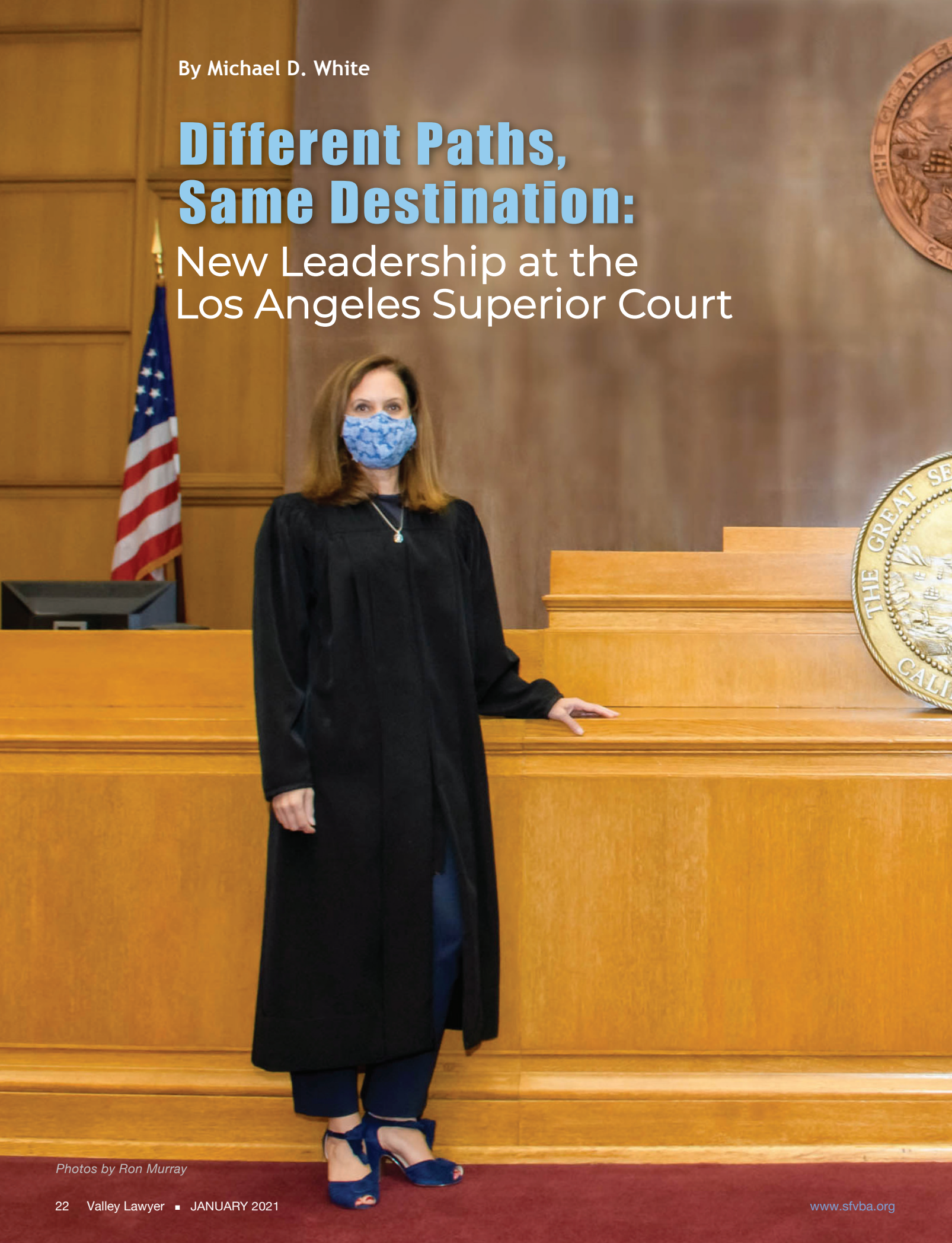
By Michael D. White

Different Paths, Same Destination:

New Leadership at the Los Angeles Superior Court



Photos by Ron Murray

Facing the continuing challenges of COVID-19, reduced budgets and a myriad of other challenges, incoming Los Angeles Superior Court Presiding Judge Eric C. Taylor and Assistant Presiding Court Judge Samantha P. Jessner have committed themselves to apply the lessons learned from their families and their unique life experiences to the task.

ASTRONAUT, COWBOY, ACTOR, rock musician, race car driver, star athlete. Every youngster has a dream of what they want to be when they 'grow up.'

It is rare, though, to find that the dreams of childhood come true. Life intervenes, different paths are considered, decisions are made, and the journey on the path that lies at one's feet begins.

"I never thought I'd be where I am today. I never thought I'd be in a job like this. Not in my wildest dreams," says Judge Eric C. Taylor, who has taken the reins as the new Presiding Judge of the Los Angeles Superior Court.

Judge Taylor had served as the Assistant Presiding Judge since January 1, 2019, and was elected unanimously in October by the Los Angeles County bench to a two-year term as head of what is—with 550 judicial officers, 4,600 employees working in 39 courthouses—the largest trial court in the entire nation.

Raised along with his brother by a single mother in a small two-bedroom apartment in Los Angeles' Crenshaw District, Judge Taylor recalls that his family never owned a car and, most importantly, learning that receiving a good education could be transformational. "My mother sacrificed everything for us and she wanted us to know that we were supported and loved," says Judge Taylor.

Recognized for his academic abilities, he received a full scholarship to The Cate School in Carpinteria, California, where his time was interrupted by an illness that led to his spending a year and a half in the pediatric unit of a hospital in Santa Barbara.

While bedridden, he says, what impressed him most was the care demonstrated by the doctors and nurses who treated him and his fellow patients.

"I got to know them and developed a deep appreciation for people who take care of others," he says. "I thought they were all very smart and compassionate and all I could think was that I wanted to be like them. So I went from wanting to be a pilot to wanting to be a doctor."

Following his time at Cate, Judge Taylor applied to and was accepted at Dartmouth College in Hanover, New Hampshire. While working through a mathematics/pre-med course of study, he had some peripheral medical school exposure.

By the end of his sophomore year, the experience led him to conclude that "it wasn't as exciting as I'd first thought it would be. I figured there were a lot of careers to consider and I decided to search out the possibilities. Several people told me that there's nothing wrong with going back and exploring those possibilities when you're young."

Taylor credits his father—a Freedom Rider who had been arrested and jailed in Mississippi in 1961—and several attorneys he had met with helping him decide to pursue a career in the law.

"When I graduated, I did what a lot of people who grow up poor do when they don't know what they want, so they look for a way to make a living. It just sounded like an interesting venture and I like to be challenged," he says. "I had some friends who were in law school and very into politics. My dad thought that, particularly after college, I should have some idea of what I wanted to do. 'You're not going to be a doctor…,' he said. So I settled on law school."

Who Knows?

The University of Virginia School of Law beckoned.

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.

In 1986, after his first year in law school, Judge Taylor served as an extern to the late California Supreme Court Justice Allen E. Broussard, the second African-American to sit on the California Supreme Court. "He was a great mentor. He helped me along and advised me to do what you love."

At the same time, he was sitting with then Chief Justice Malcolm Lucas at lunch with a number of other clerks.

"Justice Lucas went around the table asking each of us, 'What do you want to do'? He came to me and I answered, 'Well, I'm not really sure.' He said, 'Well, this could be a big waste of time for you then.' And I said, 'OK. Maybe. But here I am sitting with you having lunch. Who knows what's going to happen from here.'"

Graduation was followed by successfully passing the California Bar Exam in 1989, and the ensuing 31 years in the law have proven to be, in a word, "eventful."

Judge Taylor's first experience as an attorney was gleaned at the law firm of Sonnenschein, Nath & Rosenthal, and the former law firm of Pettit & Martin.

"I was in private practice at two large law firms for about six years," he says. "I always enjoyed going to court," where, he says, he developed a profound respect for the numerous judges he appeared before. "It was an eye-opening experience seeing judges with exemplary demeanors who were patient and prepared. They get right to the issues at hand, are efficient, and are respectful."

There was a lesson learned from them and members of his own family—"The best way to treat people is better than the way they treat you. If you do that, you can't go wrong and, as a judicial officer, create an environment that is contagious. You can see the rewards and you can see how that impacts everyone around you."

Leaving private practice, Judge Taylor—a self-described science fiction film "nerd"—was "lured" into working as a Deputy County Counsel for Los

Angeles County with the promise of spending as much time in court as he wanted—an offer that was "an obvious draw for me."

Appointed to the Inglewood Municipal Court bench in 1998, he was named its presiding judge at the time the municipal courts merged into the Superior Court two years later.

Judge Taylor served as the Supervising Judge of the Southwest District from 2003-2004 and from 2016-2018, when he was elected as the Court's Assistant Presiding Judge.

Throughout his career, Judge Taylor has served on several Superior Court committees, including its Legislative, Grand Jury, Family Law, Security, and Bench/Bar Committees and also served a term on the Judicial Council's Access and Fairness Committee.

He had previously served two separate one-year terms on the Judicial Council in an advisory position as the only judge elected twice to serve as President of the California Judges Association.

Interestingly, Judge Taylor is succeeding Judge Kevin Brazile as Presiding Judge of the Superior Court.

He and Judge Brazile worked on several major cases together while working at the County Counsel's office and have been close friends for more than 25 years.

"Kevin is a great friend," says Judge Taylor. "When I was appointed 20 years ago, I credited Kevin with being the person who taught me how to be a real lawyer. He was one of the top attorneys at County Counsel and one of the most talented lawyers I've ever known."

Judge Taylor takes the reins at the Superior Court at an unprecedented time.

The COVID-19 pandemic, he says, "has greatly influenced our ability to provide access to the justice system fairly and safely to all. We've done a lot to remain open and provide a critical service to those who need it."

The Court "was already in the process of rolling out new technologies

such as remote access and bringing technology in a much bigger way to the court, but it shifted into warp speed when the pandemic hit," he says. "We had anticipated that the only way to provide access to the courts with the COVID numbers going up and down was to bring more technology to the forward more quickly and, frankly, exhausting whatever discretionary funds we had."

Hopefully, though, "the changes that have been made by accelerating our tech implementation program will pay dividends for the public," he adds. "We went from looking at two years or perhaps longer than that to implementing changes within six to eight months. It hasn't been without its hiccups, but I think our staff has done an amazing job and our judicial officers have done the same."

"Tireless and Dedicated"

For the next two years, working with Presiding Judge Taylor is the new Assistant Presiding Judge Samantha P. Jessner, who, he says, "is tireless and dedicated to our court's technological transformation. She is an outstanding educator and a dear friend."

Like Judge Taylor, Judge Jessner had "no idea" she would be in the position she is today, helping guide the

massive Los Angeles Superior Court network.

"I think I've gotten where I am by hard work and dedication," she says. "It's a genuine privilege to lead this court and I'm very proud of the work I've done as an attorney and as a judge."

According to Judge Jessner, her goal during her two-year tenure is "to help Judge Taylor navigate the Superior Court through the pandemic and beyond. At some point, we will come out on the other side of it and, perhaps, take a look at some of the practices we were able to implement and see if they can be employed in the long-term."

The goal, she says, "is to continue the balance of providing equal access to justice with the health and safety of our judges, staff and all the people who come into our courthouses. That's a pretty delicate balance right now, but that is our mission. I'm really looking forward to working with Judge Taylor and our team of supervising judges to do the very best we can in a very challenging set of circumstances."

Supervising Judge of the Court's Civil Division since January 1, 2019, Judge Jessner has melded an interest in technology in her oversight of the operations of the state's largest Civil Division.

For the past several years, she has been the motive force behind the melding of innovative technology innovations into the court's operations, as well as providing educational training on new technologies to hundreds of judges throughout the court network.

"When I was appointed 20 years ago, I credited Kevin with being the person who taught me how to be a real lawyer."
– Judge Eric C. Taylor

Over the past two years, she has led the development of protocols to safely and effectively hear civil cases during the COVID-19 pandemic—developing jury selection methods and juror questionnaires, implementing remote appearance technology, and chairing the COVID-19 Advisory Committee with members of the bar.

"We have been in the process of updating and implementing new technology for years," says Judge Jessner. "What the pandemic did, among other things, was expedite the implementation of some innovations.

The best example is the ability to appear in court remotely in most, if not all, of our courtrooms. While that was definitely on the timeline for our civil courtrooms, it wasn't going to happen for another year and a half. We actually implemented remote technology in our criminal and juvenile dependency courts just a few weeks after the pandemic set in. That was an amazing accomplishment for a court system of our size."

For the court, navigating the ongoing challenges of COVID-19 are exacerbated

by a less microbial issue—namely, a shrinking budget.

Underscoring Judge Taylor's observation that the costs of implementing safety protocols and implementing resultant technology have drained the court's discretionary funds, Judge Jessner says that, "We are going to have to figure out how to continue to meet our mission while experiencing significant budget cuts. Before the pandemic, we were in a relatively strong financial position, but we have had visited upon us major cuts in funding. We are going to need to find ways to do what we do more efficiently."

Frankly, she adds, "Technology helps, but there are other things that we are going to have to do without and there are programs that are going to have to wait until we are in a better budget position."

Born and raised in the San Gabriel Valley, Judge Jessner graduated from Stanford University before receiving her Juris Doctorate from the University of

"I think I've gotten where I am by hard work and dedication."
– *Judge Samantha P. Jessner*

California, Berkeley, School of Law and returning home to Southern California.

From 2017-2019, Judge Jessner served as the Assistant Supervising Judge of the Civil Division. While in the Civil Division, she has presided over an Independent Calendar courtroom, a trial courtroom, and a personal injury hub courtroom. Before moving to the Civil Division, Judge Jessner served as the Supervising Judge of the Mental Health Courthouse and sat in Criminal Division courtrooms in the Alhambra, Downey, Foltz, Norwalk, and Whittier courthouses.

Courage and Commitment

"I attribute so much of what I've accomplished to my parent's courage and commitment," she says.

The daughter of attorney Patricia Phillips, the first woman president of the Los Angeles County Bar Association, Jessner "grew up in a household with a mother who was not just an attorney, but one who genuinely loved what she did. She had an unparalleled work ethic and was very involved in many legal groups and has always demonstrated gentility, civility and tact, as well as a passion for the law. That passion was infectious."

Her father, she says, "was the same way. He was a doctor and the blueprint that they drew was the one that I was able to apply to my own life."

"My father grew up, for the most part, in Washington, D.C. My grandfather was a dentist. His practice was in his home and he was successful in large part because he passed as white and, as a result, had many white patients," she says. "Interestingly, and in stark contrast, my grandmother left the house every day to go to Howard University where she was an educator."

Her father enrolled in Dartmouth College at the age of 16, and, after graduating with a degree in Romance Languages, decided to attend medical school at Meharry Medical College, which, according to its history was founded in 1886 to "provide the Colored people of the South with an opportunity for thoroughly preparing themselves for the practice of dentistry."

After earning his degree from Meharry, he headed to the West Coast, first to San Francisco and then Los Angeles, "perpetually in search of warm weather. My father met my mother in San Francisco. She was his secretary."

Judge Jessner's mother had grown up in the City of the Angels, which prompted a move by her parents from the Bay Area back to Los Angeles.

Shortly after they were married in 1963, though, intolerance of their inter-racial marriage by family and neighbors forced a move to Mexico City.

Following a return to Southern California, her father began a medical practice specializing in hand surgery in the City of Commerce with two partners, both of Puerto Rican heritage, while her mother completed her law school studies, which she'd begun in San Francisco, at Loyola Law School.

"Both my parents had successful and immensely satisfying careers in their respective fields," says Judge Jessner. "I grew up in an active and

busy household with two parents that worked hard and took great pride in their success, all while raising a family in a warm and loving household."

Los Angeles, she says, "represents opportunity, as evidenced by my parents' success here," says Judge Jessner. "It also represents acceptance, as evidenced by my parents' ability to achieve acceptance professionally and socially notwithstanding race, gender, and a mixed-race marriage in the 1960s."

Given her family's history and the role models that her parents were and still remain, "it was natural for me to not only decide to study law but also to return to Los Angeles to practice law after attending both college and law school in the Bay Area."

Following law school and successfully passing the Bar, Judge Jessner went to work at Sheppard Mullin in Los Angeles doing litigation work.

Tours as a litigation counsel for The Boeing Company and as an Assistant Inspector General for the Los Angeles Police Commission were bookended between two tours totaling 11 years as an Assistant United States Attorney in the Central District of California's Criminal Division.

An avid reader of historical fiction, she was appointed to the bench by Gov. Arnold Schwarzenegger in March 2007.

In addition to service on several key court and statewide committees, over the past several years, Judge Jessner—a ballet dancer in her youth—has participated in the court's education program for new and sitting judicial officers, while, for the last four years, served as an instructor on judicial ethics and New Judge Orientation for the Center for Judicial Education and Research, and as a member of the Supreme Court Committee on Judicial Ethics Opinions.

She also serves as an instructor for the Rutter Guide on topics including Civil Law Update, Basic Civil Procedure, Technology and the Law, and Examining Trial Issues.

What It's All About

"For me, it's always been about maintaining the quality of justice, fairness, and access," says Judge Taylor. "We will continue to do that, but the pandemic has gotten in the way and created a lot of different issues for the court. We've had to deal with the problem of meeting the needs of failing facilities and helping people feel that they have ready access to the justice system."

The Los Angeles County Superior Court, he says, "is, in effect, a large, diverse neighborhood court network with 39 courthouses all over Los Angeles County. Continuing along those lines is extremely important to us, as is involving youth in our courts because, in 20 or 30 years, one of them will have this job. It's important to leave them with something better than we inherited."

By Joseph G. Balice

Zero Out:
Finding Coverage for COVID-19-Related Business Losses

IN LATE 2019, AN APPAREL industry company, concerned that its retailer customers were cancelling orders because the factories in China couldn't ship any goods due to some mysterious new virus, inquired if its business income interruption insurance coverage might cover its losses.

The job of finding an answer fell to an insurance policyholder coverage attorney, whose job entails scouring insurance policies to find arguments for why insurance carriers should have to pay for—i.e., cover—losses and risks.

After careful review, the attorney determined that it was very unlikely the carrier would cover the claim, but that the company should report the loss just in case.

As expected, the carrier denied the claim and paid zero.

Relief Denied

Over the course of the following year, policyholders all over the world had similar experiences, suffering tremendous business losses due to the global COVID-19 pandemic and having their insurance carriers deny claims under policies that are supposed to cover business income interruption.

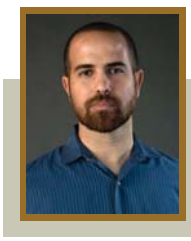
In March 2020, according to one industry analyst, insurance coverage for financial losses caused by businesses having to close down to slow the spread of COVID-19 would be, given the worldwide response, "possibly the biggest insurance coverage issue in the history of insurance."

While this may sound like hyperbole, the reality is that the global economic devastation caused by COVID-19 has been so pervasive that one would struggle to think of any business on the planet that hasn't been impacted—directly or indirectly—by the fallout, with many suffering debilitating, and even insurmountable, financial losses.

At the time, two things were predicted—first, that insurance carriers would almost universally deny coverage for these kinds of claims, and second, when the inevitable insurance coverage and bad faith lawsuits were filed, courts would dismiss many of them, finding no coverage for these losses.

The first prediction came to pass as expected; the second is yet to be determined.

With losses of this magnitude and carriers denying coverage on an almost universal basis, the public outcry has been expectedly livid.



Joseph G. Balice is a Partner at Brutzkus Gubner Rozansky Seror Weber. His core practice is representing policyholders when insurance companies deny claims. He can be reached at jbalice@brutzkusgubner.com.

An all-to-common refrain is being echoed: "We pay thousands of dollars in premiums every year to buy business income insurance and now our business income is interrupted, but the carriers deny the claims and keep all the money. This is why we bought insurance in the first place and now we're abandoned when we need it most! It's typical insurance company bad faith."

Several state regulators and legislators made broad proclamations about forcing insurance companies to pay these losses.

Several such bills have been introduced at both the federal and state legislative levels.

However, none have passed yet and all will face heated judicial scrutiny in the courts.

In particular, any law purporting to force insurance companies to pay losses not actually covered under their policies would have to overcome constitutional challenges under Article I, Section 9 of the United States Constitution, which prohibits any law "impairing the Obligation of Contracts."

Early in 2020, when rumblings about legislative action first began, insurance industry insiders were quick to raise this argument, certainly hoping to discourage the legislation and provide some damage control to the industry's dented public image.

Chubb CEO Evan Greenberg told CNBC in April 2020, "You can't just retroactively change a contract. That is plainly unconstitutional."

Still, the public outcry against insurance companies has not diminished as policyholders are suffering losses at an unprecedented level and insurance companies have, almost routinely, steadfastly refused to pay claims.

None of this should be unexpected for the simple reason that the vast majority of policyholders tend to be uninformed about what their policies actually cover. The unvarnished truth is that, despite insurance being a ubiquitous necessity in modern life, there has been, collectively, a poor job of educating the public on what insurance really does and how it actually works.

Insurance policies are dense documents with opaque provisions and technical language, that are, in turn, governed by even more obscure regulations and resultant legal decisions.

As with all highly specialized fields, many individuals simply lack the training and experience necessary to navigate complex insurance issues.

Thus, understanding why business income interruption losses caused by COVID-19 are apparently so rarely covered under insurance policies requires a brief primer on what insurance is and how it works.

Insurance 101

An insurance policy is a contract, which is to say it is an agreement between two parties—a policyholder and an insurance company—making promises to each other.

The policyholder promises to pay the premiums—i.e., the upfront cost of the insurance policy—as well as fulfill the other obligations described in the policy, such as pay deductibles or retentions, promptly report claims to the insurance company, and cooperate with the carrier's investigation.

On the other side of the contract, the insurance company's primary promise is to pay for covered losses, as set forth in the policy's terms and conditions. The losses must be caused by the particular risk covered under the policy.

That is why we buy insurance—to transfer the financial risk of bad things that might happen. If something bad happens and we have an insurance policy that covers that particular kind of risk, then we expect the insurance company to pay for the financial consequences.

There are as many kinds of insurance, often called lines, as there

are risks to insure. The most common lines of insurance are property, automobile, general liability, directors and officers liability, errors and omissions liability, crime/fidelity and, of course, health insurance, which actually serves less like a traditional insurance policy and more like a healthcare payment plan.

When it functions correctly, the policyholder has paid a relatively smaller amount—the premiums and any deductible or retention—and the insurance company, who has assumed the risk in exchange for receipt of those premiums, pays for the financial harm caused by the covered event, sometimes referred to as the loss.

The repeated use of the financial qualifier is intentional. Insurance companies can't stop an accident from happening or protect anyone from harm; all they can do is pay for the monetary costs that result when those things do happen.

Where Is the Fit?

So, where does business income interruption insurance mesh into this?

Many people are surprised to learn that, for most policyholders, business income interruption coverage is most often found as part of their property insurance.

The general idea is that if your property is damaged and your business can't continue its normal operations and, as a result, loses income, the insurance company is supposed to pay for that as well.

For example, a manufacturing company had a fire that burned down its factory, and the company's property insurance policy covers the cost of having the facility rebuilt.

But, because the rebuilding process could take many months and the company cannot operate until the rebuild is completed, the policyholder may well be forced out of business long before it could ever move into the new factory.

To cover that risk, the policyholder hopefully also bought, as part of the same property insurance, business income interruption coverage so that they can continue receiving the income they would have received had the fire never happened.

However, business income losses can be caused by a variety of factors—a factory destroyed in a fire, broken-down equipment, customers cancelling contracts, unfavorable market conditions, or, perhaps, a new competitor.

To be covered under the property policy, the business income losses must have been caused by a loss that is covered by the property policy.

So, while business losses caused by the fire-gutted factory are covered—because the damage to the factory is, itself, covered—the business losses caused by a loss of market share to a new competitor would not be, as the underlying cause of the loss is not covered under the policy.

Enter COVID-19

Applying this framework to the COVID-19 pandemic, businesses can only obtain coverage for their business income interruption losses if they can establish that the losses were the result of a cause that is covered by their property policy.

Although there are many permutations and variations of the fights between policyholders and insurance carriers, there are three big issues that stand out as the primary battleground for these cases.

First, many property insurance policies have express exclusions for losses caused by a virus such as COVID-19. Remember that the carrier's primary promise under an insurance policy is to pay losses that are covered pursuant to the terms and conditions of the policy.

One type of policy provision is an exclusion, which narrows in some way the coverage granted in the policy.

Using the example above, the factory destroyed in the fire would ordinarily be covered under a property policy, because the fire constitutes damage to the property. But if the policy, hypothetically, had an exclusion for fires caused by arson, and the insurance company could prove that the fire was the result of arson, then there would be no coverage.

So, even though the risk itself—that is, damage to the factory—would be covered, the exclusion operates to narrow the coverage by eliminating certain kinds of losses falling within the scope of the language of the exclusion.

Turning back to COVID-19, in around 2006, after a series of previous virus outbreaks such as Severe Acute Respiratory Syndrome (SARS), many insurance companies began including exclusions in their new policies that barred coverage for losses caused by such viruses. And, because property insurance policies are typically year-to-year contracts, older policies without the exclusion have long since expired and been replaced with newer ones that do.

Carriers with virus exclusions in their policies have routinely denied COVID-19 business interruption claims arguing that even if the policyholder establishes the other requirements for coverage which they also dispute, it doesn't matter because the underlying cause of the loss is the virus, which results in no coverage and a denied claim.

Courts have generally appeared to accept that defense.

For example, in *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Insurance USA, Inc*., a case heard in the Los Angeles Superior Court, the owners of the landmark Hollywood restaurant sued their insurance carrier for breach of contract and bad faith because the carrier denied coverage for business income losses from the COVID-19 pandemic-related shutdown orders issued by state and local government authorities.

The court sustained the carrier's demurrer without leave to amend, ending the case at the earliest stage, because, among other reasons, the court found that coverage for the loss was barred by the virus exclusion in their policy.

(As of the preparation and writing for this article, there have been no media reports of any appeal of the court order even though the policyholder's time to appeal is still pending.)

Similarly, high-profile attorney Mark Geragos filed a lawsuit against Travelers Casualty Insurance Company of America for denying his law firm's COVID-19 business income interruption claim.

After the case was moved to the United States District Court for the Central District of California, the court dismissed the claim in part based on the virus exclusion in the law firm's policy.

Anti-Virus Exclusion

One argument some policyholders have developed against the virus exclusion is the so-called regulatory fraud or regulatory estoppel theory.

It holds that insurance companies should be prevented from relying on the virus exclusion because they lied to state insurance regulators when they sought approval to include the exclusion in their policies.

Although insurance policies are private contracts between policyholders and insurance companies, the insurance industry is heavily regulated at the state level to protect consumers. In most states, regulators must approve the contents of or any changes to an insurance company's standardized policy forms.

The regulatory fraud theory was introduced in the 1990s when insurance companies were accused of lying to regulators about changes to the pollution exclusion in property policies, and some courts ruled that the carriers were barred from relying on the exclusion.

Applied to COVID-19, some advocates claim that insurance

companies misrepresented the facts to insurance regulators when they sought to introduce the virus exclusions into their policies, claiming that the losses caused by viruses were not covered under their policies—even in the absence of the exclusion—and that the new exclusion merely sought to clarify that.

Proponents of that theory argue that coverage for virus-caused losses was not a resolved question when the carriers made that representation and that some cases had, in fact, held that such losses might be covered.

In addition, they claim the insurance industry sought to avoid future similar losses by introducing a new exclusion to, in their view, clandestinely eliminate that risk going forward. (No known court decisions have been reached on the issue as of the preparation for this article.)

The second key issue in dispute is whether COVID-19, or any other virus, can cause property damage triggering coverage under the property policies.

While not every property insurance policy contains a virus exclusion, the vast majority of policies do typically require damage to property as a predicate to coverage, including for the business income interruption coverage.

Carriers have argued that the virus is a biological disease and that because its presence does not physically alter the property and can simply be cleaned and disinfected, there is no property damage.

Conversely, policyholders have argued that the property need not be materially altered, but that property can be deemed damaged if it is physically rendered useless or unfit for its intended purpose.

Under that theory, similar to contamination by pollutants, the COVID-19 virus damages property by making it unsafe for human occupancy and requiring businesses to shut down.

Because ambiguous and vague provisions in insurance policies are generally interpreted in favor of coverage, if the language can reasonably be construed as providing coverage, courts are supposed to do so.

Property Damage

Because the property damage requirement is so prevalent in these insurance policies, this is perhaps the most common argument fought in litigation.

In one of the first COVID-19 coverage decisions, the United States District Court for the Western District of Missouri ruling on the carrier's motion to dismiss *Studio 417, Inc. v. The Cincinnati Insurance Company*, agreed with the policyholder that the COVID-19 virus "is a physical substance" that "attached to and deprived Plaintiffs of their property, making it 'unsafe and unusable, resulting in direct physical loss to the premises and property."

> "The battle for insurance coverage caused by COVID-19 is going to live on for many years in the courts."

Cincinnati Insurance immediately sought to appeal the ruling, so it remains to be seen if this policyholder victory will hold up. Since then, numerous trial courts across the country have addressed the issue, with most coming out in favor of the carriers.

For example, in *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, the United States District Court for the Southern District of California granted Farmers' motion to dismiss and refused to grant the policyholder leave to amend the complaint, finding that, "the presence of the virus itself, or of individuals infected with the virus, at Plaintiff's business premises do not constitute direct physical losses of or damage to property."

It is likely that this specific question—whether the presence of the virus constitutes damage to property—will be argued in appellate courts across the country in the near future as trial courts continue to issue these rulings and the parties seek to have those decisions reviewed.

Of course, even if the presence of the virus does constitute property damage, that would not necessarily be the end of the discussion—even for policyholders without a virus exclusion—because of the third major issue: causation.

For the business income losses to be covered, the policyholder must show the losses were caused by the risk covered under the policy. As noted in the *Pappy's Barber Shops* order, even if the virus could cause property damage, the policyholder would still need to prove that the business income losses sustained were caused by the presence of the virus.

For most businesses that had actual COVID-19 cases on site and were required to close their doors, that acute shutdown likely would have only lasted for a few days or weeks while the premises were sanitized and the property was deemed suitable to reopen.

But for those businesses—and those that have suffered business income losses without ever having a known COVID-19 case on site—the genuine cause of their losses is likely the widespread governmental response to the virus which has ordered people to stay in their homes and forced many businesses to either close completely or drastically reduce their operations.

One possible solution to this obstacle is the civil authority coverage component in property insurance policies, which generally provides coverage for business income losses

resulting from an order by a civil authority that prevents the insured business from operating.

However, there are several challenges as many civil authority provisions require that the order be issued as a result of property damage, which circles back around to the question of whether a virus can damage property. Moreover, they often have geographic limitations, such as a requirement stating that the underlying property damage that precipitated the order happen within a 5-mile radius of the property.

Carriers with those types of provisions argue that the civil authority coverage is not implicated unless the policyholder can show that a government agency issued an order for the policyholder to close down specifically in response to an event within those geographic limitations.

The orders currently being issued across the country, carriers argue, are intended to attempt to stop or slow down the spread of the virus and, therefore, because of any property damage, do not trigger coverage.

So where does this leave policyholders with COVID-19 business income losses?

Tender the Claim

Frankly, the outlook is not rosy.

All policyholders are advised to tender their claims to their carriers, even though a denial is expected.

Tendering a claim is a requirement for coverage, so if there are victories for policyholders in the courts, only those policyholders who timely reported their claims will be able to take advantage.

Additionally, policyholders should read and carefully scrutinize their policies, because language does vary. Even seemingly insignificant variations in its wording can have significant results in changing the scope of coverage.

Even with reports of a vaccine on the horizon and the hope for an end to the pandemic's disastrous effects, the battle for insurance coverage caused by COVID-19 is going to live on for many years in the courts.

By Laurence H. Mandell

Ride On!

Bicycle Safety and the Law

WITH PEDAL POWER IN FULL FORCE, A CYCLIST treks a major two-lane highway. Wind pressing against his face, mountains rise to form boundaries in the sky as the fresh ocean air fills his lungs.

Suddenly, two tons of steel pass him within a foot of impact and his self-defined personal freedom ride dissolves into mind-numbing danger, rising anger, and a cold sense of unvarnished vulnerability.

Sharing the Road

For many of us, the new reality is working from home and finding new ways to exercise now that access to gyms and other forms of recreation are closed or limited.

As a result, hiking, home exercise, and, particularly, bicycling have become increasingly popular activities during the current COVID-19 environment.

Whether bicycling is an old pastime or a new discovery, this article will focus on important rules, laws, and safety guidelines, so clients can be made aware of the rules of the road as riding increases in popularity and a growing number of bikes populate our streets and highways.

Whether the rider is a weekend warrior or committed daily bicycle enthusiast, it must first be understood that cyclists share the road—and its conditions—with automobiles, trucks, and other motor vehicles and that, first and foremost, all the laws that apply to other vehicles must be obeyed.

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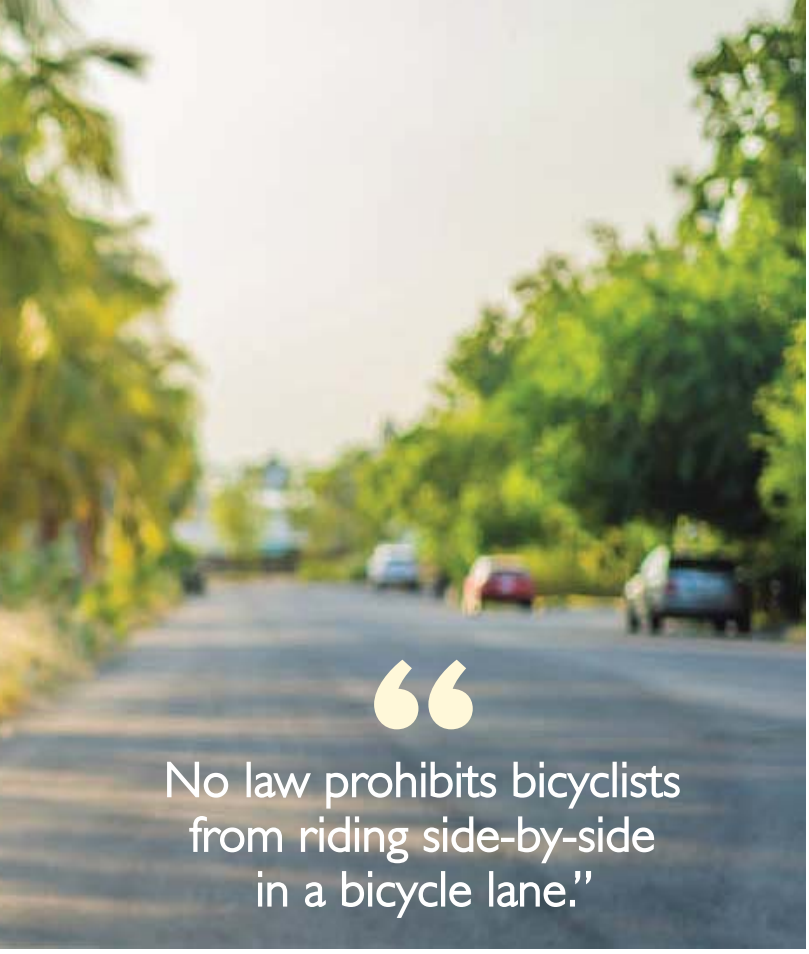

> "No law prohibits bicyclists from riding side-by-side in a bicycle lane."

The Law

The California Vehicle Code (CVC) provides that every person who rides a bike on a street or highway has the same rights and responsibility as someone operating a motor vehicle.

However, there are some interesting exceptions.[1]

Under the CVC, if a bicycle is being operated on a roadway at a speed less than the normal speed of traffic moving in the same direction, you should ride as close as possible to the right-hand curb or the edge of the roadway unless you are overtaking or passing another bicycle or vehicle; preparing to make a left turn at an intersection or into a private road or driveway; exercising reasonable care to avoid dangerous conditions, such as objects in the roadway, animals, pedestrians, or a substandard width lane—that is a lane that is too narrow for a bicycle and the vehicle to travel safely side-by-side, when approaching a place where a right turn is authorized.[2]

Thus, a pair of cyclists riding side-by-side and traveling less than the flow of traffic, not only pose a danger, but also create possible comparative negligence against the cyclists should a collision occur.

The CVC's so-called three-foot law can complicate the issue as motorists passing bicyclists must have three feet of clearance and bicyclists riding side-by-side will most likely force the motorist to move into an adjacent lane or even cross the center divider line.[3]

That said, no law prohibits bicyclists from riding side-by-side in a bicycle lane. Indeed, the CVC establishes that if an individual is operating a bicycle at a speed less than the normal speed of traffic, that person "shall ride within the bicycle lane."

Again, the bicyclist may move out of the bicycle lane when overtaking or passing another bicycle, vehicle, or pedestrian within that lane; preparing to make a left turn at an intersection, private road or driveway; when approaching a place where a right turn is authorized; or it is reasonably necessary to avoid debris or other hazardous conditions.[4]

That CVC section provides, generally speaking, that a bicyclist shall not leave a bicycle lane until the movement can be made with reasonable safety and with the appropriate hand signal.

Electric Bikes

The popularity of electric-powered bicycles is increasing.

As a result, the law distinguishes between electric bicycles and motorized bicycles/mopeds with the output of power determining which law is applicable.

There are three classes of electric bikes defined under the California Vehicle Code:

- An electric bicycle is defined as a bicycle equipped with fully operable pedals and electric motor of less than 750 watts.
- A Class 1 electrical bicycle is equipped with a motor that provides assistance when the rider is pedaling and ceases to provide assistance when the bicycle reaches speeds of 20 mph.
- A Class 2 electric bicycle is equipped with a motor that may be used exclusively to propel the bicycle and is not capable of providing assistance when the bicycle reaches a speed of 20 mph.
- A Class 3 electric bicycle is equipped with a speedometer and a motor that provides assistance only when the rider is pedaling and that ceases to provide assistance when the bicycle reaches a speed of 20 mph.[5]

Motorized bicycles or mopeds are defined as two- or three-wheeled vehicles capable of no more than 30 mph on level ground and equipped with fully operative pedals for human propulsion, a motor producing less than 4 gross brake horsepower, and automatic transmission, or no pedals if powered solely by electrical energy.[6]

For the sake of clarity, gross brake horsepower [bhp] and commonly used horsepower [hp] are similar. Thus, 4 bhp = approximately 4.06 hp.

It's important to note that neither motorized bicycles/mopeds nor Class 3 electric bicycles may not be used on bike paths/trails, bikeways, bicycle lanes, equestrian trails,

or hiking/recreational trails unless it is within or adjacent to a roadway or unless allowed by local authorities.[7]

They also may not be operated by a person under the age of 16, and helmets are required regardless of age.[8] [9]

The bicycle equipment required, and prohibited, by law is outlined in the CVC with many common sense requirements that cover such functions as brakes, handlebars, bicycle size, and what lights are required while riding at night.[10] [11]

On or Off the Sidewalk?

Bikers often ask whether it is legal to operate a bicycle on the sidewalk.

The answer is codified in the Vehicle Code, which allows individual cities and counties to control whether bikes can be ridden on sidewalks.[12]

This is legally significant because if a bicyclist is riding on the sidewalk in a jurisdiction that allows it, then an argument for comparative negligence is easily challenged in court.

For instance, the City of Los Angeles Municipal Code (LAMC), provides that "no person shall ride, operate or use a bicycle, unicycle, skateboard, cart, wagon, wheelchair, roller skates, or any other device moved exclusively by human power on a sidewalk, bikeway or boardwalk in a willful or wanton disregard for the safety of persons or property."[13]

Thus, the answer is yes—according to the LAMC, a bicycle can be ridden on the sidewalk in the City of Los Angeles. The Code also does not distinguish between riding in the same direction or against traffic on the sidewalk, only that the bicycle must be operated safely.

As a corollary to the sidewalk rule, there is a debate on whether or not a bicyclist can ride in a crosswalk.

Some argue that the crosswalk is for pedestrians only and, therefore, the bicyclist must dismount from the bicycle and walk it while in the crosswalk, while others maintain that, as long as the bicyclist is riding at the same pace as the pedestrian(s), the biker is complying with the law in a jurisdiction that allows bicycle riding on the sidewalk.

The California Vehicle Code defines crosswalk as either "that portion of a roadway included within the prolongation or connection of the boundary lines of sidewalks at the intersection where the intersecting roadways meet at approximately right angles, except the prolongation of such liens from an alley across a street;" or, "any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface."[14]

If the crosswalk is therefore an extension of the sidewalk, then despite any possible ambiguity, the bicyclist may legally ride in the crosswalk.

Know and Obey

With the increasing use of bicycles, especially during this continuing pandemic, it is important that riders know and obey safety laws, and apply common sense, the basic rule being that bikers have the same rights—and obligations—as motorists.

Using that as a springboard, there are various exceptions that include riding as close as possible to the right side of the roadway when traveling slower than traffic; rules that apply to electric bicycles vs. mopeds and prohibited bicycle equipment; and local rules that could dictate where the bicyclist may or may not ride.

Attorneys need to be aware of and understand the rules of the road in order to effectively represent collision victim clients who may well be suffering from potentially devastating, life-changing injuries, while bicyclists are encouraged to know and obey the rules to avoid such occurrences from happening in the first place.

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[1] California Vehicle Code § 21200.
[2] *Id.* § 21202.
[3] *Id.* § 21760.
[4] *Id.* § 21208.
[5] *Id.* § 312.5.
[6] *Id.* § 406(a).
[7] *Id.* § 21207.5.
[8] *Id.* 21213(a).
[9] *Id.* § 21213(b) and § 27803.
[10] *Id.* § 21201.
[11] *Id.* § 21201(d)(1)-(4) and (e).
[12] *Id.* § 21206.
[13] Los Angeles Municipal Code § 56.15(1).
[14] California Vehicle Code § 275.

SFVBA Past President Alan J. Sedley has joined the law firm of Nelson Hardiman, LLP as Senior Counsel.

Sedley's addition "marks the firm's ongoing growth and extension into Orange County, where he is based," according to Nelson Hardiman, adding that he "will draw on three decades of experience, including service as corporate in-house general counsel to two large California hospital health systems.

A civil litigator for the past thirty-five years, Sedley has successfully litigated dozens of lawsuits in federal court on behalf of DSH hospitals and GME academic medical centers against the Centers for Medicare and Medicaid, alleging misapplication of rules and regulations during the course of computing hospital reimbursement payments."

OF INTEREST: UCLA economists have issued an optimistic forecast, predicting the U.S. economy will experience "a gloomy COVID winter and an exuberant vaccine spring," followed by robust growth for some years. "The '20s will be roaring, but with several months of hardship first," according to the latest quarterly UCLA Anderson report.

"These next few months will be dire, with rising COVID infections, continued social distancing, and the expiration of social assistance programs," they said. The forecast, which assumes mass vaccination of Americans will take place by summer, predicts that annualized growth in the nation's gross domestic product will accelerate from a weak 1.2 percent in the current quarter to 1.8 percent in the first quarter of next year, then to a booming 6 percent in next year's second quarter and consistent 3 percent growth each quarter thereafter into 2023.

California's recovery will ultimately look similar to the U.S. trajectory, the forecast predicts. In October, the state's unemployment rate was 9.3 percent, considerably higher than the national rate of 6.9 percent, and probably influenced by a loss of international tourism and tighter restrictions on businesses than in many other parts of the country.

But, the report continued, "The state is due to grow faster than the U.S. once restrictions are lifted and the pandemic is in the rearview mirror" with California joblessness expected to drop from 8.9 percent in the last quarter of this year to 6.9 percent in 2021, 5.2 percent in 2022, and 4.4 percent in 2023, a rate, though, that is still higher than the pre-pandemic rate of 3.9 percent recorded in February 2020.

According to the *National Law Review*, a class action lawsuit was filed last August alleging the marketing of Hostess Brands' *Carrot Cake Mini-Donuts* violates various New York consumer protection laws.

How so? Specifically, the plaintiff alleged a qualifying term is prescribed by FDA's flavoring regulation–e.g. "flavored, naturally flavored, artificially flavored"–and that the absence of a qualifier led consumers to expect the product to contain real carrots, whereas, based on the ingredient statement's disclosure of "natural and artificial flavor," without listing carrots, it was apparent that the product did not contain any real carrots.

As reported in the NLR, Hostess Brands, LLC and Hostess Brands, Inc., in a December motion to dismiss the suit, argued that "carrot cake" refers to the taste of the donuts, rather than the presence of carrots as an ingredient, and that the absence of carrots in the ingredient statement, along with there being no picture of carrots on the label, shows there are no actual carrots in the pastries.

The defendants further argued that claims of deception due to the absence of a disclaimer in the product name are undermined by the plaintiff's admission of having begun purchasing the donuts before a "naturally and artificially flavored" disclaimer was temporarily removed for a brief period in 2020.

It is not clear whether the defendants concede that a disclaimer is required by the Federal Food, Drug, and Cosmetic Act's (FDCA) food labeling requirements since their brief to the court did not directly address this aspect of the plaintiff's allegations.

The only question: What would Bugs Bunny think?

CLARIFICATION: The Editor apologizes if there was any confusion resulting from the photo in the December 2020 'Bar Notes.' In the image, Judge Armand Arabian is seen after he received the SFVBA's Lifetime Achievement Award from then California Gov. George Deukmejian. The photo showed Judge Arabian (center) with then Bar President Thomas Trent Lewis (right). The unidentified individual with them is former California Supreme Court Chief Justice Malcolm Lucas.

By David Mercy

Correct Tech:
Choosing the Right Technology for Your Firm

WITH THE CONSTANT onward march of technology, law offices and their administrators have to deal with increasingly complex issues.

While most practices have certain technologies already in place, law software programs tend to become outdated and cumbersome over time, even with frequent upgrades.

Running a law firm is enormously complicated and, granted, while almost any business is, the legal profession may be second only to NASA in terms of how intricate the procedures can be, and how any failing can seriously damage not only the bottom line, but the firm's reputation and standing in the legal community.

What is offered here are simple, basic choices—with no brand endorsements implied—and a breakdown of the elements of legal tech that can be folded into a firm's network infrastructure.

Hardware

First is hardware. This is comprised of the physical devices that allow access to your network: computers, printers or connected copiers, scanners, servers, fax machines, and the devices that support your VoIP (Voice over Internet Protocol) telephone systems—although with VoIP systems, the software and provider you choose will dictate the hardware.

Most law offices are PC-based, with typically a very small number of Mac 'Apple' users.

Choosing a brand for your PC desktop or laptop to use is not a monumental chore as just about anything will do the job, although the most commonly preferred brands are Dell, HP and, to a lesser extent, Lenovo.

With a Mac, the same holds true, but Apple itself rules that hardware roost, and although there are 'clone' versions available, it is important to bear in mind that very important piece of age-old wisdom: *caveat emptor*. Let the buyer beware.

For the most part, the same can be said for the rest of the hardware listed above—most reputable brands will suffice. These devices just need to function dependably, but they are by nature peripheral to your business.

Don't buy on the cheap and all should be well.

Software

This category is the more complicated of the two, with a myriad of options in every sub-category, from your basic

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Client Relationship Management (CRM) program to software that manages legal calendaring and other more complex functions. It is rare to find a mid-size law office that has not addressed network infrastructure fundamentals, such as software that handles operating systems, email management, cybersecurity and hardware connectivity.

Solo practitioners, on the other hand, typically do not need much in this area, but as a firm grows, the demands on the network grow in tandem.

Questions about non-legal oriented applications are best discussed with the firm's IT provider, specifically a Managed Services Provider (MSP).

Once the MSP learns its policies and procedures and acquires a thorough understanding of how work flows through your office, they will be in an excellent position to offer the best solutions.

Working from Home

With the surge this year in remote working, network and data security is of prime importance.

Setting up a proper Virtual Personal Network (VPN) is critical to safeguard critical, sensitive data, but true security cannot be achieved without the correct firewall in place.

It is good to remember here that Linksys, Netgear, or the router that comes with Spectrum/AT&T are not proper firewalls and will not provide the protection you need.

A 'Next Generation' firewall will provide that protection. SonicWall is an excellent choice, while Cisco Meraki and Untangle, as well, routinely secure top spots in most of the industry media's 'Best of' rankings.

WiFi, MDM and VoIP

Proper Home WiFi is the other critical component to secure remote working. Do not allow WiFi to be the weak link that exposes your data to cyber predators.

The home WiFi that comes with Spectrum does not provide adequate protection for a business; look into 'Enterprise Level' WiFi brands such as top-reviewers Ubiquiti Networks, Cisco, HPE (Aruba).

Mobile Device Management (MDM) is crucial for mobile devices, such as smartphones, iPads, and MacBooks.

If devices containing sensitive data are lost or stolen and they are not managed remotely, your client data may well wind up for sale on the Dark Web. With MDM in place, the missing device can be located or wiped clean remotely, eliminating the possibility of a ruinous date breach.

With a VoIP (Voice over Internet Protocol) phone system can be used anywhere—from a smartphone, at home or anywhere. Incoming and outgoing calls can be fielded from anywhere in the world just as if they were being handled through a standard office extension.

Should the internet fail, calls can be immediately routed to the user's smartphone. Most brands seem fairly equal depending on the benefits needed, such as eFax or conferencing.

Employee Monitoring

Every company appreciates loyalty and puts trust and faith in its employees, but, sadly, if trust and faith were an evenly and universally applied reality, society would need fewer lawyers.

For a large remote work force, there are software tools that can monitor that workers are, in fact, actually working, detect inactivity, monitor websites visited, log how much time an employee has spent using a firm's various applications, and produce a report on the information gathered. Highly-rated brands include Teramind, Veriato Cerebral, and ActivTrak.

Case Management

Absolutely foundational is practice or case management software. Offerings range from applications that cover the essentials to a complete array of programs that run virtually every one of the firm's critical functions.

Small firms and solo practitioners are advised to consider AbacusNext, Needles or Rocket Matter, among others, while larger firms should look into more robust programs such as LegalFiles, Clio or MyCase.

It is important to note that, while some of the all-inclusive brands cover functions such as court calendaring, some law firms prefer the features of stand-alone programs, rather than those that offer bundled applications.

As with any other technology, due diligence is a must to ensure that all of the firm's needs are met with reasonably easy to use platforms.

No matter the size of a practice, price will always be a factor as well. Generally the per-user, per-month pricing falls within the range of less than $20 for Practice Panther, up to $115 for Clio Suite, although the Enterprise Version is custom-priced.

Many case or practice management systems include the basics—billing, trust accounting, time tracking and client management, but it

is important to determine what specific needs exist and what system offers the appropriate solutions.

Client Relationship Management

All CRM software packages are not created equal, although all include the basic platform for managing a firm's ongoing relationships.

Some CRMs, both stand-alone and those included in case management programs, claim to be attorney specific, but it is wise to make sure that the features and benefits fit the firm's specific needs.

There are many brands to consider. They include HubSpot, SalesForce, Zoho, PipeDrive, while Contactually, and Lexicata have decent reputations.

While some law firms still use paralegals for court-rules-based calendaring, a lot of hours are spent manually tracking, calculating and entering court deadlines, and sending the appropriate responses out one at a time.

Using a calendaring software such as LawToolBox or CalendarRules can alleviate the time involved in coordinating rule changes and keep all affected parties up-to-date. Attorneys have also given high marks for the calendaring software included in the Clio software package.

A few CRM packages include time Tracking and billing applications, such as Clio and PracticePanther Legal, both of which share top honors in most 'Best-of' lists.

However, as far as stand-alone offerings, AccountSight, Bill4Time, FreshBooks, and TimeSolve Legal tend to occupy the top spots in reviews.

Utilizing Artificial Intelligence (AI)

Online legal research has been available and widely used since the birth of the internet, but a growing number of law firms are turning to AI programs to speed up the work and save time.

The Real Impact of Using Artificial Intelligence in Legal Research, a study conducted by The National Legal Research Group, utilized Casetext CARA A.I. and LexisNexis side-by-side for the sake of comparison.

According to the work, three quarters of the 20 attorneys involved in the study preferred CARA A.I. over LexisNexis with Casetext CARA A.I. showing that attorneys using Casetext CARA A.I. search finished research projects on average 24.5 percent faster than attorneys using traditional legal research tools.

In fact, for the average attorney, switching to Casetext and using CARA A.I. could save them 132-210 hours of legal research per year.

Forty-five percent of the attorneys believed that they would have missed important or critical precedents if they had only conducted traditional legal research instead of using Casetext CARA A.I. to track down pertinent cases. Attorneys using Casetext CARA A.I. also found that their results were, on average, 21 percent more relevant than those found doing traditional legal research.

Indeed, results found on Casetext were, on average, of better quality in every category of relevance analyzed in the study, including legal and factual relevance, similar parties, jurisdiction, and procedural posture.

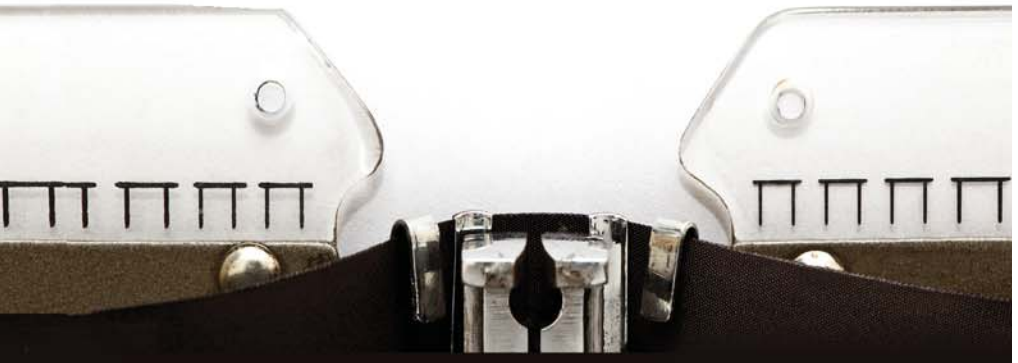
As with any emerging technology, it would be prudent to test an AI research application alongside routinely-used research methods to gauge their advantages, reliability, and utility.

With so many choices, it is important to remember that the fundamental tenets of good decision making still apply whether you are looking at buying a new car or investing in a new technology.

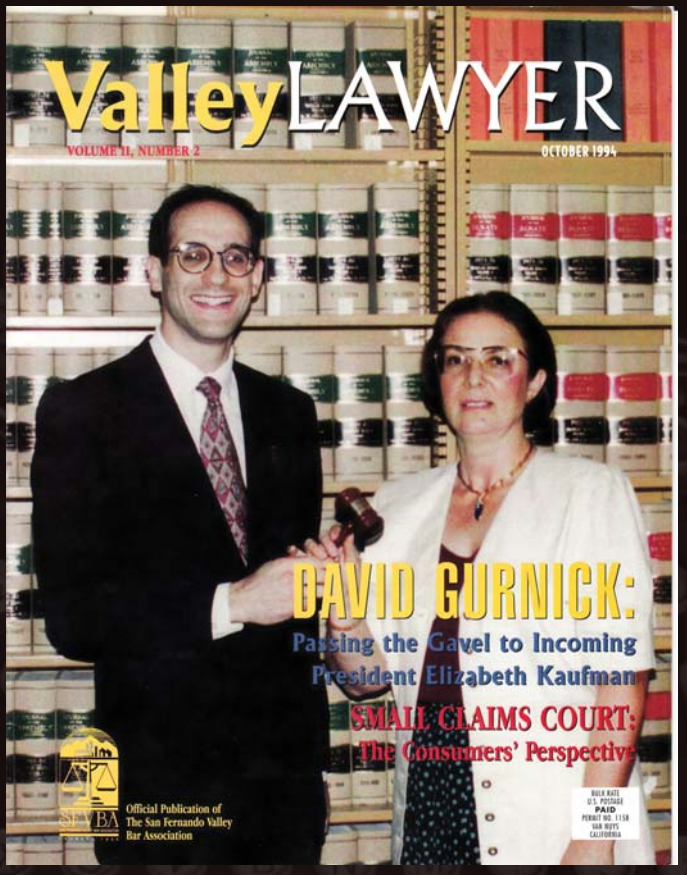
For strictly legal applications, recommendations from colleagues can be very helpful, while employees that have come to you from other law offices should be polled as they will have had hands-on experience with some as-yet undiscovered software options.

But most of all, many, if not all, of the various brands mentioned here offer free trials. Take some time and take some advantage of them.

Retrospective



It was October 1994 and outgoing SFVBA President David Gurnick passed the gavel to incoming President Elizabeth Kaufman. The previous year had been both challenging and successful for the Bar, which under Gurnick's leadership, had assisted the Valley community with recovery from the devastating Northridge Earthquake, balanced its budget, improved its attorney referral program, re-organized its Litigation and Tax Law Sections, and developed a creative four-year membership growth program, among other accomplishments. Gurnick went on to serve a second term as SFVBA President in 2013 and currently serves as head of the Bar's Editorial Committee.



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San Fernando Valley Bar Association founded in 1926

Go and Do Likewise

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AS WE HEAD INTO A SEASON of giving and a time, for many of us, of celebrating religious holidays or simply putting into action a spirit of giving, it is, perhaps, a good time to pause and ponder one of the most well-known stories from the Bible.

What did the expert in the law learn in the very popular biblical story—The Parable of the Good Samaritan?

The story and the lesson are told in the Gospel of Luke 10: 25-37.

On one occasion, an expert in the law stood up to test Jesus. "*Teacher*," he asked, "*what must I do to inherit eternal life?*"

"*What is written in the Law?*" He replied. "*How do you read it?*"

He answered, "'*Love the Lord your God with all your heart and with all your soul and with all your strength and with all your mind'; and, 'Love your neighbor as yourself.'*"

"*You have answered correctly*," Jesus replied. "*Do this and you will live*."

But he wanted to justify himself, so he asked Jesus, "*And who is my neighbor?*"

In reply, Jesus said: "*A man was going down from Jerusalem to Jericho, when he was attacked by robbers. They stripped him of his clothes, beat him and went away, leaving him half dead. A priest happened to be going down the same road, and when he saw the man, he passed by on the other side. So too, a Levite, when he came to the place and saw him, passed by on the other side.*

But a Samaritan, as he traveled, came where the man was; and when he saw him, he took pity on him. He went to him and bandaged his wounds, pouring on oil and wine. Then he put the man on his own donkey, brought him to an inn and took care of him. The next day he took out two denarii and gave them to the innkeeper.

'Look after him,' he said, 'and when I return, I will reimburse you for any extra expense you may have.'

"Which of these three do you think was a neighbor to the man who fell into the hands of robbers?" The expert in the law replied, "The one who had mercy on him."

Jesus told him, "*Go and do likewise*."

The Valley Community Legal Foundation—its volunteer members—look to be the collective neighbor, who turns from judgment to compassion for those in need. We ask ourselves, what kind of neighbor are we?

We do not want to walk on by, indifferent like the priest and the Levite in the Parable, as we see our Valley's community suffering.

The VCLF looks to act with courage, speaking up for those who cannot speak for themselves; to have compassion by offering assistance to those in need; and creating solidarity with others willing to join us in bettering our community.

We do not aim to be superheroes, but instead, look for those who may be struggling, and, give them a hand in a time of need.

If you would like to contribute to the philanthropic work of the Valley Community Legal Foundation—helping fund scholarships to worthy students, assisting the Valley's growing homeless population with their many needs, and supporting legal services for the courts with programs like Settle-O-Rama—we ask you to consider joining with us in our work to better our community by volunteering your time and talent, or treasure by visiting us at thevclf.org.

The Valley Community Legal Foundation—lawyers going forth and doing likewise helping, assisting, and supporting those in need.

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