VALLEY LAWYER

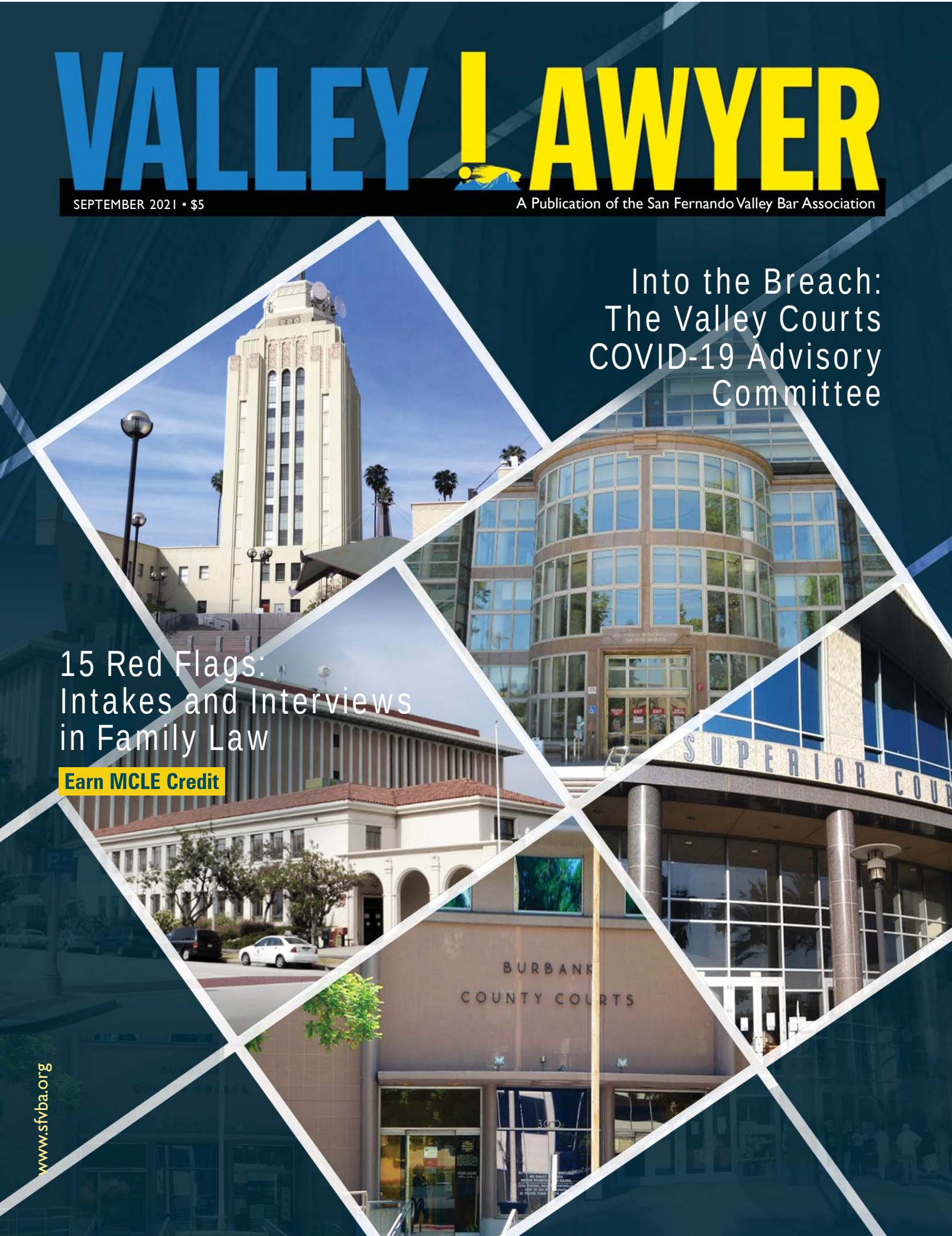
SEPTEMBER 2021 • $5

A Publication of the San Fernando Valley Bar Association

Into the Breach: The Valley Courts COVID-19 Advisory Committee

15 Red Flags: Intakes and Interviews in Family Law

Earn MCLE Credit



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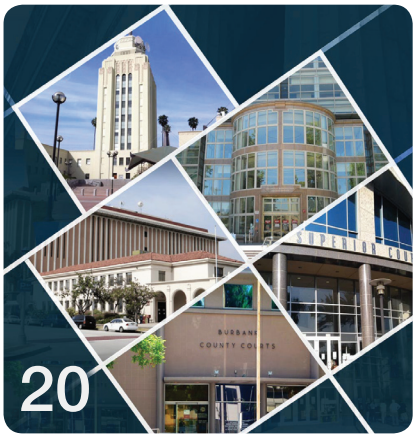

FEATURES

DEPARTMENTS

VALLEY LAWYER

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Valley Lawyer is published monthly. Articles, announcements, and advertisements are due by the first day of the month prior to the publication date. The articles in Valley Lawyer are written for general interest and are not meant to be relied upon as a substitute for independent research and independent verification of accuracy.

Lucky to Love our Bar

DAVID G. JONES
SFVBA President

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"How lucky I am to have something that makes saying goodbye so hard." — A.A. Milne

AND SO, MY FINAL PRESIDENT'S MESSAGE. And while my quote may not be from Shakespeare, but rather Winnie the Pooh, it holds no less significance for me.

Anyone who has taken the helm of our nearly 100-year-old organization knows the joy—and pain—of the role. And while every president has dealt with hardship and conflict, I think it is fair to say that my term ranks right up there with some of the most challenging in our organization's history.

It turns out we made it. And more than just made it, but along the way, we steadied our financial position, developed new programs and future leaders of the Bar, and generally transformed the SFVBA into a new version of itself.

Most importantly, we made it together as a team and weathered the storm. Membership held strong and our Board of Trustees and staff kept their heads down, navigating the ship through the stormy waters of COVID-19, financial challenges, and exactly zero in-person events.

As I reflect upon my term, the first thing that comes to my mind is gratitude for our Bar staff and Board of Trustees. Without their sustained and selfless dedication and sacrifices, our Bar could have emerged in a much different position.

Executive Director Rosie Soto Cohen has been the steadying force that our Bar so desperately needed during these challenging times.

As Executive Director, she is relied upon in what is a 24/7 role, wears so many hats and bears the burden of so many responsibilities. Rosie is the second face of our Bar, standing behind every president while maintaining continuity in our Bar's excellence.

Long-time Bar staffer Linda Temkin has been another godsend during these difficult times, adapting our Bar programs to an all-online experience during these many months.

Michael White, through many logistical challenges, has, along with graphic designer Marina Senderov and the Bar's Editorial Committee, continued to produce the award-winning *Valley Lawyer* Magazine with skill and aplomb.

Miguel Villatoro has taken strong leadership of the Attorney Referral Service as the Bar's Associate Director of Public Services, successfully turning its performance around during the pandemic.

To Bar staff—A genuine and wholehearted thank you for your dedication and contributions to the SFVBA during this incredibly difficult time.

And to our Board of Trustees—This year was not perfect, but it certainly was traversed successfully in large part due to your positive approach to moving our Association forward. While no one will ever agree with all of the decisions or choices of leadership, every one of our Board meetings was graced with a spirit of optimism, support, problem solving, and energy.

That is all I could have ever asked for.

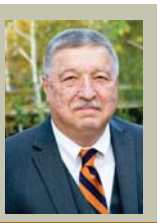
At the very beginning of my term, I promised my trustees that I would support them in their ideas, projects and passions, and I believe that I have. While any term is defined by its results and achievements, of which we have many, my proudest legacy will be, from top to bottom, the level of engagement of our trustees.

What I saw in terms of genuine dedication and willingness to meaningfully participate made me believe unreservedly in the future of our Bar's future leadership.

To quote the Chinese philosopher Lao Tzu, "A leader is best when people barely know he exists, when his work is done, his aim fulfilled, they will say: we did it ourselves."

Rising to the Occasion

MICHAEL D. WHITE
SFVBA Communications Manager



michael@sfvba.org

THE PHRASES "MAKE A difference" and "make the world a better place" have become somewhat shopworn over the past several years, with their core meanings worn down by tiresome over-use.

Like the word 'awesome,' both phrases can almost immediately invoke what I've come to call the 'Krispy Kreme Syndrome'—a quasi-sugar rush leading to eye glaze-over, a debilitating drowsiness and an almost immediate non-positive view of what may well be a worthwhile thing or effort.

In any event, though, there are times when such phraseology is appropriate.

For those who have, perhaps been living in another dimension or on another planet, the past 18 months or so have been…well…challenging.

Dare I mention the "The Big C," as some have come to call it? That really should go without saying, but when those challenges impact the day-to-day at the Los Angeles Superior Court (LASC)—the largest county-wide court system in the entire nation—that is, in a negative sense, genuinely 'awesome.'

But as depressingly and frustratingly 'awesome' its impact has been, so has, in an encouraging and positive sense, been the 'awesome' proactive response to the 'Big-C' pandemic from the leadership of the LASC.

In March 2020, the Valley Courts COVID-19 Advisory Committee, a group of Valley jurists, bench officers, and attorneys, was formed to strategize on a plan to safely reopen and continue operations at the five courthouses located in the San Fernando Valley.

Under the leadership of LASC Judge Virginia Keeny, Supervising Judge of the Court's Northwest District, working in cooperation with the SFVBA, met over a period of two months to discuss and hammer out proposed recommendations to present to the Presiding and Assistant Presiding Judges, LASC Chief Executive Officer, Sherri Carter, and the LASC's COVID-19 Working Group.

The final proposal was presented on May 21, 2020.

The document contained scores of recommendations adopted by the working group for different practice areas, many of which were immediately implemented in the Valley's courts and became part of the larger court-wide response to the pandemic adopted by the LASC COVID-19 Working Group.

According to Judge Keeny, "one of the outgrowths of the work of the Committee was a special project to create a training video for bench officers and judicial assistants on how to conduct a safe voir dire once jury trials resumed."

Both the work of the Committee and the training video "demonstrated the extraordinary commitment of the judicial officers and members of the bar to work together during the difficult and uncertain early months of the pandemic to identify and solve problems collaboratively," says Judge Keeny.

Hats off to Judge Keeny and the members of the Valley Courts COVID-19 Advisory Committee. Their work was, indeed, 'awesome' in every positive sense of the word.

CALENDAR

SEPTEMBER 2021

SUN	MON	TUE	WED	THU	FRI	SAT
NATIONAL HISPANIC HERITAGE MONTH (September 15-October 15)			1	ZOOM MEETING Membership and Marketing Committee **6:00 PM** **2**		
5	 **6** **SFVBA OFFICES CLOSED**	7	8	9		
12		**13** VBN VALLEY BAR NETWORK ZOOM MEETING **5:30 PM**	WEBINAR Probate and Estate Planning Section **14** ***Getting Paid! Applications of Ethics Rules To Attorney Fees in Probate, Trust & Conservatorships*** **12:00 NOON** Fee agreements in probate estates, trust administration, and conservatorships have an additional layer of complexity beyond those imposed upon conventional civil attorneys. This presentation focuses on the less obvious ethics implications of attorney fee agreements, billing practices, and areas that the law has yet to clearly address. Particular emphasis will be placed on *Kasperbauer v. Fairfield* (2009) 171 Cal. App.4th 229 and *People ex re. Harris v. Shine* (2017) 16 Cal.App.5th 524. Uzzell Branson IV of Branson & Branson LLP leads the discussion. 1 Hour MCLE (Legal Ethics) Board of Trustees **6:00 PM**			
19	**20** ZOOM MEETING Mock Trial Committee **6:00 PM**	WEBINAR Taxation Law Section **21** ***Taxation of Damages– Not as Simple as it May Appear*** **12:00 NOON** CPA/Attorney David De Jong will discuss the tax ramifications of damages, settlements and awards. David will provide some suggestions on drafting tax-related provisions in complaints and settlement agreements to support subsequent tax treatment and reporting. (1 MCLE Hour)	22	ZOOM MEETING Inclusion and Diversity Committee Meeting **23** **12:15 PM**	24 WEBINAR Bankruptcy Law Section ***Recent Supreme Court Cases Regarding Bankruptcy*** **12:00 NOON** Judge Alan Ahart and attorney Jonathan Hayes will update all on the Supreme Court cases regarding Bankruptcy that might impact you and your clients. Approved for Bankruptcy Law Legal Specialization. (1 MCLE Hour) WEBINAR SFVBA, MCBA and SCVBA Present ***Stretch Your Body and Relax Your Mind!*** **4:30 PM – 5:30 PM** Monthly Interactive Exercise Workshop led by Board Members Alan Eisner and Taylor Williams-Moniz. All levels welcome, no equipment needed. Free to all.	25
26	27		29	WEBINAR Conserving Britney Part II **30** ***The Internal Affairs of Conservatorships: How they run, change and end*** **12:30 PM – 2:30 PM** 2 CA CLE hours, including Estate Planning, Trust & Probate Law specialization. This program is FREE to attend. Registration via BHBA. www.bhba.org/go/conserving-britney		

SFVBA COVID-19 UPDATES sfvba.org/covid-19-corona-virus-updates/

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

By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 18.

By Joy Kraft Miles

15 RED FLAGS: Intakes and Interviews in Family Law

Attorneys should be aware of the red flags raised by some potential clients. Blissful ignorance of those danger signs can put them in the position of waving a flag of their own–a white one–because of an imprudent decision to invest time, resources, and mental well-being on a case that should have been waved off from the start.

WHILE LAW SCHOOL TEACHES FUTURE lawyers to weed out red herrings in a legal fact pattern, it, unfortunately, does not give instruction on how to avoid the negative red flags raised by some potential clients.

Unaware of those danger signs, attorneys can soon enough find themselves waving a flag of their own—a white one—because of an imprudent investment of precious time, resources, and even mental well-being, on a case that should have been waved off from the get-go.

The initial client consultation poses a challenge, especially for a less experienced attorney or someone who has not yet developed a strong book of business because of the fear that income will be lost if a client isn't taken on.

However, in reality, maybe the stress and expense of a bad investment have been successfully avoided.

Prior to an initial consultation, a potential client should be asked to complete an intake questionnaire to expedite gathering essential information. It is helpful to collect data about the family, such as how many children and their ages, the length of the marriage, and the financial lay of the land, including income, expenses, assets and debts.

Even if the matter is a custody dispute, it is important to know this basic financial information because the other side may ask for need-based attorney fees, child support or the deferred sale of the family home.[1 2 3 4 5]

Upon receipt of the intake, an interview of up to 15 minutes should be conducted, at no charge to the client; then determine if the case is the right fit for the firm.

Though there is no charge for the intake, the time spent on the interview is valuable for both attorney and the potential client as it is critical to evaluate the potential client's legal issues, educate them about their legal rights and the legal process, assess their financial risks, obtain pertinent facts, determine exigency and safety issues, develop rapport, and establish mutual expectations.

When conducting the interview, it is imperative to watch out for several tell-tale warning signs, and while one of those revelations may present, it does not always mean the client should be turned away.

When any one of the following red flags presents itself, be sure to ask follow-up questions and learn more about why the client is in their current situation.

• **Substituting in as Lawyer Number Three, Four or Five:** While giving a potential client a mulligan if they have had one prior attorney, after two lawyers, it is fair to wonder who really is to blame for the professional parting of the ways. Find out why the client has jettisoned so many lawyers before this point in time.

• **"It's the Principle":** If the client utters this during the interview, run as far away as fast as you can. This client does not understand the value of time, money, and peace of mind and has taken this matter on as a crusade. They do not understand reality or compromise. Unrealistic expectations mean this client will never be happy, which means neither will you.

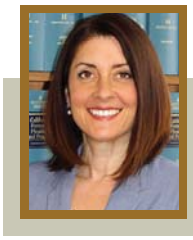
• **Disparages Prior Counsel:** If the client denigrates former counsel as incompetent, but that counsel is known in the professional community as responsible, ethical, and reputable or you have reviewed the work product and find it is well-done, then it is best to avoid this client. It may not be long before this client accuses the next lawyer of malpractice.

• **"Woe is Me":** The client plays the victim, blaming former partner, parents, children, boss, job, the court, their former lawyer, you name it, without ever self-reflecting. With this kind of client, guess who is next to blame? Their lawyer.

• **Irresponsible:** If the client has unusually high credit card balances, a large sum of debt to prior counsel, a vast amount owed in back taxes, or an unconscionable amount of support in arrears, it is likely that this client will walk out, leaving their attorney with an unpaid bill. Having this sort of client means requiring them to pay in advance.

• **The Armchair Attorney:** This client attaches way too much credibility to what they read on the internet, and has friends and relatives who have divorced. This type of client will not heed advice because they think they are more knowledgeable and smarter than their attorney. It is impossible to invest any energy in trying to convince this client a settlement offer is fair, worthy of acceptance, or if the matter should be litigated. This will be a case of the tail wagging the dog.

• **"Objection…Non-Responsive":** This type of client will make it difficult for you to obtain the information you need for the case, conduct a conflict check, and will lack credibility in front of a judge. They evade questions, refuse to divulge the name of the opposing party, avoid the subject, and fail to answer questions in a forthright and honest manner.[6]



Joy Kraft Miles is the President of Kraft Miles, ALC, in Woodland Hills, California, a boutique law firm specializing in family law. She is an elected SFVBA Trustee, serves as the Co-President of the Valley Community Legal Foundation and can be reached at joy@kraftlawoffices.com.

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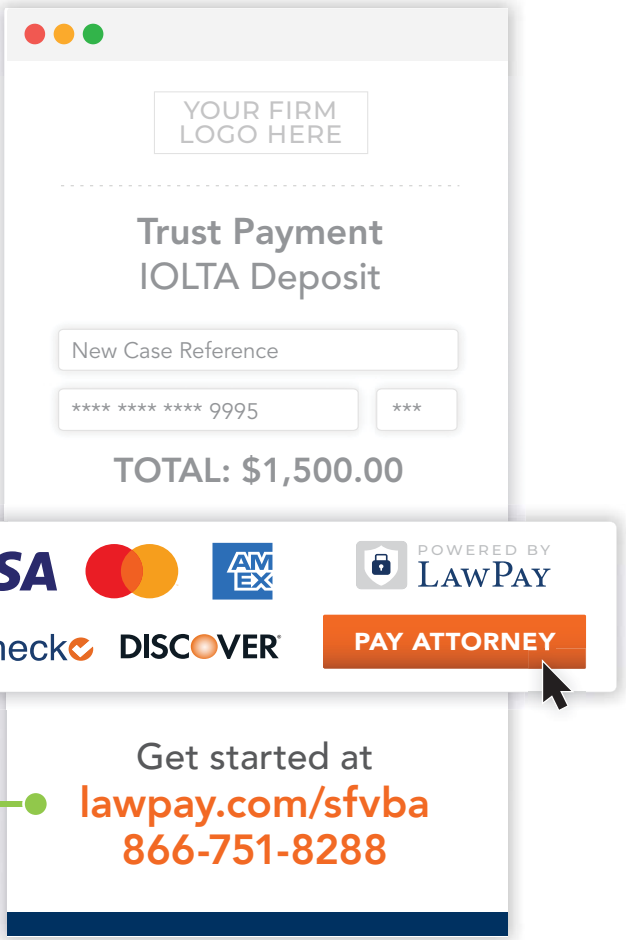

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• **Entitled, Greedy, and Manipulative:** They think they deserve money, assets, or legal rights that they are not entitled to; have never been gainfully employed; and are used to getting by on charm and good looks. They usually want their attorney to work for free.

• **The No-Show:** This client is Missing in Action. They routinely fail to keep appointments, or provide advance notice about being late or missing an appointment. They drop in without an appointment, fail to provide documents in a timely manner, and complain about completing intake forms. If a client is late or fails to appear at an appointment with you without advance notice, this client does not respect you as a professional. Time is money and this client has a difficult time grasping that concept. Intake forms are a critical tool that allow conflict checks and quickly ascertain a lot of information that can be addressed in an interview. A client who balks at this does not understand either efficiency or professionalism.

• **Disorganized.** This type sends their attorney tons of emails with documents and individual photos attached to each and every one or delivers a foot-high stack of coffee-stained papers to the office. While this is not, in itself, a reason to turn away a client, such actions add up to cost additional time and expense to get the case straightened out.

• **Disrespects the Staff:** If a client is rude to the receptionist, secretary, paralegal, or associate, they probably need a lesson in common courtesy, which is a surcharge on top of legal work.

• **The Purely Evil Spouse:** The old adage, "A Hitler doesn't marry a Snow White," comes to mind here. When the client only dwells on the flaws of the other party, one wonders, "How come you stayed in this relationship for so long?" While it is commonplace to have anger and hurt cloud one's rational thought, a client should be able to acknowledge some of their former partner's redeeming qualities. If the client cannot say anything positive, they may well be blinded by anger.

• **Substance Abuse, Violence, Mental Illness, Suicidal Ideations:** Clients are not inclined to immediately share these dark secrets or medical conditions, and it usually requires some careful questioning—not "are you an alcoholic?" but rather "do you ever drink then drive with the children in the car?" This is not an unrepresentable client, but, realistically, the case will have some hurdles, including crossover from dependency court, criminal court, and/or other family law restraining order cases. It is a good idea to try to get this type of client into a rehabilitative program before the court issues an order to do so and check to see the willingness of the client to seek help for substance dependency, depression, or anger management. Such rehabilitative programs help

the client rebut the presumption under the Family Code in awarding custody to a parent who has been issued a restraining order, assist with considerations of what is in the best interest of a child under the Code, and anticipate what may be concerns of the court in making a request to dissolve a temporary restraining order.[7] [8]

• **Children are the Weapon, the Prize, or Both:** Client wants to take the children far away to punish the other parent or have sole custody without having to share or co-parent. Courts do not look kindly on involving the children in the legal proceedings, using the children as messengers, or moving away to frustrate the other parent's frequent and continuing contact with the child(ren). Clients, like this, do not see what is in their child's best interest, as required by the Family Code, but instead just care about themselves.[9] [10]

• **Hiding Assets, Withholding Information:** In family law, there is a fiduciary duty for full and accurate disclosure of all assets and liabilities in which one or both spouses may have an interest. The remedy for breach of this fiduciary duty shall include 50 percent of the highest value of the undisclosed or transferred asset, payable to the other spouse, plus payment for the other spouse's attorney fees.

If it is proven to be intentional, the penalty could be up to 100 percent and attorney fees be ordered paid to the prevailing party by the non-disclosing party. In not disclosing what the wife believed were her separate property lottery winnings, the court found that she had misappropriated and fraudulently intended to deprive her husband of a community asset.[11] [12] [13] [14]

While all of the above could be reasons to use extra scrutiny before retaining the client, remember that this person is in need of help in what seems like their darkest moment.

Be sensitive, not judgmental, and take detailed notes.

Should a client be accepted despite a few red flags, the information gathered will still provide adequate information to proceed, and best help them achieve their goals.

On the other hand, if they should decide to seek legal help elsewhere after a few red flags have gone up, be thankful that you may well have dodged a bullet.

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[1] *Family Code* § 2030 *et seq.*
[2] *Id.* § 4058.
[3] *Id.* § 3800(b).
[4] *In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1161, as modified (Apr. 18, 1997).
[5] *In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 808.
[6] See Rule 1.7 of the current *Rules of Professional Conduct* regarding conflict of interest.
[7] *Family Code* § 3044(b).
[8] *Id.* § 3011.
[9] See *Cassady v. Signorelli* (1996) 49 Cal.App.4th 55.
[10] *Family Code* § 3011.
[11] See Family Code §§ 721, 1100, 2102, 2103, 2104, 2105, 2106, 2107, 2556.
[12] *Id.* § 1101(g).
[13] *Id.* § 1101(h).
[14] *In re Marriage of Rossi* (2001) 90 Cal.App.4th 34, 41.

15 Red Flags: Intakes and Interviews in Family Law
Test No. 155

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. As described herein, a red flag is defined as a signal that a potential client may be a bad business investment for the attorney.
❑ True ❑ False

2. If a client has any red flags as described herein, the attorney should absolutely refuse to represent the client.
❑ True ❑ False

3. A written intake questionnaire can help expedite the consultation process.
❑ True ❑ False

4. The attorney should only listen and not talk during the client interview.
❑ True ❑ False

5. The initial consultation is used to build trust with the client, show the attorney's competence and ability to develop a case plan, learn about the pertinent facts in the case, and decide whether or not to accept the case.
❑ True ❑ False

6. During custody matter intake or interview, it is helpful to gather financial information.
❑ True ❑ False

7. It is a good practice to inquire why the client had six attorneys before you.
❑ True ❑ False

8. It is a red flag when the client has bragged to you about the one-star reviews they left on Google and Facebook for their former counsel.
❑ True ❑ False

9. You should ask for a retainer deposit in advance when the client tells you they owe former counsel $20,000.
❑ True ❑ False

10. It is okay to keep the opposing party's name a secret from the attorney during the initial consultation.
❑ True ❑ False

11. It is a red flag that your client has more than three children with three different partners.
❑ True ❑ False

12. It is a red flag that client tells you this is the ninth time they have been the victim of domestic violence.
❑ True ❑ False

13. It is a red flag that the client has failed to appear for three consultations with you, without advance notice.
❑ True ❑ False

14. It is a red flag that the supported party wants you to obtain the same spousal support terms that Amazon founder Jeff Bezos gave his wife MacKenzie Scott because client knows it is possible from the internet.
❑ True ❑ False

15. You should never accept a client who has been hospitalized for depression.
❑ True ❑ False

16. It is a red flag that the client has transferred the title to their brother two years ago to avoid their spouse getting the house in a divorce.
❑ True ❑ False

17. It is a red flag that the client wants to relocate to Ohio with the children for a better job.
❑ True ❑ False

18. It is a red flag that the client tried edible THC gummy bears once when they did not have custody of kids.
❑ True ❑ False

19. It is a red flag when the client brings in a stack of papers with coffee stains and says, "here is my case."
❑ True ❑ False

20. It is okay that the client does not disclose to spouse that client inherited $30 million during the last year of marriage because it is client's separate property.
❑ True ❑ False

15 Red Flags: Intakes and Interviews in Family Law

MCLE Answer Sheet No. 155

INSTRUCTIONS:

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

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5. Make a copy of this completed form for your records.
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ANSWERS:

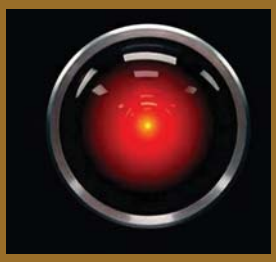
Mark your answers by checking the appropriate box. Each question only has one answer.

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

"I'M SORRY, DAVE…I'M AFRAID I CAN'T DO THAT": An artificial intelligence (AI) system is capable of being legally considered an "inventor" under Australian patent law, according to the nation's federal court in a decision that could have much wider global intellectual property implications.

University of Surrey professor Ryan Abbott has launched more than a dozen patent applications across the globe, including in the UK, U.S., New Zealand and Australia, on behalf of Dr. Stephen Thaler, CEO of Imagitorn LLC in St. Louis, Missouri.

They seek to have Thaler's artificial intelligence device known as Dabus—a device for the "autonomous bootstrapping of unified sentience"—listed as the inventor.



The applications claimed Dabus, which is made up of artificial neural networks, invented an emergency warning light and a type of food container, among other inventions.

Several countries, including Australia, had rejected the applications, stating a human must be named the inventor.

According to The Guardian, the February decision by Australia's Deputy Commissioner of Patents found that although "inventor" was not defined in the Patents Act when it was written in 1991 it would have been understood to mean natural persons—with machines being tools that could be used by inventors.

But in a recent Australian federal court decision, justice Jonathan Beach overturned the decision, and sent the matter back to the commission for reconsideration.

"In my view, an inventor as recognized under the act can be an artificial intelligence system or device," he said, adding that a non-human inventor could not be the applicant of a patent, and as the owner of the system, Thaler would be the owner of any patents that would be granted on inventions by Dabus.

That was "consistent with the reality of the current technology," the judge said. "It is consistent with the act and it is consistent with promoting innovation."

Beach said there needed to be a consideration beyond the mere dictionary definition of "inventor" as being a human.

PARTY ICEBREAKER: On July 31, Loyola Law School held its first in-person graduation ceremony since 2019. Of interest, according to the American Bar Association, there were 77 law schools in the U.S. with a total of 9,607 students enrolled in 1898. As of December 2020, there were 38,202 students attending the nation's 237 law schools.

FYI: In a first for the U.S. legal profession, the Arizona Supreme Court recently approved the non-lawyer ownership of a law firm.

As a result, Gilbert, Arizona-based Trajan Estate LLC becomes the first law firm with a non-lawyer owner to be approved by the state's high court.

The Court decision was not without its detractors.

Arizona Court of Appeals Chief Judge Peter Swann was a member of the task force tasked with studying the issue and strongly disagreed with eliminating the rule. He said that "a better approach to reform would be addressing the systemic issues that make the courts inaccessible and expensive, rather than adding non-lawyers to the equation and striking the ethics rule."

In July 2019, the California State Bar considered letting non-lawyers, including artificial intelligence (AI) programs, to "practice" law.

"Such a proposal would make Arizona unique in the nation, and a leader in the race to the bottom of legal ethics," Swann wrote. "The relationship between attorney and client is the most sacred of fiduciary relationships," one not shared by investors, whose interests might conflict with the client.

California, along with Utah and several other states, have considered letting some alternative business structures in some form; however, Arizona is the first to totally eradicate the rule.

NEW ASYLUM RULE: Asylum officers would hear and decide asylum claims at the border under a proposed rule announced by the Biden administration.

The rule change is designed to speed up consideration of asylum claims and reduce the caseload in immigration courts, according to the American Bar Association and a Department of Homeland Security press release.

Currently, immigration judges hear and decide asylum claims, contributing to a backlog of more than 1 million pending cases.

Under the proposed rule, a person subject to expedited removal who establishes a credible fear of persecution would be referred to an asylum officer with U.S. Citizenship and Immigration Services.

The asylum officer would have the authority to decide requests for asylum, eligibility for statutory withholding of removal, and eligibility for relief under the Convention Against Torture.

If the officer denies asylum, the person could request a de novo administrative review by an immigration judge under a streamlined process. Appeals would go to the Department of Justice's Board of Immigration Appeals.

The proposed rule would reportedly not apply to unaccompanied children or to people already living in the United States.

By Michael D. White

Into the Breach:

The Valley Courts COVID-19 Advisory Committee

Within weeks of the March 2020 shutdown of the Los Angeles County Superior Court system, the Valley Courts COVID-19 Advisory Committee was created "to bring together members of the bench and Valley bar to plan for the safe reopening of the courts." Here is a look at the Committee and the work it accomplished.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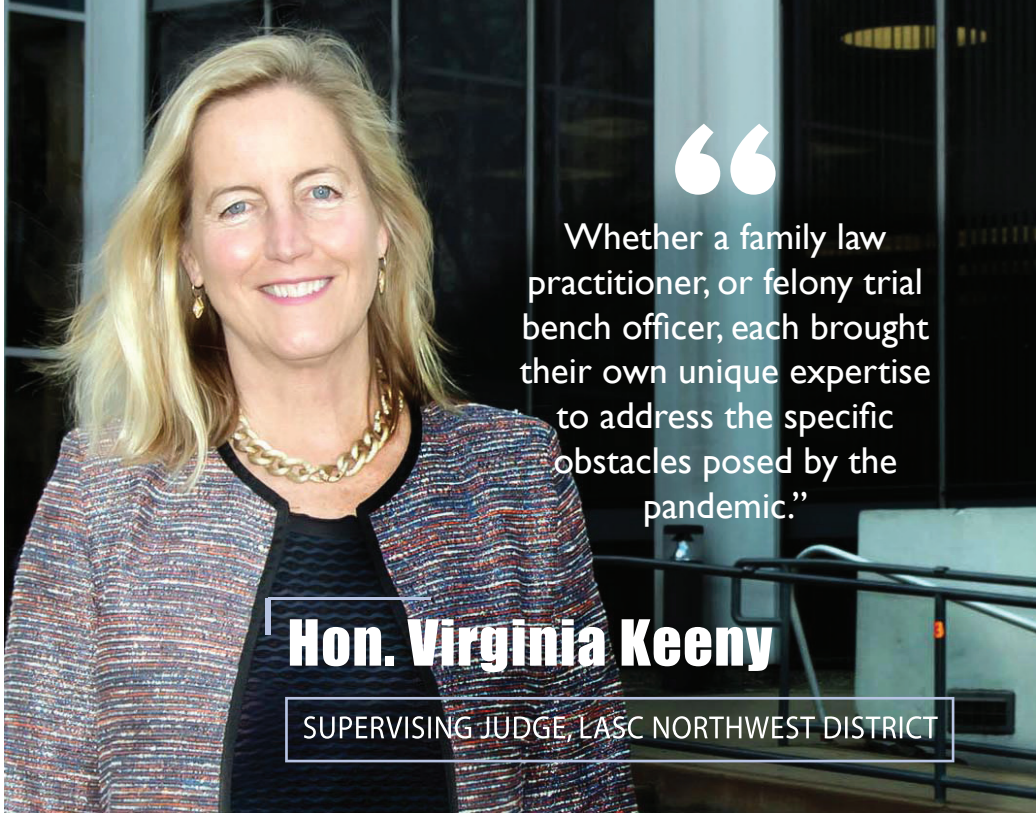
THE VALLEY COURTS COVID-19 Advisory Committee was created within weeks of the initial March 2020 Los Angeles Superior Court (LASC) shut down "to bring together members of the bench and Valley bar to plan for the safe reopening of the courts," according to LASC Judge Virginia Keeny, supervising judge of the Court's Northwest District.

The Committee was convened at the request of then Superior Court Presiding Judge Kevin Brazile and Judge Huey Cotton, then supervising judge of the Northwest District, and was charged with drafting "meaningful recommendations for each courthouse and discipline area as to how they could safely operate given social distancing requirements, restricted public access and existing technology," says Judge Keeny.

Over the next two months, the Committee met several times to discuss and hammer out proposed recommendations for presentation to the Superior Court's Presiding and Assistant Presiding Judges, Chief Executive Officer, Sherri Carter, and its COVID-19 Working Group.

After final revisions and some polishing, the final proposal was delivered on May 21, 2020.

The final report drafted by the Committee included scores of recommendations adopted by the working group for the different practice areas, including how to adjust the civil IC courts' procedures for case management conferences and law and motion; new procedures for small claims' exchange of documents; how to conduct civil mandatory settlement conferences using available remote technology; revisions to traffic court's procedures; and recommendations for safe jury selection, presentation of evidence and handling of witnesses.



"Many of these recommendations were immediately implemented in the Valley courts and became part of the larger court-wide response to the pandemic adopted by the LASC Covid Working Group.," says Judge Keeny, adding that "one of the outgrowths of the work of the Committee was a special project to create a training video for bench officers and judicial assistants on how to conduct a safe voir dire once jury trials resumed."

With the ongoing assistance and support of Judge Huey Cotton and Judge Joseph A. Brandolino, Judge Keeny headed the Committee, which was made up of Judge Michael D. Carter, Site Judge at the Burbank Courthouse; Judge Stephen P. Pfahler, Assistant Site Judge in Chatsworth; Judge Neetu S. Badhan-Smith; Judge Shirley K. Watkins; Judge Alan Schneider; Judge Theresa M. Traber; Judge Hayden Zachy; Judge Michael R. Amerian; and Court Commissioner Maria R. Byrum.

Also actively participating were attorneys Amir Aharonov, now a Court Commissioner in Chatsworth; Robert Borsky; James Felton, Past President; David G. Jones, President: Ann A. Hull; Yi Sun Kim, Past President; William D. Koehler; Caryn B. Sanders, Past President; Rikki L. Sender; Christopher P. Warne, President-Elect; and Rosie Soto Cohen, Executive Director.

"Whether a family law practitioner, or felony trial bench officer, each brought their own unique expertise to address the specific obstacles posed by the pandemic to balancing safe court administration against timely and fair access to justice," says Judge Keeny.

At the outset of the project, the working group conducted a thorough inspection of each of the five courthouses in the San Fernando Valley—Van Nuys East, Van Nuys West, Burbank,

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Chatsworth, and San Fernando—to determine the occupancy of each courtroom given new social distancing limits, existing technology in each courtroom, and the availability of alternate courtroom spaces.

Under the leadership of Judge Michael V. Jesic and Judge Neetu S. Badhan-Smith, a mock jury trial was staged and videoed, using members of the San Fernando Valley Bar Association as jurors. The morning-long exercise was held with the attorneys role-playing the jury selection process with special focus on the hardship stage.

After going through the many new safety protocols for jurors, attorney volunteers presented a wide range of COVID-related concerns for the judicial officer to evaluate, ranging from ill family members, fear of contracting the disease, to pressing financial concerns made worse by the COVID-19 pandemic.

The video of the event was made available and used as a training tape by all judicial officers and judicial assistants in the Northwest District, to help them prepare for the unique problems posed for jury selection during the pandemic.

"Both of these projects demonstrated the extraordinary commitment of the judicial officers and members of the bar to work together during the difficult and uncertain early months of the pandemic to identify and solve problems collaboratively," says Judge Keeny.

"The LASC thanks and recognizes all of the attorneys who contributed their time and creative ideas and [alluding to the mock trial] acting talents to these projects."

Some observations from a few of its members of the Valley Courts COVID-19 Advisory Committee on their mission, and the effectiveness and the implementation of the Committee's recommendations follow.

Q What was the greatest challenge you faced during the pandemic crisis?

JUDGE WATKINS: "The uncertainty of how long we would be closed and how long the pandemic would continue."

JUDGE SCHNEIDER: "The greatest challenge I faced during the pandemic depended on when during the pandemic. During the early weeks and months, I was responsible for the bail review court. Perhaps the hardest thing about working at that time was the genuine fear felt by many of the court staff and judges who, as emergency essential workers, had to work in person. Nobody knew the scope of the pandemic, the details of its ability to spread, and the danger these in-person workers faced. As for the work difficulties, I was faced with making difficult decisions to release, on their own recognizance, as many prisoners as possible, and resulting community spread without endangering public safety. Fortunately, I have not heard of any of my releases that resulted in violent crime or serious injuries, so I guess I got the balance right."

JUDGE AMERIAN: "Orienting myself, attorneys and litigants to appearing remotely to maintain efficient proceedings."

JUDGE TRABER: "There were so many unknowns about COVID-19 and its potential impacts. We saw that it was a moving target that we were going to have to deal with. It wasn't until a later point that we realized that it was much more an airborne virus than it was a surface virus. So we implemented a lot of procedures for cleaning surfaces that have been maintained. They were good, but probably weren't the most important things to put into place. It was hard because we had people with varying levels of anxiety about continuing to hold court procedures. We also had courtrooms with various kinds of proceedings. For example, the Family Law Courts had a lot of activity, including a whole range of emergency issues that arose because of the need for adjudications of temporary restraining orders in domestic violence

> During this period, the remote access capabilities for the attorneys were extremely helpful in avoiding unnecessary congestion in the courtrooms."

Hon. Alan Schneider

LOS ANGELES SUPERIOR COURT JUDGE

settings, as well as evidentiary hearings with regard to domestic violence charges, temporary support orders or other various things that really had to be done. We had many challenging, soup-to-nuts issues to deal with and we had people who were very fearful and concerned, as well as people who were less so. We were trying to meet everyone's concerns in ways that people were willing to move forward with without closing down proceedings."

Q Did the situation evolve to a manageable status and what practices helped you the most during this time?

JUDGE SCHNEIDER: "Yes, once we reopened, I made an effort to communicate with all counsel and litigants to formulate a plan to get their cases back on track.

"As the pandemic moved on, we returned to managing day-to-day operations in the criminal courts. Obviously, the emergency orders allowed us to delay jury trials, so we basically worked hard to settle as many cases as possible to avoid unwieldy backlogs when trials resumed. We managed to settle most of the felony cases in my department except the most serious cases, which ultimately must be tried.

"During this period, the remote access capabilities for the attorneys were extremely helpful in avoiding unnecessary congestion in the courtrooms. If a case warranted an actual appearance, limiting court congestion made that possible. I am extremely hopeful that we can continue the remote appearances, at the court's discretion, in the post-pandemic era.

"Having attorneys travel across the county only to tell the court that they need a continuance seems inefficient and environmentally and economically unfriendly. Also, the courts expanded use of Penal Code Section 977(b) appearances by counsel for the felony defendants was most helpful at relieving court congestion and unnecessary transportation to and from the county jail on in-custody matters. I hope to see that continue in the post-pandemic era, as there is little downside because, unlike with misdemeanors, it is not a matter of right, but at the discretion of the judge. If the judge wants a defendant personally present, they can always order the defendant to be present."

JUDGE AMERIAN: "By the end of 2020, most attorneys had gotten the hang of it. I found telling everyone to wait for me to cue them to speak was easiest for everyone, especially my court reporter!"

JUDGE TRABER: "I feel like we had most of them under control by the time we reopened in June and July of last year. But then, of course, we hit a pretty steep spike towards the end of the year and into the beginning of 2021, which caused a lot of new anxieties. We then had to evaluate whether or not the procedures that we had put into place would be viable. I think for the most part, we concluded that we had kind of put into place what we could and we upgraded to what the operational situation used to be like. The benefits of the most recent technology has been substantial and really useful. Because the communication has been clear, we've had fewer glitches in terms of people not being able to connect or not being able to be heard. I think it's been a process, but I would say that for the most part, we concluded that although the pandemic was raging outside, that would allow people to move forward without closing down proceedings."

Q Given the current rise in COVID numbers, do you feel better equipped now to deal with the ongoing crisis?

JUDGE WATKINS: "Yes. We have ongoing mask requirements. The courtrooms are still sanitized twice a day. The courtroom has fixed barriers to keep persons separated. The biggest change is the positive willingness of counsel and litigants to appear for hearings remotely and conduct trials remotely. I have also experienced a significant increase from pre-COVID-19 days in requests for bench trials."

JUDGE SCHNEIDER: "Due to the unfortunate rise in COVID-19 numbers, things have become more difficult. The court's mitigation measures, such as upgraded air filtration, protective barriers, and the like, have better prepared us; however, we now are facing increased juror reluctance to serve. Before the spread, our juror response rate and our jurors' willingness to serve had almost returned to a new normal. In late spring, I handled a three-week special circumstance murder trial with only minor difficulties. People understood that proper masking, court mitigation efforts, and increased vaccination rates kept the risk of transmission very low. Now, it seems that fear of transmission has returned."

Q Are current COVID-19-related measures effective?

JUDGE WATKINS: "Excellent. We work together as a team to address internal concerns, and concerns expressed by counsel and litigants."

COMMISSIONER BYRUM: "I see the steps the court has taken as definitely being very effective. The Presiding Judge and our Supervising Judge have both taken very logical steps to deal with the virus. As far as they can, everyone's working at their normal jobs with the sensible precautions that reflect the situation we're in today."

JUDGE TRABER: "I do. But again, I think you need to take into account that I'm in a civil courtroom. We didn't have the same kind of concerns that were raised in criminal or in family. So I think there was a less urgency for me, but I do feel, that in my own courtroom, which was a civil trial courtroom and then an independent calendar courtroom, that the procedures have worked quite well, I feel safe. I comply with the rules. And I am not averse to pointing my finger at somebody's face and saying 'Pull your mask up over your nose.'"

Q How has communication been handled among the Valley's bench officers? Has it been effective?

JUDGE WATKINS: "Excellent, we have a great group of bench officers who support each other and have worked as a team to solve ongoing concerns. Led by Judges Keeny, Brandolino and Bacigalupo, all of whom have thoughtfully guided us through this crisis. We have regular bench officer meetings to share concerns and calendar management strategies."

JUDGE SCHNEIDER: "During the pandemic, communication between bench officers was made possible by frequent web-ex or zoom district meetings. In this way, Judge Keeny kept the lines of communication open

and informing us of rapidly changing developments a priority."

JUDGE AMERIAN: "We were in constant communication with each other to maintain consistent approaches to the unique challenges we faced."

COMMISSIONER BYRUM: "We had remote video and telephone meetings. We also communicate by email. It was all very effective despite the restrictions and social distancing."

JUDGE TRABER: "I think that there was a really strong effort to communicate and that, overall, communication was effective. Judge Keeny, for example, was in a transition period with Judge Cotton as Supervising Judge in Van Nuys.

I felt that Judge Keeny in particular took on a lot of responsibilities in summarizing what the issues were, what suggestions the committees were going to pick up and run with, and many other issues, including summarizing emails so that all of us could remain on the same page."

Q Are you still seeing cases being backlogged?

JUDGE WATKINS: "There is no backlog in my department per se. The wait time for hearings on motions is very minimal. I have seen no extended wait times to get to trial or for hearings on demurrers and summary judgment motions. We increased capacity on our calendar to make sure there are no extended wait times. In my department, a demurrer can be scheduled within a month and summary judgments within four months. Trials are set whenever the parties are ready, but I have no trials set beyond May next year."

JUDGE SCHNEIDER: "In my opinion and in my district, the court has done just about everything it reasonably could have done to keep the courts functioning and the staff, inmates, and public safe. Obviously, there are risks, but we are an essential service and are not open voluntarily. From my observations, our staff has generally rallied behind one another throughout this difficult period."

COMMISSIONER BYRUM: "There's still some backlog of arraignments in traffic. In Van Nuys, we also had a backlog of misdemeanor arraignments because of a number of courtrooms being closed."

Q How can attorneys help expedite and help facilitate the courts returning to more routine operations?

COMMISSIONER BYRUM: "On the attorney side, it would help greatly if they would try not to schedule too many matters in one session in traffic court. The court is still sensitive about social distancing. So maybe that's something they can do to be sensitive to that, too, and also be aware that there is a backlog in any event and sometimes that can't be controlled."

JUDGE TRABER: "I sometimes worry about COVID being used as an excuse for interminable delays in trial dates and that kind of thing. I do grant a lot of continuances because I'm sensitive to some of the issues that get raised. But I also feel like I've seen that same paragraph from hundreds of attorneys that just says, 'Because of COVID, it's been really hard to do discovery.' From the point of view of a trial judge who needs to remove case backlog, where I now have over 750 cases that I'm dealing with in my department, I need a little more of a justification to work with. If there's a dispute between the parties, and they're not willing to agree, or if it needs to be decided by the court for one reason or another, then I need a declaration laying out specifics about why a continuance is needed. Especially where there is a need for a lengthy continuance, I need a little bit more than 'Oh, you know, there's been a pandemic.' It really puts me in a position of either being a pushover or not having enough information to make a critical decision."

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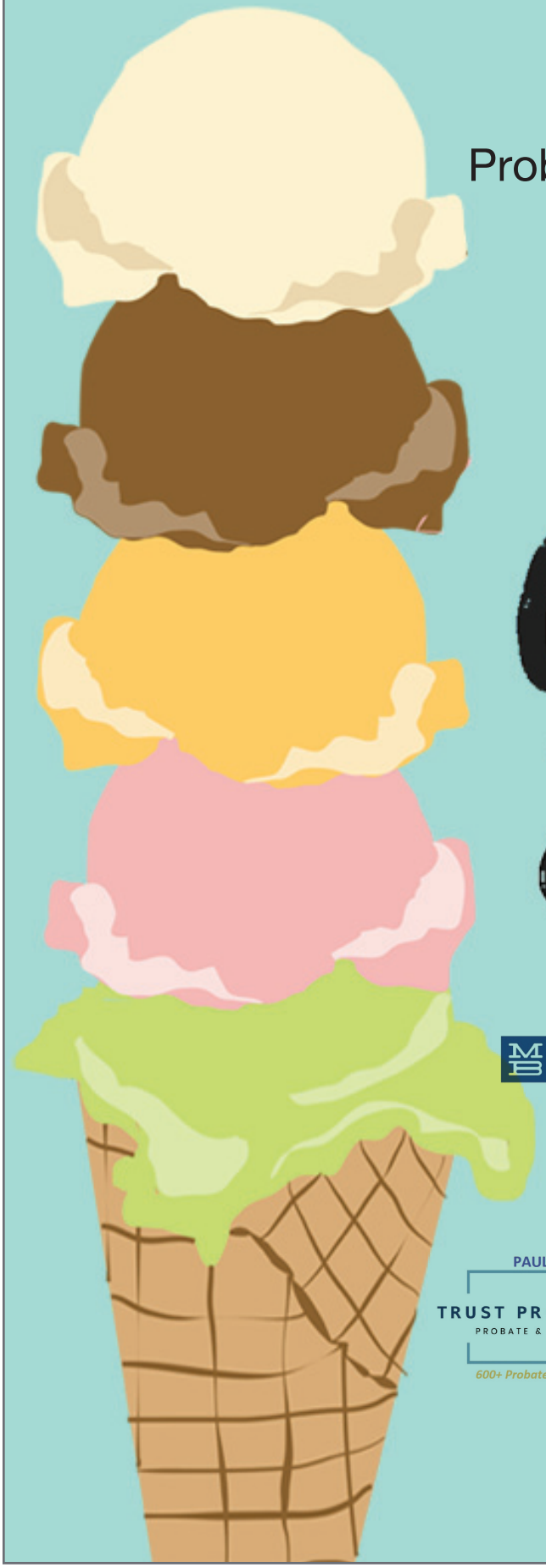

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By John Troxel

Cyber Security: Guarding Your Business Pipeline

IN EARLY MAY, COLONIAL PIPELINE SUFFERED what CNN called a "relatively unsophisticated ransomware attack" that shut down the nation's largest fuel pipeline for six days.

The pipeline, which runs for 5,500 miles between Texas and New York, delivers a daily average of 100,000,000 gallons of gasoline, home heating oil, aviation fuel and other refined petroleum products to communities and businesses throughout the southern and eastern United States.

The result of the shutdown? Gas shortages, fuel price spikes, and consumer panic. It happened on a Friday, and the following Tuesday, about 10,600 gas stations were still without fuel, causing gas prices to climb as much as $.16 per gallon across the country even though the company paid the ransom within hours of the attack.

The decryption tool was simply very slow to restore the network, showing that the ransom is just the beginning of the costs.

Note that, while agencies such as the FBI discourage the payment of ransoms, private sector organizations often ignore the advice.

The Darkside

The average ransom payout handed over by its victims in 2020 was $312,493, according to an April 2021 report by the Institute for Security + Technology. That same study found that 21 days is the average downtime from a security breach, with 287 days as the average time to fully recover from a ransomware attack.

Early reports stated that Colonial Pipeline paid $4-5 million in ransom, and the Eastern European group behind

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the hack, DarkSide, reportedly received $90 million in bitcoin from other breaches involving 47 known victims, according to analysts at Elliptic, a London-based security firm.

But the cybercriminal gang was recently shut down after access to its servers was severed.

DarkSide is the ultimate hired gun. For people who do not have the technical skills, cybercriminal operations like DarkSide serve as Ransomware-as-a-Service (RaaS), meaning DarkSide, as the developer, works with like minded pirates as affiliates.

In mid-May, the Irish Healthcare Service was hit with a ransomware attack that is now estimated to cost tens of millions of Euros. One of the major hospitals, with over 1,200 employees, was forced to use pen and paper to record all patient details and cancel many appointments for expectant mothers.

The Rise of Cybercrime

A quick search of Google will show a vast collection of news articles showing cybercrime as the fastest growing form of criminal activity. It is obvious that cyber security needs to be addressed by any organization with a presence of any kind on the world wide web.

To establish context, consider this: There is a difference between a tax accountant and an auditor. One takes care of day-to-day financial transactions, including payroll, tax deductions, customer billing, reconciling the books, etc. The other is engaged to check the accountant's work to ensure that it is accurate and keeps the company out of trouble with the IRS. The auditor knows everything the accountant knows, and then some.

Similarly, there is a difference between a professional IT expert and a cybersecurity consultant. Having your in-house IT team or outsourced managed services provider do cybersecurity is, in effect, equal to self-auditing.

Here are three significant reasons why one should engage third-party to appraise and offer recommendations to improve and enhance cyber security:

• Perspective—The first Pfizer shot reportedly makes one 80 percent protected against COVID-19, but the second shot reportedly puts them over 90 percent protected.

So if mission-critical data or sensitive information is at risk, those extra few percentage points of cybersecurity health can mean the difference between keeping a business intact, or calling for the company's cyber insurance company's negotiation team to submit and pay the ransom.

• A Focus on People and Technology—Using best-in-class technology is really not very expensive; in fact, it is cheap insurance. There are software applications that can be deployed to detect vulnerabilities, monitor for anomalies, protect from breaches and other external attacks, provide containment, log intrusion attempts, and to help employees stay on track.

Currently, some 94 percent of malware is delivered by email (CSO Online), while 98 percent of cyberattacks are focused on some sort of social engineering. Cybercriminals are aware that some employees may be unwilling to confirm that an email came from their boss. The most secure system in the world can be easily defeated by an unsuspecting employee.

Training anyone who has access to a company's technology is critical and is not a one-and-done proposition. It needs to be routine, an almost automated part of a law firm's business operations.

• Attacks are Increasing—As cyber insurance companies continue to pay out ransom money, it is highly probable that attacks will continue to trend upward, as well. According to Accenture's *2019 Cybercrime Study*, cybercrime is not only on the rise, but events take more time to resolve and are becoming more expensive.

The study estimates a 67 percent increase in security breaches in the previous five years, with an 11 percent bump in 2018 alone.

In addition, companies or firms with sensitive data face a double extortion problem when the target data is not only encrypted, but may have been stolen, as well. The threat landscape will continue to evolve, so cyber hygiene vigilance is critical.

It is not difficult to identify the dollar cost of well-known data breaches like Miracle Systems, DoorDash or Sony PlayStation. Chainalysis stated hackers were paid over $350 million in ransom in 2020, while some observers have stated that the actual amount is triple that.

> “President Biden’s May 12, 2021 executive order requires companies in a broad spectrum of business and industry areas to report attacks on their systems.”

Intangible Damage

Looking beyond dollars and cents, the damage to intangible assets such as brand reputation and customer goodwill can prove to be even more devastating, putting a weakened company on the hard road to recovery.

President Biden’s May 12, 2021 executive order requires companies in a broad spectrum of business and industry areas to report attacks on their systems. It thus seems altogether possible that the fear of both financial and reputational damage that results from mandatory breach reporting becoming public may be realized.

Further, cyber insurance appears to be morphing, and not just in terms of policy pricing.

For example, as of May, Paris-based AXA is no longer writing policies that allow for cyber ransom coverage in France as it appears the company has grown weary of selling car insurance to people who, in a manner of speaking, leave their keys on the dashboard of their car for all to see.

According to Keeper Security’s *2019 Cyberthreat Study*, 66 percent of senior decision-makers still believe they are unlikely to be target by cybercriminals.

That sobering statistic is likely one of the reasons that *Inc.* magazine reported soon thereafter that six out of every ten small businesses that suffer a cyberattack permanently shut their doors within six months of the breach and that some 43 percent of cyberattacks are aimed at small businesses while, shockingly, only 14 percent “are sufficiently prepared from a cyber security standpoint.”[1]

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ODR and Virtual Mediation: Building Rapport

By Andressa Bortolin and Jared Lee

ONE YEAR AFTER THE outbreak of the COVID-19 pandemic, nearly all mediations have been conducted online. While some mediators have been mediating online since before the pandemic, many have only begun their online practice in the past few months.

The development has raised a number of questions—Now that online mediation has become normalized, how have mediators handled the shift? How does in-person mediation differ from online mediation and what have mediators done to capitalize on those differences to excel in virtual mediations? What does the future hold for online dispute resolution (ODR) and virtual mediation?

Creating a Genuine Connection

In an era of unlimited social connections, one major concern expressed by mediators is how to truly connect with parties within a virtual environment.

With technology powerful enough to connect people on opposite sides of the world in mere seconds, how can this technology be utilized to build rapport in the virtual mediation process?

Creating that affinity is one of the crucial mediator skills that must be applied right during the initial meeting with the parties involved. This will decisively affect the outcome of the entire process.

Southern California-based mediator Steven Mehta affirmed that he initially thought that the source of his success would stem from his knowledge of negotiation techniques.

However, he says, it "has been based upon my ability to connect with the parties and the attorneys and to build a meaningful relationship in a short period of time."[1]

In Mehta's opinion, building rapport can encourage parties to share more information and work more collaboratively, making the resulting bond crucial for a settlement.

"Without gaining rapport and developing a relationship with the parties, he says, "the mediator will not be allowed into the inner world of the client."

Attorneys **Andressa Bortolin** and **Jared Lee** are mediator, facilitator, and dispute resolution specialists at the Mediation Center of Los Angeles. They can both be reached at info@mediationla.org.

Author and Social Psychologist, Dr. Robert B. Cialdini, Regents' Professor Emeritus of Psychology and Marketing at Arizona State University, once stated, "if you want to influence people, win friends."

He developed the theory of the six principles of persuasion, one of which is based on "liking."[2]

Dr. Cialdini explains that the increase of "liking" is related to a wide array of factors; the two most relevant are similarity and praise. Research proved that people are more likely to collaborate or be compelled to agree with someone that shares similar beliefs or hobbies with them.

"The important thing is to establish the bond early because it creates a presumption of goodwill and trustworthiness in every subsequent encounter," he says.

In the same way, science has revealed that "positive remarks about another person's traits...generate liking in return, as well as willing compliance with the wishes of the person offering the praise."[3]

In the opinion of attorney and mediator Mark Lemke, establishing rapport is one of the major differences when comparing in-person mediation to the virtual process.

Lemke considers the greatest challenge of online mediation to be building rapport, which can be built through seemingly insignificant interactions of reciprocity, kindness, and understanding that generate trustworthiness and goodwill.

While online mediation is largely devoid of these small interactions based on physical events, mediators need to find alternative ways to build rapport online.

Another factor that affects building rapport in virtual mediation is the ability to hold the parties' attention—an effort much more difficult to achieve in an online meeting as, quite often, distractions that demand their attention ranging from family members in the background to notifications on their phone.

Building Rapport

Wean Khing Wong, a South Pasadena-based intellectual property attorney and mediator, suggests that the mediator should give parties the opportunity to have breaks during an online mediation session.

To ensure that parties are given appropriate breaks, she suggests that mediators should "set up a signal where people can call for a break. For every one or two hours, set a ten-minute break."

Wong also mentioned that studies have proven that the online procedure can be much more tiring than in-person. These studies referred to this characteristic as Zoom Fatigue.[4]

Despite taking the name of the Zoom platform, the symptom is related to staring at a screen for a long period of time in any sort of video conferencing platform.

According to these professionals, the human brain tends to get exhausted in those situations, mostly because of the lack of change that occurs when looking at a computer screen.

As an antidote, Mark Lemke suggests that the mediator can reduce the caucus session's time length to prevent the other party from waiting too long.

Thus, by keeping the mediation sessions more compact and initiating breaks, mediators can allow parties to manage matters outside of the mediation while keeping them more focused when in session.

Los Angeles-based attorney mediators James Cameron and David Ernst have said that the online format can potentially reduce the ability of mediators to build rapport with the parties, with Ernst adding that "there is a connection in person that you cannot feel online."

In his viewpoint, the virtual process highly reduces the mediator's ability to assess the parties' body language. In this way, online mediation acts as a barrier to being able to fully express or understand one another.

Not all mediators agree, though, that virtual mediation can reduce a mediator's ability to build rapport.

Attorney Stephen Marcus trained as a mediator at the Strauss Institute of Dispute Resolution at Pepperdine University and currently works with the Mediation Center of Los Angeles.

He has said that the current virtual process has not hindered his level of rapport with parties and disagreed with the claim that body language communication is lost among participants in a virtual meeting.

In addition, Marcus shared the approach in which he overcame the lack of the seemingly insignificant interactions that often occur at the beginning of in-person mediations.

He explored virtual ways to enhance the connection between the mediating parties, such as being able to change your camera background depicting something whimsical, thought-provoking, or relating to the mediation.

"These backgrounds at least help break the ice and are conversation starters," says Marcus, who changes his camera background from Jerusalem's West Wall to a background of the signing of the Emancipation Proclamation to stabilize the mood.

Just as Good

One of the leading advocates of the online mediation process is Susan Guthrie, who trains online mediators through her program Learn to Mediate Online.

According to Guthrie, because a good deal of communication is revealed through facial expressions and tone of voice, virtual mediations can be just as effective as a face-to-face meeting.

Indeed, she says, they can be especially effective during the current pandemic situation, when in-person meetings may require masking and social distancing, both of which can significantly reduce the quality level of communication among participants.

Nevertheless, despite the fact that long-distance mediation can sometimes involve miscommunication and misunderstanding, online dispute resolution procedures have become an essential component in the alternate dispute resolution (ADR) tool kit.

Addressing the issue of possible communications glitches, Australian barrister and mediator Claire Roberts has detailed several recommendations on how to minimize those challenges when building rapport within a virtual mediation.

- The mediator must be proficient in the correct use of technology to avoid any technical difficulties that could hinder communication or give the impression of carelessness or incompetence.

- It is preferable to have a videoconferencing conversation before all the parties meet for the mediation. Such a pre-mediation session presents an opportunity to build trust and demonstrate care and respect for the client's concerns.

- Set up direct lines of communication with the parties that are accessible through the break-out rooms.

- Consider having everyone dressed as professionals as there could be situations where that standard could enhance the outcome of the process.

- Remember that the way in which someone's voice is heard in a face-to-face interaction is not the same as it is heard in a remote meeting. In order to maintain effective and engaging communication, all the participants must then speak slowly and clearly.[5]

After all these past months of social distancing, skilled mediators have found their own way to manage the barriers currently impeding the dispute resolution process.

Since human interactions of all kinds have become more and more virtual in nature, people now tend to spend much more time communicating online rather than meeting personally.

In the same way, technology also has displayed a full deck of cards when addressing some of the new tools that have been brought to the dispute resolution table.

As mediation is such a particularly sensitive process that is grounded in deep human characteristics such as emotions, prejudices, manners, biases, and beliefs, it is somewhat understandable why many mediation professionals were skeptical if the ADR process could be taken online, with, in fact, some mediators actually opposed to implementing the process.

Many considered the difficulty of establishing that critical rapport among parties as the major challenge of virtual mediation.

Still, even mediators who are skeptical about the effectiveness of online ADR believe that virtual mediation is, when all is said and done, better than no mediation at all.

It is evident, then, that the mediators able to remain flexible and add virtual dispute resolution to their toolkit will add enormous, lasting value to their dispute resolution skillset.

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[1] Steve Mehta, *Three Essential Traits Of A Highly Successful Mediator*, Mediate, May 2009.
[2] Cialdini, *Harnessing the Science of Persuasion*, Harvard Business Review, October 2001.
[3] *Id.*
[4] Clare Fowler, *Zoom Fatigue Uncovers Mediator's Secret Weapon*, Mediate, September 2020.
[5] Claire Roberts, *Building Rapport During Online Dispute Resolution: Different, Difficult, Doable*, LexisNexis Australia, July 2020.

By Hon. Clifford L. Klein (Ret.)

SB724: California's Proposed New Conservatorship Bill

NOTWITHSTANDING THE DANGERS of celebrity-legislating, the attention to conservatorships created by the Britney Spears case has engendered a productive deep-dive discussion about current conservatorship law and a series of proposed reforms in California Senate Bill 724.[1]

Although there has unlikely been a conservatorship similar to Britney Spears in American history, the case highlights important questions for all these proceedings about the right to representation, the role of appointed counsel, the right to counsel of one's choice, and the appropriate goals of advocacy by conservatee's counsel.

SB 724 would settle the long conflict about the proper role of a lawyer representing a proposed conservatee—Should attorneys advocate for what they believe are the best interests of their clients, regardless of the client's wishes? Or should the lawyer advocate for the client's position regardless of whether they think it is in the client's best interest?

Proper Representation

In the American adversarial system, a lawyer's role is to represent their client, regardless of their personal belief in what is best for them.

No one could ever expect a lawyer to tell a judge that a defendant would benefit from a prison or probationary sentence rather than an acquittal.

A criminal defense attorney may believe that a dose of confinement would be useful for a young offender, as would drug treatment or anger management programs as a condition of probation, yet it is inconceivable that counsel would argue for a result contrary to their client's wishes.

In this regard, the U.S. Supreme Court recently held that the Sixth Amendment guarantees a defendant the right to insist that his counsel refrain from admitting guilt, notwithstanding his experienced lawyer's tactical belief that a confession would offer the defendant an excellent chance to avoid the death penalty.[2]

The same legal principles apply in civil and family law cases. No one would suggest that an attorney for a spouse has the independent obligation to argue, even if true, that their client, against his wishes, should

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pay more money for child or spousal support because it could be in their client's long-term interest to preserve family harmony.

Yet, in the conservatorship arena, some attorneys do argue for results they believe are in their client's best interest, even if their client objects to the argument.

If enacted, this new law would require a lawyer to argue in accord with the client's wishes. Counsel, however, would still have the obligation to initially counsel their client as to what their best interests could be, while deferring to their client's ultimate decision as to how they wish to proceed.

Yet, should the client reject their attorney's advice, no matter how sound, it has always been the lawyer's role in every other type of legal proceeding other than with conservatorships, to vigorously argue their client's case.

The proposed conservatee, as with every other defendant in a civil or criminal case, should have their day in court.

Best Interests

It is the judge's role to decide the best interests of the conservatee, while the party petitioning to establish the conservatorship has the responsibility to present their case, which typically includes a best interest analysis.

The judge also has a report from a court investigator, which includes an assessment of the conservatee's wishes and needs. A report from a psychiatrist is typically filed, as well.

Thus, a judge is provided with sufficient information about the conservatee's best interests and need not rely on counsel acting for the conservatee to articulate that information.

The only person in the courtroom with an ethical duty of loyalty to the conservatee is their counsel. Should counsel abrogate that duty of loyalty and argue against the client's wishes, the client is effectively left defenseless.

Some judges fear that chaos could result in court if the client's wishes are communicated and pursued by counsel.

The client may lose, the litigation may be expensive, the conflict may enhance friction in the family already reeling by the filing of the conservatorship petition itself, and of course, the client, because of a diminished mental state, may not understand that what they want is not consistent with what they need.

If the case is so clear-cut on the question of best interests, there is little downside considering the eventual result. The conservatee's attorney does not have an obligation to call witnesses who have irrelevant testimony. Family members generally understand the conservatee's deficits and thus do not take personal offense at any accusations.

As with some of my former colleagues, I cannot recall in my six years hearing conservatorship cases any courtroom management problems with disruptive or unnecessarily lengthy hearings that were any different than those in criminal, juvenile or mental health courts.

A trial may take an afternoon of court time, but the conservatee has the important satisfaction of being able to talk with and being heard by a judge.

I believed that, as a judge, my responsibility was to determine the best interests of the conservatee, after vigorous advocacy between the litigants and expected counsel to be honest with their client and give them their best advice, in private, while always remembering their role was to represent and effectuate their client's wishes.

If a court-appointed attorney insisted on arguing best interests over a client's wishes, I removed the attorney and appointed new counsel.

SB 724 requires counsel for a conservatee to provide zealous advocacy. There is some concern about this requirement.

Assuming there is a workable courtroom definition of the word "zealous," I question whether this adjective in a statute will pertain to the style and personality of a litigator, rather than the content of their arguments.

My experience as a judge is that attorneys are often unaware as to whether they are being too passive or excessively confrontational, e.g., zealous.

Perhaps the incorporation into the statute the requirements in the California Business and Professions Code to maintain the respect due to the courts of justice and judicial officers will temper zealous style as opposed to zealous content.[3]

Additional Merits

In Los Angeles and San Diego counties, every proposed conservatee has an appointed attorney. This practice goes further than current state law, which mandates appointment of counsel only upon request.

With SB 724 a conservatee does not have to ask for a lawyer in order to get one.

Those conservatees who do not understand how a lawyer can assist them and how a conservatorship may impinge on their independence would get free counsel to advise them on the life-changing issues that accompany lack of capacity to manage one's personal care and finances.

Providing counsel for such individuals eliminates the pitfalls of self-representation.

The bill also provides that a conservatee should have the freedom to retain the lawyer of their choice.

This choice cannot be without limits, though, as a judge would retain the authority to insure the conservatee both has the capacity to make this decision and has exercised it independently rather than due to the influence of family members who may have conflicting interests.

There are factors which can assist the judge at a capacity hearing to evaluate the conservatee's reasons, such as whether the attorney represented their client in the past, or a psychiatrist has testified regarding capacity.

While there are issues specific to conservatorship petitions that are not present in other types of criminal and civil cases, no other issue supersedes the foundations of the American legal tradition, the right of representation and our adversarial system of justice.

[1] *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB724.*
[2] *McCoy vs. Louisiana* (2018) 138 S. Ct. 1500.
[3] California Business and Professions Code Bus. & Prof. § 6000 et seq.

Retrospective

The date was November 12, 1941, and the San Fernando Valley Bar Association held its 15th Anniversary Banquet at Eaton's Rancho Café in Studio City.

The cost per ticket was $1.50 per person.

The Bar held many meetings and events at Eaton's, which opened in 1938 near the corner of Ventura Blvd. and Laurel Canyon, for many years.

The immensely popular restaurant was air conditioned, and, according to the *Valley News*, "modeled after early California hacienda architectural style," at a cost of, for the time, a staggering $125,000.

The site where Eaton's, now a dim memory, stood is now occupied by, of all things, a McDonalds.

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AS A RELATIVELY NEW attorney, I have had a relatively short period in which to enjoy the typical routine of being a litigator.

Rising at 5:30 a.m. to drive an hour or more to court to deal with calendar cases set at 8:30 a.m.; meeting with clients seeking settlement or a trial, or colleagues or opposing counsel and being able to converse face-to-face.

Law school certainly doesn't prepare you for what to expect. As time goes on, just as in everything else in life, we get used to the routine and procedures, work on our craft, and become experienced professionals who can do the work in our sleep.

Then 2020 happened.

One need not say anything other than "2020" to evoke feelings of unease. Our lives, not only professionally, but personally as well, were turned on their heads.

I can recall watching the news commenting that businesses were to close their doors in an effort to stem the spread of the COVID-19 virus. Court hearings were canceled. Offices closed and no one was available to take calls.

Walking into our office the day after the shutdown, I was shocked to find the telephone not ringing and the place deserted. It was definitely a strange, surreal feeling.

Of course, things slowly adapted, and life limped on, slowly but surely. Hearings became telephonic, and depositions became virtual. To this day, I still have trouble setting up Zoom meetings. I used to wonder why my parents couldn't grasp technology, but now anytime I see something new, I think, "Yeah, I'm not learning that."

It was strange, but again, we have gotten used to it, and it's become a routine in my particular field.

If anyone has ever seen the movie *Groundhog Day*—it is highly recommended, by the way—then you understand perhaps in a small way what our lives have become. We go into the office, be it a physical office or our workstation at home, sit doing work, and then, eight hours or so later, quit for the day.

While I am very grateful to say I have been able to keep my job, I do wish for the old way of doing things—being in court without a mask or other restrictions; seeing opposing counsel, judges and friends; getting to court early and having coffee while waiting for the day to start. All of the little things that eventually add up as life certainly have a way of changing in a heartbeat.

2020 was a tough year for me, personally, but, as it is with all things, we learn that we can't change the cards we're dealt; we can only play the hand we are dealt.

All that said, I can say that I have grown tremendously both as a person and as an attorney over the past year by listening to others practice via remote hearings, asking more experienced and wise attorneys for advice, and by having more time to research and develop my craft.

My goal is to be better and better as the days go on, and enjoy life along the way, regardless of COVID-19. I've had some wins and had some losses, but I try to take them in stride.

As Ralph Waldo Emerson said many years ago, "Win as if you were used to it, lose as if you enjoyed it for a change."

At some point, we will get back to in-person hearings, or perhaps some hybrid or in-person/telephonic appearances. But until then, we will just keep doing what we can and adapt to life around us.

May we continually remind ourselves not only to stay safe, but remember no matter what, to be better than we were yesterday.

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Valley Community Legal Foundation

San Fernando Valley Bar Association founded in 1924

A Return to Normal

AMANDA MOGHADDAM
SFVBA Trustee
and VCLF Board Member

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BACK TO SCHOOL TIME IS ALWAYS EXCITING, but this year it has been accompanied by more meaning than usual. At the VCLF's August meeting, we parents noted how it was the first time we'd been alone in our homes since March of 2020.

What may have been commonplace in years past was now a strange absence—it was nice to focus on work rather than breaking up sibling rumbles or fixing snacks—but, at the same time, it just felt...well, weird. I think that is a sentiment many of us share in this continued state of uncertainty. Sometimes it feels like it's a case of two steps forward and one step back.

With each step toward a return to normalcy, we are faced with the disheartening news of a new COVID variant, new guidelines, and new worries.

However, lifting me out of this fog was the clear message from our Valley judges during an August 19, 2021 lunchtime MCLE—the courts are open for business.

The SFVBA's Inclusion & Diversity Committee hosted the LASC's Northwest District Court Update. The event attracted more than 75 SFVBA members, including several Valley judges who were not on the panel but graciously exhibited their support by adding to the interactive MCLE program. We were honored to have Judge Valerie Salkin as a panelist to discuss the status of civil litigation in the continuing pandemic environment.

VCLF Board Member Judge Michael R. Amerian spoke to our family law practitioners about what to expect in family law courtrooms, while and Judge Jessica A. Uzcategui addressed the changes to unlawful detainer proceedings. Finally, Judge Eric Harmon shared his insights on the status of criminal trials and current COVID-19 protocols.

All of the panelists were clear that jury trials are very much underway and that we can expect that, as is true with many aspects of life today, we are approaching some semblance of normalcy.

Yes, masks are still required in court, and yes, you should plan on appearing via LACourtConnect when possible. Yes, many jurors may be seated behind you, and yes, you will need to turn to make eye contact with them. But, the key message was this: things may look different now, but really, we are truly close to turning a corner.

> "Yes, masks are still required in court, and yes, you should plan on appearing via LACourtConnect when possible."

The courts are committed to providing our clients with swift access to justice while keeping the litigants and their counsel safe. And while it may feel strange, we will persevere.

As always, regardless of COVID-19, the VCLF remains committed to raising scholarships for those young people interested in pursuing a legal career, promoting education, and increasing access to justice to all in our community.

It was with great pride then that our Board was able to support this MCLE event so that SFVBA members could hear and discuss the incremental good news.

While we cannot claim a return to what was, suffice it to say that it is finally starting to feel like we are back on the path to Normalville.

As we approach fall with a new SFVBA Board, we hope that you will consider making a donation to the VCLF so that we can continue our work funding scholarships for the future members of our legal community.

And, remember to cast your vote in the 2021 SFVBA Election. Here's to a giving-filled remainder of 2021!

ABOUT THE VCLF OF THE SFVBA

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

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