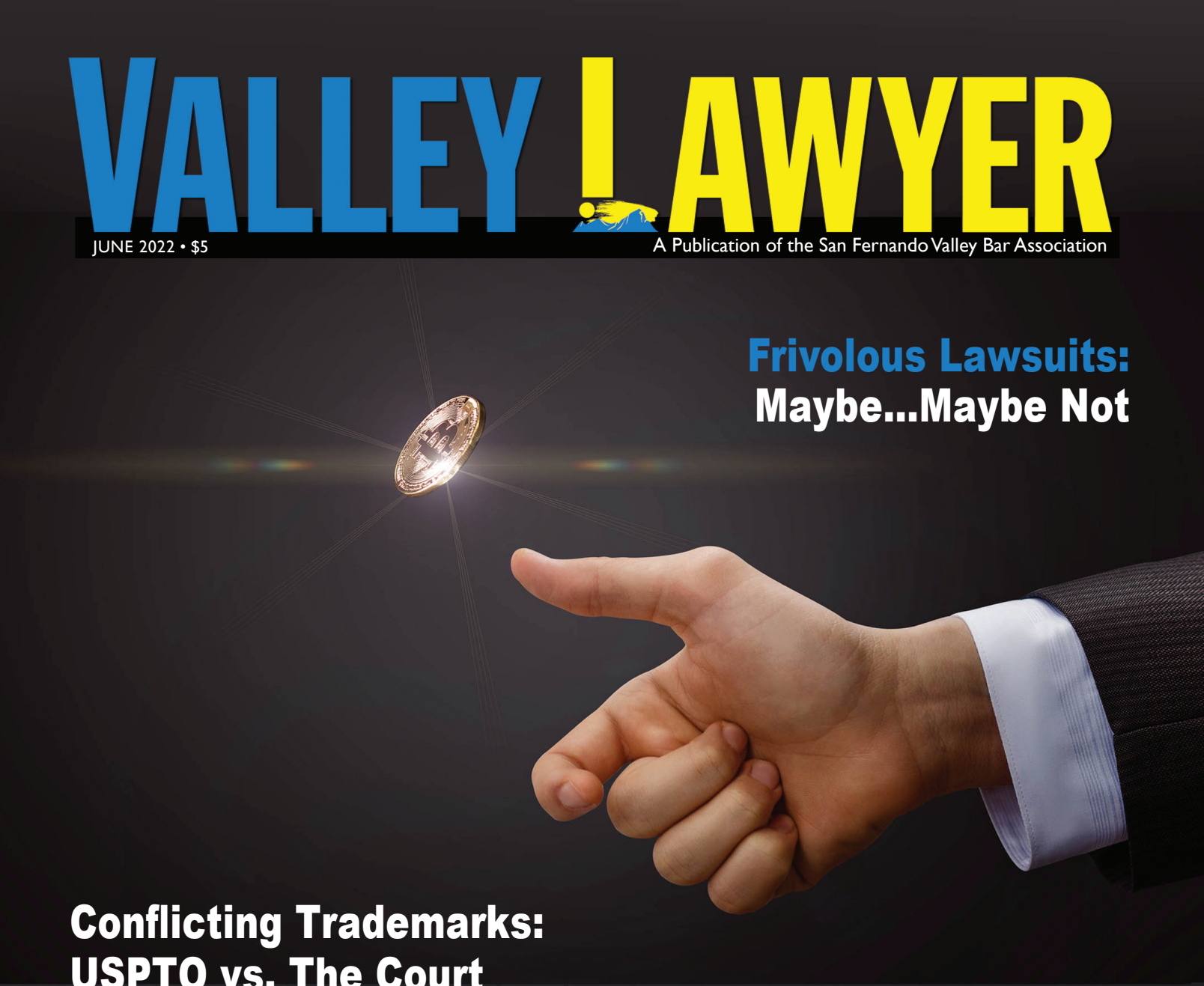
VALLEY LAWYER

JUNE 2022 • $5

A Publication of the San Fernando Valley Bar Association



Frivolous Lawsuits: Maybe...Maybe Not

Conflicting Trademarks: USPTO vs. The Court System of Analysis

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VALLEY LAWYER

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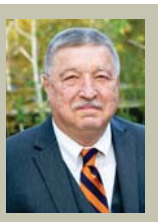
A Life of Quiet Sacrifice

MICHAEL D. WHITE
SFVBA Communications Manager



michael@sfvba.org

THERE'S SO MUCH I COULD WRITE HERE ABOUT my Dad. The memories are legion and so many of them hinge on what he did, rather than said.

He was a good, wise, and decent man of few words who was an Olympic-class listener. You could sit with him at a crowded party and he could make you feel like you were the only person in the room; he would be interested in you, not in 'working the event.' He didn't talk much, but, when he did, what he said was worth listening to.

He grew up poor helping support his family at age 14 during the Great Depression with grinding after-school and weekend work tending a loom in a Fall River, Massachusetts, textile mill after his own father suffered a sudden debilitating stroke. It needed to be done.

The same devotion to doing what was right for his family led him to turn down a Congressional appointment to the U.S. Merchant Marine Academy and a 'full-ride' football scholarship to the University of Wyoming—an outstanding student, he was an All-New England high school halfback and punter in the days of leather helmets, high-top cleats, and cardboard shoulder pads.

Drafted into the Army just six weeks after getting married in October 1942, he was trained as a medic and shipped off to Europe. He returned from the war with a stutter and a head full of bad, sometimes nightmare inducing, memories.

Daniel A. White, 1922-1994

> "The memories are legion and so many of them hinge on what he did, rather than said."

Years later, he would surrender the opportunity to finish a GI Bill college education to work two jobs to take care of his health-challenged wife and his two young sons.

I witnessed first-hand the penultimate example of his genuine concern for others when he would invite his Italy-born mother-in-law into his home where she would live—loved and cared for—in security and opera-induced happiness, until the day she died.

Sacrifice and concern for others was the Golden Thread that was woven into the fabric of his life. He loathed whining, rudeness, and dawdling; loved a good joke, baseball and rare, occasional sojourns to the beach as his love of the sea never left him.

He was always eager to help others; no questions asked, no pay-back asked for, or expected. I could honestly fill journals with the lessons he quietly taught and chronicles of the lives he touched.

My father died a few days before Christmas 1994. A few months later, grocery shopping, I happened to meet an acquaintance of his who had not heard that Dad had died. When I told him that he had passed, the man cried. No words. Quiet tears that spoke volumes.

I love you, Dad. I can never say 'Thanks' enough.

LONG-TIME SFVBA MEMBER WILLIAM Weigand, who passed away on April 8. Born in Glendale in 1927, he served in the U.S. Navy during World War II and, after his discharge, attended UCLA before later receiving his law degree from USC. He was admitted to the California Bar in 1957.

Weigand worked in a small firm before becoming a sole practitioner until his retirement, sharing an office suite in San Fernando with family friend, and fellow sole practitioner and SFVBA member Stanley Silver.

The San Fernando Valley Bar Association wishes to extend its most sincere condolences to the Weigand family.

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CALENDAR

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SUN	MON	TUE	WED	THU	FRI	SAT
			1	2 **ZOOM MEETING** **Membership and Marketing Committee** 6:00 PM	3	4
5	6	7	8	9	10	11
12	13	14 **WEBINAR** **Probate and Estate Planning Section** ***Are You Sure You're Sure? Conflicts of Interest*** 12:00 NOON A closer look at attorney-client relationships and conflicts of interest in difficult cases. Attorneys Nancy Reinhardt and Matthew Kanin will discuss conflicts of interest rules and best practices with a focus on trust and estate planning. 1 Hour MCLE (Legal Ethics) **Board of Trustees Meeting** 6:00 PM	15	16	17	18
19 	20 **ZOOM MEETING** **Mock Trial Committee Meeting** 6:00 PM	21	22	23	24 **Our Sister Organization: Santa Clarita Valley Bar Association** ***Friday Fun Night*** 6:00 PM MB2 ENTERTAINMENT SANTA CLARITA Join us for mini golf and appetizers! $10 for SCVBA Members + 1 guest (additional guests and family welcome at an additional cost) RSVP: Sarah 661-505-8670 or info@scvbar.org	25
26	27	28 **ZOOM MEETING** **Inclusion and Diversity Committee Meeting** 12:15 PM 	29	30 **WEBINAR** **Our Sister Organization: Santa Clarita Valley Bar Association** ***Top 5 Pitfalls Attorneys Make In Drafting Fee Agreements*** 12:00 NOON Presented by Lee Straus and Anahid Agemian. RSVP: Sarah 661-505-8670 or info@scvbar.org (1 MCLE Hour)	

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.

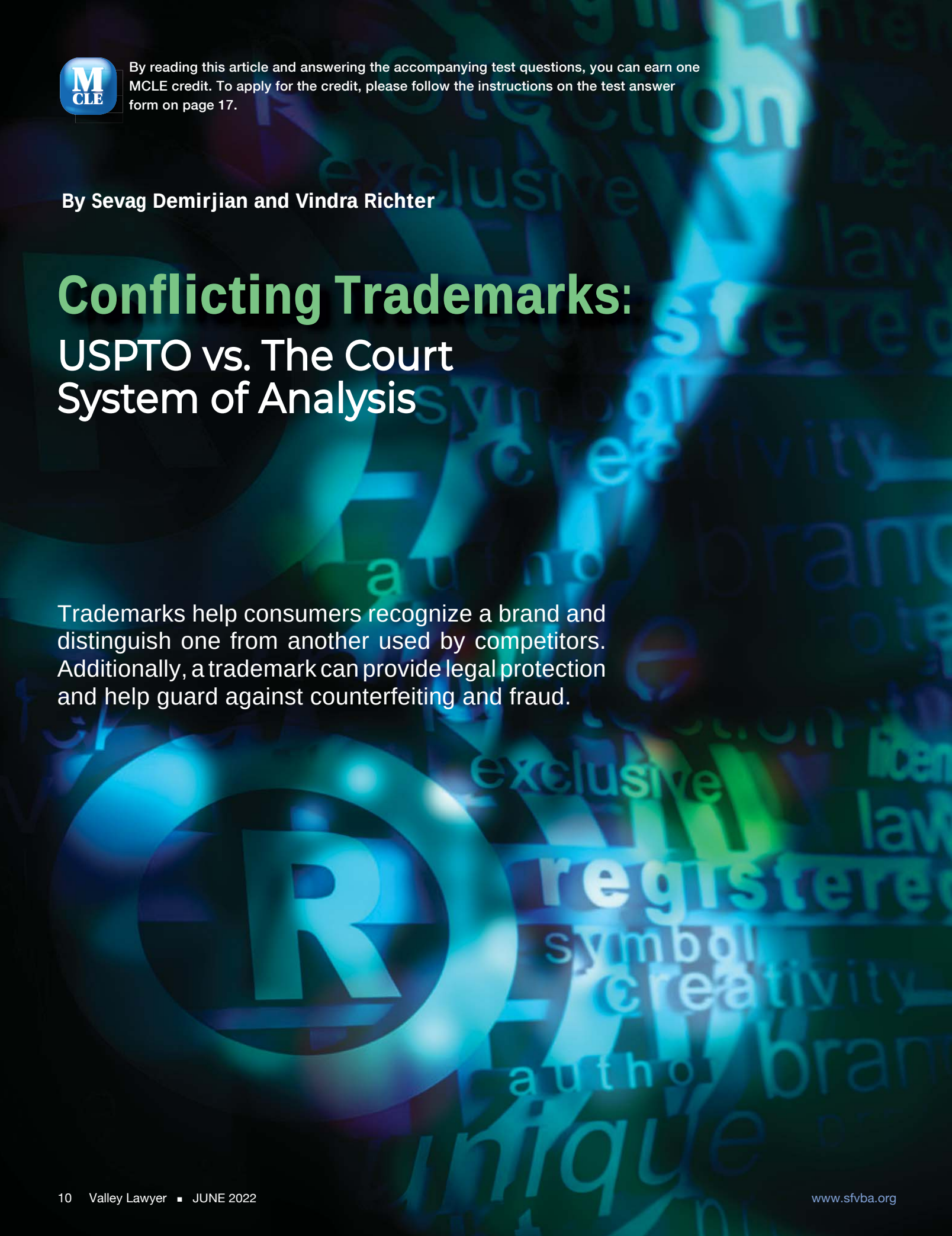
By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 17.

By Sevag Demirjian and Vindra Richter

Conflicting Trademarks:

USPTO vs. The Court System of Analysis

Trademarks help consumers recognize a brand and distinguish one from another used by competitors. Additionally, a trademark can provide legal protection and help guard against counterfeiting and fraud.



TRADEMARKS—LIKE PATENT, COPYRIGHTS, and trade secret protection—are one of the protections sought under intellectual property law and provide legal protection for a brand.

According to the United States Patent and Trademark Office (USPTO), a trademark is "*any word, phrase, symbol, design, or any combination of word/phrase/symbol/design that identify your goods and services*."[1]

That is how consumers in the marketplace recognize a brand and distinguish one from another.

Additionally, a trademark can provide legal protection and help guard against counterfeiting and fraud.

Many incorrectly assume that a business either has a trademark or it doesn't; but, unfortunately, trademarks are not that black and white. If a brand name is being used to offer goods and services, it is likely to be some form of trademark. Without a trademark registration, though, those rights are likely weak and can be difficult and expensive to either prove or enforce.

Defining trademark rights, which may or may not include registrations, is vital when evaluating potential conflicts between trademarks. Determining who has priority or other rights, and how likely it is that two trademarks would cause consumer confusion is key.

This article briefly looks at and compares how the likelihood of confusion analysis is conducted at the USPTO when compared with the how the court system acts when analyzing whether two trademarks conflict or not.

Jurisdiction and Confusion Analysis

Trademarks are normally the exclusive subject matter of the federal courts, and as such, in California, fall under the United States Courts for the Ninth Circuit.[2]

Local Federal District Courts look to the precedential decisions of the 9th Circuit Court of Appeals to guide their trademark law decisions.

Those experienced with registering trademarks have learned that the views of examining attorneys are subjective and they can apply the same rules in many different ways.

Comparing those experiences with our experience—although limited here to the 9th Circuit courts—there have been notable differences in the analysis employed by the courts, litigants and their attorneys when compared to USPTO examining attorneys.

One key to properly advising clients on their trademarks is understanding these differences and employing the correct analysis to guide your clients to the best business decisions.

To better understand and appreciate the differences of a likelihood of confusion analysis conducted within the USPTO and the courts, it is important to outline the differences of focus at the USPTO and the courts.

At the USPTO, the issue at the heart of a likelihood of confusion analysis is to determine whether a trademark is registrable and when there are similar trademarks registrations and applications already existing in their trademark database.

In sharp contrast, the courts' focus of the likelihood of confusion inquiry is whether the defendant's actual practice is likely to produce confusion with another's trademark usage, to form the basis for a trademark infringement claim.

In both systems, the likelihood of confusion analysis begins with whether the marks sound alike when spoken, are visually similar, and/or create the same general commercial impression in the consumer's mind.

At that point, the analysis moves to whether the goods/services are related. Beyond these initial steps of the first two factors, the analysis diverges.

The USPTO Rules of Analysis

Upon filing at the USPTO, a trademark application is assigned to and reviewed by an examining attorney to determine if it is in compliance with federal law and the Trademark Rules of Practice.

Approximately 70 percent of applications are refused with one of the most common reasons being that a potential conflict or likelihood of confusion exists between the subject trademark in the application and a previously registered mark(s) or a pending application(s) with an earlier filing date and owned by an unrelated third party.[3]

Determining whether there is likelihood of confusion between two trademarks may be eased when both the marks and the goods/services are identical. But what if they are only similar?

In performing the likelihood of confusion analysis, the USPTO relies on a test called the "*DuPont factors*":[4]

- The similarity or dissimilarity of the trademarks in their entireties as to appearance, sound, connotation, and commercial impression;

- The similarity and nature of the goods and services;

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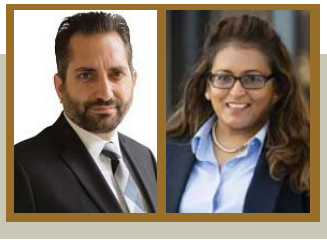

• The similarity or dissimilarity of established, likely-to-continue trade channels;

• The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing;

• The fame of the prior trademark;

• The number and nature of similar trademarks in use on similar goods and services;

• The nature and extent of any actual confusion;

• The length of time during and the conditions under which there has been concurrent use without evidence of actual confusion;

• The variety of goods and services on which a trademark is or is not used;

• The market interface between the applicant and the owner of a prior trademark;

• The extent to which applicant has a right to exclude others from use of its trademark on its goods;

• The extent of potential confusion; and, any other established fact probative of the effect of use.

Examiners will usually focus their likelihood of confusion analysis on the first two factors, namely similarity of the marks and the similarity of the goods or services.

This assessment begins with whether the marks are phonetically alike when spoken or visually similar, in the consumer's mind. The analysis then moves to whether the applicant's goods/services are similar or related to those already under the prior trademark registration(s) and application(s) that would cause consumer confusion as to the source of the goods/services.

For example, cosmetics and facial skin care products are closely related goods and they are often produced by the same company and sold in the same establishments.

Therefore, it is reasonable for a consumer to assume that a lipstick and facial moisturizer bearing the same name would originate from the same source.

Conversely, where industries are unrelated, use of the same trademark would not cause consumer confusion, for example, the use of the name "DELTA" for both a faucet company and an airline.

Additionally, the examining attorney may evaluate an identical or similar mark in terms of consumers' commercial impressions and mental reaction with prior identical/similar trademark registrations and applications.

For example, the commercial impression of the word "BRINKS" on metal gate goods could be found confusingly similar with Brinks, the well-known security services company, as both are related to security.

Usually, the examining attorney's finding of similarities between the marks and the goods/services are sufficient to support a finding of likelihood of confusion for the purposes of denying a trademark registration to the applicant. If the applicant fails to overcome the examiner's likelihood of confusion objections, they can appeal to the U.S. Trademark Trial and Appeal Board (TTAB).[6]

Even if one is able to obtain an examiner's approval of a trademark application, there still remains the possibility of a third-party complaint within the USPTO in the form of an opposition or cancellation proceeding.

In such a situation, the trademark attorney representing the third party will craft arguments as to why there is a likelihood of confusion between their client's prior trademark—whether registered or not—and the one in a client's application.

The analysis provided by such an attorney within the cancellation or opposition proceeding will likely involve reviewing more of the DuPont factors than the ones addressed by an examiner.

At this point, it is important to note that a denial of a trademark application does not necessarily mean that you have infringed or will infringe on the cited registration(s) and/or application(s).

It also does not mean that the mark cannot be used; it just means that the application could not be registered. There could be solutions involving filing a different application or using the mark in a manner that will not infringe others.

A proper review requires a separate analysis to be performed for registration purposes and for infringement purposes.

The Courts' Rules of Analysis

Courts are obligated to perform a more thorough review and will weigh all the facts and evidence before deciding whether two trademarks conflict or not.

The courts will commonly split hairs that the USPTO will not. As we mentioned above, the courts' focus of the likelihood of confusion inquiry is connected to a trademark infringement claim—basically, the unauthorized use of another's trademark in a manner that causes confusion about the source of goods and services.

To support a claim for trademark infringement, an owner must prove that they own the trademark, that they were the first to use it, and show that the adverse party's mark is likely to cause consumer confusion about the source.[7]

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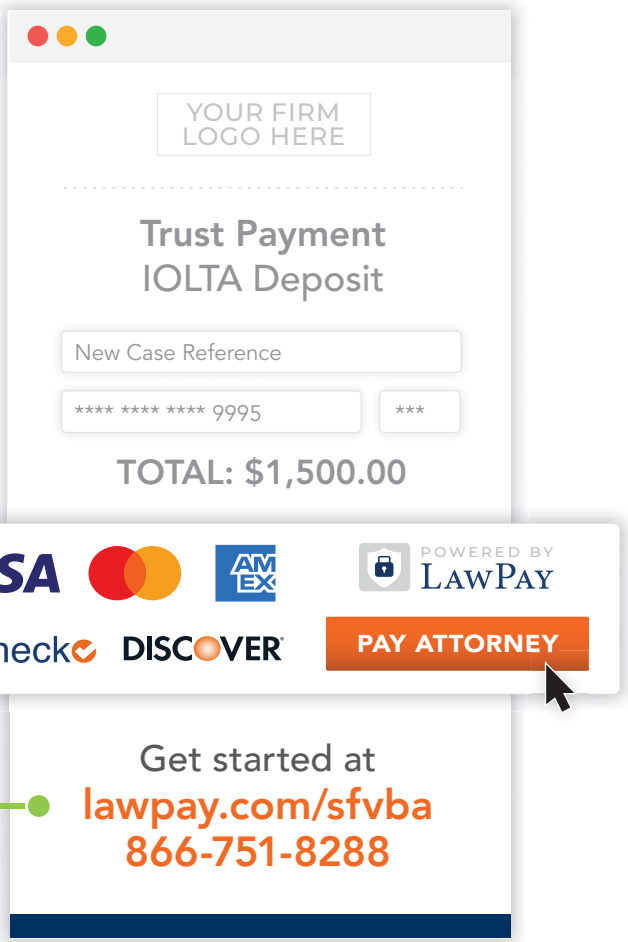

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Although the primary factors employed by the USPTO and the courts are similar, the overall analysis is very different. Courts in different parts of the country also employ different factors when performing the analysis in their circuit. The Ninth Circuit gives very little weight or no weight at all to a likelihood of confusion determination by the USPTO.[8]

The main reason for allocating little weight is that the Court considers a USPTO determination to be "low-level" in that it does not have the benefit of access to the complete record and the volume of evidence that is presented during a subsequent court's litigation, and supports the conclusion that the USPTO cannot make decisions regarding evidence that was not available or considered.[9]

The 9th Circuit employs what is colloquially known as "the Sleekcraft test" to determine likelihood of confusion.

The Court's opinion in *AMF Inc. v. Sleekcraft Boats*, stated that, considering the likelihood of confusion, the following should be examined:[10]

• Strength or Weakness of the Plaintiff's Mark: This is a measure of how uniquely a mark is identified with the goods/services.

This measure of strength can be categorized as commercial strength, that is a mark's recognition in the marketplace and how widely is the recognition of the mark by customers. The greater the public's recognition of the plaintiff's mark as a source of the plaintiff's goods/services, the more likely there would be likelihood of confusion among consumers if the defendant uses a similar mark, and conceptual strength—the level of obviousness a mark has to its goods/services—ranging from generic, descriptive, suggestive, arbitrary, or fanciful.

There are many types of evidence which can be submitted to show a trademark's strength, including advertising samples and expenditures, consumer surveys, and media coverage—all types of evidence which are not commonplace within a USPTO registration application proceeding.

• Defendant's Use of the Mark: If the defendant and plaintiff use their trademarks on the same, related, or complementary kinds of goods or services, there may be a greater likelihood of confusion about the source of the goods than otherwise.

• Similarity of Plaintiff's and Defendant's Marks: According to the Ninth Circuit, the similarity of the marks is assessed in terms of their aggregate, not piecemeal, sight, sound, and meaning.

If the overall impression created by the plaintiff's trademark in the marketplace is similar to that created by the defendant's trademark in appearance, sound, or

meaning, there is a greater chance that consumers are likely to be confused by defendant's use of a mark.

• Actual Confusion: Even though evidence of actual confusion is not required, when submitted, it is "*strong support for the likelihood of confusion*."[11]

If use by the defendant of the plaintiff's trademark has led to instances of actual confusion, this strongly suggests the likelihood of confusion. If the instances of actual confusion have been relatively frequent, there is the possibility that there has been actual substantial confusion.

If, by contrast, there is a very large volume of sales by both parties, but only a few isolated instances of actual confusion, it is possible that there has not been such confusion.

• Defendant's Intent: Another factor not commonly considered by the USPTO, but important in court, is intent. "*A defendant's intent to confuse constitutes probative evidence of likely confusion.*"[12]

The defendant's conscious use of the plaintiff's trademark to identify similar goods may strongly show an intent to derive benefit from the reputation of the plaintiff's mark, thus suggesting an intent to cause a likelihood of confusion.

> "The Ninth Circuit gives very little weight or no weight at all to a likelihood of confusion determination by the USPTO."

On the other hand, even in the absence of proof that the defendant acted knowingly, the use of plaintiff's trademark to identify similar goods may indicate a likelihood of confusion. Willful intent to infringe another's mark can also lead to heightened monetary damages.

• Marketing/Advertising Channels: Convergent channels of trade and marketing will increase the likelihood of confusion.

If the plaintiff's and defendant's goods or services are likely to be sold in the same or similar stores or outlets, or advertised in similar media, this may increase the likelihood of confusion.

• Consumer's Degree of Care: The degree of care exercised by the consumers vary according to the purchase.

In determining the likelihood of confusion, the court must consider whether a typical buyer using ordinary caution would be confused. When goods are expensive, consumers generally exercise greater care with purchases. Additionally, more sophisticated the potential buyers of goods/services tend to be more careful than the reasonably prudent purchaser exercising ordinary caution.

Therefore, courts assume that such purchasers are likely to be more discriminating and source-conscious when purchasing "big ticket" items—a shopper buying coffee is less likely to examine the source than the owner of a manufacturing company purchasing an expensive piece of machinery.

This assumption also applies to purchases by "professional buyers/shoppers," who are knowledgeable about the goods/service at the point of purchase. These consumers already are less likely to be confused by similarities in the plaintiff's and defendant's trademarks because of their superior knowledge as to purchasing decisions.

Conversely, an ordinary purchaser who buys inexpensive items on impulse, is more likely to be confused by similar mark—for example, the consumer who quickly scans the shelves at the drugstore, and impulsively picks up a bottle of lotion without realizing that she has been confused as to the choice of brand.

• Product Line Expansion. When the parties' products differ, you may consider how likely the plaintiff is to begin selling the products for which the defendant is using the plaintiff's trademark. If there is a strong possibility of expanding into the other party's market, there is a greater likelihood of confusion."

The Question of Compensation

Once a determination is made that there is the likelihood of confusion between two marks, the remedies also differ within the USPTO and court system.

The USPTO only has the wherewithal to deny applications or cancel registrations. There are no monetary remedies available within its purview when two marks are found to conflict.

Courts, on the other hand, have the ability to analyze, assess and reward monetary compensation based on a likelihood of confusion, introducing an entire new element to the situation—damages.

The threat of having to pay monetary damages and possibly attorneys' fees in court is one of the primary factors in deciding whether to have a potential conflict analyzed within the USPTO or have the matter settled in court.

A plaintiff wanting to enforce their trademark rights will either file an opposition against a pending application or a cancellation against a registration proceeding against the

defendant's trademark, or file litigation in court which allows them to both cancel defendant's application/registration and, at the same time, pursue monetary damages and attorney's fees.

How much money a party is willing to spend will also commonly sway a dispute. If a large corporation files a lawsuit against a small business, and a lawyer requires tens of thousands of dollars as an initial deposit to take on the matter, many small businesses will cave regardless of who has the stronger trademark rights.

Contingency fee arrangements are very rare in trademark cases as it is very difficult to realistically recover attorney's fees in a trademark lawsuit short of clear willful infringement—usually requiring pirating—being taken to a jury trial, which can take years and cost hundreds of thousands of dollars.

Additionally, trademark violations don't have simple and guaranteed minimum statutory damages per infringement like copyright. This makes it even less palatable for small businesses to invest their money in a trademark dispute where they are likely going to pay fees out of pocket in exchange for the chance to retain and/or enforce their trademark rights, without the realistic possibility of any monetary recovery.

Avoiding a dispute in the first place is usually the best course of action, especially for small businesses.

Conclusion

Circuit courts are split on how much deference should be given to a USPTO trademark likelihood-of-confusion determination.

This disparity underscores the need for a unified approach to seek an efficient and accurate likelihood of confusion analyses within the USPTO and in litigation.

A thorough and detailed analysis can go a long way in making the difference between the quick and inexpensive resolution of a potential dispute and ending up in unexpected litigation that can sink an entire company.

---

[1] https://www.uspto.gov/trademarks/basics/what-trademark.
[2] https://www.ca9.uscourts.gov/judicial-council/what-is-the-ninth-circuit/.
[3] https://www.uspto.gov/dashboard/trademarks/.
[4] In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973).
[5] *See In re i.am.symbolic, llc*, 866 F.3d at 1322, 123 USPQ2d at 1747 (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc*., 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); "*The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks*."); TMEP § 1207.01. Only those factors that are "*relevant and of record*" need be considered. *M2 Software, Inc. v. M2 Commc'ns, Inc*., 450 F.3d 1378, 1382, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006).
[6] https://www.uspto.gov/trademarks/ttab.
[7] https://www.uspto.gov/page/about-trademark-infringement.
[8] J. Thomas McCarthy, *"McCarthy on Trademarks and Unfair Competition* § 32:95 (4th ed. 2017).
[9] *Carter–Wallace, Inc. v. Procter & Gamble Co*., 434 F.2d 794, 802 (9th Cir. 1970).
[10] *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979).
[11] Network Automation, 638 F.3d 1137 (2011).
[12] Playboy, 354 F.3d 1028 (9th Cir. 2004).

Conflicting Trademarks: USPTO vs. The Court System of Analysis

Test No. 164

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. Without a registration, trademark rights can be difficult and expensive to prove or enforce
   ❑ True ❑ False
2. Trademarks are commonly litigated in the state courts
   ❑ True ❑ False
3. When performing the likelihood of confusion analysis, the USPTO relies on a test called the "du Pont factors."
   ❑ True ❑ False
4. The du Pont factors help determine if there is a likelihood of confusion between 2 marks.
   ❑ True ❑ False
5. Examiners will usually focus their likelihood of confusion analysis on the first two factors.
   ❑ True ❑ False
6. Using a lawyer can help significantly reduce the risks of problems with your trademark.
   ❑ True ❑ False
7. If an application is rejected in light of an examiner's likelihood of confusion objections, that decision is final and cannot be overturned.
   ❑ True ❑ False
8. Following approval of a trademark application by the USPTO, you could still face the possibility of your trademark being rejected.
   ❑ True ❑ False
9. If the trademark office rejects your application in light of a previously cited registration, then your use of that mark would surely infringe the registered trademark.
   ❑ True ❑ False
10. Denial of a trademark application means you cannot use that mark.
    ❑ True ❑ False
11. A proper review of trademark rights requires a separate analysis to be performed for registration purposes and for infringement purposes.
    ❑ True ❑ False
12. Courts will conduct a more thorough review and will weigh more facts and evidence when evaluating trademark conflicts than the USPTO.
    ❑ True ❑ False
13. The 9th Circuit employs "the Sleekcraft test" to determine likelihood of confusion.
    ❑ True ❑ False
14. All Circuits nationwide employ the same Sleekcraft test to determine likelihood of confusion.
    ❑ True ❑ False
15. Evidence of actual confusion is required to support a finding of a conflict between two marks.
    ❑ True ❑ False
16. The intent of a party is never relevant when analyzing a likelihood of confusion.
    ❑ True ❑ False
17. Money is a key factor to take into consideration when analyzing trademark conflicts.
    ❑ True ❑ False
18. Trademarks catering to more sophisticated consumers will be held to a different standard than "ordinary" consumers.
    ❑ True ❑ False
19. One can recover monetary damages within the USPTO.
    ❑ True ❑ False
20. Small businesses have just as good a chance of victory in Court as large corporations in a trademark dispute.
    ❑ True ❑ False

Conflicting Trademarks

MCLE Answer Sheet No. 164

INSTRUCTIONS:

1. **Accurately complete this form.**
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19.	❑ **True**	❑ **False**
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By Michael D. White

Frivolous Lawsuits:
Maybe...Maybe Not

Most frivolous tort lawsuits are dismissed early in the process. Some cases, though, while appearing to be ridiculous on their face, have a back story that correctly moves them from the realm of the absurd to the domain of legitimacy and reason.

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 40 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.

IT HAS BEEN SAID THAT TORT LAW IS ONE OF THE key bodies of English common law, which, itself, forms the foundation of the nation's legal system and is one of the many benefits of living in a democratic country with a well-established judicial system

Tort law–one of the major areas of law, applies to disputes in which one person is harmed by another–offers the opportunity to use the courts to achieve justice and set wrongs right.

But there is a drawback: Some folks go to court about things that make most of us shake our heads

Most frivolous cases are dismissed early in the process, and attorneys who file frivolous cases can be sanctioned by the court.

Some cases, though, while appearing to be ridiculous on their face, do have a back story that correctly moves them from the realm of the absurd into the domain of legitimacy and reason.

The Big Spill

In 1994, such a case made national headlines and unleashed a wave of criticism from late night talk show hosts and talking-head politicians that heaped scorn on one Stella Liebeck, a 79-year-old woman, who had suffered serious burns after spilling coffee on herself while sitting in the passenger seat of a car in the parking lot of a McDonald's in Albuquerque, New Mexico.

The way this case was reported in the news completely left out the details of the incident and trivialized the severity of her injuries–she was hospitalized for eight days, required numerous skin grafts and was partially disabled for two years.

She initially sought only to cover her medical expenses, future medical costs, and her daughter's lost income—who watched over her for three weeks after the injury—all of which totaled around $20,000. In response to her claim, McDonald's offered only $800 in compensation.

Unable to pay her medical costs, she hired an attorney, who filed a lawsuit in New Mexico District Court accusing the McDonald's of gross negligence, offering the company settlement amounts from $90,000 to $300,000 in pre-trial mediation. McDonald's refused the offers.

During the trial, it was discovered that the coffee was served at more than 180 degrees Fahrenheit, which experts agreed could cause third-degree burns in as little as two seconds.

It also came to light that, over the previous decade, the fast food giant had received more than 700 reports of people being burned by its coffee and had settled for more than half a million dollars in compensation.

The jury ruled in Liebeck's favor, but still assigned her 20 percent of the fault. She was awarded $200,000 in compensation, which was lowered to $160,000 after her fault contribution was deducted. She also received $2.7 million in punitive damages, intended to discourage McDonald's from their gross negligent behavior. A judge later reduced that amount to $480,000, and the parties finally settled for an undisclosed amount.

What didn't appear in the media were the facts that Liebeck wasn't driving, she was a passenger in the vehicle; her burns weren't of the typical "spilled hot coffee" variety and required extended hospitalization and treatment; she initially only asked McDonald's to cover the portion of her medical bills that Medicare didn't take care of and lost wages, but the company had refused to pay; and, an active senior citizen, she never regained her full strength after the incident.

Perhaps, most telling, was the fact that McDonald's knew the coffee was dangerously hot because of earlier burn incidents that they had settled and testimony by a company representative that McDonald's had no plans to lower the temperature of their coffee or warn customers.

The Man in the Glass Box

Twenty years before the McDonald's coffee incident an accident occurred that also made headlines and drew criticism from across the country—that is, until all the facts were made known.

Charles Bigbee was a custodian for the City of Los Angeles making an annual net salary of $7,374.57.

On November 2, 1974, Bigbee, was severely injured when an automobile driven by an inebriated Leona North Roberts crashed into the telephone booth in which he was standing, severing his leg and causing other severe injuries that permanently affected his ability to work.

Several other people in the area ran away when they saw the car out of control and heading towards the booth. Bigbee also tried to flee, but the door was jammed, trapping him inside.

His insurance policy only partially covered his medical expenses and he was left with more than $1,500 in unpaid bills and, unable to work, a constant barrage of calls from bill collectors.

He continued to require ongoing medical care, including being fitted for a prosthesis and a knee brace for his good leg, and procuring a wheelchair.

Unable to work, he expected his insurance to expire in a few months and so, he decided to sue.

His attorney, investigated and learned that a phone booth at the identical spot was struck and destroyed by another driver less than two years before and that the Pacific Telephone & Telegraph Co., owner of the booth, had replaced it with a malfunctioning door and without adding a guard rail or warning.

Looking at the scene of the accident, the attorney built the liability case, involving multiple parties contributing to the cause of action. The first was the woman who struck the booth with her car, the concession company that served her alcohol, and other related parties. They settled with Bigbee for $25,000, with the driver paying half.

With the resources from that settlement, Bigbee's attorney was able to mount a case against several companies who were responsible for the phone booth design, operation, maintenance and placement. These companies were highly profitable at the time and put up a united defense.

The case eventually wound up before the California Supreme Court with the companies settling for an undisclosed amount. Bigbee was able to return to work after a few years, albeit in a diminished physical role.

Like the now-legendary McDonald's coffee spill incident, the account of the accident that cost Charles Bigbee his leg and his livelihood made big headlines based only on a convenient part of the story.

What was missing from the widely accepted narrative was the fact that Bigbee saw the car coming, but was unable to escape the collision because the door to the phone booth wouldn't open, and that the phone company had already received several complaints about people being stuck in the phone booth because the door easily jammed.

In addition, the telephone booth was located on a dangerous corner, and was actually a replacement for another phone booth that had been destroyed two years earlier in another car crash, and witnesses described seeing Bigbee struggling to open the door and escape the phone booth as the drunk driver barreled toward him at high speed.

Bigbee suffered from depression for the rest of his life and it took nearly a decade to reach a settlement with the companies responsible for the design, maintenance and placement of the phone booth.

On the Other Hand…

Equal protection under the law, and the right to sue are basic tenets of our justice system.

That being said, however, there are lawsuits that raise eyebrows and are genuinely "frivolous."

Such a claim–often called a bad faith claim—is defined as "*a lawsuit, motion or appeal that is intended to harass, delay or embarrass the opposition" and "lacks any arguable basis either in law or in fact*."

That means, in a frivolous claim, either "*the 'factual contentions are clearly baseless,' such as when allegations are the product of delusion or fantasy,"* or *"the claim is 'based on an indisputably meritless legal theory.'*"

Some notable examples of these flights of delusion and fantasy follow…

"I Made Me Do It"

An inmate in a Chesapeake, Virginia, lock-up came up with an exceptionally innovative lawsuit.

In 1995, Robert Lee Brock sued himself for $5 million, claiming that he had violated his own civil rights when he was arrested two years earlier for breaking and entering and grand larceny.

"*I partook of alcoholic beverages in 1993, July 1st, as a result I caused myself to violate my religious beliefs. This was done by my going out and getting arrested*," wrote Brock in the lawsuit he filed in federal court.

But, because he had no income while in jail, Brock asked that the state pay him the multi-million dollar settlement.

A judge dismissed his claim as "*ludicrous*," but acknowledged Brock's "*innovative approach to civil rights litigation*."

Taken to the Cleaners

In 2007, Roy Pearson, a Washington, D.C., judge, filed one of the most awe-inspiring, and well publicized, lawsuits of recent times when he sued a small mom-and-pop dry cleaner over a pair of pants.

Pearson claimed that the shop's owners, Jin and Soo Chung, misplaced his pants after he brought them in for a $10.50 alteration, and then tried to return a cheap, imitation pair of his $800 trousers.

Pearson initially demanded $15,000 for emotional distress and $15,000 in punitive damages against the Chungs for losing his pants in 2005. He based his claims on D.C. consumer protection law and signs at the cleaners that proclaimed, "*Satisfaction Guaranteed*" and "*Same Day Service*," with "*All Work Done on Premises*."

According to *Bloomberg Law*, Pearson's compensation demands "escalated dramatically" as the case went on.

Though the Chungs felt they'd done nothing wrong, they made three attempts to settle with Pearson for $12,000.

Unimpressed, the judge sued the Chungs and their son, asserting that the signs posted in the store represented an "*unconditional guarantee*" that entitled him to a considerably larger settlement, which he defined as $1,500 per defendant for each of the estimated 12,000 days that the signs appeared in the dry cleaners.

Pearson also sought compensation for $90,000 to rent a car needed to drive to another dry cleaner, $3 million for emotional distress, ongoing services from the dry cleaner, and legal fees—even though Pearson represented himself.

The total amount of the lawsuit hit $67 million, which was later reduced to an eye-opening $54 million.

During the litigation, Pearson misquoted a case and accused the trial judge of bias. His litigation choices made the case time-intensive, according to findings of fact.

A judge in the District of Columbia ruled in favor of the Chungs and ordered Pearson to pay the couple's court costs, and their attorney fees as well. In a further blow to Pearson, a committee refused to reappoint him to his job as an administrative law judge, in part because of the questionable behavior he displayed in the Chung case.

"*As his theories expanded and his tactics grew more extreme, [Pearson] failed to comply with his continuing responsibility to conduct an objective evaluation of the merits of his claims*," the appeals court said, adding that Pearson's total damages figure of more than $67 million was "*shocking in itself*" while…"*the constituent parts*" of that figure were "*equally troubling*."

Pearson, the court said, "Did not make the required objective inquiry into whether his liability claims had even a faint hope of success."

Instead, he "did the opposite, steadfastly refusing to acknowledge contrary legal authority, engaging in extensive puffery, and pressing his preferred interpretations of the signs even after they were rebuffed by his own witnesses at trial. Indeed, even in his filings in this disciplinary case, he has continued to refer to his theories as 'indisputable.' "

Chili Con…Dedo?

In March 2005, Anna Ayala filed a claim against a Wendy's franchise owner in San Jose, Calif., asserting that she had found a human fingertip in a bowl of chili.

The bad publicity that resulted cost the fast food change approximately $21 million in lost sales and, the company computed, cut business at some northern California locations by as much as 50 percent.

An exhaustive inspection of Wendy's supply chain and the restaurant in question by authorities found no evidence of missing fingers, and suspicion soon turned on Ayala, who was eventually arrested and found guilty of attempting to extort money from the fast food chain.

She served four years of a nine-year sentence, and, as a condition of her probation, was banned from ever returning to the restaurant that she sued.

And where did the finger come from?

It was traced to a co-worker of Ayala's husband, who lost it in a work accident and gave it to the couple to…wait for it…settle a $100 bet.

"Brainless Bile"

In January, 2022, a man in rural Georgia filed a lawsuit against the discount store giant Dollar General over the music played in their stores.

Carl Schwartz, the attorney filing the suit, alleges that the mainstream country music regularly played over their loudspeakers "*has attributed to the man's mental anguish and caused him irreparable emotional harm over the years*."

According to Schwartz, his client, "*a regular customer of Dollar General, has been subjected to a distressing*

amount of Luke Bryan, Walker Hayes, and Kane Brown during each visit to one of their establishments. The constant barrage of trucks, appropriated slang, and shallow subject matter has caused him an unreasonable amount of anger, sadness, and physical discomfort."

Schwartz went on to say that no matter what Dollar General store his client would visit, "the same brainless bile was pumping through the speaker system as he attempted to dash in for paper towels or a six pack of Pabst."

He would establish "that the endless loop of Florida-Georgia Line, Thomas Rhett, and Sam Hunt brought real and provable trauma upon his quality of life…that '*Shake It for the Catfish*' song alone should be barred from use as a war prisoner coercion method."

Attorneys for Dollar General issued a statement, saying that the lawsuit was 'frivolous' and that "any judge would throw out the case on its lack of merit alone. The plaintiff, while not named to the public at this time, is a well-known troublemaker once banned from one of our competitors over similar matters."

The unnamed plaintiff has said that he is willing to settle out of court for Turnpike Troubadours tickets, room and board.

Having It Your Way

A South Florida lawyer has filed a federal lawsuit seeking class-action status alleging that Burger King has misled customers by portraying its food as being much larger compared with what it serves to customers in real life.

The suit, brought by attorney Anthony Russo, alleges Burger King began inflating the size of its burgers in images around September 2017.

Before that, the suit claims, Burger King "more fairly" advertised its menu items. Today, however, the size of virtually every food item advertised by the company, is "materially overstated," the lawsuit asserts.

Russo and the plaintiffs he is representing single out advertisements for Burger King's trademark *Whopper*, saying the entire burger is 35 percent larger than the real-life version, with double the meat than what is actually served.

The suit cites as witnesses multiple YouTube users who specialize in food reviews and Twitter users who complained about their orders, and seeks class-action status, demanding monetary damages and a court order requiring Burger King to end what it says are its "deceptive practices."

More is Less

Chicago resident Stacy Pincus filed a $5 million class-action lawsuit against Starbucks in April 2016, claiming the company puts too much ice in its cold drinks.

The lawsuit accused Starbucks of advertising iced drinks as 24-ounce beverages when the cup only contained 14 ounces of fluid.

Named the Most Frivolous Lawsuit of 2016 by the U.S. Chamber of Commerce Institute for Legal Reform, the $5 million was dismissed that same year by a federal judge in Chicago.

Less is More

Robert Bratton of Missouri filed a lawsuit claiming that the Pennsylvania-headquartered Hershey Company intentionally sells packages of *Whoppers, Reese's Pieces* and other products that are only "*partially full*."

In May 2017, Bratton's $5 million class-action lawsuit was given the green light to move forward by U.S. District Judge, but, the following February, the case was thrown out of court.

After studying the facts, the judge concluded that Bratton wasn't really harmed because even though he realized that the packages of *Whoppers* and *Reese's Pieces* candy weren't full, he continued to buy them.

And buy he did—over the course of a decade, according to court records, Bratton bought more than 600 packages of the the company's products.

Cutting It Close

A group of Chicago plaintiffs filed a class-action lawsuit in 2017 against Home Depot, because the 4 x 4 lumber being sold in its stores actually measures 3.5 x 3.5 inches.

Home Depot and other lumber suppliers have explained that 4 x 4 is just the name of the boards, as the industry-standard dimensions actually are 3.5 inches by 3.5 inches.

Nevertheless, the plaintiffs sought more than $5 million in damages.

On March 12, 2018, U.S. District Judge Sharon Johnson Coleman rejected the plaintiffs' claim and dismissed the case against Home Depot without prejudice.

You Say Potato…

Dr. Edward Gamson and his partner booked a first-class flight on British Airways to travel from London to Granada, Spain, in 2014.

A ticket mix-up sent the North Bethesda, Maryland, couple to the small Caribbean island country of Grenada instead.

Grenada was spelled correctly on their tickets, but the couple didn't notice they were headed in the wrong direction until 20 minutes after their St. Lucia-bound flight departed from London.

In total, they took seven different flights over three days to finally get to Lisbon, Portugal, where Gamson had a conference—the Granada, Spain, trip was supposed to be an added excursion—which cost $2,776.

He tried to sue British Airways for $34,000, which he said covered his first-class flights and lost wages, but his case was dismissed in a Virginia court.

Deadly Footwear

Imprisoned pimp Sirgiorgio Sanford Clardy sued footwear maker Nike for $100 million in 2014, claiming his *Air Jordan* sneakers should've come with the warning that they could be used as a dangerous weapon.

Clardy received a 100-year prison sentence for stomping on the face of a Portland, Oregon, prostitution customer who tried to flee a motel without paying.

He served as his own litigation lawyer, appearing by video feed from where he was incarcerated.

Nike lawyers spoke for less than 90 seconds, reported *The Oregonian*, whereas Clardy rambled on—often off-topic—for most of the rest of the hearing. After he failed to prove his case, it was promptly dismissed.

This Bud's For You

Richard Overton sued St. Louis-based Anheuser-Busch in 1991 for $10,000, asserting that its advertisements were "*untrue, deceptive and/or misleading*" in that *Bud Light* television commercials led consumers to buy products that were "dangerous" and could lead to addiction or death.

According to the suit, Overton "*pointed to [Anheuser-Busch's] television advertisements featuring Bud Light as the source of fantasies coming to life—fantasies involving tropical settings with beautiful women and men engaged in unrestricted merriment*."

Alas, as it turns out, drinking beer does not automatically mean you'll be transported to a tropical utopian nirvana inhabited by staggeringly beautiful, well-toned hedonists.

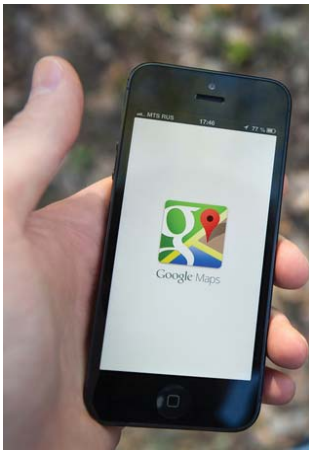
Overton sought monetary damages because he alleged that the "*misleading advertisements had caused him physical and mental injury, emotional distress and financial loss*."

The Michigan Court of Appeals dismissed Overton's case based on his "*failure to state a claim upon which relief could be granted*."

The court found that the dangers associated with consuming beer are

"*well-known and therefore didn't have to be explicitly stated in a commercial*."

Follow the Leader



Lauren Rosenberg sued Google in 2011 after the search engine's map tool instructed her to walk across a highway in Park City, Utah.

Instead of taking a safer route and allowing Google to recalculate, Rosenberg explicitly followed the app's walking directions, walked across the highway into oncoming traffic, and wound up getting hit by a car.

Rosenberg was seriously injured and sued both the driver of the car that hit her and Google for "*negligence, failure to warn and defective design*" in the amount of $100,000 in damages.

Google asked the Third Judicial District Court in Salt Lake City to dismiss the claims, which it did.

The judge found that there was "*no special, fiduciary or contractual relationship between the parties that would give rise to a duty of protection*" and that the route Google Maps suggested wasn't "*inherently dangerous*."

Rosenberg, the judge added, "*points to nothing in the complaint that alleges that an accident is more likely along the route in question than any other route*."

Furthermore, he said, "*As Google points out, it is unlikely that a pedestrian will be injured while crossing a road, as Rosenberg was here, unless the pedestrian breaches their own duty and disregards the risks to cross the road in front of oncoming traffic.*"

No Good Deed…

In 2004, as a gesture of goodwill, Colorado teens Taylor Ostergaard and Lindsey Zellitti decided to bake cookies for their neighbors.

Wishing for their good deeds to remain anonymous, the girls knocked on the doors of nearby houses, and leaving packages with heart-shaped gift tags that read, "*Have a great night. From the T and L Club*," before running away into the darkness.

At 10:30 p.m., the girls visited the home of 49-year-old Wanita Renea Young who, startled by the "*shadowy figures*" on her doorstep, called the police, who arrived to find nothing to suggest that a crime had been committed.

Still, the experience reportedly gave Young an anxiety attack and, the following day, was admitted to the hospital the following day.

Ostergaard and Zellitti visited Young in the hospital and apologized with their families even offering to pay her medical bills.

But, no. Instead of forgiving the well-intentioned young ladies and moving on, the disgruntled woman sued them.

A Durango judge awarded Young almost $900 for medical expenses, but denied her demand for nearly $3,000 in punitive damages, including lost wages and the cost of installing new motion-sensor lights on her front porch.

When the ruling made local and later national headlines, Ostergaard and Zellitti received donations from all over the country to help them pay the $900 judgement.

A Two-Sided Coin

Just as in the cases of Stella Liebeck and Charles Bigbee, many of those who have brought suit in court claiming injury have, indeed, suffered severe physical and emotional pain due to another party's negligence.

Others, though, with visions of dollar signs dancing in their heads, file tort suits for petty reasons, such as dissatisfaction with a product's presumed effect or performance, unfulfilled expectations, or a personal grudge against another individual.

Whatever the case, be it valid and compelling or absurd and flip, the tort system proves itself over and over, every day as a workable venue for individuals to redress their grievances, and exercise what is a fundamental right in our justice system.

Off and Running

Fear Factor viewer Austin Aitken sued NBC for $2.5 million in 2005 because a segment where contestants ate rats mixed in a blender caused him to vomit, become disoriented and run into a doorway.

He felt the stunt went "*too far*," but was unable to turn the television off fast enough to avoid the stunt. The outcome wasn't quite as Aitken had hoped, however.

His frivolous lawsuit was dismissed, and U.S. District Judge Lesley Wells warned him against filing an appeal.

By Amanda M. Moghaddam

The Bar is Back:









The 2022 Installation Celebration

THE LAST TWO YEARS HAVE been tumultuous and missing a huge part of why we all love to be members of the SFVBA.

In-person events, such as our annual Installation Galas and Judge's Nights, and mixers, Membership Appreciation gatherings, and so much more, came to a screeching halt during the pandemic.

I think it's no secret that the economic impact on all membership organizations has been tough. At the SFVBA, sponsorship and ticket sales are a large piece of how we fund the Bar's operations, including the publication of *Valley Lawyer*. Not to mention, our members love to socialize, network, and enjoy the wonderful weather that our beautiful Valley has to offer.

That's a major reason why it was such a joy for our staff and Events Committee to plan our first larger-scale in-person event—The 2022 Installation Celebration—at The Garland Hotel on April 26, 2022, offering our members delicious heavy appetizers, beer, wine, fun, and sunshine.

More than 80 of our members were in attendance and almost everyone made a point to say how good it felt to "be back" and "be together" again. The excitement in the air was palpable and several judges, past-presidents, and faithful supporters were in attendance.

On behalf of the Bar, sincere thanks to those who came to support our Bar.

Passing the Baton

It's difficult to hold an event that in any way can make up for the two years that we've lost. Due to COVID, the SFVBA could not hold an in-person Installation Gala for now Immediate Past-President, David Jones.

There was no outgoing ceremony for Past President Barry Goldberg to "pass the baton"—or in the Bar's case, a silver platter—to David, and likewise, there was no opportunity for either of them to present their President's Award to a Bar member they believed exemplified extraordinary service to the Association.

In planning the event, we wanted to tell those in attendance about the chosen members' service and provide a platform for those awards to take place.

It was a cheerful occasion when Barry Goldberg presented his award to SFVBA Trustee Erin Joyce and gave a lovely speech highlighting Erin and her accomplishments.

David Jones presented his President's award to Trustee Kyle Ellis, who you may know as the extraordinary

Amanda M. Moghaddam is the current Treasurer of the SFVBA. She is a Claims Attorney at Lawyers' Mutual Insurance Company in Burbank and she can be reached at moghaddama@lawyersmutual.com.

motivator behind the SFVBA's Mock Trial Competition. David told our members about Kyle's tireless work through the pandemic to help the Bar and young students interested in pursuing a career in the law.

A huge congratulations to the two award recipients!

Amazing Sponsors

The event wouldn't have been possible without our amazing sponsors.

While I cannot put into words all of the incredible things they do for our Association and the community, this article is intended as a sincere "thank you," as well as a spotlight on what these businesses do and how they might be of assistance to our members and their law practices.

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A LAW CORPORATION

First, we'd like to thank our Diamond, Platinum, and Gold Sponsors, all of whom are long-time supporters of the SFVBA. Their yearly support allows the Bar to provide services to help our members improve their practices through networking, continuing legal education, and other services.

Diamond Sponsor Lewitt, Hackman, Shapiro, Marshall, and Harlan, ALC, is a full-service law firm located in Encino. The firm handles complex business, real estate, and financial matters, and has a wide array of practice groups including employment law, family law, personal injury law, and estate planning. We are very appreciative of their support. The firm has a history of dedicated service to the SFVBA, as five Past Presidents hail from their firm—Kira Masteller, David Jones, Steve Holzer, Sue Bendavid, and David Gurnick. David, in fact, is the only two-term president in the history of the Bar, having served as President in 1994 and 2013.

The Celebration's Platinum Sponsors were Nemecek & Cole, G&B Law, and Alpert, Barr, & Grant.

Nemecek Cole Law Firm

Nemecek & Cole is a mid-sized law firm recognized as one of Southern California's preeminent professional liability and business litigation firms, servicing clients nationwide from its Encino office. They are "lawyers for lawyers" who are known for their aggressive advocacy, stellar trial work, and proactive approach to litigation.

G&B LAW

G&B Law is one of the Valley's leading bankruptcy and insolvency firms representing corporations, closely held businesses, entrepreneurs, shareholders, and individual clients, and proudly advertising that its most valuable asset is their people, or self-proclaimed "G&Bers."

ALPERT BARR & GRANT
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Alpert, Barr & Grant, based in Sherman Oaks, has been representing business leaders—from large public and private companies to middle market companies, to entrepreneurs and start-up organizations—for more than 30 years.

The firm provides a host of services including, but not limited to, transactional and litigation services, data and security privacy, real estate, and outside general counsel services.

Our Gold Sponsors, Reape-Rickett Law Firm, and Kraft Miles, A Law Corporation, are also longtime friends of the SFVBA, and likewise have current attorneys who serve on our Board of Trustees.

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Reape-Rickett Law Firm is a dedicated Family Law firm with offices in Westlake Village, Calabasas, and Santa Clarita priding itself on personal attention to its clients' needs and providing reasonable expectations to those going through a difficult event in their lives. Firm shareholder Matthew Breddan is the SFVBA's President Elect.

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Kraft Miles, A Law Corporation, led by SFVBA Trustee Joy Kraft Miles, is an all-female, Woodland Hills-based family law firm that handles a vast array of family law matters, ranging from divorce and custody to domestic abuse and paternity.

Joy Kraft Miles is an SFVBA Trustee and also serves as the President of the Valley Community Legal Foundation, the Bar's charitable arm.

MANUFACTURERS BANK
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Our Silver Sponsors this year were Manufacturers Bank and Lawyers' Mutual Insurance Company.

Manufacturers Bank is a premier California regional professional business bank with the mission of serving as the "bank of choice" for middle market and professional services companies.

Lawyers' Mutual Insurance Company is exclusively dedicated to insuring California's lawyers. It not only provides insurance to its policyholders, but also education and related services to lawyers throughout the state and the community.

Our Bronze Sponsor was IT Support LA, which provides information technology services throughout the San Fernando Valley. The company focuses on "redefining IT services," and providing managed IT services, cybersecurity strategies, backup and disaster recovery, web designs, office moves, and much more.

Given that the Celebration looked different from the more formal Galas of years' past, the Events Committee created two event-specific sponsorship levels called "BFFs of the Bar" and "Friends of the Bar"—designations that were well-received, and we are thrilled to share with you a little about these law firms and businesses.

Our new "BFF" sponsors are Abir, Cohen, Treyzon, Salo, LLP, a.k.a. ACTS Law; Cornelius & Kasendorf, APC; and Erin Joyce Law.

Our new "Friends" sponsors are Barry P. Goldberg, APLC; the University of West Los Angeles; Nolan Heimann, LLP; Glick-Atalla, APLC; attorneys Kyle Ellis and Amanda Moghaddam; ADR Services; Judicate West; Packer, O'Leary & Corson, APLC; One Legal; Veritext Legal Solutions; Donahoe, Young & Williams, LLP; and Kjar, McKenna & Stockalper, LLP.

ACTS Law is a trial law firm with offices in Encino and San Diego, focusing on plaintiffs in civil litigation involving civil rights claims, personal injury, wrongful death, property loss, and insurance bad faith disputes.

Cornelius & Kasendorf, APC, handles all aspects of real estate, business, and bankruptcy law, as well as transactional advice and litigation services from its office in Calabasas. Partner Alexander Kasendorf is a Trustee of the SFVBA.

Erin Joyce Law is a State Bar and professionally-licensed defense firm located in Pasadena. Erin Joyce, a former State Bar Prosecutor, now advises attorneys facing license censure or revocation. Like Alex Kasendorf, Erin also serves on the SFVBA Board.

Barry P. Goldberg, APLC is a personal injury law firm in Woodland Hills priding itself on seeking the greatest possible recovery for each individual case. Barry Goldberg is a Past President of the SFVBA.

The University of West Los Angeles Law School is located in Chatsworth and justifiably takes pride in its history of admitting both traditional and non-traditional students interested in pursuing a career in the law.

Nolan Heimann, LLP is an intellectual property and legal strategic planning law firm, focused on helping businesses build and grow. The firm is based in Encino, and partner Yi Sun Kim is a Past President of the SFVBA.

Sherman Oaks-headquartered **Glick-Atalla, APLC**, is an estate planning and non-profit law firm. The firm prides itself as being the type of law firm its principals would want to hire in a legal matter. Heather Glick-Atalla is the current Secretary of the SFVBA.

ADR Services and **Judicate West** likely need no introduction to most of our readers, as both are leaders in mediation and arbitration services. ADR Services operates in every major market in California, with more than 130 neutrals. Judicate West has a roster of highly sought-after neutrals. The firm has offices in downtown Los Angeles, Sacramento, San Diego, San Francisco, Santa Ana and West Los Angeles.

Packer, O'Leary & Corson, APLC is a boutique law firm in Glendale with a staff of experienced trial attorneys specializing in the defense of healthcare professionals and institutions. In addition to trial work, they also perform medical license defense work.

One Legal offers electronic and physical filing services for all of California's Superior Courts, as well as service of process, bulk filing capabilities, and courtesy copy delivery.

Veritext Court Reporting Agency is a national court reporting company with more than 40 nationwide deposition facilities. They maintain a secure virtual platform that has been invaluable to many practitioners during the pandemic.

Donahoe, Young, & Williams, LLP has offices in Valencia and Encino, providing representation for clients with bankruptcy, business law, real estate, estate planning, and immigration issues. The firm has more than 100 years of collective legal experience which they apply to their clients' cases. Partner Taylor Williams-Moniz currently serves as an SFVBA Trustee.

Kjar, McKenna, & Stockalper, a civil litigation and professional liability defense firm, operates out of offices in El Segundo and Huntington Beach. They defend legal actions brought against medical and legal professionals, and pride themselves on having a highly experienced legal team with a variety of other practice specialties.

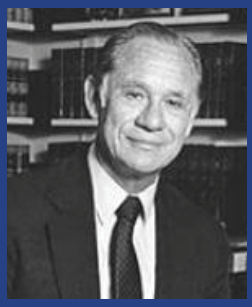
Finally, a special thanks to **Galpin Motors** for providing the free weekend rental of a brand-new Ford Mustang convertible for us to raffle at the event.

All in all, the Installation Celebration was an overwhelming success, and we cannot wait to announce all that we have planned this coming year!

A JUDGE'S PASSING: Former California Supreme Court Justice John A. Arguelles passed away at his home in Los Angeles on April 10 at the age of 94.

Arguelles was the first UCLA Law alumnus to serve on the state's highest court and only the second Hispanic Justice on the court.

A highly regarded jurist, Arguelles was born in East Los Angeles in 1927 and attended both college and law school on the GI Bill after service in the Navy during World War II.



After working as a sole practitioner and six years on the L.A. Municipal Court, Arguelles was appointed by Governor Ronald Reagan to serve as a Judge of the Los Angeles Superior Court, a seat he held for 15 years, after which Governor George Deukmejian elevated him to Associate Justice of the California Court of Appeal.

He was named by Governor Deukmejian as an Associate Justice of the California Supreme Court, beginning his term in March, 1987. After retiring from the bench in 1989, Arguelles became Of Counsel for the law firm of Gibson, Dunn & Crutcher, and served as an arbitrator and mediator.

The recipient of many honors during his career and one of the founding members of the Mexican American Bar Association of Los Angeles, Arguelles headed the State Bar Commission that made the recommendations that were used in crafting a model for interpreter and language access in the state's civil and criminal justice system.

PARAPROFESSIONALS: At a recent public meeting, the chair of the State Bar of California Paraprofessional Program Working Group announced that, after much negative feedback, the group will not recommend that non-lawyers be allowed to own a stake in law firms.

This idea was being considered as part of a discussion of possible structures for a new program in which licensed non-lawyer professionals could offer limited legal services.

The committee also voted to further restrict the areas of law in which these new paraprofessionals could practice and endorsed language prohibiting the bar from using any money to support the new program that would have otherwise been spent on discipline.

TO BLURB OR NOT TO BLURB: The California Supreme Court's 12-member Committee on Judicial Ethics Opinions (CJEO) has issued advice about whether a judge may review, critique, or comment on legal education books written by others. The committee also advised whether a judge who has not authored or contributed to the book may write a "*blurb*" to be included on the book's cover.

In CJEO Expedited Opinion 2022-048, the Committee concluded a judge may review, critique, or comment on legal education books or writings in legal publications—such as legal periodicals or newsletters—for educational purposes related to the law, the legal system, or the administration of justice.

Review and critique have important academic value and contribute to the improvement of the law, and while a positive review might have an incidental impact on book sales, the primary goal is education rather than marketing or promotion.

However, a judge who has not authored, co-authored, or contributed to the book may not provide a written "*blurb*" or endorsement to be used on the book's cover.

In this case, the judge's reputation "*may be leveraged to promote book sales, which violates the prohibition against lending judicial prestige to advance a person's financial interests.*"

HAVE IT YOUR WAY?: Long Island, New York resident Justin Chimienti is suing the McDonald's Corp. and the Wendy's Co. on after buying a Big Mac and the Bourbon Bacon Cheeseburger, which he claims he thought would be as big and juicy as advertised.

He is accusing the fast food chains of defrauding customers with deceptive advertisements.

Chimienti claims McDonald's and Wendy's use undercooked beef patties in their ads, making them appear 15-20 percent larger than what the customer actually receives.

The lawsuit says that meat shrinks 25 percent when cooked and references a food stylist who was formerly employed by both fast food chains. The stylist, according to the lawsuit, said that she prefers using undercooked patties because fully-cooked burgers appear "*less appetizing.*"

The proposed class action by Chimienti is similar to a lawsuit filed in March against the Miami-based Burger King Corp.

For more interesting and eyebrow-raising law suits, read the cover story in this month *Valley Lawyer.*

Member Focus

No organization can function without its individual members and the San Fernando Valley Bar Association is no different. Each of the Bar's 2,000-plus members is a critical component that makes the Bar one of the most highly respected professional legal groups in the state. Occasionally, then, we would like to help put a face on the SFVBA by spotlighting a member for you. This month, we would like to introduce you to...

Neil M. Popowitz

SUPERVISING ATTORNEY

RELAW APC, Westlake Village

Neil M. Popowitz received his undergraduate degree from the University of California at Berkeley, his JD from Loyola Law School, and his MBA from the University of Southern California's Marshall School of Business.

He is admitted to practice law in California, the Court of Appeals for the Ninth Circuit, the Court of Appeals for the Eighth Circuit, the Court of Appeals for the Federal Circuit, and all U.S. District Courts in California and before the Court of Federal Claims.

He is a founding director of the Clean Technology Council, whose nonprofit mission is to foster an environment of learning, mentoring, expert support and collaborative resourcing for businesses and entrepreneurs to develop and market clean energy and technology innovations both locally and globally.

In addition to membership in the San Fernando Valley Bar Association, Popowitz is active in several sections of the American Bar Association, the Federal Bar Association, the United States Court of Federal Claims Bar Association, the Los Angeles County Bar Association, and the Santa Monica Bar Association.

Westlake Village-based RELAW, APC, a boutique firm founded in 2015 to serve the Southern California real estate sector.

"My wife and I own a small vineyard in Paso Robles. I love farming. Tending the vines, driving the tractor, and the days outdoors. There is something very zen about working with your hands and the satisfaction of a job well done, a feeling of accomplishment at the end of the day."

Laura M. Revy

PARTNER

Aharonov & Revy Family Law, Encino

Originally from upstate New York, Laura M. Revy came west to attend law school at UCLA after graduating from Cornell with a degree in industrial and labor relations.

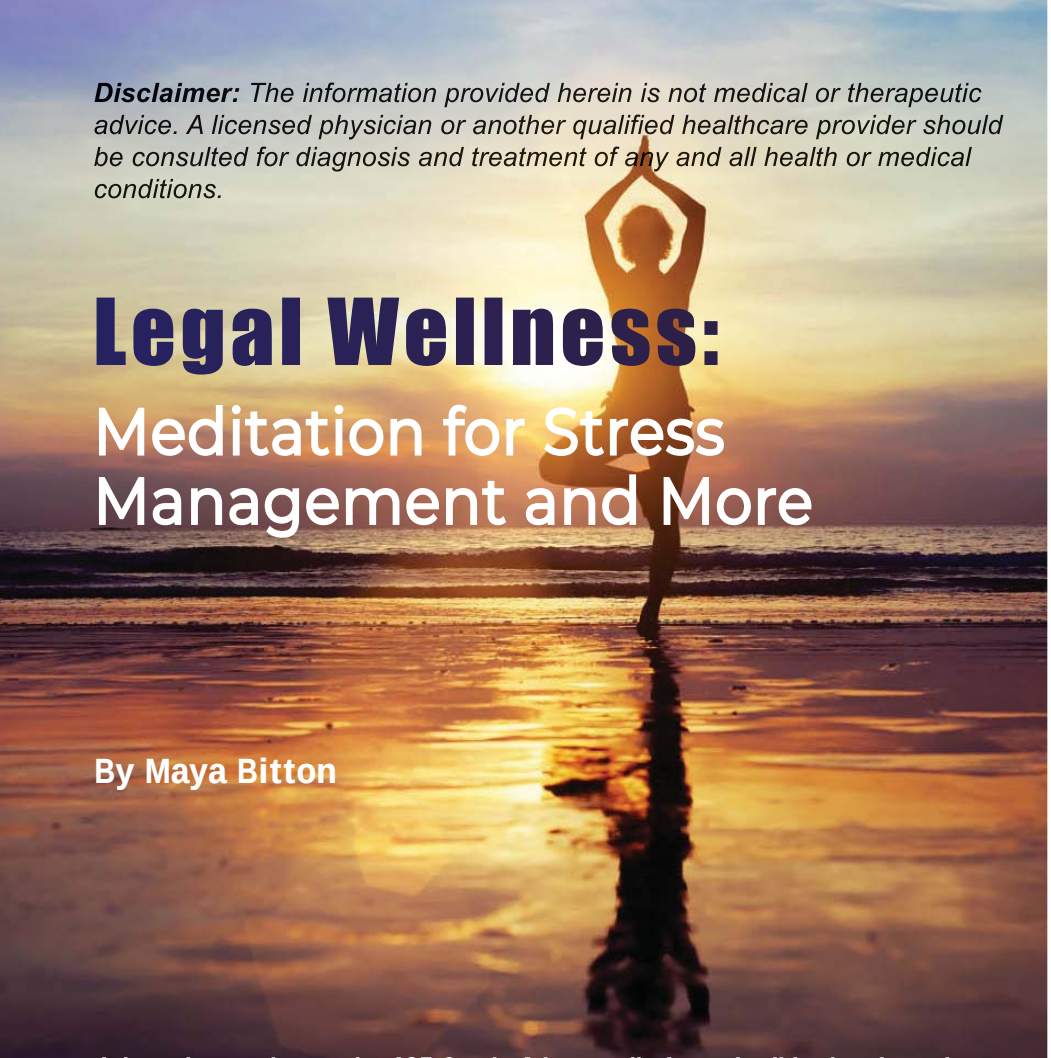
Neither of Revy's parents attended college. "My Dad started out washing tractor trailer trucks and worked his way up to have an interest in his own company. He always told me that I was going to go to college, but he told me that he'd only pay for me to go to a state school or an Ivy League school. He was rather surprised when I got into Cornell and he had to pay for it. It was close to my home and I really didn't want to go very far away from home at that point."

The program at Cornell "was a really big pre-law program and most of the people in the program wound up going to law school after taking a year off," she says." During that break time, I worked for a general practice attorney and took the LSAT in the off-year because I wasn't sure I wanted to go to law school."

Completing work in economics at Cornell made Revy think about going into research "because I really liked it," but a high score on the LSAT convinced her to try law school.

After graduating from UCLA, Revy was admitted to the Bar in 2009. "It was my own parent's contentious divorce that drew me to family law," she says. "My mom's lawyer was really helpful and that really impressed me."

Her three children, she says, "take my mind off work when I get home. I try to leave it at the door to whatever extent is possible, so I mainly work on forensic accounting and that sort of thing. I shy away from child custody because that's much harder to leave at the office."



Disclaimer: The information provided herein is not medical or therapeutic advice. A licensed physician or another qualified healthcare provider should be consulted for diagnosis and treatment of any and all health or medical conditions.

Legal Wellness:

Meditation for Stress Management and More

By Maya Bitton

It is early morning on the 405 South. A long trail of cars is slithering down the freeway.

It is not summer quite yet, but for the lawyer who is driving one of them, it feels uncomfortably hot and stifling. She is on her way to yet another very important meeting.

This time it is the final stage of a long, meticulously orchestrated mediation for a big corporate client. Today, the final details are up for discussion, and, hopefully, will be settled and agreed upon.

She is nervous about today's session: her performance, the way it will unfold, its final resolution. A blazing thought has persistently stricken her mind for a few days now: "My entire career is crystalizing into this moment…"

As always, she has carefully chosen her attire and makeup. She has not slept well, so this morning she had to work extra hard at concealing the dark circles of anxiety marked under her eyes.

As she maneuvers the traffic jam, she is also trying to skim through the mediation briefs, the papers now tossed everywhere beside her on the passenger's seat.

Shielded behind a pair of dark oversized sunglasses, her gaze is constantly shifting between the clock—she cannot be late! The traffic is piling up; she is definitely going to be late; the relentless stream of text messages and emails; the stubborn phone keeps alerting her; on, and—just for the last time—the papers.

Sipping coffee—her third cup already this morning—only worsens the dryness in her mouth. Her heartbeat is racing uncontrollably, and her breath is becoming increasingly rapid and shallow. If that were not enough, she is now sensing beads of sweat on her forehead and temples.

Like the traffic, her head is getting heavier.

The Culprit: Stress

The word 'stress' is commonly perceived as inherently negative. It is generally understood to be the sense of emotional or physical tension stemming from a frustrating or otherwise agitating experience or thought.

At its core, however, the definition of stress is neutral—stress is merely how our body-mind reacts when faced with change; it is not an external circumstance but our own response—physical, mental, or emotional—to a challenge, demand, or anything else that requires us to adjust or adapt.[1]

Short-term stress, or acute stress, can be positive and useful. Known as the fight-flight-freeze response, it is a primal stress response, a remnant of our survival instincts, that was crucial for our ancestors when confronted with a predator or any other imminent peril, and thus essential for the self-preservation of our species.

Under fight-flight-freeze, the body undergoes distinctive physiological changes. It reacts by releasing hormones, including cortisol and adrenaline, which cause the brain to be more alert, the muscles to tense, the heart rate to increase, and the blood pressure to rise.

Anti-aging hormone production also decreases, and the immune system as a whole is weakened.

The fight-flight-freeze response is a defense mechanism in which the body-mind plummets to functioning on the basis of constricted awareness, diverting all its energy and resources to the sole purpose of escaping physical danger and surviving life-threatening situations.

An innate cognitive bias—referred to as the negativity bias—coincides with and triggers the fight-flight-freeze response.

Negativity bias is the mind's tendency to notice and remember negative experiences more than positive ones, feel the former more intensely, and adversely interpret

situations, albeit potentially innocent ones, as the primary first line of response.

This too has evolved over millions of years in the interest of survival, as focusing on threats, rather than rewards, was more important to our ancestors for staying alive, and therefore, "*(t)hose who survived to pass on their genes paid a lot of attention to danger. Their legacy is a brain that is primed to focus on negative experiences and has a tendency to get stuck in conditioned patterns of thinking, returning again and again to thoughts of anxiety, depression, and limitation.*"[2]

The retention of negativity in the mind, in turn, may instigate a habitual stress response in the body.

Stress can be beneficial not only in survival situations; minor stress, or eustress, can stimulate and motivate us to succeed and achieve, for instance, when starting a new job or publicly delivering a speech. Eustress challenges, but does not overwhelm.

We can be overwhelmed by chronic stress—particularly when stress lasts for a long time and is unsuccessfully managed.

With chronic stress, the body-mind remains alert and often reacts in the same fight-flight-freeze manner, although there is no actual danger; it activates this constrictive response amidst everyday encounters and experiences—traffic jams, work overload, feuds with loved ones, financial strain, as well as fears, concerns, and doubts that, due to the negativity bias, tend to consume the mind.

Chronic stress is the modern-day epidemic.[3]

Such prolonged, unmanaged stress plants the seeds of illness in our body-mind, and may lead to various mental and physical health problems, and, if there is an underlying condition, may further exacerbate it.[4]

It is well established that chronic stress contributes to a variety of ailments, including high blood pressure, heart disease, cancer, autoimmune and digestive disorders, diabetes, obesity, inflammation, depression, anxiety, addictions, and accelerated aging.[5]

Chronic Stress and the Legal Profession

Stress, depression, and addictions are very prevalent among attorneys.

According to ALM's Mental Health and Substance Abuse Survey from 2020, 31.2 percent of the attorney-respondents feel they are depressed; 64 percent feel they have anxiety; 10.1 percent feel they have an alcohol problem, and 2.8 percent feel they have a drug problem.[6]

That survey also shows that the rate of attorney depression is higher than that of the general population—roughly three times as much at the time.[7]

In 2021, a study by the California Lawyers Association and the D.C. Bar revealed even more alarming findings:

- Roughly half of practicing attorneys are experiencing symptoms of depression and anxiety, with approximately 30 percent of those falling in the mild range and nearly 20 percent falling in the moderate-severe range;

- More than half of the attorneys screened positive for risky drinking, and 30 percent screened for high-risk hazardous drinking—alcohol abuse or possible dependence, for example;

- Female attorneys are experiencing worse mental health than men and are drinking more hazardously; and,

- 25 percent of female attorneys are contemplating leaving the legal profession due to mental health problems, burnout, or stress, whereas 17 percent of male attorneys report the same thoughts.[8]

As the COVID-19 pandemic has adversely affected the entire world spiking stress levels in the public at large, there are several specific reasons for the prevalence of chronic stress and its implications in the legal field.

Law, an innately high-stress, high-stakes, and high-performing line of work, that includes the predominance of perfectionism and steadfastness among attorneys; law schools' inadequate preparation of students for a legal career; and the stigma of mental illness that deters many attorneys from seeking help.[9]

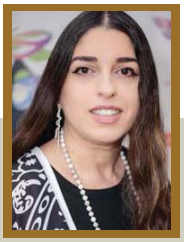
The detrimentally higher rates among female attorneys may be explained by the greater pressure women still face in trying to balance work, life, and child-rearing.

Indeed, stress management for attorneys and paving their path for wellness are only growing more crucial. Something must be done. But what?

Meditation: The Antidote to Stress

One of the best methods for stress management is meditation, as discussed below in detail. But first, it bears asking what is meditation?

Meditation is a journey inward, a journey from activity to silence. We all spend most of our waking lives in activity, experiencing the outer world through our five senses. Our minds are constantly engaged in an endless



Maya Bitton is an attorney licensed to practice in both California and Israel. She is a mother of two and a certified Chopra Meditation teacher. She can be reached at mayabitton@hotmail.com.

internal dialogue, where one thought associatively leads to the next, taking us into the past or future.

Meditation gives us the opportunity to be aware of the present moment and turn to the other direction, away from the external noise that overshadows our mind.

In meditation, we delve into quieter and quieter levels and, ultimately, even for a fraction of a moment, reconnect with the silence that has always been there, lying dormant within us.

During that process, we release accumulated stress—physical, mental, and emotional. By moving our awareness inward, and with regular practice, the body and mind settle into a deep level of rest and reach a meditative state, referred to as restful alertness, in which the body attains deep rest, while the mind is restfully aware yet still fully alert.

As the leader in the field of mind-body medicine, Dr. Deepak Chopra explains that restful alertness is a state "*where you are more awake, not less, as the result of feeling calm.*"[10]

It is through this deep, restful state that the body-mind heals itself. As meditation releases accumulated stress, it detoxifies and purifies the body and mind.

The release of stress during meditation also reverses the effects of the fight-flight-freeze response and the negativity bias discussed earlier.[11]

Numerous scientific studies have documented the positive physiological changes that occur during and as a result of meditation.

The changes include decreased hypertension and heart rate; lowered cholesterol levels; reduced sweating and the production of stress hormones; a more efficient use of oxygen by the body; increased production of the anti-aging hormone DHEA; improved immune function; and decreased inflammation.[12]

Similarly, an expanding body of research has established that regularly practicing meditation also produces mental benefits, such as decreased levels of anxiety, depression, PTSD, and insomnia.[13]

During meditation, the brain is prompted to release neurotransmitters, including dopamine, serotonin, oxytocin, and endorphins, that are all linked to various aspects of happiness.

Dopamine plays a vital role in the brain's ability to experience pleasure and maintain concentration; serotonin causes a sense of calm and relaxation, whereas lower levels thereof have been linked to migraines, anxiety, bipolar disorder, apathy, fatigue, and insomnia.

Oxytocin, the levels of which rise during sexual arousal and breastfeeding, is a pleasure hormone that creates a feeling of calm, safety and contentment, while reducing fear and anxiety; and lastly, endorphins, which create the exhilaration colloquially named 'the runner's high,' contribute to a diminished sense of pain and reduce the side effects of stress.[14]

These neurotransmitters are being released in meditation concurrently—a simultaneous occurrence that cannot be induced by any single drug.[15]

Research has also found that meditation reduces perceived pain, potentially lessening or eliminating entirely the need for medication.[16]

As stress dissipates and the brain's negativity bias is countered, the regular meditator begins to cultivate inner calm, as well as "*foster positive experiences and intentions and enjoy the peace of present moment awareness*."[17]

The renowned teacher and author Eckhart Tolle once tweeted, "*Stress is caused by being 'here' but wanting to be 'there*'."[18]

Tolle's eloquent words illuminate how meditation, which is essentially the awareness of the present moment, is intrinsically the antidote to stress.

Meditation in the Workplace

Stress thrives in the workplace—specifically, as indicated above, in the legal profession, which is plagued with burnout most often resulting from ill-managed chronic workplace stress.

As regular meditation relieves accumulated stress and nurtures inner calm and a state of restful alertness, it is also an effective remedy for burnout in the workplace. There are numerous studies that demonstrate how meditation contributes to a substantial decrease in work-related stress, anxiety, and depression.[19]

In the context of work, the benefits of meditation extend beyond combating burnout alone.

First, meditation refines the brain's ability to focus, learn, and memorize.[20]

Several studies suggest that meditation stimulates and awakens the brain's plasticity—its capacity to produce new neurons and even transform different brain regions—thereby increasing and refining concertation, learning aptitudes, and memory.[21]

Improving concentration, which directly translates to greater work productivity, is much needed nowadays, with the constant distractions that deflect one's attention to so many different directions at any given moment.

Meditation also enhances creativity and problem solving—valuable assets in any line of work, particularly in the practice of law. With regular practice, meditation trains the mind to go "*beyond habitual, conditioned thought patterns into a state of expanded awareness… (where) we open to new insights, intuition, and ideas.*"[22 23]

Lastly, meditation helps form more harmonious relationships at home and in the workplace. When workers feel more balanced and centered, they tend to respond with awareness rather than react in an unconstructive, or even destructive, way.[24]

Regular meditation practice "*cultivates equanimity and compassion, allowing you to be present with a loved one, client, or co-worker and really listen to what they are saying and what they may need. As you meditate on a regular basis, you develop what is*

known as 'witnessing awareness'—the ability to calmly and objectively observe a situation, notice when you are being triggered, and consciously choose how you want to respond."[25]

Meditation Promotes Legal Ethics

As part of the many responsibilities that rest on their shoulders, attorneys are bound by numerous ethical and professional duties.

Meditation genuinely upholds the spirit of the law of ethics and professional responsibility, as its benefits support the core ethical rules, namely decorum, due diligence, and competency.

With regularity, a meditative legal community is potentially more empathetic, respectful, and collegial both in and outside the courtroom; its members are sharper, more focused, creative, and attuned to their clients' needs, hence serving them better; and are less likely to suffer from mental illness or turn to substance abuse that may impair their competency and professional capabilities.

A Final Word

The practice of law entails bearing a heavy responsibility.

In democratic societies, particularly, attorneys serve as pillars, fundamentally representing something greater than themselves—the rule of law.

Their individual wellness equates to the wellness of the legal system in its entirety, and thus, at a profound level, also that of democracy itself. As stress and burnout exponentially continue to deplete the legal world, fostering and restoring wellness is an urgent calls at a critical hour.

The notable philosopher and psychologist William James so reflected, "*The greatest weapon against stress is our ability to choose one thought over another*."[26]

Emphasizing that the source of stress is not the actual events in our lives, but rather how we perceive and relate to them, James wisely reminds us that we have a choice to either make conscious decisions to think constructive and enabling thoughts or cultivate those that are constrictive and detrimental.

This is precisely what meditation teaches us to do—that is, monitor our thought processes, while training us to act and think with witnessing awareness. In other words, to observe the situation and consciously respond rather than habitually react, even amidst the primeval instincts and biases engraved in our body-mind structure.

Meditation is a gift and a powerful tool to go inward, cultivate stillness and present moment awareness, and refine our experience in and of the world.

Yet, it is individuals and organizations alike who ultimately hold that vital key to the path of wellness. If we dare not slip it into the keyhole and unlock the door, the key will forever be useless.

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[13] *Supra* note 2.
[14] *Id.*
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[16] *Id.* See, for example, "*3 Pain Relief Meditation Techniques To Relieve Your Aches [With Scripts*]," The Daily Meditation, published January 22, 2018, https://www.thedailymeditation.com/pain-meditation-techniques.
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[25] *Id.*
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By Craig B. Forry

Trespass By Encroachment Issues and Remedies?

IN THE RECENT DECISION IN *Little Rock Ranch, LLC v. Premier Valley, LLC*, the California Court of Appeal discussed the remedies available in a trespass and encroachment case concerning a dispute over the property line.

Little Rock Ranch, LLC, the defendant in this matter, bought 677 acres of land in 2012 to develop into a walnut orchard.

The plaintiffs, the Johnson family, own a 210-acre property adjacent to, and to the south of, the property acquired by Little Rock Ranch.

The Johnsons filed their lawsuit in 2014, alleging that Little Rock Ranch, having moved forward to develop and plant an irrigated walnut orchard, was trespassing on 3.44 acres of the Johnsons' property and that the orchard encroached on their property's northern edge, specifically on a 3.44-acre strip adjoining Little Rock Ranch's property.

The Johnsons alleged that Little Rock Ranch had excavated a hillside, leveled land, planted walnut trees, and installed irrigation and sprinkler systems on the disputed strip.

The Johnsons sought injunctive relief to end the encroachment and restore the hillside strip to its original condition, among other remedies. After a bench trial was held, the trial court found Little Rock Ranch was trespassing by encroachment on the Johnsons' property.

However, applying the defense of laches and the doctrine of relative hardship, the court denied the injunctive relief sought by the Johnsons.

The court fashioned an alternative equitable remedy—Little Rock Ranch was required to pay damages to the Johnsons and undertake corrective action to limit erosion of the now-excavated hillside, while the Johnsons were required to deed the strip of land at issue to Little Rock Ranch.

In a parallel analysis, the trial court found the trespass by Little Rock Ranch was permanent such that the appropriate measure of damages were diminution in value damages, rather than other alternative measures.

The Johnsons challenged the trial court's ruling in multiple respects, and the appellate court affirmed the judgment.

The Back Story

The events leading to the sale of the Roen property to Little Rock Ranch took place in the fall of 2011, when the Roens ran into a local real estate agent named Jim Booth, a family friend whom they had known for approximately 50 years.

Albert Roen told Booth that the property on Tim Bell Road was in

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danger of falling out of escrow. Booth subsequently contacted Roen and determined the property had, in fact, already fallen out of escrow.

Booth eventually found a buyer for the Roen property. The buyer—Little Rock Ranch—was represented by its principal, Raymond Brian Greer.

In connection with Little Rock's purchase of the Roen property, Booth went to inspect the property; he met up with Albert Roen there. As Albert Roen and Booth looked over the property from a knoll, a canal and a barbed-wire fence could be seen crossing the property.

Booth asked Albert Roen whether the canal marked the property line; Roen answered in the affirmative with Booth, in turn, telling Greer that the fence marked the property's southern boundary.

Greer began the process of purchasing the Roen property for Little Rock Ranch in late 2011 with various documents generated.

Booth ended up representing both sides to the transaction—the Roens as the sellers, and Little Rock Ranch, via Greer, as the buyer.

The Roens provided sellers' disclosures, including a vacant land questionnaire, which was completed and signed by the Roens under penalty of perjury.

One of the questions on the questionnaire was whether the sellers were using any neighboring property; the Roens answered this question in the negative.

At trial, the Roens testified they answered these questions in the negative at Booth's direction; however, in his deposition Booth denied that he had directed the Roens to provide false information in the questionnaire.

Another document generated for purposes of the transaction was a preliminary title report, which noted that "*the fence line encroaches onto adjoining land in multiple areas*," but did not specify the extent of divergence between the fence lines and property lines.

The preliminary title report referenced a survey of the property conducted in 2008 as the basis for its conclusion. The survey, which mapped the divergence between the property line and fence line, was not attached to the report.

Greer received and signed off on the preliminary title report, but did not delve into it deeply; he also did not receive or obtain a copy of the 2008 survey referenced in the report.

He took possession of the Roen property on March 1, 2012, and immediately set about preparing a walnut orchard on the entire parcel, operating on his understanding that the southern boundary of his property ran along the barbed-wire fence, beyond which lay the neighboring farmer's almond orchard.

Right around the time escrow closed, Greer ordered thousands of trees for his orchard. The trees were so-called special bud trees, which typically took a long time—up to two years—to both generate the requisite rootstock and obtain special bud wood and complete the grafting process.

Greer had the southern 130 acres of the property graded, rendering all of it farmable. Dirt was moved and leveled in various parts of the property, including in the area immediately to the north of the barbed-wire fence.

In December 2012, Greer received a letter from an attorney representing the Johnsons asserting that the fence line was not the true boundary between the Roen and Johnson parcels; rather, it stated, the boundary lay 45 feet from the fence line.

Greer tried to ascertain how he reasonably could proceed, given he had preordered the trees for the orchard, the irrigation system design was already completed, and costly excavation and leveling work had been done—all on the assumption his property extended to the fence line.

In March 2013, the Johnsons' attorney provided Greer with a survey from 1950 that showed the boundary between the Roen and Johnson parcels was approximately 50 feet north of the barbed-wire fence.

Greer continued to try unsuccessfully to resolve the situation with the Johnsons, even offering to buy the disputed land. Despite that, he installed the irrigation and sprinkler systems for the property as, like the trees, these systems had been previously ordered and paid for.

Also, when the preordered, special-variety walnut trees were delivered, Greer planted them, including in the disputed strip, because the trees are of a variety that must be planted quickly; they cannot "*sit in cold storage*."

The trees, he testified, were not marketable as they were specially-ordered and a variety that was unique to Little Rock Ranch's orchards and, thus, would not move on the market.

Greer incurred substantial costs in developing his orchard. The tractor and dirt work in preparing the land cost approximately $1.3 million, while four wells were constructed—none on the disputed strip—at a cost of approximately $1 million.

The Johnsons initiated the action on February 28, 2014, suing Little Rock Ranch to quiet title to the disputed strip, and for trespass, conversion, and injunctive relief, among other claims.

Little Rock Ranch cross-complained against the Johnsons seeking to quiet title to the disputed strip based on adverse possession.

Little Rock Ranch also cross-complained against the Roens for intentional misrepresentation and indemnity, and against Premier Valley, Inc., dba Century 21 M&M and Associates, Little Rock Ranch's real estate broker, for breach of fiduciary duty, negligent misrepresentation, and indemnity as Jim Booth worked at Century 21 M&M and Associates in Turlock.

The matter proceeded to bench trial and, in 2018, the judgment was eventually entered.

The court found that Roen had made intentional misrepresentations

regarding boundary lines; that Booth had represented to Little Rock where the property lines were; and that Little Rock had relied on those representations and developed the disputed property because it was within the fence lines.

The court also found that Premier Valley incurred liability to the extent that Booth hadn't examined and then explained to Greer the discrepancy between the seller's vacant land questionnaire completed by the Roens and the preliminary title report.

The court addressed the question of remedies for Little Rock Ranch's trespass. The court denied the Johnsons' request for equitable relief in the form of injunctions requiring Little Rock Ranch to end the trespass on the disputed property located between the fence and the true boundary line to the north, and to restore the land to its original state.

Preliminarily, the court concluded that the equitable defense of laches applied in the case to bar the equitable remedy of injunctive relief. Laches may bar equitable relief where the party seeking relief has delayed enforcing a right and there is prejudice resulting from the delay.

Equitable defense of laches applies where unjustified delay has operated to the injury of another. In determining whether laches apply, the court should weigh the competing equities and grant or deny relief depending on the balance of those equities.

The doctrine of laches bars a cause of action when the plaintiff unreasonably delays in asserting or diligently pursuing the cause and the plaintiff has acquiesced in the act about which the plaintiff complains, or the delay has prejudiced the defendant.

It is not so much a question of the lapse of time as it is to determine whether prejudice has resulted. If the delay has caused no material change in *statu quo, ante*—for example, no detriment suffered by the party pleading the laches—his plea is in vain.

The Defense of Laches

The court also correctly set forth the elements of the defense of laches, the basic elements of which are:

- An omission to assert a right;
- A delay in the assertion of the right for some appreciable period; and,
- Circumstances which would cause prejudice to an adverse party if assertion of the right is permitted.

The court noted that the Johnsons had taken no action whatsoever to move the fence to the proper boundary line over the course of several decades, and had never used the disputed property for any significant purpose of their own.

The court further noted that the Johnsons had delayed asserting their rights to the disputed property until well after Little Rock had completed the grading and groundwork of the disputed property.

Here, the problem was not that there was no fence on the boundary line separating the properties.

Rather, the problem was that there was an actual fence on the Johnson property "*just a short distance*" from the boundary line.

Relative Hardship Doctrine

The relative hardship doctrine is applied by California courts in encroachment cases to determine whether to grant an injunction requiring removal of the encroachment or to resolve the issue by fashioning an "*alternative, equitable remedy*" and awarding damages.

The doctrine has been applied by California courts for many years to determine whether to grant an injunction to enjoin a trespass by encroachment on another's land.

Pursuant to the relative hardship doctrine, which involves balancing the equities that bear on the situation at issue, courts have the power in equity

to create a protective interest in favor of an encroacher and may exercise their equity powers to affirmatively fashion an interest in the owner's land which will protect the encroacher's use.

In other words, under the relative hardship doctrine, once the court determines that a trespass has occurred, it conducts an equitable balancing to determine whether to grant an injunction prohibiting the trespass or whether to award damages instead.

Under the relative hardship test, the trial court must identify the competing equities underlying each party's position, and then balance the relative hardships of granting or denying an injunction to remove encroachments from the plaintiff's property.

Where the encroachment was innocently made, does not irreparably injure the plaintiff, and where the cost of removal would be great compared to the inconvenience caused plaintiff by the continuance of the encroachment, the equity court may, in its discretion, deny the injunction and compel the plaintiff to accept damages.

The trial court has the authority to fashion an equitable remedy appropriate to the circumstances of each case. It is well established that a court called upon to afford relief, historically or analytically equitable in its nature, has broad powers to fashion a remedy. Also, it may create new remedies to deal with novel factual situations.

Judicial Remedies

It has always been the pride of courts of equity that they will so mold and adjust their decrees to award substantial judicial remedies according to the requirements of the varying complications that may be presented to them for adjudication.

The powers of a court of equity, dealing with the subject-matters within its jurisdiction, are not cribbed or confined by the rigid rules of law. From the very nature of equity, a wide play is left to the conscience of the chancellor in formulating his decrees.

It is the very essence of equity that a court's powers should be so broad as to be capable of dealing with novel conditions in order to meet the requirements of every case.

The granting or denial of a permanent injunction rests within the trial court's sound discretion and will not be overturned on appeal absent a showing of a clear abuse of discretion, the exercise of which must be supported by the evidence.

A trial court's discretionary ruling will be sustained on review unless it falls outside the bounds of reason.

Here, the trial court effectively applied the relative hardship doctrine in denying injunctive relief, awarding damages, and fashioning an alternative equitable remedy.

The trial court found Little Rock Ranch was trespassing—by encroachment—on a strip of the Johnsons' property, having physically leveled the land, and integrating it into the treeline.

The court also found that while Greer committed the trespass, he had operated on the understanding that his property extended to the barbed-wire fence, and had taken several steps toward designing and developing his walnut orchard before the Johnsons moved to inform him that the fence line was not the property line.

The court also concluded that Little Rock Ranch's trespass on the Johnsons' property was permanent, such that an award of damages based on the diminution in value of the plaintiffs' overall property in light of the loss of the disputed property, rather than injunctive relief or damages pursuant to the Civil Code, was the appropriate remedy.[1]

In determining whether injunctive relief and/or an award of damages is an appropriate remedy and in identifying the proper measure of damages, courts consider whether the underlying trespass is permanent or can be abated.

The law regarding private nuisances is also instructive in this context.

California cases have recognized that invasions of property, otherwise amounting to trespass, may also constitute a nuisance.

Generally, the principles governing the permanent or continuing nature of a trespass or nuisance are the same and the cases discuss the two causes of action without distinction.

The nature of the trespass—whether it is permanent or continuing—affects the proper measure of damages.

For example, when a trespass is continuing, a permanent measure of damages is not an appropriate choice, as future harm is not ascertainable to a certainty.

The Nature of Damages

In an action on a permanent nuisance, the plaintiff will be permitted to recover both past and prospective damages while in an action on a continuing

nuisance, prospective damages are unavailable and recovery is limited to actual injury suffered prior to commencement of each action.

Pursuant to the Civil Code, damages allowed for *continuing* trespass include the value of the use of the property, reasonable cost of repair or restoration to the property's original condition, and the costs of recovering possession.[2]

However, general principles of damages in trespass cases require that the damages bear a *reasonable* relationship to the harm caused by the trespass.

The general rule is that if the cost of repairing the injury and restoring the premises to their original condition amounts to less than the diminution in value of the property, such cost is the proper measure of damages; and, if the cost of restoration will exceed such diminution in value, the diminution of the property in value is the proper measure to be employed.

Continuing trespasses are essentially a series of successive injuries. In order to recover for all harm inflicted by a continuing trespass, the plaintiff is required to bring periodic successive actions.

In any trespass case, the proper measure of damages will fully compensate the plaintiff for damages that have occurred or can, with certainty, be expected to occur.

Courts retain flexibility in identifying and applying the theory of damages that is appropriate to the circumstances at issue.

Since the trespass in this case was permanent, the court concluded the Johnsons were entitled to damages based on the the decrease in market value of their property.

The court stated that the appropriate compensatory damages for the Johnsons being deprived of the 3.44 acres of their property was the diminution in the market value of their overall property on account of the loss of 3.44 acres.

Thus, the court calculated the compensatory damages based on the present value of the land, that is, $35,000 per acre, instead of the value of undeveloped farm land in that area, that is, $8,000 per acre.

The court then awarded damages in the amount of 3.44 acres x $35,000, for a total of $120,400, concluding that the Johnsons' theory of conversion damages—based on the value of over 60 acres of Little Rock Ranch's own property—amounted to a request for "*astronomic damages*," and denied the request.

Significantly, damages are an element of the tort of conversion, and are generally based on the value of the thing converted; at trial the Johnsons failed to present competent evidence as to the amount of dirt removed from the disputed property and the dirt's value.

The appellate court detected no error in the court's analysis and ruling rejecting the Johnsons' theory of additional conversion damages.

Lessons to Be Learned

It is critical to always consider obtaining a survey to determine property lines because the first rule is know what is being purchased.

Be aware that the trial court has the authority to fashion an equitable remedy appropriate to the circumstances of each case, and it is well established that a court that is called upon to afford relief historically or analytically equitable in its nature has broad powers to fashion a remedy, and it may create new remedies to deal with novel factual situations.

Remember that, if litigation is based on non-disclosure by the seller, or misrepresentations, a dual broker will likely be sued by one or both parties, and the broker should carefully document the advice given to both parties.

[1] Civil Code § 3334.
[2] *Id.*

Retrospective

A century ago, the San Fernando Valley was known across the country as an agricultural gem with a coastal valley climate.

By the 1920s, with further assistance from the waters of the Los Angeles Aqueduct, fruit and especially citrus cultivation became the San Fernando Valley's biggest industry.

The price of land for orange and lemon groves went as high as $5,000 an acre—as much as eight times more than the cost of other land—and the Valley had at least four packing houses with shipments of nearly 500 rail cars of oranges and lemons headed to the U.S. Midwest and East Coast annually.

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NATURAL DISASTERS HAVE A PARTICULARLY devastating impact on low-income families and communities.

Wildfires, earthquakes, hurricanes, tornadoes, and an escalating climate catastrophe threaten to permanently derail the lives of people living in poverty, who often lack the basic resources necessary to survive, let alone the capacity to rebuild and recover.

Disasters shed a stark light on our inequities. Families of means rebuild their lives—often with ample assistance from government—while the ripples of devastation can continue to marginalize lower-income families, impacting their housing, health, education, and economic security for years, and sometimes decades, to come.

But the private bar can play a unique role in changing this narrative as survivors frequently need legal advocacy in the aftermath of disaster to help them access to assistance from the Federal Emergency Management Agency (FEMA), and the Small Business Administration (SBA) loans, as well as food and cash benefits, unpaid wages, unemployment, insurance, and health care.

> "In the immediate aftermath of a disaster, private attorneys can conduct legal clinics for disaster survivors."

They frequently have to resolve housing issues when they are displaced or are threatened with the displacement due to evictions, security deposit disputes, Section 8 transferability issues, and habitability issues that impact their health and safety.

Often times, survivors' legal needs fall outside of traditional legal aid specializations—requiring expertise in tax, trust and estate, and land use law—making attorneys in private practice a vital part of the recovery effort.

In the immediate aftermath of a disaster, private attorneys can conduct legal clinics for disaster survivors, handle pro bono cases to assist disaster survivors, and conduct legal research.

Attorneys, paralegals, and law students alike can provide emergency response by volunteering at Disaster Recovery Centers, and may also volunteer to support a disaster relief 'hotline.'

But the needs of low-income survivors do sometimes fail to rise to the surface immediately after a disaster, as legal intervention may become necessary months or even years later as unaddressed issues spiral and threaten to derail survivor's lives.

In response, the Disaster Legal Assistance Collaborative (DLAC) provides free legal help for survivors of California disasters.

The DLAC is a coalition of non-profits, legal aid organizations, government entities, and law firms in California that help low-income individuals, families and communities navigate the often-complex road to recovery following a disaster.

Neighborhood Legal Services of Los Angeles County (NLSLA)—which has provided targeted legal services to low-income disaster survivors since the 1994 Northridge Earthquake—is a DLAC member.

Part of the NLSLA's work with the collaborative involves collaborative efforts to mitigate the impact of disasters before they occur through policy advocacy and outreach events such as community fairs and educational training sessions to ensure that the most vulnerable communities are protected in their time of need.

To aid in that effort, the NLSLA is convening a statewide Disaster Preparedness Training Conference in partnership with Pepperdine Caruso School of Law and Kilpatrick & Townsend.

Dr. Lucy Jones, the founder of the Dr. Lucy Jones Center for Science and Society and one of the foremost seismologists in the country, will give the keynote address.

The day-long conference will take place on Friday, June 17 from 9:00 a.m. to 5:00 p.m. and is free. Participants will be able to attend either virtually or in person.

For more information and to register, call (818) 834-7572.

If you would like to get involved with providing pro bono legal support after a disaster, visit the websites of either the State Bar of California's or the California Lawyers Association, or call the Neighborhood Legal Services of Los Angeles County at (818) 834-7585 to volunteer.

REPORT OF THE NOMINATING COMMITTEE

Present were: David Jones (Chair), Matthew A. Breddan and the following five active members: Alexander Kasendorf, Joy Kraft Miles, Carol Newman, Kathy Neumann and Alexis D. James; the Executive Director, Rosie Soto Cohen, is an ex officio member of the Committee.

Christopher Warne was absent.

The first meeting of the SFVBA Nominating Committee was held via Zoom and was called to order by David Jones (Chair) on May 27, 2022, at 12:15 p.m. David Jones welcomed everyone. Alexis D. James was nominated to be Secretary of the Nominating Committee by unanimous vote of all present. The Committee decided that members will receive their ballots via email and that the application deadline would be June 6, 2022, by midnight. Each candidate would pay an optional election ballot advertising fee of $250.00, in line with past practice. Kathy Neumann moved that the application with slight modifications be approved. Carol Newman seconded. The Committee approved by unanimous vote with Christopher Warne absent. A brief Treasurer Appointment discussion was held.

The second meeting of the Committee was scheduled for June 7, 2022, at 4:00 p.m.; packets would be sent out by Rosie Soto Cohen by Tuesday morning, June 7, 2022.

On June 7, 2022, at 4:00 p.m., a second meeting of the SFVBA Nominating Committee came to order over Zoom. Present were David Jones (Chair), Christopher Warne, Matthew A. Breddan and the following five active members: Alexander Kasendorf, Joy Kraft Miles, Carol Newman, Kathy Neumann and Alexis D. James; the Executive Director, Rosie Soto Cohen, is an ex officio member of the Committee.

David Jones welcomed the Committee and thanked them for their efforts and explained that the role of the Nominating Committee is to act as a filter for candidates, but that the votes are cast by the electorate. David Jones abstained from voting. The Committee is required to nominate no less than nine but can nominate up to twelve candidates for Trustee. The Committee reviewed the applications of each of the candidates and there was an open discussion of comments and concerns before voting commenced. (1) Shannon M. DeBiase, (2) Chrystal Ferber, (3) Alexander (A.J.) Harwin, (4) Nolan J. Hiett, (5) Nina Niedbalski, (6) Nancy Reinhardt, (7) Jessica Rosen and (8) Pravin Singh were unanimously voted through. One candidate did not meet the eligibility requirements and will be welcome to reapply next year.

Three more candidates submitted applications within the extended required timeframe: (9) Kenny Brooks, (10) Gary Williams and (11) Melanie Gardner-Pawlak applied and were approved unanimously by the Committee to seek election.

Matthew A. Breddan, President-Elect, was automatically nominated for the office of President. Matthew A. Breddan moved to nominate Heather Glick-Atalla to President-Elect. Kathy Neumann seconded. The Committee unanimously approved.

Kathy Neumann moved to nominate Amanda Moghaddam to Secretary. Joy Kraft Miles seconded. The Committee unanimously approved.

Two candidates were considered for Treasurer. Matthew A. Breddan moved to nominate Taylor Williams-Moniz; Joy Kraft Miles seconded the motion and the Committee unanimously approved.

The meeting ended at 5:33 p.m.

Alexis D. James
Nominating Committee Secretary

David G. Jones
Nominating Committee Chair

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