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VALLEY LAWYER
A Publication of the San Fernando Valley Bar Association

On the cover: *U.S. Bankruptcy Judge Hon. Martin R. Barash*
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FEATURES

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VALLEY LAWYER

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Farewell, One More Time

MARK S. SHIPOW
Interim Editor,
Valley Lawyer

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SADLY, WE'VE LOST ANOTHER President. Mark Blackman passed away recently, at the age of 62.

After graduating from Loyola Law School, Mark began practicing law in 1985. As a young lawyer Mark joined what was then Mink, Alpert & Barr, looking for a friendly, supportive firm atmosphere. He found it there, and became an integral part of the firm for many years. He became established as a leading mobile home park lawyer, representing both owners and residents. He established a reputation as being a workhorse on behalf of his clients, and was known for being tough but fair in all his dealings. He put the interests of others first, and did not need the spotlight; he was more than happy to see a job well done, even if he did not get all the credit. As Linda Temkin, our longtime Director of Education & Events, remembers, Mark was a "very kind soul."

With the support of his firm, Mark was active in the San Fernando Valley Bar Association. He worked his way up the leadership ranks, and was President in 2000, fostering the legacy of what was by then the Alpert, Barr & Grant firm, which produced SFVBA Presidents Lee Alpert, Gary Barr and Adam Grant, as well as Mark, over the years. Even after becoming a "Past President," Mark stayed active in the Association, attending events and helping out on projects.

One of Mark's great accomplishments for SFVBA was establishing the *Blanket The Homeless* program. Mark was enthusiastic about helping people. As his former partner, Lee Alpert, says, "Mark had a passion for humans." The BTH program Mark founded has helped thousands over the years by buying blankets for unhoused and other needy individuals. That program is still a centerpiece of the charitable work of SFVBA/VCLF. You can continue to support Mark's BTH program by making donations through VCLF.

We remember Mark for his service to SFVBA and the community. He will be greatly missed. We should also take a moment to reflect on the relatively limited amount of time we all have, and try to make the most of it. Do things that make life worthwhile: enjoy family, do good as a lawyer and a member of the community, pamper yourself occasionally. We all hope and plan for the days ahead, but let's not lose sight of the present.

Judicial Officers in Our Legal System

MATTHEW A. BREDDAN
SFVBA President

MBreddan@ReapeRickett.com

ON THE EVE OF SFVBA'S Judges' Night, it seems appropriate to reflect on the role judges play in our society. Although most people never interact with our legal system, some are involved on a daily basis. And, ultimately, our judicial system—and judges in particular—have a significant impact on all of our lives.

Judicial officers carry tremendous responsibility in shaping people's opinions about the legal system and the administration of justice. This applies equally to the general public as well as to the attorneys that appear before them.

As in any profession, judicial officers develop reputations while carrying out their daily duties. Some judges are well known for their judicial demeanor, knowledge of the law and the respect they show attorneys and litigants who appear before them. These reputations can be varied across the spectrum from stellar to marginal. Some seem to allow pro per litigants far too much latitude while others seems to hold attorneys and parties to a more stringent standard. Some judges seem to yearn for the spotlight, while others are content to labor more in the background.

In any event, the judicial officers are critical components to the system. Our system is designed to be adversarial in nature, two sides "zealously advocating." This system ultimately requires a decision as to which side wins or is "right." Judges necessarily play that role.

Many people are unaware of the tremendous responsibility that rests on the shoulders of the judicial officers. They are required to make what are sometimes very difficult decisions on very important issues. Their burden is increased in situations where they are assigned to a courtroom that has nothing to do with the body of law in which they practiced, thereby forcing him or her to take a crash course in a "foreign language". And many judges are assigned to courts that require them to make decisions on a broad variety of subjects, requiring them to learn new areas on an almost constant basis.

Recognizing the importance of judges in our system, many courts, including those in Los Angeles County, have launched a judicial mentorship program to help entice people to submit an application to be a judge. Interested applicants are paired with a member of the bench to help guide them and appropriately submit the application for judicial appointment. There is also a push for diversity in seeking applicants that better reflect our gender and ethnic diversity in the judicial ranks.

While often a thankless job, bench officers of every variety carry a tremendous responsibility and are under constant scrutiny both on the bench and off. It is a job most would not be willing to undertake.

The purpose of SFVBA Judges' Night is to make the judicial job a little less thankless. It is an opportunity to recognize exceptional contributions made by our local judicial officers. This year, please join me in congratulating Hon. Martin R. Barash as our Judge of the Year, and Hon. Brenda Penny and Hon. Robert Wada as recipients of our Administration of Justice Award winners. Come celebrate with us on May 25.

San Fernando Valley Bar Association
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CALENDAR

MAY 2023

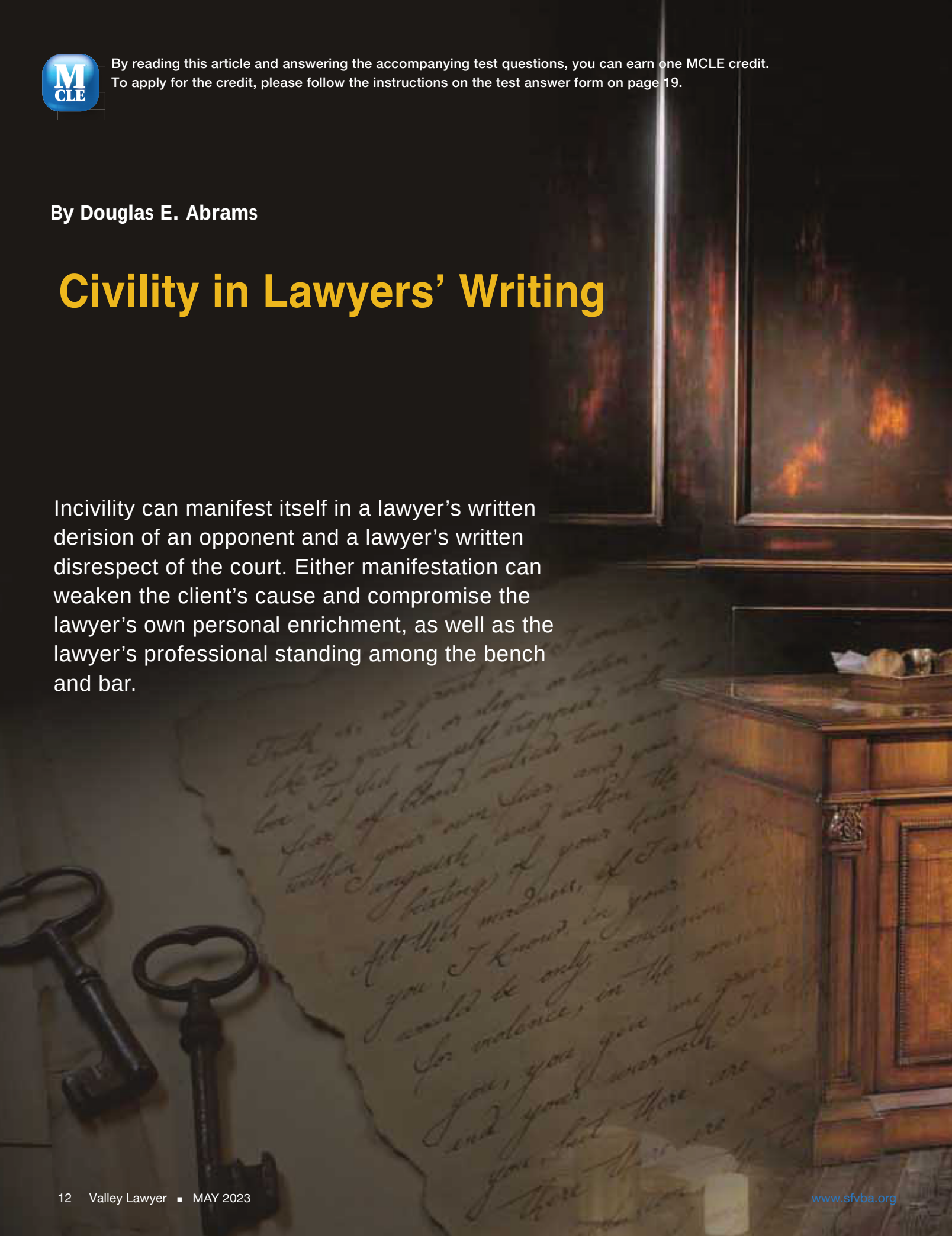
SUN	MON	TUE	WED	THU	FRI	SAT
	1	2	3	**4** ZOOM MEETING **Membership and Marketing Committee** 6:00 PM	5	6
7	8	**9** WEBINAR **Probate and Estate Planning Section** ***Shifting to Neutral –The Change in the Court's View on Trustees Remaining Impartial in Light of Breslin v Breslin and Zahnleuter v Mueller*** 12:00 NOON A trustee, even one that has no person interest in a trust, can no longer take a position that favors one potential beneficiary's interest over another's. In the wake of *Breslin v. Breslin* (2021) 62 Cal.App.5th 801, where the trustee avoided any liability through taking a neutral position, *Zahnleuter v. Mueller* (Filed February 9, 2023; Certified for Publication March 7, 2023) 88 Cal.App.5th 1294, has further spotlighted the importance of the trustee's neutrality. Mark A. Lester and Eric A. Hirschberg will discuss the potential dangers and consequences for a trustee who advocates for one beneficiary's interest over a different beneficial outcome, which, in turn, changes the financial dynamics previously overlooked in trust litigation. (1 MCLE Hour) **Board of Trustees Meeting** 6:00 PM SFVBA OFFICES	10	**11** **Our Sister Organization: Santa Clarita Valley Bar Association** ***Scholars & Bench Night*** 6:00 PM THE OAKS CLUB This dinner event will celebrate the three top scoring students from the Speech Competition, who will present their speeches during the dinner and be formally presented with scholarships. RSVP: info@scvbar.org	12	13
14 	15	16	17	18 	19	20
21	22	23	**24** WEBINAR **Business Law and Real Property Section** ***Dealing with Real Estate in Probate*** 12:00 NOON Tamila Jensen will outline how real estate law and Probate law intersect with a focus on probate estates, trusts, conservatorships and guardianships. (1 MCLE Hour)	25 	26
28	29	30	31			

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.

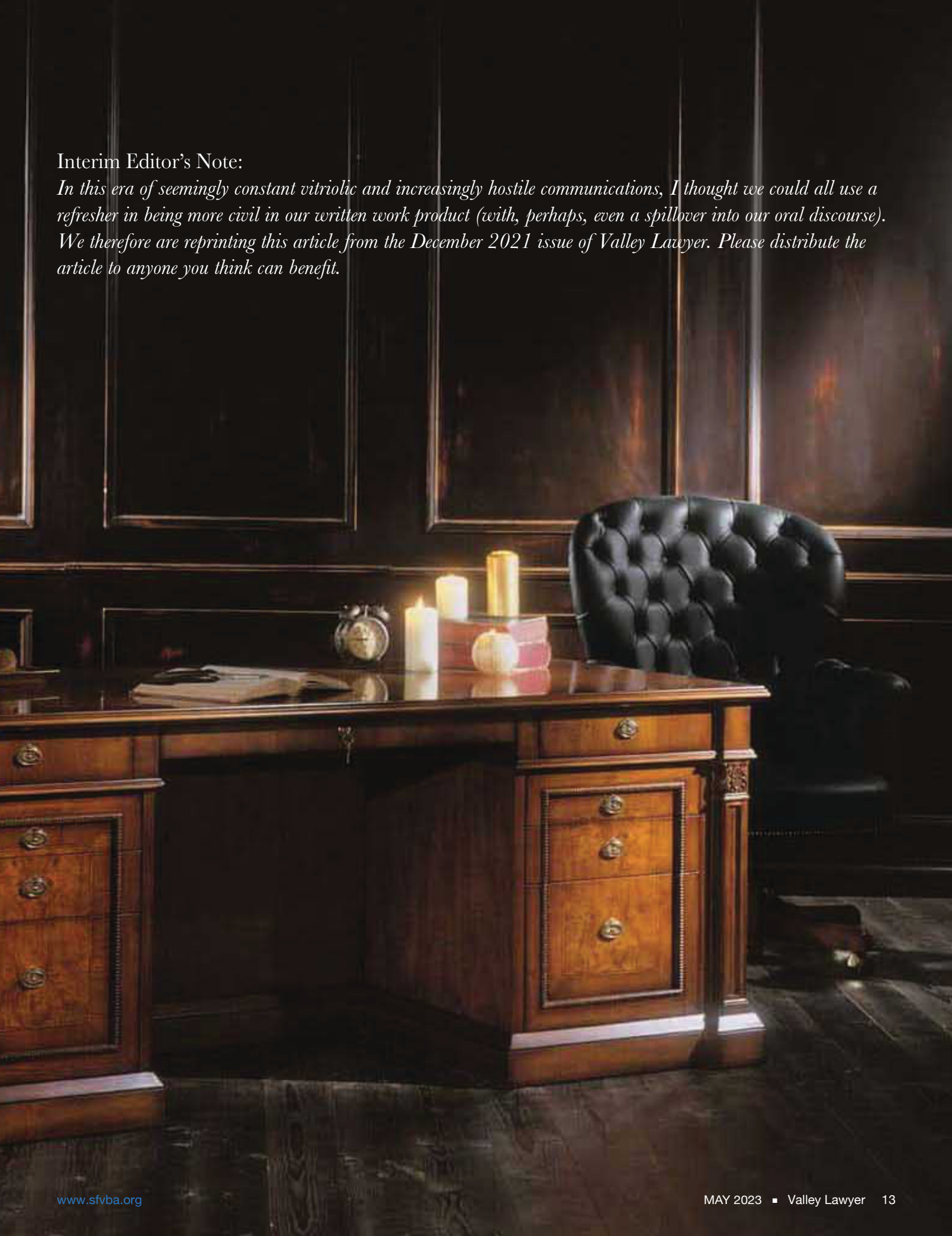
By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 19.

By Douglas E. Abrams

Civility in Lawyers' Writing



Incivility can manifest itself in a lawyer's written derision of an opponent and a lawyer's written disrespect of the court. Either manifestation can weaken the client's cause and compromise the lawyer's own personal enrichment, as well as the lawyer's professional standing among the bench and bar.



Interim Editor's Note:

In this era of seemingly constant vitriolic and increasingly hostile communications, I thought we could all use a refresher in being more civil in our written work product (with, perhaps, even a spillover into our oral discourse). We therefore are reprinting this article from the December 2021 issue of Valley Lawyer. Please distribute the article to anyone you think can benefit.

A FEW YEARS AGO, AMERICAN BAR Association President Stephen N. Zack decried the legal profession's "continuing slide into the gutter of incivility."[1]

An ABA resolution "affirm[ed] the principle of civility as a foundation for democracy and the rule of law, and urge[d] lawyers to set a high standard for civil discourse."[2]

The ABA initiative echoes federal and state courts that call civility "a linchpin of our legal system," a "bedrock principle," and "a hallmark of professionalism."[3] [4] [5]

Justice Anthony M. Kennedy says that civility "defines our common cause in advancing the rule of law."[6] Chief Justice Warren E. Burger called civility a "lubricant[] that prevent[s] lawsuits from turning into combat."[7]

"Courtesy is an essential element of effective advocacy," agrees Justice John Paul Stevens.[8]

The adversary system's pressures can strain the tone and tenor of a lawyer's oral speech, but the strain on civility can be especially great when lawyers write. Words on paper arrive without the facial expression, tone of voice, body language, and contemporaneous opportunity for explanation that can soothe face-to-face communication. Writing appears cold on the page, dependent not necessarily on what the writer intends or implies, but on what readers infer.

This article is in three parts—Part I describes two manifestations of incivility, a lawyer's written derision of an opponent, and a lawyer's written disrespect of the court; Part II describes how either manifestation can weaken the client's cause; and Part III describes how incivility in writing can also compromise both the lawyer's own personal enrichment and the lawyer's professional standing among the bench and bar.

Part I

"[C]ivility is not a sign of weakness," President John F. Kennedy assured Americans in his Inaugural Address in 1961 as he anticipated four years of face-offs with the Soviets.[9]

"Civility assumes that we will disagree," says Yale law professor Stephen L. Carter, "It requires us not to mask our differences, but to resolve them respectfully."[10]

The advice prevails, regardless of whether incivility pits lawyer on lawyer, or whether it pits lawyer against the court. Each of the two manifestations of incivility warrants a representative example here.

Lawyer-On-Lawyer Incivility

When Chief U.S. Bankruptcy Judge Terrence L. Michael (N.D. Okla.) considered whether to approve a compromise in In re Gordon, the contending lawyers in the Chapter 7 proceeding detoured into written lawyer-on-lawyer invective.[11]

In a filing to support its motion to compel discovery from the bankruptcy trustee in Gordon, the lawyer for creditor Commerce Bank charged that the trustee and the United States had engaged in "a pattern... to avoid any meaningful examination of the legal validity of the litigation plan they have concocted to bring... a series of baseless claims."[12]

"[T]hey know," the bank's lawyer continued, "that a careful examination of the process will show the several fatal procedural flaws that will prevent these claims from being asserted."[13]

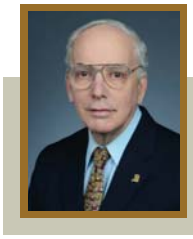
"Only by sweeping these issues under the rug will the trustee be able to play his end game strategy of asserting wild claims...in hopes of coercing Commerce Bank into a settlement (which the Trustee hopes will generate significant contingency fees for himself)."[14]

> "Civility assumes that we will disagree. It requires us not to mask our differences, but to resolve them respectfully."

The trustee charged that the bank's lawyer had impugned his character with accusations that he had compromised his fiduciary obligations for personal gain. Judge Michael denied the trustee's sanctions motion on procedural grounds, but he chastised the bank's lawyer because "personal and vitriolic accusations have no place as part of a litigation strategy."[15]

The court instructed the parties to "leave the venom at home" because "[w]hether you like (or get along well with) your opposition has little to do with the merits of a particular case." [16] [17]

Some courts have moved beyond instruction. In the exercise of inherent authority, these courts have sanctioned lawyers, or have denied attorneys' fees, for incivility.[18]



Douglas E. Abrams is Associate Professor of Law Emeritus at the University of Missouri School of Law. Four U.S. Supreme Court decisions have cited his law review articles and he has written or co-written six books, which have appeared in a total of 22 editions. His latest book is *Effective Legal Writing: A Guide for Students and Practitioners*.
This article originally appeared in *Precedent*, The Missouri Bar's quarterly magazine. Reprinted by permission.

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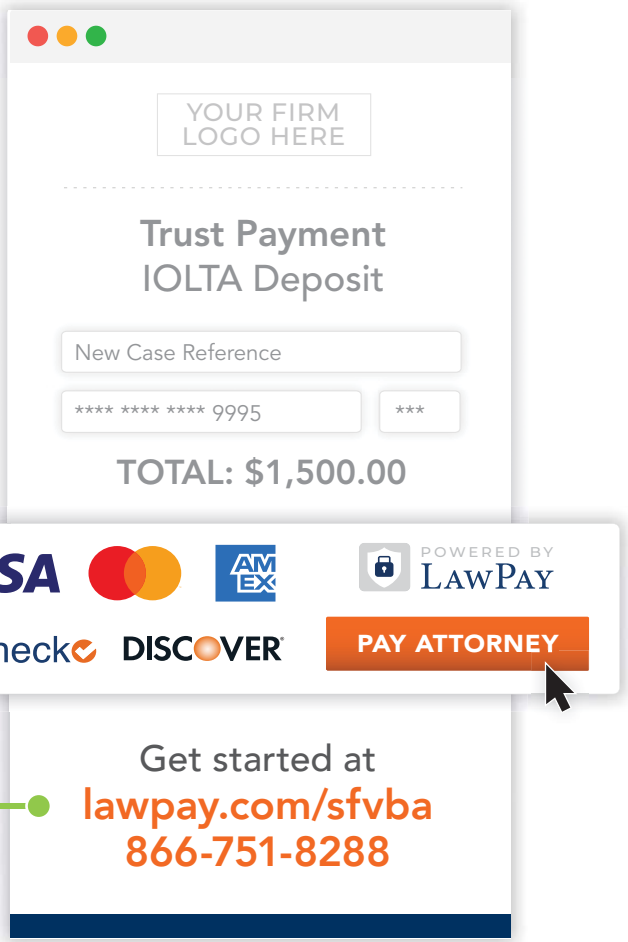

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Some courts have even sanctioned the client who, having retained the lawyer, bears some responsibility for the lawyer's conduct.[19]

Lawyer-on-Court Incivility

Gordon's written recriminations pitted counsel against counsel, but lawyers sometimes venture into incivility that disrespects judges and the court.

Every appeal involves at least one party who believes that the lower court reached an incorrect outcome, but few judges deserve criticism for incompetence. Lawyers for aggrieved parties are more likely to receive a serious hearing (and more likely to perform their roles as officers of the court) by firmly, forcefully, but respectfully arguing a judge's good faith misapplication of the law to the facts, rather than by resorting to insinuations about the judge.

Insinuations surfaced during the federal district court's review of the magistrate judge's report and recommendation in *In re Photochromic Lens Antitrust Litigation*.[20]

A party's lawyer contended that the magistrate judge was "misled" concerning relevant legal standards, and that the judge made her recommendation without "any reference to the voluminous underlying record." The lawyer further contended that she "conducted no analysis, much less a 'rigorous analysis,'" and decided "based on no evidence, a superficial misreading of the evidence, or highly misleading evidence."[21]

The district court approved the magistrate judge's recommendation and report in significant part, but did not stop there.

The court also publicly reprimanded the lawyer for crossing the line: "It is disrespectful and unbecoming of a lawyer to resort to such language, particularly when directed toward a judicial officer. Its use connotes arrogance, and reflects an unprofessional, if not immature litigation strategy of casting angry aspersions rather than addressing the merits...in a dignified and respectful manner."[22]

Part II: Incivility's Costs to the Client

Lawyers whose writing descends into incivility risk weakening the client's cause, perhaps irreparably. The Chief Justice of the Maine Supreme Court confides that "[a]s soon as I see an attack of any kind on the other party, opposing counsel, or the trial judge, I begin to discount the merits of the argument."[23]

As they determine the parties' rights and obligations by applying fact to law, perhaps judges sometimes react this way because civility projects strength and incivility projects weakness. "Rudeness is the weak man's imitation of strength," said philosopher Eric Hoffer.[24]

The lawyer's first step toward civility may be an early candid talk with the client, who may feel grievously wronged and may believe that the surest path to vindication is

representation by a junkyard dog waiting to be unleashed. The client's instincts may stem from movies and television dramas, whose portrayals of lawyers sometimes sacrifice realism for entertainment.

Without this early talk, the client may mistake the lawyer's civility for meekness, and courtesy for concession. The client needs to understand that a take-no-prisoners strategy can disgust any decision maker who shares the sensibilities expressed by the Justices and judges quoted above.

One Illinois trial judge recently had this advice for lawyers: "No judge has ever been heard to endorse or encourage the use [of mean-spirited] writing. Not one. You may feel better writing it and your client may feel better reading it, but your audience is the judge, and judges abhor it."[25]

Judicial abhorrence scores the client no points. Justice Sandra Day O'Connor says that, "It is enough for the ideas and positions of the parties to clash; the lawyers don't have to."[26]

"It isn't necessary to say anything nasty about your adversary or to make deriding comments about the opposing brief," added Justice Ruth Bader Ginsburg, who said that such comments "are just distractions. You should aim to persuade the judge by the power of your reasoning and not by denigrating the opposing side...If the other side is truly bad, the judges are smart enough to understand that; they don't need the lawyer's aid."[27]

Judges are not alone in advancing civility for projecting strength.

John W. Davis, perhaps the 20th Century's greatest Supreme Court advocate, understood his judicial audience.

"Controversies between counsel," he wrote, "impose on the court the wholly unnecessary burden and annoyance of preserving order and maintaining the decorum of its proceedings. Such things can irritate; they can never persuade."[28]

Part III: Incivility's Costs to the Lawyer

Aside from compromising the client's interests, incivility can damage the lawyer's own personal enrichment and professional standing. Incivility "takes the fun from the practice of law," says Judge Duane Benton of the U.S. Court of Appeals for the Eighth Circuit.[29]

"Being a lawyer can be pleasant or unpleasant," explains Judge William J. Bauer of the U.S. Court of Appeals for the Seventh Circuit, who adds that "[w]hen we treat each other and those with whom we have professional contact with civility, patience and even kindness, the job becomes more pleasant and easier."[30]

Moving from the lawyer's personal enrichment to professional standing, the Preamble to the ABA Model Rules of Professional Conduct recites "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system."[31]

Model Rule 8.4(d) operates against "conduct that is prejudicial to the administration of justice."[32]

The Model Rules' spotlight on professional obligation is fortified by commands for civility in federal and state court rules; state admissions oaths; and unofficial codes that some professional organizations maintain for their member lawyers.[33 34 35]

The ABA Model Code of Judicial Conduct imposes reciprocal obligations of civility on judges in the performance of their official duties.[36]

These professional commands and expectations mean that descent into incivility can damage the lawyer's reputation with judges and others lawyers. The damage seems greatest when the court's opinion calls out the offending lawyer publicly, either by name or by leaving the lawyer readily identifiable from the appearances listed atop the opinion.

In the two decisions featured in Part I of this article, the offenders may have had belated second thoughts when the court shined the spotlight.

"Just as lawyers gossip about judges and most litigators have a 'book' on the performances of trial judges, we judges

keep our own book on litigators who practice before us," confides one federal district judge.[37]

During my judicial clerkship, I learned early that when many judges pick up a brief or other submission, they look first for the writer's name. A writer with a track record for civil, candid, forceful advocacy gets a head start; a writer who has fallen short must make up lost ground.

Incivility brings tarnish, but civility brings luster. Justice Kennedy calls civility "the mark of an accomplished and superb professional."[38]

A veteran federal district judge concurs: "The lawyers who are the most skillful tend to be reasonably civil lawyers because they project an image of self-confidence. They don't have to stoop to the level of acrimony."[39]

Even without public rebuke or other disdain from the bench, word gets around. In cities, suburbs and outstate areas alike, the bench and bar usually remain bound by mutual relationships, word of mouth, recollections, and past experiences.

Lawyers with sterling reputations for civility stand a better chance of receiving civility in return. Sooner or later, for example, a lawyer may need a stipulation, consent to a continuance, or similar accommodation from opposing counsel or the court. Like other people, lawyers get what they give.

In a challenging employment market, maintaining a reputation for civility can also enhance a lawyer's professional mobility. Lawyers sometimes receive appealing lateral job offers from a nearby public- or private-sector adversary who respects not only their competence, but also their professionalism.

Being smart is not enough. Plenty of lawyers are smart, but fewer lawyers earn respect for genuine professionalism as they seek the best possible outcomes for their clients.

Because few Americans—including few lawyers–spend their entire careers with their first employer, enhanced lateral mobility can be a significant reward for unswerving commitment to an honorable law practice.

As members of a largely self-governing profession devoted to the rule of law, lawyers are judged by expectations sometimes higher than the expectations that judge other professionals.[40]

President Theodore Roosevelt said that "[c]ourtesy is as much a mark of a gentleman as courage."[41]

"The greater the man, the greater courtesy," wrote British Poet Laureate Alfred, Lord Tennyson in his epic poem, *Idylls of the King*.[42] The greater the lawyer too.

Conclusion: The Will to Win

"All advocacy involves conflict and calls for the will to win," said New Jersey Supreme Court Chief Justice Arthur T. Vanderbilt, but the will to win is only one ingredient of professionalism.

Advocates, he added, also "must have character," marked by "certain general standards of conduct, of manners, and of expression."[43]

One prime marker of an advocate's character is civility.

Civility in advocacy resembles sportsmanship in athletics. Sportsmanship presumes that each athlete wants to win within the rules of the game; a sportsmanlike athlete who does not care about winning should not play.

Civility similarly presumes that each advocate wants to win within the rules of professionalism; a civil advocate who does not care about winning should not represent a client. Civility and forceful advocacy, like sportsmanship and forceful athleticism, define the total package.

---

[1] James Podgers (ed.), *From Many Voices, a Call for Public Civility*, 97 A.B.A.J. 58, 58 (Sept. 2011) (quoting Zack).
[2] *Id.*
[3] *Wilson v. Airtherm Prods., Inc.*, 436 F.3d 906, 912 n.5 (8th Cir. 2006).
[4] *Wescott Agri-Prods, Inc. v. Sterling State Bank, Inc.*, 682 F.3d 1091, 1096 (8th Cir. 2012).
[5] *Cardello v. Cardello*, No. FA020088156S, 2002 WL 31875435 * 1 (Conn. Super. Ct. Dec. 4, 2002).
[6] Louis H. Pollak, *Professional Attitude*, 84 A.B.A.J. 66, 66 (Aug. 1998) (quoting Justice Kennedy).
[7] Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 214-15 (1971).
[8] Marvin E. Aspen, *Let Us Be "Officers of the Court*," 83 A.B.A.J. 94, 96 (July 1997) (quoting Justice Stevens).
[9] Joint Congressional Comm. on Inaugural Ceremonies, *Address by John F. Kennedy*, 1961 (Jan. 20, 1961).
[10] Stephen L. Carter, Civility 132 (1998).
[11] 484 B.R. 825 (N.D. Okla. 2013).
[12] *In re Gordon*, 484 B.R. 825, 827 (N.D. Okla. 2013).
[13] *Id.*
[14] *Id.* at 827-28.
[15] *Id.* at 828.
[16] *Id.* at 830-31.
[17] *Id.* at 830.
[18] G.M. Filisko, *You're OUT OF ORDER!*, 99 A.B.A.J. 32 (Jan. 2013); Wescott Agri-Prods, Inc., supra note 5, at 1095-96 (citation omitted).
[19] *See, e.g.*, Wescott Agri-Prods, Inc., *supra* note 4, at 1096 (citation omitted).
[20] No. 8:10-md-02173-T-27EAJ, 2014 WL 1338605 (M.D. Fla. Apr. 3, 2014).
[21] *Id.* at *1 n.1.
[22] *Id.*
[23] Leigh Ingalls Saufley, *Amphibians and Appellate Courts*, 14 MAINE B.J. 46, 49 (Jan. 1999).
[24] Eric Hoffer, *The Passionate State of Mind: And Other Aphorisms* (1955).
[25] Naomi Kogan Dein, *The Need for Civility in Legal Writing*, 21 CBA RECORD 54 (Feb./Mar. 2007) (quoting Judge Michael B. Hyman).
[26] Sandra Day O'Connor, *Professionalism*, 76 Wash. U. L.Q. 5, 9 (1998).
[27] *Interviews with United States Supreme Court Justices: Justice Ruth Bader Ginsburg*, 13 SCRIBES J. LEG. WRITING 133, 142 (2010) (quoting Justice Ginsburg) (italics in original).
[28] John W. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 898 (1940).
[29] Duane Benton, *Chief Justice's Address to Members of the Missouri Bar*, Sept. 24, 1998, 54 J. MO. BAR 302, 302 (1998).
[30] J. Timothy Eaton, *Civility*, *Judge Bauer and the CBA*, 28 CBA RECORD 8 (2014) (quoting Judge Bauer; citation omitted).
[31] ABA Model Rules of Prof'l Conduct, Preamble [9] (2015).
[32] *Id.*, R. 8.4(d) (2015).
[33] *E.g., Standards for Professional Conduct Within the Seventh Federal Judicial Circuit* 120-21, 123 (2013).
[34] Filisko, *supra* note 18 (quoting S.C. oath).
[35] *See, e.g., Am. Bd. of Trial Advocates' Principles of Civility, Integrity, and Professionalism*, https://www.abota.org/index.cfm?pg=Civility.
[36] ABA Model Code of Judicial Conduct R. 2.8(B) (2015).
[37] Aspen, *supra* note 8, at 96.
[38] Louis H. Pollak, *supra* note 6 (quoting Justice Kennedy).
[39] Laura Castro Trognitz, Bench Talk, 86 A.B.A.J. 56 (Mar. 2000) (quoting Judge John G. Koeltl, S.D.N.Y.).
[40] ABA Model Rules of Prof'l Conduct, Preamble [10] (2015).
[41] Cliff Sain, Earth's Atmosphere, Springfield (Mo.) News-Leader, Feb. 26, 2008, at 3C (quoting Roosevelt).
[42] Alfred, Lord Tennyson, *Idylls of the King*, *The Last Tournament* (1859-85).
[43] Arthur T. Vanderbilt, *Forensic Persuasion*, 7 Wash. & Lee L. Rev. 123, 130 (1950).

Civility in Lawyers' Writing
Test No. 175

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 Legal Ethics. 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. Courts have sanctioned lawyers but never deny attorneys' fees for incivility.
❑ True ❑ False

2. Some courts have sanctioned the client who, having retained the lawyer, bears some responsibility for the lawyer's conduct.
❑ True ❑ False

3. Personal and vitriolic accusations have an important place as part of a litigation strategy.
❑ True ❑ False

4. Lawyers for aggrieved parties are more likely to receive a serious hearing by firmly, but respectfully, arguing a judge's good faith misapplication of the law to the facts, rather than by resorting to insinuations about the judge.
❑ True ❑ False

5. In *In re Photochromic Lens Antitrust Litigation*, the court publicly applauded the lawyer for crossing the line.
❑ True ❑ False

6. Lawyers whose writing descends into incivility strengthen the client's cause.
❑ True ❑ False

7. Justice Sandra Day O'Connor said that, "It is enough for the ideas and positions of the parties to clash; the lawyers don't have to."
❑ True ❑ False

8. The Preamble to the ABA Model Rules of Professional Conduct recites "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system."
❑ True ❑ False

9. ABA Model Rule 8.4(d) operates against conduct that is prejudicial to the administration of justice.
❑ True ❑ False

10. The ABA Model Rules' spotlight on professional obligation is not fortified by unofficial codes that some professional organizations maintain for their member lawyers.
❑ True ❑ False

11. The ABA Model Code of Judicial Conduct imposes reciprocal obligations of civility on judges in the performance of their official duties.
❑ True ❑ False

12. As members of a largely self-governing profession devoted to the rule of law, lawyers are judged by expectations sometimes lower than the expectations that judge other professionals.
❑ True ❑ False

13. Justice Kennedy calls civility "the mark of an accomplished and superb professional."
❑ True ❑ False

14. Aside from compromising the client's interests, incivility can damage the lawyer's own personal enrichment and professional standing.
❑ True ❑ False

15. The lawyer's first step toward civility may be an early candid talk with the client.
❑ True ❑ False

16. An ABA resolution affirmed the principle of civility as a foundation for democracy and the rule of law.
❑ True ❑ False

17. President John F. Kennedy assured Americans in his Inaugural Address in 1961 that "[C]ivility is not a sign of weakness" as he anticipated four years of face-offs with the British.
❑ True ❑ False

18. The client may mistake the lawyer's civility for meekness, and courtesy for concession.
❑ True ❑ False

19. Attorneys should aim to persuade the judge by denigrating the opposing side.
❑ True ❑ False

20. If the other side is truly bad, the judges are smart enough to understand that; they don't need the lawyer's aid.
❑ True ❑ False

Civility in Lawyers' Writing
MCLE Answer Sheet No. 175

INSTRUCTIONS:

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

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20750 Ventura Blvd., Suite 104
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METHOD OF PAYMENT:

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

Name _____
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_____
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City _____
State/Zip _____
Email _____
Phone _____
State Bar No. _____

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

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

By Mark S. Shipow

Most Fun Job in The Room

Meet SFVBA's Judge of the Year, Hon. Martin R. Barash

Hon. Martin R. Barash enjoys his job. Which makes it that much easier for him to be the dedicated, respected, hard-working jurist that he is. He also is extremely involved in professional and community activities. And he cooks dinner too. His SFVBA Judge of the Year Award is well-deserved.

Photo by Barnett Photography

IT'S NOT SURPRISING WHEN someone who thinks their job is "fun" is good at the job and well-respected. That is exactly the case with United States Bankruptcy Judge Martin R. Barash, who sits in Woodland Hills and Santa Barbara and will be honored as the San Fernando Valley Bar Association Judge of the Year at the upcoming Judge's night on May 25, 2023.

Judge Barash was first introduced to the bankruptcy practice during law school, when he was a summer associate at the then-venerable bankruptcy firm Stutman, Treister & Glatt P.C. in Los Angeles. From early on, he enjoyed the combination of problem-solving, deal-making, litigation and courtroom practice presented in the bankruptcy arena. He earned his J.D. in 1992 from the UCLA School of Law, where he served as editor, business manager, and symposium editor of the UCLA Law Review. Following law school, he clerked for Judge Procter R. Hug, Jr., of the U.S. Court of Appeals for the Ninth Circuit, from 1992 to 1993. He then joined the Stutman firm as an associate, and began regularly appearing in court. From his courtroom experiences as a clerk and associate, he came to believe that judges "have the most fun job in the room." From his perspective, judges contributed to the betterment of society by resolving disputes, were in a great position to mentor lawyers, and had enough flexibility in their schedules, notwithstanding their heavy caseloads, to be able to engage in community, professional and personal activities.

Of course, it took time to get on the judgeship track. Following his stint at the Stutman firm, Judge Barash became an associate at Klee, Tuchin, Bogdanoff & Stern LLP (now called KTBS Law) in Los Angeles. He practiced at the firm from 2001 to 2015, representing debtors and other parties in Chapter 11 cases and bankruptcy litigation, and became the firm's first associate to be made a partner. It was during his tenure at the firm that he started to get on track toward a possible bankruptcy judgeship. Bankruptcy judges are appointed by the Ninth Circuit through an exhaustive selection-committee process, making it somewhat less political than the district court process. That made it even more important for Judge Barash to establish himself as a well-respected, highly qualified bankruptcy expert. Even so, it took a couple of applications, and navigating the rigorous vetting process, to finally be appointed in 2015.

Since then, Judge Barash has found that he does indeed have the most fun job in the room. He continues to enjoy the variety and challenges presented by the bankruptcy practice. He believes that he is playing an important role as a government servant, resolving the constant stream of disputes and problems presented by bankruptcy. Of course, he believes that

part of the "fun" includes maintaining a civil courtroom; he expects everyone to maintain decorum and, to the extent possible, collegiality. As a judge, he responds best when attorneys are candid and straightforward. He strongly urges attorneys to avoid playing fast and loose with the facts and the law, and to refrain from biting rhetoric. He suggests that attorneys focus on the practical aspects of getting clients through bankruptcy and back on their feet, rather than litigating for the sake of litigating. In his view, this is what best serves clients – and the bankruptcy process itself.

In addition to handling cases assigned to him, Judge Barash is active in the judicial mediation program, through which he helps parties settle cases that are pending before other bankruptcy judges. He appreciates the opportunity to act outside the "winner/loser" role of a judge, trying to find common ground for bankruptcy participants to come to mutually-acceptable resolutions.

Judge Barash also appreciates the opportunity he has as a judge to help guide and mentor students, externs and lawyers as they find their way into and through the profession. His mentorship even extends to third-graders, who annually conduct a trial of "Goldilocks" in his courtroom. The young students never fail to impress him with their insights into fairness and justice and their take on right and wrong.

But Judge Barash also has "fun" outside the formal courtroom, making the most of the control he has over his schedule. He served as a member of the board of directors for the American Bankruptcy Institute (ABI) and its Education Committee. He now serves on its Diversity Working Group. He also serves as a Judicial Director of the Los Angeles Bankruptcy Forum, where he is a member of its Committee on Diversity, Equity and Inclusion. Judge Barash is a strong believer that the bar and the judiciary both need to look like the people they serve, and therefore he is a part of various initiatives to help increase diversity along every parameter, including having more senior bankruptcy people mentor more junior members of the profession.

Judge Barash also finds time to act as a judicial advisor to ABI's annual Southwest Conference and its Consumer Practice Extravaganza. He is a former member of the Board of Governors of the Financial Lawyers Conference. He is a volunteer for the Los Angeles chapter of Credit Abuse

Resistance Education (CARE) and was recognized nationally as the CARE Volunteer of the Year for 2022 for his work helping high schoolers gain financial literacy and related "adulting skills," as he puts it. He sees the consequences of financial ignorance and poor financial decisions in his courtroom, and realizes the importance of planting the seeds for using money wisely at an early age, rather than just reacting to the problems later in life.

Judge Barash has served on numerous committees of the United States Bankruptcy Court for the Central District of California and currently serves as chair of its Education Committee, which is responsible for conducting educational programs for judges, law clerks and externs. He is a frequent panelist and lecturer on bankruptcy law and is a co-author of the national edition of the Rutter Group Practice Guide: *Bankruptcy*.

Although very active and busy professionally, Judge Barash also finds time for family. He enjoys time with his wife Lisa, who is the Director of Judicial Clerkships at the UCLA Law School, where she counsels and assists students in securing judicial clerkships. They have three children, one in high school and two in college. In his free time, Judge Barash enjoys cooking and baking – he cooks dinner for the family most evenings, with Italian and Asian being his "go to" dishes. He also likes gardening and photography. For himself and for those he mentors, he stresses the importance of a good work/life balance.

The San Fernando Valley is fortunate to have a judge who is as dedicated and involved as Judge Barash. He is a worthy recipient of the SFVBA Judge of the Year Award. Please join us in celebrating his award at Judge's Night on May 25.

LASC Supervising Judge of Probate and Mental Health **Hon. Brenda Penny**

Administration of Justice Award

Judge Brenda Penny joined the Los Angeles Superior Court in 1997 as a Probate Attorney after 15 years in private practice. As a private practitioner her cases consisted primarily of trust and estates cases as well as business litigation matters.

In 2001 Judge Penny became the Assistant Supervising Probate Attorney for the Court. In addition to her Assistant Supervising Probate Attorney duties, Judge Penny also sat as a judge pro tem in Probate. She served in that role until July, 2014 when Judge Penny was elected to be a Los Angeles Superior Court Commissioner. Judge Penny was assigned to Probate and served as a Probate judicial officer during her tenure as a Court Commissioner.

On October 11, 2018, Judge Penny was appointed to the bench by Governor Jerry Brown. At her oath ceremony on October 24, 2018, Judge Penny was selected to serve as the Assistant Supervising Judge of Probate and Mental Health. In February 2020, Judge Penny was selected to serve as the Supervising Judge of Probate and Mental Health.

LASC Assistant Supervising Judge of Probate and Mental Health **Hon. Robert Wada**

Administration of Justice Award

Robert S. Wada is the Assistant Supervising Judge of Probate and Mental Health for the Los Angeles County Superior Court. He has served as a Judge from December 2017 to the present time. Prior to becoming a Judge, he was a Los Angeles County Superior Court Commissioner serving from September 2008 to October 2011 and then from March 2016 to December 2017. Between his times as a Commissioner, he was the Supervising Probate Attorney for the Court from October 2011 to March 2016. Prior to his time on the bench, he started with the Court as a Probate Attorney I from July 1997 through September 2008.

"Are You Mockin' Me?"[1]

MARK S. SHIPOW
Interim Editor,
Valley Lawyer

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WHAT DO YOU DO WHEN YOU'RE GIVEN A CASE summary, seven pages of exhibits, two percipient witness and two expert witness deposition transcripts of about six pages each, a few jury instructions, and a directive to prepare for trial? Why, of course, you conduct a Mock Trial.

SFVBA recently presented its Third Annual Mock Trial Competition. Eight teams of four law students per team from Pepperdine's Caruso School of Law, Thomas Jefferson School of Law, UCLA School of Law, Western State College of Law, and Chapman's Fowler School of Law conducted mock trials in the Van Nuys courthouses. Judges Paul Bacigalupo, Firdaus Dordi, Graciela Freixes, Leslie Green (Ret.), David Hizami, Mary House (Ret.), Karen Moskowitz, Valerie Salkin, and Andrea Thompson graciously donated their time and expertise to preside over the proceedings. Volunteers from the SFVBA membership acted as evaluators.

The gravamen of the mock case was a civil claim by a person (names of parties and witnesses are gender-neutral so that roles can be played by anyone) who had overdosed on drugs. The drugs may have been laced with fentanyl, which should have been detected by the use of test strips manufactured by the defendant. The essence of the claim was for breach of warranty (that the test strips would detect fentanyl). The key issues in the case were whether or not the drugs in fact had been tested, either by the plaintiff or by the

Best Advocate Award
Teejan Saddy

Best Cross Examination Award
Lauren Carrasco

Best Opening Award
Grace Whitten

Best Direct Examination Award
Neil Edat

Best Closing Award
Joe Kahn

plaintiff's drug dealer, and if so whether the test failed. Two students from each mock trial team, playing the role of counsel, argued pre-trial motions, made an opening statement, examined and cross-examined one fact witness and one expert witness for each side (played by two students from the team), introduced exhibits, and made a closing argument. Counsel were entitled to make objections, which were ruled on by the presiding judge. Students alternated between acting as counsel and playing the role of a witness during the two rounds of competition.

No formal decision on the merits was rendered, but evaluators graded each of the attorneys. Points were awarded based on such factors as: whether the opening statement told a good story and was persuasive; whether direct examination included proper, non-leading questions that elicited logical, coherent testimony; whether on cross-examination counsel was able to control the witness and elicit important testimony that undermined the other party's case; whether counsel was able to effectively introduce and utilize exhibits; and whether the closing argument included strong, persuasive arguments and effectively addressed the other side's arguments. In addition, all counsel were graded on their civility, ethics and professionalism. Of course, these are all the things that jurors and judges would be "evaluating" during the course of an actual trial, and on which the verdict would be based, making this quite close to a real trial experience for the students.

It was obvious from the presentations that these students had spent a significant amount of time and effort preparing for the mock trial competition. That time and effort paid off with truly excellent presentations. Counsel – and the witnesses – knew the facts of the case, were well-prepared for all aspects of the presentation, and made very effective presentations. It is very clear that our profession will be in good hands going forward when these students graduate and take their places among us.

All of the students deserve recognition and applause for their part in preparing and presenting their cases. Based on the points awarded by the evaluators, certain students performed exceptionally well in various aspects of the case, earning individual scholarship awards.[2] The scholarship awards were presented as follows:

The Best Advocate Award, with a scholarship of $500, went to **Teejan Saddy**, part of Team D, from the Thomas Jefferson School of Law.









The Best Opening Award, with a scholarship of $250, went to **Grace Whitten**, part of Team C, from Pepperdine's Caruso School of Law.

The Best Direct Examination Award, with a scholarship of $250, went to **Neil Edat**, part of Team B, from Pepperdine's Caruso School of Law

The Best Cross Examination Award, with a scholarship of $250, went to **Lauren Carrasco**, part of Team C, from Pepperdine's Caruso School of Law

The Best Closing Award, with a scholarship of $250, went to **Joe Kahn**, part of Team G, from Chapman's Fowler School of Law.

In addition, following the preliminary rounds, the two finalists from Teams B and C went head to head, with:

First Place going to Team B, with **Manson Folse** and **Dillon Garcia** as the advocates for Defendant, and **Maxwell Lyster** and **Neil Edat** serving as their witnesses with each team member receiving a $250 scholarship.

Second Place went to Team C, with **Lauren Carrasco** and **Michael Elterman** as the advocates for Plaintiffs, and **Grace Whitten** and **Aryan Ahmadian** serving as their witnesses.

All participants – the law school students, judges, and evaluators – found the Mock Trial Competition to be a rewarding and fulfilling experience. SFVBA appreciates the tremendous effort of Kyle Ellis in putting together and overseeing the entire competition. Kyle could not have run the competition without the efforts of the Mock Trial Subcommittee's Nancy Reinhardt, Judge Valarie Salkin, Matt Kanin, Heather Glick-Atalla, and Linda Temkin. Likewise, the event was successful because of the supporting efforts of the judges and evaluators, and the hard work of the law students themselves and their coaches. SFVBA also thanks Judge Virginia Keeny, Van Nuys Presiding Judge, who facilitated the use of the Van Nuys Courthouses.

Preparations are already underway for the Fourth Annual Mock Trial Competition. Don't miss out on your chance to help and be involved. Keep on the lookout for upcoming announcements.

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[1] Famous line from the movie *My Cousin Vinny*. A must-see for all lawyers.
[2] The funds for the monetary awards were provided by The Valley Community Legal Foundation, the charitable arm of SFVBA. VCLF relies on donations to be able to provide scholarship money to deserving students. Over the years, students have consistently told VCLF that these awards provide an important source of funds for things like computers and basic necessities. You can help and encourage these students by donating at www.thevclf.org, or sending a check payable to VCLF to the Bar office.

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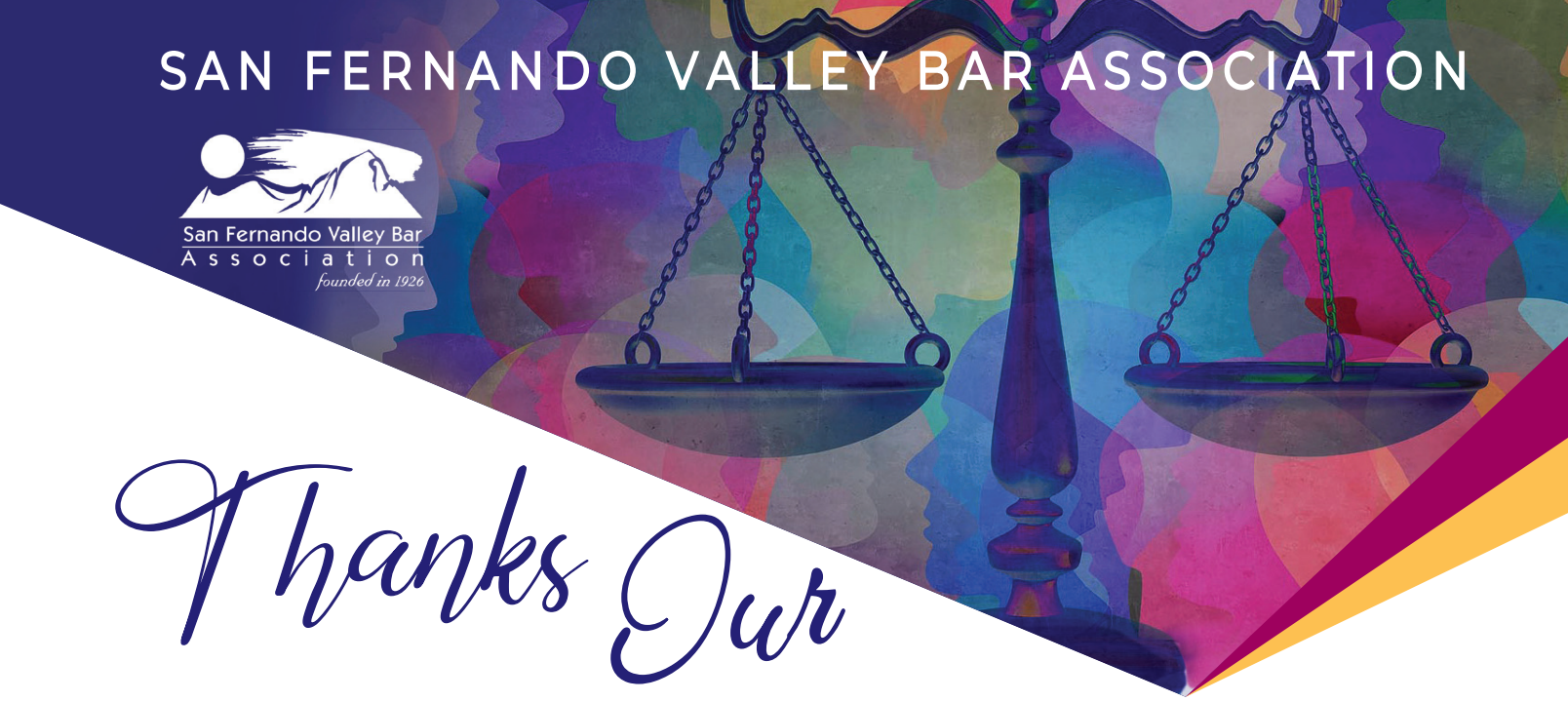

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Law student scholarships were graciously provided by the Valley Community Legal Foundation.

Reception and Final Round were graciously hosted by the University of West Los Angeles, Woodland Hills Campus.

UWLA
University of West Los Angeles

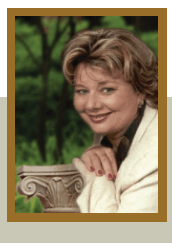
By Ilene B. Fletcher

Weapons of Mass Destruction

"WEAPONS OF MASS DESTRUCTION" ARE not just military arms. They can be Court orders issued after allegations of domestic violence, sexual abuse, neglect, addiction, or mental health issues are made in Family Court. The Court subsequently issues temporary orders that usually preclude the accused parent from having physical custody of the children. These orders may allow a parent and a child to see each other only under the watchful eyes of a professional monitor while the case is going on and until a final judgment has been issued. Whether the accusations prove to be true or false, a parent who finds himself or herself separated from their children and only allowed visitation with a professional monitor present, can cause the family members to spiral into a tragedy so big that it can feel like a "*weapon of mass destruction*" has exploded. The impact can be financial, legal, and psychological in nature, and its effects can be felt throughout the extended family.

Many times, cases can deteriorate for a variety of reasons. For example, court orders for visitation that are not detailed and that are not specific to the family dynamics of that particular case can create problems. Another issue can be hiring a monitor who lacks enough training or experience to effectively handle the case. Finally, there are parents who want to use monitoring as an opportunity to punish the "*bad*" parent, and end up punishing the children as a result. All of these reasons can cause the situation to deteriorate.

Many times, families that are seeking legal counsel may not initially be able to disclose important details to the attorney because of the trauma they are dealing with.



Ilene B. Fletcher is a professional monitor with over 30 years of experience. Her company, Family Visitation Services, provides professional monitors for supervised visitation. She can be reached at info@familyvisitationservices.com.

Since the temporary visitation orders are usually issued by the Court very early in the process (often as the very first step), it is incumbent on family law attorneys to know the case thoroughly prior to appearing before the Court to obtain the visitation orders. It is also requisite for attorneys to understand what types of visitation orders are going to work for the dynamics of a particular family. Ineffective court orders can range from those that provide minimum visitation (one hour, for example) or infrequent visitations (once per month, for example), to orders that do not take into account the activities of the children or the work schedules of the parents. Orders that are too specific in their times and days can also create difficulties for the parents, the children, and the monitors.

Another recipe for disaster is the hiring of a professional monitor who lacks sufficient training and/or experience that is specific to the needs of the family. There are the non-professional visitation monitors, such as friends or family members, who have no training or direction about what their actual role is. There can be an advantage to hiring an agency that employs various monitors, who are properly trained and who can provide backup when the assigned monitor is unavailable.

Even worse than unworkable court orders are those "*high conflict*" parents who are willing to harm the children in the process as part of their vengeful "atomic bomb" approach to Family Court. It is not unheard of to have a custodial parent want to "*brief*" the monitor about all the evils of the non-custodial parent; they often seek the endorsement of the monitor—something that runs contrary to the acceptable position of a monitor as a neutral third party. Non-custodial parents often have no concept of what they have done to harm the children or the other parent. Often these parents will continue to practice harmful parenting, even during a visitation.

Custodial Parents sometimes can use the Court to victimize the non-custodial party by trying to alienate the children from the Non-Custodial Parent. A good professional monitor is able to re-direct this parent and is prepared to stop the visitation should the Non-Custodial Parent not follow the rules for visitation. In addition, a good monitor can report to the court what is really going on with the dynamics of a particular family by submitting detailed reports of every visit to assist the Judge in making the best decision for the family. Reports that come from inexperienced or incompetent monitors can be devasting to the Non-Custodial Parent, especially when taken out of context.

Some parents are so traumatized and are dealing with grief and loss over the lack of contact with their children and with the stress of the court process, that they can barely go on. These feelings sometimes affect how they behave on visitations. There are an abundance of anecdotes detailing the devastating harm that parental separation does

to children, as well as to the parents; this devastation can result in societal harm.

In every case, all the monitor can do is report and document for the Court what is observed; they do not act as child custody evaluators or therapists, even if they are trained as such. While the monitor does have the latitude to stop a visitation to protect the children from harm, most of the time they are only recording what is happening for the attorneys and the court. There are ways a parent can make the time count during the temporary period and really "*win*," not just in family court, but in the bigger sense of the word—for the sake of their children and for their own well being. In California, monitors are governed by Family Code § 3200.5 and the California Rules of Court Standard 5.20 Uniform Standards of Practice for Monitors, and, depending on the county, local rules may also apply.

In Los Angeles County, there are approximately 30,000 children in foster care, according to the Department of Family Services 2017 data snapshot. That's a small town of children separated from their primary attachment figures. According to the 2017 Judicial Counsel of California's Statistics Report, there were over 43,000 dependency and over 35,000 juvenile delinquency cases filed in one year. Marital filings (dissolutions, legal separations and nullities) accounted for 138,520 cases and other family law filings (e.g. paternity, child support) totaled 249,329 cases. That is approximately half a million cases involving families and children filed per year in California. According to the study, only about 2,000 judges or judge fill-ins oversee these cases, and there are no requirements for judges to have family law training or fully understand monitoring.

These orders can be made without the judge being aware of how their orders affect the family because of the lack of information from attorneys. Furthermore, this lack of information does not always take into consideration children's ages, developmental needs, or the relationship with the non-custodial party before supervise visitation started. A mindful, child-centered approach is the best method to minimize the damages to families.

These numerical statistics unfortunately do not quantify how many children are involved in family law matters, and who are subject to crossing over into dependency or delinquency cases. Who really wins in visitation depends on the thoroughness of the attorneys, the Court, and the professional monitor. Visitation monitors, mental health professionals, judges, and attorneys need to work together to create more mindful court orders. Better orders will reduce stress on the court system and on the families affected. Working together in a mindful way can create a winning situation for all parties.

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By Norman A. Chernin[1]

Musings on Real Property Law

I HAVE BEEN PRACTICING LAW for more than fifty years. For almost all of that time, my focus has been on real property law. Recently I have been reflecting on how things that I thought were immutable have been altered.

As we all learned in law school, there is a good deal of formality associated with interests in real property, especially with aspects of holding title to real property. The integrity of our system of landholding would seem to require adherence to recognizable rules that apply to owning, transferring and encumbering of real property. However, just like constitutional law that is based on a single document drafted at a particular time in history, adjustments are necessary over time in order to deal with changes in circumstances that could not have been envisioned by the original drafters of the Constitution or by the creators of the rules affecting real property.

Rule against perpetuities

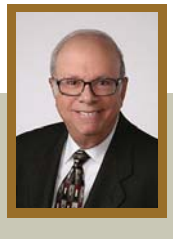
One of the hoariest of these long-standing governing doctrines is the Rule Against Perpetuities. To refresh your memories, this doctrine states simply that an interest in real property must vest, if at all, within twenty-one years from the death of a life-in-being at the time it was created. But as we all know, there is nothing simple about applying this Rule. For instance whose life?—e.g., the last surviving child of a specified person. In fact, interpreting and applying the Rule to specific circumstances can be so difficult that a California court held a number of years ago that it did not constitute legal malpractice to fail to properly apply it.

To overcome the difficulties in trying to comply with the Rule, there is now available for enactment by states a Uniform Act to establish a ninety year safe harbor. California already has a statute creating a sixty year period. The most frequent application of this protection is to leases or contracts of sale which state that the term does not commence until completion of improvements.

Easements

Another evolving area has occurred with respect to easements. We all learned that the creation of an easement requires a grantor, a grantee, a description of the location and purpose of the easement, and a term.

Determining location is straight-forward if it consists of a legal



Norman A. Chernin is a former in-house real estate transactional attorney and title insurance underwriting counsel. He currently acts as a legal consultant to attorneys, and as an expert witness, on title-related issues. He is Chair of the Business Law and Real Property Law Section of the SFVBA. He can be reached at normchernin@gmail.com.

description. But often it is not possible to create a precise delineation of the portion of property to be covered by the easement. Over time changes to topography or use of the affected property may occur which make the encumbered area more difficult to ascertain. I recall an instance where I needed to create an easement for out-of-bounds areas along a golf course. Adjacent residential lots with views from above the course had not yet been graded. It could be expected that actual grading would deviate from the grading plan for civil engineering reasons. My solution was to create an easement on the abutting residential lots extending a specified width from the plotted golf course lot rather than using the measurements of the residential lot itself, and also to provide a similar encroachment easement for the residential lots onto the golf course lots where the actual slope extended beyond the boundaries of the residential lots.

Even the purpose of the easement could be problematic as technology has opened up new interpretations of what constitutes access or similar activities to those delineated in the document. One example is an easement for utility purposes granted many years ago in which installation of fiber-optic cable is now proposed.

Lastly, a specified duration of the easement was often ignored so that easements appear to last potentially forever. As part of the Marketable Record Title Act in California, dormant easements can be extinguished after a specified time. Quiet title actions and declaratory relief actions can likewise be brought to assert that the purpose for which the easement was granted has terminated.

Of course, courts have long recognized that a person can claim a prescriptive easement if the elements of adverse possession without payment of real property taxes can be proved. I recall some years ago participating in a hike led by a Sierra Club member who was asked whether we had a right to be on the private property that we were crossing. His blithe response was that there was a prescriptive right to do so. However, as lawyers know, only a court decree can create such an easement.

But sometimes a situation may arise where all the elements of a prescriptive easement cannot be established, especially the five years of required occupancy of the property. There have been several recent cases (arising primarily out of Ventura County) in which the court has crafted what is referred to as an "equitable easement". Some have viewed this process as the exercise of a private right of eminent domain. Applying long-recognized principles of equity, the court considers the relative harm to the fee owner caused by the encroachment against the harm to the encroacher if the trespass were to be compelled to be removed. Typically the permitted use is limited to the existing encroachment for a designated period of time and compensation may be required to be paid to the fee owner.

Another evolution in the development of creative easements is occurring to accommodate concerns about climate change and environmental protections. In order to effectively utilize solar energy, the sun must be able to reach solar panels, located typically on roofs of buildings. View easements have not been well-received in the past generally; but in essence what is required here is a view of the sun from a property.

Efforts to preserve open space have also led to some interesting developments in easement law. Quite some time ago, a couple of appellate courts created a concept since referred to as a "Gion-Dietz easement". Essentially this doctrine created a right in the public to use private property over which the public had satisfied the elements for a prescriptive easement—i.e. continuous, hostile, etc. occupancy. To avoid such loss of use by court judgment, some landowners were

willing to permit use of their property for recreational purposes, subject to their future right to rescind such use. Of course, inevitably, issues arose over liability for injury to persons so using the property, and a whole area of premises liability law related to such use has been the result.

Conservation easements are also gaining popularity. We are anticipating an article in a later issue this year of the Real Property Journal dealing with the features and issues related to such easements.

Joint Tenancy

We are all familiar with the four unities required to create a joint tenancy interest in real property—time, title, interest and possession. And we likewise are all aware that a joint tenancy can be severed by either joint tenant unilaterally and without the consent, or even knowledge, of the other joint tenant by conveying his/her interest to a third party. However, once again, in appropriate circumstances, courts will overlook what was considered to be an automatic severance. I found this quotation in a law review article: "*California has in practice ignored in varying degrees the "four unities test," while constantly paying it lip service. The courts have ignored it in favor of what is felt is a much more desirable formula, which is to follow the intent of the parties wherever possible, and to preserve the joint tenancy so long as the essential characteristic thereof, survivorship, has not been fatally interfered with.*" When recently presented with the circumstance where a husband and wife holding title as joint tenants conveyed title to themselves as joint tenants as to a one-half interest and to a third party as a tenant in common as to the other half interest, I concluded that a court might uphold this title based on the above quotation.

Until relatively recently, spouses could choose to hold title as either joint tenants or as community property, depending upon which benefit of so holding title they preferred. Now they can choose the best of both worlds by choosing to hold title as community property with right of survivorship.

Covenants, Conditions and Restrictions

For a very long time, courts had repeatedly held that failure to recite a Declaration of CC&Rs in a deed resulted in the grantee acquiring title free and clear of the restrictions contained in such Declaration. Recently, with respect to lots in a residential subdivision, a court held that the grantee was nevertheless bound by such omitted restrictions because the Public Report issued by the California Department of Real Estate and the title report and policy provided actual knowledge of the restrictions. Since no prudent buyer or lender would complete the acquisition or encumbrance of commercial real estate without obtaining a title report and policy, I would expect the same result in a similar situation involving commercial real property.

Environmental Law

In 1970 the California Legislature passed the California Environmental Quality Act ("CEQA"). Initially it was believed that this new statute only applied to government agencies dealing with public land. However, a few years later, the California Supreme Court determined in the *Friends of Mammoth* case that the law was intended to apply to every discretionary decision of a governing body affecting land use. Thereafter, an Environmental Impact Report ("EIR") became an integral part of every land use decision.

At the outset, an EIR for a major project resembled in size the telephone company Yellow Pages. [As an aside for the benefit of younger attorneys—when everyone only had landlines, the local telephone company (and there was only one in those days) produced an annual listing of phone numbers

(the White Pages) and a separate listing for businesses (the Yellow Pages) which was very large.] An EIR covered such arcane topics as prevailing winds as well as detailed descriptions of flora and fauna, among a myriad of other matters. Approval of the completeness of the EIR was, and remains, a pre-requisite for the consideration of the application for any discretionary permission from the governing body, although there was great uncertainty as to what constituted completeness—e.g., how many alternatives to the project had to be considered.

As you might expect, disapproving an EIR was viewed by governing bodies as a good way to prevent approval of a project that was otherwise in conformance with other requirements. Needless to say, a cottage industry was created for under-utilized land use lawyers to become environmental lawyers until land development became feasible again. Since that time, and continuing to this day, CEQA remains an area for a good deal of litigation.

Over time, adjustments to satisfaction of EIR requirements have occurred. EIRs became more focused, and smaller in size, by addressing only relevant issues. Many projects are now approved based on Mitigated Negative Declarations—steps are proposed to deal with the unavoidable consequences of a development. I recall representing a developer of a project on which Indian artifacts were located. The project was approved by creating a mound of these small items to be located nearby. A permanent marker was erected identifying the existence of these artifacts which would be available to generations of archaeology students for future study, but their exact location was not disclosed except to a local university.

More recently, legislative efforts are being pursued to create exemptions from the coverage of CEQA in order to speed-up the development of desired projects, such as sports stadiums, affordable housing, etc.

There is a similar federal law—the National Environmental Protection Act ("NEPA") which requires a similar document entitled an Environmental Impact Statement ("EIS") to be prepared where a federal agency must approve the permit being requested. There are cases interpreting this statute as well but they are not as voluminous as those related to CEQA.

Construction Financing

When I began practicing, most real estate developers were sole proprietorships or general partnerships. It was a risky business because the principals could be personally liable for all of the debts and other liabilities of the business. The other available business entities were not really better. A corporation subjected its owners to double taxation: first at the corporate level and then as to its dividends. A limited partnership would limit liability to the amount invested, but required that the limited partner be a passive investor. Real estate developers are anything but passive. The problem was solved by the statutory creation of limited liability companies ("LLCs") which protected the members from liability in excess of their investment, but permitted them to be active participants in the business.

For many years new construction was financed by construction loans made by banks. The amount of the loan was often the full cost of construction. Banks were willing to make these loans because they were packaged with a permeant loan, typically from an insurance company, which would "take out" the construction lender pursuant to the terms of a tripartite agreement which was entered into by all the parties at the outset. Alas, sometimes problems could arise.

I recall an instance where a prominent developer's project had a mechanic's lien recorded against it. The permanent lender refused to fund its loan until the lien was removed. The developer said he would pay it from funds from the construction lender who did not want to pay it until the permanent lender agreed to fund. As negotiations proceeded, the developer would periodically call his wife about postponing their plans to immediately leave on a vacation and his bankruptcy lawyer to tell him to prepare a petition in case the issue was not resolved. To end the suspense in this tale, I will tell you that the title company (under its Indemnity Agreement with the developer) and the bonding company worked out a deal.

Banks often found the process of handling periodic disbursements burdensome. Independent construction disbursement agents stepped in to perform this function for them. I recall representing an insurance company that

contemplated making a construction loan directly. After I explained the effort that would be involved in monitoring disbursements, my client decided to nonetheless make the loan in a single disbursement secured by a letter of credit.

Sometimes the lender of construction funds would proceed without a takeout lender in place, requiring the borrower to line-up a bridge loan from a hard money lender. Such an approach was not uncommonly the precursor to a bankruptcy filing by the borrower.

Increasingly, the source of funds for new development became more sophisticated as more money began to be provided by Wall Street investment entities. There are now tranches of funding with complicated formulas for computation of re-payment, and which require inter-creditor agreements among the various players in the financing stack.

Mezzanine Financing

Traditionally lenders who made loans related to real estate secured repayment by recording mortgage liens against the property. In California deeds of trust were the favored vehicle because of their ease in foreclosing non-judicially. But being a junior lender could be precarious in the event of default, and many lenders who were required by their formation documents or by law to be a first lender precluded the borrower from obtaining secondary mortgage financing The use of LLCs by borrowers offered another avenue.

An LLC which owned real property could obtain mortgage financing encumbering its property, but then pledge its membership interests to another lender under the Uniform Commercial Code ("UCC") to obtain additional financing. Knowledgeable mezzanine lenders required that the Operating Agreement of the LLC contain language which their attorneys believed would make the entity "Bankruptcy-remote". Title insurers created mezzanine endorsements to further protect the lender. Among other coverages, these endorsements protected against loss arising from imputation of knowledge of the individual members in the borrowing entity to the lender's representative if they succeeded to those members.

This discussion of the evolution of the areas of real property law covered in this article is not intended to be all-inclusive. If you have other topics that you think would be worthy of further discussion, you are encouraged to write an article.

[1] EDITOR'S NOTE – Many *Valley Lawyer* articles are geared toward teaching and informing our readers, with supporting statutory and case citations. The author's goal in this article is to provide food for thought in an area of the law – real property – that has historically presented innumerable legal issues and in which our members typically have had wide-ranging experience. The author and editor encourage our readers to use this article as motivation to write their own law-based articles on specific topics.

Valley Retro

Looking Back at the Bar

By Mark S. Shipow, Interim Editor

Announce New Valley Bar Members

Twenty-six new members were enrolled by the Valley Bar Association in January. Special congratulations are in order for the many new members who are also new admittees. The new members are:

Arabian, Armand, 14411 Vanowen Street, Van Nuys, California.

Abrams, Max, 1108 Celis Street, San Fernando, California.

Berglund, David Weston, 14423 Hamlin Street, Van Nuys, California.

Billips, Dale D., 6842 Van Nuys Boulevard, Van Nuys, California.

Dix, Julius A., 14011 Ventura Boulevard, Sherman Oaks, California.

Gallant, Philip G., 14416 Hamlin Street, Van Nuys, California.

Greenberg, David H., 1633 Westwood Boulevard, Los Angeles 34, California.

Hanson, Roger Sandberg, 8447 Wilshire Boulevard, Beverly Hills, California.

Kaufman, Bruce M., 1108 Celis Street, San Fernando, California.

Korn, Michael, 18645 Sherman Way, Reseda, California.

Leeds, Charles Stanton, 10889 Wilshire Boulevard, Los Angeles, California.

Magee, Frank Joseph, 1633 Westwood Boulevard, Los Angeles, California.

Maslin, Harvey Lawrence, 14328 Victory Boulevard, Van Nuys, California.

Mattis, John J., 15300 Ventura Boulevard, Sherman Oaks, California.

McCann, Daniel Steven, 18075 Ventura Boulevard, Encino, California.

McCoy, Thomas F., 461 South Boylston, Los Angeles, California.

Nagin, Lawrence Morris, 12345 Ventura Boulevard, Studio City, California.

Newman, Meyer, 14401 Delano Street, Van Nuys, California.

Oliphant, David J., 2222 North Figueroa, Los Angeles, California.

Ordas, Dale E., 1336 Wilshire Boulevard, Los Angeles, California.

Pease, Lucinda, 3600 Wilshire Boulevard, Los Angeles, California.

Ray, Irven C., 13701 Riverside Drive, Sherman Oaks, California.

Shayne, Sherwin Allen, 15130 Ventura Boulevard, Sherman Oaks, California.

Standing, J. Howard, 1741 North Ivar Avenue, Hollywood 28, California.

Walsh, William, 501 South Brand Boulevard, San Fernando, California.

Kestler, Thomas P., 1010 South Flower Street, Los Angeles, California.

The March 1966 edition of *Bar Bulletin* listed among its new members a future icon of the profession: Armand Arabian. He would be an active, respected member of SFVBA for decades thereafter, and, of course, an Associate Justice of the California Supreme Court.

Law Practice Economics Survey

(Continued from Page 3)

legal secretary in the San Fernando Valley is $446.28. This compares to $408.54 paid in 1961. The average legal experience of a legal secretary in the San Fernando Valley is 7.1 years, and the average number of hours worked per week is 37 hours.

Two out of three employers give fixed periodical increases to their secretaries, while the balance give them upon merit. A very small percentage of the employers of legal secretaries give a bonus based on the income derived by the office.

Very few of the employers pay overtime to their secretaries.

The average hourly rate paid to secretaries who are employed on a part-time basis is $2.54.

One-third of the attorneys use an outside secretarial service and two-thirds do not.

Average Net Income Per Attorney: The average net income for all attorneys represented in the survey is $18,746.00. This computation takes into consideration both sole practitioners and members of partnerships. It should also be kept in mind that the average attorney has been in practice 11.5 years and in the San Fernando Valley 8.9 years.

The income of Valley attorneys ranged from a low of $4,000.00 to a high of $53,000.00 per year. A listing of income by categories is as follows:

$7,499.00 or less	7%
$7,500.00-$9,999.00	14%
$10,000.00-$14,999.00	11%
$15,000.00-$19,999.00	29%
$20,000.00-$24,999.00	14%
$25,000.00-$29,999.00	10%
$30,000.00-$34,999.00	10%
Over $35,000.00	5%

The average income of Valley attorneys was broken down into categories of length of practice as follows:

4 years or less	$12,966.00
5 to 10 years	17,090.00
11 to 15 years	21,766.00
Over 15 years	21,333.00

It was interesting to note that the average net income for attorneys practicing alone was $18,423.00, while average for two man partnerships was $19,546.00. However, average for three man partnerships was $16,794.

The ratio of costs to gross income was: sole proprietorships, 47.6 per cent; two man partnerships, 42 per cent; three man partnerships, 45.3 per cent.

(To Be Concluded Next Month)

Legal Aid and Lawyers' Reference Committee was mentioned as a desirable goal. Of the four attorneys who serve on a committee of seven, one is the current president of the San Fernando Valley Bar Association, and the other three are appointed for one year only. Upon motion duly made and carried, it was resolved that in the making of such committee appointments there be the policy of reappointing the same persons so that each lawyer, except the current president of the San Fernando Valley Bar Association, serve for a period of three years, and that the terms served by the remaining three lawyers preferably be staggered.

Those wishing to serve as Judges Pro Tem in Van Nuys for the purpose of hearing civil actions were asked to contact David L. Shane. A minimum of five years' experience as an attorney was deemed to be a prerequisite.

Upon motion duly made and carried, a resolution was adopted that the cost per ticket of the San Fernando Valley Bar Hi-Jinx be increased from a margin of $2.00 to $2.50 over and above the cost per plate, so as to cover entertainment expenses.

There being no further business, the meeting adjourned.

DICKINSON THATCHER,
Secretary.

How much were you making in May 1965? (How many of you had even been born yet??) Compare that to the income survey published in that month's edition of *Bar Bulletin*.

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