



PROMOTING JUSTICE SINCE 1877

ALAMEDA COUNTY BAR ASSOCIATION

MARCH/APRIL 2005

Vol. 36, No. 1

The Bulletin



Spring unlocks the flowers to paint the laughing soil.

Reginald Heber (1783-1826)

Is A Malpractice Insurance Crisis Looming In Your Horizon? Are You Ready?

Over 15 ~~41~~ carriers have withdrawn from the California market. Will your carrier be next?

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THE BULLETIN

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To promote professional development, ethics, and civility in the practice of law;

To promote diversity in the legal community;

To promote the fair and equitable administration of justice;

To improve access to legal services for residents of Alameda County; and

To promote communication and cooperation among the bench, the bar, and the community.



The Need for an Independent Judiciary and an Independent Bar

The need to have an independent judiciary has been a growing topic in our profession, sparked by virulent political attacks on some judges for a decision they made (I heard about one in Sacramento; the local bar rallied to defend the judge and helped put a stop to the witch hunt). This is an important topic we need to be mindful of. Judges need to make their decisions based on legal analysis, not the power of the political winds. It also seems that sometimes individuals are nominated for judgeships primarily based on their ideological commitments rather than their legal knowledge, experience, and ability. This is not to say judges should always ignore social and political conditions. Jurisprudence has to advance as our society advances. Otherwise, "separate but equal" might still be the law of this land.

Not talked about as much is the need also for an independent bar. Lawyers, too, need to be able to make as objective a legal analysis as possible, regardless of the viewpoint of their employer or boss. The recent nomination hearings on Alberto Gonzales to be the attorney general of the United States brought this home to me.

I was able to listen to some of the nomination hearing and also read the comments of Senators Dianne Feinstein and Harry Reid in explaining why they voted no on the nomination. (Neither is known as being exactly radical leftists). I was disturbed by what I perceived as evasion on the part of fellow lawyer Gonzales. He, at critical moments, gave what I felt was the stereotypical "lawyer's answer," meaning no answer at all. I am sure most of us have done this at times, but in the monumentally important action of confirming the highest law enforcement official in our country, it did not sit well.

The central topic for the confirmation process was, of course, the so-called Torture Memo. The main premise of the memo is well known: that the new conditions of the "War on Terror" have rendered "obsolete Geneva's strict limitations on questioning enemy prisoners." The dean of Yale Law School reportedly said he had never seen such bad legal reasoning as contained in the memo. A couple of weeks ago, I was fortunate

to be able to attend a luncheon lecture at the Commonwealth Club by Stanford International Law Professor Allen Weiner. He had many interesting things to say, but one that really struck me was when he said that the Torture Memo had "no legal analysis." Rather, it was simply a proclamation.

One of the points that Senator Reid made was how the military lawyers, the JAGs, had strongly opposed the direction to ignore the Geneva Conventions. These are the military's own lawyers, essentially being overruled by a civilian White House lawyer. And I thought the military was supposed to be the more gung-ho aggressive types.

It seems that Gonzales was more concerned with providing his boss with what he wanted to hear rather than the superlative

We are, after all, talking about legal justification for torture.

and thorough legal analysis that such a supremely important topic demanded. We are, after all, talking about legal

justification for torture. His conduct stands in stark contrast to the JAG's. In looking at this, I also recall how some Enron lawyers wrote memos warning company executives that some of the proposed dirty tricks to manipulate California's energy market were questionable or illegal, as well as some of the accounting shenanigans they wanted to pull. Now, some of those executives are probably in jail.

We are certainly in trying times for our profession on many fronts. It is important that we reaffirm publicly, and to each other, that lawyers have a duty to provide sound and objective legal analysis, regardless of what the boss wants, and regardless of our own individual political beliefs.

ACBA President Victor R. Ochoa is a solo attorney in Oakland.

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Trusts that Don't Work: Why Elder Law Attorneys Get Gray

It is very common for a client to present the elder law attorney with a trust done years ago, more often than not by an unsupervised paralegal or "trust mill." The latter are usually in a vinyl binder, maybe with other documents such as powers of attorney, pour-over wills, instructions for funding the trust, and so on. The trustors, whether the client or the client's parents, are quite confident that these documents mean that all "affairs are in order." Even when a reputable estate planning attorney has prepared the trust, often it does not work well in the event of incapacity. Here are the most common problems:

1. The assets are not in the trust. Maybe they were never put there, maybe a home was taken out for re-financing or a Reverse Annuity Mortgage and never deeded back in, maybe the efforts to put the assets into the trust failed for whatever reason. (In one current case, the letters were written and signed, but never mailed.) This could be cured, if indeed the terms of the trust are helpful under the present circumstances, if there is still capacity to make transfers, or there are durable financial powers of attorney.

2. There is no durable financial power of attorney to manage financial affairs that do not concern the assets in the trust. Examples are transferring assets to the trust, signing tax returns, getting information about annuities or IRAs that may impact MediCal planning, claiming insurance benefits, and so on. The legal description of the principal's real property and the assessor's parcel number, along with authority to transfer assets to a trust, should be in the power. There may also be no Advance Health

Care Directive. Current standard practice should include both these documents.

3. There is no device for removing the original trustor(s) for incapacity, no objective standard for determining incapacity, or standards that do not work. Having two doctors release personal medical information without authorization (prohibited by state and federal statutes, although many doctors still do it as a matter of course) is the usual device. Sometimes they must do so "under penalty of perjury" or by notarized document. Most

doctors will not take the time to do either. Or, the language says that the successor trustee comes into office upon the incapacity of the original trustee, but there is no method provided for documenting incapacity. Remember that a third party, such as a title company, will want to be sure that the person seeking to act as trustee, is actually in office.

Amazingly, some trusts provide that the original trustee must die before a successor takes office.



More than one child is named as successor co-trustees, but it is not clear whether they must act together, or singularly. If they must act together, transactions will be cumbersome, but perhaps the trustors had a good reason for not wanting any child to act alone.

4. More than one child is named as successor co-trustees, but it is not clear whether they must act together, or singularly. If they must act together, transactions will be cumbersome, but perhaps the trustors had a good reason for not wanting any child to act alone. If any one can act alone, will the third party be comfortable accepting the authority of one without the approval of the others?

Better to name one, then another if needed, then another if needed after that, and so forth.

Priscilla Camp is an attorney in Oakland.

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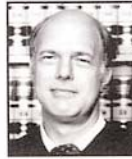
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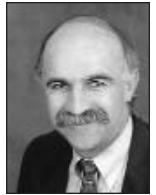
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Being Less Boring

Trials can be pretty dreary affairs. Not for us lawyers, of course—we think we are brilliant, our witnesses dynamic, and our exhibits compelling. But, according to Marin County Superior Court’s Hon. Lynn Duryee, for judges and juries most trials are like Bill Murray’s *Groundhog Day*, where he relives the worst day of his life over and over and over. Here are some tips to make your trials more interesting for everyone.

Cut to the Chase. Sometimes it’s effective to slowly build to a dramatic conclusion or lull a witness on cross-exam with a stream of seemingly trivial questions before hitting him with the million dollar baby. However, these things are hard to do and your fact finder is usually asleep by the time you get to your nugget. The best and safest approach is to focus the fact finder on the nugget right away. They’ll get the impression that they should pay attention to you and your witnesses, and they will get your point.

Avoid Repetition. The favorite objection of judges and juries is “Asked and Answered.” Repetition sends the message that the lawyer is boring and thinks her fact finder is stupid.

Think Visual. Psychologists tell us that most people learn best visually. The “ensions”—attention, comprehension, retention—are enhanced up to 500% by information presented visually rather than aurally. Use photos, demonstrations, videos, computer animation, PowerPoint presentations, diagrams, and so on, whenever you can. Think of them as your special effects. Visuals will make you a more effective communicator and a more interesting one.

Watch your Language. The courtroom makes all of us drift into legalese. It’s kind of fun to talk like that but way boring for regular folk and a communication barrier even to many judges. Cut down the length of your words and sentences. Talk like a real person. However, you don’t want to talk down to your judge and jury either. And sprinkle in some visual images—“The train roared down the track and slammed into the van.”

Tell Stories. People love stories and storytellers. The best movies are those with great scripts; the best trial lawyers are those who tell great stories. Recent neurological research using MRI brain scans confirms the common sense notion that memories, even false memories, are more powerful when they have emotional content. As you present your information, describe the facts using storytelling techniques. But don’t call your version of the truth a “story.”

Be Yourself Plus. Bing Crosby became the most popular singer and movie star of his era because he was the first to learn how to use the microphone. Before that invention, people couldn’t use a natural, conversational style when making presentations to audiences of any size. The most effective contemporary speakers, people like Bill Clinton, Oprah Winfrey, and Jon Stewart, have a relaxed, everyday delivery, as do great trial lawyers like Jim Brosnahan and Barbara Caulfield. So don’t check your personality at the courthouse door. Be yourself, but also be better than yourself by concentrating on good eye contact and variation in your tone, volume, and pacing. The best way to be better than yourself is to practice, just like all good entertainers do.

Be Prepared. You can’t do any of the above without preparation. It’s the sloppy lawyers who usually ignore these guidelines to less boring advocacy. A good scout and you may win an Academy Award for trial advocacy, over and over and over again.

Tim Hallahan is director of the Advocacy Skills Program at Stanford Law School, a national CLE speaker, and co-founder of the Hecht Training Group, a litigation skills training firm. Contact him at thh47@pacbell.net.



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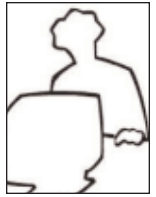
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A Holistic Approach to Compliance

Few issues in the last couple of years have been more bewildering and frustrating for organizations than government rules regarding the security and retention of electronic data. More than one organization has probably wished there was a way to comply, in one fell swoop, with all the regulations, from the *Sarbanes-Oxley Act* to the Health Insurance Portability and Accessibility Act (HIPAA) to California's SB 1386. Unfortunately, there is no checklist for complying with all the rules. But there are some basic strategies companies can use that will help.

Be Security- and Privacy-Conscious

Simply being security- and privacy-conscious goes a long way toward compliance. For example, a company that implements sound user authentication practices is going to do better at protecting personal health information—a major requirement of HIPAA. Strong user-authentication processes, along with other security policies, may also constitute “internal controls,” which companies are required to have under *Sarbanes-Oxley*. And implementing a sound security plan would defend against the consequences of SB 1386. That law, which affects all companies that do business in California, requires them to notify a customer when there's been a security breach regarding that customer's personal information.

It's All in the Planning

Planning for the regulations is often an enlightening process. Preparation makes companies concentrate on areas, such as security and privacy, in ways they may not be used to. For example, many federal regulations require a risk assessment. A thorough risk assessment may show holes that the company didn't know existed. A risk assessment may also help identify programs to cut. The risk assessment stage is one area in which thinking holistically about compliance can be fruitful. A good strategy is to have one risk assessment for all the regulations. Or, if that's not possible, use the same firm for the assessments. Mark Doll, Ernst & Young's director of security and technology solutions for the Americas, was once asked by a client to reconcile a HIPAA risk assessment with one for the ISO 17799 standard. “It would have been cheaper for us to have done a new assessment,” he said.

Don't Be Myopic in Your Approach

Companies sometimes take a myopic approach to compliance. They think of compliance as an issue for specific departments, rather than the entire organization. For example, HIPAA requires that patient data be handled properly. So, a company may implement procedures for protecting the servers housing that data. The problem with this approach is that users outside the department housing the servers won't be sure which data is or is not private and may not know the proper procedures for handling private information.

To avoid such issues, an organization needs to assemble a group that oversees compliance. For example, in larger organizations, a chief risk officer (CRO) is often appointed. Ideally, the chief information security officer and the chief security officer, who handles physical security, would report to the CRO. The chief security officer should be involved in compliance efforts because the regulation of physical security, such as access control, is an important element of the *Gramm-Leach-Bliley Act* and HIPAA.

Compliance can also reach beyond company boundaries. A company that falls under SB 1386, for example, needs to add language to its contracts so that partners know about issues that may be problematic. For example, if you have an offshore outsourcer, you need to add language to their contract that requires them to notify you if their information systems get compromised. This will allow you to notify your customers and fulfill your obligation under SB 1386.

Given the above and the fact that your compliance group also needs to communicate with the rest of the organization on how compliance affects their daily actions, you may want to add legal and department head representatives to your compliance oversight group. Please visit isaca.org/cobit for the best compliance resource we've found to date.

If you have questions or concerns about your particular situation, please e-mail Tom Snyder at tpsnyder@xantrion.com. He will use your input to direct future columns.



Noshing News

BILL GIBBS

Noshing in the Footsteps of Lewis and Clark

The years 2003-2006 mark the bicentennial of the Lewis and Clark expedition. My faithful traveling companion DJ and I happened upon an American West Steamboat Company brochure incorporating a trip on an authentic Stern wheeler, up the Columbia River to the Snake River and back to Astoria, Oregon, that also featured a food and wine cruise with Cory Schreiber, the noted Chef/Owner of the Wildwood Restaurant in Portland. We jumped at the chance to indulge ourselves in an historical adventure while enjoying good food and wine at the same time.

First, a little history for those of you who don't remember the fine details of one of the most epic feats performed in American history, which was related to us by the cruise historian via daily lectures. On February 23, 1803, Congress appropriated the sum of \$2,500 to fund the Corps of Discovery, and appointed Meriwether Lewis as its commander. In December 1803, America and France completed the agreement to transfer the Louisiana Purchase, which would extend the U.S. territory west to the Continental Divide. President Thomas Jefferson's master plan was to find the fabled Northwest Passage that connected the Atlantic to the Pacific and, to that end, charged Lewis and his co-commander William Clark and the Corps of Discovery to explore the lands from St. Louis to the Pacific Ocean, which the U.S. had just acquired. (They did not discover the Northwest Passage—that took another 100 years or so, and when it was discovered, it was not commercially useable.)

The weather was typical of November in the Northwest. We were on board the Empress of the North, one of two sternwheelers operated by the company. U.S.-owned and registered, it measures 360 feet long by 58 feet wide and carries up to 235 passengers. It has a very shallow draft, which allows it

to go places that other bigger ship cannot, such as through the seven locks on the Columbia River.

Three comfortable coaches followed the boat up and down the river and provided ground transportation for the various sidetrips—Mt. St. Helens, and several Interpretive Centers along the way, many of them with Lewis & Clark themes. We went up the Columbia as far as Clarkston and Lewiston (named for guess who?) and then took jetboats up the Snake River to



President Thomas Jefferson's master plan was to find the fabled Northwest Passage that connected the Atlantic to the Pacific.

Hells Canyon National Recreation Area, which is some of the most pristine wilderness in the U.S. Much of this area is reachable only by boat, unless one wants to walk thousands of miles across hill and dale.

We also went back down the Columbia River to Astoria, at the mouth of the Columbia, to Fort Clatsop National Park and environs. This is a replica of the fort where the Corps spent three months rarely seeing the sun. It was cold, wet, and

dreary—not a place that I would want to spend more than a few hours, let alone three months!

The food was an equally important part of the trip. The meals provided by the ship were good, but Cory Schreiber made it even better. Chef Schreiber has his roots in Portland, for several generations, and returned there some ten years ago after a stint as the Executive Chef at the now defunct Cypress Club in San Francisco. He returned to Portland in 1994 and opened Wildwood and the rest, as they say, is history.

I discovered his restaurant shortly after he opened it, and I have been going there ever since whenever I am in Portland. As I grew up there, I return several times a year, so I have enjoyed his cuisine for years. He won the 1998 James Beard Award for the best chef in the Pacific Northwest. His mantra is cooking from the source, which means that he utilizes the bounty of the area—produce, meats, poultry, and fish. His first cookbook, *Wildwood: Cooking From The Source In The Pacific Northwest*, came out in 2000.

He designed three winemaker dinners, pairing premium Oregon wines with Pacific Northwest cuisine. The first dinner presented Adelsheim Vineyard wines—a 2003 Pinot Gris, a 2002 Pinot Noir, and a 2002 Chardonnay. For the appetizer, we had the sautéed Oregon chanterelles on toast, and the main course was a butter-sautéed chicken breast in a bed of Washington cider-braised apples with cabbage and parsnips. The winemaker, David Paige, presented his wines and they were all well received. Adelsheim has been in the wine business in Oregon for over thirty years and operates a modern winery on a 165-acre estate in the northern Willamette Valley. They are well known for their Pinot Noir.

The second dinner featured the King Estate Winery. Dinner started with Cory's renowned dungeness crab cakes with orange, fennel, and watercress salad, which was accompanied by the Wineries signature 2003 Pinot Gris. The roasted acorn squash and cider soup complimented the 2000 Chardonnay. The main course was a Painted Hills rib eye steak with porcini-pinot noir barbecue sauce and garlic-mashed potatoes that went well with the 2001 Pinot Noir. The King family got into the wine business in 1991 and began planting 235 acres in the southern end of the Willamette Valley near Eugene. They also specialize in Pinot

Gris, Pinot Noir, and, to a lesser extent, Chardonnay. They are an organic winery, having been certified in 2002.

The third dinner featured Yamhill Valley Vineyards wines—Pinot Gris, Pinot Noir, and a very nice Pinot Blanc reserve that accompanied the roasted beets appetizer. The Pinot Gris went well with oyster pan roast. Their 2000 Pinot Noir went very nicely with the herb salmon baked on rock salt with Pinot Noir-braised leeks and caper aioli. This is another Cory Schreiber signature dish. This winery is likewise noted for their Pinot Noirs. They are located in the Willamette Valley about one hour southwest of Portland and have been in the wine business since 1983. Stephen Cary is the winemaker and shared his wine and winemaking secrets with the passengers. All of the wineries

are open to the public, and if any of my faithful readers are interested, I will be happy to provide more information.

Another interesting portion of the trip featured visiting several Washington wineries in the Walla Walla Valley area, where we were treated to tours of the various wineries, as well as tasting their products. There are a host of wineries in the region, which is primarily known for production of red wines, particularly Cabernet Sauvignon, Merlot, and Syrah, and smaller quantities of Sangiovese and Cabernet Franc. Walla Walla is located in Southern Washington, not far from the Columbia River, and traces its grape-growing back to the late 1850s when immigrants started growing grapes and making wine for their home use. This has grown into a substantial enterprise, with more than fifty wineries operating in the region. It even has its own separate American Viticultural Area (AVA).

Overall, it was a worthwhile trip, even though I gained more weight than I needed. I enjoyed visiting some of the small towns that you would not ordinarily see flying over them or

by passing them on the interstates. I found that public libraries were also very helpful in pointing out local areas of interest to visit, in addition to providing free internet access.

If anyone is interested in more information regarding the cruises, which will continue throughout 2005, feel free to give yours truly a call. You can also reach American West Steamboat Company at (800) 434-1232 or americanweststeamboat.com. Ciao.

Hayward attorney Bill Gibbs has been reviewing restaurants for THE BULLETIN for many years.



Chef Cory Schreiber's mantra is cooking from the source, utilizing the bounty of the area—produce, meats, poultry, and fish.

Installation Memories

The ACBA formally installed its officers and directors at a reception on January 13 at the Oakland Museum of California. Rocio V. Fierro of the Oakland City Attorney's Office served as mistress of ceremonies, and State Bar President John Van de Kamp was our special keynote speaker. Mr. Van de Kamp discussed the importance of voluntary bar associations and their contributions to the legal community. He also presented a \$9,000 contribution from the State Bar Foundation's to the Volunteer Legal Services Corporation

The installation was followed by the presentation of the ACBA's Distinguished Service Awards. The Judicial Distinguished Service Award was presented to the Honorable Barbara J. Miller, presiding judge of the Superior Court of California, County of Alameda. The Individual Distinguished Service Award was presented to Betty J. Orvell, a partner at Reed Smith, member of the ACBA Volunteer Legal Services Corporation Board of Directors, and dedicated volunteer. The Community Service Distinguished Service Award was presented to Patricia Loya, executive director of Centro Legal De la Raza, which provides free and low-cost legal services, counseling, and referrals to create a fair and just society by protecting and upholding the rights of low-income, Spanish-speaking, and immigrant communities.

We would like to thank our generous sponsors of this event: Donahue Gallagher Woods; Kazan, McClain, Abrams, Fernandez, Lyons & Farrise; Office of the Oakland City Attorney; and Reed Smith.



Rocio Fierro & Patricia Loya



Judge Barbara Miller & Spencer Strellis



Judge Jon Tigar



Cheryl Hicks, Judge Brenda Harbin-Forte & Pam Jester



Victor Ochoa and Spencer Strellis



Judges Patrick Zika & Julie Conger



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Judge Barbara Miller & Spencer Strellis



John Van de Kamp and Spencer Strellis

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Drafting Sweepstakes Rules: Client Landmine

TSAN ABRAHAMSON

No Purchase Necessary. Void in New York and Florida. Sponsor reserves the right to substitute prize. These words may look familiar if you've ever bothered to read the mice-type on a sweepstakes or contest, but if your client wants you to draft a set of rules for his upcoming gasoline give-away, could you do it? While most attorneys would—and probably should—deflect a rule-drafting task to a promotions attorney, it never hurts to understand the common pitfalls involved in creating a promotion for your client.

At the outset, attorneys should understand that much of promotions law is primarily state-governed. Accordingly, there is no federal treatise that outlines how rules should be drafted. A good promotions attorney will understand the quirky laws of each state as well as the general rules that apply to most states. Such understanding can take some considerable research, but general practitioners should understand the basics. Promotions are often categorized as either sweepstakes or contests. Needless to say, give-aways, rebates, gift cards, and other forms of offering a prize are important, but contests and sweepstakes tend to confuse clients the most, and are a good starting point for getting through the maze of distinctions within the law.

Any contest or sweepstakes (other than state-run Lotto promotions) must contain only two of the following three elements: prize, the element of chance, and consideration. Sweepstakes, or games of chance, eliminate the element of "consideration." The winner is determined by random drawing from among a pool of entries. No form of consideration can be required to enter a sweepstakes. Contests, on the other hand, eliminate the element of chance. In a contest, the winner is determined from among a pool of entries by using specific judging criteria to score whatever skill is the

subject of the promotion. A promotion that involves all three elements, namely a prize, consideration, and chance, is considered an illegal lottery and can subject your client to significant legal penalties. All fifty states are consistent regarding this particular component of promotions law.

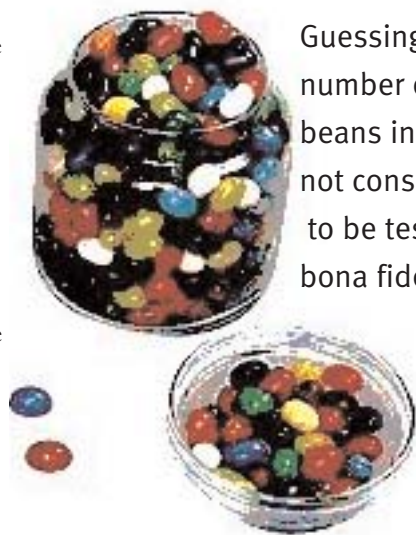
"No purchase necessary" is the standard language used in the fine print to accommodate the proscription against consideration in a sweepstakes, and it is especially important where consumers have an option to be entered to win upon a purchase. This is known as the "alternate method of entry."

Adding such text to the rules, however, is not always sufficient to avoid liability. For instance, if a six pack of soda gives a contestant six chances to win, then so too must a non-purchasing entrant get six chances to win. Moreover, the consumer who wants a free entry must be able to easily procure his entries. This is known as an equal dignity provision.

In addition to the foregoing, equal prominence provisions in most states require the free entry option to be prominently displayed and not buried in the fine print. Though enforcement of this provision is sporadic, clients who are promoting to children may have problems if the free method is too small to find. Recently, the Get

Wonked promotion, sponsored by Nestle, was tagged by the Children's Advertising Review Unit for, inter alia, the mice-type it used to explain that children need not actually purchase the candy in order to win.

In a game of skill, contestants are asked to engage in some activity, be judged, and win a prize if they have the highest score. The law in all fifty states requires that a sponsor of a contest provide judges specifically qualified in the area to be



Guessing the number of jelly beans in a jar is not considered to be testing a bona fide skill.

judged. They also require that sponsors outline with specificity the judging criteria that will be used. Clients who merely want to use marketing executives, for instance, to judge an essay contest where those executives have no specific expertise in writing or English, should be counseled away from administering contests. Similarly, if the client is really trying to create a sales opportunity and isn't testing a bona fide skill, then the client may be better off promoting a coupon rather than holding a contest. Guessing at the number of jelly beans in a jar is a common promotion that is not considered to be testing a bona fide skill. Accordingly, regardless of the guess, all entries (right and wrong) must be given an opportunity to win the prize, even if they don't guess at all.

There are numerous other obscure issues that can plague a promotion and complicate rule drafting. Offering a prize that is federally regulated, such as alcohol, milk, gasoline, or weapons, invokes very specific disclosure requirements. Sweepstakes wherein the aggregate prize value exceeds \$5,000 must post bond in certain states or remove them from eligibility. Requiring an in-store visit may also invoke specific state codes. California, for instance, has very specific disclosure requirements for sweepstakes that involve a store visit and prohibits awarding a prize of alcohol. Rhode Island requires state registration for in-store visits.

Given the vast reach of an online promotion, rules should clearly delineate where, exactly, the promotion is targeted. There is a big distinction between a promotion being open to "all U.S. residents" and "all residents in the contiguous United States." Is the sponsor willing to ship a car to Guam? At the international level sweepstakes are illegal in some countries. Canada, for instance, does not allow sweepstakes. Accordingly, certain provisions must be added to rules in order to reach out to Canadian audiences. Adding provisions to allow Canadian audiences to participate in a sweepstakes may not be enough. In Quebec, for instance, under their equal parity laws, rules must be translated into French.

The digital age, while offering a convenient way to disseminate information, has also brought with it a new set of challenges. Good rule drafting will account for problems such as misdirected entries or accidental crashes to the site. It can also curtail or attempts by a consumer to "hack" or "spam" the system using electronic means like bots, but daily new events happen that can change the scope of a sponsor's responsibility. In text-messaging promotions, for instance, companies have to be

careful that they are not adding charges to the recipient's bill. Text messaging can also trigger review by the FCC and invoke federal laws, like CAN-SPAM. In addition to the foregoing, online sweepstakes directed to children must comply with the Children's Online Privacy Protection Act, especially if the entrants' email addresses or names will be stored by the sponsor for later marketing opportunities.

The issue of marketing to children comes up even in situations where the client has no intention of targeting them. Sometimes the prize is attractive, like an mp3 player or a vintage miniature car. In other instances, the venues chosen by the client may attract children. Airing a promotion on the radio or television during child-directed shows may bring unwanted entries as well. In each instance, special provisions have to be in place to screen out entrants who are too young to qualify for the prize. There are a number of ways to do this, including having potential winners sign a declaration, or—in the case of an online promotion—instituting an age-neutral screening system. Age-

screening is one aspect of a promotion that can not be taken care of by use of a disclaimer. If a client's primary goal is to develop a mailing list, then age-screening should be implemented, since not doing so could jeopardize the entire mailing list and the purpose for the promotion.

Notwithstanding the parade of horrors listed here, it is possible to create a legal and successful promotion that meets the goals of your clients.

Promotions can be a savvy marketing tool for clients to use in creating some buzz around their products or services and simple promotions, like those

done at trade shows or other internal events, need not be agonized over. That said, given the problems that can crop up with larger promotions, using the standard clone-and-revise strategy has some severe pitfalls. Each promotion, even if only the prize or the audience changes, is distinct and should be treated as such. Something as simple as changing the sponsor from a consumer goods maker to a bank can invoke federal and state laws, or substituting in a trip to Hawaii for a trip to Florida can invoke additional restrictions. Lawyers should be wary of their clients who want to go it alone.



There is a big distinction between a promotion being open to "all U.S. residents" and "all residents in the contiguous United States." Is the sponsor willing to ship a car to Guam?

Tsan Abrahamson practices advertising, promotions, and trademark law in Berkeley. She has an active practice in internet-related issues and is on the adjunct faculty at USE. Her article, "Trademark Owners Keyed-up over Latest Google Move," appeared in the September/October 2004 issue of THE BULLETIN.

Listening and Learning: Summary of the Membership Survey

ACBA STAFF

Background and Methodology

To maintain a healthy, vibrant and responsive membership organization, experts in association management recommend that such organizations survey their members at least every five to seven years. The membership survey typically helps inform the strategic planning process and helps the board set priorities for the organization.

The Alameda County Bar Association last surveyed its members in 1997; that survey led to the development of a strategic plan that came out of a two-day planning meeting held in April 1997. Since then numerous changes have taken place at the ACBA, most notably: a change in management; a different configuration of programs; a stronger and better informed board of directors, and increased use of technology including the ACBA website.

At its 2004 board retreat, the board of directors agreed that a membership survey should be conducted. After consultation with the ABA's Division for Bar Services and several local bar associations that had recently conducted membership surveys, a survey form was developed by staff and reviewed by the Board of Directors in July 2004. From September 20 to October 15, 2004, the survey form was made available to members on the ACBA website. A postcard reminding members of the survey was mailed on October 1, 2004. Hard copies of the survey form were available upon request.

Approximately ten percent of the ACBA members, or 205 members, responded to the 41-question survey. Of these, 188 completed the survey online and 17 completed hard copy versions of the survey.

The Trusts and Estates Section had the greatest number of survey respondents, with 36.2% of the 130 members who responded to this question stating they belong to that section; 23.1% of those responding belong to the Solo & Small Firm Practice Section; and 15.4% of those responding are members of the Family Law Section. Significantly, 23.1% of the respondents

to this question are members of either the Criminal or Civil Court Appointed Attorney Programs.

SurveyMonkey.com, an online survey service, compiled the data. The "Results Summary" and the "Open-Ended Results Detail" from SurveyMonkey.com are available by contacting Membership Specialist Kavita Ferregur at kavita@acbanet.org.

Costs

The ACBA originally budgeted \$8,000 in non-personnel costs for the membership survey. Due to cost-savings incurred by working with SurveyMonkey.com and relying more on staff expertise than outside consultants (such as Tecker Consultants in 1997 for the membership survey or ReData in 2002 for the judicial evaluation survey), the cost of conducting the survey was significantly less: \$4,930.

The survey costs break out as follows:

Printing and mailing postcards	\$2,885
ACBA database programming	\$ 675
Result tabulation and reporting software	\$1,270
SurveyMonkey fees	\$ 100
Total	\$4,930

Survey Results

While readers are encouraged to review the actual survey results in the attachments, the key findings of the membership survey are:

- the service or activity that ACBA members find most important is MCLE
- the second most important service or activity is the opportunity to communicate with judges
- the third most important activity is the promotion of pro bono legal services

These findings are quite similar to the results of the 1997 membership survey, where access to MCLE was cited as the most important reason to join the ACBA and promoting pro

bono legal services was viewed as the second most important reason.

Other key findings include:

- 94% stated that they would continue their membership in the ACBA in the future
- 90% would recommend joining the ACBA to a friend
- 88% stated that email was an extremely or somewhat effective method of communication, 75% of respondents indicated that *The Bulletin* was an effective means of communication and 62% find the website an effective means of communication
- when asked how to allocate ACBA funds given a hypothetical \$100 amount, promoting and funding access to legal services for those who don't have access received more allocations than any other activity by far
- 71% of respondents had visited the website and 91% had read *The Bulletin*
- the most important factor in deciding to attend an MCLE program is topic, followed by location and time

Demographics

Of the members who responded to the survey,

- over half are 51 years old or older, and only 2% of the respondents are 30 years old or younger
- 76.3% are Caucasian; 5.3% are African-American; 2% are Latin, 7.2% are Asian and 9% declined to state or made a separate comment
- approximately 75% of the respondents are married or have a significant other
- over half have no children living at home
- 56.2% live in Oakland or Hayward; 13.7% live in Berkeley/Emeryville; and 13.1% live in Contra Costa County
- 69.2% work in Oakland or Hayward; 9% work in Berkeley/Emeryville; 5.8% work in Fremont/Union City/Newark area and 5.8% work in the Pleasanton/Dublin area; only 2% of the respondents work in San Francisco
- 98.1% have access to the Internet at work

It should also be noted that the open-ended comments were quite varied, ranging from simple notes of thanks to lengthy comments about the CCAAP program and payments to panel members. Other comments included: praise for the Trusts & Estates Section; the need to expand pro bono legal services;

comments about the website, both positive and negative; and some misinformation about the Intellectual Property/Computer Law Section (which no longer exists) and the availability of a hard copy of the ACBA membership directory. A total of 57 survey respondents provided written comments.

Implications for the Future of the ACBA

In November 2003, the ABA's Division for Bar Services conducted an operational survey of the ACBA, and on February 23, 2004, issued a final report with their findings. The report noted: "The ACBA's greatest opportunity for advancement lies in strategic planning...A succinct vision statement or message that outlines the desired future for the organization is an important way to underscore the ACBA's stability and anticipated development."

The report cites the 1997 member survey and predicts, accurately, that issues such as inclusiveness of the bar, access to justice and professionalism will reemerge. The report states: "Nevertheless, effective planning is largely about deciding what not to do. Given the bar's limited financial and staff resources, we urge the board to be extremely selective. The previous plan contained six broad goals; this time, hone it to two or three. What are the two or three things the ACBA must address in the next three years? The fewer the issues, the more likely the association is to attain its desired outcome."

The 2004 member survey results will aid the ACBA Board of Directors in its development of a strategic plan that will guide the organization for the next few years and help prioritize its agenda. Clearly, enhancing educational programs, providing opportunities for members to interact with judges and further developing its pro bono program are viewed as important ACBA activities by its members. When making decisions about the allocation of ACBA funds, the provision of free or reduced-fee legal services to the poor deserves consideration, according to members surveyed. The member survey results will help the ACBA choose which services and activities to offer its members and thus develop both a membership strategy, as well as a vision for the future, that will serve the greatest number of members in the most meaningful way.

If you would like a copy of the "Results Summary" and/or the "Open-Ended Results Detail" from SurveyMonkey.com, please contact ACBA Membership Specialist Kavita Ferregur at kavita@acbanet.org.



THANK YOU TO EVERYONE WHO COMPLETED THE ACBA MEMBERSHIP SURVEY. YOUR INPUT WILL HELP US BUILD A BETTER BAR ASSOCIATION!

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We all know that times are tough in California, but did you know that well over one million of the state's children are living in poverty?

Your gift to the Alameda County Bar Association's Volunteer Legal Services Corporation (VLSC) will help us provide legal aid to the poorest and most vulnerable members of our community. For more than twenty years, our dedicated volunteers and staff have provided legal services in such areas as family law, guardianship, and immigration.

At its high point, foundation funding accounted for about half of our income. That is no longer the case. Because we use volunteers, your contribution will go even farther as we find

new ways to do more with less. We are restructuring our delivery models to make it easier to volunteer, and we are collaborating with other service providers to improve the provision of legal services countywide.

However, we still need your help. Please donate a minimum of \$50. If you are an attorney, please consider donating the equivalent of one billable hour. Your gift will enable us to help the most vulnerable members of our community.

We understand that money's tight for everyone right now. Consider using your credit card to make a donation. You'll be able to pay over time, but your gift will start helping people today. Thank you for your help.

Yes, I want to help VLSC to continue providing legal assistance for those in our community who need it the most.

I can give: \$50 \$100 \$_____

☐ Check enclosed, made payable to VLSC, a 501(c)(3) corporation.

☐ Please bill my credit card

Card Number _____ Expiration Date _____

Name of Cardholder _____ Signature _____

Please return this form to Alameda County Bar Association
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610 16th Street, Suite 426 • Oakland, California • 94612
For more information, call (510) 251-3504 or email laura@acbanet.org.

NOTES FROM THE BENCH/BAR LUNCHEON MONDAY, JANUARY 24, 2005

The Bench/Bar Committee holds quarterly luncheons to discuss issues of mutual concern. The luncheons are sponsored by the ACBA and so-hosted by the presiding judge of the Alameda County Superior Court and the president of the ACBA.

From the Presiding Judge, Judge Robert Freedman, Assistant Presiding Judge:

- The Court appreciates the opportunity to participate in the ACBA's Bridging the Gap program and is willing to participate in future programs.
- New judicial assignments were effective January 1, 2005, and are posted on the Court's website (<http://www.alameda.courts.ca.gov/courts>).

From the Hayward Hall of Justice, the Hon. George Hernandez, Supervising Judge and Acting Presiding Judge for January 24:

- The court will experiment with direct calendaring in Judge Bonnie Sabraw's court.

From the Administration Building, the Hon. William McKinstry:

- Judge Kraetzer is planning to retire.
- ADA construction is planned for departments 16 and 17.

From the Family Law Department, the Hon. Yolanda Northridge, presiding family law judge:

- Judge Northridge is exploring setting long cause matters for the full expected time instead of in half-day increments. In order to do this, she is literally "switching courtrooms" and taking the trial judges daily calendar. Two trials are already scheduled.
- There is a shortage of Spanish language interpreters.

BARRISTERS LAUNCH NEW PROGRAM!

On December 15, 2004, the Barristers launched a new monthly program: "Lunch with a Judge." The ACBA and Barristers are committed to building a stronger relationship between the Bench and Bar in Alameda County. This program promotes greater communication and cooperation between the Bench and the Bar in Alameda County, and gives newer ACBA attorneys a chance to meet judges.

These monthly lunches provide you and several of your peers, a unique opportunity to enjoy a delicious lunch and casual conversation with a judge from the Superior Court of California, County of Alameda. Whether you have already appeared in court for a case or may make a future court appearance, it is a terrific way to gain insight and become acquainted with a member of the bench outside the courtroom setting. "Lunch with a Judge" affords you an excellent opportunity to ask questions and learn information that may increase your comfort level when you are appearing in court. Ask the judges about their career path and learn about their experiences before they took a seat on the Bench.

Past lunches:

December 15, 2004: Lunch with Hon. John True in Oakland. Hon. John True is a graduate of Boalt Hall; prior to his judicial appointment in October 2003, he was a partner in the Oakland office of Leonard Carder, LLP, and spent approximately 27 years practicing labor and employment law in the San Francisco Bay area. Judge True is the former Chair of the California State Bar Labor Employment Law Section and the past chair of the Northern District of California's Civil Justice Reform Act Advisory Group. He is a frequent writer and speaker on labor and employment law topics.

February 16, 2005: Lunch with Hon. Wynne Carvill in Alameda. Judge Wynne Carvill was appointed to the Superior Court of California, County of Alameda by Governor Davis in 2003. Judge Carvill earned his law degree at Harvard and was a business litigator and a partner in Thelen, Reid and Priest before he was appointed to the bench. He is the supervising judge at the George E. McDonald Hall of Justice in Alameda and presides over limited civil, misdemeanor and felony criminal cases.



December's Lunch with a Judge, featuring Hon. John True (center)

Upcoming lunches:

April 20: To be announced; location will be in Oakland.

May 18: To be announced; location will be in Hayward.

The lunches will always follow the same format:

- One judge from Alameda County.
- Space for up to nine Barristers (if more than four slots remain open two weeks prior to the lunch, it will be opened to all ACBA members).
- \$25 per person for complete sit-down lunch in a nice restaurant.
- Payment must be made to ACBA in advance—no registration at the door
- Name and location of the restaurant will change every month. Barristers have committed to scheduling lunches in areas other than Oakland at least twice per year.
- For details, registration and payment, interested members should contact Sarah Dorsey at (510) 817-3524 or sarah@acbanet.org.

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Recap of the January and February Meetings

At its **January 4, 2005**, meeting, the Board of Directors approved the minutes of the December 2, 2004, meeting, and took the following action:

1. Passed a resolution approving a request from the Real Estate Section to maintain an additional \$10,000 in their section balance. The \$10,000 is in addition to the \$5,000 that each section may maintain at the close of 2004 per previous board resolution.

Non-action items included:

1. Discussed a draft memo outlining a proposal to form an ACBA Diversity Committee that would be modeled on the structure of the ACBA's Community Projects Committee. Board members were asked to submit comments and edits to the memo within three weeks.
2. Reviewed the draft list of board liaison assignments.
3. Victor Ochoa reported that mentors would be assigned to new board members and asked board members.

At its **February 1, 2005**, meeting, the Board of Directors approved the minutes of the January 4, 2005, meeting, and took the following actions:

1. Passed a resolution approving the appointment of Vanji Unruh to the Civil Court Appointed Attorney Program Advisory Group for a one-year term beginning January 1, 2005.
2. Passed a resolution approving the request from the Bankruptcy Section to maintain an additional \$1,000 in their section account. The \$1,000 is in addition to the \$5,000 allowed to be kept as an accumulated balance in each section account at the end of 2004 per previous board resolution.

3. Passed a resolution approving the request from the Family Law Section to maintain an additional \$5,000 in their section account. The \$5,000 is in addition to the \$5,000 allowed to be kept as an accumulated balance in each section account at the end of 2004 per previous board resolution.
4. Passed a resolution directing the staff to organize a forum of diversity bar leaders and creating an ACBA Diversity Committee with the purpose of promoting diversity in the legal profession and to further develop the committee's objectives.

Non-action items included:

1. Heard a report from Jud Scott and Thomas McDonnell on the value of participation in the ABA House of Delegates
2. Heard from Victor Ochoa about the history on the Conference of Delegates and its current status. The Board may want to consider ways to enhance participation. It was noted that Bob Gray, current chair of the Legislation/Conference of Delegates Committee, would give a brief presentation at the upcoming Section Leaders Orientation to solicit participation.
3. Heard an overview of the bylaws from Pam Jester, who noted that procedural language will be taken out of the bylaws and described the revisions regarding governance of sections. Board members were encouraged to review the revised bylaws and forward comments to Ann Wassam.

Oakland attorney Cheryl L. Hicks is vice-president of the Alameda County Bar Association and chair of the CCAAP Advisory Group.

The Benchmark

March 2005

Listing of continuing education courses and special events

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
		1	2	3	4	5
6	7	8 CCAAP Program VLSC Volunteer Orientation—Oakland	9 VLSC Volunteer Orientation—Hayward	10	11	12
13	14	15	16 Lunch with a Judge Trusts & Estates Litigation Cmte. Meeting	17 Solo Section Program Barristers Mixer	18	19
20	21	22 Trusts & Estates Trusts Cmte. Meeting	23	24 ADR Section Program	25	26
27	28	29 Bankruptcy Section Program	30 Trusts & Estates Mediation Cmte. Meeting	31 Cesar Chavez Day—ACBA Closed		

REGISTRATION & CANCELLATION

Unless otherwise indicated, you can register for MCLE classes by contacting Sarah Dorsey at (510) 817-3524, fax (510) 893-3119, or sarah@acbanet.org. The ACBA does not provide refunds for MCLE registration, but registrations are transferable to another attendee for the same program. You can also enroll for most ACBA events online. Visit acbanet.org and click on *The Benchmark*.

MARCH 16

Barristers' Lunch with a Judge

12:00-1:00 P.M. Featuring Hon. Hugh A Walker. Location (in Pleasanton) to be announced. Space is limited to nine Barristers. \$25. Payment must be made in advance. Contact Sarah Dorsey for info.

Enforcement of Settlement Agreements Under CCP Section 664.6 and Alternatives Thereto

12:00-1:00 p.m. Trusts & Estates Section Litigation Committee Meeting Presented by James Berringer of Evans Latham & Campisi. Reed Smith, 1999 Harrison Street, Conference Room 24A, Oakland. Free. RSVP/More info: Tim Winchester at

(510) 465-7100 or Noel Lawrence at (510) 581-6611

MARCH 17

Getting the Green: St. Patrick's Day Marketing Salon: Tips, Tricks, and Strategies

4:00-5:30 P.M. Solo & Small Firm Practice Section. Hear innovative ideas on how to creatively and effectively promote what you do. More details forthcoming; watch your mail or visit acbanet.org.

Third Thursdays at Cafe Van Klee

6:30-8:00 P.M. Barristers Section Monthly Mixer. Cafe Van Klee, 1621 Telegraph Avenue, Oakland. Free. There will be no MCLE offered for this event.

MARCH 22

Appraisal Issues in Trusts & Probate

12:00-1:00 p.m. Trusts & Estates Section Trusts Committee Meeting Presented by Michael Herwood, MAI, Probate Referee. Burnham Brown, 1901 Harrison Street, Oakland. Free. RSVP/More info: Carolyn West at (510) 452-2133 or Carol Greenbarg at (510) 444-6044

MARCH 24

Exploring Assumptions in Mediation

12:00-1:30 P.M. ADR Section Brown Bag Luncheon. Mediators are often called upon to assist disputing parties find a resolution without making determinations of fact. Being aware of how we form assumptions and how they can hold us captive is often key to being able to move beyond impasse. Speaker John Ford is the director of the Organizational Conflict Management Certificate Program at JFK university. ACBA Conference Room, 610 16th Street, Suite 426, Oakland. Free. One hour general credit.

MARCH 29

Partnered in Debt: Creditors' Rights and Debtors' Remedies in the Wake of California's New Registered Domestic Partners Law

12:00-1:30 p.m. Bankruptcy & Commercial Law Section Program. Speakers: Frederick C. Hertz, Oakland attorney specializing in the formation and dissolution of non-marital partnerships; and Robert F. Kidd, of counsel to the Oakland law firm of Stein, Rudser, Cohen & Magid, specializing in corporate and

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
					1	2
3	4	5	6 ACBA Spring Open House	7	8	9
10	11	12 CCAAP Brown Bag	13	14	15	16
17	18	19 Bankruptcy Section Program	20 Lunch with a Judge	21 Solo Section Program Barristers Mixer	22	23
24	25	26	27	28	29	30

commercial insolvencies. They will discuss the new Registered Domestic Partners Law and its impact on bankruptcy practice. Wendel, Rosen, Black & Dean, 1111 Broadway. Bankruptcy Section Members and Barristers: \$40; ACBA Members: \$45; Non-members: \$60. Lunch will be included. One hour general credit. RSVP

MARCH 30

Trusts & Estates Section Mediation Committee Meeting.

12:00-1:30 P.M. Fitzgerald, Abbot & Beardsley, 1221 Broadway, 21st Floor, Oakland. Free. RSVP/More info: Virgina Palmer at (510) 451-3300 or vpalmer@fablaw.com. Advance RSVP is required to gain access to the floor.

APRIL 6

Spring 2005 Open House

5:30 - 7:30 p.m. Co-sponsored with the ACBA's Family Law Section. By popular demand, we are presenting our spring open house in centrally-located San Leandro. Come share delicious refreshments while you mix and mingle with representatives from the bench, the bar, and the Alameda

County legal community. Vila Cereja Restaurant (formerly Jake's), 1045 MacArthur Boulevard, San Leandro. Please RSVP by Monday, April 4, 2005, to Eileen Cunningham at (510) 817-3526 or eileen@acbanet.org.

APRIL 12

Parents' Mental Health Issues

12:15-1:15 P.M. CCAAP Brown Bag Luncheon. Presented by the Parental Stress Service. Hayward Hall of Justice, Department 504, 24405 Amador Street, Hayward. Bench officers, attorneys, child welfare workers, probation officers, and other interested professionals are welcome to attend. Feel free to bring your lunch. MCLE may be available, and attendance will count towards local court requirements. RSVP to Elizabeth Hom at (510) 251-3510, fax (510) 893-3119, or elizabeth@acbanet.org.

APRIL 19

Recent Developments in Exemption Law

12:00-1:30 P.M. Bankruptcy & Commercial Law Section Program. Speaker Max Cline, Bay Area bankruptcy attorney, will

highlight changes in bankruptcy exemption law, with a focus on the *hard* stuff. Wendel, Rosen, Black & Dean, 1111 Broadway, 24th Floor, Oakland. Section members: \$40; ACBA members \$45; non-members: \$60. Lunch will be included. One hour general credit.

APRIL 20

Barristers' Lunch with a Judge

12:00-1:00 P.M. Guest judge and location (in Oakland) to be announced. Space is limited to nine Barristers. \$25. Payment must be made in advance. Stay tuned for more details, or contact Sarah Dorsey.

APRIL 21

Clerks Unplugged: Horror Stories from the Court Clerks Who Have Seen it All

4:00-5:30 P.M. Solo & Small Firm Practice Section Program. Haven't you always wondered what years of experience in dealing with all kinds of attorneys in all kinds of situations would teach you? You will want to hear the stories of attorneys gone wild, or doing things just the way the court likes them! More details forthcoming.

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