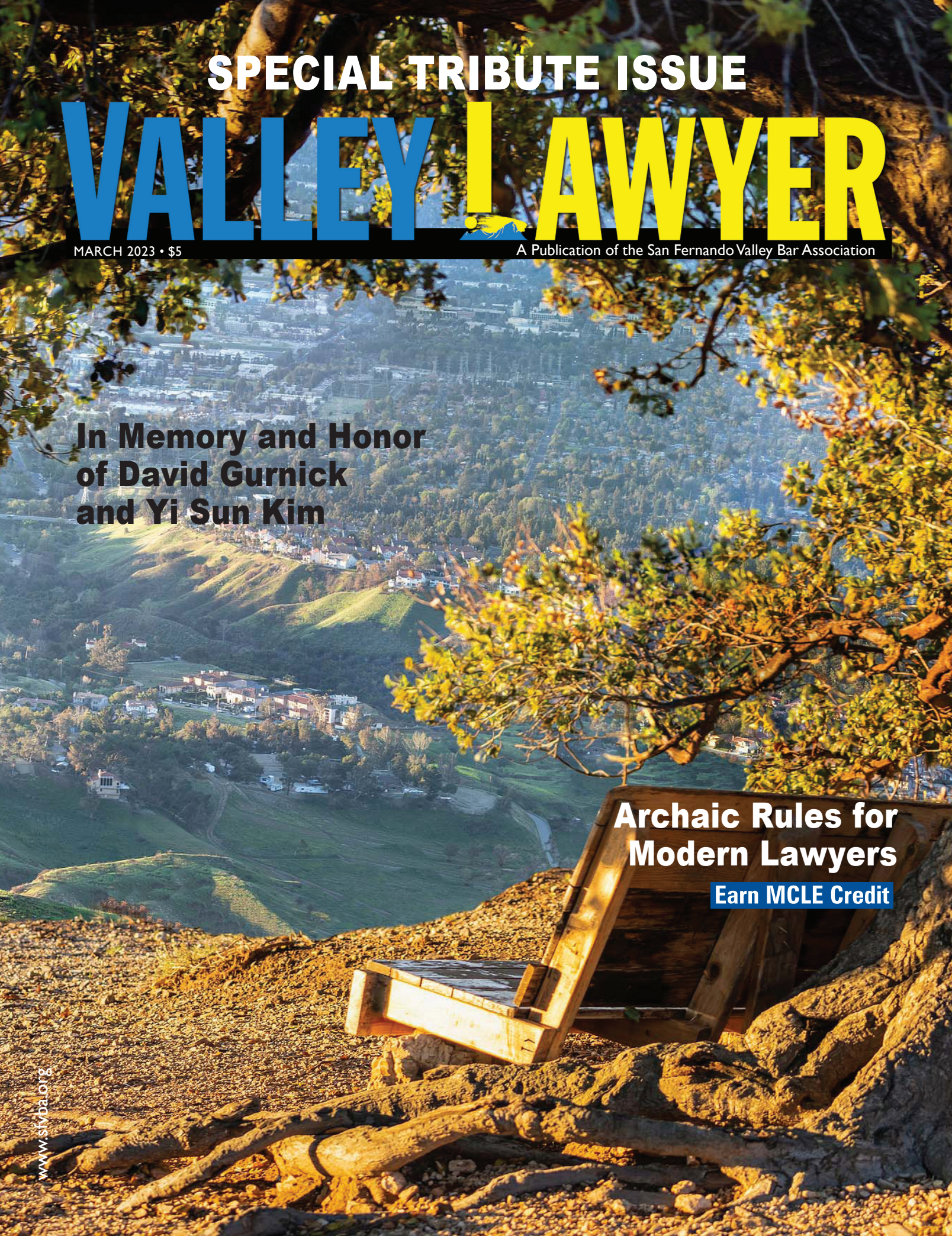
SPECIAL TRIBUTE ISSUE

VALLEY LAWYER

MARCH 2023 • $5

A Publication of the San Fernando Valley Bar Association



In Memory and Honor of David Gurnick and Yi Sun Kim

Archaic Rules for Modern Lawyers

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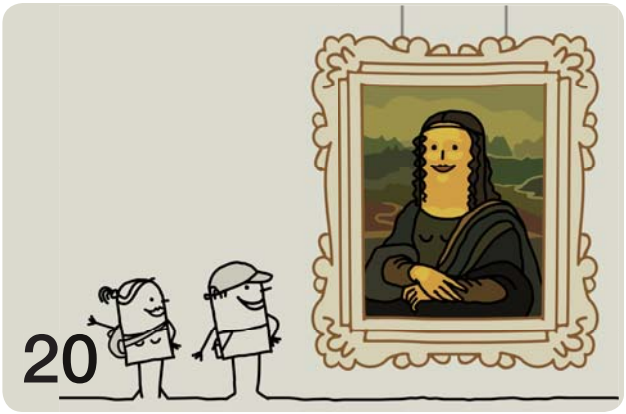

FEATURES

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VALLEY LAWYER

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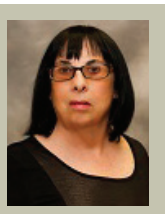
A Look Back

LINDA TEMKIN
Director of Education & Events

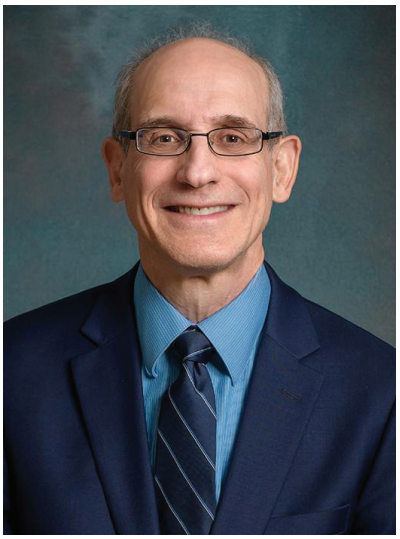


events@sfvba.org

THIS IS A SPECIAL EDITION of our *Valley Lawyer* Magazine. In memory of our recently deceased Past Presidents David Gurnick and Yi Sun Kim, we wanted to share with our members some of their previously published works.

Both were outstanding Bar leaders and highly accomplished attorneys. Each shared a deep commitment not only to the legal community but the greater Valley community as well. And each during their reign, had to deal with truly catastrophic events! David is the only SFVBA member to have ever served as SFVBA President twice. During David's first presidency in 1994 the Northridge Earthquake struck. The 6.7 magnitude earthquake killed 72 people, injured another 11,800 and caused massive destruction. The infrastructure damage measured nearly 50 billion dollars. Homes and businesses were left in disarray. The SFVBA offices, then on Balboa, were upended but thankfully not red-tagged and David as President, oversaw the cleanup efforts. He made sure the business of the SFVBA was not disrupted. Then with the support of other SFVBA lawyers, he formed a team to help Valley residents obtain all their much-needed benefits from their earthquake insurers.

David was not only a past President but also past chair of the *Valley Lawyer* editorial committee. As you will see in the following pages, David was a prolific writer. And David loved the Valley. He not only raised his family here but as a long time shareholder at Lewitt Hackman, made his career in the Valley as well. And David relished history, particularly the history of the San Fernando Valley. For David's second term as SFVBA President in 2013, he wanted to hold the SFVBA annual Executive Retreat at the San Fernando Mission. "David," I protested, "wouldn't you rather spend the afternoon at the beach?" As a resident of Santa Monica, I relished time spent near the ocean. "Or how about



Palm Springs?" I offered. "We've had some great retreats in the desert. I could get us a great rate at the Desert Springs." But David wouldn't hear of it.

He wanted the Valley and not just your standard Valley hotel, he wanted something with historical import. And so we found our way on a hot October weekend day to the San Fernando Mission.

Built in 1797 the Mission indeed had centuries of history behind it and David made sure each Board member learned about it. And while he and the Board members enjoyed the adjacent garden, I and then Executive Director, Liz Post, set out lunch in the Mission's meeting room but first had to rid the place of thousands of ants. As for David, that was a small price to pay. We were honoring a part of the Valley's history and in retrospect, it was the perfectly right thing to do.

Yi Sun also faced great challenges. During Yi Sun's time on the board, the fallout from the Aliso Canyon Gas Leak continued. The gas leak, widely reported as the worst single natural gas leak in U.S. history in terms of its environmental

impact, sickened many of the nearby Porter Ranch residents. Yi Sun was a key player in working with local officials and government representatives to assist the impacted citizens. Yi Sun always responded to the community's call. Yi Sun was proudly our first Korean American President and under her reign our Inclusion and Diversity Committee grew and our association with the Multi-Cultural Bar Alliance of Southern California strengthened.

The contributions of both David Gurnick and Yi Sun Kim were enormous and their loss too immeasurable for words.

Civil and Open-Minded

YI SUN KIM
SFVBA Past President

2018-2019

MY COUSIN IS EXTREMELY accomplished, having advanced to a high-level government position that is held by few if any other women in South Korea.

I was fortunate to meet with her when she attended a special conference during a break from her Harvard graduate program. She needed quick business cards—nothing fancy to advertise herself or a comprehensive description to justify why she was there. Her accomplishments and position were more than sufficient for people to want to connect with her, and she just needed an easy way for them to know how.

I took her to our neighborhood copy place. As soon as my cousin spoke (in English, which is widely taught in Korea from elementary school on), the employee's exasperation was impossible to ignore. We answered his questions, but due to her accent, his tone was immediately condescending, his speech deliberately faltering, and his eyes rolled while he sighed repeatedly every time she spoke. He could not get rid of us fast enough.

This is nothing new. Many of us experienced that growing pain of having strangers be rude to our parents as they exercised their English pronunciation. We know the moment people stop listening and interrupt to make side comments disparaging them, loud enough to hear, with the assumption that they cannot understand or will not do anything about it if they could. We think we are being the strong ones to not alert our parents, but we know now our parents were the strong ones who perfectly understood, but remained polite in front of us to protect our own pride.

Unfortunately, people continue to associate a person's intelligence with that person's grasp of the English language and ability to communicate effectively, even if English is their primary language. The person's skills may lay elsewhere—in artistic or mathematical matters, for example, rather than putting thoughts in words. The person may have inadequate schooling and support to nurture those skills at critical times in his or her development, suffer from anxiety or other natural inhibitions, or is understandably discouraged after having been silenced and ignored for so long. The bottom line is that one's inability to adequately express his or her thoughts does not make what he or she wants to communicate any less important.

> "We can give speeches and write articles to advertise our own accomplishments and views, but our higher duty is to make sure the views, needs and rights of others are equally represented."

As attorneys, we enjoy a true gift—the luxury of being able to express our thoughts to the extent and manner that we intend. We may be at our best in court, arguing on the spot in front of a judge and jury, or in meticulously writing down our arguments in labored motions. Either way, we experience the relief of releasing our thoughts and getting our point across.

Ours is not a gift that makes us special or better people. It creates a duty on our part to help others. Isn't that what attorneys are supposed to do? Advocate on behalf of others who cannot represent themselves? We can give speeches and write articles to advertise our own accomplishments and views, but our higher duty is to make sure the views, needs and rights of others are equally represented.

It's poetic justice that my parents have a child whose livelihood is based on using words to communicate the needs and thoughts of others. I have been guided by this belief leading up to my tenure as the new President. I believe everyone should be included in the conversation, and there should always be a civility and open-mindedness in the communications.

With that, I intend this year to be a time of growth and decorum, expression and courtesy, acceptance and respect. I welcome everyone's viewpoints and look forward to productive discussions with our Bar's members to promote collective and individual growth.

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EVENT INFORMATION

Sponsor the SFVBA's Third Annual Mock Trial Competition where teams from California law schools will go head-to-head to be the San Fernando Valley Bar Association's Mock Trial Champions.

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

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

PLEASE CONTACT

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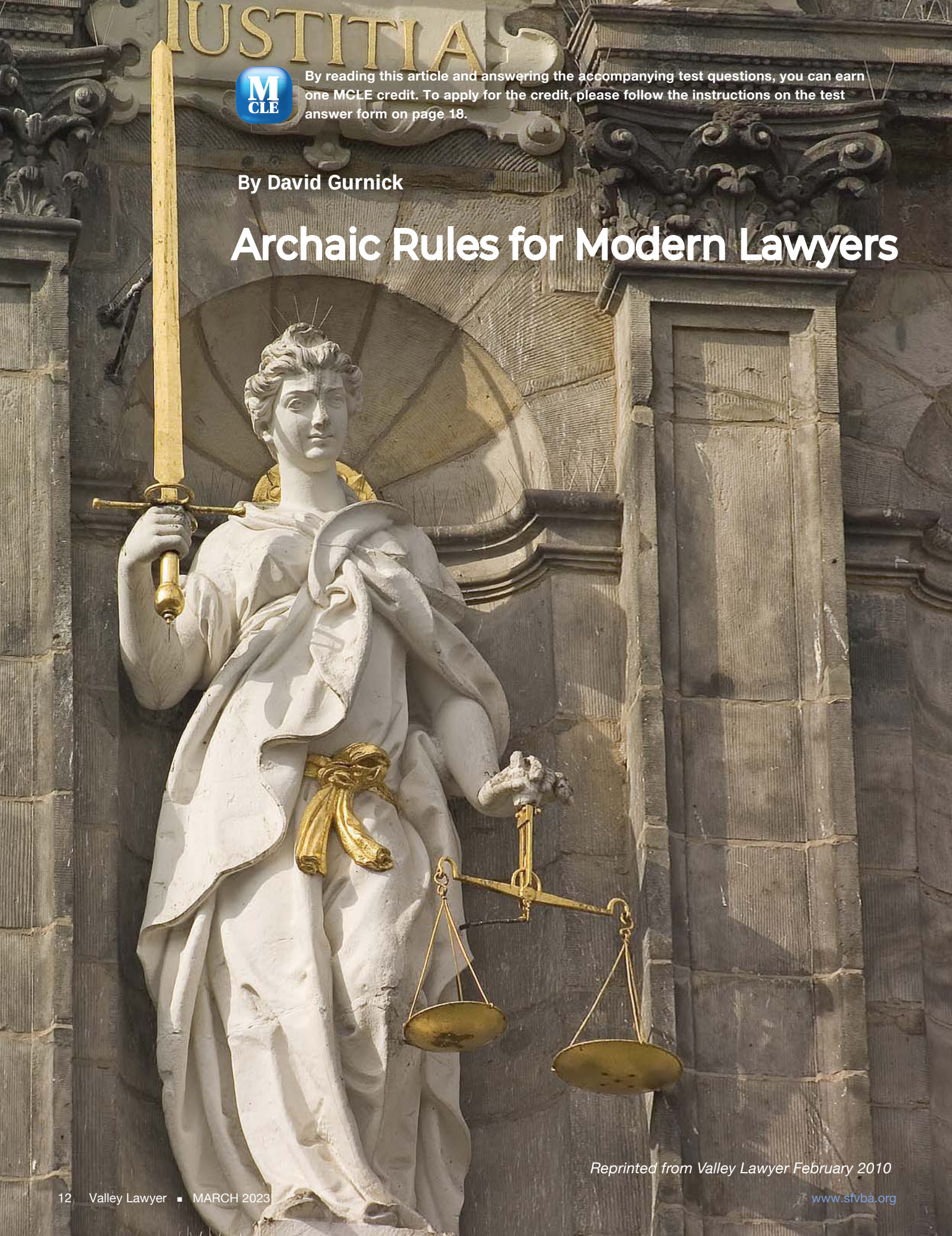
CALENDAR

MARCH 2023

SUN	MON	TUE	WED	THU	FRI	SAT
WOMEN'S HISTORY MONTH						
VBN Returning Live and in Person Soon!			1	2	3	4
5	6	7	8	**ZOOM MEETING** 9 **Membership and Marketing Committee** 6:00 PM	10	11
12	13	**WEBINAR** 14 **Probate and Estate Planning Section** ***Estate Planning for Cryptocurrency*** 12:00 NOON Andrew M. Katzenstein of Proskauer Rose LLP presents. (1 MCLE Hour) **Board of Trustees Meeting** 6:00 PM SFVBA OFFICES	15	**Our Sister Organization:** 16 **Santa Clarita Valley Bar Association** ***Employment Law Update*** 6:00 PM COLLEGE OF THE CANYONS 26455 ROCKWELL CANYON RD, ROOM 205 SANTA CLARITA Presented by Brian Koegle, Esq. Partner, Greenspoon Marder LLP (1 MCLE Hour) See ad on page 33	17 	18
19	**ZOOM MEETING** 20 **Mock Trial Committee** 6:30 PM	**WEBINAR** 21 **Taxation Law Section** ***The Tax Ramifications of Adoptions*** 12:00 NOON Prof. Kaitlin Newkirk, CPA will present an overview of the adoption tax credit and discuss tax planning tips and strategies adoptive parents can use to maximize the adoption tax credit and other tax benefits. This informative premium would be helpful to family law attorneys who represent clients in adoptions and practitioners counseling clients who have or are contemplating adoptions. (1 MCLE Hour)	**WEBINAR** 22 **Business Law and Real Property Section** ***Handling A Neighbor Dispute*** 12:00 NOON Sean Bryn will discuss the intricacies and complications involved with neighbor disputes. (1 MCLE Hour)	23	24	25
26	**WEBINAR** 27 **Family Law Section** ***Monitors/Supervised Visitations*** 5:30 PM Commissioner Amir Aharonov, Brian P. Lepak, CSFL, and Ilene Fletcher, Director of Family Visitation Service will discuss the ins and outs of monitors and supervised visitation. (1 MCLE Hour)					

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



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

By David Gurnick

Archaic Rules for Modern Lawyers

Reprinted from Valley Lawyer February 2010

IN LAW SCHOOL, FUTURE LAWYERS LEARN MANY longstanding principles of common law. After a few years of practice in a particular area some of these are lost to the lawyer's memory. But occasionally, an ancient, or arcane – but still applicable – legal principle can apply to a client's matter and is thus valuable knowledge for the lawyer. This article discusses some basic, even ancient rules of common or statutory law that may prove useful to any lawyer. For lawyers who remember, and even use some of these rules, it is still worthwhile to refresh memory of other rules that may have been forgotten.

English Law is California Law

The common law has roots in England, and this remains true in California today: "the Common Law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States or the Constitution or Laws of [California] is the rule of decision in all the courts of this State." (Civ. Code §22.2). Thus, "the whole body" of English jurisprudence "as it stood, influenced by statute" in 1850 forms the basis of California law." *Martin v. Superior Court* (1917) 176 Cal. 289, 293. By adopting this rule, the Legislature superseded Mexican law, which had previously applied in California. *Credit Mgrs. Assn. v. National Indep. Business Alliance* (1984) 162 C.A.3d 1166, 1170.

As courts have noted, "common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." So the adoption of English common law does not require "unqualified application of all its rules." *State of Calif. ex rel State Lands Commission v. Superior Court*. (1995) 11 Cal.4th 50, 75. Thus, "neither the Legislature nor the courts are precluded from modifying or departing from the common law, and frequently do." *Schnier v. Supreme Court* (2000) 78 C.A.4th 703, 709. Departures from English common law include California's community property system, wherein the Legislature incorporated Spanish law rather than English rules on the marital estate; and the civil discovery rules, which "established a pretrial fact- finding mechanism with a breadth not contemplated at common law." *Id.*

The Rule Against Perpetuities

This rule has been called "every first- year law student's worst nightmare." *Shaver v. Clanton* (1994) 26 C.A.4th 568, 570. The common law rule states: "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest." *Id.* And, despite anxiety created by the rule, it has also been described as being "as clear and distinct as any other rule which has ever been declared by the court... No difference of opinion exists as to [its] terms." *Id.* at 571. In contrast, another commentator observed: "The rule ... is one upon which the authorities refuse to come to any semblance of agreement as to its reason for existence." *Id.*

In 1991, California adopted the Uniform Statutory Rule Against Perpetuities. (Probate Code §§21200 et seq.) Today, commercial, nondonative transactions are exempt from the rule. Commercial leases are limited to a term of 99 years. (Civ. Code §718). Other property interests and transfers are invalid unless, *either*: (a) when created, the interest is certain to vest or terminate no later than 21 years after the death of an individual then alive; or (b) the interest either vests or terminates within 90 years after its creation. Probate Code §21205.

Rule of Adverse Possession

At common law, adverse possession let someone obtain title to real property without paying for it, by holding the property openly, and adversely to the true owner, for a specified length of time. California replaced the common law rule with a statute. (Civil Code §1007). Today, a claimant may obtain title to property by establishing five elements: (1) he or she occupied the property in a way that constitutes reasonable notice to the owner; (2) possession was continuous and uninterrupted for five years; (3) possession was hostile to the owner's title; (4) the adverse possessor claims the property as his or her own, under color of title, or claim of right; and (5) the adverse possessor paid all taxes levied and assessed on the property in the period. *Nielsen v. Gibson* (2009) 178 C.A.4th 318, 325.

It seems rare that today all these elements can be established. Why, for example, would someone pay someone else's taxes? But it does happen. In *Nielsen* 178 C.A.4th at 325, parents owned two lots and their daughter, who was out of the country, owned an adjoining third lot. Parents transferred their two lots. The transferee occupied all three lots and after the required period of time, won an action confirming title by adverse possession, as against heirs of the prior owner. *Id.*

Mailbox Rule

This rule concerns how acceptance of an offer may be communicated, to form a contract. Generally, acceptance occurs when it is actually communicated to an offeror. Under the Mailbox Rule, also called the *Effective on Posting Rule*, consent is deemed to be communicated as soon as acceptance of a proposal is put in the course of transmission to the offeror. *Palo Alto Town & Country Village, Inc. v. Bbtc Co*. (1974) 11 Cal.3d 494, 500-501. The rule is codified in Civil Code §1583. Under the rule, acceptance of an offer to enter into a contract is effective and deemed communicated when placed in the regular course of mail. *State v. Agostini* (1956) 139 C.A.2d 909, 915. The rule applies even if a mailed acceptance never arrives. *Huizar v. Carey* (9th Cir. 2001) 273 F.3d 1220, 1223n.3. The rule has various applications. A party can exercise an option by depositing written acceptance in the mail. *Palo Alto, supra,* 11 Cal.3d at 501. Under federal common law, mailing something raises a rebuttable presumption that the addressee received it. *Schikore v. BankAmerica Supp. Retirement Plan* (9th Cir. 2001) 269 F.3d

956, 961. If a sender shows enough evidence to raise the presumption, the other party has the burden to show the sent item never arrived. *Huizar, supra* 273 F.3d at 1223n.3. And an emerging issue is whether the Mailbox Rule applies to other forms of transmission, such as email and facsimiles. *See Am. Boat Co. v. Unknown Sunken Barge* (8th Cir. 2005) 418 F.3d 910, 914 (presumption of delivery should apply to emails).

Colgate Doctrine

This antitrust law doctrine originates in a 90-year-old Supreme Court decision. It relies on the principle of freedom to choose with whom one will, or will not, do business. Antitrust laws prohibit agreements, conspiracies and concerted action that unreasonably restrain trade. 15 U.S.C. §1. For many years, these laws prohibited suppliers from setting or fixing their distributors' resale prices. The rule was that resellers must be free to charge whatever price they wish. But in 1919, the Supreme Court ruled that a supplier could announce a resale pricing policy, announce that it will not do business with a distributor or reseller who fails to follow its policy, and act on the policy by refusing to deal with a noncompliant distributor. *U.S. v. Colgate & Co*. (1919) 250 U.S. 300. The Court ruled that announcing and enforcing a policy does not form a conspiracy, because there is no "agreement." The *Colgate Doctrine* has come to mean that a company may choose who to do business with, and acting alone to end a business relationship does not violate the antitrust laws' prohibition against conspiracies and agreements in restraint of trade.

Rule of Escheat

Escheat is a procedure with ancient origins, in which the sovereign may acquire title to abandoned property if, after a number of years, no rightful owner appears. *Texas. v. New Jersey* (1965) 379 U.S. 674, 675. "In this country the respective states have the attributes ascribed by the law of England to the crown in this respect, and the state is the recipient of all escheats caused by lack of heirs or otherwise." *State v. Savings Union Bank & Trust* (1921) 186 Cal. 294, 299. While commonly known as escheat, this term is actually a misnomer. The correct term is "*bona vacantia*" which refers to "ownerless goods." *Delaware v. NY* (1993) 507 U.S. 490, 497.

In the 1960s several states disputed which of them had escheat rights to abandoned property. An oil company owed money to small creditors who had not claimed or cashed royalty checks. The dispute was whether escheat rights to the monies belonged to the state where the payor (the oil company) was incorporated, or the state of its principal offices, or where payees of the checks were located. The Supreme Court ruled the money was property of recipients of the checks, they were creditors of the oil company, and the money should escheat to the state of the last known address of each creditor. 379 U.S. at 682.

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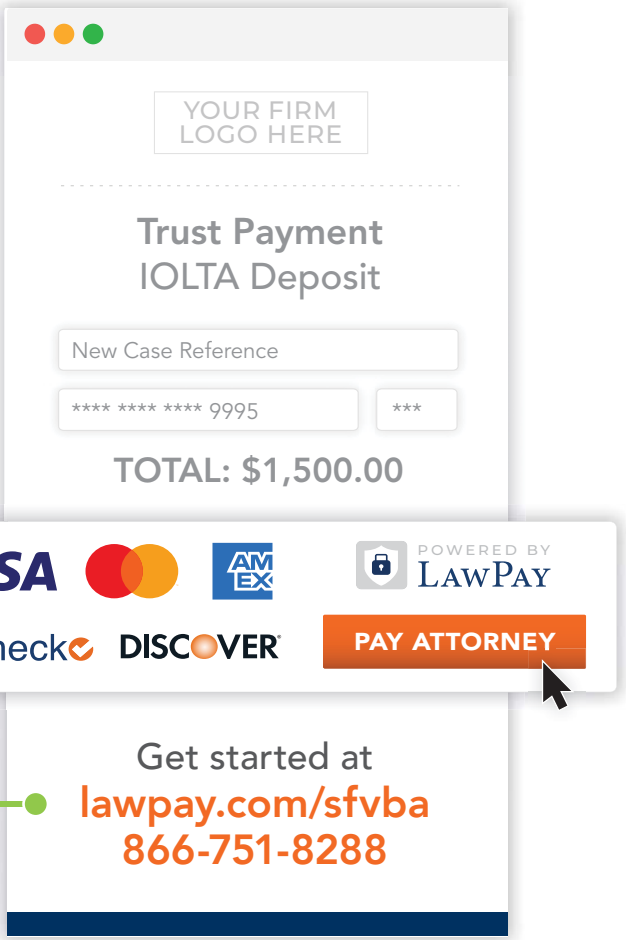

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Similar disputes between states have come to the Supreme Court multiple times. *See e.g., Delaware v. NY* (1993) 507 U.S. 490 (dispute over escheat rights to dividends and interest); *Penn. v. NY* (1972) 407 U.S. 206 (dispute over escheat rights to unclaimed money orders). The cases concern intangible property. No serious controversy can arise between States seeking to escheat "tangible property, real or personal," for "it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located
may escheat. *Delaware v. NY* (1993) 507 U.S. at 497.

A more recent issue concerns unredeemed gift cards and gift certificates and whether they are intangible property that escheats to a state. As noted by a New Jersey court, states treat the question differently: "Some states have expressly excluded all gift certificates from their abandoned property laws...Other states make only certain types of gift certificates subject to escheat." *Matter of November 8, 1996, Determination of State, Dept. of Treasury* (N.J. Superior Ct. App. Div. 1998) 706 A.2d 1177, 1180.

In California, the Unclaimed Property Law establishes conditions in which unclaimed personal property escheats to the state. Code of Civ. Proc. §§1300, 1500, et seq. It is not a "true" escheat law because the state does not take ownership. Rather, the law give the state only custody and use of unclaimed property until the owner claims it. Its purposes are to protect unknown owners by locating them, and returning their property and to give the state, rather than a holder, the benefit of using unclaimed property which experience shows will largely never be claimed. *Azure Ltd. v. I-Flow Corp*. (2009) 46 Cal.4th 1323, 1328.

Sovereign Immunity

Under the ancient doctrine of sovereign immunity, no action lies against a government entity for its wrongs. The rule stems from what is now recognized as a fiction, that the sovereign or state cannot commit a legal wrong, and is therefore immune from suit. The rule also rests on the idea that it is better for an individual to suffer an injury than for the public to suffer inconvenience; and that government liability tends to slow government personnel in doing their duties for fear of claims. *Madison v. City and County of San Francisco* (1951) 106 C.A.2d 232, 250.

For decades these theories were strongly criticized. Even the Supreme Court expressed "disfavor of the doctrine of governmental immunity from suit." *FHA. v. Burr* (1940) 309 U.S. 242, 245. In 1961 the California Supreme Court abrogated sovereign immunity as an anachronism, lacking any rational basis. *Muskopf v. Corning Hospital* (1961) 55 Cal.2d 211, 216.

Responding to this decision, in 1963 the Legislature enacted the Tort Claims Act, Govt. Code §§810 et seq. which reestablished immunity. As a result, even today, "sovereign immunity is the rule in California;" and "governmental liability is limited to exceptions specifically set forth by statute." *People ex rel. Grijalva v. Superior Court* (2008) 159 C.A.4th 1072, 1079. Often, specific procedures must be followed to bring a claim against a federal, state or other government agency. And even

where a claim is permitted, damages that are recoverable may be limited. (See e.g., Govt. Code Sec. 818, excluding punitive damages against a public entity).

Court Will Not Aid Illegal or Immoral Act

Several ancient doctrines establish that courts will not aid illegal or immoral acts. For example, "that the participants to an illegal contract who are in pari delicto can secure no relief based on such contract, is an ancient and most salutary one. It is part of the general rule that he who comes into equity must come with clean hands. *Norwood v. Judd* (1949) 93 C.A.2d 276, 284. A similar principle is expressed in the Latin phrase *ex turpi causa non oritur actio* (from an illegal act there can be no lawsuit). Under this principle, one who knowingly does an illegal act may not claim damages arising from it. Thus, courts refuse to aid a wrongdoer, either by enforcing an illegal contract or relieving a wrongdoer from obligations. Courts follow this principle not to help a defendant, but to restrict the use of judicial power to the furtherance of lawful ends, not to aid unlawful schemes. *Lizak v. Rottenbucher* (N.J. Chancery Ct. 1947) 53 A.2d 362, 365.

The principle has applied to refuse enforcement of claims for gambling losses, *see e.g., Kelly v. First Astri Corp*. (1999) 72 C.A.4th 462; collection of gambling debt, *Union Collection Co. v. Buckman* (1907) 150 Cal. 159; paying a commission to an unlicensed broker, *Richardson v. Roberts* (1962) 210 C.A.2d 603, and even to refuse enforcement of an agreement to deliver citrus whose poor condition made it unlawful to sell. *MacRae v. Heath* (1922) 60 C.A.64.

In recent years, the policy against aiding unlawful acts has been relaxed in some contexts. "The rule that courts will not aid enforcement of an illegal agreement or one against public policy will be relaxed where the transaction has been completed, no serious moral turpitude is involved, the defendant is guilty of the greater moral fault, and where reliance on the rule would permit the defendant to be unjustly enriched at the plaintiff's expense. *Hirsch v. Bank of America* (2003) 107 C.A. 4th 708, 720.

Knowing the Legal Principles

Again and again, courts note that today's legal principles have deep roots in the common law. *See e.g.*, *All EMS Inc. v. 7-Eleven Inc.* (7th Cir. 2006) 181 Fed.Appx. 551, 556 (nonliability of breaching party when other party to a contract unjustifiably caused the breach by preventing breaching party from performing, is a rule that has deep roots in the common law); *Sterling v. Taylor* (2007) 40 Cal.4th 757, 771n.13 (noting a flexible, pragmatic view of the statute of frauds has deep roots in the common law). Knowing the ancient legal principles can assist lawyers in representing clients today.

Archaic Rules for Modern Lawyers

Test No. 173

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. According to statute, the common law of England, where not in repugnant or inconsistent with the Constitution of the United States or California, is the rule of decision in all courts of California.
   ❑ True ❑ False

2. In California the common law rule against perpetuities still applies.
   ❑ True ❑ False

3. California law limits the term of commercial leases to 50 years.
   ❑ True ❑ False

4. In California the common law rule of adverse possession has been replaced by a statutory rule with five elements.
   ❑ True ❑ False

5. At common law adverse possession could be established without paying property taxes, but under California law today, payment of property taxes is one of the conditions to obtain title by adverse possession.
   ❑ True ❑ False

6. Under the Mailbox Rule, an item must be sent by certified or registered mail with a receipt, as a condition to accepting an offer by mail.
   ❑ True ❑ False

7. Federal common law establishes a presumption that if an item was mailed, it was received.
   ❑ True ❑ False

8. Mexican law once applied in California.
   ❑ True ❑ False

9. Community property rules and extensive civil discovery both existed under English common law.
   ❑ True ❑ False

10. States generally treat property the same way for escheat purposes, and generally agree on which of them has the right to escheated property.
    ❑ True ❑ False

11. Escheat is the correct name for the process by which states acquire title to unclaimed property.
    ❑ True ❑ False

12. In the United States, states have the same rights in many ways, as the law of England granted to the monarch.
    ❑ True ❑ False

13. Under the rule of escheat, the state takes possession of unclaimed property and will return it if claimed by the proper owner.
    ❑ True ❑ False

14. Sovereign immunity is based on a legal fiction.
    ❑ True ❑ False

15. The purposes of California's unclaimed property law are to protect unknown property owners, return their property and give the state the benefit of using unclaimed property that will never be claimed.
    ❑ True ❑ False

16. Punitive damages generally are not recoverable against a government entity.
    ❑ True ❑ False

17. Because the California Supreme Court eliminated sovereign immunity as an anachronism, sovereign immunity is no longer the law in California.
    ❑ True ❑ False

18. Though once an important legal principle, the Colgate Doctrine no longer applies in its original form because of dramatic changes in toothpaste formulas over the years.
    ❑ True ❑ False

19. In recent years, the courts' policy against aiding unlawful acts has been relaxed if certain conditions are met.
    ❑ True ❑ False

20. When a company issues checks that recipients do not cash, escheat rights belong to the state where the company's bank is located.
    ❑ True ❑ False

Archaic Rules for Modern Lawyers

MCLE Answer Sheet No. 173

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

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

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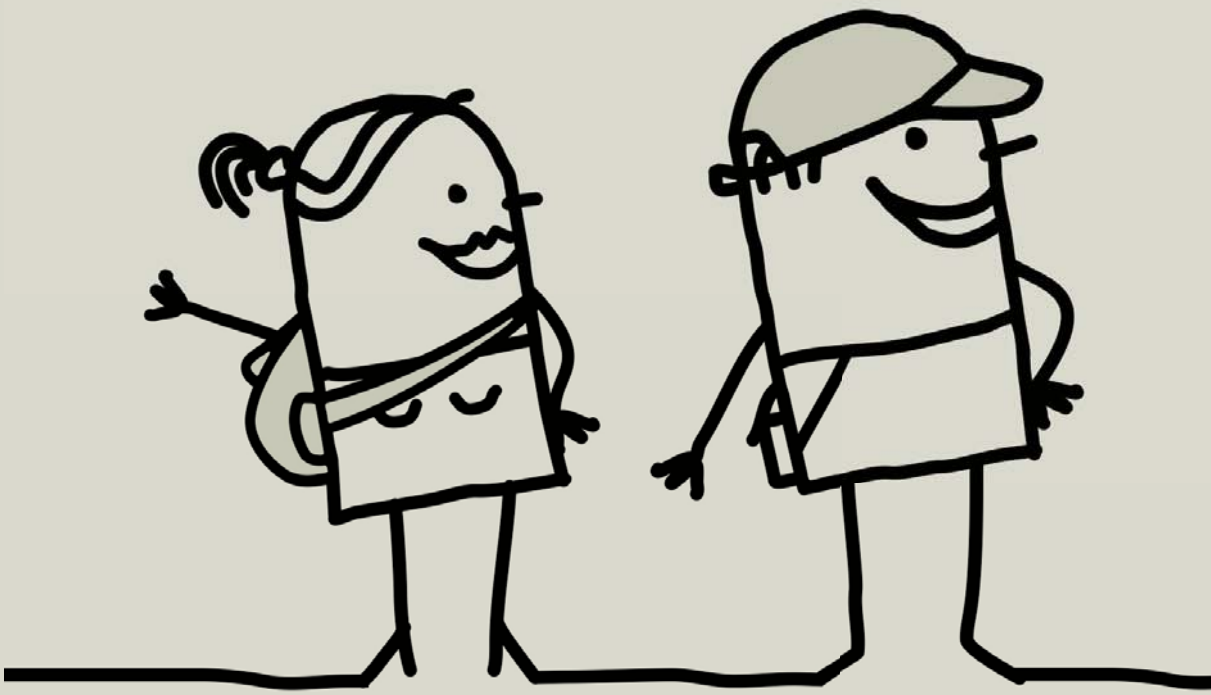
By David Gurnick

Fun with Trademarks and Copyrights:

Parody, Satire and Lampoon

There are distinct differences between parody, satire and lampoon. Intellectual property attorneys should be able to recognize these differences and understand the respective case law to best protect their clients' trademarks and copyrights—or to best argue their clients' fair use of other people's work.



Reprinted from Valley Lawyer August 2015

PEOPLE KNOW THAT GENERALLY THEY ARE NOT allowed to use other people's trademarks and copyrights. Copying someone else's work or using someone else's trademark in a way that causes confusion is unlawful. But poking fun at someone's trademark, or using someone else's work or brand as social criticism or commentary on the work itself is often permitted if it is parody, satire or lampoon. These combination literary-legal concepts are part of the doctrine of "fair use" which is a defense to a claim of copyright or trademark infringement.

What Are Parody, Satire and Lampoon?

Parody has been defined as "a composition burlesquing or imitating another, usually serious, piece of work." It is "designed to ridicule in nonsensical fashion, or to criticize by brilliant treatment, an original piece of work or its author."[1] Usually, parody requires borrowing from the work being parodied. Otherwise, the viewer or reader or listener would not be aware of the burlesque or imitation, or criticism. Popular examples of parody include *Saturday Night Live*'s comic sketches that mock popular celebrities, or *The Simpsons*, *Family Guy*[2] or *South Park*[3] parodies of popular culture.

The U.S. Supreme Court stated that for copyright law purposes, "the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."[4] The Supreme Court added, "parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination."[5]

Satire has been defined as "a work which holds up the vices or shortcomings of an individual or institution to ridicule or derision, usually with an intent to stimulate change; the use of wit, irony or sarcasm for the purpose of exposing and discrediting vice or folly."[6] The Supreme Court, indicating a less favored status for satire than for parody, stated that satire, "can stand on its own two feet and so requires justification for the very act of borrowing."[7] The meaning of satire was also illuminated by the Texas Supreme Court, which stated:

> [s]atire, particularly realistic satire, is a distortion of the familiar with the pretense of reality in order to convey an underlying critical message. Satire deals with actual cases, mentions real people by name or describes them unmistakably (and often unflatteringly), talks of this moment and this city, and this special, very recent, very fresh deposit of corruption whose stench is still in the satirist's curling nostrils. . . . Perhaps the most famous example of satire is Jonathan Swift's 1729 essay, "A Modest Proposal," in which he advocated that the children of the Irish poor be sold and slaughtered for meat. The article was intended to criticize English landlords and political economists, but Swift was widely criticized by those who misunderstood the satire.[8]

The Texas Court noted that the United States has a long and storied "tradition of satiric comment" and that public figures and judges often bear the brunt of satire.[9]

Lampoon "is a form of satire, often political or personal, characterized by the malice or virulence of its attack;"[10] it is a writing that ridicules and satirizes the character or personal appearance of a person in a bitter, scurrilous manner.[11] Or it is criticism of someone or something by using ridicule, irony, or sarcasm.[12] Many people will recall *Mad Magazine* as well as *National Lampoon* as publications that ridiculed and criticized many institutions and aspects of American culture. These publications could fairly be called lampoons.

Satire, Lampoon and Parody Applied in Trademark Cases

Trademarks might be used in a parody or satirical manner. This is illustrated in several court decisions. In one case, a manufacturer of a chewy dog toy parodied the famous Louis Vuitton trademark.[13]

Louis Vuitton

Chewy Vuiton

Many people may recall the Jordache Jeans brand that was popular in the 1970s and '80s. The brand conducted widespread advertising featuring thin women, viewed at the time as having sex appeal due to their wearing tight fitting Jordache denim jeans. A company decided to parody the brand with a product identified as Lardashe Jeans.[14] The product was "blue jeans for larger women with a smiling pig and the word "Lardashe" on the seat of the pants."[15] The court found that the respective marks were not confusingly similar. The court also noted that when a party "chooses a mark as a parody of an existing mark, the intent is not

necessarily to confuse the public but rather to amuse."[16] With regard to the original trademark owner's objection to being parodied, the Ninth Circuit, quoting the famous parodist Will Rogers, stated:

> "Now everything is funny as long as it is happening to somebody Else, but when it happens to you, why it seems to lose some of its Humor, and if it keeps on happening, why the entire laughter kinder Fades out of it."[17]

The court added that the same principle is true in trademark law, noting that "no one likes to be the butt of a joke, not even a trademark. But the requirement of trademark law is that a likely confusion of source, sponsorship or affiliation must be proven, which is not the same thing as a 'right' not to be made fun of."[18]

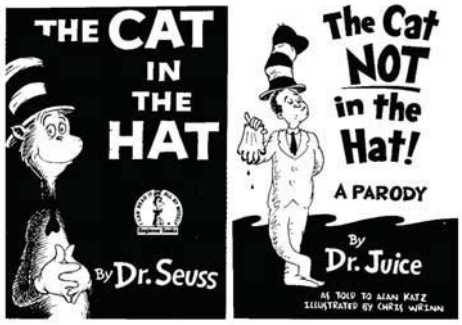
The case of *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*[19] concerned a manufacturer of perfumes designed for pets. The manufacturer created brand names that parodied famous high fashion perfumes for people, such as Timmy Holedigger (parodying the Tommy Hilfiger brand), CK–9 (parodying Calvin Klein's CK–1), Pucci (parodying Gucci), Bono Sports (parodying Ralph Lauren's Polo Sports), Miss Claybone (parodying Liz Claiborne), and White Dalmatians (parodying Elizabeth Taylor's White Diamonds). A District Court noted:

> where the unauthorized use of a trademark is part of an expressive work, such as a parody, the Lanham Act must be construed narrowly... Specifically, it has held that the public interest in avoiding consumer confusion must be balanced against the public interest in free speech. Cases finding that First Amendment interests prevail involve nontrademark uses of mark—that is, where the trademark is not being used to indicate the source or origin of consumer products, but rather is being used only to comment upon and, in the case of parody, to ridicule, the trademark owner. In such cases, the parodist is not trading on the good will of the trademark owner to market its own goods; rather, the parodist's sole purpose for using the mark is the parody itself, and precisely for that reason, the risk of consumer confusion is at its lowest.[20]

In another case, *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.*,[21] the Second Circuit ruled that "Spy Notes" was a parody of "Cliff's Notes." The publisher of Spy Notes intentionally used some of the identical colors and aspects of Cliffs Notes' well-known cover design. But the slight risk of consumer confusion from this usage was outweighed by the public interest in free expression.

Some Risks in Using Parodied Marks

Not every claimed parody or satire will be found to be fair use. And labeling a work as parody will not necessarily be effective. After the infamous murder trial of O.J. Simpson, Penguin Books and Dove Audio sought to publish and distribute "The Cat NOT in the Hat! A Parody by Dr. Juice." Their work was a "rhyming summary of highlights from the O.J. Simpson double murder trial."[22] Here are the covers of the two books:



The defendants' title was obviously similar to *The Cat in the Hat* and included a character, named "Dr. Juice," similar in name, and appearance to the title character of Dr. Seuss's book. In the following image, from the court decision, Dr. Seuss' title character is on the left, and a character from the defendant's work is on the right[23]:

The publisher of Dr. Seuss books claimed trademark and copyright infringement and was granted a preliminary injunction. Affirming, the Ninth Circuit stated:

> In several cases, the courts have held, in effect, that poking fun at a trademark is no joke and have issued injunctions. Examples include: a diaper bag with green and red bands and the wording "Gucchi Goo," allegedly poking fun at the well-known Gucci name and the design mark, the use of a competing meat sauce of the trademark "A.2" as a "pun" on the famous "A.1" trademark. Stating that, whereas a true parody will be so obvious that a clear distinction is preserved between the source of the target and the source of the parody, a court found that the "Hard Rain" logo was an infringement of the "Hard Rock" logo. In such a case, the claim of parody is no defense "where the purpose of the similarity is to capitalize on a famous mark's popularity for the defendant's own commercial use."[24]

In *Wendy's International, Inc. v. Big Bite, Inc.*[25] a small, new chain of sandwich restaurants sought to compete with national chains. Defendant's TV commercials parodied ad campaigns of other fast food chains. In one commercial, a cute, pigtailed, freckle faced little girl, apparently recognizable as Wendy's trademarked character, ordered a Big Bite

sandwich and said, "Ain't no reason to go any place but Big Bite."[26] That statement parodied a phrase trademarked by Wendy's ("Ain't no need to go anyplace else.").

Big Bite 1983 TV Commercial


Wendy's Registered Trademark (U.S. Trademark Reg. 936803)

Wendy's claimed the commercial gave the false impression that Wendy's own character endorsed or sponsored Big Bite.[27]

A U.S. District Court in Ohio noted "it is fairly well established that an advertiser such as Big Bite may lawfully use a competitor's trademark for the purpose of comparing its wares directly to those of the competitor," and added, "no uniform rule exists where, as here, the advertiser compares his goods to those of another implicitly or indirectly by using the other's mark in a satirical or humorous manner." The court noted "courts facing this issue have reached widely different results for widely different reasons."[28]

The court found that Big Bite's commercials were inoffensive, entertaining and light—hearted spoofs that did not misrepresent or make false statements about Wendy's products. But the court issued a preliminary injunction anyway, because evidence showed there was some confusion between the marks among the buying public.[29]

Thus, one's belief that his or her conduct is lawful fair use may turn out to be incorrect. A trademark owner's claim may thus result in a finding of infringement.[30]

Court decisions on whether a trademark usage was parody or satire thus have an element of subjectivity. There is risk that a court may find confusion between usages, and that a use does not qualify as a parody, satire or lampoon, and thus was not a permitted fair use. Potentially serious consequences can follow. The federal trademark law (the Lanham Act)[31] authorizes a court to order preliminary and permanent injunctive relief, and various measures of damages. A successful plaintiff can recover actual damages, and potentially triple damages. A victim of infringement can require an infringer to disgorge profits attributable to the infringement. Court costs are also recoverable.[32] In a case found to be exceptional, the court can also award reasonable attorneys fees to the prevailing party.[33]

Parody, Satire and Lampoon in Copyright Cases

Parody, satire, and lampoon have their roots in literature. As such, they are defenses to claims of copyright infringement by works of literature. Establishing that a literary work is a true parody, satire or lampoon can help establish the defense of fair use.[34]

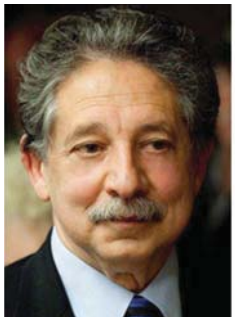
Campbell v. Acuff Rose Music involved a parody, by a rock music group 2 Live Crew, of an earlier Roy Orbison song, *Oh Pretty Woman*. The Supreme Court analyzed fair use, applying a

statutory four factor test set forth in the Copyright Act.[35] The Supreme Court gave reduced significance to the statute's first factor, which is the purpose and character of the use, whether commercial or nonprofit.[36] The statute's second factor, or the nature of the original work, was found by the court to be "not much help . . . or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works."[37]

With regard to the third factor in fair use analysis (amount and substantiality of the portion of the original used), the Supreme Court found in favor of the defendant, noting that a parody "must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable."[38] *2 Live Crew* had copied the key opening bass riff (musical phrase) of the original, and words of the first line, comprising the "heart" of the original.[39] But the Supreme Court was satisfied this was not "a substantial portion" of the parody itself or "verbatim" copying of the original; it was not a case "where the parody is so insubstantial, as compared to the copying," as to resolve the third factor against the parodist. The Supreme Court was satisfied that "no more was taken than necessary."[40]

Regarding the fourth fair use factor, "effect of the use upon the potential market for or value of the copyrighted work," the Supreme Court noted this factor does not concern injury to the market for the original that results from the parody's critique or disparagement of the original. In other words, a work that critiques another, may well reduce using public's esteem for the work that is the subject of the parody. That result is not relevant to the test's fourth factor. Rather, this factor concerns whether the new work affects the market by acting as a substitute for the original.[41]

In a recent case, *Kienitz v. Sconnie Nation LLC*,[42] a federal court and Court of Appeals upheld a fair use defense by a defendant clothing manufacturer. The defendant used a professional photographer's photo of a mayor, shown below, taken at the mayor's inauguration, as the basis for an image on t-shirts. The defendant had downloaded the photo from the city's website. The defendant then made t-shirts with the phrase "Sorry for Partying," which was a response to the mayor's effort to close down an annual block-party event. The original photo and image that appeared on the t-shirts are shown here:



Original Photo of Madison, Wisconsin Mayor Michael Paul Soglin by Photographer Michael Kleinitz

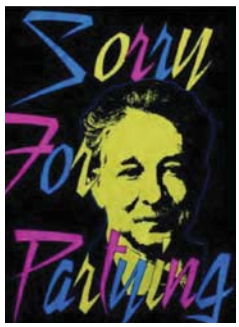


Image on T-Shirt Made by Sconnie Nation, LLC

The Seventh Circuit commented that there was no good reason why the defendant should be allowed to appropriate someone else's copyrighted efforts as the starting point for their lampoon, when so many noncopyrighted alternatives, such as snapshots that they could make themselves, were available. The court added that the fair-use defense is not designed to protect lazy appropriators but is to facilitate uses that would not be possible if users had to negotiate with copyright owners. The court also noted that the usage could hurt the photographer's commercial opportunities. But all these considerations did not overcome the fact, in the court's view, that "by the time defendants were done, almost none of the copyrighted work remained."[43]

But in copyright cases as well, the parody, satire, lampoon defense often does not succeed. In the *Cat in the Hat* case discussed above, the court quoted some content of the defendant's work:

> *A plea went out to Rob Shapiro*
> *Can you save the fallen hero?*
> *And Marcia Clark, hooray, hooray*
> *Was called in with a justice play.*
> *A man this famous*
> *Never hires*
> *Lawyers like*
> *Jacoby–Meyers.*
> *When you're accused of a killing scheme*
> *You need to build a real Dream Team.*
> *Cochran! Cochran!*
> *Doodle-doo*
> *Johnnie, won't you join the crew?*
> *Cochran! Cochran!*
> *Deedle-dee*
> *The Dream Team needs a victory*[44]

The Ninth Circuit noted that while these stanzas retell the O.J. Simpson tale, mimicking Dr. Seuss' style, they did not hold his style up to ridicule.[45] In other words, the defendant used Dr. Seuss' style not to parody or ridicule Dr. Suess, but to tell their own other story. The fair use defense was therefore rejected, and the preliminary injunction was upheld.

Parody, satire and lampoon can be fun. They are literary tools seeking to poke fun at the expense of the work that is their subject. The result may not be fun for their target.[46] But in many cases, the courts have ruled that the use of these tools to mock trademarks and copyrighted works is fair game.

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[1] Holman, *A Handbook to Literature*, Third Ed. (Odyssey Press 1972) 380.
[2] See e.g. *Burnett v. Twentieth Century Fox Film Corp.*, 491 F.Supp.2d 962 (C.D. Cal. 2007) (Dismissing based on defense of parody, claim by Twentieth Century Fox and celebrity Carol Burnett that television show *Family Guy* infringed copyright and violated California's right of publicity. "The episode at issue put a cartoon version of Carol Burnett/the Charwoman in an awkward, ridiculous, crude, and absurd situation in order to lampoon and parody her as a public figure.").
[3] *See e.g., Brownmark Films, LLC v. Comedy Partners* 682 F.3d 687 (7th Cir. 2012) (dismissing, on ground of parody, claim that television show South Park infringed copyright).
[4] *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 580 (1994).
[5] *Id.*
[6] *Metro-Goldwyn-Mayer v. Showcase Atlanta Co-Op Productions, Inc.* 479 F.Supp.

351, 357 (N.D. Ga. 1979).
[7] *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 581 (1994).
[8] *New Times, Inc. v. Isaacks* 146 S.W.3d 144, 151 (Tex., 2004) (some internal punctuation and citations omitted).
[9] *Id.* at 151.
[10] *Garvelink v. Detroit News* 522 N.W.2d 883, 886 (Mich. App. 1994).
[11] Holman, *A Handbook to Literature*, Third Ed. (Odyssey Press 1972) 286.
[12] Lampoon definition, OxfordDictionaries.com, available at http://www.oxforddictionaries.com/us/definition/american_english/lampoon (last visited July 17, 2015).
[13] *Louis Vuitton Malletier S.A. v. Haute Diggity Dog., LLC*, 507 F.3d 252 (4th Cir.2007).
[14] *Jordache Enterprises, Inc. v. Hogg Wyld, Ltd*., 828 F.2d 1482 (10th Cir.1987).
[15] *Id.* at 1483.
[16] *Id.* at 1486.
[17] *Id.* (quoting Will Rogers, Warning to Jokers: Lay Off the Prince, in The Illiterate Digest, I–3 The Writings of Will Rogers 75 (1974)).
[18] *Id.*
[19] 221 F. Supp.2d 410 (S.D.N.Y. 2002).
[20] *Id.* at 414 (citations omitted).
[21] 886 F.2d 490 (2d Cir. 1989).
[22] *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc*. 109 F.3d 1394 (9th Cir. 1997).
[23] *Id.* at 1394.
[24] *Id.* at 1405-1406 (internal citations omitted, citing *Gucci Shops, Inc. v. R.H. Macy & Co.*, 446 F.Supp. 838 (S.D.N.Y.1977); *Nabisco Brands, Inc. v. Kaye*, 760 F.Supp. 25 (D.Conn.1991); *Hard Rock Cafe Licensing Corp. v. Pacific Graphics, Inc*., 776 F.Supp. 1454, 1462 (W.D.Wash.1991)).
[25] 576 F. Supp. 816 (S.D. Ohio 1983).
[26] 576 F. Supp. at 818. Versions of McDonald's Ronald McDonald character and KFC's Colonel Sanders also appear in the 1983 Big Bite commercial. The commercial can be viewed on the internet at www.youtube.com/watch?v=Dq225Qxl_Us.
[27] 576 F. Supp. at 820.
[28] *Id.* at 823.
[29] *Id.* at 822.
[30] If there is doubt about whether a proposed mark may infringe, the potential user could seek declaratory relief. Quality Inns adopted this approach when it sought to establish a chain of economy hotels to be called McSleep Inn. *Quality Inns Int'l. v. McDonalds Corp* 695 F. Supp. 198 (D.Md. 1988). A District Court in Maryland ruled that the proposed brand would infringe the McDonald's trademark, refused to grant Quality Inns the declaration it requested, and enjoined Quality Inns from using the McSleep mark.
[31] 15 U.S.C. Secs.1051 et seq.
[32] 15 U.S.C. Sec. 1117(a).
[33] *Id.*
[34] *Campbell v. Acuff Rose Music Co*. 510 U.S. 569, 579 (1994) ("We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use."). But the defense is not certain. Id. at 581 ("The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use. . . ").
[35] 17 U.S.C. Sec. 107.
[36] *Campbell, supra* 510 U.S. at 584. ("The mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country."").
[37] *Id.* at 586. In *Campbell* the original work was a song, which the court found to be at the core of the types of works copyright law protects. Some other types of work, such as copyrighted functional works of a business competitor, could receive even less deference under the second factor.
[38] *Id.* at 588.
[39] *Id.* at 588.
[40] *Id.* at 589.
[41] *Id.* at 591.
[42] 766 F.3d 756 (7th Cir. 2014).
[43] 766 F.3d at 760.
[44] *Dr. Seuss Enterprises*, supra, 109 F.3d at 1401.
[45] *Id.* at 1402.
[46] *See e.g.*, *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F.Supp.2d 499, 507 (S.D.N.Y.2009) (tune and lyrics of defendants' song I Need a Jew resembled Disney's *When You Wish Upon a Star*. Defendants claimed their song poked fun at Walt Disney's purported anti-Semitism. Though Disney did not write the song or own the copyright, the court accepted this argument as supporting a parodic character and granted summary judgment for the defendant).

By David Gurnick

How Do I Distribute:
Let Me Count The Ways

Reprinted from Valley Lawyer August 2019

MANUFACTURERS AND resellers have many ways to place their goods and services into the stream of commerce, while the government has many ways to regulate distribution methods. This article discusses various modes of distribution and how each is regulated.

Defining 'Distribution'

The most basic distribution method is for one to create a product and sell it. This can be called "direct distribution". A farmer who grows a product and brings it to the market for sale engages in direct distribution. So does a restaurant that prepares meals for customers and receives payment. This method of distribution is sometimes called "cash-and-carry." The term can apply to any business that sells merchandise and receives payment at or about the time of sale.[1]

Today, the term "cash-and-carry" also commonly applies to sales made on short term credit, such as payment by credit card. As an example, Apple makes iPhones and sells them through company-owned stores where customers can pay with cash or, more commonly, by using their credit cards.

Direct distribution is the least regulated form of conducting sales. Neither the federal nor state government regulates this as a method of distribution. But this does not mean such businesses are unregulated.

A typical business in any field is subject to federal, state and local laws regulating any number of concerns—by way of example, the construction of physical premises; zoning, parking, health, safety and welfare of customers, workers and the public, sanitation; inspections by government agencies; employment practices; the restrictions on hiring persons not authorized to work in the United States; minimum wage; any restrictions on smoking; insurance for employees; taxes and withholding; the collection and payment of sales tax; fire safety and emergency preparedness; the use, storage and disposal of waste and hazardous materials; and nondiscrimination as to customers, employees and others.

Obviously, laws addressing many more subjects, as well as laws specific to the industry and activities of business also apply.

Working with Representatives, Dealers and Distributors

Next, one may engage representatives to sell one's product. Representatives can be sales agents, dealers or other kinds of distributors. Representatives solicit potential customers who then buy direct from the manufacturer.

A California statute—the Independent Wholesale Sales Representatives Contractual Relations

Act—seeks to protect commission-based sales representatives against perceived mistreatment by companies whose products they represent.[2]

According to the statute, a company in the state that uses outside sales representatives who are to be paid by commission must have a written agreement. The agreement must address the rate and method of computing commissions, when commissions will be paid, the sales representative's assigned territory, any chargebacks and any exceptions the representative is subject to with regard to territory and customers.

The California company must also provide its representative a copy and get a receipt for having done so and must provide the representative with an accounting of orders for which payment is made, the commission rate for each order, and details of any chargebacks.[3] A company that violates the statute can be subject to triple damages.[4]

Dealers and distributors buy inventory of a product, and resell from that inventory for their own account. The chain of product distribution, from manufacturer to end user, commonly includes dealers and distributors as links in the chain.[5]

Thus, as examples, Ford Motor Company and other car makers manufacture automobiles. These companies do not sell their products directly to consumers. Rather, their products are sold through dedicated Ford dealers, or sellers of other specified brands. Home appliances, household furnishings, clothing, food and agricultural products, pharmaceuticals, and the seemingly infinite varieties of other tangible products, and increasingly many kinds of services, are sold through resellers, such as distributors and dealers.

In a sense, retail stores, whether grocery, department, sporting goods, home furnishings, mattress or the countless varieties of independent stores in shopping malls, strip centers and along commercial streets, are examples of independent distributors. They buy products supplied by others, hold them in inventory, and advertise, display and resell them to the public. So are companies that buy, warehouse and resell industrial goods.

When an individual proprietor succeeds so well as to grow its number of distribution points, or, in other words, to grow its number of retail stores, it has become a chain distributor.

In 1950 Sam Walton opened a variety store called Walton's 5 & 10 in Bentonville, Arkansas. Twelve years later, he opened the first Wal-Mart store. Today, Walmart has thousands of stores nationwide and internationally.[6] Auto Zone, .99 Cents Only, Best Buy, Grainger and Nordstrom are additional examples of chain distributors.

Working with Suppliers

Suppliers have a strong interest in helping resellers maintain and grow sales. More sales by a reseller means an increase in sales by the manufacturer to the reseller.

Thus, everyone profits with suppliers able to provide additional assistance to their resellers such as, advertising, training reseller personnel in the use of the product, staffing and merchandising assistance at retail stores, the payment of slotting fees, sharing or reimbursing advertising expenses, consulting on product usages, conducting sales and other promotions.

Resellers sometimes become strongly associated with a supplier. As a result, a retail store may become known for one or more brands of products distributed. In earlier times, examples included appliance stores that might display signage for such brands as Maytag washer/dryers or Orrick vacuum cleaners. Today, it is common for a mattress store to display signage of the product brands they sell, for example, Beautyrest, Certa, Sealy and Simmons.

A supplier may provide so much assistance that the aid, in effect, amounts to a marketing program for its reseller. When a supplier provides a

marketing program, allows the reseller to become strongly associated with the supplier's brand, and charges the reseller any kind of a fee, the relationship may be in actuality, a business franchise—a distribution method in the United States that has roots dating back to the late 1800s and has grown most substantially over the past 50 years.[7]

Today, the public does business with countless franchised businesses including quick service restaurants such as, McDonald's, Burger King, real estate services like Century 21, Union 76 and ARCO gasoline stations, Hilton and Marriott hotels, and numerous other businesses.

Federal and State Regulations

A rule of the Federal Trade Commission that has nationwide application, as well as statutes in 13 states, have established an extensive body of regulation of offers and sales of business franchises.[8]

These rules require the preparation of an extensive Franchise Disclosure Document that must be presented to prospective franchisees, followed by a cooling-off period of at least 14 days, before any agreement is signed or any money is paid in relation to a franchise. In states with franchise laws, an additional regulatory layer consists of a review of the Franchise Disclosure Document by a state examiner.

California and approximately 25 other states regulate the ongoing franchise relationship. Those states restrict a franchisor from terminating a franchise agreement before the expiration of its agreed term and restrict a franchisor from refusing, at the end of the term, to renew a franchise if the franchisee wishes to renew. Early termination or nonrenewal may not occur over the franchisee's objection, unless the franchisor has good cause for its decision to terminate or not renew.

Good cause is defined in each statute, typically involving breaches of the franchise agreement that the franchisee fails to cure after being given notice and a reasonable opportunity to do so, endangerment of public health or safety, abandonment of the franchise and a few other specified circumstances.[9]

California goes so far as to restrict business franchisors from interfering with franchisees who wish to associate with each other.[10]

Consignment Sales

One more type of distribution method is consignment sales.

Consignment occurs when a supplier, called a consignor, provides its product to another, called a consignee, without transferring title. The consignee is authorized to resell the product and keep part of the sale price, while turning over the rest of the price to the supplier.

As described in the courts, "a consignment is nothing more than a bailment for care or sale, wherein there is no obligation of purchase in the consignee."[11] Thus, a consignment "creates an agency pursuant to which goods are delivered to a dealer for the purpose of resale; the consignor usually requires the consignee to charge a certain price for the goods."[12]

Farm-fresh produce is often placed in the chain of distribution in this manner, being placed with resellers sometimes called commission houses. The reseller does not own the produce, but sells it to another distributor, keeps a commission on the sale price, and remits the rest to the supplier.

This method makes sense because the market price of wholesale produce fluctuates continuously so that it would be difficult for the farmer to set a fixed price and equally difficult for the reseller to agree to it.

Many retail antique and used goods stores use the consignment method. Individual owners provide merchandise for display on consignment. This lets the store operator present vintage clothing and eclectic household relics for sale without having to incur any investment in inventory. This is important because

the uniqueness of each item means the store owner lacks reliable knowledge about how much time will be needed for any particular item to be sold.

Multi-Level and Seller-Assisted Marketing

Another distribution method—multi-level marketing—is, in some ways, a development over recent decades, but in other ways has been around a long time.

This is sometimes called "network" or "pyramid marketing." This characterization is often pejorative, as the reference to a pyramid recalls the infamous Ponzi schemes of the 1920s.[13]

While multi-level marketing is not against the law, it has been criticized as involving deception in the promises made to participants.[14] The Federal Trade Commission also has expressed concern that aggressive multi-level marketing programs may be deceptive and unlawful pyramid schemes.[15]

Yet another distribution method is related to franchising. It consists of a supplier providing assistance in starting a business that creates merchandise for sale back to the originator, or in which the originator commits to assist in providing locations for sales of merchandise, such as vending machines, or displays of items like jewelry.

California calls this method a Seller Assisted Marketing Plan, while other states refer to this as sales of business opportunities.

In this distribution method, the supplier makes a commitment that it is in need of and will purchase products made by the investor, or that it will provide locations for resale of the merchandise, or provides some other assurance of success.[16]

Licensing is another method. This occurs when the owner of a valuable brand name, cartoon character or other intellectual property grants permission to a third party to display or otherwise use that property whether on the third party's products or in the conduct of its business.

Professional sports teams, universities, entertainment companies, and even industrial companies generate large revenues from licensing their names and characters for use on toys, clothing and any number of items.[17]

Merchandise Making Licensed Use of Third Party Names and Characters

Patent owners, by virtue of their position, possess for a period of time, a limited monopoly to make or use the inventions embodied in their patents. Patent owners often grant licenses letting others use their patented inventions, in exchange for the payment of royalties.

Trademark, copyright, trade secret, and patent licenses typically require licensees to follow guidelines and comply with restrictions while using the name, character, secret or invention. Fundamental to most licenses is the requirement to pay royalties to the intellectual property owner.

Other Regulation of Distribution Methods

The federal government and California, as well as some other states, have regulations that focus on particular industries.

The Federal Petroleum Marketing Practices Act and portions of the California Franchise Investment Law, apply specifically to the offers, and sale and terminations of gas station franchises, while the distribution of alcoholic beverages and of automobiles each have their own regulations.[18] [19]

An ongoing development is the wave of legislation moving toward legalizing the distribution of cannabis products. These too are subject to particularized schemes of regulation.

Seller Assisted Marketing Plans or Business Opportunities are regulated by laws similar to the franchise laws. These too consist of a regulation of the Federal Trade Commission having nationwide application, and laws in several states.

Typically, these too require preparation of a disclosure document, presentation to a prospective investor and allowing a cooling-off period to pass before signing. Business opportunity laws also typically require the promoter to post a bond.[20]

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[1] See e.g., *In re Micro Innovations Corp.*, 185 F.3d 329, 332 (5th Cir. 1999) (Supplier who requires payment in cash at the same time he releases goods, "is engaging in a cash and carry transaction.").
[2] Cal. Civ. Code Secs., 1738.10 et seq.
[3] Cal. Civ. Code Sec. 1738.13.
[4] Cal. Civ. Code Sec. 1738.15. See e.g., *Reilly v. Inquest Technology* 218 Cal. App. 4th 536 (2013) (affirming award of triple damages for violation of the Act).
[5] See e.g., Solomon and Joffee, *Exclusive Distribution and Antitrust*, 53 Fordham L. Rev. 491, 491 n.1 (1984) ("We use the terms 'distributor' or 'dealer' generically to refer to distributors, retailers, or other firms in the chain of distribution between manufacturer or supplier and ultimate consumer.").
[6] Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution*, 1920−1940, 90 Iowa L. Rev. 1011, n.444 (Mar. 2005).
[7] See, Gurnick and Vieux, *Case History of the American Business Franchise* 24 Okla. City U. L. Rev. 37 (1999).
[8] The FTC Rule is codified at 16 C.F.R. Secs., 436.1 et seq. The California Franchise Investment Law is at Cal. Corp. Code Secs., 30,000 et seq. Other states that regulate the offer and sale of franchises are Hawaii, Illinois, Indiana, Maryland, Minnesota, New York, North Dakota, Rhode Island, South Dakota Virginia, Washington State and Wisconsin.
[9] The California Franchise Relations Act is at Cal. Bus. & Profs. Code Secs., 20000 et seq.
[10] Cal. Corp. Code Sec. 31220.
[11] *Martini E Ricci Iamino S.P.A. v. Trinity Fruit Sales Co*., 30 F.Supp.3d 954, 966 (E.D.Cal., 2014).
[12] *Id.*
[13] For a description of Ponzi's scheme, see e.g., *Cunningham v. Brown*, 265 U.S. 1 (1924).
[14] See FTC Bus, Guidance Concerning Multi-Level Marketing, available at *www.ftc.gov/tips-advice/business-center/guidance/business-guidance-concerning-multi-level-marketing*.
[15] See Staff Advisory Opinion -Pyramid Scheme Analysis (Jan. 14, 2014).
[16] See California Seller Assisted Marketing Plan regulation, Cal. Civ. Code Secs., 1812.200 et seq.
[17] See e.g., *Wolf v. Superior Court*, (2004) 114 Cal. App.4th 1343, 1347 (discussing Disney's "agreements with corporate entities such as Kodak, Coca–Cola, and Burger King, licensing them to use Roger Rabbit and Disney characters in their advertising and promotions.").
[18] Federal Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2841 (2007).
[19] Cal. Corp. Code Sec. 31104.
[20] See e.g., Cal. Civil Code Sec. 1812.214.

By Tamila C. Jensen and David Gurnick

Showdown Over the Pronoun

"On this issue, our court has gone both ways"[1]

Reprinted from Valley Lawyer December 2020

SINCE WRITING BEGAN WITH the ancient Sumerians, the 15th Century invention of the printing press and, near in time, the advent of English-language dictionaries, languages have faced ever increasing tensions between standardization and change.[2] [3]

Standardization enables people to understand each other; that is to say, we speak the same language. Change means language evolves—allowing talk about the world as it exists in the present. But, at the same time, tensions also exist between the speech of different classes of people.

In England, after the conquest by William of Normandy in 1066, three languages prevailed: English, of course; French, introduced by William; and Latin, which became the dominant written language, particularly for English law.[4]

For the government, courtly and elite the official language was French, while the common people spoke the vernacular language, English.[5]

Vernacular—the language of the common people—has, over time, proven to be the kind of language most prone to change and most reflective of the real lives of the greatest numbers of people.

For example, after the breakup of the Roman Empire, the Italian peninsula was a hodgepodge of principalities and city states. So many dialects were in use that people in Florence could hardly understand people from the Kingdom of Naples.

In the 13th Century, along came the poet Dante Alighieri (1265–1326), who gave the world The Divine Comedy—The Inferno, The Purgatorio, The Paradiso and is often credited as the Father of Italian Literature, having written in the vernacular and standardizing Italian.[6] [7]

Two centuries later, Geoffrey Chaucer had a similar role choosing to write in vernacular English at a time when French and Latin were the more sophisticated languages spoken in England.

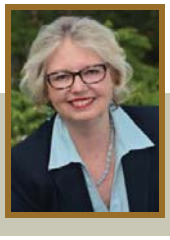
Tensions Made Evident

Chaucer and Dante exemplify the tensions between the elite and the common people.

In their times, only a handful of people were educated, and they wrote in Latin. Commoners spoke various dialects of the vernacular and were generally not literate. The structure by which uniformity is established, passed on and enforced—higher education—was totally absent.

And yet, it was with the rise of the vernacular that the world began to dramatically change politically, socially, spiritually, and economically.

With the invention of the printing press in the early 15th Century, books



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and other printed material became much more widely available than in earlier times when books had to be painstakingly transcribed by hand. Ideas, thus, spread ever more rapidly.

Jacques Barzun, in his book, *From Dawn to Decadence—500 Years of Western Cultural Life 1500 to the Present*, argues that the 95 Theses of Martin Luther (1517) had their profound effect because they were easily disseminated in common languages thanks to Gutenberg's movable type and to development of better quality paper and ink, giving a craftsmen the tools to produce new books and pamphlets quickly and disseminate them broadly.

Reading, writing, and the more critical thinking these skills engender, were forever no longer limited to the elite and clergy.

Tension between the standardization and change in language was discussed at length by the writer and student of languages, H. L. Mencken, in his three-volume work, *The American Language* (1919, 1921, 1923, 1936); *The American Language: Supplement One* (1945); and *The American Language Supplement Two* (1948).

Mencken addresses the tension between English as spoken in Britain and English as spoken in America, which was—and, perhaps, still is—considered by British intellectuals and American Brahmins as uncouth and even unintelligible. It moved rapidly away from the mother tongue, oddly enough and, to some extent, retained words and structures that had become archaic in the England of several centuries ago.

Explaining the American love of novelty and lack of conformity, Mencken wrote:

"They have acquired that character of restless men, that impatience of forms, that disdain of the dead hand, which now broadly marks them. Thus, the American on the linguistic side, likes to make his language as he goes along, and not all the hard work of the schoolmarm can hold the business back.[8]

According to Mencken, the American is notable for his "revolt against conventional bonds and restraints" especially in common speech.[9]

To bolster his argument, in a later edition of his work, he devotes several pages to discussing pronouns then in common usage and shares with us this delightful poem, now curiously quaint:

> Whatever is our ain't theirn.
>
> If it ain't hisn, then whosn is it?
>
> I like thisn bettern thatn.
>
> Let him and her say what is hisn and hern,
>
> Everyone should have what is theirn.[10]

A Contemporary Challenge

This brings us to a contemporary challenge in the English language and particularly in the language of the law.

Our language lacks grammatical gender, with the exception of pronouns— English does not have a gender-neutral pronoun in general usage.[11]

Historically, he was considered gender neutral in formal speech. But Americans long ago moved away from using he as gender neutral and adopted he/she.

Meanwhile, people are asking, sometimes insisting on being referred to according to their gender identity.[12]

The challenge was illustrated this year, in the decision quoted at the start of this article. In *U.S. v. Varner* the Court of Appeals for the Fifth Circuit faced a question of litigants, judges, court personnel and others using and potentially being required to use pronouns matching a litigant's gender identity.[13]

Changing and Evolving

English, like all living languages, is always changing, ever evolving.[14]

In light of today's active movements seeking social justice it has been noted that language is a mechanism "by which gender is constructed and reinforced," and that our words used to describe others or

objects can be biased, now including binary gender bias.[15]

Recognizing this, contemporary writers and speakers often consider use of "they" to be an acceptable gender neutral pronoun, even when used to refer to a single indi vidual.

Lack of a gender-neutral pronoun has been a source of increasing frustration for members of the LGBTQ community and others who are sensitive to such concerns.

The University of California San Francisco (UCSF) LGBTQ Resource Center lists the following pronouns as being in common usage:[16]

Subject	Object	Possessive	Possessive Pronoun	Reflexive
He	**Him**	**His**	**His**	**Himself**
"He studied"	"I called him"	"His pencil"	"That is his"	"He trusts himself"
She	**Her**	**Her**	**Hers**	**Herself**
"She studied"	"I called her"	"Her pencil"	"That is hers"	"She trusts herself"
They	**Them**	**Their**	**Theirs**	**Themselves**
"They studied"	"I called them"	"Their pencil"	"That is theirs"	"They trust themselves"
Ze (or Zia)	**Her**	**Hir**	**Hirs**	**Hirself**
"Ze studied" *("zee")*	"I called hir" *("heer")*	"Hir pencil"	"That is hirs"	"Ze trusts hirself"

UCSF suggests including one's preferred pronouns in their email and asking people which pronouns they prefer.[17]

At a recent Zoom conference, each person's name appeared with their preferred pronoun stated.

In fact, the authors of this article have seen email with the lawyer's signature presented as follows:[Attorney's Name] Partner (Pronouns: he/ him/ his). This has potential to become an increasingly used, potentially standard practice.

The University of Southern California (USC) LGBTQ Center lists the following commonly used gender-neutral pronouns:

they, them, their, theirs, themself sie, hir, hir, hirs, hirself zie, zir, zir, zirs, zirself

so instead of…	*you may use…*	*which is pronounced…*
he/she	sie zie	see zie
him/her	hir zir	here like sir with a "z"
his/hers	hirs zirs	here's like sirs with a "z"
himself/herself	hirself zirself	here-self like sir-self with a "z"

In 2014, Professor Marshall Thatcher of the University of South Dakota published an article proposing to create gender neutral third person pronouns.

In the article, Thatcher noted the workarounds that writers currently use to avoid using gender specific pronouns. These methods included repeating the noun rather than substituting a pronoun.

But, he found this method is not always ideal because it may lengthen the text and sound contrived, omitting the pronoun, using passive rather than active voice, pluralizing nouns so that plural rather than gender specific third person singular pronouns may be used, and achieving gender neutrality by using the word "one" as a generic referent rather than masculine pronouns.[18]

Professor Thatcher's proposal is to adopt the following:

- ee—use as a gender neutral third person singular pronoun; this would substitute for he or she.
- eet—use as a gender neutral third person singular pronoun to refer to a person of unspecified sex or to an inanimate actor; he, she, or it.
- herim—use as a third person singular object of a sentence to use in place of her or him (such as, "an officer shall assist herim).
- hermit—use as a third person singular object of a sentence to refer to a person of unspecified sex or a non- human entity in place of him, her, or it.
- herimself—use as a third person singular reference to in place of herself or himself.
- herimtself—use as a third person singular reference for a person of unspecified sex or a non-human entity, in place of herself, himself, or itself.
- hisers—use as a possessive pronoun in place of his or hers.
- hiser—use as a pronoun in place of his or her.
- hiserts—as a pronoun in place of his, her, or its.

Thatcher argues that incorporation into English of such new pronouns can be expected to achieve results comparable to the adoption into the language of the term Ms. in place of Mrs. and Miss and that adoption of these pronouns would end the clumsy or inaccurate workarounds that have been adopted in writing to avoid gender specific pronouns.[19]

As Martin Luther King famously said, "the arc of the moral universe is long, but it bends toward justice."[20]

Today, it is increasingly recognized that ever-evolving language too, even at the granular level of our pronouns, can be a force for that justice.

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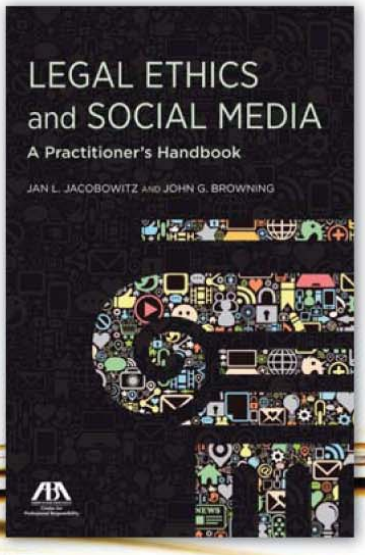
[1] *US. v. Varner*, 948 F.3d 250, 255 (5th Cir. 2020).
[2] *See e.g.*, Rickie Sonpal, *Old Dictionaries and New Textualists* 71 Fordham L. Rev. 2177, 2181 (2003) (describing earliest English dictionaries in 1400s and 1500s).
[3] *See e.g.*, Wayne M Senner (editor) The Origins of Writing (U. of Nebraska Press 1989) p.6 (noting Sumerians were the inventors of true writing).
[4] David Mellinkoff *The Language of the Law* (Little Brown & Co. 1963) 71, 95.
[5] *See*, Britt Hanson, *A (Mostly) Succinct History of English Legal Language* 48 Ariz. Attorney 28, 32 (2012). (noting that judges and lawyers spoke the language of the court and nobility: Norman French).
[6] *See discussion* in John M. Stefano III, *On Literature as Legal Authority* 49 Ariz. L.R. 521, 527, 527n.38 (2007).
[7] *See e.g.*, Asher Salah, *A Matter of Quotation: Dante and the Literary Identity of Jews in Italy* (chapter in *The Italia Judaica Jubilee Conference* (Shlomo Simonsohn and Joseph Shatzmiller, editors, Leiden: Boston: Brill, 2013) 168 (noting, Dante is considered to be the spiritual father of literature written in Italian vernacular).
[8] H.L. Mencken, *The American Language* (Alfred A. Knopf, 1919) p.22.
[9] H.L. Mencken, *The American Language* 4th Edition (Alfred A Knopf, 1962) p. 95.

[10] H.L. Mencken, *The American Language, Supplement Two* (Alfred A Knopf, 1948) p. 36.
[11] C. Marshall Thatcher, *What Is "EET"? A Proposal To Add A Series of Referent-Inclusive Third Person Singular Pronouns and Possessive Adjectives to the English Language for Use in Legal Drafting*, 59 S.D. L. Rev. 79 S.Dak. L. Rev. (2014) ("Like all living languages, the English language is an evolving work in progress.").
[12] *See e.g.*, *Privacy Matters v. U.S. Dept. of Education*, 2016 WL 6436658, at *1 n.1 (D. Minn., 2016) (Plaintiffs' court filings referred to defendant Doe as male and used masculine pronouns, but did not ask Court to adopt that pronoun usage. Doe referred to herself as female, used feminine pronouns and asked Court to do the same. Court granted Doe's request, referring to her as female and using feminine pronouns in referring to her.)
[13] *U.S. v. Varner*, supra note 1 at 254-255. Illustrative of a time of transition, the Court noted courts sometimes do and sometimes do not use parties' preferred pronouns; and the Fifth Circuit "has gone both ways." *Id.*
[14] Thatcher, *supra note* 7 at 79 ("Like all living languages, the English language is an evolving work in progress."); *see also* e.g., Rudi Keller, *On Language Change, The Invisible Hand in Language* (Routledge, 1994) 3 ("Languages are always changing. Twenty generations separate us from Chaucer. If we could board a time machine and visit him in the year 1390, we would have great difficulties in making ourselves understood – even roughly.") and 4 ("we find in newspapers printed about 40 years ago a wide range of expressions that would be inappropriate nowadays in a similar context").
[15] Heidi K. Brown, *Get With the Pronoun*, 17 Legal Communications & Rhetoric 61, 67 (Fall 2020) (quoting Nat'l Council of Teachers of English, Statement on Gender and Language (Oct. 25, 2018), https://ncte.org/statement/genderfairuseoflang/).
[16] *See* website of University of California Lesbian, Gay, Bisexual, Transgender Resource Center, https://lgbt.ucsf.edu/pronounsmatter (last visited Nov. 21, 2020).
[17] *Id.*
[18] Thatcher, *supra note* 11 at 81.
[19] Thatcher, *supra note* 11 at 87.
[20] *See e.g.*, *Shelby County, Ala. v. Holder*, 570 U.S. 529, 581 (2013) (Ginsburg, dissenting).

Book Review

Legal Ethics and Social Media: A Practitioner's Handbook



By David Gurnick

"Social Media is an environment of instantaneous sharing and connecting, while the legal profession prides itself on confidentiality and careful, analytical thinking."

Reprinted from Valley Lawyer February 2018

THE ABOVE QUOTE, FROM *Legal Ethics and Social Media: A Practitioner's Handbook* (American Bar Association, 2017), addresses many tensions such as the clash between the lawyer's quest for professionalism and the public's freedom of speech; and the conflict between fast-paced, free-wheeling social media and the legal profession's commitment to high standards, deliberative analysis and methodical approach toward change.

The rapid expansion of online communications, networking, photo-sharing, cloud-computing, and a myriad of other uses of the internet have certainly created not only useful tools for the legal profession, but serious challenges to keeping up-to-date with ever-changing technologies and their accompanying ethical risks.

There are no safe harbors and no escape, and as the *Handbook* shows, lawyers face ethical risks from using, or not using, available technology to communicate.

The *Handbook* was published by the American Bar Association's Center for Professional Responsibility and written by Jan L. Jacobowitz and John G. Browning, both of whom have strong backgrounds in the law, academia, and organizations focusing on legal ethics and professional responsibility. Their work is a useful overview discussing many kinds of social media, and how these tools—created for social, informational and networking purposes—can be utilized by lawyers to improve results for their clients.

The work dissects various ways—good and bad, right and wrong, with many involving ethical questions—in which lawyers and judges use social media. In several eyebrow-raising discussions, particularly for those not versed in these new technologies, the writers examine why—as matters of competence, ethics and professional responsibility—lawyers have an obligation to make affirmative use of social media.

The *Handbook* does more than just identify issues—it provides well-formed and workable suggestions and resources for addressing the ethical and professional issues it raises.

The work is divided into thirteen chapters, with its early chapters covering the early background and development of social media. The authors are fond of noting that back in the day, technology caused lawyers to shift from employing scriveners—who hand-copied and proofread documents—to using typewriters, telephones and copy machines. The conservative legal profession resisted new technology. For many years in the early 1900s, the storied law firm Cravath, Swain & Moore rejected telephones, and later when finally installed, told employees not to use them, but only to answer the phones when they rang.

Time-warp to today, with authors Jacobowitz and Browning noting that social media's investigative and informational tools are so powerful, that a competent lawyer must understand how to use technology and that a "duty to Google" is emerging in the practice of law.

The *Handbook* explores ethics issues in such developments as discovery, preserving social media evidence, client postings and jury research. Additional timely subjects covered include the ethics of judges befriending lawyers and parties, the prosecutorial uses—and misuses—of social media, attorney online advertising,

social media's usefulness in estate planning, securities, bankruptcy and other transactional practices and responding, or not, to negative statements posted by clients.

In each area, the authors describe the circumstances and present a surprising range of interesting cases. For example, in a 2013 criminal case, the Ninth Circuit held that a lawyer's failure to find and use a purported sexual abuse victim's recantation on her social networking profile was ineffective assistance of counsel.[1] In the area of advertising, an Indiana bankruptcy attorney was suspended from practice for 30 days for advertising online "we have been screwing banks since 1992." The ACLU's defense of the attorney was unsuccessful. The same attorney has a bulldog pictured on his website. But the authors note another state—Florida—found it impermissible to show a pit bull, on the ground this sent the wrong message to the public.[2]

The *Handbook* thus summarizes or references numerous court and ethics opinions of the ABA and state and local bar associations, and packs a lot of useful information and resources into a readable 239 pages. Here are several examples of other interesting and informative points made in the *Handbook*:

- Advising a client as to social media postings before and after filing a lawsuit is an element of competent, diligent legal representation.

- A lawyer may properly advise a client to remove social media posts that may hurt the client's case or interest, even after a matter is pending. Relevant information should be preserved so it may be produced in discovery.

- Monitoring a client's activity on social media may be appropriate for an attorney to stay informed of developments affecting the client's legal dispute.

- Social media may be used to conduct informal and effective discovery. The *Handbook* notes that with almost 2 billion people engaged in social media networking, an internet search will likely reveal relevant information in many litigation situations.

- A lawyer may look at an opposing party's public social media postings. Propriety becomes more nuanced when the party's social media is inaccessible due to privacy settings. Restrictions against contacting a party who is represented by counsel remain in effect.

- The *Handbook* discusses the current state of the legal, practical and ethical issues involved when researching social media activity of prospective and sitting jurors, and monitoring social media activity of jurors during trial. The *Handbook* suggests there are circumstances when the standard of practice makes it mandatory to do this research, and also discusses when doing such research on jurors may be prohibited.

- Criminal prosecutors have been disciplined for overaggressive investigative steps using social media. In Ohio, a prosecutor invented a fake online "baby mama" and used this fictitious persona to communicate on Facebook with a murder defendant's ex-girlfriend's alibi witnesses. The ploy convinced the witnesses not to testify. The defendant was convicted, but the lawyer was terminated from his position and suspended by the state bar. The suspension was later stayed by the state Supreme Court.[3]

- In California, a lawyer was nearly disciplined for an "incredible display of poor judgment" in commenting on Facebook about a pending criminal trial. But the attorney's "foolishness" did not rise to the level

of misconduct warranting a new trial.[4]

- The *Handbook* discusses best advertising practices on several social media platforms such as LinkedIn, Facebook, YouTube and Avvo, as well as the use of Google AdWords, pay-per-click lawyer advertising and even Groupon promotions. Doubtless, many lawyers are not fully aware of the availability of these advertising opportunities. The *Handbook* is informative as to both methods and related ethics issues.

- Sometimes lawyers have posted rants or other candid comments they felt had no connection to any pending matter or even, in a broader sense, to the practice of law. But lawyers have faced discipline for such comments. The authors point out that a lawyer "is posting not only as a person, but also as a lawyer, a role that has a 24/7 connotation where legal ethics are concerned." It seems that anything a lawyer posts automatically has a connection to the practice of law.

- Addressing another increasing challenge for lawyers, the *Handbook* discusses the problem of online negative postings made by clients, and considerations in evaluating whether or not, and how, to respond.

Both the technology of social media and law concerning this technology are evolving rapidly, in real time. For this reason, in many areas the *Handbook* obviously can't provide definitive guidance. While it covers current incidents, recent cases and ethics opinions, many are not officially published and emanate from local and regional bar associations.

On some occasions, the book points out, different authorities have reached different conclusions. As a result, one senses that the *Handbook* will quickly need to be updated to reflect inevitable further developments in both technology and the law.

Lawyers are challenged to be aware of all the ways the internet and social media affect the practice of law; the ways these tools can and must be used; as well as the ethical dangers in failing to use or misuse available technological tools. Because there is, at present, no other single source, the *Handbook* is an important resource for lawyers to consult—informative and happily for non-savvy practitioners, easy to read and presented the old-fashioned, low-tech way with ink on paper, bound at the spine, and readily accessible to all.

[1] *Cannedy v Adams* (2013) 706 F.3d 1148.
[2] *Fla. Bar v Pape* (Fla. App. 2005) 918 So.2d 240, 243.
[3] *Disciplinary Counsel v Brockler* 48 N.E.3d 557 (Oh. 2016).
[4] *People v Armstrong* 2014 WL 125939 (Cal.App. 2014) (review denied Apr. 9, 2014).

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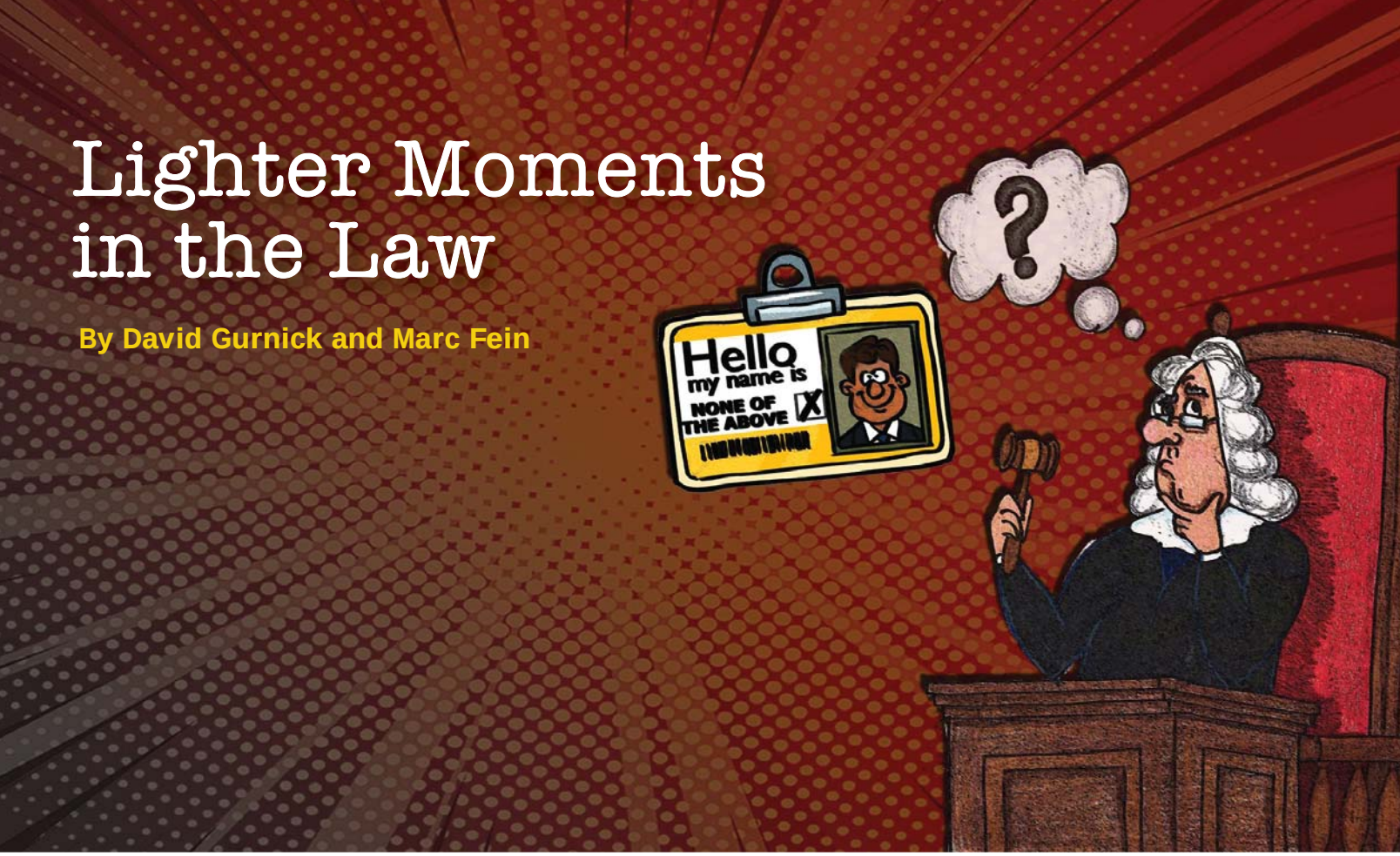
Lighter Moments in the Law

By David Gurnick and Marc Fein



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THE LAW IS A SERIOUS SUBJECT AND A SERIOUS business. It is the fabric of rules and decisions that bind and give texture to our society. But there can be humor in our law and in the process of resolving disputes.[1]

Whether you are a lawyer, a litigant or one who hopes never to be either, we hope these amusing vignettes helps to lighten your view of the law, the judges who apply it, the attorneys who practice it, and the public that relies on it.

Sure Way to Win an Election

Politicians sometimes go to unusual lengths to get votes. One Louisiana man went especially far in trying to get elected —changing his name to boost his chances of winning.

Luther Knox qualified to run for governor of Louisiana. Soon after qualifying, he legally changed his name to "*None of the Above*."

Knox felt that voters would like this choice the best. Now legally named "None of the Above," he asked that his new name appear on the ballot. When his request was denied, he filed suit.

A court ruled against him. Although the court noted that people have the right to change their name to whatever they want, it said that "None of the Above" was a misleading name which violated a law prohibiting deceptive names in elections.[2]

Plain Talk

Here's an excerpt from the opinion in a case decided in the United States Court of Appeals, bemoaning the way some federal agents communicate, or, at least, try to…

> *"The agents involved speak an almost impenetrable jargon. They do not get into their cars; they enter official government vehicles. They do not get out of or leave their cars, they exit them. They do not go somewhere; they proceed. They do not go to a particular place; they proceed to its vicinity. They do not watch or look; they surveille. They never see anything; they observe it. No one tells them anything; they are advised. A person does not tell them his name; he identifies himself. A person does not say something; he indicates. They do not listen to a telephone conversation; they monitor it. People telephoning to each other do not say "hello;" they exchange greetings. An agent does not hand money to an informer to make a buy; he advances previously recorded official government funds. To an agent, a list of serial*

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numbers does not list serial numbers, it depicts Federal Reserve Notes. An agent does not say what an exhibit is; he says what it purports to be. The agents preface answers to simple and direct questions with "to my knowledge." They cannot describe a conversation by saying "he said" and "I said;" they speak in conclusions…One agent, when confronted with the facts demonstrating that his affidavit was false, did not admit that it was false; it was merely "inconsistent."[3]

Even Superheroes Lose Sometimes

Mortals aren't the only ones who go to court. Superheroes fight there too. In the early 1980s, ABC wanted to produce a television series loosely based on Superman. So, ABC approached Warner Brothers—Superman's owners—which refused to grant a license. So ABC created a new hero and dubbed him The Greatest American Hero, a mild-mannered teacher whose caped costume gave him fantastic powers.

Faster than a speeding bullet, Warner Bros. sued for copyright infringement claiming that The Greatest American Hero was just a thinly-veiled copy of the iconic Superman.

The court found The Greatest American Hero was a reluctant, bumbling hero, just the opposite of Superman, who was brave and confident.

You can add a lawsuit to kryptonite as the only effective ways to beat Superman, because in this particular judicial battle for truth, justice and the American Way, the Man of Steel lost.[4]

The Devil Himself

Even the devil has been sued. In 1971, one Gerald M. filed a class action lawsuit against the Devil claiming that Satan caused him misery, put obstacles in his life's path, and caused his—that is, Gerald's—downfall. He also alleged that Satan had ruined the lives of other people, as well.

Unfortunately, the case had some technical problems. The complaint was not properly served on the defendant according to the law, and the court seriously doubted it could force the defendant into court, even with a subpoena or arrest.

Though there is an officially published record about this case, there is no official published record as to how it was finally decided.[5]

A Half Equals a Third…But Then Again

A corporation was formed and it was agreed the capital stock would be "divided half and half between the parties." That sounded easy. Each party would get half the stock. The problem was that the corporation was formed by three parties. The court's solution was to divide the stock in equal thirds. In this case, a "half " meant a "third."[6]

In another somewhat similar case, a half meant a whole. A company authorized its salesman to sell as many as 50 half-chests of tea. A customer ordered exactly 50 chests of tea. The parties argued whether the order was more than the salesman was allowed to sell.

Checking an old dictionary, the Court found that in selling tea, a "chest of tea" meant "a half-chest, not a whole chest." A "whole" actually meant a "half" and the company had to fill the order.[7]

A Case for Dear Abby

Ronnie loved Bonnie and Bonnie loved Ronnie. So they said and so it seemed. They had two kids, lots of property, and 13 years together. That is, until Bonnie filed papers in court to end their marriage.

Ronnie responded with an unusual claim of fraud—in this case, fraud in love. He said that before marrying Bonnie, she said she loved him and was physically attracted to him. But as the marriage ended, Bonnie admitted she had lied, saying that, in fact, she was never really physically attracted to Ronnie in the first place.

A jury awarded Ronnie damages, but a higher court had another view. The justices said that matters of romance and courtship are not suited for law suits simply because juries can't tell if a person was truthful in claiming to love or be attracted to someone else. The court ordered the award overturned.[8]

Neighbor Cries Foul Over Basketball Noise

When Ken built a basketball court in his yard, his neighbor cried foul, claiming the basketball noise disturbed his rest, reading, television watching, and his ability to enjoy a good meal.

Ken refused to limit his playing, and the neighbor's complaints evolved into spraying water on the basketball court (and the players) and blasting ear-shattering rock music at Ken's house.

The parties could not resolve their dispute, so the situation bounced from the basketball court into a court of law with the lawsuit filed by Ken's neighbor claiming nuisance and emotional distress.

A trial court agreed with the neighbor and forced a time-out by issuing an injunction limiting the hours Ken could play. Determined to get the last shot, Ken appealed.

The appeals court ruled for Ken. The court said the emotional distress was due more to anger than basketball playing. Ruling that everyone must put up with some noise from neighbors, the appeals court canceled the injunction, ruling that Ken could again play ball.[9]

Referee's Wrong Ruling Is Right

Two Georgia high school football teams—Osborne and Lithia—played each other to decide who would go to their league playoffs.

On one of Osborne's fourth down punts, Lithia was called for a penalty. Under league rules, Osborne was entitled to a

first down. But the referee gave Osborne only the penalty yards, and a new fourth down. Osborne punted again. Lithia received the ball and later scored and won.

Osborne's protest was denied by the school district. So parents of the Osborne players sued and the trial judge ruled that the disputed game would be replayed from the moment of the referee's mistake. The trial court also issued an order canceling the first playoff game (which was set for that evening) pending results of the replayed Osborne-Lithia game.

In an emergency appeal, Georgia's Supreme Court suspended the trial judge's order, and then reversed it. The Supreme Court ruled that Georgia courts were not in a position to review decisions of football referees.

Though the referee's error could not be changed, the trial judge's ruling for Osborne could be reversed, and it was. Lithia's last minute victory in court took the team to the playoffs.[10]

Switching the Ticket

Two friends ran a raffle with the grand prize being 80 lottery tickets. Before the raffle, the husband of one friend switched a lottery ticket he had bought with one of the raffle prize tickets. As planned, the winner of the raffle received the 80 tickets.

Two days later, the winning lottery number was announced. Having switched tickets, the husband had the $100,000 winner. The raffle winner, on learning that the winning ticket had originally been, but was no longer among the 80 tickets he'd won, sued.

A court ruled in favor of the raffle winner, saying that since the raffle's promoters kept track of the tickets they awarded as prizes, they intended that the raffle winner would get the $100,000 winning ticket. He did.[11]

Defendant Whose Case Takes Too Long Sues

In 1981, a grand jury issued a criminal indictment for 92 felony counts, including fraud, forgery and grand theft. Over the next ten years, the court granted the defendant's numerous requests to postpone the case.

When the trial was finally ready to start, the defendant filed an emergency petition in the court of appeal. He claimed he was denied his constitutional right to a speedy trial, and asked that the case against him be dismissed.

Like the legendary defendant being sentenced for killing his parents—who pleaded for mercy because he was an orphan—the defendant's request was denied.[12]

"Dead" Woman Sues National Enquirer

Tabloid newspapers has given us many interesting stories, and also some lighter moments in law. In 1990, a tabloid newspaper in Arkansas ran a story about a 101 year-old lady who had quit her newspaper route because she had been impregnated by a millionaire customer.

Next to the story was a picture of another woman, Nellie M., aged 96. The editor chose Nellie's photo because he thought she was dead, but, in fact, she was alive and well. So alive that she sued the tabloid for damaging her reputation.

In court, the tabloid referred to the Guinness Book of World Records, arguing that everyone knows someone aged 96 or 101 can't get pregnant. The tabloid claimed everyone would know the story was a joke. The court didn't laugh. It let Nellie go ahead with her claim, which she later won.[13]

And Finally…A Conviction Reversed with a Verse

To convict someone of the crime of "fraud" the prosecutor must prove that the defendant told a lie, and that the lie was "material," that is, the lie was about something significant.

A federal court used a short verse to reverse a fraud conviction because the prosecution did not show that the defendant corporation's lie was "material."

This case presents a vicious duel,
Between the U.S. of A. and defendant Ven-Fuel.
Seeking a license for oil importation,
Ven-Fuel submitted its application.
It failed to attach a relevant letter,
And none can deny, it should have known better.
Yet the only issue this case is about,
Is whether a crime was committed beyond reasonable doubt.
Ven-Fuel was convicted of fraudulent acts,
By the Trial Court's finding of adequate facts.
We think it likely that fraud took place,
But materiality was not shown in this case.
So while the Government will no doubt be annoyed,
We declare the conviction null and void.[14]

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[1] See e.g., Mary B. Trevor, From Ostriches to Sci-Fi: A Social Science Analysis of the Impact of Humor in Judicial Opinions, 45 U. Tol. L. Rev. 291, 292 (2014) ("humor, while not widespread, is an ever-present aspect of the body of judicial opinions").
[2] *None of the Above v. Hardy*, 377 So.2d 385 (La. 1979).
[3] *U.S. v. Marshall* 488 F.2d 1169 (9th Cir. 1973).
[4] *Warner Bros. v. ABC*, 720 F. 2d 231 (2d Cir. 1983).
[5] *U.S. ex rel. Mayo v. Satan and His Staff*, 54 F.R.D. 282 (W.D. Pa. 1971).
[6] *Bates v. Wilson*, 24 p. 99 (Col. 1890).
[7] *Japan Tea Co. v. Franklin Macveagh & Co*., 171 NW 305 (Minn. 1919).
[8] *Askew v. Askew*, 28 Cal Rptr. 2d 284 (1994).
[9] *Schild v. Rubin*, 283 Cal. Rptr. 533 (1991).
[10] *Georgia High School Ass'n v. Waddell*, 285 S.E. 2d 7 (Ga. 1981).
[11] *Smith v. Williams*, 698 F. 2d 611 (3d Cir. 1983).
[12] *Gottlieb v. Superior Court*, 91 Daily Journal D.A.R. 9015 (2d Dist. Jul 23, 1991).
[13] *Mitchell v. Globe International Publishing. Inc*., 773 F. Supp. 123 5 (W.D. Ark. 1991).
[14] *U.S. v. Ven-Fuel. Inc.* 602 F.2d 747 (5th Cir. 1979).

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