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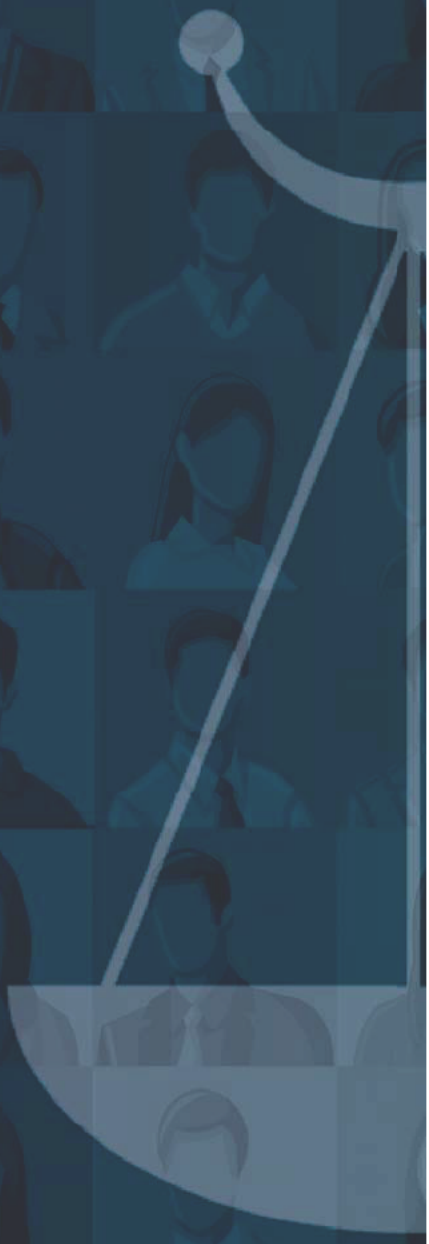
The Evolution of the Private Attorneys General Act of 2004

By Hannah Sweiss



The Labor Code Private Attorneys General Act of 2004 was intended to augment the enforcement abilities of the Labor Commissioner by creating an alternative private attorney general system for labor law enforcement. More than a decade later, wage and hour claims continue to rise and it's unclear if the private attorneys general under PAGA are really initiating lawsuits on behalf of social or public interest.

THE TERM "PRIVATE ATTORNEY GENERAL" FIRST appeared in an appellate court ruling in 1943[1] and generally refers to a private attorney who initiates a lawsuit on behalf of social or public interest.[2] The legislature has the ability to create private attorneys general by statute,[3] which is how the Private Attorneys General Act of 2004 (PAGA) came into being.

Where it All Began

Proposed in 2003, Senate Bill (SB) 796, the Labor Code Private Attorneys General Act of 2004, was intended to augment the enforcement abilities of the Labor Commissioner by creating an alternative private attorney general system for labor law enforcement, due to the California Labor Commissioner's lack of resources and truncated ability to enforce California's wage and hour laws.[4] The California Legislature declared:

> *"Adequate financing of essential labor law enforcement functions is necessary to achieve maximum compliance with state labor laws in the underground economy and to ensure an effective disincentive for employers to engage in unlawful and anticompetitive business practices . . . It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general, while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act."*[5]

Opponents of PAGA feared the new law would disproportionately tip labor law protection in favor of the employee to the detriment of overburdened employers and encourage frivolous lawsuits,[6] citing the fact that employees would be entitled to attorneys' fees and costs if they prevail in their actions, yet there was no similar attorneys' fees and costs for prevailing employers.[7]

Additionally, PAGA opponents feared that it provided no discretion to reduce penalties under the law and that insignificant or inadvertent violations could lead to astronomical penalties. There were also concerns that PAGA plaintiffs would be able to file on behalf of a class, but would not be required to fulfill class certification requirements.[8]

Despite the opposition, on October 12, 2003, PAGA was signed into law,[9] expanding the prospect of litigation under the Labor Code, while allowing an "aggrieved employee"[10] to step in the shoes of the Labor Commissioner and bring a representative civil action to recover specified civil penalties[11] that prior to PAGA could have only been assessed and collected by the Labor and Workforce Development Agency (LWDA).[12] PAGA actions can also include violations that were short in duration, were highly obscure or technical in nature, or those that were so minor they did not incur monetary penalties.

Senate Bill 1809

It wasn't long before PAGA lawsuits became alarmingly common and within months of its passage, newly elected California Governor Arnold Schwarzenegger attempted to repeal the law to no avail.

Though his repeal efforts were unsuccessful, he was able to amend the law through Senate Bill 1809 and provide some procedural protection for employers. Since SB 1809 was enacted, employers no longer have to file a copy of their job application forms with the Division of Labor Standards Enforcement.[13]

All settlements, the Senate bill directed, would require court approval,[14] with courts having discretion to reduce the amount of a civil penalty if, under the circumstances, the penalty otherwise would be "unjust, arbitrary and oppressive, or confiscatory."[15]

Another safeguard implemented was the administrative exhaustion procedure, which requires the employee to provide written notice to the LWDA and employer that cites the specific Labor Code sections the employer allegedly violated and sets forth the facts and theories upon which the alleged violations are based.[16] The employee is then required to wait until the LWDA advises it will not investigate the claim, or 65 calendar days of the postmark date of the notice given, before filing suit. Failure to exhaust this administrative remedy within one year of the violation bars the suit.[17]

Despite the passage of SB 1809 and the continued efforts to amend and repeal PAGA, plaintiffs' attorneys have remained vigilant in bringing PAGA suits, leaving employers largely exposed.

Since its inception, PAGA has altered Labor Code enforcement by creating new civil penalties for every provision of the Labor Code that affect employees and that did not previously have a civil penalty,[18] and assuring a private right of action to recover civil penalties (where only previously recoverable by the LWDA).[19]

Hannah Sweiss is an employment defense attorney at Lewitt Hackman in Encino. She can be reached at hsweiss@lewitthackman.com.

PAGA provides that 25 percent of the civil penalties recovered are awarded to the "aggrieved employees," with 75 percent going to the LWDA.[20] Where no specific civil penalty previously attached to a Labor Code violation, under PAGA there is a "one hundred dollar ($100) [civil penalty] for each aggrieved employee per pay period for the initial violation and two hundred dollar ($200) [civil penalty] or each aggrieved employee per pay period for each subsequent violation."[21]

Shortly after PAGA was enacted, the Court of Appeal in *Caliber Bodyworks v. Superior Court*[22] arguably expanded the scope of PAGA beyond what had been intended, holding that statutory penalties differ from "civil penalties."[23] So, for violations of Labor Codes statutes[24] which do not provide for a "civil penalty," an employee can arguably recover PAGA penalties in addition to the penalties already available under those statutes.

Regardless, if it is possible to obtain an award of civil penalties on top of statutory penalties for the same violation, courts may exercise discretion not to award where doing so would be "unjust, arbitrary and oppressive, or confiscatory."[25]

A Representative Action

Before PAGA became law, individual plaintiffs could largely only sue employers on behalf of other employees by way of a class action lawsuit.[26]

Under PAGA, an aggrieved employee may recover civil penalties in a civil action "filed on behalf of himself or herself and other current or former employees."[27] However, PAGA provides almost no guidance on how an "aggrieved" employee can seek penalties on behalf of other aggrieved employees. Thus, PAGA has created a mechanism for employees to sue employers in a representative capacity, without having to satisfy the procedural requirements of a class action lawsuit.

Unlike a class action, where a plaintiff must show ascertainability, commonality, typicality, adequacy, and numerosity,[28] PAGA plaintiffs do not have to establish the existence of an ascertainable class and a well-defined community of interest among the class members, predominant common questions of law or fact, class representatives with claims, or defenses typical of the class. Nor does the class representative have to be an individual that can adequately represent the class.

Significantly, there doesn't need to be any particular number of aggrieved employees to bring a PAGA suit. There is also no requirement to notify other potential PAGA plaintiffs of a pending suit, much less give them the option to opt-out.

So, when the representative nature of PAGA is combined with the ability to stack penalties on top of penalties, the exposure and potential liability can be astronomical for even small employers.

Scope of Discovery in PAGA Cases: *Williams v. Superior Court*

In addition to the threat of astronomical penalties, when an employee brings a PAGA claim on behalf of a group of employees, PAGA has been used as a tool to obtain wide-ranging discovery (i.e., names and contact information of all employees). In fact, the scope of discovery in a PAGA action is a question currently pending before the California Supreme Court.[29]

The discovery issue made its way to the state's high court after the Second Appellate District affirmed Superior Court Judge William Highberger's decision to deny PAGA plaintiff Williams' motion to compel disclosure of contact information for all nonexempt employees in a PAGA action against the retailer Marshalls.[30]

The *Williams*' court significantly held the discovery request was premature because the plaintiff had yet to be deposed and because the plaintiff had not established the defendants' employment practices were uniform.[31] Writing for the majority, Justice Chaney stated:

> *"Even if Marshalls' employees' identifying information was reasonably calculated to lead to admissible evidence, their right to privacy under the California Constitution would outweigh plaintiff's need for the information at this time. The California Constitution provides that all individuals have a right of privacy. (Cal. Const., art. I, §1.) This express right is broader than the implied federal right to privacy.… The California privacy right "limits what courts can compel through civil discovery." … "[W]hen the constitutional right of privacy is involved, the party seeking discovery of private matter must do more than satisfy the section 2017[.010] standard. The party seeking discovery must demonstrate a compelling need for discovery, and that compelling need must be so strong as to outweigh the privacy right when these two competing interests are carefully balanced." … A discovery proponent may demonstrate compelling need by establishing the discovery sought is directly relevant and essential to the fair resolution of the underlying lawsuit. Applying this balancing test we conclude Marshalls' employees' privacy interests outweigh plaintiff's need to discover their identity at this time. Those interests begin with the employees' right to be free from unwanted attention and perhaps fear of retaliation from an employer. On the other hand, plaintiff's need for the discovery at this time is practically nonexistent. His first task will be to establish he was himself subjected to violations of the Labor Code. As he has not yet sat for deposition, this task remains unfulfilled. The trial court could reasonably conclude that the second task will be to establish Marshalls' employment practices are uniform throughout the*

company, which might be accomplished by reference to a policy manual or perhaps deposition of a corporate officer. The trial court could reasonably conclude that only then will plaintiff be able to set forth facts justifying statewide discovery. The courts will not lightly bestow statewide discovery power to a litigant who has only a parochial claim. Here, the trial court's measured approach to discovery was reasonable.[32]

Needless to say, the California's Supreme Court's decision will have a significant and immediate impact on California employers. This is especially true for larger employers who are particularly vulnerable to overreaching discovery demands due to the number of locations, the number of employees and positions, the scope of their operations, and the high costs associated with expansive discovery.

Discovery demands such as the one at issue in *Williams* have become commonplace in PAGA litigation and clarity is needed with respect to a trial court's role in determining the appropriate scope and sequence of PAGA discovery.

Contracting around PAGA?

Not only are employers subject to massive penalties and broad discovery, the case law evolution of PAGA has produced an outcome not even the original objectors to PAGA could have envisioned—the fact that employers cannot contract around PAGA.

Iskanian v. CLS Transportation[33] held that a prospective waiver of an employee's right to bring a representative PAGA claim in court is contrary to public policy and unenforceable as a matter of state law.[34] The court further held that its new rule is not preempted by the Federal Arbitration Act (FAA) because the state's interests in enforcing the Labor Code and recovering civil penalties through a PAGA action does not interfere with the FAA's goals of promoting arbitration as a forum for private dispute resolution.[35] The *Iskanian* court noted:

"Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the state, which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—that the employer has violated the Labor Code."[36]

This issue recently played out in *Hernandez v. Ross Stores, Inc.*,[37] when both the trial and appeals courts denied the employer's motion to compel arbitration. Ross argued Martina Hernandez must arbitrate a dispute over whether or not she was an aggrieved employee before she could pursue

her PAGA action, and on appeal, questioned whether the FAA gave the employer and employee the right to individually arbitrate certain disputes of a PAGA claim.

The court held (1) contractual waiver of representative actions was unenforceable as contrary to public policy as applied to PAGA claims and (2) contractual waiver of representative actions did not authorize trial court to "split" representative claim into an arbitrable "individual claim" and a non-arbitrable representative claim.[38]

The Fourth Appellate District Court's opinion noted "this dispute does not involve an individual claim by Hernandez regarding the Labor Code violations but rather an action brought for civil penalties under PAGA for violating the Labor Code. There are no "disputes" between the employer and employee as stated in the arbitration policy. The trial court properly determined it had no authority to order arbitration of the PAGA claim."[39]

PAGA and the Ability to Cure

Prior to 2015, employers were dead in the water even for the most technical violation of the Labor Code. In 2015, Governor Brown approved Assembly Bill 1506, providing employers a right to cure certain pay stub violations within 33 days. The emergency legislation declared:

> *"This bill would provide an employer with the right to cure a violation of the requirement that an employer provide its employees with the inclusive dates of the pay period and the name and address of the legal entity that is the employer before an employee may bring a civil action under the act. The bill would provide that a violation of that requirement shall only be considered cured upon a showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee, as specified. The bill would limit the employer's right to cure with respect to alleged violations of these provisions to once in a 12-month period, as specified. The bill would also delete references to obsolete provisions of law."*

> When the representative nature of PAGA is combined with the ability to stack penalties on top of penalties, the exposure and potential liability can be astronomical for even small employers."

The bill went into effect immediately, rather than at the start of the 2016 new year, to give employers the opportunity to promptly cure pending disputes arising from wage statements.

On February 2, 2017, Assembly Bill 281 was introduced to amend PAGA to allow an employer the opportunity to cure not only certain pay stub violations, but the proposed law would allow an employer the opportunity to cure any violation (with the exception of health and safety violations).[40] If passed, Assembly Bill 281 will significantly change the landscape of PAGA, providing employers with the ability to cure.

Procedural Changes to PAGA and Settlement of PAGA

Last year, Governor Brown signed an amendment to PAGA which made largely procedural changes. Employees must now serve notice to the LWDA online, pay a $75 processing fee, and notify the employer via certified mail.[41]

The LWDA now has 60 days to review claims and consider potential actions,[42] and 180 days to investigate the claim.[43] The complainant must now wait 65 days after notice to LWDA to file a PAGA suit and must provide the LWDA with copies of file-stamped PAGA lawsuit filed in court.[44]

As noted previously, any settlement of a PAGA claim must be reviewed and approved by the court.[45] And effective last year,[46] all proposed settlements shall be submitted to the LWDA at the same time the settlement agreement is submitted to the court.[47]

In PAGA settlements, plaintiff's lawyers typically try to avoid attributing much of the settlement to PAGA because 75 percent of the settlement goes to the LWDA. In fact, California courts have accepted an award of zero dollars attributed to PAGA.[48] However, after last year's amendments to PAGA,[49] the trend is that most courts require some amount to be attributed to PAGA. Among many open-ended questions is one asking whether the 25 percent portion of a PAGA settlement goes only to the individual plaintiff, or distributed among the individual plaintiff and all other alleged aggrieved employees.[50]

Employment Defense

From the evolution of PAGA over the past decade, it is unclear if the private attorneys general under PAGA are really initiating lawsuits on behalf of social or public interest. As we wait and see what happens next with PAGA, wage and hour claims continue to be on the rise, with numerous potential pitfalls for employers left vulnerable to potential PAGA claims.

Though employers will continue to argue PAGA awards are unjust or oppressive—prompting the court to exercise discretion in assessing penalties—there are currently no hard definitions to determine whether or not a particular award qualifies under these categories.

[1] *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943) ("Instead of designating the Attorney General, or some o her public officer…Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit…even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.")

[2] The phrase is sometimes used to refer to plaintiffs, occasionally used to refer to defendants, and typically refers to lawyers. *See e g., Fogerty v. Fantasy, Inc*. 510 U.S. 517, 524 (1994); *Albermarle Paper Co. v. Moody*, 422 U.S., 405, 415 (1975); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General,* 88 Colum. L. Rev. 247, 251 (1988); Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. Cal. L. Rev. 353, 370 (1988); Geoffrey C. Hazard, Jr., *Modeling Class Counsel*, 81 Neb. L. Rev. 1397, 1403-06 (2003).

[3] *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*., 421 U.S. 240,247-61 (1975) (providing a historical overview of the creation of private attorneys general).

[4] S.B. 796, 2003-2004 Reg. Sess., Cal. Senate Judiciary Committee (April 30, 2003).

[5] S.B. 796, §1, 2003-2004 Reg. Sess., Chapter 906 (Cal. 2003).

[6] S.B. 796, 2003-2004 Reg. Sess., Cal. Senate Floor Analyses (September 11, 2003).

[7] *Id.*

[8] *Id.*

[9] Cal. Lab. Code §2698.

[10] Cal. Lab. Code §2699(c) (for purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.)

[11] Cal. Lab. Code §2699.5.

[12] S.B. 796, Cal. Senate Floor Analyses, *supra*.

[13] S.B. 1809, Chapter 221 (Cal. 2004).

[14] Cal. Lab. Code §2699(l)(2).

[15] Cal. Lab. Code §2699(e)(2).

[16] Cal. Lab. Code §2699.3(1)(A).

[17] *Id.*

[18] Cal. Lab. Code §2699(f).

[19] Cal. Lab. Code §2699(a).

[20] Cal. Lab. Code §2699(i).

[21] Cal. Lab. Code §2699(f)(2). In *Amaral v. Cintas Corp*., 163 Cal. App. 4th 1157, 1209 (2008), the California Court of Appeal held that an "initial" violation encompassed violations covering multiple employees for multiple pay periods, up until such time as "the employer has learned hat its conduct violates the Labor Code," at which point "the employer is on notice that any future violations will be punished just the same as violations that are willful or intentional," meaning the penalty rate will be doubled.

[22] *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365 (2005).

[23] *Id.*

[24] *See,* e.g., Cal. Lab. Code §256 (providing a separate civil penalty previously recoverable only by the LWDA for violations of Cal. Lab. Code Section 203); Cal. Lab. Code §210 (providing a separate civil penalty recoverable only by the LWDA for violations of Cal. Lab. Code §§204, 204b, 204.1, 204.2, 205, 205.5, and 1197 5).

[25] Cal. Lab. Code §2699(e)(2).

[26] With he exception of Bus. & Prof. Code §17200 litigation.

[27] Cal. Lab. Code §2699(g)(1).

[28] *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 470 (1981).

[29] *Williams v. Superior Court*, S227228 (B25997; 236 Cal.App.4th 1151).

[30] *Williams v. Superior Court*, 236 Cal.App.4th 1151, 1159 (2015).

[31] *Id.*

[32] *Id.* at 1158.

[33] *Iskanian v. CLS Transportation Los Angeles LLC*, 59 Cal. 4th 348 (2014).

[34] *Id.* at 384.

[35] *Id.* at 386-387.

[36] *Id.*

[37] *Martina Hernandez v. Ross Stores, Inc*. 7 Cal.App.5th 171 (2016).

[38] *Id.* at 489-90.

[39] *Id.*

[40] A.B. 281, 2017-2018 Reg. Sess., (Cal. 2017).

[41] *See* Senate Bill 836 (effective June 27, 2016); see also, Cal. Lab. Code §2699 3 (1)(B).

[42] Cal. Lab. Code §2699.3 (2)(A).

[43] Cal. Lab. Code §2699.3 (2)(B).

[44] Cal. Lab. Code §2699.3 (2)(A), Cal. Lab. Code §2699 (l)(1).

[45] Cal. Lab. Code §2699(l)(2).

[46] S.B. 836 (26), 2015-2016 Reg. Sess., Chapter 31 (Cal. 2016).

[47] *Id.*

[48] *Nordstrom Commission Cases*, 186 Cal.App.4 h 576, 589 (2010) (Appellate court found no abuse of discretion in trial court's approval of settlement agreement where the parties allocated $0 to any PAGA claim.)

[49] S.B. 836 (26), supra.

[50] *Cunningham v. Leslie's Poolmart, Inc*. (2013) WL 3233211, fn. 1 ("…the best interpretation of PAGA is that the penalties not distributed to the Labor Workforce Development Agency are distributed to the individual employee who brought the action.")

Test No. 101

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. A private attorney general is usually a private attorney who initiates a lawsuit on behalf of social or public interest.
   ❑ True ❑ False

2. The Private Attorneys General Act of 2004 (PAGA) was unopposed.
   ❑ True ❑ False

3. PAGA has altered Labor Code enforcement by creating new civil penalties for every provision of the Labor Code that affect employees and that did not previously have a civil penalty.
   ❑ True ❑ False

4. After SB 1809 was passed, there is no administrative exhaustion requirement.
   ❑ True ❑ False

5. One of the amendments to PAGA after the passage of SB 1809 gave courts the discretion to reduce the amount of a civil penalty if, under the circumstances, the penalty otherwise would be unjust, arbitrary and oppressive, or confiscatory.
   ❑ True ❑ False

6. An employee is required to wait until the Labor and Workforce Development Agency (LWDA) advises it will not investigate the claim, or 65 calendar days of the postmark date of the notice given, before filing suit.
   ❑ True ❑ False

7. PAGA provides that 25% of the civil penalties recovered goes to the aggrieved employees and 75% goes to the LWDA.
   ❑ True ❑ False

8. Under PAGA, there is a $200 civil penalty for each aggrieved employee per pay period for the initial violation.
   ❑ True ❑ False

9. PAGA is not a representative action.
   ❑ True ❑ False

10. A PAGA plaintiff is required to show ascertainability, commonality, typicality, adequacy, and numerosity to proceed with a PAGA action.
    ❑ True ❑ False

11. The scope of discovery in a PAGA action is a question currently pending before the California Supreme Court.
    ❑ True ❑ False

12. Employers cannot contract around PAGA.
    ❑ True ❑ False

13. *Iskanian v. CLS Transportation* held that a prospective waiver of an employee's right to bring a representative PAGA claim in court is contrary to public policy and unenforceable as a matter of state law.
    ❑ True ❑ False

14. In 2015, Governor Brown approved Assembly Bill 1506, providing employers a right to cure certain pay stub violations within 33 days.
    ❑ True ❑ False

15. On February 2, 2017, Assembly Bill 281 was introduced to amend PAGA to allow an employer the opportunity to cure not only certain pay stub violations, but the proposed law would allow an employer the opportunity to cure any violation (with the exception of health and safety violations).
    ❑ True ❑ False

16. PAGA settlements do not require court approval.
    ❑ True ❑ False

17. A question remains as to whether the 25% portion of a PAGA settlement goes only to the individual plaintiff, or distributed among the individual plaintiff and all other alleged aggrieved employees.
    ❑ True ❑ False

18. Last year, Governor Brown signed an amendment to PAGA which made largely procedural changes.
    ❑ True ❑ False

19. The LWDA now has 60 days to review claims and consider potential actions, and 180 days to investigate the claim.
    ❑ True ❑ False

20. All proposed settlements shall be submitted to the LWDA at the same time the settlement agreement is submitted to the court.
    ❑ True ❑ False

MCLE Answer Sheet No. 101

INSTRUCTIONS:

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

   San Fernando Valley Bar Association
   5567 Reseda Boulevard, Suite 200
   Tarzana, CA 91356

METHOD OF PAYMENT:

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

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
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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