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A Publication of the San Fernando Valley Bar Association

International Business Relations: Lawyers' Guide to Japanese Culture, History and the Law

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Using Ratios to Find Hidden Income

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A Publication of the San Fernando Valley Bar Association

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MCLE ARTICLE AND SELF-ASSESSMENT TEST

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 23.

International Business Relations: Lawyers' Guide to Japanese Culture, History and the Law

Midway through the production of Valley Lawyer, Japan was hit by the earthquake and tsunami that has devastated that nation. The MCLE article on Japanese culture, history and the law was long planned for inclusion as the centerpiece of the April issue. As Valley Lawyer goes to print, we are uncertain about the outcome of the nuclear tragedy or the final casualties. What we are confident about is that the Japanese nation and people have shown through their history, culture and actions that they are resilient, focused and before long will return to their prominence in the world's economy. The author and the San Fernando Valley Bar Association express our heartfelt support and prayers for a speedy recovery for those affected by the earthquake.

By Gary O. Haase

AS COMPANIES BASED IN THE UNITED STATES work their way through the 21st Century, purely domestic business activity is becoming less and less common. An increasing amount of transactions is touched in varying degrees by persons or entities from other places. And lawyers who find themselves thrust upon this international plane of business have their plates full, despite the supposed "greased wheels" of commerce. However, just as a lawyer attempts to avoid potential legal problems *ex ante*, by providing for issues in a contract before there is any performance, a lawyer departing on a business trip to Japan can minimize the risk of loss due to cross-cultural miscues by gaining background knowledge of the people of Japan.

Japan and Its People

The following are some superficial observations compiled by an attorney during his first year of living in rural Japan, as a 26-year-old high school English teacher.

Geography and Population

Although the entire land area of Japan is smaller than the state of California, and 75% of Japan is covered by mountains and volcanoes, Japan's population was close to 130 million while California's was only around 30 million. Unlike the diversity of races in the United States, Japan is almost entirely Japanese (Shelley, Rex. *Culture Shock: A Guide to Customs and Etiquette*. Portland: Graphic Arts, 1993, p.8).

Around Town, the Suburbs and the Countryside

In general, except for in places like airports or in parts of major cities, everything (meals, rooms, sitting spaces, clothes, cars, buildings) was smaller. Because space is at a premium, cars were often parked in these machines or buildings designed to save space. It was like parking one's car in an elevator, and upon return the attendant pushes a button, the doors open, and one's car reappears.

Vending machines were everywhere, including those that sold beer and hard alcohol (even though the drinking age was twenty). Tipping is not done in Japan (e.g., for a meal in a restaurant, for a taxi ride) as it is in the United States. Western-style toilets — that allow one to sit — could sometimes be

found, but Japanese-style toilets — requiring one to squat — were still very common. Be prepared for the occasional staring, pointing, and hearing the word "gaijin!" (foreigner!) if one has a non-Japanese appearance and travels outside of Tokyo or Osaka.

Food and Dining

"Seafood" in Japan denotes a broader array of selection and serving styles than the average American may be accustomed to. One will quickly come to appreciate the ubiquitous *oshibori* (a moist hot towel) that one can use to clean one's hands before eating in a restaurant. A typical Japanese breakfast may consist of *miso* (fermented soybeans) soup, rice and *tsukemono* (pickled vegetables). Slurping one's noodles is not only tolerated, it is a proper way to show one's appreciation to the one who prepared the dish.

Communication and Language

Several Japanese colleagues agreed that nonverbal communication was possible between Japanese people because, as the country is homogenous, "everyone thinks the same". In the United States, one can convey the idea "me?" by pointing to one's chest. In Japan, one points to one's nose.

Japanese students learn four alphabets: 1) *Hiragana* (46 characters); 2) *Katakana* (46 characters); 3) *Kanji* (an adult of average education knows about 2500 of the over 10,000 characters) (*Baedeker's Japan*. Ed. Alec Court. New York: Prentice Hall, 1993, p. 325); and 4) the alphabet learned in the United States (26 characters). In Japan, the gesture of waiving a turned hand in front of one's nose means "no," even though this gesture, in the United States, is usually used when an American is conveying that something smells bad. In the United States, one can convey "come here" by putting one's hand forward, with the palm facing in, the index finger pointing up, and curling the index finger towards the one conveying the message. In Japan, this same message is conveyed by having the palm face down and flapping one's four fingers.

Schools and Education

Students who excelled in sports or academics often showed extreme modesty in order to remain within the group and to not be considered arrogant. Instead of homecoming, the prom and

pep rallies, Japanese high schools have “sports day” and “cultural day”. Teachers patrolled the shopping malls, *pachinko* (a pinball game) parlors and arcades regularly to find delinquent students. Several Japanese people expressed the notion that students work extremely hard to get into good universities, but that once admitted, university life is like a vacation before entering the hard work of company life.

Values

A non-Japanese living in Japan may detect that, even though the society denies any specific, strong religious base, the following virtues permeate the Japanese culture, language, media and society: respect for the others in one's group, modesty, silence, obligation and avoidance of conflict. Japanese friends and colleagues would frown at loud, emotional or flailing reactions in others.

Employment and On the Job

Many companies had their employees do *taiso* (calisthenics) as a group every morning. If one is not successful in keeping one's weekend trip out of town a secret, it was expected that one would return with *omiyage* (souvenirs) for one's colleagues. Although changing, it was still assumed in many places that there would be a female employee to serve the tea of coffee.

Miscellaneous

In general, many Americans (especially Californians) appear to be more relaxed than many Japanese about sitting on tables, putting feet up on chairs or tables, putting hands in pockets, eating or drinking while walking in public, blowing one's nose in public, wearing appropriate clothing for the occasion and being on time for appointments. A Japanese colleague expressed that Americans are friendlier with strangers — which is a reflection of an individual-centered society, and that Japanese are friendlier with their friends — which reflects a group-centered society.

In Japan, “taking a bath” typically means first, taking a mini-shower and cleaning oneself with soap outside of the bath, and second, then getting into the clean, hot water to soak. In Japan, *manga-bon* (comic books) were devoted to a variety of subject areas and were read by children, teenagers and adults. A Japanese colleague shared that the reason why drinking, smoking, *pachinko* (pinball) and *karaoke* are so popular is because they are methods of relieving the stress associated with conforming each day to the strict social etiquette.

The picture of Japan described above was a mere thumbnail profile of a hugely complex, multi-dimensional society, taken from a street-level point of view.

Introduction to Japanese Law

Even if the parties have somehow agreed in the contract to apply no Japanese law, or even if the American lawyer is not planning to speak with a *bengoshi* (a lawyer) during this trip to Tokyo, one element of the (cultural) preparation needed for an international transaction taking place in Japan is that the non-Japanese party should be familiar with the basic legal framework in place in Japan.

As The Task Force for Transnational Competence asserts: Successful players benefit from knowing who the key people are in new settings, knowing the local rules that apply to their activities and having an understanding of local negotiating practices. Technical skills in an applied field such as engineering or law are an important component of transnational competence, but these need to be balanced by cultural skills to ensure effective applications (The Task Force for Transnational Competence. *Towards Transnational Competence. Rethinking*

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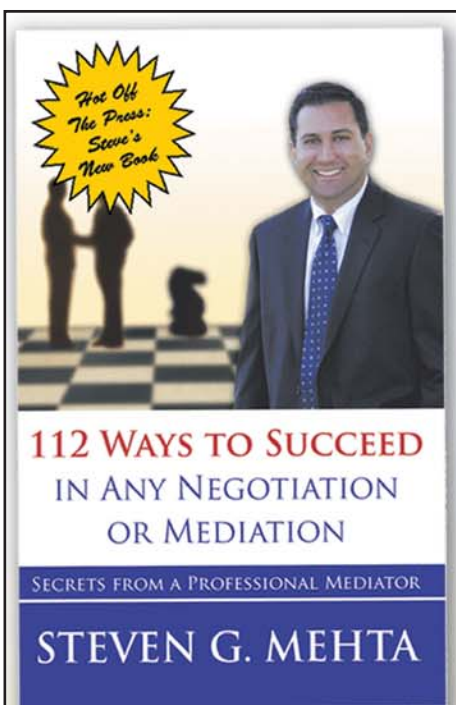
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International Education: A U.S.-Japan Case Study. 28. New York: Institute of International Education, 1997, p. 19).

Becoming familiar with a legal system is not simply reading the rules as printed in the latest edition; one should have some sense of the development of the principles in order to fully appreciate today's application of the rules. In order to have a better grasp on modern-day Japan, it may benefit one to first have a look at the interesting story of its development.

One interested in tracking the development of Japanese law might focus on three blocks of time: 1) the Tokugawa Period; 2) the Meiji Era; and 3) the Post-War period. (A reforming of the justice system, which took the form of official recommendations back in 2001, is beyond the scope of this article.)

The Tokugawa Period (from 1603)

During this period, Japan chose to isolate itself from the world by closing the islands from intercourse with foreigners. According to John Wigmore, the nation "reached a permanent state of political equilibrium, economic prosperity and social quiet . . . and for nearly three centuries, enjoyed a complete peace, internal and external, unparalleled in any European country" during which "literature and commerce flourished, and prosperity prevailed" (Wigmore, John Henry. *A Panorama of the World's Legal Systems*. N.p.: Washington Law Book Co., 1936, p. 479).

During this block of time, conciliation emerged as a principle that resulted from the Confucian philosophy imported a thousand years before. Under the principle of conciliation — an idea prominent in Chinese justice — every town was divided into companies of five neighbors who were mutually responsible for each other's conduct. Then, when there was a disagreement between members of a company, "the five heads of families met and endeavored to settle the matter" (Wigmore, p. 490). The main point seemed to be that the problems were to be resolved within the group. If the settlement failed, "the neighbors might take matters in their own hands and break off intercourse with him, refusing to recognize him socially; this usually brought him to terms" (p. 491). Few private disagreements went beyond the family or company, and a case which could not be settled in this way "was regarded as a disreputable one or as indicating that the person seeking the courts wished to get some advantage by tricks" (p. 491).

Another feature of Japanese justice during the Tokugawa period was that, from the 1600s onward, "the highly organized judiciary system began to develop by judicial precedent a body of native law and practice" (Wigmore, p. 504). According to Wigmore, it is by reason of this achievement "that the Japanese legal system is entitled to be regarded as an independent one" (p. 504).

The Meiji Era (from 1868)

Robert Christopher reminds us that in 1853, "when Commodore Matthew Perry and the 'black ships' of the U.S. Navy forced the Japanese to open their country to foreigners, Japan was a kind of fly in amber — the world's last surviving feudal society of any consequence" (Christopher, Robert C. *The Japanese Mind*. New York: Ballantine, 1983, p. 30). In 1868, the house of Tokugawa collapsed, and the power went to the Imperial throne (Shelley, Culture Shock, p. 20).

Japan reached out to France for advice. For example, in 1873 Gustave Boissonade, a law professor in Paris, came to Japan as a legal advisor; he ended up staying for twenty years, drafting the penal code and criminal procedure code that were the first modern codes to be applied in Japan (Noda, Yoshiyuki. *Introduction to Japanese Law*. Trans. Anthony Angelo. N.p.: n.p., 1976, p. 45). From 1881, the influence of French law declined, and German law began to play an increasingly important role in the Japanese legal world (Noda, p. 50).

Ultimately, these foreign contributions were only influences on a Japanese product. "Although Japan succeeded in faithfully and skillfully imitating the French and German legal systems, its own culture could not help but give an original character to the system that was received" (Noda, p. 58).

The modern codes spoke of individual rights and duties — ideas that did not fit well with the society for which the codes were written. It seemed that what the Japanese really wanted was to combine the best of the foreign ideas with the best of their system. The lower ranking samurai did not want to abandon the feudal principles which they considered superior to the European. "They understood that they could not preserve Japan's independence without recourse to the material means that the Western powers controlled, but they believed that it was possible to adopt the material civilization of Europe and

to harmonize it with Oriental morality" (Noda, p. 59).

The Post-War Period (from 1945)

The American influence on the legal development of Japan can be illustrated by comparing the "Meiji Constitution," in place from 1889 to 1946, to the post-war Constitution of Japan, promulgated in 1946. The "sacred and inviolable" Emperor, who could essentially make law under Chapter 1 of the former constitution, became a "symbol" in the present constitution, deriving his power from the people, and needing approval of the Cabinet for all his acts (Japan Const. ch. 1). Chapter 2 of the Constitution of Japan provided for renunciation of war. Chapter 3 provided the people with some American-style rights and duties, including the right to "life, liberty, and the pursuit of happiness."

Alfred Oppler, who played a leading role in the efforts of General MacArthur's General Headquarters to reform the Japanese legal system, describes the frank exchange of opinions between the Japanese officials and the occupation forces as a leading reason that contributed to the success of the legal and judicial reforms carried out: "It may not be an exaggeration to say that the method of full and free discussion has been unique in a military occupation" (Oppler, Alfred C. *Legal Reform in Occupied Japan: A Participant Looks Back*. N.p.: Princeton, 1976, p. 73). Oppler goes on to emphasize that, in spite of the strong influence of American law, especially in the fields of constitutional law, criminal procedure and regulation of economic activities, Japanese law, viewed as a whole, still belongs to the civil law family (p. 74).

Linda Coulter stresses how the culture and history of Japan and the United States are reflected in the respective legal systems. Because of the very nature of being multicultural, the United States has come to rely on law as the mechanism for order and synthesis among its people. This is not so in Japan.

Because it is an island state, Japan has been geographically isolated. This has allowed it to remain homogeneous. Consequently, Japan is imbued with a communitarian sense of self. Individualism is neither accepted nor desired. Rather, societal harmony or "wa" is given top priority, often resulting in the deprivation of individual rights . . . Unlike many many other nations, these early aspects of Japanese culture have survived centuries of industrialization and modernization and still transcend all aspects of Japanese society (Coulter,

Linda. *Japan's Gaiben Law: Economic Protectionism or Cultural Perfectionism?* Houston Journal of International Law. 17 (1995): 431, p. 436).

Some Approaches to Effective Communication

We have learned, among other concepts, the following: to understand the Japanese negotiation style, some knowledge of Japanese cultural tradition is necessary. Order and harmony are highly respected and regarded as prime virtues of the society. Japanese people not only share a common language and

culture, but they also have gradually adopted common social values. Regional and occupational differences do exist, but the country as a whole is intrinsically far more unified than any Western industrialized nation (Folsom, Ralph H., Michael Wallace Gordon, and John A. Spanogle, Jr. *International Business Transactions: A Problem-Oriented Coursebook*. 5th ed. American Casebook Series. St. Paul: West, 2002, pp. 29-30).

The point is to be as prepared as possible, in the hope that one can increase one's chances of success. Preparation is also a sign of respect. As

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a non-Japanese colleague once shared, the message conveyed by a non-Japanese businessperson who arrives on time, in appropriate attire, and who smiles and attempts to refill the drink of the Japanese businessperson at a social gathering can communicate more than a sentence in perfectly-fluent Japanese.

Etiquette Tips that Reflect Japanese Courtesy

Do wait for others to sit down first; serve beer/sake/juice (or whatever the person is drinking) for others in one's group, particularly one's supervisors; use the opposite ends of chopsticks when picking food from a common dish; keep one's hands to one's sides when bowing (men); keep one's hands in front of one's body when bowing (women); be aware that many non-Americans perceive Americans as "loud, obnoxious and overly aggressive" (try not to let one's actions perpetuate this impression).

Don't sit or lean on desks; put one's hands in one's pockets; rub one's wooden chopsticks together (in order to remove splinters) when on *tatami* (straw floor mats).

Shelley asserts that one of the etiquette "don'ts" in Japan is being too open with one's emotions (*Culture Shock*, p. 131). So if in the United States *the squeaky wheel gets the grease*, in Japan *the nail that sticks up gets hammered down*. As Shelley warns, "The rules of social behaviour are part of a culture, and in Japan they are very complex and detailed. When you came to Japan you brought with you your assumptions about how to behave with people, all the rules and regulations of your society. Unfortunately, many think that the rules of good behaviour between people are universal, and that if you are just your natural self, people will accept you, or that if you have good intentions, things will work out nicely. These simple and false beliefs often lead to *faux pas* and unnecessary misunderstandings (*Culture Shock*, p. 136).

For example, according to *Insight Guides Japan*, "the ability to express thoughts clearly, accurately and in a straight-line fashion corresponds very little with the Japanese understanding of courtesy" (*Insight Guides Japan*. Ed. Malcolm B. Davis. Singapore: APA, 1992, p. 56). Or, to put it another way: "The way the Japanese usually speak and express themselves gives a very good picture of their culture. Direct statements of fact are most often avoided as this implies that the speaker has a superior knowledge, and this is considered impolite. Therefore, much "beating around the bush" is done which often leads to misunderstandings and seems like a waste of time to foreigners, but this must be taken into consideration when dealing with the Japanese" (*Insight Guides Japan*, p. 377).

Finally, Peter Berton addresses how language is a reflection of the culture and how it can also become an issue, especially for lawyers: "The ambiguity of the Japanese language is legendary. Lack of precision is, of course, wonderful for poetry, when a thought can trail off into nothingness, but it is not desirable for legal contracts" (Berton, Peter. *Understanding Japanese Negotiating Behavior*. ISOP Intercom. UCLA International Studies and Overseas Programs. 18 (1995): 1-8, p. 4).

Best wishes for a successful trip to Tokyo! *Ganbatte kudasai!* (Good luck!) 🍀

Gary O. Haase is a transactional lawyer with five years of California law firm and in-house counsel experience. His current location is Kyoto, Japan, where he is improving his Japanese language skills and cultural competency. He can be reached at ghaase@uclalumni.net.



MCLE Test No. 33

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. *Bengoshi* means "lawyer" in Japanese.
True
False
2. According to The Task Force for Transnational Competence, technical skills in law need to be balanced by cultural skills to ensure effective applications.
True
False
3. Japan chose to isolate itself during the Tokugawa period.
True
False
4. Under the principle of conciliation, every town was divided into companies of five neighbors who were mutually responsible for each other's conduct.
True
False
5. Most parties with private disagreements during the Tokugawa period sought to settle their cases in court.
True
False
6. During the Meiji Era, a law professor from France drafted the penal code and criminal procedure code that were the first modern codes to be applied in Japan.
True
False
7. Japanese law was influenced by German law during the Meiji Era.
True
False
8. According to Yoshiyuki Noda, lower ranking samurai from the Meiji Era believed that it was possible to adopt the material civilization of Europe and to harmonize it with Oriental morality.
True
False
9. Under the post-war Constitution of Japan, the Emperor became a "symbol," deriving his power from the people and needing approval of the Cabinet for his acts.
True
False
10. The post-war Constitution allows Japan to go to war and to use force to settle international disputes.
True
False
11. Japan refused to allow "life, liberty and the pursuit of happiness" to be included in the post-war Constitution of Japan.
True
False
12. Japanese law, viewed as a whole, still belongs to the civil law family.
True
False
13. According to Linda Coulter, Japan has come to rely on law as the mechanism for order and synthesis among its people because of the very nature of being multicultural.
True
False
14. Linda Coulter asserts that societal harmony is given top priority in Japan, often resulting in the deprivation of individual rights.
True
False
15. It has been stated that Japanese people not only share a common language and culture, but they also have gradually adopted common social values.
True
False
16. During a negotiation in Japan, an American will be more successful if he shows his emotions openly because, in general, *the squeaky wheel gets the grease* in Japan.
True
False
17. A typical Japanese non-lawyer will probably consider an American lawyer's ability to express thoughts clearly, accurately, and in a straight-line fashion as being courteous.
True
False
18. In Japan, direct statements of fact are most often avoided as this implies that the speaker has superior knowledge.
True
False
19. It has been stated that, in Japan, much "beating around the bush" is done which often leads to misunderstandings and seems like a waste of time to foreigners.
True
False
20. Peter Burton argues that the ambiguity of the Japanese language is helpful in the drafting of contracts.
True
False

MCLE Answer Sheet No. 33

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 \$15 testing fee for SFVBA members (or \$25 for non-SFVBA members) to:

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

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| 1. | <input type="checkbox"/> True | <input type="checkbox"/> False |
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**Tuesday, April 5
5:30 PM**

**Oliva Trattoria Restaurant
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RSVP to events@sfvba.org or
(818) 227-0490, ext. 105.



Intellectual Property, Entertainment & Internet Law Section Patents: To File or Not To File

**APRIL 8
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS**

Attorney Mark Nielsen will discuss when
to file a patent application and when patent
infringement comes into play.

MEMBERS	NON-MEMBERS
\$30 prepaid	\$40 prepaid
\$35 at the door	\$50 at the door
1 MCLE HOUR	

Probate & Estate Planning Section Branch Court Survival Guide

**APRIL 12
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO**

Judge James Steele and Judge Mary Thornton
House will talk about the latest happenings in
their respective courthouses, Van Nuys and
Pasadena, and discuss trial avoidance. And if
avoidance doesn't work, how to make your trial
preparation and trial as painless as possible!

MEMBERS	NON-MEMBERS
\$35 prepaid	\$45 prepaid
\$45 at the door	\$55 at the door
1 MCLE HOUR	

Family Law Section Presents SELF DEFENSE TECHNIQUES FOR LAWYERS - THE SEQUEL



The hands-on training will be taught by Grand
Master Ho Sik Pak and will also include a
discussion about self defense led by Gary
Weyman, Irene Mak and Michelle Robins.

Date: Saturday, April 16
Time: 1:30 PM to 4:00 PM
Location: Tarzana Karate Studio
19618 Ventura Boulevard, Tarzana
Cost: \$40 which includes a book showing
simple self defense techniques
Dress: Exercise clothes

RSVP by April 10 to (818) 227-0490, ext. 105.

New Lawyers Section Etiquette in the Courtroom

**APRIL 21
5:30 P.M.
SFVBA CONFERENCE ROOM
WOODLAND HILLS**

Join us for a wine and cheese reception with
Judge Michael Convey and Judge Susan
Speer. They will discuss proper behavior and
procedures in the courtroom.

**Free to SFVBA New Lawyers!
1 MCLE HOUR**

Santa Clarita Valley Bar Association Substance Abuse

**APRIL 21
12:00 NOON
TOURNAMENT PLAYERS CLUB
VALENCIA**

Action Family Counseling Inc. will present on
this issue. RSVP to (661) 414-7123 or rsvp@scvbar.org.

MEMBERS	NON-MEMBERS
\$35 prepaid	\$45 prepaid
\$45 at the door	
1 MCLE HOUR	
(Prevention of Substance Abuse)	

Family Law Section Enforcement of Attorney Fee Orders and Support Orders

**APRIL 25
5:30 PM
MONTEREY AT ENCINO RESTAURANT
ENCINO**

Commissioner Keith Clemens, Ret. and
attorney Ray Goldstein, an expert in this area,
will address the enforcement of Attorney Fee
Orders and Support Orders.

MEMBERS	NON-MEMBERS
\$45 prepaid	\$55 prepaid
\$55 at the door	\$65 at the door
1 MCLE HOUR	

Litigation Section Trademarks and Copyrights for Litigators

**APRIL 28
6:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS**

Attorney Bob Finkel will discuss the above
topics.

MEMBERS	NON-MEMBERS
\$35 prepaid	\$45 prepaid
\$45 at the door	\$55 at the door
1 MCLE HOUR	

The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. To register for an event listed on this page, please contact Linda at (818) 227-0490, ext. 105 or events@sfvba.org.



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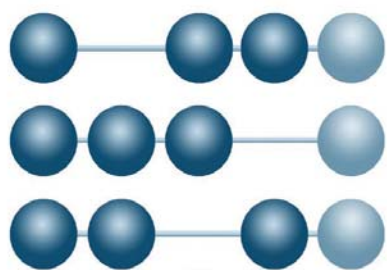


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