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The Somewhat Secret World of Pre-Election Litigation

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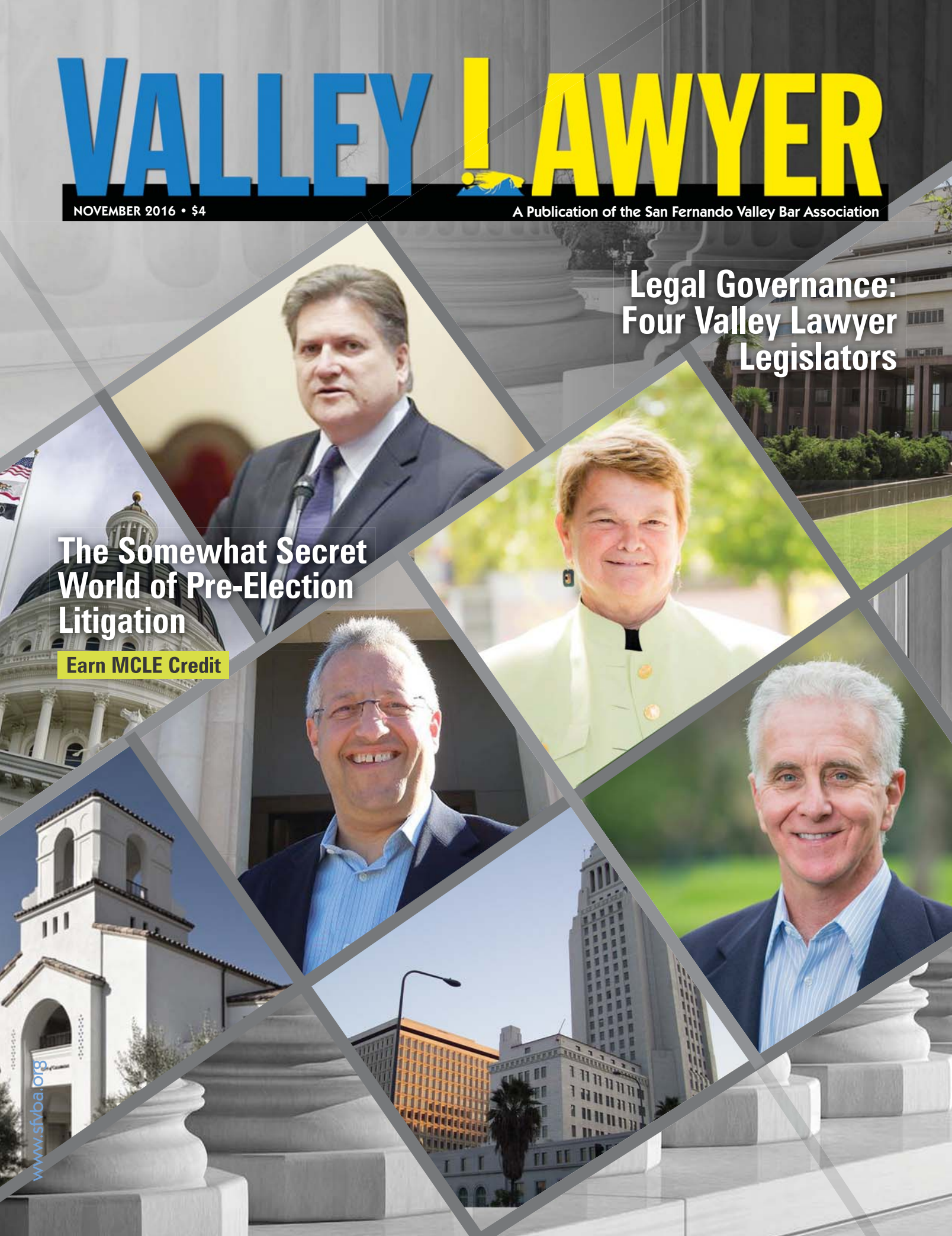

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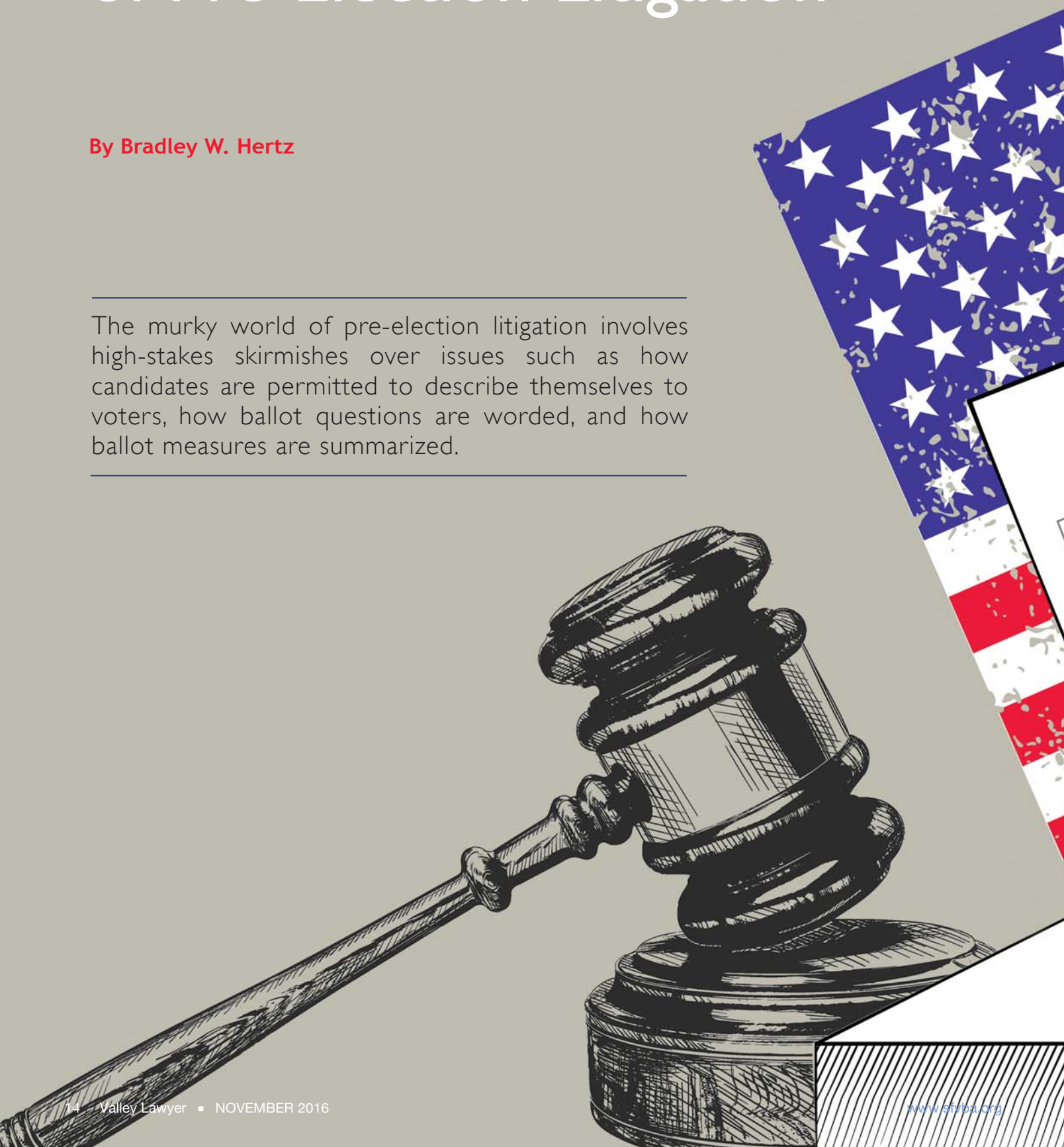
The Somewhat Secret World of Pre-Election Litigation

By Bradley W. Hertz

The murky world of pre-election litigation involves high-stakes skirmishes over issues such as how candidates are permitted to describe themselves to voters, how ballot questions are worded, and how ballot measures are summarized.



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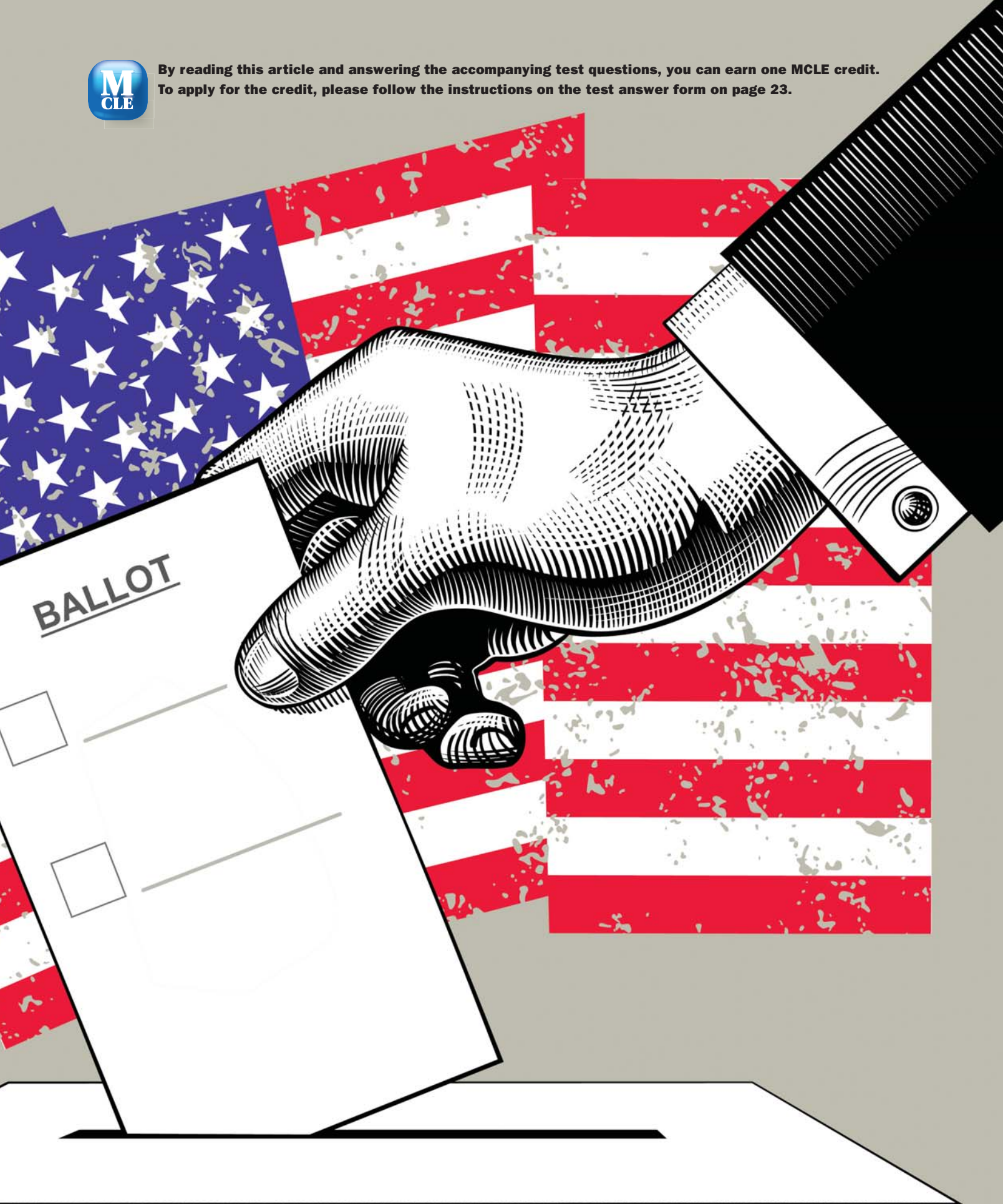

UNBEKNOWNST TO MANY ATTORNEYS, A flurry of litigation precedes the printing of the voter information guide and sample ballot each election cycle. This somewhat secret world of pre-election litigation involves high-stakes skirmishes over how candidates are permitted to describe themselves to the voters, how ballot questions are worded, how ballot measures are summarized, and various other nuanced aspects of the information voters ultimately receive from elections officials. This obscure area of law encompasses several legal disciplines, including First Amendment jurisprudence, administrative law, civil procedure, and of course, the California Elections Code (CEC).

Pre-election litigation has a significant impact on the voter information guide, the sample ballot, and oftentimes, the election. Not only do political consultants, pollsters, and political scientists emphasize the importance of voter information such as candidate ballot designations, candidate statements, ballot arguments, and the like, but the fact that those involved in the process often allocate substantial portions of their budget to this type of litigation is illustrative of its overall significance.

When preparing to vote in the November 8, 2016, presidential election and beyond, and when diving into the multi-faceted voter information guide and sample ballot, voters who read this article will be well-equipped to read between the lines and know that much of the wording was vigorously litigated prior to the documents being printed.

This article seeks to demystify the world of pre-election litigation, discussing not only the types of voter information that are most often litigated, but also focusing on the procedural and other aspects of these types of matters.

Procedural Preliminaries and Constitutional Considerations

Pre-election litigation benefits from several procedural protocols that make it at once exciting and stressful. Elections Code §13314(a)(3) and Code of Civil Procedure §35 give these types of actions priority over all other civil matters. In addition, because relief cannot be granted if it would "substantially interfere with the conduct of the election,"[1] the cases are almost always specially set for hearing via ex parte application.

In an era where many civil litigants wait for years to get to trial, most pre-election cases are heard by the trial court in a matter of days. The time-pressure caused by an upcoming election, and the public interest in protecting the voters from improper materials, ensures that litigants are afforded their day in court in record time. In addition, these cases are almost always considered "special proceedings of a civil nature"[2] and are decided on the papers, thus not consuming too much of the court's time.[3]

Although First Amendment speech is most certainly implicated in this type of litigation, the voter information guide and sample ballot are limited public forums and thus subject to governmental oversight. Unlike the unfettered rough and tumble of the campaign trail, in which prior restraint of speech would not be allowed, because these government-funded and distributed election materials carry the imprimatur of government, the law has evolved in a way so as to allow judicial intervention before the ballot materials are finalized.

Even though to some it may seem unusual for parties to engage in heated litigation over mere words in a booklet that is sent to voters, a "voter's pamphlet can have a substantial impact on the equality and fairness of the electoral process."[4] Unlike other vehicles for political discussion, the information set forth in the voter guide is likely to carry greater weight in the minds of voters than other forms of campaign information.

What's Your Day Job?

The ballot designation a candidate chooses plays a significant role in how the public perceives the candidate, and can dramatically increase or decrease the likelihood of a candidate's success on Election Day. This is especially the case for judicial candidates[5] and for those in other low visibility, or down ballot races, where the candidates are not widely known.

Other than the candidate's name, the ballot designation is one of the main factors voters use to distinguish among candidates. The designation, which appears directly under the candidate's name in the sample ballot and on the ballot itself, describes—usually in three words or less—the candidate's "current principal professions, vocations, or occupations."[6]

Bradley W. Hertz is a partner at the Sutton Law Firm, which specializes in political and election law in Los Angeles and throughout California. He can reached at bhertz@campaignlawyers.com. Special thanks to law clerk Gabrielle E. Gordon for her assistance with this article.

While the three-word designation is the most commonly used and the most frequently litigated, candidates may also choose to describe themselves by designating their elective office, in which case the three-word limit does not apply.[7] They may also use the word "incumbent," "appointed incumbent," or "appointed" followed by the non-judicial office to which they were appointed.[8] "Community volunteer" may also be used if specified criteria are met.[9]

Ballot designations are heavily regulated via the CEC and the Secretary of State's Ballot Designation Regulations,[10] with the goal of preventing candidates from making false or misleading claims about their official or professional endeavors. At the time candidates file their paperwork with the appropriate elections official, they are required to complete a ballot designation worksheet explaining and justifying their chosen designation.[11] These worksheets become available for public examination 87 days before the election and any voter may file a petition for writ of mandate alleging that an error, omission, or neglect of duty has occurred or is about to occur in connection with the ballot designation.[12]

The CEC provides that elections officials shall not accept designations that would mislead voters; use the name of a political party; or refer to a racial, religious or ethnic group or to any activity prohibited by law.[13] There are also strict rules pertaining to the use of the word "Retired," which cannot be abbreviated or follow any words it modifies, and may only be used if certain criteria are met.[14] Nor are the words "former" or "ex-" permitted.[15]

Yet another prohibited designation is one that suggests an evaluation of the candidate, such as "outstanding" or "virtuous." In a recent election for Republican County Central Committee, a candidate sought to use the designation "Conservative Author/Commentator," but the elections official rejected the use of the word "Conservative" as constituting an evaluation of the candidate. The Ballot Designation Regulations are extremely detailed, providing definitions of "principal," "profession," "vocation" and "occupation," as well as types of activities that are not allowed, including one's "avocation," "*pro forma*" position, or "status."[16]

Although much of the jurisprudence surrounding ballot designations stems from statutory and regulatory requirements, there are also appellate cases that elaborate upon these issues. The appellate cases, however, are relatively few and far between, given the lack of time that exists between the public availability of proposed ballot designations and the deadline for printing the ballot materials. Often, by the time a voter prepares and files the litigation, seeks an order shortening time for the briefing

and hearing of the matter, and has the matter heard, it is the proverbial eleventh hour and there is no time for appellate relief.

One of the key appellate cases that provides guidance regarding ballot designations is *Andal v. Miller*.[17] In that instance, the term "Peace Officer" was rejected as part of a ballot designation because it was not a "principal" profession, vocation or occupation as the candidate's volunteer service as a reserve deputy was nominal, pro forma and titular in character and did not entail a significant enough involvement of time to enable him to use that term.

Another key appellate case is *Luke v. Superior Court*,[18] which focused on a judicial candidate's proposed ballot designation of "Judge, Los Angeles County (Acting)."[19] In *Luke*, the appellate court held that a court commissioner, even though often sitting as a judge pro tem, was precluded from utilizing the term "judge" or a derivative thereof, as it would mislead the public.[20]

Be Careful What You Wish For

In litigation of this kind, sometimes a litigant can win the battle but lose the war. In a recent case,[21] a school board candidate's ballot designation of "Education Foundation President" was successfully challenged in court. However, the candidate was given an opportunity to submit and justify an alternative designation, "Educator," which both sides agreed was better than the challenged designation. Lawyers who litigate in this area of the law should warn their clients that in addition to the unpredictable nature of litigation in general, "winning" in pre-election litigation does not necessarily mean achieving a politically desirable result.

Attorneys' Fees: The Double-Edged Sword

Pre-election litigation can be complicated by the possible assessment of attorneys' fees against the unsuccessful party. Code of Civil Procedure (CCP) §1021.5 authorizes a court to award attorneys' fees to a successful party in any action "which has resulted in the enforcement of an important right affecting the public interest." In addition, a significant benefit must have been conferred on the general public or a large class of persons (i.e., the voters), and the necessity and financial burden of private enforcement must be such as to make the award appropriate.

Because litigating in an area protected by First Amendment rights of free speech and petition can lead not only to CCP §1021.5 private attorney general fees but also to other types of statutory fee awards, clients should be advised to pursue these types of cases only after a thorough cost-benefit analysis of the legal, financial, and political pros and cons.

What's in a Name?

Yet another aspect of pre-election litigation involves candidates' names, and there have been efforts to obtain court orders changing such names on the ballot for various reasons. In one case,[22] a judicial candidate was to appear on the ballot with the first name of "Pat" (in addition to his last name). The candidate's opponent sued, seeking to require the use of his full first name, Patrick.

The argument was that by using a gender-neutral nickname, an improper effort was being made to cater to female voters. After evidence (including a declaration from the candidate's mother) was presented to the court that the candidate had long used the name Pat, the court denied the challenge.

Another challenge to a candidate's name involved now-Congresswoman and U.S. Senate candidate Loretta Sanchez. Her then-married name was Loretta Brixey, but she sought to run as Loretta Sanchez (which was her maiden name) to represent a heavily Latino part of the state.

A lawsuit sought to require her to use the last name Brixey instead of Sanchez, but the trial court rejected the attempt. The general rule regarding candidate names is that there is fairly wide latitude for the candidate to choose his or her name so long as the candidate can demonstrate the prior use of that name.

> "Although First Amendment speech is most certainly implicated, the voter information guide and sample ballot are limited public forums and thus subject to governmental oversight."

Vote for Me!

Candidate statements are another important aspect of pre-election litigation. However, because many such statements are expensive for candidates to purchase, there are less statements to challenge as compared to ballot designations. Candidate statements are usually limited to 200 words and are autobiographical statements that introduce the candidate, illustrate his or her qualifications for office, and set forth their positions regarding particular issues.

According to Elections Code §13307, candidate statements may include the name, age, and occupation of the candidate and a brief description of the candidate's education and qualifications. The statement is not allowed to include the candidate's party affiliation or membership or activity in partisan political organizations. Moreover, a candidate may not make references to other candidates for that office.[23]

In addition to codifying the catch-all election law writ of mandate provision found in Election Code §13314, the legislature created a specific provision for challenging candidate statements, namely CEC §13313. Under that provision, "any voter of the jurisdiction in which the election is being held, or the elections official… may seek a writ of mandate . . . requiring any or all of the material in the candidates[']statements to be amended or deleted." The writ "shall issue only upon clear and convincing proof that the material in question is false [or] misleading . . . ."

Oftentimes, elections officials will intercept an errant candidate statement that refers to an opponent. Sometimes, however, such statements pass muster with the officials, leading a voter to commence litigation as permitted by the Elections Code. Such litigation must be commenced within ten days, which constitutes one of the shortest, if not the shortest, statute of limitations periods. Sometimes, efforts at administrative advocacy—seeking to convince the elections official to reject a candidate statement or other proposed candidate document—meet with success.

More often than not, however, the elections official stands back and allows the parties to battle it out in court, appearing through counsel only to ensure that the court's ruling is completed by the "drop dead date" for the printing of the ballot materials.[24] In addition to litigation challenging the materials that candidates provide for the voter information guide, litigation also is available to challenge the wording put forth by a governmental body, such as ballot questions or impartial analyses.

Ballot Questions: Yes, No, Maybe So

The Yes-No questions that confront voters in connection with ballot measures are required to be neutral and not to create favor or disfavor toward the measure.[25] Oftentimes, however, the public officials drafting the question put a positive or negative spin on it—something for which they can be taken to task.

Recently, in *McDonough v. Superior Court*,[26] the appellate court concluded that the use of the word "reform" in a ballot question relative to a pension reform measure was biased in favor of the measure. The court thus replaced the word "reform" with the word "modification."

In another case, where the city seemed to be telegraphing its desire for a yes vote, the question as drafted was "Shall Ordinance 94-011, a gaming ordinance, zoning modification and Development Agreement . . . be

enacted to allow and regulate card room gaming at Golden Gate Fields . . . in order to provide revenue for the City of Albany, create jobs, provide for an Albany Bay Trail, and allow Albany waterfront access?"

Opponents of the ballot measure sued, and the court agreed that the question was biased in favor of the measure. The court viewed the phrase "in order to provide revenue for the City of Albany, create jobs, provide for an Albany Bay Trail, and allow Albany waterfront access" as not only unnecessary, but as also having the effect of stating a partisan position on the measure. Finding that the phrase overtly endorsed arguments advanced by proponents of the measure, the court ordered the biased language to be deleted.

Similar principles apply with regard to other government-drafted election documents. For example, in addition to ballot questions—also known as ballot labels—government officials prepare titles and summaries that accompany initiative petitions and that appear in the voter information guide, fiscal analyses, and impartial analyses. To the extent voters believe that any of these materials are biased, litigation can be brought seeking to amend such language. Although the courts show considerable deference toward these public officials and their work product, courts are willing to intervene if the officials abuse their discretion in a way that puts the proverbial governmental thumb on the scale and renders the electoral process patently unfair.

Ballot Arguments

Although ballot arguments are by definition argumentative, they nevertheless are still not permitted to be false or misleading. The Elections Code contains provisions enabling courts to amend or delete false or misleading portions of ballot arguments so that the voters will not be misled.[27]

In a recent case in which Secretary of State Alex Padilla was the respondent and the authors of the principal and rebuttal ballot arguments against Proposition 60—the California Safer Sex in the Adult Film Industry Act—were real parties in interest, the petitioner successfully obtained a large number of court-ordered amendments to the challenged arguments.[28]

Although pure statements of opinion cannot be false and are protected from the reach of the courts, portions of ballot arguments that are presented as fact, and that are false or misleading, are subject to judicial amendment. Thus, the courts have broad discretion to protect voters from being subjected to false or misleading information in ballot arguments and often have no problem weighing in as courts of equity to amend such arguments. Sometimes

courts will give counsel the benefit of their thinking (either via a tentative ruling or via colloquy from the bench) and then advise the parties to meet and confer in an effort to agree on mutually acceptable language.

Another consideration that counsel should be sure to emphasize to clients is the optics of a judicial ruling. Sure, it is great to prevail and then inform voters that the court concluded that one's political opponents were seeking to mislead the electorate. But on the other hand, a loss could mean that one's opponents can claim that the court has blessed the accuracy of the challenged argument.

Due to the nuanced and unforgiving nature of this practice area and the extremely small margin of error that exists when seeking such immediate and impactful relief from the courts, pre-election litigation is not for the faint of heart. As voters thumb through (or voraciously read) their voter information pamphlets and sample ballots in the run-up to the election, hopefully they will have greater appreciation as to the roles attorneys have played in the fine-tuning of the information they are being presented.

Even more importantly, hopefully the ballot questions, ballot arguments, impartial analyses, and other pre-election materials are clearer, fairer, and more precise and the electorate is better informed as a result of the litigation efforts discussed above.

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[1] Cal. Elec. Code §13314(a)(2)(B).
[2] Cal. Civ. Proc. Code §1063 et seq. See also CCP §1085 writs of mandate.
[3] On rare occasions, live testimony is allowed, but only where good cause is shown and the court grants permission.
[4] *Patterson v. Board of Supervisors*, 202 Cal.App.3d. 22 (1988).
[5] Judicial candidates who are deputy district attorneys are often seen trying to out-designate each other with increasingly dramatic ballot designations, such as "Gang Homicide Prosecutor" or "Child Molestation Prosecutor." Judicial candidate ballot designations are the most-heavily litigated, with the outcome of the election often turning on those few all-important words.
[6] Elec. Code §13107(a)(3).
[7] *Id.* at §13107(a)(1).
[8] *Id.* at §13107(a)(2) and (4).
[9] *Id.* at §13107.5.
[10] 2 CCR §20710 et seq.
[11] Elec. Code §13107.3.
[12] *Id.* at §13314.
[13] *Id.* at §13107(b)(1), (5), (6) and (7).
[14] *Id.* at §13107(b)(3).
[15] *Id.* at §13107(b)(4)
[16] 2 CCR §§20714, 20716.
[17] *Andal v. Miller*, 28 Cal.App.4th 358 (1994).
[18] *Luke v. Superior Court*, 199 Cal.App.3d. 1360 (1988).
[19] California geographical names count as one word, so this designation satisfied the three-word requirement. Elec. Code §13107(a)(3).
[20] In *Andrews v. Valdez*, 40 Cal.App.4th 492 (1995), an administrative law judge was allowed to designate herself as such, because the term was authorized by statute, accurate, and did not mislead.
[21] *Richard C. Cassar v. Michael Vu (Mark B. Wyland)*, San Diego County Superior Court Case No. 37-2016-00027737-CU-WM-CTL (August 12, 2016).
[22] *Mildred Escobedo v. Conny McCormack (Patrick "Pat" David Campbell)*, Los Angeles County Superior Court Case No. BS091869 (Filed August 17, 2004).
[23] Elec. Code §13308; *Dean v. Superior Court*, 62 Cal.App.4th 638 (1998); *Clark v. Burleigh*, 4 Cal.4th 474 (1993).
[24] Procedurally, the elections official is named as the "Respondent" and the opposing candidate is named as the "Real Party in Interest."
[25] Elec. Code §9050(c); *Citizens for Responsible Government v. City of Albany*, 56 Cal.App.4th 1199 (1997).
[26] *McDonough v. Superior Court,* 204 Cal.App.4th 1169 (2012).
[27] See Elec. Code §9092 re: statewide ballot measures.
[28] *Derrick Burts v. Alex Padilla (Eric Paul Leue)*, Sacramento County Superior Court Case No. 34-2016-80002404 (filed July 28, 2016).

Test No. 97

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. Lawyers should warn their clients that, in addition to the unpredictable nature of litigation in general, prevailing in pre-election litigation does not necessarily mean achieving the politically desirable result.
❑ True ❑ False

2. Many aspects of pre-election litigation have priority over all other civil matters, and most pre-election cases are heard by the trial court in a matter of days.
❑ True ❑ False

3. Because First Amendment speech is implicated in pre-election litigation, governmental oversight is not permissible.
❑ True ❑ False

4. Courts strictly limit the name a candidate chooses to use on an election ballot, even when the candidate can demonstrate prior use of that name.
❑ True ❑ False

5. Candidate statements must include the name and occupation of the candidate, a brief description of the candidate's education and qualifications, and a comparison to the candidate's opponents.
❑ True ❑ False

6. Candidate statements are permitted to include the candidate's party affiliation or membership or activity in partisan political organizations.
❑ True ❑ False

7. Any voter in the jurisdiction where the election is being held may seek a writ of mandate requiring that any or all of the material in a candidate statement be amended or deleted.
❑ True ❑ False

8. A court may award attorneys' fees to a successful party in an action which has resulted in the enforcement of an important right affecting the public interest and where other criteria are satisfied.
❑ True ❑ False

9. Ballot questions may be drafted as the drafter chooses, so long as they are accurate in describing the matters at issue.
❑ True ❑ False

10. Litigation regarding candidate statements must be commenced within ten days of the statements being made public, one of the shortest statute of limitation periods.
❑ True ❑ False

11. Ballot questions need not be neutral.
❑ True ❑ False

12. Courts tend to show considerable deference toward public officials and their work with regard to the drafting of initiative titles and summaries.
❑ True ❑ False

13. The California Elections Code provides lax guidelines regarding the use of the term "Retired," which is allowed to be abbreviated as "Ret'd."
❑ True ❑ False

14. Even with the lack of time that exists between the public availability of proposed ballot designations and the deadline for printing the ballot materials, a large number of appellate cases provide guidance regarding ballot designation issues.
❑ True ❑ False

15. A court commissioner who often sits as a judge *pro tem* is precluded from utilizing the term "judge," or a derivative thereof, as it would mislead the public.
❑ True ❑ False

16. Candidate statements are inexpensive for candidates to purchase, and as a result, there are many candidate statement challenges preceding each election.
❑ True ❑ False

17. Materials distributed to voters by a candidate's own campaign are subject to the same level of judicial scrutiny as the official voter information guide that carries the *imprimatur* of government.
❑ True ❑ False

18. More often than not, an election official will accept a candidate's statement or other proposed candidate document and will appear through counsel only to ensure that the court's ruling is completed by the "drop dead date" for the printing of the ballot materials
❑ True ❑ False

19. In 2012, the Court of Appeal disallowed the use of the word "reform" in a ballot question relative to a measure to change a pension law on the grounds that it indicated a bias in favor of the measure.
❑ True ❑ False

20. Judges are required to issue writs of mandate from the bench and are not permitted to advise the parties to meet and confer in an effort to agree on mutually acceptable language for the voter information guide.
❑ True ❑ False

MCLE Answer Sheet No. 97

INSTRUCTIONS:

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

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❑ **Check or money order payable to "SFVBA"**
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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**
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**