# VALLEY LAWYER

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A Publication of the San Fernando Valley Bar Association


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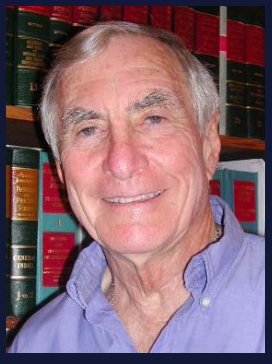






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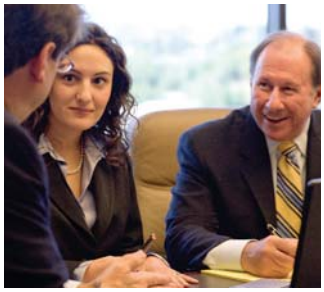

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VALLEY LAWYER

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# Sports Completes Me

**ALAN J. SEDLEY**
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WHO AMONG US CAN forget the three words recited by movie character Jerry McGuire (played by Tom Cruise) as he begged his girl Dorothy (Renee Zellweger) to take him back despite his whinny, unbearably dislikeable personality "You complete me?" Well it turns out that a slight adjustment to this Hollywood-created bromide defines yours truly to the proverbial "T"; I am, always have been and always will be a sports fan addict. Sports completes me.

I attribute my sad affliction to my youth; growing up in the city of Cleveland, sports viewing was a way of life, and at times seemed larger than life itself. As close friends know, I will defend Cleveland to the death when it comes to upholding its rightful place in my heart. Despite its years in the spotlight as "the mistake on the lake," "the nation's first city in default" and the city "where a river caught fire," it is nevertheless my birthplace and the city where I spent my first 27 years, and despite its reputation as just another rust-belt city, provided me countless cherished memories and life-long friendships.

Like most cities north of the Gulf Coast states and east of the Mississippi, winters can and oftentimes are brutal, while many summer days are wet and stormy. Residents of these climate-impaired venues find themselves indoors more often than they care to admit. Hence, television viewing, and in particular, sports can reach a feverish level in those cities with or near the home of professional sports teams. During my years in Cleveland, Sundays in the fall or winter would signal a full-day's investment in NFL football, starting with a brunch with friends at the local deli, followed by a full-day of watching the Browns battle a worthy opponent. On those occasionally stunning autumn afternoons, half-time would offer a chance to venture outside and engage in a hotly competitive game of touch football. If the Browns won, friends and I would feel a pleasing glow that lasted into the night. When they lost, it made for a truly depressing Sunday, lasting well into the week.

My fondest memory as a child in Cleveland occurred in the winter of 1964, December 27, 1964 to be exact. On that date, the Browns battled the Baltimore Colts in the NFL championship game. I accompanied my dad to the game at Cleveland's Lakefront Stadium, along with almost 80,000 other hearty fans. I say hearty, because during the course of the game, the temperature dipped below zero, and with a brisk wind flowing off nearby Lake Erie, the chill factor reached minus 15°. The Browns entered the game as seven points underdogs against the Unitas-led Colts. By game's end, the Browns handed the Colts a veritable skunking, winning 27-0.

The civic pride we Clevelanders felt with this upset win over the highly-vaunted Colts lasted for weeks and even months. It remained the main topic of conversation at cocktail parties and family gatherings throughout 1965 to be sure. There is something indescribable about the sheer elation a sports fan feels when his or her team wins a championship, and resides in a city where the daily attractions and pleasant "distractions" are far and few between.

In a similar vein, major league baseball would offer a great summertime diversion from the dull routine that was often commonplace in the Midwest. After all, while these cities may have had the pleasure of professional sports teams, they still lacked the variety and excitement of activities and venues (beach, mountains, desert) we Angelenos take for granted.

Chief Wahoo is the Cleveland Indian mascot. Though long ago considered a politically-incorrect caricature, the Chief adorned my bedroom walls in the form of pennants, posters and decals. Even today, the red-faced grinning Chief is never far from my sight: wallpaper on my iPhone and the back cover of my iPad and the Wahoo patch on at least two of my jackets, as well as countless t-shirts. My fellow synagogue-goers are never surprised to observe me sitting through temple services wearing a yarmulke bearing the likeness of Chief Wahoo.

And so I maintain that the civic identity, the very heart and soul of the professional sports fan in Cleveland and other less-than glamorous cities rests with the ups and downs, the wins and the losses of its beloved sports teams. While it can be argued that such sporting events are only a game, and the outcomes never life and death, I observed that such victories were worn by we, the loyal Cleveland fan as a personal triumph, while the losses in a crucial game hung in the air like an ominous dark cloud for days. The outcomes were embedded in the city's fiber as a display of its culture. It may not have been life and death, but it certainly shaped the daily mood of a city.

I certainly never would have envisioned that the Browns championship of '64 and its warm glow of victory for the residents of the city would have to last for nearly fifty years. The Browns championship victory remains the last pro sports championship experienced by diehard Cleveland fans, marking the longest period of pro sports championship futility of any city in the country.

My thoughts of pro sports' impact on a community come into focus as tonight, June 11, the City of Los Angeles held it collective breath as the NHL Kings finished off the New Jersey Devils in their third attempt (after being up three games to none), thus earning their first Stanley Cup. The championship series will still be on Angelenos' minds by the time this column hits the newsstands. I had the opportunity to attend game four, which was touted to be the game that would complete the Kings' sweep of the Devils. (As we know, the Kings lost.) But what was remarkable to me was the unabashed enthusiasm on display before the game, outside Staples, and the raucous, near-deafening support Kings fans gave their team once the game began. It was not only an impressive display of fan support and civic pride, but it gave me hope and encouragement that even in sunny LA, with its plethora of events, activities and distractions, the residents can feel the pride and excitement of rooting for the home team.

The presence of the pulse/heartbeat, the civic pride and excitement generated by local sports teams that I felt lacking upon my arrival in LA in the 80's and 90's seems to have grown this past decade, and is genuinely here. Though the outcome has been decided, I nevertheless chant, "Go Kings!" And while I'm at it, "Go Doger Blue!" Perhaps next it will be the flags adorning automobile windows for the new NFL team, the Los Angeles Chargers. Now pardon me while I slip on my pair of Chief Wahoo-emblazed shorts…

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New Lawyers Section

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# Happy to Comply

**ELIZABETH POST**
Executive Director
epost@sfvba.org

I WANT TO SHARE A LETTER I received last month from State Bar President Jon B. Steeler regarding the State Bar's efforts to crackdown on California lawyers' MCLE compliance.

*Dear Voluntary Bar Association Leaders:*

*I am writing to alert you that the State Bar is taking a more aggressive approach to auditing MCLE compliance than it has historically. All California lawyers need to be aware of this change in the Bar's MCLE auditing process.*

*The result of the State Bar's recent 2011 MCLE audit of one percent or 635 lawyers has confirmed the need for increased auditing. Of the 635 audited attorneys, 539 provided the necessary documentation showing full compliance. Of the remaining 96 attorneys, five have been suspended due to their inability to show any compliance. Most of the remaining 91 attorneys had minor reporting deficiencies and received a cautionary letter from our MCLE compliance group about future compliance. Approximately 25 of the 91 are being referred to the Office to Chief Trial Counsel for disciplinary action. Using simple math, we see that 15% of this reporting group were not in compliance.*

*This result is troubling and reaffirms the action being taken by the State Bar. In 2012, California attorneys can expect that five percent or roughly 3,000-4,000 lawyers to be audited. In 2013, the goal is to audit 10% which translates to 7,000-8,000 lawyers. Letters requesting proof of compliance for 2012 will be mailed in June.*

*The message is clear. California lawyers must fulfill and accurately document and report their MCLE requirements. No California attorney should be surprised if their compliance certificate is audited. For more information regarding MCLE requirements and reporting, visit the State Bar's MCLE web page.*

*If you have any questions, please send an email to Carol Madeja, Managing Director of Bar Relations Outreach at carol.madeja@calbar.ca.gov.*

Attorneys selected for the audit will receive a link to an online MCLE compliance log, where they will be asked to provide compliance details. They will also be requested to submit actual certificates of attendance, either by mail or email. Lawyers must keep documentation for at least a year after their compliance is due. Members can contact SFVBA Education & Events Director Linda Temkin at events@sfvba.org to obtain your MCLE attendance transcript of classes sponsored by the San Fernando Valley Bar Association.

The State Bar of California mandates that attorneys must complete a total of 25 hours of approved continuing legal education credit every three years. (There is a proposal being considered by the Board of Governors to raise the 3-year total to 36 hours.) SFVBA members who have not fulfilled their requirements have many cost-effective options to earn MCLE credit, including monthly Section seminars, an annual MCLE Marathon in January and self-study credit through *Valley Lawyer*'s MCLE articles and the Bar's lending library of taped seminars. Let the SFVBA help you stay in compliance.

By Client Communications Committee

# Family Law DOs and DON'Ts

The SFVBA established the Client Communications Committee to address the number one reason for client discontent—need for better communication—and reduce negative interactions with the State Bar. The Committee, a volunteer group of a dozen veteran practitioners in wide-ranging fields of law, answers written questions from attorney members regarding problems they observed or dealt with that may have been avoided by better attorney-client communication. Responses are published anonymously in *Valley Lawyer*.

SINCE MEMBERS CONTINUE TO SHOW A preference for tips and pointers because they leave no doubt about the bottom line, the Committee continues with DOs and DON'Ts for family law practitioners. Some pertinent tips are below.

**DO** be candid about "time is money." This applies if an attorney's fees are not fixed and firm. Be sure to inform client that there's no such thing as a quick "I only have one question" call. The time spent dropping another matter and getting back to it after any client conversation is never quick. If competent staff can handle the client call, insure clients know the difference in hourly rates and reliability.

**DO** encourage the client, whether by call, email, letter or fax, to try to cover multiple matters, instead of making each an urgent communication of one question, problem or issue (unless attorney fees are truly not relevant to the client's situation).

**DO** assume clients have no understanding of their attorney's professional courtesy, professional objectivity, exercise of independent professional judgment in the client's best interest or, for that matter, necessary negotiation tradeoffs. Clients sometimes have an unrevealed hidden agenda like "make him/her suffer." Family law is replete with false claims of child abuse as some parent's means of attempting to influence minor child custody.

**DO** candidly discuss client's goals. Attorneys should discuss their client's "gut and heart" goals early on. It's always mandatory that clients exercise their right to be full, more-than-equal partners in the attorney/client relationship in this field. Informed consent in order to accommodate client's objectives is often strongest in this area of law. Family law probably has more non-economic, totally subjective wish lists than most other areas of law because it almost always deals with the utmost in very personal. Who people really are and who they live with are less economically driven than merely where they live.

**DO** quash unrealistic expectations. Without motivating the client to find stronger more cooperative counsel, do accept the fact that some clients block out anything which doesn't accommodate their wish lists—no matter how candid or honest, some matters see many, many successive counsel.

**DO** deal realistically with economics. There are multi-millions-at-stake dissolutions with realistic and legitimate absence of predictability to predict the dollar outcome. As people of means become more and more sophisticated in the art of dealing with their means in very private ways, making such determinations at the outset may miss the mark. Involve the client in reality determination and planning early on in the case.

**DO** understand the interplay of professions other than law. Most practitioners understand that accountants often play a major part in community property division and sometimes separate property determination. Most understand that real estate appraisers and brokers are often part of the needed adversarial team. Most know that psychotherapists play very strong roles in minor custody matters.

**DO** be different than many practitioners who, along with their staff, pontifically purport to deal with the emotional issues which are often more important than economic issues at many junctures in the proceedings. Also, encourage clients to seek and find psychotherapeutic specialists who are educated, trained and credentialed to deal with issues lawyers are generally clueless about. (While not for everyone, one committee member routinely mandated client participation in self-selected psychotherapy as a condition of representation.) Encouraging concentration on economic issues tends to reduce the number of real issues, reduce the fees for counsel and experts, accelerate the reasonable conclusion of the matter and decrease the number of successor counsel for any single client.

**DO** be candid about deposits accompanying the initial retainer. Criminal lawyers everywhere have traditionally used flat fees or successive segments of flat fees with impunity. Family lawyers, on the other hand, have had some intervention by regulatory agencies (the California State Bar, Office of Chief Trial Counsel).

The disciplinary interest stems from a narrow view of when a fee is earned and somewhat ivory tower view of what is reasonable. This in turn is based on the archaic view that a true retainer, a sum paid and earned in advance of any legal services, is based on a client's engagement of a lawyer or law firm based on assuring their availability for a particular purpose. In fact, the majority of the eleven factors which determine whether a fee is unconscionable or unreasonable do not even hint at that view. (Rule of Professional Conduct 4-200).

The intervention or disciplinary emphasis becomes an issue when the attorney-client relationship ends short of the client's expectations of what he or she would be getting for the deposit, down payment or earnest money paid at the outset or subsequent interval. Rule 4-100 (B)(4) mandates that counsel promptly pay, as requested by the client, any funds in the possession of the attorney which the client is entitled to receive.

It follows that unless the retainer candidly deals with express services or phases or segments thereof which are anticipated to be approximately covered by the initial retainer, there will often be two different views of whether or not the client is entitled to a refund. Defending oneself from a needless State Bar complaint can be very time consuming, so it pays to have unambiguous and candid engagement letters or retainers dealing with this issue.

**DON'T** assume clients understand or accept the reality that divorce law is based on no-fault, no matter how unfair or egregious that may seem to the unwilling partner whose relationship is now over; clients always candidly play "show and tell" to counsel; clients understand that custody matters are primarily determined by the minor child's best interest; clients understand the difference between law and equity; clients understand why alternatives to resolving disputes without a trial was born and bred in family law; or reconciliation is always out of the question.

**DON'T** cover every conceivable area of law. Family law practitioners get experience and develop skills in many other areas of law, including, but not limited to, real property, asset protection, commercial and corporate law. There are times when consultations must be made with attorneys who specialize in particular fields.

Whether the client is sent out in the world of "seek and find" to locate their own specialist, a referral is made, or whether the attorney and the client agree that the family law practitioner ought to get an independent consult, turns on many factors. Affordability, necessity, stakes involved, timing and degree of client sophistication are only a few which both the attorney and client need to candidly discuss in advance.

**SFVBA Client Communications Committee** accepts written questions, which may be submitted to epost@sfvba.org or SFVBA Client Communications Committee, 21250 Califa Street, Suite 113, Woodland Hills, CA 91367. The opinions of the Committee are those of its members and not those of the Association.

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# Jurisdictional Reach in Internet Cases:

## Clarification from the Ninth Circuit

**By Lisa Miller and John B. Marcin**

WHERE THERE IS NO federal statute that authorizes personal jurisdiction, the court applies the law of the state in which the court sits. Personal jurisdiction based on state long-arm statutes (jurisdiction not based on presence within the state) falls into two categories: general jurisdiction and specific jurisdiction.

General jurisdiction exists when an out-of-state party has continuous, systematic and extensive dealings with the state in which the court sits. The court has personal jurisdiction over any dispute involving the party when it has general jurisdiction over a party. In the internet context, this is the case when a company advertises and sells so many products for such a long time within a state that it is subject to personal jurisdiction for any claim against it. This is so even when the claim involves activity that occurred only outside the state (ignoring venue issues).

Specific jurisdiction is related to the power a particular court may have to hear a particular case. Specific jurisdiction exists when the defendant has had "minimum contacts" within the specific geographic area. Specific jurisdiction may be triggered when the issues arise from those minimum contacts. This is the case whether the defendant, either an individual or a business, resides or does all of his business there.

The minimum contacts analysis is involved when the defendant has enough contact with the forum state for it to be fair for the court to exercise power over him in the context of the dispute. This can be the case when the defendant has had a small, but substantially significant, amount of activity in the area in which the lawsuit is filed, and the case involves a dispute surrounding that specific activity.

### The Ninth Circuit Speaks

In two unrelated cases, the same appellate panel considered jurisdictional issues and internet activity issues. The court revived the lawsuits, both of which had been dismissed for lack of personal jurisdiction over out-of-state companies.

The first case, *Mavrix Photo v. Brand Technologies*, 647 F.3d 1218 (9th Cir. 2011), centered on a company, Mavrix Photo Inc., a Florida corporation with its principal place of business in Miami. Mavrix licenses and sells candid photos of celebrities (e.g., "Lindsay Lohan Stays Sexy and Sober"). Mavrix maintains a Los Angeles office, employs Los Angeles-based photographers, has a registered agent for service of process in the forum state and pays fees to the California Franchise Tax Board.

Mavrix asserted that Brand Technologies Inc., an Ohio corporation, posted to its website a number of Mavrix's copyright-protected images. Mavrix sought an injunction barring Brand from disseminating the photos, actual and statutory damages. The District Court denied Mavrix's motion for jurisdictional discovery and granted Brand's motion to dismiss.

In *Mavrix*, the Ninth Circuit held that general jurisdiction was lacking over the nonresident defendant in the case. The defendant had no offices or staff in the forum state, was not registered to do business in the state,

had no registered agent for service of process and paid no state taxes.

The plaintiff had argued that the defendant allowed third parties to advertise jobs, hotels and vacations in the forum state on the defendant's website; sold or allowed others to sell tickets to events in the forum state on its website; employed a firm in the forum state to design this website; had business relationships with a national news organization, an internet advertising agency and a wireless provider located in the forum state; and maintained a highly interactive website.

The court held that these contacts, considered collectively, were insufficient to justify exercise of general jurisdiction with the forum state. However, the defendant used the plaintiff's copyrighted photos in its marketing push. This effort was part of its exploitation of the forum state's market for its own commercial ends. The court held that the defendant committed an intentional act through this use. The court found that this intentional act was "expressly aimed at the forum state." This was held to be sufficient to establish specific jurisdiction.

In another case decided by the same court (indeed the very same panel) at the same time, *CollegeSource v. AcademyOne*, 653 F.3d 1066 (9th Cir. 2011), the court elaborated on its view of jurisdictional challenges. In *CollegeSource*, the court was unable to find general jurisdiction under the factual circumstances. CollegeSource, a California corporation, and AcademyOne, of Pennsylvania, are competitors in the market to assist students and educational institutions with the college transfer process. CollegeSource asserted that it owns a digital collection of 44,000 course catalogs from 3,000 colleges and universities dating back to 1993. The company accused AcademyOne of illegally reproducing 680 catalogs from this collection on its website.

Despite the plaintiff's allegation of misappropriation of a forum state resident's intellectual property, the court found that this did not support general jurisdiction. The court held that the nonresident defendant had no offices or staff in the forum state, was not registered to do business in the state, had no registered agent for service of process and paid no state taxes.

After jurisdictional discovery, the District Court granted AcademyOne's motion to dismiss CollegeSource's complaint for lack of personal jurisdiction. The court held that the misappropriation was not a "continuous and systematic" forum activity. Instead, the defendants did a few things for a short time. Marketing to forum residents, which does not amount to substantial and continuous commerce with the forum state, does not trigger general jurisdiction. The court found that the defendant's business interactions with 300 California registered users and two paid subscribers (the defendant asserted that it realized no profit from these relationships) did not amount to the needed substantial "volume" and "economic impact" for general jurisdiction. "Many of the features on which *Mavrix* relies to show zippo interactivity—commenting, receiving email newsletters, voting in polls, uploading user-generated content—are standard attributes of many websites. Such features require a minimal amount of engineering expense and effort on the part of a site's owner and do not signal a non-resident defendant's intent to "sit down and make itself at home" in the forum by cultivating deep, persistent ties with forum residents."

But the court found that specific jurisdiction was justified. The court held that AcademyOne "committed intentional acts by downloading CollegeSource's catalogs, republishing them on its own websites, and obtaining course descriptions from those catalogs," and that these acts were targeted at California, where CollegeSource was based.

The court held that the defendant had sufficient "minimum contacts" with the forum state arising out of, or related to, its actions in misappropriating plaintiff's catalogs and course descriptions. Based on this activity, the court found a basis for specific jurisdiction.

Because CollegeSource and AcademyOne were direct competitors in a relatively small industry, AcademyOne's assertion that it was unaware of CollegeSource's California place of business…is implausible, to say the least, according to the court.

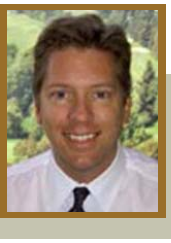
The court noted that the defendant committed intentional acts by downloading and using the plaintiff's work product, the defendant individually targeted the plaintiff, and the harm to the plaintiff's business occurred in California.

## The Takeaway

The fact that a particular case involving allegations based upon internet activity does not change the analysis of jurisdiction. General jurisdiction exists when an out-of-state party has continuous, systematic and extensive dealings with the state in which the court sits.

For a court to find specific jurisdiction, the non-resident defendant must purposefully direct his or her activities or consummate some transaction with the forum or resident thereof; or perform some act by which s/he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; the claim must be one that arises out of or relates to the defendant's forum-related activities; and the exercise of jurisdiction must comport with fair play and substantial justice i.e., it must be reasonable.

When internet activities are alleged to form the basis of contacts sufficient to allow the court to exercise jurisdiction, the analysis is the same. Where general jurisdiction doesn't exist and where a plaintiff can show that the actions by the "foreign" defendant intentionally targeted the plaintiff by theft of intellectual property or other misconduct, the court is more likely to find specific jurisdiction.



**Lisa Miller** is an attorney with the Marcin Lambirth law firm. She is also a temporary judge with the Los Angeles Superior Court. Miller can be reached at Protem@LMillerconsulting.com. **John B. Marcin** is a highly accomplished trial lawyer with an expertise in business litigation. He is the managing partner of the Marcin Lambirth law firm. Marcin can be reached at JBM@Marcin.com.

Finding an Expert

# Understanding Product Liability Litigation

By Marc S. Colen

THE LATIN PHRASE *SCIENTIA POTENTIA* MEANS "Knowledge is power!" That declaration holds true be it in product liability litigation or in any other conflict process. In the instance of product liability litigation, the requisite knowledge is obtained through investigation, discovery and consulting experts. Success in product liability litigation is based in large part on obtaining the optimum analyses of the failure and related circumstances, and then the optimized use of the resulting knowledge at trial.

This article focuses on what occurs during the period between the complaint served date and the discovery cut-off date; the attorney-consulting expert relationship and how it affects the discovery process; and the needs of the plaintiff, whose burden of proof is based on technical knowledge and the application of that knowledge.

## Propounding Effective Discovery Requests

In no other litigation is drafting and propounding effective discovery more important, and so difficult, as it is in product liability litigation. Preparing astute and effective requests based on both extensive technical knowledge and litigation experience will optimize the likelihood of an attorney's success. The discovery methodologies used by most attorneys representing clients in product liability cases are very rarely optimized to obtain all possible and relevant technical information. A significant reason for this is a lack of understanding between an attorney and a consulting expert.

The plaintiff's attorney will most likely begin the discovery process by propounding, in large part, non-incident specific interrogatories, requests for admissions and/or requests for the production of documents and things (collectively "discovery requests") based on those used previously, found in form discovery books and computer files or those that were prepared by other attorneys. That is certainly as it should be, but it is far from sufficient.

Decades of experience and being able to recite BAJI 1200 et seq. is not enough. The facts of every case are different and it is the need for all of the relevant, specific facts that permits an attorney to prevail or, if the facts and other factors are against him or her, at the least, not be ambushed.

Unless an attorney is a technical professional or failure analyst, he/she may have little chance of discovering the minutiae on which an accurate analysis and valid conclusions may be made so that he/she can develop a causal theory based on fact and science (which will not be torn apart by defense experts). Often, a consulting expert is needed to help an attorney create and effectuate adequate discovery; this should be done as early in the case as possible.

## How Experts Think

Before an attorney can begin to work with an expert, he/she will have to deal with a problem that may be far more perplexing than IRS regulations: communicating with one's expert. The problem is that the language of the scientist is not that of the attorney. The words may be incomprehensible, partially understood or worse, the assumption may be made by an attorney that he/she does understand a consulting expert or a scientist, but does not. This is less of an issue for a defense attorney who may defend the same type of product with precisely the same issues many times.

Experts such as material scientists or failure analysts think differently. They work with facts. They want to see everything and test everything. They typically research and analyze all aspects until they have reached conclusions based upon the facts, on physics, or the basis of all science. Experts want to fix things, which is certainly the optimum result in product liability, whether the theory be design defect, manufacturing defect or otherwise.

Blame setting is not an expert's concern. Finding the problem and fixing it is their primary goal. The laws that experts are concerned with are those of nature, not those dictated by statute or case law. Experts sincerely want to help and can often provide invaluable insight to a case. Attorneys often obtain maximum benefits from working with experts.

## Propound Adequate Discovery

A consulting expert can assist an attorney in determining

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what facts are needed to prevail in the liability phase of one's case and assist in developing a discovery plan. Perhaps an expert with both a technical and litigation background is most useful. Obtaining information that an attorney needs is far more difficult than hiding it, and he/she really needs all of the help possible.

Broad discovery requests, the typical form discovery, will get an attorney nowhere because opposing counsel has so many options. Precisely targeted requests are fine, but only if the attorney is aiming at the correct target. It can be very difficult to clarify the request or propound a superior request. And it will be even more difficult to prevail in a motion to compel where an attorney's arguments are no more than *Deyo*.[1]

Consider what defense counsel will do when they receive broad discovery requests. First, an otherwise brilliant defense counsel may become obtuse and confused. No disrespect to defense is intended; everyone has bad days. He/she may decline to respond with anything other than vague and ambiguous objections. That can reveal a lot.

Alternatively, that attorney will return to his astute state but remain partially impaired. A response made in a manner that appears to be fully responsive but it may be so only to some portion of an attorney's request that is not confusing and thus justifies a response in a manner that will invariably fail to fully address his/her request. Are narrow discovery requests necessarily going to lead to a response providing what an attorney expects and desires? Perhaps, but not all that likely because the shot may very well be a shot in the dark or a shot at the wrong target.

It is all about interpretation, and the more narrowly a request is made, the easier it is to misconstrue—unless an attorney knows his/her target precisely and has aimed so precisely that a full and complete response is required.

The worse scenario may be where the objections are made and then a further response is limited by "notwithstanding the foregoing..." Here there is a response predicated on a statement that effectively allows defense counsel to respond in any manner that is preferred by the attorney and his/her client.

How can an attorney deal with all of the possibility? Work with an expert that is versed in technology and the machinations of the discovery process. Consider having that person:

- Define what is wanted with the precision that technical people prefer
- Examine the draft discovery to determine whether and how the request may be misinterpreted
- Examine the responses looking for clear discrepancy, miscomprehension, evasion, etc.
- Advise on how to hone in on what is wanted, what may be available and how the attorney can go about obtaining that information, that knowledge

Knowledge is truly power. When an attorney has the burden of proof, he/she needs all of the power that can be assembled. Good consultants can assist in achieving these goals.

[1] *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771.

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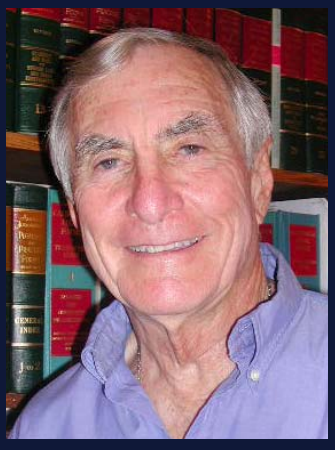

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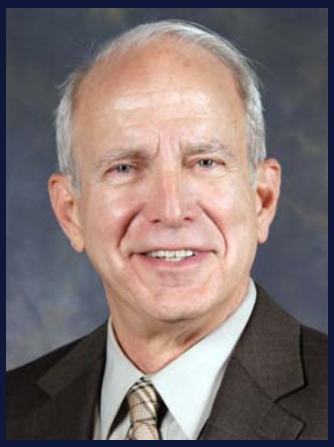

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Alan E. Kassan

Mark S. Shipow

# Meet the SFVBA Board of Trustees Candidates

By Angela M. Hutchinson

The SFVBA's Nominating Committee recently announced its slate of candidates for the 2012-2013 Board of Trustees. Before casting a vote, get to know the candidates!

Michelle Short-Nagel

Charles A. Shultz

THE SAN FERNANDO VALLEY BAR ASSOCIATION is governed by a 20-member Board of Trustees who manages the affairs and decides policy for the Association. Nomination to the Board of Trustees is an honor for members—an opportunity to be recognized by their peers as leaders within the legal community.

According to the bylaws, the Nominating Committee can nominate one, but not more than two, active members of the Association for each of the offices of President Elect, Secretary and Treasurer and shall automatically nominate the current President Elect for President. The Committee can nominate between nine and twelve active members of the Association for the positions of Trustees.

The Nominating Committee met on May 31 to choose the slate of candidates for the 2012-2013 Board of Trustees. After thoroughly reviewing the participation and experiences of the applicants, the Committee selected the following candidates:

**President**
David Gurnick (automatic)

**President Elect**
Adam D.H. Grant

**Secretary**
Caryn Brottman Sanders

**Treasurer**
Carol L. Newman

**Trustees**
Phillip Feldman (incumbent)
Megan Ferkel Earhart
Robert L. Finkel
Gerald L. Fogelman (incumbent)
Randi R. Geffner
Sean E. Judge (incumbent)
Alan E. Kassan
Mark S. Shipow (incumbent)
Michelle Short-Nagel
Charles A. Shultz (incumbent)

"This year is notable not only for the wide range of practical experience the candidate pool offers (from the relatively new lawyer to the veteran), but also the unique value each candidate expressly states he or she expects to bring to the Board," says SFVBA President Alan J. Sedley. "Each nominated candidate assures to be involved and proactive, two highly desirable attributes for our Board going forward."

Election Day is September 10; ballots and the election pamphlet are mailed to active attorney members in early August. Although the nomination process by the Committee has concluded, additional nominations for any office (except that of President or President Elect) or for the position of Trustee may be made by filing with the Secretary at any time on or before July 25 a written nomination signed by at least 20 active members of the Association in good standing.

While the candidates practice different areas of law and come from a variety of backgrounds, they share the vision of ensuring that the San Fernando Valley Bar Association continues to serves its members and the community with excellence. The new Board will be sworn in at the SFVBA Installation Gala on Saturday, September 22, 2012 at the Warner Center Marriott. *Valley Lawyer* encourages SFVBA members to get to know the 2012-2013 Board of Trustees candidates by reading the following profiles.

## Officers Candidates

**David Gurnick** is President Elect of the SFVBA and will be sworn in as the Association's president on September 22. He is a franchise law, business and litigation attorney with Lewitt Hackman, a firm that is home to past presidents

Sue Bendavid and Steve Holzer. He also chaired the SFVBA Litigation Section and is currently active in the Association's Diversity and Mentoring Committees. Gurnick served as President of the SFVBA from 1993 to1994.

**Adam D.H. Grant** is the current Secretary of the San Fernando Valley Bar Association and was nominated unopposed for President Elect. Grant is Chair of the SFVBA Litigation Section. He is an experienced trial lawyer with Alpert, Barr & Grant, the Encino law firm that has produced three past SFVBA presidents: Lee Alpert, Gary Barr and Mark Blackman. Grant has chaired the SFVBA Programs Committee and was a Director of the Valley Community Legal Foundation.

**Caryn Brottman Sanders** is the Association's Treasurer and was nominated unopposed for Secretary. She has served on the SFVBA Board of Trustees as an officer or trustee since 2006, initially as the representative of the Santa Clarita Valley Bar Association during her presidency with the SFVBA affiliate. Sanders practices business litigation and personal injury defense with Tharpe & Howell. She is Chair of the SFVBA Bench-Bar Committee and chaired the ARS and Programs Committees.

**Carol L. Newman** has been a member of the SFVBA Board of Trustees since 2009 and was nominated unopposed for Treasurer. Her Woodland Hills firm focuses on real estate and business litigation, civil appeals and palimony cases. She is Co-Chair of the SFVBA Business Law, Real Property & Bankruptcy Section and Membership & Marketing Committee. Newman is also an active member of the Association's Diversity Committee.

## Trustees Candidates

**Phillip Feldman** was elected to a two-year term on the SFVBA Board of Trustees in 2010. A former State Bar prosecutor, today he defends lawyers before the State Bar. Feldman is Chair of the SFVBA Client Communications Committee and has chaired many Association committees during his 44 years of membership in the SFVBA.

**Megan Ferkel Earhart** is an Associate in the Trusts & Estates department of Goldfarb Sturman & Averbach in Encino and is currently pursuing a LL.M. in Taxation at Loyola Law School. Megan participates in the SFVBA's Probate & Estate Planning Section and networking mixers. Megan's community involvement includes the American Cancer Society Attorneys Committee and Bet Tzedek National Leadership Council.

**Robert L. Finkel** limits his practice to U.S and foreign intellectual property law as a sole practitioner in Lake Balboa. He is active in the Association's Attorney Referral Service and the Intellectual Property, Entertainment & Internet Law Section.

**Gerald L. Fogelman** was elected to a two-year term on the SFVBA Board of Trustees in 2010. He is a former deputy district attorney and has represented adult and juvenile criminal defendants in private practice since 1978. Fogelman is Chair of the SFVBA Programs Committee and the Criminal Law Section. He also sat on the Board of Trustees from 1997 to 2004.

**Randi Geffner** is a Senior Associate at Wasserman Comden Casselman & Esensten in Tarzana. Geffner's area of practice is employment law and litigation. She is active in the SFVBA's Horace Mann Project and she and her firm support the Law Post project at Northridge Academy High School. Geffner has developed the community service program at Wasserman Comden and fundraises for Aids Project LA.

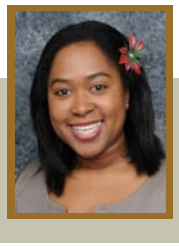
**Sean E. Judge** was appointed to the SFVBA Board of Trustees in 2011. He is a mediator in Woodland Hills. Judge is Co-Chair of the SFVBA Mandatory Fee Arbitration Committee and is a frequent contributor to *Valley Lawyer*. He has also served as a VAST settlement officer and belongs to the SFVBA's online Mediator Directory.

**Alan E. Kassan** first joined the SFVBA in 1988. He is a partner in the Northridge firm of Kantor & Kantor and represents plaintiffs in recovery of health related insurance benefits. Over the last 20 years, he has been actively involved in his synagogue serving on several committees, such as Long Term Planning Committee, Technology Committee, Special Event Planning Committee and Nominating Committee.

**Mark S. Shipow** was elected to a two-year term on the SFVBA Board of Trustees in 2010. He has a solo business litigation practice in West Hills. Shipow has worked to expand member benefits and networking opportunities as Chair of the SFVBA Membership & Marketing Committee. He is active in Blanket the Homeless and the SFVBA Litigation Section.

**Michelle Short-Nagel** is Co-Chair of the SFVBA Family Law Section. She practices family law as a sole practitioner in Woodland Hills. Short-Nagel has been a member of the SFVBA since 1998 and interned for the Association's Attorney Referral Service as a law student. She volunteers as a family law mediator and participates in the Pro per Judgment Days and Settle-O-Rama for the court.

**Charles A. Shultz** was appointed to the SFVBA Board of Trustees in 2011. He practices trusts, estates and probate as a partner with the Tarzana law firm of Wasserman Comden Casselman & Esensten. Shultz is Co-Chair of the SFVBA Mentoring Program and chaired the Probate & Estate Planning Section.



**Angela M. Hutchinson** serves as the Managing Editor of *Valley Lawyer* magazine, and she was recently accepted to law school. Hutchinson is also a published author and entrepreneur within the entertainment field. She and her husband of eight years have two young children. Hutchinson can be reached at editor@sfvba.org.

# Maintaining Client Confidentiality in the Cloud

**By Debra S. White**

THE MODERN LAW OFFICE extends far beyond four walls and a desk. With the advent of the internet and modern technology, in a competitive legal industry, lawyers need to stay connected while on the move. In the courtroom or in the car, mobility is the name of the game. The winners are the lawyers who can manage and access all of their data across multiple platforms. But with this mobility comes risk.

Because technology makes electronic information so easily accessible, it has become increasingly difficult for attorneys to effectively manage their data without compromising their clients' confidences. Hackers, thieves and even email service providers, are reading people's private documents. In recent years, it has become apparent that a simple password does not provide protection from prying eyes. So how can an attorney effectively manage data over the internet without compromising client confidentiality?

## Cloud Computing

"The cloud" is the new buzzword used frequently over the past year by technology companies. Put very simply, the cloud is nothing more than a metaphor for the internet. Cloud computing refers to accessing and using resources and applications that are available on the internet. To store one's data in the cloud means to keep documents and information in a central place via the internet.

This central place is usually a large, powerful computer, called a server. Large companies generally have their own servers onsite, while smaller companies generally rent space on servers offsite. Data is then easily accessed from the server using any computer or other device with an internet connection.

## Document Storage

With today's advanced technology, attorneys no longer need to rely solely on support staff or to be tethered to a fax machine and file cabinet at the office. Companies like eFax allow people to send and receive faxes via the internet from anywhere in the world using their smartphone or computer. And with confidential document storage services available through the internet, lawyers now have the freedom to work efficiently outside of the physical office by taking advantage of all the cloud has to offer.

There are several cloud services available for storing and accessing documents. A few of the most popular are iCloud, Dropbox, SkyDrive, Box.net, and the most recent addition, Google Drive. iCloud, the free service offered by Apple, may seem like a good choice. However, iCloud only offers a place to store documents made with Apple's mobile apps called Keynote, Pages and Numbers. PC users will have to keep converting documents every time they need to be edited. This is a time consuming process, and isn't versatile enough for a law office.

Dropbox was one of the first companies to offer cloud storage for documents and is one of the most popular. They offer a free account that includes 2GB of storage with paid plans starting at 50GB for only $99 per year. According to Lucien Palmer from TechnicallyInclined.net, a provider of technical services for attorneys, "Dropbox is one of the easiest services for clients to manage because it installs a folder on each attorney's computer and any documents and folders placed inside of it are automatically synced between those computers. An individual folder can then be shared with other attorneys or support staff, so everyone involved on a project can access, edit, and share files."

Box.net lacks this ability to sync folders directly from the desktop, but offers more sharing options found useful by large corporations. Dropbox and Box.net can both be used with iPhone, iPad, Blackberry and Android mobile operating systems, but not with Windows Phone. Windows Phone users only have access to the Microsoft SkyDrive service.

Google Drive is another popular cloud service. However, Google may not be the best choice for an attorney who needs to protect confidential information. As with email, close inspection of the company's terms of service is needed to ensure privacy. Most people don't take the time to read the fine print while signing up for these services. People assume that their files remain their private property, but they would be very wrong to make that assumption.

Google seems to be the worst offender. According to their terms of service: "When you upload or otherwise submit content to our Services, you give Google (and those we work with) a worldwide license to use, host, store, reproduce, modify, create derivative works…communicate, publish, publicly perform, publicly display and distribute such content." Other service providers such as Dropbox and SkyDrive are very clear that they do not use or make claim to any of an attorney's documents.

## Email Security

Email has emerged as a dominant form of communicating and sharing sensitive documents throughout the legal industry. Unfortunately, not all email providers can guarantee that an attorney's confidential communications or electronic documents will remain private.

Most people in this country were first exposed to email through dial-up services such as AOL or free email providers like Yahoo, Gmail or Hotmail. An alarming number of attorneys still continue to use one of these companies for their email account. This is problematic because such companies lack security. Yahoo and Hotmail are constantly in the news for being hacked and recently it was discovered that Arianna Huffington's AOL account was hacked as well.

Last summer, The Washington Post reported that a hacker in China gained access to hundreds of Gmail accounts, including those of senior U.S. government officials, military personnel, Chinese political activists and journalists.

Even Google scans every one of its customers' emails and their attachments to decide which ads to show while the customer is browsing. "Google knows who you are," explains Palmer. Google collects as much personal information as possible "to decide what kind of advertising to expose you to. This includes scanning your emails and attachments, then assuming that information is relevant to things you like or want to purchase," says Palmer.

According to TechnicallyInclined.net, one of the best solutions for an attorney to keep their emails private is to use an email system such as Exchange from Microsoft. It is designed to keep the contents of a user's mailbox accessible only by that user, so emails are not scanned for advertising. Many different companies offer MS Exchange across the country.

It is important to confirm that the company an attorney hires for MS Exchange is using secure servers. "We only use MS Exchange servers that are SAS 70 Type II certified," states Palmer. "That is a system developed by the American Institute of Certified Public Accountants (AICPA) which examines a server and confirms that it meets the highest level of security to safeguard the data it contains."

## Smartphone Security

It is easy for attorneys to protect confidential data on their smartphone. For example, Apple offers a free app, Find My iPhone, that can be downloaded to the iPhone. In the event of loss or theft, it allows the user to either lock the screen to prevent access, to track it with GPS or to play an alarm to help find it. If the phone cannot be located, it also includes a feature that will wipe the entire contents of the phone to protect the user's personal data and prevent access to those precious files and photos.

Users of the Microsoft Exchange platform for email have the ability to send a similar "wipe" command to any of their lost mobile devices. If an attorney loses his or her phone, this command immediately erases all of the data contained on the phone. Features similar to this have become commonplace in recent years, and should be a requirement for all attorneys practicing law in the cloud.

## Data Recovery

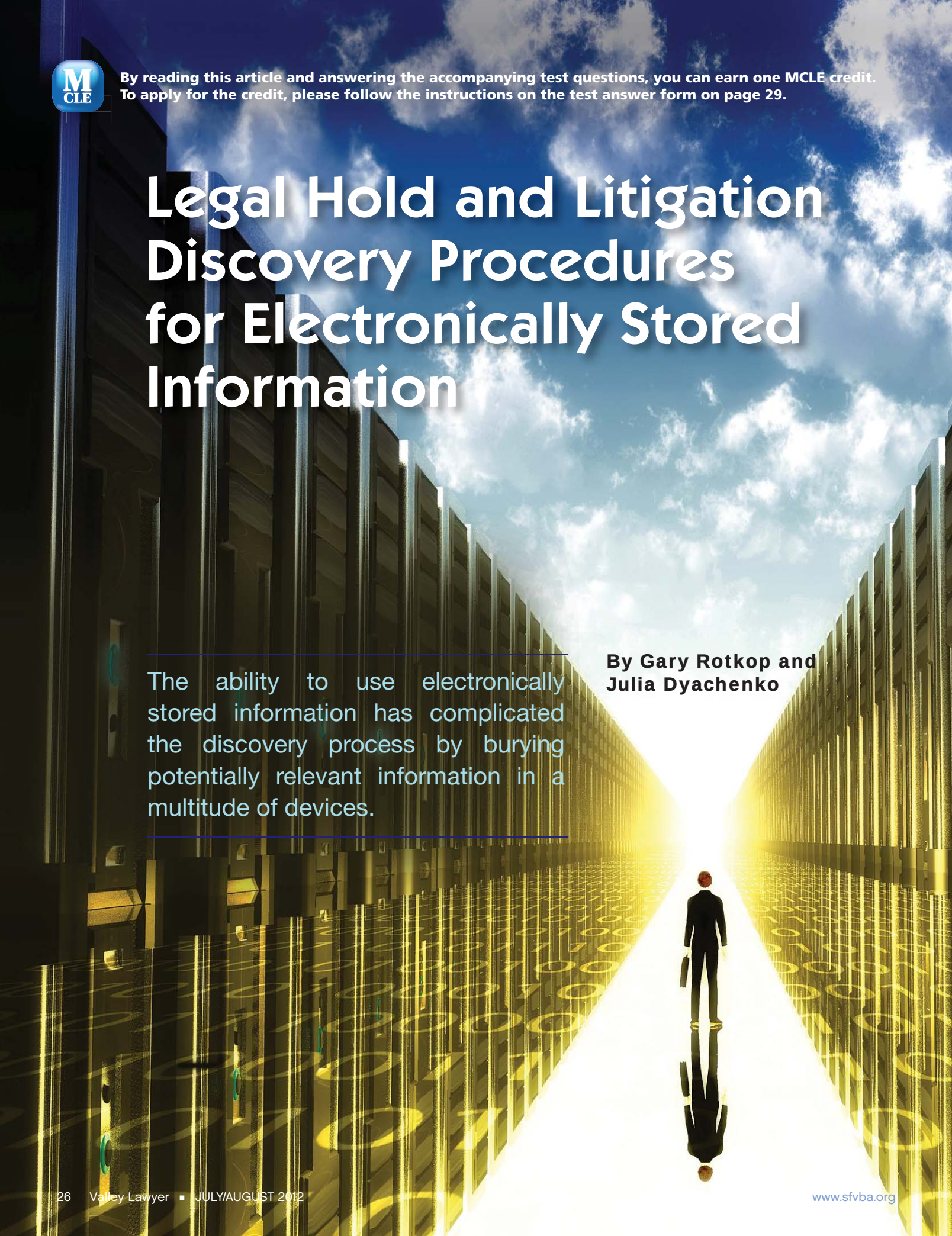
Attorneys know that work does not stop because a phone or a computer is lost or stolen. It's important to get back to business as soon as possible. Services such as Microsoft Exchange and iCloud store contacts, calendars and emails on the server. So, even if the information on an attorney's smartphone or computer is deleted, the information is not lost. By simply entering a user name and password on the new electronic device, the user's information is automatically downloaded from the server to that device.

As a further convenience, iPhones and iPads offer complete backup with iCloud. This offers the ability to instantly restore a new device to be identical to the lost device. This even includes data such as photos and videos. All this is done without the need to connect to a computer, so it makes for a painless recovery even when traveling.

## Cloud Computing is Here to Stay

Attorneys need not be apprehensive about cloud computing. It is easy to learn and use, and it levels the playing field between the solo practitioner and the larger law firm. It allows for a more efficient, cost-effective law practice, and it's arguably a safer method of storing client files than in a file cabinet or in a computer in an attorney's law office. If a few common sense precautions are taken, confidentiality need not be compromised in the cloud.

**Debra S. White** is a criminal defense attorney with offices in Los Angeles and Encino. She has been practicing exclusively criminal defense since 1999. Ms. White can be reached at debra@dwhitecriminaldefense.com.



**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 29.**

# Legal Hold and Litigation Discovery Procedures for Electronically Stored Information

The ability to use electronically stored information has complicated the discovery process by burying potentially relevant information in a multitude of devices.

**By Gary Rotkop and Julia Dyachenko**

CURRENTLY, ELECTRONICALLY stored information (ESI) can be saved on personal computers, flash-drives, back-up tapes and even virtual storage is available via online "cloud" storage in addition to many other forms of data storage. Nevertheless, when an organization anticipates litigation, relevant ESI must be identified and preserved. Organizations, from large to small, private and government sector, utilize a legal hold to preserve all forms of relevant information when litigation is reasonably anticipated. Furthermore, the legal hold process must be specifically tailored for your company's infrastructure. A generic plan may prove to be both insufficient and inefficient.

A proper legal hold protocol occurs when the attorney and the organization have performed their duty to preserve discoverable information. The duty to preserve ESI is triggered when an organization concludes, based on credible facts and circumstances, that litigation or a government inquiry is likely to occur. The courts have recently held that a loss of electronically stored data due to negligence is punishable by sanctions. The knowledge of an agent may be imputed on the organization so litigant companies as well as their attorneys should be familiar with what is expected of them before litigation takes place.

## ESI Legal Holds

*Zubulake v. UBS Warburg* is the landmark decision in the area of ESI legal holds. In this case, Judge Shira Scheindlin of the U.S. District Court of the Southern District of New York determined that electronic discovery was included under FRCP 26(b)(1). The court specifically focused on the following language: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense," recognizing the wide scope of the rule.[1]

Under FRCP 34, one may request the discovery of documents even if they may "be obtained only with the use of detection devices," such as electronic data. Judge Scheindlin also validated the *Oppenheimer* presumption: That the side responding to the discovery request must pay for the expense of discovery.[2]

This presumption is subject to the limitation of FRCP 26(c), which allows the presiding judge to use discretion to force the requesting party to pay for the cost of discovery if he finds an existence of "undue burden or expense," a concept known as cost shifting.[3] Therefore, electronic documents are now subject to the same rules of discovery as traditional paper documents.[4]

The amended Federal Rules of Civil Procedure that became law on December 1, 2006 expanded the *Zubulake* ruling by amending the FRCP to include various kinds of ESI.[5] The main interest of this ruling was backup tapes. However, the 2006 amendment to the FRCP also captured additional types of ESI.

Rule 34(a)(1) is intentionally expansive, covering a broad category of ESI subject to discovery, "The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically."[5] Currently, instant messages are potentially a discoverable form of ESI. Furthermore, cell phone images, metadata, information stored in RAM, and deleted files and backup tapes are all potentially discoverable.[7]

## Adapting to Electronic Discovery

Federal courts are not the only arenas struggling with the adaptation of electronic discovery. Attorneys and litigant clients must also be familiar with electronic discovery in California state courts. In the wake of the 2006 FRCP amendment, many states, California included, have adopted new e-discovery rules. In June 2009, Governor Schwarzenegger signed Assembly Bill 5 into law; it is now known as the Electronic Discovery Act.

This new California law closely resembles the federal e-discovery rules.[8] However, one notable distinction is that California rules start with the presumption that all ESI is accessible.[9] FRCP 26(b)(2)(B) explicitly limits discovery seeking inaccessible ESI.[10] California law places the burden on the responding party to identify and detail any accessibility objections in their response to discovery requests.[11]

When a dispute arises as to the production of ESI, the judge weighs the burdens and benefits of the discovery at issue.[12] Even if the ESI is determined to be reasonably available for production, a judge is entitled to limit the scope of production if the probative value of the electronic information is outweighed by the production burden.[13]

Whether the party responding to a discovery request must provide the actual ESI or printed document has not been decided definitively in California. In a recent appeal to the Supreme Court of California, petitioner Ponani Sukumar contends that the production of printed emails does not fulfill the respondent's obligation to produce ESI.[14] Sukumar explains that the ESI produced in its native format would include metadata regarding creation, manipulation and deletion of files that printed documents lack.[15] If the California Supreme Court elects to consider this issue, it would be a watershed moment in California discovery rules, perhaps heightening the standard for what types of information must be produced in discovery.

In the case where relevant ESI cannot be produced despite the best efforts of the responding party, lawyers and litigant clients can take a deep sigh of relief. Similar to the FRCP, the California Electronic Discovery Act creates a safe harbor for the failure to maintain and produce electronic information based on the "routine, good faith operation of an electronic information system."[16] However, once a prospective litigant learns of potential legal claims, a litigation hold should be put into place in order to preserve ESI that relates to those claims.[17]
The legal hold must be established notwithstanding existing retention and destruction ESI policies of the litigant client.[18]

## Threshold for Data Preservation

The courts have established a heightened threshold for preservation of relevant data for discovery in cases such as *Zubulake* and may take it further in cases in the near future. To meet this threshold, an attorney must recognize what triggers the duty of preservation and implement a proper and timely litigation hold.

The basic principle that an organization has a duty to preserve relevant information in anticipation of litigation is easier to articulate than to apply. The duty to preserve relevant information arises when litigation is "reasonably anticipated."[19] The duty to preserve is definitely triggered when

a complaint is served, subpoena is received or a government proceeding is initiated, but the duty may arise much earlier.[20] The key is timely recognition of any information available to the company that may put them on notice of possible litigation.[21]

There is no one approach that fits every company and situation, but some of the factors that tend to suggest a company should be in reasonable anticipation of litigation are: (1) the level of knowledge within the organization about the claim; (2) the risk posed by the claim to the organization; (3) the risk of losing information if the litigation hold is not implemented; and (4) the number and complexity of sources where information is reasonably likely to be found in addition to many other conceivable factors.[22] Whether the litigation is reasonably expected is based on a good faith and reasonable determination of the facts and circumstances as they are known at the time.[23]

The adoption and consistent compliance with a policy that defines preservation and the decision-making process demonstrates reasonableness and good faith in meeting the preservation obligation.[24] This process should include the procedure for reporting the threat of litigation to a responsible decision maker working within the litigating organization.[25]

In implementing a legal hold, courts expect litigation hold notices to be issued in written form.[26] Anything short of this standard may be deemed grossly negligent.[27] Courts demand an established preservation protocol.[28] However, the protocol is merely the game plan, proper implementation is equally important.

The protocol must be written in such a way that it is clearly understood and targeted to the relevant players in the pending litigation.[29] Direct communication with every source of relevant information is crucial and establishes a solid and defensible discovery foundation.[30] For instance, the legal department must ensure that the IT department understands what is expected of them. Thus, the preservation plan must be clear and concise.

The attorney writing the protocol should have a proper understanding of the data management process and the cycling of data through the back-up hardware in order to write and execute the game plan. Conversely, a generic, broad statement, being broadcast throughout the company, falls short of legal hold obligations.[31] Anyone that handles data relevant to the case is a custodian and must be instructed and educated about how to handle ESI.

The duty to preserve arises when the organization should be reasonably aware that the evidence may be relevant to future litigation.[32] This duty extends to the key players in the company, basically, any employee likely to have relevant information.[33] The duty to preserve also encompasses any relevant documents at the time the duty arises and any other documents created afterwards that are relevant to the case.[34]

Media that is difficult to access such as backup tapes should be preserved if they are actively used for information retrieval.[35] In other words, if employees are able to contact the IT department to retrieve an erroneously deleted file from backup tapes, then the backups are considered "accessible" and should be preserved.

If employees are prohibited from retrieving such files, and the policy is to use backup tapes only for disaster recovery, then the files are less likely to fall under the duty to preserve. However, if the documents of key players can be traced to a specific set of backup tapes, then those tapes should be preserved if the original documents are unavailable.[36] Beware, since no bright line test exists, it is best to err on the side of caution and save as much relevant information as can be deemed reasonable under the circumstances.

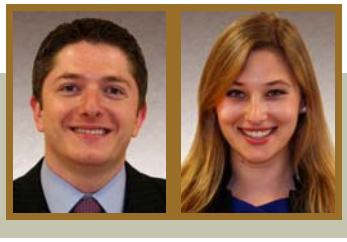
## Failing to Preserve Information

Possible remedies for failure to preserve relevant information include spoliation sanctions and an adverse inference instruction. Spoliation sanctions are used sparingly and require a higher burden of proof with regards to culpability in some jurisdictions. However, an adverse instruction is very damaging to the litigating party's case. Whereas a negative piece of evidence can be spun in such a way as to mitigate its effect, an adverse instruction leaves it up to the jury to use their imagination to contemplate the gravity of evil encompassed in the destroyed evidence. In practice, the adverse instruction can be far more damaging than the evidence.

Three key steps to creating an adequate legal hold are: (1) have a defensible legal hold strategy, understood by all potential ESI custodians in the organization; (2) recognize the triggering event for the legal hold; and (3) execute the legal hold strategy, resolving preservation issues with caution. Recent rulings have held explicitly that a legal hold strategy must be followed; otherwise the remedy will be harsh.

---

[1] *Zubulake v. UBS Warburg* LLC, 217 F.R.D. 309.
[2] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358.
[3] *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421.
[4] W. Lawrence Wescott II, *W. Lawrence Wescott II on the Duty to Preserve Electronic Evidence*, Emerging Issues 2896, September 15 2008, at 1.
[5] FRCP 34, 2006 Amendment.
[6] Id.
[7] See Wescott at 4.
[8] Eric Sinrod, *States Embrace Electronic Discovery*, Records Retention Report, January 2010.
[9] Id.
[10] Id.
[11] Id.
[12] Id.
[13] Id.
[14] 2010 WL 2650066 (Cal.) [Appellate Petition, Motion and Filing].
[15] Id.
[16] Electronic Discovery Act.
[17] Id.
[18] Id.
[19] Conor Crowley, Eric Schwartz, and Gregory Wood, *The Sedona Conference Commentary on Legal Holds: the Trigger and the Process*, at 5.
[20] Id.
[21] Id.
[22] Id.
[23] Id.
[24] *Id.* at 8.
[25] Neil Packard, *Understanding Legal Hold Notification Changes* (2010), http://my.advisor.com.
[26] *Id.* at 2.
[27] Id.
[28] Id.
[29] Id.
[30] Id.
[31] *Id.* at 2.
[32] Wesctott at 2.
[33] Wesctott at 3.
[34] Id.
[35] Id.
[36] Id.



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# Test No. 47

**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. Data storage online in virtual "cloud" is one form of electronically stored information.
   ❑ True ❑ False
2. Legal hold strategies are implemented in private companies and are unnecessary in the government sector.
   ❑ True ❑ False
3. The duty to preserve electronically stored information is triggered when an organization concludes that litigation or a government inquiry is likely to occur.
   ❑ True ❑ False
4. The knowledge of an agent of an organization may not be imputed on the organization itself.
   ❑ True ❑ False
5. Loss of electronically stored data due to negligence is punishable by sanctions.
   ❑ True ❑ False
6. The *Oppenheimer* presumption states that the side responding to the discovery request must pay for the expense of discovery.
   ❑ True ❑ False
7. Under Federal Rule of Civil Procedure 26(c), notwithstanding the *Oppenheimer* presumption, the court has discretion to transfer the costs of discovery onto the requesting party.
   ❑ True ❑ False
8. Both state and federal courts have safe harbor provisions where relevant electronically stored information cannot be produce despite the best efforts of the responding party.
   ❑ True ❑ False
9. A litigation hold notice that is not issued in written form may be deemed grossly negligent.
   ❑ True ❑ False
10. Most people that handle data relevant to the case do not need to be educated on how to handle electronically stored information.
    ❑ True ❑ False
11. A legal hold protocol is a game plan that establishes how and when data will be preserved.
    ❑ True ❑ False
12. Meeting with the IT department of your organization to discuss the legal hold is not crucial to ensuring that the legal hold protocol is followed.
    ❑ True ❑ False
13. Possible remedies for failure to preserve relevant information include spoliation sanctions and adverse inference instructions.
    ❑ True ❑ False
14. Small private companies do not need to preserve electronic data.
    ❑ True ❑ False
15. Federal Rule of Civil Procedure 34 includes the discovery of electronic data.
    ❑ True ❑ False
16. Electronic documents are subject to many of the same rules of discovery as traditional paper documents.
    ❑ True ❑ False
17. Federal courts have adapted electronic discovery rules; however, state courts have not.
    ❑ True ❑ False
18. Federal Rule of Civil Procedure 26 explicitly limits discovery seeking inaccessible electronically stored information.
    ❑ True ❑ False
19. California law closely resembles federal rules on electronic discovery.
    ❑ True ❑ False
20. California law presumes that all electronically stored information is accessible.
    ❑ True ❑ False

## MCLE Answer Sheet No. 47

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:

   San Fernando Valley Bar Association
   21250 Califa Street, Suite 113
   Woodland Hills, CA 91367

METHOD OF PAYMENT:
❒ Check or money order payable to "SFVBA"
❒ Please charge my credit card for $_____.

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5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0490, ext. 105.

Name_____
Law Firm/Organization_____
_____
Address_____
City_____
State/Zip_____
Email_____
Phone_____
State Bar No._____

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 |

# Three Dimensions of Change

By Edward Poll

DURING TIMES OF UPHEAVAL for law firms, there are three basic dimensions to the profession's business model that do not change: marketing (securing new clients and maintaining current ones), production (performing legal work as efficiently and effectively as possible) and collection (maintaining enough liquidity to operate). But like everything else in the business of law, these constants are changing rapidly. There are three dimensions of change that show what the "new normal" will look like.

## 1 Marketing and Oversupply

An oversupply of lawyers has transformed the marketing function. With aging lawyers working longer, and law schools graduating 40,000-plus new lawyers every year, something has to give. Already this has meant the end of law firm tenure through de-equitization and layoffs.

There are wider implications than this for the future of law firm marketing, such as:

- Convergence in which large corporate clients reduce their legal expenses by paring down the hundreds of outside counsel firms that they previously used to a few dozen or less
- Onshoring by legal staffing companies that hire lawyers in lower-cost parts of the United States and pay them less for repetitive work that is provided to clients online
- Proliferation of do-it-yourself websites purporting to offer advice, research and forms in such areas as family law, probate, real estate closing and even filing a patent
- The use of technology tools like e-discovery software, which can analyze a million pages of documents far faster than a now unnecessary army of document review lawyers

The common thread in these changes is that, more than ever, lawyers must now not only respond to clients' needs, but also their wants. The firm that markets itself as the most efficient provider of legal services, not the one with the most lawyers, will be the firm that clients choose.

## 2 Production and Virtualization

The cost pressure from lawyer oversupply and advancing technology has spurred conducting legal practice through the internet. This can be through telecommuting from an existing office or establishing a completely virtual one. In either instance, the concept is the same: minimal expenditures on physical office space; contact with clients or colleagues largely online or by telephone; and use of online virtual assistants at another remote location for staff support.

There is no formal ethical prohibition against having a virtual office. In fact the eLawyering Task Force of the ABA's Law Practice Management Section has prepared guidelines for conducting virtual practice. As the task force says on its website, "eLawyering encompasses all the ways in which lawyers can do their work using the Web and associated technologies … interview, investigate, counsel, draft, advocate, analyze, negotiate, manage [through] corresponding Internet-based tools and technologies."

However, while virtual production is acceptable, a virtual lawyer is not. Virtual production must accommodate client service, communication and access. Nothing must disrupt the means by which a lawyer learns the intent and desires of his/her client. No matter what technology makes possible, it is not the production answer if it makes life more difficult for the client.

## 3 Collections and Liquidity

As marketing and production are transformed, the traditional law firm revenue formula changes. In the drive for cost efficiency, it is inevitable cash collections and liquidity will decline. One response to this dilemma has been the growing momentum for non-lawyers to take an equity interest in law

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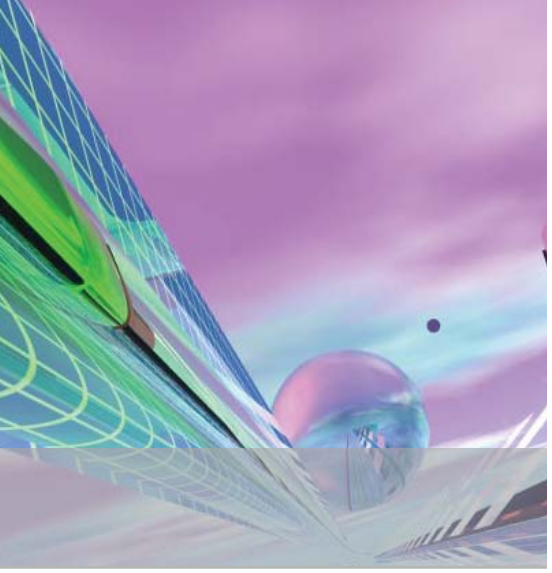

firms, despite Rule 5.4's prohibition of such an arrangement.

Last year, a nationally known law firm filed suit in several federal courts, contending that state versions of Rule 5.4 are unconstitutional because they allegedly prevent the firm from raising the money it needs to provide legal services—supposedly, violating the Constitution's due process clause. By year's end, the American Bar Association's Ethics Commission recommended that state rules be changed to allow non-lawyers to own up to 25% of law firms so that U.S. firms can compete globally. The proposal said that any firm with non-lawyer owners must have "as its sole purpose providing legal services to clients."

Bringing in outside owners to get more capital raises numerous ethical concerns. For example, would non-lawyer investors urge lawyers to violate confidentiality and tell potential financing sources that the firm has a lucrative new client, or a new matter with potentially high fees? It is the kind of disclosure dilemma corporations face all the time. Public ownership of law firms is a reality in countries like Australia and the U.K.; it could happen here.

**New World, Old Formula**

Transformation of the marketing, production and collection functions will continue. Lawyers must alter their business practices and cost structures in the new world created by oversupply, commoditization and liquidity shortages. This means focusing on the formula for all business success: P = R – E (i.e. Profit equals revenue collected deducting expenses.) That formula never changes.

# The Art of Collections in a Down Economy

## How Simple Office Procedures Can Reap Benefits for Counsel and Clients

By Alexander S. Kasendorf

WHEN DRIVING THROUGH ANY OF California's thoroughfares, it is sobering to see the number of storefronts and businesses that have cleared out, with the empty spaces only to be left with giant "For Lease" signs in the window. The downtrodden economy has, and will continue to, affect every fabric of society.

One of the segments hit the hardest is small and family owned businesses. With capital influxes drying up and with nowhere to turn for a personal bailout, many have had to shutter their dreams. Not being able to collect from customers for services rendered is a major reason many business are being forced to close their doors. Yet, remedies are available to collect what is owed. With simple law practice and management techniques, attorneys can assist their clients in getting back on track.

Clients who have promptly paid in the past are allowing payables to exceed 30, 60, 90 or 120 days. When a friendly reminder from the attorney or a past due notice does not get the job done, attorneys might consider taking the collections efforts to the next level.

Receipt of a letter from an attorney, emblazoned with the firm's letterhead, may be sufficient to get the attention of a non-paying customer or client. Many individuals will respond to a letter from an attorney because of the fear of a lawsuit, effect of a judgment on their credit rating or even the thought that the individual's public perception will be diminished.

Often, an attorney letter is all it takes for an overdue invoice to be paid. A form letter can be generated and saved in a firm's word processing directory and customized as needed. A follow-up telephone call to the individual from the responsible partner will show persistence and will put added pressure on the individual to pay. Although an attorney cannot talk to a defendant who is represented by counsel, there is no prohibition on direct contact before a lawsuit is filed if the individual is not represented by counsel. The only caveat is that the attorney must not run afoul of the Fair Debt Collection Practices Act.

Once a telephone call is placed to the debtor or a letter is sent, various calendaring tools can provide systematic follow-up that could lead to the payment of the invoice. Classic methods included using a "tickler" or "accordion file" and the placement of a copy of the letter or memo regarding the phone call at 7, 14 and 30 day intervals. Other methods include setting calendar entries on desktop or mobile calendaring software to remind the attorney of the need to follow up the correspondence in the future.

At this juncture, the work incurred for the attorney's time (drafting a demand letter and a telephone call or two) can be accomplished in an hour or less and usually be justified. If these tactics are successful, the majority of unpaid invoices will be collected.

What if these additional tactics are not successful? A decision must be made: does the size of the unpaid invoice warrant sinking more money into the endeavor to collect? Does the debtor have assets that are collectible (investigation of the debtors assets can be achieved through free internet searches or on paid legal services software sites)? Is there potential for future business from the customer/client? Was the customer/client referred by a trusted source? The decision makers of the business and firm must analyze the pros and cons of pursuing unpaid invoices. Every situation is different and there are no bright line rules. However, if the decision is made to proceed, simple processes can help collect the unpaid invoices and fees.

### Fee Arbitration for Unpaid Legal Services

Most local bar associations provide an attorney fee arbitration and mediation program. These programs allow clients and attorneys to resolve disputes concerning fees and costs

charged by the attorney through an informal, low-cost alternative to the court system. Most cases take approximately four to six months to complete. These programs provide a procedure by which a client may resolve fee disputes with his or her attorney efficiently and without the necessity and expense of hiring a second attorney.

The Mandatory Fee Arbitration (MFA) Program provides the opportunity to have a neutral arbitrator decide the appropriate amount of attorney fees for professional services. Fee arbitration is mandatory for the lawyer if the client elects to have the dispute resolved through an MFA program.

The Business and Professions Code Sections 6200-6206 requires attorneys to arbitrate fee disputes and to provide written notice of the client's right to arbitrate prior to or at the commencement of any proceeding against the client. Once an attorney sends a client a written notice of the right to arbitrate, the client has 30 days from the date the client received the form to file a request for arbitration through the local bar association. If the client requests arbitration, the bar association will provide the attorney and client with the necessary information to proceed. However, if the client does not file within 30 days, it may constitute a waiver of the client's right to request or maintain arbitration. Further, if the client does not elect to arbitrate the dispute, the attorney can proceed with collection efforts outlined below.

## Small Claims

An individual or sole proprietor can sue in Small Claims Court for $10,000. A corporation or business can sue for $5,000. A plaintiff may only file two cases each year for more than $2,500. Small Claims Court is informal, without the customary rules of evidence. There are no juries. Although lawyers are customarily excluded from representing clients in Small Claims Court, if a law firm or attorney is the plaintiff, the attorney or a member of the firm can litigate the claim. Filing fees range from $30 (if the claim is for $1,500 or less) to $75 (if the claim is more than $5,000 but less or equal to $10,000). In Los Angeles County, small claims can be filed online through the Los Angeles Superior Court's website.

Upon filing a small claims action, the defendant is entitled to file a cross-claim. Depending on the relationship with the customer or client, it is entirely possible that the customer or client will cross-claim for fees previously paid that they felt were unwarranted.

If a judgment is entered by the court and the judgment debtor refuses to pay the judgment willingly, the attorney can attempt to collect. An attorney can take a number of actions to enforce the judgment. These include:

- Garnish the judgment debtor's wages until the debt is paid.
- Levy execution on the debtor's bank accounts so the judgment debtor's bank accounts will be accessed to pay the judgment.
- Record an Abstract of Judgment. A lien is placed on any real property owned by the judgment debtor. If the property is sold or refinanced, the creditor should be paid out of proceeds before the title can be transferred.
- Record a personal property judgment lien with the Secretary of State.

- Require a "till tap." Money is removed by a sheriff from the cash register of a judgment debtor's business.

- Place a "keeper" in the debtor's business. Here, a sheriff will remain in the judgment debtor's business and collect all funds until the judgment is paid. This can include cash, checks and credit card drafts.

- Conduct a judgment debtor's examination. The judgment debtor appears in court to answer questions, under oath, about money and property that can be used to pay the judgment. The attorney can subpoena documents such as bank statements, pay stubs and property deeds.

## Limited Jurisdiction

When the debt is over $7,500 but less than $25,000, a complaint can be filed in the limited jurisdiction courts of the Superior Court. The filing fee is $225 to $370 (depending on the size of the claim). Once the complaint is filed and served on the defendant, a judge will be assigned and the defendant will have 30 days from the date of service to file a responsive pleading. Again, if the debt is undisputed, the defendant will likely not bother to respond. However, the hope is that the complaint filing will force the defendant into either paying the full amount of the claim or settling for a mutually acceptable amount.

If the defendant fails to respond, a Request for Default is filed and once a judgment is entered by the court, the above collection efforts can be applied. However, if the defendant files a response to the complaint (which may include a cross-complaint), the case will continue.

## Unlimited Jurisdiction

When the debt is for over $25,000, a complaint can be filed in the unlimited jurisdiction courts of the Superior Court. An attorney will draft an initial complaint (filing fee $395). As with cases in limited jurisdiction, if the defendant fails to appear, the default can be taken and collection efforts ensue. However, if the defendant files a response to the complaint (which may include a cross-complaint), the case will continue.

With the assistance of the legal system, and simple law practice and management techniques, receivables and unpaid invoices can be collected efficiently so small and family owned businesses and law firms can put more money in their pockets—and a chance to survive even in times of economic uncertainty.

**Alexander S. Kasendorf** is a senior member with the Encino law firm of Alpert, Barr & Grant. His primary practice focus is on complex business and commercial litigation, banking law, collections, construction defect and unfair business practices. He can be reached at akasendorf@alpertbarr.com.

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$1,050—Spacious executive office w/view and secretarial space to sublet (approx. 22' x 18') with southern view of hills in prime location on Ventura Blvd. Will share reception area. Call David (818) 907-9688.

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Valley Community Legal Foundation
of the San Fernando Valley Bar Association

# VETERANS DAY GOLF TOURNAMENT

Proceeds fund grant and scholarship programs of the VCLF of the SFVBA

## MONDAY, NOVEMBER 12, 2012

PORTER VALLEY COUNTRY CLUB • NORTHRIDGE

10:00 AM CHECK-IN | 10:30 AM PUTTING CONTEST | 11:30 AM SHOTGUN START
5:00 PM AWARDS RECEPTION AND DINNER
*TOURNAMENT GUEST HOST TIM CONWAY, JR.

### GOLFER'S PLAYER PACKAGE

- **$150 "Early Birdie Special"**
  **(Purchase by October 1)**
- **$175 (Purchase after October 1)**
- **$560 "Early Birdie Foursome Special"**
  **(Purchase by October 1)**
- **$150 Sitting/Retired Judges**

Includes green fees, cart, tee gifts, beverages, luncheon and awards reception and dinner.

### SPONSORSHIP OPPORTUNITIES*

**Eagle Sponsor $5,000**
Includes two golf foursome packages, two additional tickets for awards dinner, on-course beverage station with sign, sign at tee, name/logo prominently displayed in promotional material and banner.

**Birdie Sponsor $2,500**
Includes one golf foursome package, one additional ticket for awards dinner, name/logo included in promotional material and sign at tee.

**Hole-in-One Sponsor $1,500**
Hit a Hole-In-One on a par 3 hole and win a vacation. We will place sponsorship signs on every par 3 hole on course. Includes two tickets to luncheon and awards dinner.

**Tee Sponsor $250**
By sponsoring a tee/green sign on the course your firm or company can show your support for the VCLF's good works. You may hand out gifts and information to the golfers at your sponsored hole. Includes two tickets to luncheon.

### OTHER SPONSORSHIP OPPORTUNITIES*

**Cocktail Reception Sponsor $2,000**
The awards reception will be a fun filled event! We will place sponsorship signs on the bar. Includes two tickets to the awards dinner.

**Lunch Sponsor $1,500**
Let us announce your generosity in "picking up the tab" for lunch. We will place sponsorship signs at the lunch site and give you a table for you to hand out gifts and information to the golfers. Includes two tickets to the luncheon and awards dinner.

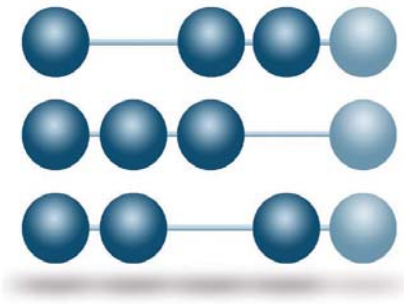
**Photo Sponsor $1,000**
Every golfer will receive a framed picture of their foursome and an individual shot of each golfer. Your logo will be included on the frame. Includes two tickets to the luncheon and dinner.

**Putting Contest Sponsor $1,000**
We'll display a sign at the putting contest showing your support. We'll mention your sponsorship when we announce the winner of the putting contest. Includes two tickets to the luncheon.

**Beverage Station Sponsor $750**
Sponsor a favorite golfer spot! We will acknowledge your sponsorship by placing a sign at one beverage station and you may hand out gifts to the golfers at your sponsored hole. Includes two tickets to luncheon.

**Contact (818) 227-0490, ext. 105 or events@sfvba.org for player and sponsorship information.**

*** All sponsors receive recognition on the VCLF website, in *Valley Lawyer* magazine and acknowledgment at awards dinner.**



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