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# VALLEY LAWYER

A Publication of the San Fernando Valley Bar Association

## VALLEY LAWYER

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## Goodbye, Farewell, and Amen



**ROBERT F. FLAGG**  
SFVBA President

**W**HEN I WAS EIGHT YEARS old, a day lasted forever and a year was eternity. It is a known phenomenon that long periods of time appear to pass faster as people grow older. The time from a child's eighth birthday to the ninth seems an eternity; the time from the fifty-eighth to the fifty-ninth seems to pass in a flash. Stephen Hawking suggested that the perception of time is a function of age, according to the ratio unit of time to time lived.<sup>1</sup> For example, one hour to a six-month-old person would be approximately 1:4368, while one hour to a 40-year-old would be 1:349,440. Therefore an hour appears much longer to a young child than to an adult, even though the measure of time is the same. I know this is true because my year as president of the San Fernando Valley Bar Association has flown by at what seems to be the speed of light.

Who was it that first said, "Leading lawyers is like herding cats?" I have never been able to track that saying back to an identifiable author, but everyone seems to have heard it. I suppose it goes back to the observation that no one has ever seen eight cats hitched to a sled while pulling it through the snow. Nevertheless, I have found that learning to lead lawyers is worth the effort. It's even become the subject of discussion and study at strategic law practice management institutes. Mark Beese, marketing director of Holland & Hart, LLP, a Denver-based law firm with offices in seven states and the District of Columbia, was quoted by Managing Partner magazine in 2006 as remarking, "Lawyers and law firms that figure out how to raise the best cat wranglers in the country will have the strategic advantage."<sup>2</sup>

At the end of my term of office, I can reveal what really has been at the heart of my endeavors here at the San Fernando Valley Bar Association:

to raise the best cat wranglers in the Valley. We are an organization of lawyers and the last, best hope for the continued success of our Association is to continually raise up and develop our leaders. I have spent much of my time this year, behind the scenes, working to position and develop those serving as key committee chairs, finding present and future candidates for Board membership and working with the officers of our Executive Committee.

For another year, I'll be acting as *éminence grise*, Immediate Past President and advisor and counselor to my friend and successor, Seymour Amster, as well as to the officers and

trustees of our Association. And I'll be riding at the back of Seymour's chariot, holding a golden wreath over his head and whispering quietly, "Memento mori." You're in good hands. 🐾

*Robert F. Flagg can be contacted at robert.flagg@farmersinsurance.com.*

<sup>1</sup> *Time's Winged Arrow*, C. Claiborne Ray, New York Times (04-20-2009) <http://www.nytimes.com/2009/04/21/science/21qna.html>

<sup>2</sup> *Opinion: Herding cats and leading lawyers*, Mark Beese, Managing Partner US Edition (07-18-2006) <http://us.mpmagazine.com/xq/asp/txtSearch.training/exactphrase.0/sid.0/articleid.D18EFB64-81EB-4B4A-8658-9012B374D1C9/qx/display.htm>

### San Fernando Valley Bar Association

## Annual Autumn Gala

Installation of Officers and Trustees

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# From the Editor

For questions, comments or candid feedback regarding Valley Lawyer or Bar Notes, please contact Angela at (818) 227-0490, ext. 109 or via email at [angela@sfvba.org](mailto:angela@sfvba.org).



ANGELA M. HUTCHINSON  
Editor

Dear Members,

**Why settle for less, when you can earn more!** The San Fernando Valley Bar Association is excited to announce the launch of its membership rewards card, which was created to encourage members to attend more MCLE events throughout the year. You should have received details about this new benefit inside your membership renewal packet. If you did not, please contact the Bar office immediately.

The way the rewards card works is every time you attend one of SFVBA's 70+ MCLE seminars from now through the end of our fiscal year, September 30, 2011, your rewards card will be punched by a staff member. After attending eight MCLE events, you get to attend the ninth event for free!

Inside this issue of Valley Lawyer we focus on law and technology. The advancement of technology is having a significant effect not only on how attorneys manage their offices, but also how attorneys interact with their clients. Be sure to read our MCLE article on new technology that benefits small firms. This month's feature articles address patent protection for software

business methods, internet marketing for attorneys and other relevant topics that may provide you with new insights.

In other Bar updates, the Communications Department would like to bring your attention to the SFVBA website. As you know, the newly design site was launched earlier this year. If you ever have any difficulty accessing information or site pages, please do not hesitate to contact the SFVBA office. Also, the Communications team would like to especially draw your attention to the news scroll that is to the right of the site.

The scroll is updated often to feature upcoming events, court and legal news, and in-house staff updates.

As for future issues of Valley Lawyer, we are seeking Year-in-Review articles that summarize new rules or procedures, or recap outcomes of court cases that address a pertinent legal issue. Please submit ideas or completed articles by September 30th. 

Have a tech savvy month!

Angela M. Hutchinson



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# PATENT PROTECTION FOR SOFTWARE BUSINESS METHODS

By Reid Eric Dammann

ON JUNE 28, 2010, THE FINAL DAY OF ITS TERM, the United States Supreme Court issued its decision in *Bilski v. Kappos*, 561 U.S. \_\_\_\_ (2010). Changing the landscape of patent protection, the Court's judgment dealt with an issue that has not been addressed in thirty years. The issue was whether an innovative process fell within the subject matter of patent law. The decision had to do with whether a "process," invented by Bernard L. Bilski and Rand A. Warsaw, for instructing buyers and sellers how to protect against the risk of price fluctuations in a discrete section of the economy, is patentable subject matter under 35 U.S.C. §101.<sup>1</sup>

After rejection at the Board of Patent Appeals and Interferences, the inventors appealed to the Court of Appeals for the Federal Circuit, which heard the case en banc. *In re Bilski* (Fed. Cir. 2008) 545 F.3d 943. The Federal Circuit upheld the rejection of the Board, the majority distilling a "machine-or-transformation" test from earlier Supreme Court decisions regarding 35 U.S.C. §101. According to the majority, a method or process is eligible for patent protection only if "(1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing."<sup>2</sup> Applying that test, the Federal Circuit found the invention claimed by Bilski and Warsaw to be unpatentable because the claims failed to recite performance by a particular machine. The court held that data about financial transactions is neither a physical object or substance itself, nor "representative" of any physical object or substance.

## Patentable Subject Matter

The United States Supreme Court was tasked first to consider whether the Federal Circuit erred by holding that a "process" must be tied to a particular machine or apparatus or transform a particular article into a different state or thing ("machine-or-transformation" test) to be eligible for patenting under 35 U.S.C. §101, and second, whether the Federal Circuit's "machine-or-transformation" test contradicts congressional intent that patents protect "method[s] of doing or conducting business" under 35 U.S.C. §273.

The scope of patentable subject matter is defined by 35 U.S.C. §101 as follows: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title."

Any patent claim must fall within at least one of the above categories to be considered "patent eligible" subject matter. As stated in *Diamond v. Chakrabarty* (1980) 447 U.S. 303, "anything under the sun made by man" can be patentable

subject matter. However, excluded from such protection are laws of nature, natural phenomena, and abstract ideas. *Diamond v. Chakrabarty*; See *Parker v. Flook* (1978) 437 U.S. 584; *Gottschalk v. Benson* (1972) 409 U.S. 63, 67; *Funk Bros. Seed Co. v. Kalo Inoculant Co.* (1948) 333 U.S. 127, 333 U.S. 130 ("An idea in and of itself is not patentable").

## Petitioners' Argument

With the above framework in mind, the petitioners argued for a reversal of the Federal Circuit. Namely, that the machine-or-transformation test has no basis in 35 U.S.C. §101 or past precedent. The petitioners argued that if there were such a test, the implementation would be unable to accommodate unforeseen advances in the useful arts because in some industries, innovation may not be tied to a machine or transform an article. The petitioners took an expansive view of 35 U.S.C. §101 and asserted that all processes should be "patent eligible" provided the invention meets the other prerequisites of the patent statutes, namely, that the subject matter is novel under 35 U.S.C. §102 and non-obvious under 35 U.S.C. §103.

Further, the petitioners argued that any ruling otherwise would run counter to the congressional intent in enacting 35 U.S.C. §273, deemed a safe harbor from patent infringement for prior user rights for business methods<sup>3</sup> and 35 U.S.C. §287(c)<sup>4</sup> which absolves a medical practitioner practicing "medical activities" from infringement, and therefore, made the connection for the Court that if Congress provided for methods of doing business, some of which are neither tied to a particular machine nor transform a particular article into a different state or thing, the machine-or-transformation test would eliminate some innovative business methods.

The respondent took a narrower view of 35 U.S.C. §101 and argued that a "process" under 35 U.S.C. §101 must be in the realm of the physical and therefore tied to a machine or transform an article in order to be considered patentable subject matter under a "process." The respondent argued that the machine-or-transformation test specifically found its origins in the prior precedent of the Supreme Court, namely, *Gottschalk v. Benson*, *Diamond v. Diehr* and *Parker v. Flook*.

## U.S. Supreme Court's Decision

The United States Supreme Court agreed with the respondent and affirmed the rejection of Bilski and Warsaw's "process," however it did so on the basis that the investment strategy set forth in the application was "abstract" under 35 U.S.C. §101, not on whether the invention met the requirements under the machine-or-transformation test. In so holding, the Supreme



Court indicated that the machine-or-transformation test is not the sole test for determining the patent eligibility of a process, but rather “a useful and important clue, an investigative tool” for determining whether some claimed inventions are processes under 35 U.S.C. §101.

In reaching its holding, the Supreme Court used the cases of *Gottschalk v. Benson*, *Diamond v. Diehr* and *Parker v. Flook* as guideposts in determining what is and is not “abstract.” For instance, the invention in *Gottschalk v. Benson* was directed to a mathematical algorithm for converting binary numbers from one encoding scheme to another. In *Benson*, the Supreme Court held that the claims were directed to an abstract idea and therefore were not patentable because the mathematical formula involved had no substantial practical application, and any patent resulting would be, in practical effect, a patent on the algorithm itself.

Further, in *Parker v. Flook*, the invention contained process claims that involved updating alarm units. During the catalytic conversion process, operating conditions such as temperature, pressure, and flow rates are monitored. When any of these variables exceeds a predetermined limit, an alarm may signal the presence of that abnormal condition. However, the only novel feature of the process was the specific manner in which the alarm limit was calculated. Here, the Supreme Court found these claims to be unpatentable because it considered an adjustment of the alarm limit to the figure computed according to the formula, conventional and obvious in itself, and as such, “insignificant post-solution activity.”

At the other end of the spectrum, in *Diamond v. Diehr*, the Court, considering a process which employs a mathematical equation, found an invention patentable. Here, the invention involved process claims directed at calculating a value used to control an industrial process of curing rubber. The process of curing rubber had been well known but using a computer to perform the calculation ensured that an accurate, current value was always available. The claimed process took temperature readings during the process and used a mathematical algorithm, the Arrhenius equation<sup>5</sup>, to calculate the time when curing would be complete.

The Court indicated that in relation to *Benson* and *Flook*, while the process employs a well-known mathematical equation in the process of curing rubber, the inventors do not seek to preempt the use of equation, rather, they seek only to foreclose from others the use of that equation in conjunction with all of the other steps in the process.

Therefore, the *Bilski* Court, looking at the invention of *Bilski* and *Warsaw* determined under *Benson*, *Flook* and *Diehr*, that the innovative process was not a patentable process, not in the context of the machine-or-transformation test, but instead, in attempting to patent an abstract idea. In doing so, the Court likened *Bilski* and *Warsaw*’s “process” to the “algorithms” at issue in *Benson* and *Flook*. The Court stated: “Petitioners’ remaining claims, broad examples of how hedging can be used in commodities and energy markets, attempt to patent the use of the abstract hedging idea, then instruct the use of well known random analysis techniques to help establish some of the inputs into the equation. They add even less to the underlying abstract principle than the invention held patent ineligible in *Flook*.” *Bilski*, at 3.

In moving to whether the machine-or-transformation test contradicts congressional intent, the *Bilski* Court held that the term “process” does not categorically exclude “business methods.” The Court stated: “Under 35 U.S.C. §273(b)(1), if

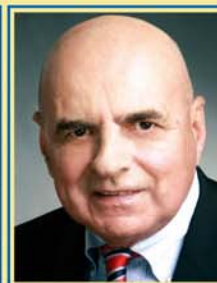
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Judge Chirlin has handled Law & Motion, Civil Trials, and MSC's while on the bench. As a litigator for over 10 years, she practiced business and employment litigation. Throughout the years she has frequently traveled to several countries for special programs designed to educate students, lawyers, judges, and governmental agencies.

Judge Chirlin has been the recipient of numerous awards by various bar groups including "Trial Judge of the Year" by the Los Angeles County Bar Association. Attorneys who have appeared before her praise her courteous and respectful judicial demeanor, intelligence, and fairness.

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a patent-holder claims infringement based on 'a method in [a] patent,' the alleged infringer can assert a defense of prior use. For purposes of this defense alone, 'method' is defined as 'a method of doing or conducting business.' 35 U.S.C. §273(a)(3). In other words, by allowing this defense the statute itself acknowledges that there may be business method patents. "Section 273's definition of 'method', to be sure, cannot change the meaning of a prior-enacted statute. But what §273 does is clarify the understanding that a business method is simply one kind of 'method' that is, at least in some circumstances, eligible for patenting under §101." *Bilski* at 11. Therefore, the Court indicated that a conclusion that business methods are not patentable in any circumstance would render 35 U.S.C. §273 meaningless and otherwise violate the canon against interpreting any statutory provision in a manner that would render another provision superfluous.

**Board of Patent Appeals Speaks Out**

The Board of Patent Appeals and Interferences released its first opinion citing the U.S. Supreme Court case of *Bilski v. Kappos*. In *Ex parte Proudler*, Appeal 2009-006599, Serial No. 10/643,306, Tech. Center 2400, Decided July 7, 2010, The Board of Patent Appeals and Interferences cited *Bilski* for the proposition that abstract ideas are unpatentable. Here, the claims being analyzed recited to a method for "controlling the processing of data." The claims contained no true hardware structure. The Board, relying in part on the *Bilski* decision, concluded that the claims are "barred at the threshold by §101," citing *In re Comiskey* (Fed. Cir. 2009) 554 F.3d 967, 973 (quoting *Diamond v. Diehr*). *Proudler*, slip op. at 3.

At this time, the application of the machine-or-transformation test is unclear, meaning while the Court of Appeals for the Federal Circuit used the test in determining whether a "process" is patentable under 35 U.S.C. §101, the United States Supreme Court seemed to use it in determining whether an invention is or is not "abstract." This is particularly pointed out in the trilogy cases of *Benson*, *Flook* and *Diehr*. Given *Ex parte Proudler*, the machine-or-transformation test seems to apply in determining what is or is not abstract. However, regardless of the analysis, the test limits what is or is not patentable subject matter.

**Method or Process Subject Matter**

It is important for practitioners dealing with subject matter that falls within the realm of a method or process, which may or may not include software, to look to the cases of *Benson*, *Flook* and *Diehr* for guidance. The claims of the invention should be written more towards *Diehr*, in that the claims should emphasize the particular machine operations or the physical results of claimed processes. However, at the same time, the practitioner should keep in mind the "post-solution activity" of *Flook*, in that any mathematical equation must be central to the process itself and not in and of itself, the novel component. Of course, the question of what constitutes "a particular machine," or what results in "transforming an article into a different state or thing" should always be in one's mind. In the future, these terms will hopefully be clarified.

The holding in *Bilski* should not have been surprising given that it was authored by Justice Kennedy. After all, it was Justice Kennedy who authored the opinion in *KSR Int'l Co. v. Teleflex, Inc.* (2007) 550 U.S. 398. These cases seem to suggest a pattern with the United States Supreme Court. In *KSR*, the Court pulled back from a test called the "teaching,



suggestion, motivation test,” a test the Court of Appeals for the Federal Circuit had been using rigidly in determining whether an invention was “obvious” under 35 U.S.C. §103. As in *Bilski*, the Court in *KSR* essentially indicated that the teaching, suggestion, motivation test is not the *sole* test for determining obviousness, and in doing so, never clarified or provided any guidance.

The fight in *Bilski* is really about whether the term “process” should be narrowed. Some views are inline with that of the petitioner, in that, Title 35 U.S.C. *et. seq.* has never been about excluding “types” of inventions, yet by requiring certain innovation to meet the machine-or-transformation test, the Court is excluding some business method type patents. Further, the use of the machine-or-transformation test from *Benson*, *Flook* and *Diehr* roots us back to an age where industry and manufacturing were the norm. The view is that such a test cannot accommodate the move to the current information age, where “technology” can comprise different sectors of industry such as business and financial services. Meaning, future innovation may not meet the machine-or-transformation test and still be considered “technological” and “innovative.”

The petitioner's view is that rather than adding complexity as to what is or is not a “particular machine” or what does or does not “transform an article into a different state or thing,” the term “process” should not be narrowed by the machine-or-transformation test, but instead, if considered a useful process, machine, manufacture, or composition of matter under 35 U.S.C. §101, allow the innovation to be filtered under 35 U.S.C. §102 and 35 U.S.C. §103. The addition of the test would seem to otherwise hinder the progression of promoting the progress of science and the useful arts. United States Constitution, Article 1, Section 8. Under this view, the methods and processes which satisfy the rubric of 35 U.S.C. §101, and not filtered out under the laws of nature, natural phenomena, and abstract ideas detailed in *Diamond v. Chakrabarty*, should be allowed as “patent eligible” subject matter. It is through this avenue that patent laws can accommodate the economical move from the industrial age to the information age. ♣

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<sup>1</sup> Claim 1 provides: A method for managing the consumption risk costs of a commodity sold by a commodity provider at a fixed price comprising the steps of: (a) initiating a series of transactions between said commodity provider and consumers of said commodity wherein said consumers purchase said commodity at a fixed rate based upon historical averages, said fixed rate corresponding to a risk position of said consumer; (b) identifying market participants for said commodity having a counter-risk position to said consumers; and (c) initiating a series of transactions between said commodity provider and said market participants at a second fixed rate such that said series of market participant transactions balances the risk position of said series of consumer transactions.

<sup>2</sup> Chief Judge Michel authored the majority opinion. Here, the majority adopted a “machine-or-transformation” test for patentability, pulled from the Supreme Court's decisions in *Gottschalk v. Benson* (1972) 409 U.S. 63 and *Diamond v. Diehr*, supra note 1.

<sup>3</sup> 35 U.S.C. 273 *et seq.* serves as a defense to infringement based on earlier inventor (1) the terms “commercially used” and “commercial use” mean use of a method in the United States, so long as such use is in connection with an internal commercial use or an actual arm's-length sale or other arm's-length commercial transfer of a useful end result...(3) the term “method” means a method of doing or conducting business...

<sup>4</sup> 35 U.S.C. 287(c) indicating “[w]ith respect to a medical practitioner's performance of a medical activity that constitutes an infringement under section 271(a) or (b) of this title 35 U.S.C. 271(a) or (b), the provisions of sections 281, 283, 284, and 285 of this title [35 USC §281, 283, 284, and 285] shall not apply against the medical practitioner or against a related health care entity with respect to such medical activity.

<sup>5</sup>  $k = Ae^{-\lambda t}$

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# Internet Marketing 101 for Attorneys

## Understanding Search Engine Optimization (SEO) and Google

By Dave Hendricks

**A**S MOST SUCCESSFUL CONSUMER-BASED ATTORNEYS CAN ATTEST, THE INTERNET HAS REPLACED the traditional advertising that law firms used to use like yellow pages, newspapers, billboards and even TV in some markets. The web is by far the best and most cost-effective place for savvy attorney marketing experts to dominate other attorneys in their city, county or even their state.

Every month, there are thousands and thousands of searches for attorneys on Google, Yahoo and Bing. The attorneys that are positioning themselves to get in front of them are the ones that are getting the phone calls and the cases.

If a person is actively looking for an attorney by willfully typing into Google “divorce attorney Woodland Hills,” the potential client is actively looking for that specific type of attorney. Unless an attorney does not need more cases, why would they not want to show up on page one of Google, Yahoo and Bing, effectively positioning themselves to be in front of a client that seeking an attorney’s exact practice and location.

Many business professionals think they can just hire someone to get them on Google’s first page. But it is not that easy. There is a truly unfortunate premise about attorney internet marketing, or Search Engine Optimization (SEO). An attorney can pay just as much to a SEO consultant who does not know what they are doing as paying a consultant who does. The trick is to ask specific, pointed and educated questions of them to make sure the SEO consultant knows what they are doing. This way, an attorney will not waste money on the lack of results.

## 10 Key Questions to Ask an Attorney Marketing Consultant or SEO Consultant

### 1 How many legal clients does the consultant have, and how are their rankings?

Attorney marketing is a completely different breed of internet marketing than getting a local pet shop website optimized. Attorneys are highly competitive and one of the most difficult industries to create successfully optimized web sites. Make sure the consultant or team hired is experienced working with lawyers. It’s one thing to have a lot of lawyers as clients, but a whole different level of skill to have successful page one rankings for those lawyers. A good litmus test is searching for practice area plus a big metro area like Los Angeles or San Diego keywords. If someone is getting high rankings for those cities, then they should have a good chance to get an attorney found in their desired Valley cities.

### 2 Can proof of rankings be shown?

This is big. Unfortunately, with most SEO technician/specialist it is rare to deal directly with the owner of the business, or the consultant that will be doing the actual work. Most of the time an attorney ends up dealing with salespeople. Most sales reps have a tendency to say “yes, yes, yes” because if they don’t, they won’t get business. But at the end of the day, it is the SEO specialist that is doing the work, and unfortunately all SEO specialists are not created equally. Insist on proof of their work (more than one example) in the specific areas of interest, populated city and practice area. Then go to Google, Yahoo or Bing right there and do a search.

### 3 What specific keyword phrases are going to be optimized?

An attorney’s goal is to get found for the most-searched, most-popular keyword phrases in their practice area. A SEO consultant is getting paid to get you to page one or high on page one for specific keyword phrases. Believe it or not, some SEO companies/legal publishers do not tell clients specifically

what words they are optimizing for them. This is alarming because that is exactly what they should be accountable for! The attorney wants to be found for specific and relevant keyword phrases in geographical and practice area.

### 4 How much monthly search do those keywords get?

Many SEO companies/legal publishers will get an attorney found on page one for some much lower-searched terms like “DUI Attorney in Los Angeles.” But the problem is that phrase doesn’t get much search. In reality, the phrase DUI Attorney Los Angeles is searched 20 times more than DUI Attorney in Los Angeles. Which keyword phrase would an attorney like to be found for? One that gets 8,100 searches a month or one that gets 480? And this ratio will apply to most any practice area, not just DUI. This practice is all-too-common in the SEO world. Reps show an attorney page one ranking for a very lowly searched phrase, and then the attorney feels good they are getting found. In reality, they aren’t because no one is really searching for that phrase.

Go to <https://adwords.google.com/select/KeywordTool> to see how much search that phrase actually gets every month. This is Google’s free keyword research tool. From here, an attorney can tell right away whether it gets a good amount of search (500+ per month is good for each term, but make sure to do your research as some get 10,000 searches a month!). Insist that a SEO consultant optimizes a site for 10-20 of the Highest-Searches terms in 1) geographical area and 2) practice area (i.e. “Van Nuys DUI Lawyer” gets the most search for that practice area/city), or go somewhere else. Anything else will be a waste of money. Put it in writing.

### 5 What is the linking strategy? Ask for examples.

An attorney shouldn’t want to hear: “We’ll link all your pages together – We’ll link your ‘Home Page’ to your ‘Contact Us’ page, then your ‘Home Page’ to your ‘Practice Areas Page’...”



What an attorney should look for is a specific, focused plan on getting *OTHER websites* to link to the attorney's site. This "Off-Page" SEO will do more to impact one's rankings than anything else an attorney can do on their own website.

Go to Yahoo.com and do a search for "Miserable Failure." While it used to be #1, Barack Obama and George Bush's White House Biography's come up in the top 5-7 results. Neither is trying to optimize their websites for the term "Miserable Failure!" They appear 100% because of links pointing to their sites with the anchor text "Miserable Failure." An attorney needs a highly-skilled SEO consultant to do the same (but for legitimate keyword terms) with a specific, focused linking strategy for the attorney's practice area. When it comes down to it, a SEO consultant is really getting paid for their linking skill – what type of links and where one gets back links from will impact rankings the most.

**6 What about Caffeine?** If a SEO consultant has a blank stare, or starts talking about coffee, it's not a good sign. The right answer is to have them talk about Google's newest algorithm change – Google Caffeine. Caffeine is the latest of the hundreds of Google's algorithm changes that affect a websites ranking results.

The purpose of the caffeine question is to get examples of how a SEO consultant has been actively checking their clients on the test site: [www.comparecaffeine.com](http://www.comparecaffeine.com). That site (the caffeine part was deactivated as of this writing) showed SEO consultants the difference in rankings today (before caffeine) and what it would look like after caffeine goes live. This way, they can proactively make adjustments in anticipation of Google's change to make sure their clients still maintain good rankings. Extra credit points for them if they say that Google Caffeine puts a greater emphasis on 1) on-site videos, 2) on-site pictures and 3) on-site interactivity such as reviews and other user comments.

**7 Will the attorney be an exclusive client in their city and practice area? Or how many other competitors will the SEO consultant sell?**

Unless an attorney is paying 5-figures+ a month for SEO services, an attorney cannot expect SEO consultants to have them as their sole client in that city/area. However, a good answer is only 2 or 3 per practice area in that city. If an attorney is willing to pay more, it can be negotiated with smaller SEO companies, but before doing so, make sure they have shown proof of their success first and are worthy of being paid more money for that exclusivity.

That said, there are two alarming things an attorney needs to know. First, there is one major legal publisher who sells SEO to as many attorneys in a single practice area/city as they can, which means that usually the squeaky wheel (in theory pays the most) usually gets the grease (highest rankings and most SEO attention). And second, there is another major legal publisher who has said they are 'exclusive' and stop selling after a certain number in that city/geography, but truly they have more than that number sold in some cities. Bottom line; regardless of what an attorney is paying monthly to a SEO consultant, they need to be sure to get written proof in the contract that the attorney will be one of a limited number of SEO clients in that practice area/city.

**8 What kind of reporting is provided?**

An attorney is paying a SEO company thousands of dollars a month, so now what is the attorney getting for their money? There are all kinds of reports a client can receive: traffic

reports, analytics, and referring search terms. But honestly, an attorney has access to all of those right now. In the log files of a website, all of this information can be retrieved. Not saying it is bad information; just saying there is access to it without paying for it.

For SEO reporting, first of all, an attorney should receive a baseline report of what their rankings were in the beginning. Second, every month an attorney should get results that show how much higher the attorney is today on Google, Yahoo and Bing for those same terms. There should be monthly, measurable improvement month over month for all the search terms. Then the attorney should check it for themselves and make sure those results are accurate.

One major legal publisher provides their clients results of their *highest all-time overall position* rather than the more accurate (and correct) results of where they are now. This is why an attorney needs to check and search for themselves on the search engines and see where the attorney is really showing up.

**9 What is the ratio of workload (clients) to each SEO specialist? Or, simpler, how many clients does each SEO specialist have to work on?**

Ideally, an attorney needs to have someone touch their site, or build links to their site every single day. The major legal publishers have thousands of SEO clients nationwide. Do the math first, and then ask to see how many people they have actively working on their customers and how they touch their clients daily.

Not saying they do a poor job, the attorney can decide the quality of their work and whether they have been satisfied in the past by their products. But how much time can an individually dedicated SEO specialist spend on an attorney's website if they have 20-30 or more clients to work on? SEO

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is an ongoing, every-day process that demands continuous attention to a website. Make sure that the specialist working on the site is not bogged down by an excessive workload. Otherwise, results will suffer at the hands of someone who's SEO is devoting more time, attention and skill to their clients site.

#### **10 How soon will results be seen?**

This is 100% dictated by an attorney's website. There are many variables involved in successful SEO: how old is the domain name, how many pages does the site have (or how many pages does Google think the site has), how often is it updated, how many links does it have now, what is the page rank, does it have a sitemap, how competitive is the practice area, how competitive is the city. There are truly dozens, if not hundreds of factors that go into getting an attorney's site ranked higher than someone else's.

One basic rule of thumb is that it is much harder to get a brand new domain name ranked high quickly without putting up too many red flags to Google. However, if an attorney's site is seasoned and has a 3-6 year old domain name, a good SEO specialist can take that site from nowhere to Page 1 much faster. If an attorney has an older domain name, as long as they do the proper linking from the correct authority sites, and pay the proper daily attention to their site, any good SEO can get the attorney on Page 1 rankings within 2-3 months.

This is likely new information to an attorney and can be foreign to most people; however, the intention was to give more help than harm here, and help to: 1) Understand the process of what a good SEO company needs to do to get a site found on Google, Yahoo and Bing; and 2) Empower attorneys with the right questions to ask a SEO consultant who wants to optimize the attorney's site, and therefore prevents bad decision making and wasted money. 📌

**Dave Hendricks**, Internet Marketing Consultant with the Attorney Marketing Network, sponsors and presents Search Engine Optimization seminars to the San Fernando Valley Bar Association. Google Adwords Certified, Dave has over eight years of experience in the legal field. He can be reached at dave@attorneymarketingnetwork.com or (818) 618-2227.





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# New Technology Benefits Small Law Firms

## Web 2.0, Software as a Service (SaaS) and Cloud Computing

By William G. Wais

**I**N THE NEXT YEAR, SMALL FIRM practitioners will be hearing more and more about Web 2.0, Software as a Service (“SaaS”) and Cloud Computing. These are important concepts that both new and established attorneys should look at to enhance efficiency and increase revenue. Some of these software products can help an attorney add new areas to their practice.

### Web 2.0 Software Services

The term “Web 2.0” differentiates current web services from older web services, known as Web 1.0. Web 2.0 services are thought to be more advanced and useful to consumers than the older (somewhat outmoded) Web 1.0 applications. The term was first explained extensively by Tim O’Reilly in 2005.

Mr. O’Reilly gives “Encyclopedia Britannica Online” as an example of a Web 1.0 application, while Wikipedia functions as the best Web 2.0 example. Encyclopedia Britannica simply took an existing data product and put it, largely unchanged, onto the internet. The basic theme of Web 1.0 applications is for users to utilize existing data. Wikipedia created a grid for an online encyclopedia. It required the participation of users to create the actual, always-evolving, participatory encyclopedia. In the Wikipedia model, users add entries to the evolving encyclopedia to create a complete encyclopedia by enlisting the help of the users themselves.

### Web 2.0 is an Attitude, Not a Technology

The technology used by Encyclopedia Britannica was not much different from the technology used by Wikipedia. Both used websites containing data. Britannica used its pre-existing store of data and Wikipedia used the website to attract data from users. Wikipedia’s attitude was to solicit input (data) from its users. The data could then be shared with other users, basically for free. The idea was to use the collective data contributed by the users to create a store of data that would benefit the internet community.

The Web 2.0 attitude can be described as participatory and service-oriented. The Web 1.0 can be described as proprietary, in the sense that, existing data owned by Encyclopedia Britannica was presented to the users of the internet for a fee. Encyclopedia Britannica owned the entries in its encyclopedia and offered them for a fee.

Many of the Web 1.0 applications mirrored the Britannica model of using their data. Wikipedia enhances that user data (Wikipedia entries) by combining it with other user data (more Wikipedia entries). All user data becomes enhanced by its association with all the other data.

### Using Web 2.0 Software to Create Legal Documents

Web 2.0 internet legal software takes client data and enhances the data to create legal documents. The Web 2.0 software can generate a comprehensive worksheet for the initial client interview.

In this case, the discussion will involve estate planning (living trusts).

The attorney records the client data on the worksheet during the initial client interview. After the interview, the attorney can hand the completed worksheet to staff for data entry. The data entry by staff or attorney can take as little as ten minutes.

The attorney then selects the appropriate document template from the Web 2.0 software. The client data automatically merges into the internet template. After the data has been merged into the template, the attorney (or trained staff) “customizes” the merged document. To produce a simple estate plan can take as little as twenty minutes.

The data entered into the online database remains there; however, the merged document resides on the user’s computer.

The entered client data remains available when a draft transmittal letter is prepared by the attorney for sending the draft documents to the client. By merging the already entered data with the transmittal letter template, a letter of transmittal is created for the draft documents. Attached to the draft transmittal letter are the instructions for staff to print the draft documents, place them in a booklet and send them to the client.

With many Web 2.0 software products, an attorney does not have to dictate instructions to their staff. Therefore, attorneys do not have to hire employees to transcribe dictation tapes. Less experienced (and less expensive) staff can be hired. Due to written



instructions, time to train new staff is reduced.

The computer software also creates instructions for the client to use in the review of the document. The instructions are in the form of Frequently Asked Questions (FAQ's).

None of the data entered into proper Web 2.0 software should constitute a security risk. Social security numbers are not entered into the system for that reason. Attorneys should check the software worksheet to make sure that nothing critical can be entered online.

Web 2.0 software can automatically generate a list of "Frequently Asked Questions" along with the draft documents. These "FAQ's" help the client understand the draft documents and ease the client's stress. The Frequently Asked Questions also reduce the need for the client to call their attorney and ask questions about the draft. Attorneys can save nearly an hour on every estate plan because of the Frequently Asked Questions.

### Cloud Computing

Web 2.0 companies include websites such as Wikipedia and also legal-services-based software services. Generally the internet-based services provided by Web 2.0 companies are referred to as "cloud computing."

The services are referred to as cloud computing, because, as far as the users are concerned, the data goes into an online "cloud" and comes back out as legal documents. The use of the cloud image allows the inclusion of all services and applications within the general concept. The cloud symbolizes all such services and applications.

Under this model, data entered by the attorney-user can be merged with a whole range of stored internet document templates. This set of enhancement services would be known as "document preparation services" and can be extremely useful for smaller law firm practitioners.

### WHAT IS SaaS?

SaaS (pronounced "sass") is an acronym for "Software as a Service". One of the defining features of a "SaaS" Web 2.0 application is that the software is provided to the user as an online service, not as packaged software. For example, a user can have only a small "access program" that allows the user to connect with the online "SaaS" software.

Software updates for Web 1.0 software are sent in a container and

manually entered into the desktop computer. SaaS updates are made continuously on the server-based software, so updates are automatically downloaded for the benefit of all users. It is literally impossible to miss a software update to the software. And because the automatic software updates do not involve a significant cost to the Web 2.0 software company, improvements to the system can be made easily and quickly. Innovation and improvement are encouraged in this model.

Part of the Web 2.0 attitude is the "perpetual beta test" or "continuous improvement" attitude. Because of the insignificant cost of a software improvement, the SaaS model facilitates continuous improvement in the software. Cost and difficulty of transportation do not affect the decision to improve the software, so the company is able to make improvements based closely on user input and participation.

### Enhanced Attorney Client Data

Web 1.0 can be described as using the internet as a platform for providing data to users. Web 2.0 can be described as using the internet as a platform for the enhancement of attorney client data. The enhancement can involve transforming the client data into legal documents.

### Network Issues – Web 1.0 vs. Web 2.0

#### Office Network

One of the biggest problems connected to Web 1.0 software is the compatibility of the Web 1.0 software to the office network. The office network can be configured in many ways and the many potential network conflicts can be difficult to resolve.

Web 2.0 software companies can use the internet as an automatic

network, thereby avoiding the potential office network problems. Each individual office user accesses the Web 2.0 software directly through the internet, completely avoiding the local office network.

An attorney or assistant can enter client data and create documents without being part of the local office network. Two or more employees can access the software on the internet without any possibility of losing data or documents due to office network errors.

#### Home Network

Using only the Web 2.0 software, the attorney or assistant can enter data or create documents from a home-based computer, a WiFi based laptop or from a remote office.

#### Client Home Network

Theoretically, an attorney or paralegal with a mobile laptop could visit a client's home or even a hospital and produce documents on the spot.

### Licensing – Web 1.0 vs. Web 2.0

The price of Web 1.0 software can be very deceiving. A software program in a box can advertise a \$995 price, but there is an extra charge for a second set of software in case an attorney wants one for their assistant or themselves. There might be a third charge for a laptop version of the Web 1.0 software and a fourth charge for software on a home computer. Multiple assistants can drive the charges even higher. All these extra charges for multiple copies of the software can be technically justified because, for each user, or each computer, a box of software must be produced for installation into the additional computer.

Web 2.0 "SaaS" software does not require a box and a CD-Rom for

## David Rothblum

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installation. Installation requires a small one megabyte installation program. The small installation program builds an access program which connects to the larger online Web 2.0 software. The installation program can be sent as an attachment to an email. A user of Web 2.0 software can open the email file attachment in each computer where the Web 2.0 software is needed. Installation of the access program finishes within just one minute.

All of the multiple users listed above can be part of the internet network authorized to use the Web 2.0 account. Web 2.0 software allows unlimited installation of the software to any number of computers and users.

### Web 1.0 Software – “Idiot Prompts”

Most of the current Web 1.0 software uses what can be described as “idiot prompts”. A user opens the software, chooses the document to be produced, and then respond to prompts from the computer software. The computer might ask the user “What is the name of the husband?” or “What are the names of the children?” A first time user can become lost in such a system, because there is no worksheet to guide them. Most Web 1.0 software programs don’t include a worksheet to record the data which the attorney acquires during the initial consultation.

Lack of a systematic worksheet can result in a lot of fumbling and inefficiency. It can also require additional embarrassing calls to the client to obtain data which should have been recorded at the initial consultation. A good example of Web 1.0 “idiot prompts” would be Legal Zoom.

### Web 2.0 Software – “The Database Principle”

Many Web 2.0 software programs

determine what information will be needed in order to produce certain documents, whether estate planning documents, probate documents or others. Once the needed data has been identified, a worksheet can be fashioned which will assist the user of the Web 2.0 software.

After the worksheet has been fashioned, then an online database can be set up for the production of the needed documents. The database should be synchronized to the worksheet. The worksheet (on which the data has been recorded) becomes a data entry sheet. All the user knows is that the Web 2.0 software contains a worksheet which can be used to record all necessary data for an estate plan. All the data for all the documents can be entered on to the worksheet.

The worksheet can then be used as a data entry sheet to enter the data into the Web 2.0 software. In short, a Web 2.0 worksheet can be organized to be more efficient than a Web 1.0 software “idiot prompting” system. The Web 2.0 worksheet organizes even the most inexperienced of attorneys, and makes it possible to add new areas to a user’s practice.

### Complete “Turn Key” System: Web 1.0 vs. Web 2.0

Some of the best Web 1.0 software programs are limited in the documents which they can produce. Many of those programs produce only the specific legal documents, but none of the supporting documents. For example, many Web 1.0 programs cannot produce client retainer letters. Others cannot produce California deeds and Preliminary Change of Ownership reports.

An attorney who wants to add estate planning to their practice must create all the supporting documents

themselves. This can be discouraging, as the list of “supporting documents” can be quite long. On the contrary, a good Web 2.0 system will have literally hundreds of documents available for use by the estate planning practitioner. Everything from file folders to retainer letters to transmittal letters can be produced on the database. Each piece of data need only be entered once to be available to the hundreds of “supporting documents”.

### The Future of Web 2.0 Legal Software

Web 2.0 legal software has been revolutionized by a software tool known as the “Document Generation Platform”. This tool can be used to create legal software for any type of practice area in any kind of jurisdiction. The “platform” includes a grid which automatically creates the database for each online template. This template can be a family law document or a probate document or a living trust.

First the documents are analyzed for the data which they require. Next, a worksheet can be fashioned to help the attorney record that data during a client interview. Finally, the documents are fitted with special internet merge codes. The platform transforms those merge codes into internet templates with an attached connected database. Each internet template database can be connected to the other internet template databases.

Any document in any practice area, in any jurisdiction, can be turned into legal software. Using the proper set of practice documents can create a “best practices” system. Such a system assures that an attorney is using the correct documents in the correct way. Any attorney with a great set of documents can create their own software, use the software and even market the software. Web 2.0 software encourages participation by users. Like Wikipedia, where users can create their own entries, Web 2.0 users can create their own software using existing, tested documents. 🏠

**William G. Wais** practices estate planning law in Glendale. He uses a Web 2.0 estate planning software application to prepare over 120 living trusts per year. Wais can be reached at (818) 244-1894 or at [bill@billwais.com](mailto:bill@billwais.com).





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# MCLE Test No. 25

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. TV Commentator Bill O'Reilly wrote the definitive article on the Web 2.0 concept in 2005.  
True  
False
2. Software as a Service provider does not charge a fee for the software they distribute over the internet.  
True  
False
3. Web 2.0 software (sometime known as cloud computing) refers to the enhancement of data which is done on the internet by specialized software.  
True  
False
4. An example of Web 1.0 technology would be Encyclopedia Britannica online, a proprietary product sold to the public.  
True  
False
5. An example of Web 2.0 technology would be Wikipedia, a participatory encyclopedia.  
True  
False
6. Web 2.0 internet legal software enhances and transforms client data into legal documents.  
True  
False
7. Legal Zoom would be an example of Web 1.0 technology.  
True  
False
8. Web 2.0 legal software creates legal documents using a magic wand.  
True  
False
9. Data entry for a complete Web 2.0 estate planning worksheet can take as little as ten minutes.  
True  
False
10. Preparation (customization) of a simple estate plan can take as little as twenty minutes after the merging of client data.  
True  
False
11. All estate planning software, whether Web 1.0 or Web 2.0 contains a list of Frequently Asked Questions to help the client understand the draft documents.  
True  
False
12. A Web 2.0 section on "Frequently Asked Questions" can save attorneys up to one hour of time because those questions reduce the need for clients to ask questions about the draft documents.  
True  
False
13. Web 2.0 software can be less expensive than the cost of conventional Web 1.0 software, when considering the cost of multiple licenses and yearly 1.0 updates.  
True  
False
14. Many Web 2.0 software programs do not require a separate fee for each user or computer.  
True  
False
15. Web 2.0 software can be downloaded to an unlimited number of computers without an additional licensing fee.  
True  
False
16. Web 2.0 software is sometimes called "cloud computing" because an attorney must buy an extra machine which produces a cloud in the office to enable connection.  
True  
False
17. The term "SaaS" refers to Software as a Service, a method of billing for Web 2.0 software services.  
True  
False
18. The Web 2.0 "SaaS" user must constantly load updates for the Web 2.0 software.  
True  
False
19. Web 2.0 software can be continuously improved by the automatic updates developed from input from the users.  
True  
False
20. Web 2.0 users enjoy an automatic "free" network between attorney and secretary, laptop and desktop.  
True  
False

## MCLE Answer Sheet No. 25

### INSTRUCTIONS:

1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the \$15 testing fee for SFVBA members (or \$25 for non-SFVBA members) to:

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### ANSWERS:

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

- |     |                               |                                |
|-----|-------------------------------|--------------------------------|
| 1.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 2.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 3.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 4.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 5.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 6.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 7.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 8.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 9.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 10. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 11. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 12. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 13. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 14. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 15. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 16. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 17. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 18. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 19. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 20. | <input type="checkbox"/> True | <input type="checkbox"/> False |

# BODYGUARD FOR ELECTRONIC INFORMATION

## Protect Electronic Information with a Comprehensive Policy

By Nicole Kamm

*This article is a reprint from the January 2010 issue of HR Magazine.*

**I**MAGINE A BUSINESS OPERATING WITHOUT any locks on its front doors. As preposterous as that sounds, some companies operate without the equivalent of locks on their electronic information – an electronic information policy.

That can be a costly mistake in today's workplace, where most companies' operations depend on computers and the ways electronic information can be compromised are manifold.

Employee misuse of computers includes hours spent surfing the internet. This exposes employers to the risk of viruses contaminating their electronic system. Some employees visit pornographic sites at work. And some employers that discipline or terminate employees may learn the hard way that computer misuse today includes tampering with and even deleting key electronic data.

An employer's first line of protection against the misuse and misappropriation of electronic information is a clearly worded, readily available computer and internet use policy. All employers – large and small – should, at a minimum, have an electronic information policy in place, and educate employees about the policy. Employees should know what constitutes a violation of the policy, what the potential disciplinary actions are, why the safeguards are necessary, and should be told that compliance is mandatory, without exception.

### Set the Boundaries

Any electronic information policy should clearly define the company's expectations regarding computer usage as well as delineate rules governing data storage and distribution, the use of company email and other electronic systems – including pagers, cell phones and personal digital assistants (PDAs), such as BlackBerries and iPhones – and what confidentiality, if any, employees can expect to maintain. Employees should be reminded that their computer, email and other electronic systems are company property to be used for business purposes only. To the extent employees use computers, cell phones and pagers for personal use, they should have no expectation of privacy regarding data in these devices.

An effective policy establishes ownership. The company's ownership of computers, networks, servers, files, email, phones and text messaging devices should be explicitly

stated. Establishing ownership reduces employees' privacy expectations and strengthens the employer's rights.

The acceptable and unacceptable uses of company property should be clearly defined. A company should describe what kinds of language, material and images employees are permitted to access and transmit with company property. It is imperative that employees understand and acknowledge that the employer can and will use the company's computer system to monitor all electronic activity.

To prevent potential data tampering or removal problems, make sure policies are broad and restrict the downloading and/or storage of sensitive data or software on employee-owned (and employer-owned, without written approval) devices. Encryption and "firewall" software can be used to prevent unauthorized downloading of company data or software. In addition, software is available that limits which devices can be plugged into Universal Serial Bus (USB) ports to further block illicit use.

### Virus Prevention

Taking the time to create and disseminate an electronic information policy can help inform employees about the restrictions on their use of computers and other technology at work. It also can support any disciplinary action should an employee misuse a company's electronic property and defend such action that is subsequently challenged in court, as was the case when I represented a hospital in a wrongful termination lawsuit.

Prior to the plaintiff's termination, the hospital's information technology (IT) director discovered a computer virus on the hospital's computer system. He promptly conducted an investigation to determine the source of the virus. The investigation revealed that the virus had entered the hospital's computer system through a computer connected to the internet in the emergency room (ER) admitting department, where the plaintiff worked.

As part of the investigation, the IT director reviewed the web sites visited by employees in the ER admitting department. He discovered that some employees, including the plaintiff, had been using the internet in violation of the hospital's internet policy, which the employees knew about and had previously acknowledged receiving. On the day the



virus entered the hospital's computer system, according to the IT director's investigation, the plaintiff had spent more than seven hours of her eight-hour shift on the internet, visiting hundreds of web sites for purposes completely unrelated to her professional duties. As a result, the plaintiff and two other employees who worked in the same department and were also violating the policy were terminated.

At mediation, I presented the hospital's comprehensive computer and internet use policy alongside a detailed spreadsheet that charted the time, minute by minute, that the plaintiff had been on the internet for nonwork purposes that day, and the web sites she had visited. The result: case dismissed.

### Monitoring Employees

As in the above case, monitoring controls, supported by company policies, are an effective method of protecting employer property and preventing potential security violations.

There are several strategies for monitoring computer and other electronic device usage. Employers can use computer software that enables them to track server, email and internet activity, as well as gather information directly from employee computers and conduct forensic analyses. Software tools can restrict access to certain internet sites. Most of this software can be installed without alerting the computer user.

Employers also can use something called "keystroke monitoring." Keystroke monitoring tells the company how many keystrokes each employee makes per hour. It can inform employers if employees have gone beyond or fallen below the expected number of keystrokes required to fulfill their responsibilities, and may raise a red flag to what employees are doing other than their assigned tasks.

Another computer monitoring technique allows employers to keep track of the amount of time employees spend away from their computers or idle time at computers. Other tools can screen for select words, phrases or images. Monitoring also can be outsourced to a third party.

Employers, however, should be aware that employees may be given some protection under certain circumstances. For example, union contracts may limit an employer's right to monitor. Also, public sector employees may have some additional rights under the Fourth Amendment, which protects against

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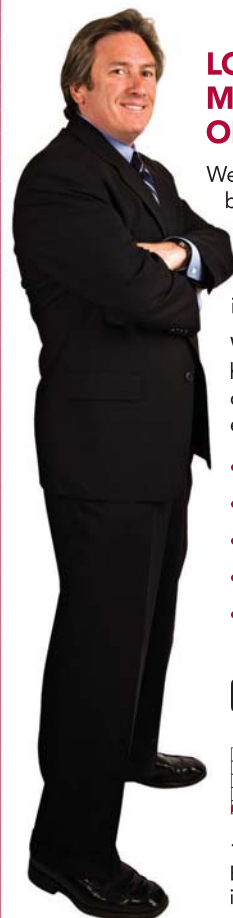
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unreasonable government search and seizure.

Courts have suggested that reasonableness is an important standard for determining acceptable monitoring practices. Electronic monitoring is generally reasonable where there is a legitimate business purpose, where policies exist to set the privacy expectations of employees, and where employees are informed of the rules and understand the methods used to monitor the workplace.

### Tight Controls

Often though, employers do not take steps to monitor their employees. Instead, employees seem to be the ones closely monitoring their employers.

For example, in 2008, an employee at a Florida architecture firm saw a help wanted ad in the newspaper for a position that looked suspiciously like her current job, and with her boss's phone number listed. The woman assumed she was about to be fired. She went to her office and erased seven years' worth of drawings and blueprints, worth an estimated \$2.5 million.

It didn't take long for the woman's boss to discover the responsible party. The woman was the only other person who had full access to the files. Police arrested her and charged her with causing greater than \$1,000 damage to computer files, a felony. Her boss was able to recover most of the files, but only after using an expensive data recovery service. As for the job, the woman had not been in danger of being fired. The ad was for the owner's wife's company.

Layoffs and cutbacks are regrettable yet often inevitable byproducts of difficult economic times. When an employer decides to terminate an employee, the discharged employee's continued access to confidential information is a critical consideration.

Upon notice of termination or after the employee's last day of work, the employer should immediately terminate the employee's access to the company's offices, computers and computer system (including remote access and BlackBerry service), voice mail, email, and client and company documents. This will minimize the opportunities for the employee to misappropriate client or company information, destroy information or property or conduct any damaging final correspondences. If the employee requests computer access to retrieve personal contact information and other electronically stored material, the

employer should have either a company representative do it or closely monitor the employee to ensure that the individual does not copy, tamper with or destroy any company material.

In some cases, particularly where wrongdoing is suspected or there is an increased risk of potential litigation, the employer should preserve the employee's hard drive, network files, emails and BlackBerry.

Data loss and damage is, in large part, preventable. Companies should know exactly where sensitive data is located, how it is being used and how to prevent it from being illicitly copied or sent outside the company. Well-defined policies, clear communication, tight controls on data access and an exit procedure for departing employees are essential to maintain the safety of your electronic information.

### How Much Socializing?

A new trend in employment hiring practices is to find the applicant's profile on social networking web sites such as MySpace, Facebook, [Twitter], LinkedIn and Friendster. In a recent nonemployment matter, a California Court of Appeal held that when a person posts on MySpace, it is not "private." *Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125.

Arguably, there is no invasion of "privacy" when an employer uses posted information or discloses posted information to others. However, employers should still be careful about how they use the information they discover online. For example, an employer might learn that an employee identifies himself or herself as being a part of a particular religion or having a particular sexual orientation, or some other information that falls within a protected category. If mishandled, this knowledge could lead to violations of state and/or federal laws.

Once hired, employers should consider whether they want to limit access to such sites, and specify how in their policies. If some personal use at work is allowed, it should be spelled out in clear terms. For example, "limited personal use of some of the sites is permissible, as long as it is consistent with conscientious job performance." Prohibited conduct, such as gambling, entertainment downloading, visiting pornographic or adult sites and making personal purchases, should be included in any policy as well.

### Keep It Real


There is little good that comes from having a computer and internet usage and monitoring policy if employers don't enforce it. Routine monitoring and enforcement of policies, and discipline for violations, is as important as the policy itself. Most companies are willing to live with a little personal use of computers at work to keep employees satisfied and acknowledge that there are periods of unproductiveness in every workday. Ultimately, it is the company's responsibility to determine how much "personal use" is too much and which method to curb excessive use is most appropriate.

Too much leeway here can be dangerous though. For all you know, an employee might be accessing your company's confidential information, visiting an adult website or sending an inflammatory email over the company email while you are reading this article.

### Steps to Prevent Litigation

In sum, it is critical that employers take the following steps to protect their information and prevent potential litigation:

- Develop an electronic systems use policy.
- Clearly communicate the policy to all employees.
- Consistently monitor employee use and enforce policies and procedures.
- Be aware of who has access to what company data.
- Regularly review and revise existing policies to ensure all necessary changes and additions have been addressed.

With a well-defined, clearly communicated electronic information use policy in place, your company's security will be strengthened and your employees' productivity should improve. And with proper monitoring and enforcement, the well-being of your company's most prized information will have the kind of protection it so richly deserves. 

*Nicole Kamm practices employment litigation and counseling, primarily for employers, with the Encino law firm Lewitt, Hackman, Shapiro, Marshall & Harlan. She can be reached at NKamm@lewitthackman.com.*





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# IT TAKES A THIEF

By Barry Smith

**IT IS 3 A.M. AND ONE IS ASLEEP IN WHAT ONE** firmly believes is the sanctity of their own bedroom. Even today's conservative Supreme Court has sided with tradition and affirmed the bedrock privacy of the home in general, and the bedroom in particular. Nothing, one believes, can disturb this tranquility.

Suddenly there is a loud noise outside. Someone's calling out a name. Before the occupant can respond, the sound of breaking glass is heard. There are loud voices and footsteps in the hallway. The dog barks. Within seconds the lights go on and the now trembling occupant sees armed men screaming epithets, ordering "no one move". They haul the victim out of bed, apply handcuffs, and then determine who it is that they have apprehended.

It turns out a mistake has been made. Wrong house or the tip was bad. "Have a good night" they say as the person is released. The invaders make a noisy withdrawal, crunching the broken glass on the floor. They fail to leave a business card. This must be a nightmare, a bad dream. Surely it can't happen in America, the land of the free. Perhaps in Baghdad or some drug lab in Columbia, but not in the USA. It can and it does. Welcome to the wonderful world of the bounty hunter.

Modernly, the breed is best personified by Duane Chapman, aka "Dog", who rose to national prominence and acclaim when he and his team crossed the border into Mexico in search of cosmetics heir and convicted felon Andrew Luster. They brought him back to face the music. Bounty hunters work for bail bondsmen who guarantee to return prisoners to court by a certain date. If the prisoner or his death certificate is late, the bond is forfeited. Thus, a prisoner who bails and flees presents an economic threat to his bondsman.

The bounty hunter, usually working for one or more bondsmen, can seize the person, cross jurisdictional lines, and pay no homage at the shrine of the 4<sup>th</sup> Amendment. The capture has its genesis and authority in contract. When bailing out, the prisoner gives permission in writing to the bondsman to use "whatever means necessary" to affect recapture. Thus, even in a far away state, the contract can be enforced without the judicial requirement of extradition.

Usually the bounty hunter receives 10% of the bond as his reward. Dog claims 6,000+ fugitive captures over the course of his colorful career, so the pay isn't bad if you can handle the stress.

Qualifications for a bounty hunter are minimal. Rather than college or a background in law enforcement, the best

bounty hunters seem to be poorly educated ex-cons. Dog served time for first degree murder and was arrested numerous times for armed robbery. Now he is a self-professed born again Christian. The adage, "it takes a thief to catch a thief" is apt. Bounty hunters need to understand the criminal element, be fearless, ready to travel at a moment's notice, work at night, and have loud voices and big muscles. The irony is that this work is often entrusted to that segment of society who once shunned the law; now they are surrogates of the law.

Justices Warren and Brandeis, in their now classic Harvard Law Review article<sup>1</sup> in 1890, spoke with great passion about the right to privacy, and what we now know as the privacy torts (misappropriation of identity, invasion upon one's seclusion, false light and publication of private facts). These two great jurists focused on one's right to be left alone, and even castigated the press for encroaching too far and revealing too much about what should remain private. One wonders how they would react today to the nocturnal invasion of a man's castle by a band of modern day vigilantes.

The 4<sup>th</sup> Amendment to the U.S. Constitution protects the people in "their homes ... against unreasonable searches and seizures," and requires a search warrant supported by probable cause to be issued first, unless circumstances are exigent. With the *Katz*<sup>2</sup> decision and its bountiful progeny, the Supreme Court of the 20<sup>th</sup> Century focused on, and then erected a wall around, 4<sup>th</sup> Amendment rights.

Conventional law enforcement agencies such as the police or FBI have had so many cases dismissed because of their scant lip service to the 4<sup>th</sup> Amendment that now the guidelines are usually followed to a tee. Why should the bounty hunter be given so much more license to move freely and without constitutional limitations? The theory is that the prisoner who is released into the custody of a bondsman is still in custody but the prison cell has been replaced by the bondsman as surety. The bondsman becomes the new jailer.

In *Wilson v. Arkansas*, 514 U.S. 927 (1995), Justice Thomas said that the requirement that police knock and announce before they enter is "woven into the fabric of the 4<sup>th</sup> Amendment." More recently, the same court in *Banks*<sup>3</sup> found that fifteen seconds was a reasonable time to wait after announcing. The police have to count from one to fifteen in most situations, but bounty hunters can dispense with the math. They march to a different drummer.

Historically, bail bondsmen and the whole concept of an unregulated, unlicensed field force of lay police functioning as



law enforcement personnel, originated in medieval England. With modern day state budgets under pressure, it would be difficult to imagine a sea change, wherein the 10,000 or so bounty hunters making tens of thousands of arrests each year from coast to coast, were legislated out of business. Like them or not, the justice system works because there is a network of people, paid on commission, who are willing to risk life and limb to run criminals aground. Attempts to regulate the profession have not fared well. At the federal level, the Bounty Hunter Responsibility Act of 1999 failed to gain traction. State responses have been anemic.

Bounty hunters enjoy sweeping powers. Going as far back as 1810, the Supreme Court of New York in *Nicolls*<sup>4</sup> sanctioned what would otherwise have been a burglary under common law (breaking and entering into a home at night to commit a larceny or other felony therein) and gave its judicial blessing to a break-in by a bounty hunter to recover his 'ward' and return him to court.

For all intents and purposes, bounty hunters are policemen without a badge and without the need to observe the Constitution. Indeed, they are "super-policemen". Intimately involved in the law enforcement process by removing criminals from the street, they serve a critical role. Without them there is no doubt that crime would rise and law enforcement agencies would fall further and further behind. Is their nexus to law enforcement so intimate that they rise to the level of being aptly called state actors? If so, why are bounty hunters not required to observe the 4<sup>th</sup> and 5<sup>th</sup> Amendments?

The very reason why Burton, in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), was successful in his suit against the Eagle Coffee Shop for discrimination was because of the "symbiotic relationship" between the private coffee shop (if private they could discriminate) and the state who owned the building and was the shop's landlord. The court saw such an interconnection between the private and public entities that the discrimination was found illegal.

Would a modern day court dare to reach the same result regarding bounty hunters and throw the burden of their work back onto conventional law enforcement? It would be difficult to imagine such a result. To date, no court has been willing to pin the state actor label on the profession, and until this happens bounty hunters will roam free. Contractual common law is thus immune from the strictures of the Bill of Rights.

Prisons are overcrowded places and social therapeutics suggest that the majority of modern inmates, incarcerated for non-violent drug crimes, could be punished outside of prison by house arrest or community service, thus reducing space and costs significantly. But that is not likely to happen anytime soon, because it is politically and socially unacceptable. Neither is a broken law enforcement system likely to embrace reform of the bounty hunter business if it means more costs being borne by the government. Economics will hold sway over Constitutional concerns.

The solution for one who is the victim of a bounty hunter's mistake is to sue for, among other things, damages and emotional distress, assuming, of course, that the victim can identify and locate the perpetrator(s). On October 9, 1994, a Rhode Island family on vacation in California was awakened by bounty hunters who kicked in the motel door in search of a bail-jumping prostitute. Holding a gun to the startled mother's head and screaming curses at everyone in the room (noise and the element of surprise are part of the bounty hunter's modus

operandi) was viewed with alarm by the Los Angeles Superior Court jury which awarded the family \$1.15 million.

That same year another case of mistaken identity resulted in an innocent person being transported by bounty hunters from New York to Alabama, whereupon the mistake was discovered and the victim was released. The civil suit resulted in a jury award of \$1.2 million.

Criminal charges against bounty hunters are relatively rare. Does law enforcement look the other way, leaving redress up to the civil courts? The failure to prosecute criminally may explain why these "wannabe" law enforcers are seemingly able to push the legal envelope to limits other citizens only dream of. It may also bolster the argument that bounty hunters are really state actors.

Isn't there something delightfully American about an ex-con like Dog who can resurrect his life and become a TV celebrity with his own show, and have Hollywood's filmmakers circling in the water? The old posters from the wild, wild west... Wanted: Dead or Alive... are not a vestige of the past, but are part and parcel of the modern bounty hunter's quest. It's déjà vu all over again. 🐕

**Barry Smith** is a criminal defense attorney based in Los Angeles and handles all types of state and federal cases. He can be reached at (323) 722-4880 and [loyds@ix.netcom.com](mailto:loyds@ix.netcom.com).



<sup>1</sup> Warren, Samuel and Brandeis, Louis, "The Right to Privacy," 4 *Harvard Law Review* 193-220 (1890)

<sup>2</sup> *Katz v. United States*, 389 U.S. 347 (1967)

<sup>3</sup> *United States v. Banks*, 540 U.S. 31 (2003)

<sup>4</sup> *Nicolls v. Ingersoll*, 7 Johns. 145 (N.Y. Sup. Ct. 1810)

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## Law and Technology, Then and Now

*All units in the vicinity and 9a81 – 211 in progress at Van Nuys and Roscoe. Be advised shots have been fired. No other units available. Your call is code 3.*

**T**HE ABOVE IS AN EXAMPLE OF A ROOKIE cop's introduction to the law in 1962. In the early days of law enforcement, technology was yet to be a reality.

Communications were by telephone and car radios that worked some of the time. In the "olden days" if a portable walkie-talkie was needed it was sent from the station. The walkie-talkies were powered by a six volt car battery and had a range of about one mile. Today's officer is equipped with gear that allows him/her to talk to anyone by using the mic attached to the uniform and to access the various computer systems and state and federal databases and conduct nearly zero time "want and warrant" information on a suspect.

Again the olden days were filled with paper – paper that was not connected. If a detective wanted to search crime files from other divisions the detective had to drive to the other divisions and conduct a manual search. Today all of this information is on computer and can be accessed from the detective's desk. Just think what DNA has done for the justice system. While DNA can be strong evidence against a suspect, it can be compelling evidence that works in the suspect's favor in proving innocence.

In 1972, computers were not in every law office. Manual typewriters, carbon paper and erasers were standard equipment. The copy machine industry was just being born. Remember adding toner, replacing rollers, replacing the light bulb and waiting and waiting while the machine made five copies per minute?

Over the years seasoned attorneys have equipped their offices with "modern" electric typewriters but still had the carbon paper and the erasers. The computer was emerging as an office tool. In the early 1980's, a IBM XT PC computer and one printer cost approximately \$25,000 and was used at some law firms to process billings. Five years later, firms could purchase six computers and 12 printers for about the same amount of money.

Today, law firms have electronic search capabilities that are just another program on the attorneys and paralegal's personal computers. These new devices have allowed attorneys to forget the libraries and to do instant searches regarding nearly anything desired and can print out the results of the research.

In 1987, the court system was years behind private industry in many ways, including computers and the capacity of the computers. Over the years the court has started to catch up and there is a statewide project to have the courts use one computer system that will be connected to various other governmental agencies.

Some courts now allow filing by email. In the olden days attorneys had to travel to the courthouse to view a court file. There is a tremendous effort to computerize all the files and make the contents available via the internet. What a time saver for attorneys.

The new modern courts have court reporters that stay current with the advances in technology. To have the ability to have "real time" reporting and to be able to read the testimony as it is being spoken is a great help to judges and to trial attorneys.

As for the Valley Community Legal Foundation, how does the VCLF and technology work hand in hand with the members of the San Fernando Valley Bar Association?

The VCLF is the charitable arm of the SFVBA. Some people are amazed that attorneys have an ounce of charity period. This issue of *Valley Lawyer* features the foundation's Law Day Gala. The event was a lot of fun and was the result of a great deal of volunteered work and sweat by many of the VCLF's board. The concept of the VCLF is to recognize exceptional service provided by the emergency services, provide scholarships to law related students, make grants to long established Valley charities and to solicit money to make all of this possible.

To view some actual work that the VCLF has accomplished, visit either the Van Nuys or San Fernando courthouses. The VCLF, in conjunction with the County Board of Supervisors and some private donations, raised sufficient funds to have children's waiting rooms constructed at the two courthouses.

Just imagine the relief of parties, witnesses and victims to be able to drop their children off at a professionally staffed waiting room while they have to conduct business in the courtroom. Parents can now be relieved to be able to leave their child in the professionally staffed children's waiting room rather than to have to take them into a contentious proceeding that takes place in a courtroom.

Attorneys can help the VCLF by joining and or donating time and money to help the community and to show the community that attorneys do have hearts. Please consider including the \$20 optional donation to the VCLF with your Bar dues payment.

The economy is in a slump, a recession, or whatever else one would call it. The VCLF is not immune to the downturn in the economy and this year the amount generated by the efforts of the VCLF declined. This decline means less money for grants and scholarships and to help needy families and needy children. Volunteer participation in the VCLF and donations are truly needed. The VCLF is a qualified charity so donations are tax deductible. Please help! 🐾



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The following members joined the SFVBA in June and July 2010:

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**Laura Venet**  
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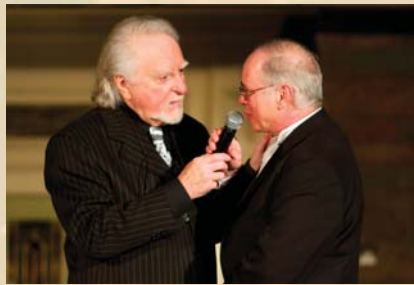
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*Associate Member*

## Law Day Gala Saturday, June 5, 2010 at CBS Studios



Los Angeles City Councilman Dennis Zine and VCLF Director Etan Loran



MC Marty Ingels and VCLF President Steve Holzer



Honoree District Attorney Steve Cooley and Event Chair Jodi Berman Levine



North Valley Supervising Judge Robert Schuit, Court Administrator Terri Johnson, Public Defender Leslie Warren, Judge Daniel Feldster and Mackenna Johnson



VCLF President Elect Judge Michael Hoff, Ret. and recently appointed Judge Michael Convey



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SFVBA Past Presidents Jim Felton and Patricia McCabe

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MONTEREY AT ENCINO RESTAURANT  
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## Workers' Compensation Section Is Serious and Willful Misconduct Truly Serious?

SEPTEMBER 15  
12:00 NOON  
MONTEREY AT ENCINO RESTAURANT  
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## Santa Clarita Valley Bar Association Attorney Collection Practices

SEPTEMBER 16  
12:00 NOON  
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## Criminal Law Section What's the Latest with L.A. Gangs?

SEPTEMBER 21  
6:00 PM  
SFVBA CONFERENCE ROOM  
WOODLAND HILLS

A Los Angeles gang expert will discuss what you need to know in defending your clients.

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## Business Law, Real Property & Bankruptcy Section Woodland Hills Bankruptcy Judges' Decisions

SEPTEMBER 22  
12:00 NOON  
SFVBA CONFERENCE ROOM  
WOODLAND HILLS

Attorneys Steve Fox, Andy Goodman and Bankruptcy Trustee Amy Goldman will review the most significant Woodland Hills Bankruptcy Court opinions and offer their perspective of the decisions.

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## Intellectual Property, Entertainment & Internet Law Section Registering Copyrights to Avoid Claims of Invalidity

SEPTEMBER 24  
12:00 NOON  
SFVBA CONFERENCE ROOM  
WOODLAND HILLS

Attorney John Yates of Greenberg & Bass will discuss how to avoid future challenges to your copyright registration.

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## Family Law Section Back to School

SEPTEMBER 27  
5:30 PM  
MONTEREY AT ENCINO RESTAURANT  
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Attorney Guy Leemhuis will address how best to advise your client regarding choice of schools, special ed, and "schooling" your judge in the matter.

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## SFVBA Business Law, Real Property & Bankruptcy Section

## Farewell Luncheon Honoring Retiring Bankruptcy Judges Geraldine Mund

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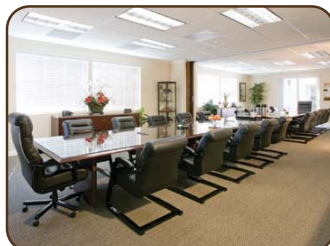
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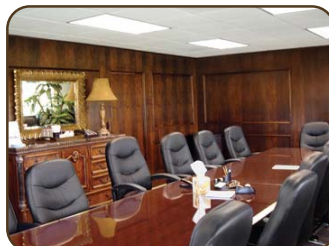
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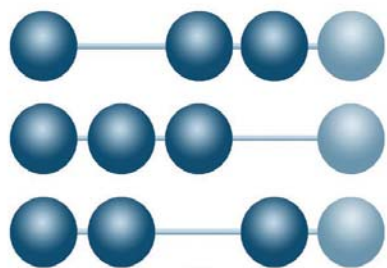
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