VALLEY LAWYER

SEPTEMBER 2012 • $4

A Publication of the San Fernando Valley Bar Association

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Jury Trials in the Social Media Age

Meet Past and Future SFVBA President David Gurnick

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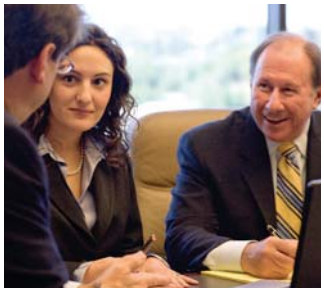

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VALLEY LAWYER

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Failure is the Path of Least Persistence

ALAN J. SEDLEY
SFVBA President
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AS I APPROACH THE FINAL weeks of my term as your Bar president, I naturally reflect back on the Association's year—its triumphs, its disappointments, and most of all, the initiation of new programs and such, the success and effects of which may not be known for months or perhaps years to come.

I am especially proud of the work of this year's Board. Its enthusiasm was at times palpable, its focus often laser sharp, and sense of purpose genuine and motivated by pride and a desire to do right for the Bar membership, and for the community at large.

It is personally gratifying that the Board chose to accept my challenge recited months ago at the Autumn Gala: make the SFVBA a must-have association for its membership and a must-need organization for members of the Valley community, particularly those less fortunate who are so often reluctant to let their needs be known.

Most of all, I was impressed with the persistence of many board members who took it upon themselves to push the envelope, think outside the proverbial box and experiment with new solutions to old issues, speak responsibly and thoughtfully but passionately in debate at meetings, attend Bar-sponsored events, both traditional (Autumn Gala and Judges' Night) and novel (first annual Administrative Professional Day luncheon).

There was no absence of creative committee projects, some of which generated noteworthy revenue for the association, but most critically, served the public welfare. Our annual Blanket the Homeless was a rousing success, and gained the Bar unsought publicity in a special American Bar Association publication. Also, we provided needed holiday cheer to the children of battered women with our first-ever holiday Pick-a-Gift tree, which provided over 70 children participants with a wish-gift, as members and guests at the annual holiday Bar reception picked a special ornament from the tree, and purchased the wish-gift for the child regardless of cost.

Not every committee project achieved the sought-after result. Yet, this Board chose to follow my mantra that, "failure is the path of least persistence." That is to say, to achieve genuine success, one must be willing to pursue well-conceived ideas despite the risk of failure. As is often the case, a few failures inevitably lead to countless instances of rich success.

It was a year of firsts: the largest attendance ever at our Annual Judges' Night, with a presentation by the California Supreme Court Chief Justice; an unprecedented turnout at our Annual Autumn Gala; a widely-acclaimed first annual Administrative Professional Day luncheon at Braemar Country Club; and the largest referral fee ever generated by the ARS.

The Board, in cooperation with the Valley Community Legal Foundation, blazed new ground by at long last enunciating the respective role of each organization. Through careful analysis and then action by these two boards, the correct decision was made to more or less merge the two under one umbrella—the Foundation shall pursue the necessary fundraising functions as would any successful 501(c)(3), while the Bar Board will guide, help create and actively support many of the fundraising programs for the ultimate benefit of the legal community and those it seeks to serve.

The Board willingly adopted my recommendations that we create new sections for next year, which will generate not only additional revenues, but added choices for our Bar members to experience and participate as well as offer opportunities for education and networking. Those new sections include: Employment Law, Bankruptcy Law and Real Property & Land Use, as well as revamped Business Law and Litigation Sections.

I spoke often this year of the importance of pursuing one's passion, particularly in our day-to-day law practices. Too many lawyers succumb to the vagrancies of unfilled law practices. Too many law students fear

the anticipated challenges and goals of practicing law. Too many lawyers in our community give in to the pressures of earning an adequate living and keeping the head above water, paying ever-growing overhead, and essentially viewing law practice as a mere means to an end.

I challenged our Board and our membership to resist these trappings and to re-examine their law practices. If plausible, consider beginning anew in an area(s) of law that truly excites, challenges and fulfills their mind, or adding such an area of law to his/her existing portfolio. It may require additional training and education, attending seminars and conferences, but as one who did just that (converting from civil litigation to health law), I can vouch that seeking and finding one's passion in practice is an extraordinary and irreplaceable sensation.

Little did I know how the satisfaction of pursuing and fulfilling one's passion in practice would become so symbolic, so critically essential in my life. Just months ago, I was informed to my total disbelief that I was suffering from prostate cancer. Here I had boasted of my strict adherence to daily exercise and healthy nutrition, only to learn that no one is immune to the perceived randomness of a serious illness.

I am relieved to report that just eight weeks after diagnosis, an extraordinarily skilled surgeon and team at the City of Hope removed the bothersome cancer from my abdomen, and post-surgical pathology would indicate that not a detectable trace was left behind. I feel indescribably fortunate having been given this clean bill of health and (as one consumed in the health care environment each day of practice), cannot adequately put into words the phenomenal care I received by everyone involved in my care at the City of Hope. And, I could not wait to get back to the passion I call my law practice. If you or a loved one should have the misfortune of a cancer diagnosis, know now that where there is need for the very best care, there is Hope.

Thank you for the honor and pleasure of serving this fine Bar association as its President. As we were so very well-served by the dedicated, creative and high energy service of past president Seymour Amster, I am absolutely certain we will be rewarded with the focused and brilliant leadership of incoming president David Gurnick.

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Calendar

Probate & Estate Planning Section

To Complicate or Not Complicate an Estate Plan—That is the Question!

SEPTEMBER 11
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorney Linda Retz will address estate plans and discuss why it's so important to not strong-arm clients into the plan you think is best.

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

Business Law Section

Forming the New Company: How to Choose the Right Entity for Your Client's Business

SEPTEMBER 12
12:00 NOON
SFVBA CONFERENCE ROOM

Attorney John Marshall of Lewitt Hackman Shaprio, Marshall & Harlan will discuss new company formation and explore the various options attorneys and their clients might have.

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

All-Section Special Event

Work/Life Balance: Essential Tools for Lawyers

SEPTEMBER 13
5:00 PM
SFVBA CONFERENCE ROOM

Richard Carlton, Acting Director of the State Bar's Lawyer Assistance Program, will discuss how to recognize stress, how to manage stress and identify stress in others. Space is limited.

Dinner Sponsored by
Rob Rutt, Last Minute Mobile Notary

Free to current members
1 MCLE HOUR
(Prevention of Substance Abuse)

Workers' Compensation Section

Amarez/Guzman: Increases and Decreases in the Ratings

SEPTEMBER 19
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorney Kenneth Kingdon, a rater and author of three books on the AECOM Guides, will update the group on the latest developments.

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

Santa Clarita Valley Bar Association

Employment Law Update

SEPTEMBER 20
12:00 NOON
TOURNAMENT PLAYERS CLUB
VALENCIA

Attorney Brian Koegle will bring everyone up-to-date on what attorneys and employers need to know regarding the latest developments in employment law.

MEMBERS	NON-MEMBERS
$35 prepaid	$45 prepaid
1 MCLE HOUR	

Litigation Section

Nursing Home Litigation

SEPTEMBER 20
6:00 PM
SFVBA CONFERENCE ROOM

Attorney Steven Peck will outline what you need to know to best handle nursing home litigation.

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

University of West Los Angeles School of Law

Bankruptcy: Chapter 11

Cosponsored by San Fernando Valley Bar Association

SEPTEMBER 21
10:00 AM
UWLA
CHATSWORTH CAMPUS

While speakers Steven R. Fox and Patrick Rettig will discuss pleadings and motions, their main focus will include the non-legal issues which attorneys must address, but usually neglect to, such as client control, setting realistic expectations and measuring the likelihood of success. The chapter 11 businesses can include manufacturers, business owners, commercial real estate owners, contractors and owners or managers of rental properties. Contact Kim Brewer at (310) 342-5237 for reservations.

$30 includes lunch
2 MCLE HOURS

Family Law Section

Conciliation Court for the 21st Century

SEPTEMBER 24
5:30 PM
MONTEREY AT ENCINO RESTAURANT
ENCINO

Ernest Sanchez and Sherrie Kibler-Sanchez will update all on what every family law attorney and parent should know.

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

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

On the Move

ELIZABETH POST
Executive Director
epost@sfvba.org

BY THE TIME THIS ISSUE of *Valley Lawyer* finds its way to members' mailboxes, the movers have left the Bar's new offices in Tarzana and staff remains busy unpacking hundreds of boxes filled with files and knickknacks accumulated over our fifteen years in Woodland Hills.

The San Fernando Valley Bar Association is now located at 5567 Reseda Boulevard, Suite 200, Tarzana, CA 91356. If that address sounds familiar, the building has been home to one of the Valley's largest and most prominent law firms, Wasserman Comden Casselman & Esensten, for more than 35 years.

The Bar is excited to be housed with a strong supporter of the Bar Association, as well as being able to provide greater access to all members of our Association. Although the staff valued the serenity that Warner Center offered, the Bar is now midway between the Valley's main legal hubs, Sherman Oaks/Encino and Woodland Hills. Our offices are just two blocks south of the 101 freeway and less than three blocks north of Ventura Boulevard.

Our second floor offices are more spacious and offer a better layout for members and staff. Our new conference rooms have a separate entrance from the hallway, which is more suitable for seminars, as well as mediations and depositions. Also, parking is still free. Members can enter the building from Reseda Boulevard or the back parking lot. For larger meetings,overflow parking will be available two buildings down.

Sections News

Another big change that occurred this summer while members were on vacation (and finding ways to avoid the heat) was a vote by the SFVBA Board of Trustees to reorganize and expand the Bar's sections. The goal of the Board is to provide members more and higher quality continuing legal education programs, while meeting the needs of members' varied practice areas.

> "The Bar is currently offering a special to all renewing and new members to make it easier to belong to these new, as well as existing, sections: pay for two section memberships, join one free."

The Business Law, Real Property & Bankruptcy Section has been subdivided into three sections: Business Law Section, Real Property & Land Use Section and Bankruptcy Law Section. Carol Newman and Tina Allequez will co-chair the Business Law Section, while Steven Fox will head the new Bankruptcy Law Section.

In addition, the Board established two new sections—the Employment Law Section, chaired by Nicole Kamm, and the Taxation Law Section, headed by Ronald Hughes. The Board also agreed to waive section dues for the Small Firm & Sole Practitioner Section and inactivate the Women Lawyers Section.

The Bar is currently offering a special to all renewing and new members to make it easier to belong to these new, as well as existing, sections: pay for two section memberships, join one free. All section members automatically belong to the section's corresponding listserv. We encourage all SFVBA members to get more involved with your Bar by joining a section or two (or three).

By Client Communications Committee

Professional Responsibility and Liability in Joint Representation

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*.

AN SFVBA MEMBER EXPLAINS TO THE CLIENT Communication Committee that for a number of years an attorney represented two corporate clients, one of which was the wholly-owned subsidiary of the other until it was sold to a third party. The member asks two questions:

1. Did the lawyer need to get conflict of interest waivers in the absence of any apparent conflict of interest (when perceived by the lawyer to be aligned in their purpose and finances)?

2. If the parent receives an unsolicited offer from a third party to buy the subsidiary and the subsidiary is sold, what are the lawyer's communication obligations?

These questions have universal interest to all attorneys and not just corporate counsel. Family lawyers, transactional attorneys involved in joint ventures, personal injury lawyers who are interviewed by drivers and their passengers in a vehicle collision, IP counsel representing authors and their publishers and any lawyer ever dealing with any two prospective clients has the same concerns as the inquiring member.

The short answer to the first question is maybe, maybe not, depending on all of the surrounding circumstances. Long standing California Rule of Professional Conduct 3-310(C)(1) and (2) provide that a lawyer must have "the informed written consent of each client" in order to "accept representation of more than one client in a matter in which the interests of the clients potentially conflict, or continue representation—in a matter in which their interests—actually conflict."

As to potential conflict, the discussion under the rule makes it clear that when several shareholders for a potential corporation prefer a single counsel for convenience or economy, it's up to the lawyer to explain that like a couple in a friendly dissolution, it is always reasonably foreseeable they might not see eye to eye downstream. For that reason, Evidence Code §962's exception to the attorney client privilege precludes such assertion by either client in a subsequent civil matter.

Although not mentioned in the discussion, B&P §6068(e)(1) goes further than attorney-client privilege, which only covers communications. It requires a lawyer "to maintain inviolate the confidence, and at every peril to himself or herself preserve the secrets, of his or he client." For all practical purposes, this protects anything learned in the course of representing the client which is not a matter of public record. If there is a potential conflict, the lawyer must obtain informed written consent from each client.

Analysis of the Conflict

The first part of the analysis is always what constitutes a potential conflict and what type of matters makes them relevant. There's not a black letter rule or bright line for that analysis because it is sui generis, depending on the facts and circumstances. Not mentioned at all in the professional conduct rule, which covers disciplinary standards of conduct, is the standard of care, which is identified in the discussion of the rule. It reads: "There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes." (citing *Klemm v. Superior Court* (1977) 75 Cal. App. 3d 893; *Ishmael v. Millington* (1966) 241 Cal. App. 2d 520). The California State Bar is not the last word on common law and for that reason

the friendly divorcing couple exemplified as a potential conflict missed the mark because any attempt to represent both spouses can never pass muster based on conflict waivers.

Joint Representation

In order to determine whether joint representation of parent and subsidiary entities without apparent potential conflicting interests, in fact had a real potential requiring waiver (or very real potential making joint representation non-waivable), we'd need to know whether the entities are in the same state, and if so, which. For example, at one time, New York State held parent corporations responsible under Respondeat Superior for the torts of their agent, the subsidiary, but most states did not.

Was the parent going to be responsible for the torts and debts of its subsidiary, and was the subsidiary a de facto division of the parent? And was the subsidiary's role to support the parent's services or products to the public and not to provide a product or service wholly independent of the parent? And did the subsidiary take all of its direction and control from the parent? And did common directors serve on both boards?

If all of those questions would have been answered in the affirmative, then probably the subsidiary is the alter-ego of its parent and informed written consent/conflict waiver would be superfluous. If, on the other hand, sufficient independence of the two entities existed, it is more likely than not, that like the husband and wife using the same lawyer for their divorce, the conflict was non-waivable and each needed separate, independent counsel.

Rule 3-310(F) provides that a lawyer "shall not accept compensation for representing a client from one other than the client," unless it doesn't interfere with the lawyer's independence of professional judgment, confidentiality is protected, and the lawyer gets the client's informed written consent. If the parent paid for the initial representation, it's easy to see that the same analysis for conflict would apply with the same likely outcome (either a non-waivable conflict or de facto, not a conflict at all.)

Communication Obligations

To address the member's second question—if the parent receives an unsolicited offer from a third party to buy the subsidiary and the subsidiary is sold, what are the lawyer's communication obligations? Here, a bright line does exist.

No third party would ever solicit a subsidiary whose sole role was to act as a dependent division of the parent company since the subsidiary has nothing saleable outside of its utility to the parent. Therefore, a patent foreseeable conflict always existed in that event the attorney erred in his or her analysis that common interests and finances made them different from shareholders visiting a single lawyer for convenience (requiring a waiver) or a marital couple doing likewise (requiring abstinence from joint representation).

Upon receipt of the unsolicited third party offer, an actual conflict of interest occurred. This mandated discontinuance of representation for either corporate entity. Yes, this means the lawyer had a duty to properly terminate his employment. In the real world, particular relationships develop between live persons. Lawyers learn who the major players of their corporate clients seem to be or at least who their primary corporate contacts are. Attorneys tend to forget that Rule 3-600 requires that: "In representing an organization, a (lawyer) shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer..." By virtue of the offer, without more, the CEO's or Board Chairs of both entities became co-equal client representatives entitled to a lawyer's duty to properly withdraw without providing any guidance or comments on the pros and cons of the sale, to either.

Rule 3-700(B)(2) provides that a lawyer representing a client before a tribunal shall withdraw with permission of the court and a lawyer representing a client in other matters shall withdraw from employment if the lawyer should know that continued employment will result in violation of the rules of professional conduct or the State Bar Act. Rule 3-700(A)(2) mandates that the lawyer may not withdraw until he or she has taken reasonable steps to avoid reasonably foreseeable prejudice to the client, and has returned the client's property, unearned fees and original files.

The short answer to member's question two is that the attorney must communicate jointly to both the parent and subsidiary that he/she is disenabled from revelation of anything to anyone other than doing whatever it takes to provide the successor counsel for each with getting them up to speed on unique outstanding matters for the two entities which have no bearing on the other entity. The attorney must neutrally provide joint information to both entities.

The attorney should advise each that their joint engagement superficially disenabled the attorney-client privilege and confidentiality for the initial retention. Thereafter, the attorney jointly represented both entities in diverse and common matters. New found independence of the former subsidiary now precludes the attorney from addressing previously common interests with either as individual entities. Prior joint engagement exception to the attorney-client privilege and confidentiality are now trumped by the lawyer's co-equal duty of loyalty to both entities. (*Flatt v. Superior Court* (1994) 9 Cal. 4th 275.)

Actual conflict brings with it reasonable foreseeability of many divergent interests upon which the former entities would no longer remain friendly. Just like the attorneys who represent two prospective shareholders initially forming a corporation based on their common goals, but then split up, counsel would be well advised to put their own E&O carrier on notice. This follows, since refusing to testify in court on the grounds of disloyalty may not appeal to all judges and the attorney's refusal, after being ordered to do so by the court, puts the attorney on the horns of a dilemma as far as both the State Bar and either of his former joint clients are concerned. The lesson for attorneys to learn is: When in doubt, do not participate in joint representation, and sleep better at night!

SFVBA Client Communications Committee accepts written questions, which may be submitted to epost@sfvba.org or SFVBA Client Communications Committee, 5567 Reseda Boulevard, Suite 200, Tarzana, CA 91356. The opinions of the Committee are those of its members and not those of the Association.

San Fernando Valley Bar Association

San Fernando Valley
Bar Association
President David Gurnick

2012 Autumn Gala & Installation of SFVBA and VCLF Officers and Trustees

Valley Community Legal
Foundation of the SFVBA
President Etan Z. Lorant

Saturday, September 22

Warner Center Marriott
21850 Oxnard Street, Woodland Hills

6:00 PM Cocktail Reception ▪ 7:00 PM Dinner and Installation Ceremony

$105 Ticket ▪ $1,000 Table of Ten
Cocktail Attire or Black Tie Optional ▪ Validated Self-Parking Included

Entertainment Provided by
Award-Winning Gary Greene, Esq. and His Big Band of Barristers

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LEW
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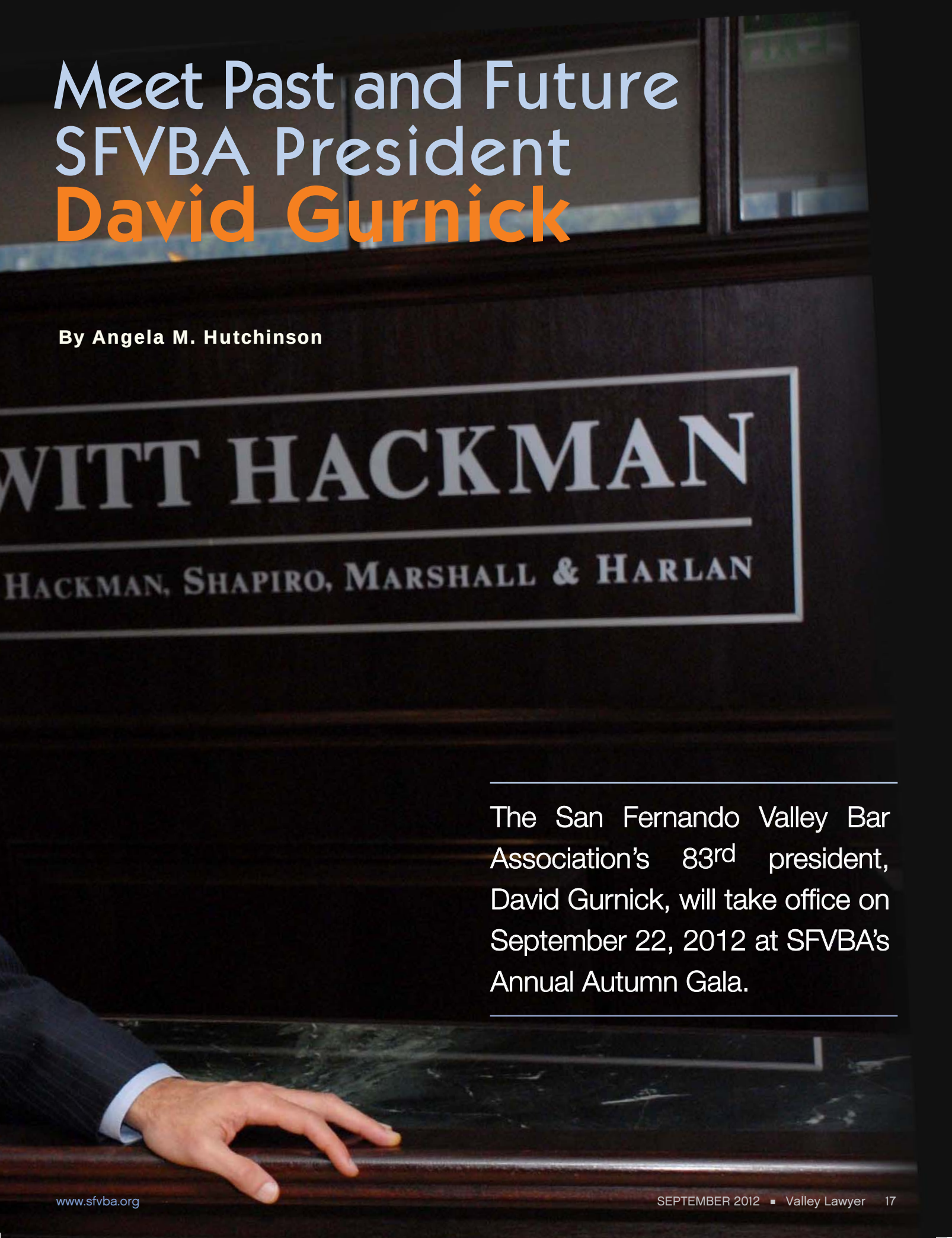
Meet Past and Future SFVBA President David Gurnick

By Angela M. Hutchinson



The San Fernando Valley Bar Association's 83rd president, David Gurnick, will take office on September 22, 2012 at SFVBA's Annual Autumn Gala.

DAVID GURNICK practices law with the Lewitt Hackman firm in Encino. Gurnick represents manufacturers, franchisors, cooperatives, distributors, dealers and franchisees from wide ranging industries in preparation of distribution agreements, franchise law compliance, antitrust and competition matters, government investigations, trademarks, copyrights, trade secrets, e-commerce and related litigation.

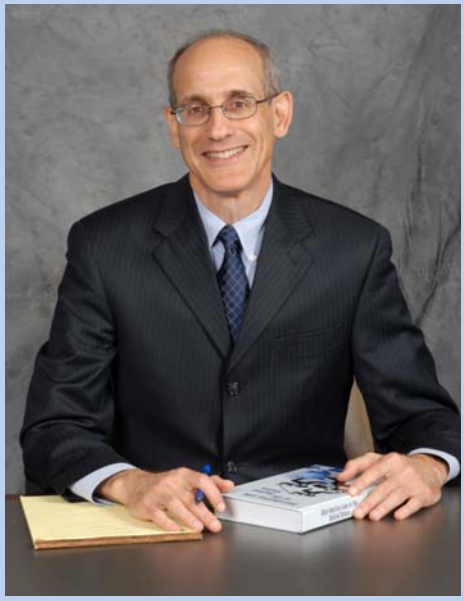
Gurnick earned his bachelor's degree in 1981 from the University of California, Los Angeles where he graduated Summa Cum Laude and Phi Beta Kappa. At UCLA, he was a member of the Student Council and University Policies Commission and chair of the Judicial Review Committee. He received his law degree in 1984 from the University of California, Berkeley. While in law school, he served as Judicial Extern to the U.S. Ninth Circuit Court of Appeals.

Gurnick is admitted to practice in the U.S. Supreme Court, U.S. Courts of Appeals for the Federal Circuit and Ninth Circuit, and U.S. District Court for the Central District of California, and is a member of the Bar in the District of Columbia. He is certified by the State Bar of California, Board of Legal Specialization as a specialist in Franchising and Distribution Law.

Gurnick has written numerous articles on franchise and distribution law subjects. He was a contributing co-author for "International Franchising," a text on law and strategies for international franchising programs. Gurnick is also the author of "Distribution Law of the United States," a book on U.S. law and practices for product distribution, and "Franchising Depositions" a treatise on taking and defending depositions in franchising cases. Both of Gurnick's books are published by Juris Publishing Company.

In the past, Gurnick served as an adjunct professor of law, teaching franchising. He has been a panelist numerous times at the American Bar Association Forum on Franchising, and International Franchise Association Legal Symposium. Previously, he was on the editorial board of the American Bar Association Franchise Law Journal. In addition, Gurnick is past president of the San Fernando Valley Bar Association, past chair of its Business Law Section and of its Litigation Section. He is a past trustee of the University of West Los Angeles College of Law, past president of the Valley Community Legal Foundation and past and also a present trustee of the Los Angeles County Bar Association.

"David brings years of Board experience to the presidency



(including a term as Bar President eighteen years ago), and the Bar is fortunate to have David as its incoming leader, not only for the experience he brings, but his intellect, his calm demeanor, and most important in the world of the legal profession, his character," says Alan Sedley, outgoing SFVBA president. "I wish to extend my best wishes to our incoming President."

Valley Lawyer is excited to further acquaint its readers with Gurnick and his goals as the SFVBA's new president.

***Valley Lawyer*: You were SFVBA's president from 1993 to 1994. Why take on this position again?**

David Gurnick: Working as an officer with fellow SFVBA lawyers was a challenge and also gratifying. It felt good and still does—to have influence in our Bar Association and for my ideas to have a lasting effect in the legal community. Staying involved came naturally. The Valley and SFVBA are different today than 20 years ago.

***VL*: What's different in the Valley from the 90s to now?**

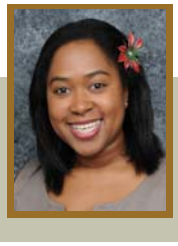
DG: The Valley is busier. Law practices are more varied. Our geography is more diverse. In the 1980s and 1990s, law was transitioning from more of a residential community practice focused on domestic matters, such as family law and wills. Those practices remain important and growing. Meanwhile, three courthouses were added [Chatsworth, a second Van Nuys courthouse and the Woodland Hills bankruptcy court]. Today, there is much more business law and business litigation.

***VL*: What are your goals as SFVBA's new president?**

DG: To lead the SFVBA to be more of a club helping our members. We're small enough to help members get more business, help members get to know each other socially. We can recognize successes. We can help those who are going through difficulties and are in need.

***VL*: How does the SFVBA best serve its members?**

DG: SFVBA is a place to grow as lawyers. Here, you can become known in a field by getting an article in *Valley Lawyer*. You can be a leader in a practice area by chairing a Section. You can learn more in an area by participating in a Section. We are small



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 nine years have two young children. Hutchinson can be reached at editor@sfvba.org.

so the organizational chart is flat, and the path to leadership is short.

SFVBA enables lawyers to meet judges outside of court, in a professional, ethical setting. Through the SFVBA, lawyers can speak collectively on practice-related issues; get our board of trustees to adopt a position on an issue. You can serve pro bono, help the courts with mediations, perform public service, and socialize with other lawyers. You can get business from our referral service.

VL: Any fears as the 83rd president?

DG: Whether a term of just one year is enough time... But we have great fellow officers Adam Grant (VP/Pres-Elect), Caryn Sanders (Secretary) and Carol Newman (Treasurer); we also have a good line-up of future leaders.

> "Thanks to all Valley lawyers, for all you do for clients and the community."
> —*David Gurnick*

VL: Tell our readers something they wouldn't find in your professional bio?

DG: My dad started work every day between 2:00 A.M and 4:00 A.M., driving his truck, selling fruits and vegetables to restaurants. My mom wrote the checks. They put four sons through college without health insurance, student loans, vacations or a day-off to be sick. My parents told everyone, "David's going to be a lawyer." That sounded good. Every day of practicing law is the fulfillment of a childhood dream.

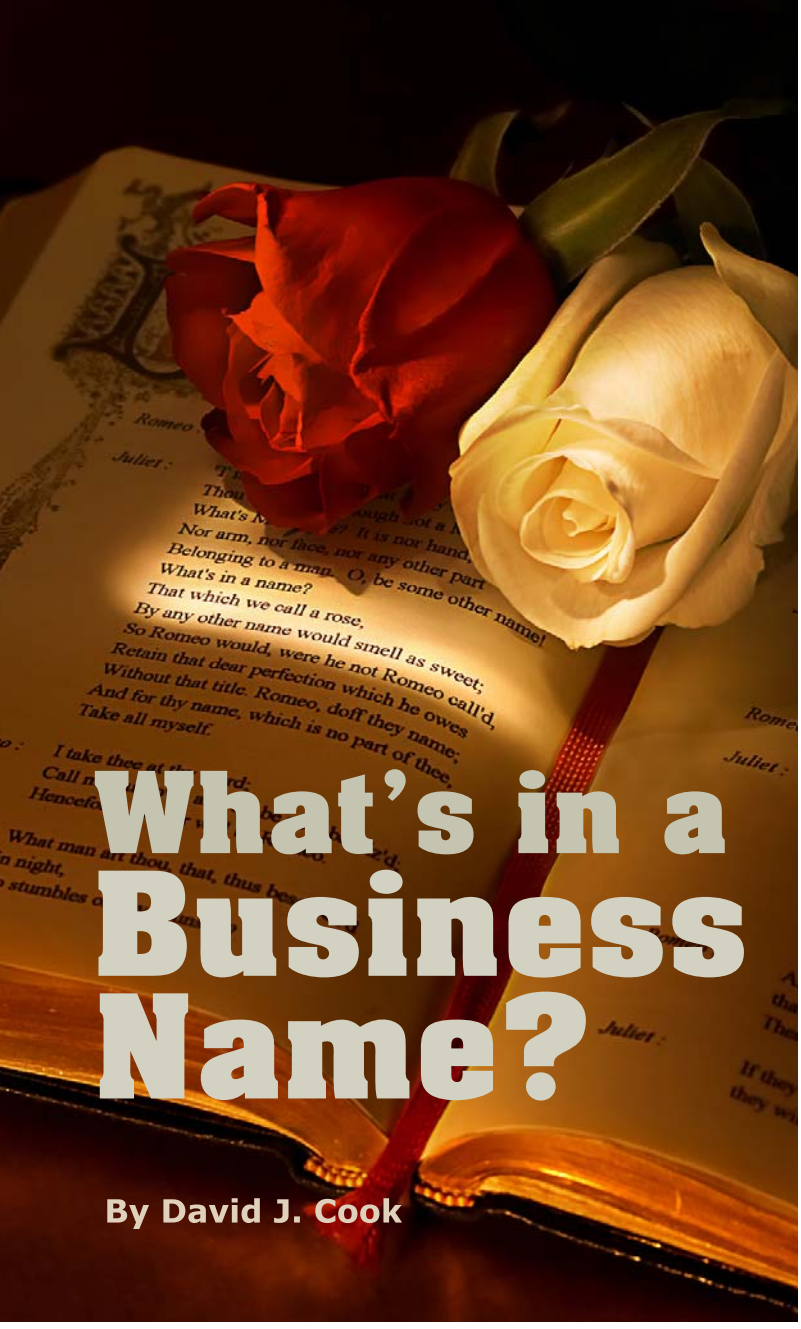
VL: You've written two published books and taught franchise law. What made you pursue those endeavors?

DG: A career in law lets you do so much. In the daily practice you help others in matters that are important to them. Writing and teaching are ways to study your field even deeper and share that knowledge with others. These are different ways a lawyer can practice, and be of service to others.

VL: Is there any other message you'd like to tell your fellow SFVBA attorney members?

DG: Yes! You and your colleagues are excellent, committed lawyers. Paralegals too. You are hard working and are getting good results for lots of real people in our Valley community. The folks you represent in litigation, wills, divorces, adoptions, business deals and insolvency, criminal defense, taxes, mediations, and the list goes on—they depend on your help, and they appreciate all you are doing.

More than that, your work is critical to our society of freedom under law. Win or lose on any particular matter, your work benefits our society. What you do every day is important, and very much appreciated. So my message is thanks to all Valley lawyers, for all you do for clients and the community.



What's in a Business Name?

By David J. Cook

IN "ROMEO AND JULIET" WILLIAM SHAKESPEARE wrote "What's in a name? That which we call a rose. By any other name would smell as sweet." Maybe that worked in Elizabethan England, but not along the Sunset Strip in Hollywood, which is dotted by clubs playing Tu Pac or selling mixed tapes out the back door, tee shirts shops peddling Bob Marley images and boutiques featuring copyrighted fabrics. Who are these people? Answering this question identifies the correct person to sue.

Infringers, pirates and downright thieves sponge off any successful endeavor. Jaws had many illegal offspring. Success, no less, comes unexpectedly in IP or entertainment. Slap wings to a toaster, reduce the image to an icon, sue and settle. Gucci launched a thousand knockoffs. "Fake" enters the lexicon as an adjective for luxury goods. "Is that a fake Chanel?" Some fakes flood the market, such as Dali paintings and lithographs. Up to recently, Hollywood movies suffered massive infringements through illegal downloads. Pirated CDs or DVDs are peddled out the trunk of a car, hawked on the sidewalk or purchased from the backroom of a store. Welcome to the City of Angels.

IP litigation fends off infringing musical compositions, the sale of protected music on a CD or mixed tapes, piracy of sporting events (boxing) through cable TV, consumer products bearing an infringement of a patent, design patent, trade dress or copyright and names, logos, shapes and sounds that infringe on a protected trademark. Add cybersquatting to this list.

The task at hand is identifying who are the infringers, confirming their capacity and naming them correctly to enjoin the infringement and recover money damages. Turn the stone over, and find that the infringers come in pairs, partnerships or groups. The infringers (or pirates) obscure their identities as the first line of defense. This article will show that accessible information from government entities and readily retrievable documents can identify the party and demolish this barrier.

Secretary of State

The California Secretary of State identifies a business entity as a corporation, LLC or limited partnership—whether domestic or foreign or just non-existent. Other jurisdictions provide a statement of officers and directors or copies of articles of incorporation. Florida cross indexes names, agents for service of process and related parties. Nevada offers significant information online. Expect that the pirate, if a manufacturer or distributor, is incorporated as another layer to hide true ownership. Nevada is popular because the incorporator can use dummy addresses and surrogates to conceal true ownership and management. Every state has a secretary of state or department of corporations and nearly all have an active and easily navigable website.

Many pirates and infringers run real businesses with employees, inventory and leases, may even own the building, pay taxes and sell non-infringing products. Infringers are not imbeciles. The foolish are not always fools. The fact of incorporation is a rational expectation.

Fictitious Business Name (FBN) Filings

As a condition of filing suit, fictitious business name statements are common. FBNs are filed with the county clerk and identify the party who claims the fictitious business name. FBN filings are online or available through a commercial search service. FBNs are signed by the holder of the fictitious name.

The FBN reveals the legal name of the registered owner, residence addresses and whether the business is conducted by individual, partnership, LLC, association, trust, husband and wife, joint venture, domestic partners or LLP. An FBN is signed under penalty of perjury.

Some infringers run legitimate businesses, but sell pirated and infringing products. The FBN is the initial task, and best, in identifying the person who is running the business. One of the most common forms of infringements is clothing that bear protected images or designs. Whether Melrose, Haight or Canal Street, these merchants conduct a business with some earmarks of legitimacy and filed a FBN business name with the court clerk.

UCC Filings and Real Property Recordings

Publicly recorded documents might identify the party who is presumptively the owner of the business and has taken out a loan or accrued unpaid taxes. As security for a loan, lenders file a financing statement (UCC-1) with

the Secretary of State or record a deed of trust with the county recorder. Taxing authorities file and record liens seeking to collect unpaid taxes with the Secretary of State or county recorder. As a condition of a loan process, lenders demand an executed Uniform Residential Loan Application (URLA) or a sworn loan application, tax returns, financial statements, and proof of identity and ownership. The URLA is very exhaustive. A subpoena can reach the URLA, or loan application, and supporting documents that clearly identify the borrower, down to the driver's license.

As a condition of issuing the tax ID number or sales tax permit (see below), the true owner completes an application revealing the correct name. UCC records are online (small fee paid to Secretary of State) or available through commercial search service. Other than Los Angeles County, most recorders are online and records are available through title companies. This information would disclose a lender, or other credit grantor, whose credit files would reveal the true name of the owners.

State Board of Equalization (SBE)

With the sales tax resale number, the SBE website reveals the permit holder, who is the owner and operator of the business. Westlaw or other commercial services offer the sales tax resale number. The SBE requires the execution of a detailed application, under penalty of perjury, spelling out the name of the person selling taxable goods, subject to sales tax. Westlaw (People Map) and Lexis Nexis might provide this information.

A SBE number is particularly helpful in identifying the owner because the SBE requires a detailed sworn application which identifies the owner and operator. As a matter of law, the person who is holder of the SBE permit is presumptively the person who is selling the products. Whose name is on the SBE permit is the owner of the business, absent the most bizarre, and in Los Angeles the bizarre is routine.

Professional Licenses

The Department of Real Estate, State Bar of California, Department of Consumer Affairs, Contractors Licensing Board and others identify the licensee who is the operator of the licensed business. Most professional licenses require a sworn application, a test and educational requirements, investigation of the applicant and bond (contractor). Only a licensee can operate the business (all professions), and typically the name on the wall (the license) is the owner and operator. These records are online.

Alcoholic Beverage Control (ABC)

Liquor licenses require a sworn statement, proof that the licensee is the owner of the business, evidence of the source of funds and a lease for the premises. The ABC will investigate the character of the applicant. Absent secret or split ownership, the name on the license is the owner and operator of the restaurant or bar. ABC records are online.

In the cases of boxing and music piracy, the illegal display of sporting events, infringements of protected—copyright or trademark—images, dance hall liability, mixed tape battles and downright infringements, suing a bar, restaurant or tavern starts with the ABC website. A bar must also have a SBE permit which should match with the name of the liquor license. If it does not, the business might bear split ownership.

Buying or selling a bar requires the filings of a Notice of Intended Transfer with the county recorder, which likewise identifies the buyer and seller, and therefore the presumptive operator of the business.

Securities Sites

The U.S. Securities and Exchange Commission has a vast online library of all public filings (EDGAR). Canada's equivalent is SEDAR. The Company House is UK's database for publicly traded companies. Free of any charge, these sites offer corporate, financial and business information which identifies the company and its subsidiaries and better lays out the insiders, transactions and financial statements. Is it possible that infringers are public companies? Some of the biggest infringers are multi-nationals. Just ask Samsung, which is locked into a bitter struggle over patent rights with Apple Inc.

Public Utilities Commissions (PUC)

Another stepping stone to identifying the correct party is utilizing the PUC. If the infringer is a regulated entity, the PUC might have a file on them. PUCs compel licensing, and therefore a signed application, for telecommunication providers, utility companies, trucking and moving companies and taxis (try the police department also).

Trademarks and Copyrights

The U.S. Patent and Trademark Office (USPTO) and U.S. Copyright Office offer online databases that identify the registered owners of patents, trademarks, trade dress (if registered) and copyrights. Google also has a searchable USPTO database. Applications to register a patent, copyright or trademark disclose their owners or assignees, who in turn are the probable owners and operators of the business.

Trademarks are particularly helpful. If the name on the door is Golden Bloom®, the USPTO would reveal the owner of the mark. Even though the target of the litigation is an infringer, the infringer might own other properly filed and protected IP. Expect the unexpected, and leave no stone unturned.

Buy the product, which might display "patent" or "patent pending" and number, trademark insignia ® or copyright © and name. With this information at hand, the USPTO and U.S. Copyright Office would disclose the name of the registrant who presumptively is using the IP in the operation of the registrant's business. Buy the infringer's product to see what might appear.

Search U.S. government websites for permits (or certificates) to do business, such as an importer or exporter, or license, or specific licensee. A FOIA request might produce the application.

Clubs infamously engage in piracy. Aside from the liquor license (ABC) and sales permit (SBE), counsel can identify the owner from the county health permit if food is sold, cabaret license for live music and a dance hall (entertainment) license for dancing. Subpoena the lease and the file from the landlord, who can readily identify the owner of the business. Modern landlords demand financial disclosures as part of the lease qualification.

Courts and Lawsuits

Most courts are now online and might offer direct access to filed documents (federal courts and many state courts).

The filings reveal the identity of the party that is claimed by other claimants and their capacity. Co-conspirators jump out of the page, sometimes. If another claimant scored a judgment (even a default) against the party, the judgment might collaterally estop the defendant in ensuing litigation. If the prior litigant recovered judgment against Larry Liable, whose DBA is Golden Bloom Garments, Larry Liable is deemed a sole proprietor. Probably the first litigant discovered the FBN revealing the sole proprietorship, the trademark through the USPTO, UCC's listing Larry Liable as the debtor for the commercial loan and that Golden Bloom Garments does not exist as a California corporation. Infringements tend to be serial and piracy is contagious. Other lawsuits might identify the person, partners and related entities.

Papers filed by the party as a plaintiff reveal the true names disclosed in the complaint, declarations, motions and correspondence. Filed papers attached as exhibits—contracts, letters, brochures, marketing materials, emails, purchase orders—can identify a party.

Credit Reporting Agencies and Search Services

Westlaw, Lexis-Nexis, D&B, TransUnion, Equifax, Experian and others offer commercial reports that identify the party on a subscription or single use fee. Search Google, Yahoo Finance and all social (LinkedIn, Hoovers, etc.) media websites to confirm names if publicly accessible. Online legal research (Westlaw, Lexis-Nexis, etc.) might report cases revealing names. Trade associations identify their members. The party's own website discloses the name in "About us," "Our history," or "Warranties." Try blogs. When in doubt, call to confirm a name. Ask for the owner.

Sellers and Buyers of Products

In selling products to buyers, the party confirms purchase orders, enters into supply agreements or prescreening agreements, which identifies the party to the deal. Bills of lading, invoices, statements and dunning notices also disclose the party. Letters and emails, promotional materials and ACH instructions (or in-coming wires) reveal a party. The payee on the buyer's check or the information from the ACH (or wire) transmittals discloses the recipient, further identifying the party. The endorsement on the back side of the check reveals the identity of the party. Also, business cards reveal parties.

If the party is a garment vendor or restaurant, they purchase products from wholesalers or often lease from a commercial landlord. As a buyer, the party signs credit applications, contracts, bears a SBE resale certificate or issues purchase orders. Checks and ACH (or out-going wires) transmittals as payment reveal the party. The check identifies the party as the drawer, which originates from the documents furnished to the bank to open the account. Letters promising payment reveal the party.

The garment business offers its own mysteries. As an example, a garment bears the label Autumn Sunrise. The trade name for the vendor is Fair Weather Fashions, which might (or might not) be the same as the registered trademark with the USPTO, which might be All Weather Clothes. The owner of the trade name and trademark is Fabulous Fabrics Inc., which presumptively appears as a debtor in the UCC filed by the factor. The FBN would reveal that Fair Weather Fashions is the trade name for corporation.

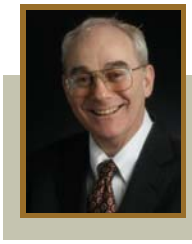
If the party is in the rag trade, subpoena the major retailers whose files disclose the legal names, trade name or trademark or label, and might have a vendor application. In the Los Angeles market, garment vendors factor their receivables and execute an agreement disclosing the legal trade name, the label and trademarks, which the factor transmits to the retailer. The UCC filed by the factor correctly identifies the vendor. Factors rarely err in identifying their clients. Inherent in the rag trade, the infringement actions correctly name the liable party along with the retailer. In addition, some merchants take PayPal, Google Wallet or other forms of electronic payment. Subpoena the payment service who will disclose the identity of the party.

Catching the Infringer before the Hasty Retreat

Once the suit is filed, the infringer might flee if the potential damages are large. IP infringement judgments are difficult to collect and pose the question whether litigation is viable against a judgment proof defendant. However, IP enforcement serves the goal of deterrence. The $1 million judgment against the college student deters, if not frightens to death, other students. "Not worth it" is the balm to illegal downloads. A big money judgment in favor of RIAA makes big news, big worry for would-be pirates and a big fat deterrent. Every dollar spent in chasing down the hapless student saves the recording industry many fold in lost revenues.

Facing financial ruin, the infringer might sell the business and make a hasty retreat. Counsel must cull through the county recorder to locate a notice of bulk transfer, or notice of intention to transfer a liquor license (if the infringer is a bar restaurant or club), or through the SBE to see the closure of the SBE permit. Check with real estate brokers to see if the property is listed with the MLS or a For Sale sign is in front of the house.

Getting to know the identity of the liable parties enables counsel to seek effective pre- and post judgment relief when the infringer pulls up stakes and heads out the back door. Whether an attachment, receivership, injunction, an involuntary bankruptcy or post judgment enforcement, getting the business name right might mean getting justice. Justice is money, and money is justice. Getting paid is even better, but getting rid of piracy is the best and makes you the hero.



David J. Cook is the founding member of Cook Collection Attorneys PLC and a frequent contributor of practice articles in legal magazines, journals and newspapers. He can be reached at Cook@SqueezeBloodFromTurnip.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.

Representing Artists in California

By Bonnie J. Chermak

In the world of California entertainment deals, it is important for all talent representatives to know that the use of client's services is reserved by law solely to talent agents licensed in this state.

THE LAWS GOVERNING THE REPRESENTATION of artists in California are principally found in the Talent Agencies Act under the Labor Code at sections 1700-1700.47.[1] Its first incarnation was in 1913, as the Private Employment Agencies Law which imposed the first licensing requirements for employment agents.[2] In 1943, artists' managers became a separate category for regulation, and in 1959 the Artists' Managers Act became its own separate Chapter of the Labor Code.[3] Perhaps recognizing the incongruity of the scheme with its name, in 1978, it was re-named the Talent Agencies Act (TAA or the Act herein).[4]

Procurement and the reservation of this right exclusively to licensed agents can prevent anyone else[5] from receiving and/or keeping fees they have earned—if the client challenges that fee as violative of the Talent Agencies Act because the representative engaged in procurement activities without a license. The main purpose of the TAA is to prevent and redress the exploitation of artists by representatives.[6]

The Labor Commissioner has exclusive original jurisdiction over claims plausibly invoking the Act, including the determination of jurisdiction.[7] In exchange for giving agents a procurement monopoly, the Act establishes detailed rules and requirements for their conduct, including submission of contracts and fee schedules to the state for approval, maintenance of a client trust account, the posting of a bond, etc.[8] The fees to be charged by talent agencies are also regulated.[9]

As a practical matter, because artists often acquiesce to the requirement of their respective guilds (SAG-AFTRA, DGA, WGA, AFM) that they use only agents who have

become signatories to the union's franchise agreement, the talent agent's fee is usually capped at 10% on the artist's earnings.[10] The title given to the services provided by the representative is not controlling; it is conduct that determines whether you will be deemed a talent agent, or not.[11]

Talent Agencies and Artists

A talent agency is defined in §1700.4 as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists…"[12] Artists are defined as various types of performers, writers, cinematographers, composers, models, etc., and "other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises."[13]

If one procures employment for an artist, he/she will be deemed a talent agent. If one has engaged in procurement activities without a license, he/she has violated the Act and is subject to the penalties to be imposed by the Labor Commissioner if the dispute has been timely referred to that forum.

The Act has a one year statute of limitations and a 10-day appeal period for a Trial De Novo following the Commissioner's decision.[14] Historically, any contract for talent agency services with an unlicensed person is illegal and void ab initio.[15] Most significantly, under the Act and historical application of it by the Labor Commissioner and appellate courts to disputes before them, there is no exception or exemption for incidental or insubstantial procurement.[16] Needless to say, this statutory scheme has had a disproportionate impact on talent managers who typically engage in procurement activities for their clients. This impact was not lost on the California Supreme Court deciding *Marathon Entertainment, Inc. v. Blasi.*[17]

Managers vs. Agents

In the *Marathon* case, Justice Werdegar, speaking for all participating justices, began by explaining: "Agents procure roles;… Managers coordinate everything else…" The court continued: "This division largely exists only in theory. The reality is not nearly so neat. The line dividing the functions of agents, who must be licensed, and of managers, who need not be, is often blurred and sometimes crossed."[18]

Marathon also noted in conclusion that the current statutory scheme "may well punish most severely those managers who work hardest and advocate most successfully for their clients, allowing the clients to establish themselves, make themselves marketable to licensed talent agencies, and be in a position to turn and renege on commissions."[19]

Unfortunately, despite its recognition of the inequities inherent in the TAA's implementation, the court acknowledged that fixing the statute is a state legislative function in which it cannot engage.[20] What the court could do, and did, was remind the Labor Commissioner that the remedy of severance was in her tool kit, and that it may be appropriate for application in certain cases.[21]

The *Marathon* court found this remedy in Civil Code section 1599, which codifies the common law doctrine of severability of contracts: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."[22]

In deciding whether severance is available, [t]he overarching inquiry is whether "the interests of justice ... would be furthered."[23] The doctrine is equitable and fact specific.[24] If "the representative engaged in substantial procurement activities that are inseparable from managerial services, they may void the entire contract... however, an isolated instance of procurement does not automatically bar recovery for services that could lawfully be provided without a license."[25]

This is a welcome relief to managers who heretofore had consistently been told by the Labor Commissioner and the California Court of Appeal to disgorge their earnings because of even the most remote or insignificant incidents of procurement. It is by no means a get out of jail free card, but it resurrected and shined up a remedy to a problem that has stymied the industry and the legislature for decades.

Marathon may indeed be the best fix available for the Act, as the legislature has not been able to effectively address it on their own, despite several efforts to do so. In 1978, the legislature considered establishing a separate licensing scheme for personal managers but were unable to reach agreement and settled for minor changes.[26] In 1982, the legislature attacked the problem again, amending the Act under a sunset clause to impose a one-year statute of limitations, eliminate criminal sanctions and establish a

safe harbor for managers to procure employment if they did so at the request of and in conjunction with a licensed agent, and further established a 10-person California Entertainment Commission to recommend a model bill. The Commission recommended making the 1982 changes permanent, and a modest series of other changes, all of which were adopted.[27]

Safe Harbor for Talent

Another decision with the potential to have a huge impact on the resolution of talent-manager is the United States Supreme Court decision in *Preston v. Ferrer*,[28] in which Justice Ginsburg, speaking for the 8-1 majority, held that when parties agree to arbitrate all questions arising under a contract, the Federal Arbitration Act supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.[29] This decision now allows parties to choose by contract to have the matter decided in the first instance by an arbitrator, instead of the Labor Commissioner.

Although *Marathon* and *Preston* have made inroads into the manager-agent problem, the parameters and effect of those decisions remain to be seen.[30] The statute is designed to protect artists from unscrupulous managers, but in effect it allows an artist to renege on the deal he or she has made with a manager who has done nothing more unscrupulous than secure safe, legal, compensated work for that artist.

The safe harbor provision of the statute allows some leeway to managers, but it ignores the reality that in this industry the artist most often starts his or her career with just a manager, and expands their representation stable to include an agent only after the manager has secured sufficient work for the artist to make him or her attractive to the agent. By then, illegal procurement has already occurred, making the safe harbor provision unavailing to the manager.

Perhaps a more reasonable and equitable safe harbor would be to exempt initial procurement, so long as the manager promptly associates an agent to develop any employment relationships the manager has secured for the artist.

If procurement activity in conjunction with an agent is acceptable when an agent has requested the activity, it should be no less acceptable if the association has been joined shortly after the initial procurement activity. Until such time as the law catches up with the realities of this business, managers remain vulnerable under the Act, but certainly less so than before the decisions in *Marathon* and *Preston*.

[1] Talent agents are also governed by *Title 8. California Code of Regulations, Chapter 6, Group 3. Employment Agencies, Article 1. General Rules and Regulations for talent agents, 12000 et seq.*

[2] *Marathon Entertainment, Inc. v. Blasi, supra 42 Cal. 4th 974, 984.*

[3] Comment, *Regulation of Attorneys Using California's Talent Agencies Act: A Tautological Approach to Protecting Artists (1992) 80 Cal. L.Rev. 471, 494, nt. 140.*

[4] *Marathon Entertainment, Inc. v. Blasi, supra 42 Cal. 4th 974, 984*, citing *Buchwald v. Superior Court (1967) 254 Cal. App. 2d 347, 357.*

[5] Technically, the terms of the Act would seem to apply to attorneys, but there are no reported cases involving the imposition of sanctions under the Act against attorneys for procurement. In light of the underlying purpose of the Act (infra), and the extensive regulatory and licensing scheme under which attorneys already operate, it is questionable whether application of the Act to attorneys would be appropriate. *See Also: Comment, Regulation of Attorneys Using California's Talent Agencies Act: A Tautological Approach to Protecting Artists (1992) 80 Cal. L.Rev. 471.*

[6] *Marathon Entertainment, Inc. v. Blasi, supra 42 Cal. 4th 974, 984; Styne v. Stevens, supra, 26 Cal.4th at p. 50; Buchwald v. Superior Court, supra, 254 Cal.App.2d 347,350-351.*

[7] *Lab. Code §1700.44 (a); Buchwald v. Superior Court, supra, 254 Cal.App.2d 347, 357, 359 and 360-361; Styne v. Stevens (2001) 26 Cal.4th 42, 54-56, 59, fn10 [109 Cal. Rptr. 2d 14, 26 P.3d 343]*

[8] *Labor Code §§1700.23-1700.47; Marathon Entertainment, Inc. v. Blasi, supra 42 Cal. 4th 974, 985.*

[9] Talent Agencies' contracts and fees are reviewed by the Labor Commissioner to make sure they are not unjust unfair or oppressive. With respect to fees, one criteria looked to by the Commissioner is industry custom and practice. Currently the largest commission percentage approved by the Commissioner is 20% for non-union print model work, based on its historical practice. *D. Gurley, Labor Commission attorney, telephone interview 7/24/12.*

[10] *Marathon at 983. See also: Matthau v. Superior Court (2007) 151 Cal. App .4th 593, 596-597 [60 Cal. Rptr. 3d 93];* Association of Talent Agents' website, www.agentassociation.com/frontdoor/agency_licensing_detail.cfm?id=742.

[11] *Marathon Entertainment, Inc. v. Blasi, supra 42 Cal. 4th 974, 986.*

[12] *Labor Code section 1700.4.* The statute goes on to state that the procuring of recording contracts shall not of itself subject a person or corporation to regulation and licensing under this chapter, and further affirms that (like managers) talent agencies may, in addition, counsel or direct artists in the development of their professional careers.

[13] *Labor Code §1700.4(b).*

[14] *Labor Code §1700.44(a).* See also: *Park v. Deftones (1999) 71 Cal App 4th 1465, 1469; 84 Cal Rptr 2d 616.*

[15] *Buchwald v. Superior Court, supra, 254 Cal.App.2d 347, 351; Styne v. Stevens, supra, 26 Cal.4th 42, 50.*

[16] *Waisbren v. Peppercorn Productions, Inc. (1995) 41 Cal.App.4th 246, 261; Styne v. Stevens, supra, 26 Cal.4th 42, 50-51.*

[17] *Marathon Entertainment, Inc. v. Blasi, supra, 42 Cal. 4th 974.*

[18] *Marathon Entertainment, Inc. v. Blasi, supra 42 Cal. 4th 974, 980.*

[19] *Marathon Entertainment, Inc. v. Blasi, supra, at 998.*

[20] *Id., 999.*

[21] *Marathon Entertainment, Inc. v. Blasi, supra, at 995-996:* "We recognize, however, that in more recent decisions, the Labor Commissioner has expressly adopted the position Blasi advocates: severance is never available to permit partial recovery of commissions for managerial services that required no talent agency license... Here, the Labor Commissioner's views rest in part on a reading of the legislative history as suggesting such a rule, in part on a reading of past Court of Appeal decisions as announcing such a rule, and perhaps in part on a policy judgment that voiding contracts in their entirety is necessary to enforce the Act effectively. With due respect, the Labor Commissioner's assessment of the legislative history and case law is mistaken..."

[22] *Marathon Entertainment, Inc. v. Blasi, supra, at 991.*

[23] *Marathon Entertainment, Inc. v. Blasi, supra, at 996, citing Armendariz v. Foundation Health Psychcare Services, Inc., supra, 24 Cal.4th at p. 124.*

[24] *Marathon Entertainment, Inc. v. Blasi, supra, at 998.*

[25] *Id.*

[26] *Marathon Entertainment, Inc. v. Blasi, supra, at 994-985.*

[27] *Labor Code section 1700.44,* and *Marathon supra, at 985 and 998.*

[28] *Preston v. Ferrer (2008) 552 U.S. 346; 128 S. Ct. 978; 169 L. Ed. 2d 917.*

[29] *Preston v. Ferrer, supra, 552 U.S. 346, 359.* The Court also quoted Section 2 of the FAA: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *9 U.S.C. §2; Preston v. Ferrer, supra, 552 U.S. 346, 352-353.*

[30] Labor Commission attorney David Gurley advised the author that there have already been several decisions from the Labor Commissioner applying severance to manager disputes since the Marathon decision.

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Test No. 48

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. The laws governing the representation of artists in California are principally found in the Labor Code.
   ❑ True ❑ False
2. The regulation of talent representation began in 1963.
   ❑ True ❑ False
3. To hold a talent agency license in California, an applicant must maintain a client trust account, and post a bond.
   ❑ True ❑ False
4. Prospective talent agency licensees must submit their proposed contracts and fee schedules to the Labor Commissioner for approval.
   ❑ True ❑ False
5. Offering an artists' services to a potential buyer is reserved by law solely to talent agents licensed in this state.
   ❑ True ❑ False
6. The main purpose of the Talent Agencies Act is to prevent and redress the exploitation of artists by representatives.
   ❑ True ❑ False
7. The fees charged by a licensed talent agent are not regulated.
   ❑ True ❑ False
8. Guild Franchise Agreements typically limit talent agent fees to a 10% commission on an artist's earnings.
   ❑ True ❑ False
9. If you are not licensed as a talent agent, you are not subject to the jurisdiction of the Labor Commissioner.
   ❑ True ❑ False
10. The TAA looks to the understanding of the parties to determine if a representative has acted as a talent agent.
    ❑ True ❑ False
11. If you have procured employment for an artist, you will be deemed a talent agent.
    ❑ True ❑ False
12. Historically, there has been no exception for incidental or insubstantial procurement.
    ❑ True ❑ False
13. Historically, a contract involving any amount of procurement has been deemed void ab initio if the representative was not a licensed talent agent.
    ❑ True ❑ False
14. The Talent Agencies Act has a one year statute of limitations.
    ❑ True ❑ False
15. You must seek Trial De Novo from a decision of the Labor Commissioner within 10 days.
    ❑ True ❑ False
16. The California Supreme Court case of *Marathon v. Blasi* ruled that the doctrine of severance may be used to address the issue of procurement by unlicensed talent agents.
    ❑ True ❑ False
17. The *Marathon* court found support for its decision in California Civil Code section 1599, which codifies the common law doctrine of severability of contracts.
    ❑ True ❑ False
18. The TAA provides a safe harbor for managers who procure employment if they do so at the request of, and in conjunction with, a licensed agent.
    ❑ True ❑ False
19. Parties may not contract to divest the Labor Commissioner of her exclusive jurisdiction to hear TAA disputes.
    ❑ True ❑ False
20. The Federal Arbitration Act supersedes Labor Code section 1700.44(a) with respect to vesting primary jurisdiction of TAA with the Labor Commissioner.
    ❑ True ❑ False

MCLE Answer Sheet No. 48

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
   5567 Reseda Boulevard, Suite 200
   Tarzana, CA 91356

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

_____
Credit Card Number Exp. Date

_____
Authorized Signature

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

Patent on Rye: Protecting a Trademarked Sandwich

By Deborah S. Sweeney

TWO PIECES OF BREAD WITH a little something in the middle—the sandwich is simplicity embodied, and yet it remains a staple of nearly every restaurant in operation. So the question naturally arises: how could anyone enforce intellectual property rights for a sandwich? Where is the line drawn? When does a sandwich leave the counter tops of delis and kitchens everywhere, and enter an area of legal protection?

The answers to those questions are not particularly easy to come by, but a few recent cases have shed some light onto the patent and trademark process for the ubiquitous sandwich.

Typically, the most common complaints of intellectual property infringement do not actually involve the sandwich itself, but take issue with what the restaurateur actually calls that sandwich. Recently a Nevada restaurant called the Heart Attack Grill (HAG) slapped the New York Second Avenue Deli (Deli) with a cease and desist after they found out the deli was selling an "Instant Heart Attack Sandwich" which, the Heart Attack Grill claimed, infringed on their intellectual property rights as protected by the Lanham Act, which sets the parameters of trademark law in the United States. Second Avenue argued that they had been selling this sandwich, which was comprised of a pile of classic cold cuts on top of three potato latkes, since 2004—a year before the Heart Attack Grill registered for their name. The Deli also planned to sell a "Triple Bypass Sandwich," but the United States Patent and Trademark Office (USPTO) denied them the right to the title as it could cause confusion with HAG's own "Triple Bypass Burger." One is pastrami served on fried potato pancakes, and the other is a gigantic hamburger, but there was still concern that consumers would not be able to keep the two straight.

And so the case, *Lebewohl v. Heart Attack Grill*, went to the Southern New York District Court after the Deli filed for a declaratory judgment hoping that the ruling would find that neither of its two marks infringe on HAG's intellectual property—the Heart Attack title on the basis of prior use, and the Bypass name based on the fact that the two meals had very little in common, other than that name and a colossal calorie count.

HAG's attorney wound up conceding that if the Deli only sold the Triple Bypass Sandwich at current locations and did not spread the Instant Heart Attack Sandwich outside of Manhattan, customers would not wind up confusing the two restaurants. As a result, the Deli is able to sell its sandwich, albeit to the distress of the hearts of all New Yorkers.

The case has sparked quite a bit of interest, mainly because the subject matter is so odd. It was about sandwiches, after all, and who honestly has a serious opinion regarding sandwich rights? Well the USPTO, for one. They have an entire Patent Classification (Class 426) that is dedicated entirely to Food and Edible Material. And, as was just discussed, the names given to a sandwich can cause quite a bit of contention if the marks are found to infringe on ones that already exist.

But a trademark for a sandwich name is easy enough to get. Fill out the necessary paperwork, send it in with a check and, as long as the name does not resemble anything already in the database, the sandwich's creator can print a cute little ® onto their menu and take infringers to court. Most sandwich chefs don't see much need in taking matters any further. Pursuing a patent for something like a recipe is much trickier than registering a name that shows up on a menu.

Technically, a chef cannot just patent the recipe for a sandwich

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by sending in its composition and waiting for the USPTO to approve the application. The brain behind the sandwich has to prove that whatever culinary delight they have come up with meets standards for usefulness, novelty and non-obviousness. The last two essentially kick most sandwiches to the curb in regard to patents. It is difficult to prove that a particular arrangement of bread, meat, cheese, vegetables and condiments is new or non-obvious. However, there are cases where a sandwich's creators were actually able to receive patent approval.

The USPTO actually awarded Uncrustables, which are pre-packaged peanut butter and jelly sandwiches with the edges crimped shut, a patent for something as everyday as a PB&J sandwich. The two men who originally pursued the patent argued their decision to encase the jelly in a pocket of peanut butter to keep the bread from becoming soggy made the patent non-obvious and novel.[1]

J.M. Smucker Co. was so impressed that they bought the patent and then spent the next few years ensuring no one else sold pre-package PB&J sandwiches by flexing its intellectual property muscles. Unfortunately for them, they were then later denied a patent when they tried to protect the way they crimped the edges of the sandwich down. They argued that the crimping process was, once again, novel and unobvious. But the BPAI concluded that particular procedure closely resembled the method for sealing pies and other pastries.[2] So aspiring chefs, and any large corporation that sells food, could get a patent if they could prove that their sandwich's arrangement is particularly clever, but they will still be denied one if they try to claim that pushing the soft, encasement of bread down is just as clever and unheard of.

Despite the ill-fated crimping patent, the Uncrustables case is particularly interesting as it showed that it was possible to patent a sandwich. And not just any sandwich; PB&J is arguably one of the most famous sandwiches in the United States. The non-obvious requirement is supposed to mean that other people, whether they are chefs or just an average consumer, would not easily stumble upon a patented sandwich while throwing the contents of their fridge onto a piece of bread. And, as the Uncrustables patent showed, the requirement for usefulness usually means the sandwich should do something other than be delicious. Uncrustables use peanut butter to keep the bread from becoming soggy from jam, so the usefulness and non-obviousness of the sandwich's composition does not have to be groundbreaking. The sandwich just has to tick all the necessary boxes.

The very act of cooking sort of throws a wrench into the wider legal understanding of intellectual property protection. If somebody was to visit any online recipe site that allows comments, they would see that, right below the recipe, a slew of adjustments and changes from people who decided to tweak small things here and there. A smidge more mustard, a couple dashes of pepper, and all of a sudden a ham sandwich made by one person will taste and look nothing like a ham sandwich made by their next door neighbor. It will have ham and bread and then it is anyone's guess. The point is that recipes are particularly easy to tweak, and after a certain amount of changes it is easily argued that the resulting product is nothing like the product made from the patented recipe.

For the most part, then, it is always advisable to recommend against pursuing a patent for a sandwich, or really any recipe, unless the chef is certain that they can prove, in writing, that their method of preparing food is new, unique, and non-obvious. Most people are not able to do that, making the entire process a colossal waste of time and money. Patents can wind up taking months to crawl their way through the USPTO, and few people have the sheer polemic skill to argue that they invented a particular way of preparing a sandwich.

Trademarks, however, are fair game in the food industry. In fact if a restaurateur or a chef does take the time and energy to come up with a particularly amusing gimmick or name then they should make the effort to protect the amount of time they invested into the creative process. They just need to remember that if they sue an entirely different type of restaurant in a state over 2,000 miles away, they may become the butt of legal jokes for the next couple of months.

[1] United States Patent Number 6,004,596

[2] BPAI Number 2003-1754

U.S. Supreme Court Ruling on Health Care Reform: A Blessing or a Curse?

By Elliot Matloff

ON JUNE 28, 2012, THE U.S. SUPREME COURT upheld the constitutionality of the 2010 Patient Protection and Affordable Care Act (PPACA). In President Obama's first public remarks following the Court's decision, he stated that the Supreme Court reaffirmed the "American fundamental principle" that "no illness or accident should lead to any families' financial ruin."

The 250 million Americans who already have insurance are expected to keep their coverage as-is for it will be "more secure and affordable." For the 30 million Americans who do not have insurance, the healthy and financially capable individuals are expected to buy insurance, pronto; and the poor folks who do not have insurance will have federal subsidies if they cannot afford to pay premiums.

President Obama's program shows compassion. Millions of Americans are walking around without any insurance—some by choice, some without the financial ability to pay, and some with significant uninsurable pre-existing health conditions. In light of the current economic times, will there be enough cash to pay for all of the costs? It will take time to see if President Obama's health care reform law will be a blessing or a curse for the American people and their pocketbooks.

Recent History of Health Care Insurance in the United States

It was just 30 years ago when Americans with health insurance policies were proud to know that their policies had $100,000 lifetime maximums. When a person applied for a policy for the first time, if he or she had any health history at all, the policy could be declined or a condition could be excluded or the premium surcharged. If an employee on an employer sponsored group plan decided to quit, or was terminated or his employer's business folded, the employee would have no guaranteed issue insurance.

About 20 years ago, many health insurance companies improved the lifetime maximums of policies to $1 million or $2 million. Employees that left their jobs were offered 18 months of continuing insurance, coverage required under COBRA (Consolidated Omnibus Budget Reconciliation Act).

Then, about 10 years ago, insurance companies in California started to offer $5 million and $6 million lifetime maximums in their health insurance policies. One might recall that when the actor Christopher Reeves was injured, his Screen Actors Guild insurance policy only had a $500,000 lifetime maximum. Insurance companies around the country looked at ways to offer richer benefits and higher lifetime maximums to stay competitive with other carriers and to be in compliance with federal and state laws.

COBRA was extended to 36 months for most employees leaving a company. At the end of COBRA, if an individual could not qualify for an individual policy due to pre-existing conditions, he or she was offered HIPAA (Health Insurance Portability and Accountability Act of 1996). Insurance companies were required under HIPAA to offer health insurance to individuals after the individual exhausted 36 months of COBRA, regardless of any pre-existing conditions.

Even before the Affordable Care Act, insurance companies had already made some significant improvements in their insurance, whether forced by the federal or state government or by staying competitive with other carriers. These improvements have also caused premiums to go up, often erratically. As a result, insured individuals and employers have had to raise deductibles and take plans with reduced benefits in order to keep premium increases modest. Yet, premium paying ability has not been a slam dunk for individuals and employers, especially over the last two years.

Health Care Reform Timetable

The Supreme Court's ruling affirmed the Affordable Care Act's timetable, which already began in 2010. Here is what

has already happened since then and what is going to happen in the years to come. Of course, this assumes that there won't be a major change in the leadership of the country come the next presidential election or until the government's financial kettle possibly runs out of money, sometime afterwards.

2010

- Pre-existing Insurance Plan (PCIP) gives health insurance to people, previously declined for health insurance and who have not had coverage for 6 months or longer.
- Children can remain on their parent's health insurance plan until they turn age 26.
- People on individual or group health plans will not pay any deductibles or co-pays for preventative care. Yearly mammograms, pap smears, age appropriate colonoscopies, immunization and other screenings for high blood pressure, cholesterol and diabetes are essentially free.
- Children under age 19 cannot be denied health insurance due to pre-existing conditions. Insurance companies can still surcharge premiums for children with significant pre-existing conditions.
- Insurance companies must increase their lifetime benefit maximums to unlimited (from the prior $5 million that most companies offered in the last few years).
- Federal government provides incentives for doctors working in underserved areas, including business loan re-payments.
- Federal government provides grants to states that hold insurance companies accountable for rate hikes.
- Federal government provides grants to support construction of community health centers.
- Federal tax credits are provided to employers who offer group health insurance to lower income employees.

2011

- Medicare improvements, informally known as the "doughnut hole" of the prescription plans, now requires the insurance companies to offer 50% discount on brand name prescriptions and 7% discounts on generic prescriptions.
- Medicare benefits include free wellness and preventative care.
- Insurance companies are required to spend more of their earned premium dollars on health care services; otherwise, the insurance companies must issue rebates to their policyholders. The President has said that too much of the premium dollars an insurance company collects is going to the executives and not enough to the policyholders. A medical loss ratio was implemented, so that 80 cents of every dollar of premium must be spent on claims.
- New federal health programs will start collecting and reporting racial, ethnic and language information to show why some groups suffer from persistent health problems.

2012

- Medicare increases the discount for generic drugs in the doughnut hole to 14%.
- Federal government will give financial incentives to hospitals that improve the care of patients with Medicare.
- All insurance companies will be required to standardize their billing procedures and to adopt electronic exchange of health information that is secure and confidential.

2013

- Medicare increases the discount in the doughnut hole to 52.5% for brand name drugs and 21% for generic drugs.
- The federal government will increase funding to help low income children and families to get coverage through Medicaid.
- Hospitals and doctors can qualify for a new federal payment called a "bundle."

2014

This is the year that most of the important changes occur.

- Medicare increases the doughnut hole discount for generic drugs to 28%.
- Subsidies are available for those people with limited incomes who purchase insurance through an exchange set up by the federal government or one's particular state. California will likely have its own exchange.
- Children, parents and adults without children who are not currently covered by Medicare, and who have very low incomes, are able to apply for Medicaid.
- Insurance companies can't deny anyone health coverage, regardless of pre-existing health conditions.
- Insurance companies cannot put annual limits on health coverage or base rates on gender.

2015 and Beyond

- The Medicare doughnut hole will be phased out and insurance companies will be required to honor all prescriptions, brand or generic, with co-pays.
- Doctors will receive federal payments when they demonstrate that they have given higher quality care to patients.

Health Care Reform

There is little disagreement by insurance companies or policyholders that many of the benefits found in the Affordable Care Act will enhance coverage benefits. On the other hand, here are some of the concerns.

Are Healthcare Costs Going to be Reduced?

It is unlikely that doctors and hospitals will reduce their costs in the next few years. Price Waterhouse Coopers did a study and there are indications that health care costs will increase by 8% to 10% in 2013, even with the Affordable Care Act. For now, the Affordable Care Act's main interest is to help people without insurance to get insurance. The lowering of cost is secondary.

Will the Healthcare System Change?

For the 250 million people in the U.S. who have insurance now, there will be no change. The cost of insurance is likely to go up, and the insured person will have options to choose less expensive, higher deductible plans.

For individuals with very low incomes, they may choose to be insured by a federal or state exchange, to take advantage of the federal subsidies. The subsidy will depend on one's income. It can be as high as 60% for some and as low as 7% for others. A higher income individual is unlikely to switch to an exchange, because the subsidy will not apply at all. Also, if the government is controlling the exchanges, it is likely that healthcare will be rationed, if the economy continues to struggle.

Will the IRS Tax Penalize People if They Don't Buy Insurance?

Beginning in the 2014 tax year, people who can afford insurance but decide that they are not going to buy insurance, will receive penalties from the Internal Revenue Service when they file their tax returns. The penalties are small in 2014, but become much larger as the years go on. In taxable year 2014, the penalty is $95 per year per adult and $47.50 per year per child, or 1% of family income, whichever is greater.

By 2016, the penalty is $695 per year per adult and $347.50 per year per child or 2.5% of family income, whichever is greater. It is believed that about 4,000,000 young people will choose to go without coverage and pay the penalty.

Some non-insured individuals will be exempt from the penalties:

- Individuals who are between jobs and without insurance for 3 months or longer
- Undocumented immigrants
- Religious objectors
- Jailed persons
- Indian tribe members

For individuals who fall below the federal poverty level, they will be exempt from penalties and most likely be covered by Medicaid. For individuals and families who fall within 133% (individuals) to 400% (for family of 4) of the federal poverty level, they may be exempt from penalties if the cost of the lowest cost exchange plan less the federal tax credit is greater than 8% of the household's modified gross income.

Employer Sponsored Health Insurance, Requirements and Penalties

Under the Affordable Care Act, no employer is required to offer group health insurance to its employees now or in the future. However, employers with more than 50 full time employees, starting in 2014, will incur IRS penalties if they don't provide minimal essential coverage to their employees. The penalty can be as much as $2000 per year per employee for each full time employee who is not covered.

If an employer employs more than 250 W2 employees for 2012, it will have to include the annual health insurance premium for each employee on his or her 2012 W2, for information purposes only. In 2013, all employers will have to include premium information on W2 forms.

Other Tax Consequences

The Supreme Court ruling also affirms that the Affordable Care Act is a tax. Here are just a few of the tax issues that have people on both sides of the political isle arguing.

- *Medicare Payroll Tax*. For higher income individuals, earning over $200,000, starting in 2013, the Medicare tax will increase from 1.45% to 2.35% of taxable wages above the $200,000 threshold.
- *Medicare Investment Tax*. For individuals who are earning over $200,000, all passive net investment income will receive a Medicare Investment Tax of 3.8%.
- *Medical Expense Tax Deductions*. In prior years, taxpayers who itemized deductions, could only deduct unreimbursed healthcare expenses, if those expenses exceeded 7.5% of their adjusted gross income. The new threshold has been increased from 7.5% to 10%, starting in 2013.
- *Health Insurance Excise Tax*. Starting in 2018, insurance companies that offer very low deductible policies and very rich benefits (Cadillac policies), will be charged a 40% excise tax on policies that cost more than $10,200 per year for an individual and $27,500 for a family. Insurance companies will probably justify premium increases on non-Cadillac policies, in consideration of this tax.

What's the Bottom Line to the Affordable Care Act?

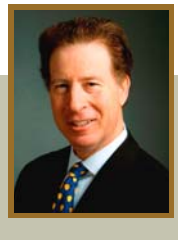
It is more likely that insurance premiums will go up in the future than down. Government regulation requires policies on single males to include maternity benefits. It can be argued that Americans will be healthier with the mandatory inclusion in policies of new essential benefits—birth control, preventative care, mammograms, colonoscopies, full physical exams, extended mental health benefits, etc.—but there will be a price to pay in the form of premiums.

In 2014, insurance companies will not be able to decline people for pre-existing health conditions. The government says that if more people are insured, the risk will be spread among more people, hence lowering premium. The insurance companies say that if they are forced to insure more unhealthy people, the risk will increase and the premiums will increase.

At this point, states and the federal government have not indicated what they are going to charge for policies available through these exchanges, nor have they produced any specimen policies to indicate what the coverage would include. Insurance through the exchanges will generally be for low income individuals and families, with the government subsidizing a good portion of the premium.

American business owners are asking themselves how they will cope with the Affordable Care Act and whether it will drive insurance companies to raise the premiums so high, that the premiums might be unaffordable. Will employees have to assume more of the burden of the premium? Will the additional costs of the employer be transferred over to the consumer?

America has enjoyed the highest level of health care in the world for several generations. The Affordable Care Act can be a blessing to several million people who do not have insurance. In the next few years, Americans will learn whether this program works.



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Case Study

Kardashian v. The Gap, Inc., et al.
Discovering the Gaps

By Jonathan Arnold

NOT TOO LONG AGO, Counsel for Kim Kardashian had filed suit in federal court in Los Angeles against the Gap and Old Navy for unfair competition, violation of California's common law right of publicity and violation of California's statutory right of publicity.

The apparent genesis of this lawsuit was an ad run by Old Navy that features an actress/singer named Melissa Moldinado who does look something like Kardashian and presents a persona within this ad as something of an "it girl" that may or may not be Kardashian. The author of this article viewed the ad once (which was enough) and could see the resemblance to Kardashian. That being said, Moldinado's ad character could just as easily been a general reference to almost any other "it girl" with long, dark hair…or just another trendy ingénue (the groupies, the dancing, the toys dogs and so on).

Without going into too much chapter-and-verse on the three causes of action in the subject complaint, suffice it to say that while one is federal, and the other two state, they all surround a common theme; namely, that Gap, et al. structured their ad (and the correlative campaign) to take advantage of Kardashian's persona (which she has worked very hard to develop and leverage for her own commercial advantage) and profit themselves, not Kardashian.

It seems to be no mistake that this case is going forward in the domain of the Ninth Circuit, which tends to favor plaintiffs whose right(s) of publicity have been violated. Methinks (and as a practitioner myself respects) that Kardashian's attorneys may be relying upon a key triumvirate of cases: *White v. Samsung*, where Vanna White sued Samsung and ultimately prevailed; *Abdul-Jabbar v. General Motors Corp.*, where Kareem Abdul-Jabbar was able to maintain a right of publicity suit sounding in both federal and California law; and, *Wendt v. Host International*, where the Ninth Circuit allowed the factual issues in connection with whether cut-out figures were similar or dissimilar to various "Cheers" characters to go to a jury for determination.

These cases, though finally favorable to the plaintiffs, contained some pretty powerful dissenting language authored by Judge Kozinski which continues to resonate in secondary sources and learned analyses. And in Wendt he opined that, "...we [have] held that the right of publicity extends not just to the name, likeness, voice and signature of a famous person, but to anything at all that evokes that person's identity...we again let the right of publicity snuff out creativity." *Wendt v. Host International, Inc.* (1997, C.A.9) 125 F.3d 806, reh'g denied (1999, C.A.9) 197 F.3d 1284, cert. denied, (2000) 531 U.S. 811. And while a dissent is not the decision in a case, well-taken dissents have a habit of pointing out one or more forks in the legal road that future cases may take.

Currently, this prompts three issues for Kardashian's case. One, is it Kardashian's persona or just a generic 'it girl' that is actually evoked by the Old Navy ad that features Moldinado? Two, did Gap intend the evocation of Kardashian by the ad? (I can already feel the discovery issues on the horizon: Kardashian's camp asking for all correspondence, including emails between Gap corporate and the ad agency wherein the folks at Gap and/or Old Navy specifically communicated about a Kardashian look-alike such as Moldinado and maybe even the Gap team requesting a Kim Kardashian celebrity look-alike). Three, is the consuming public likely to be sufficiently confused by Moldinado's singing and dancing in the Old Navy ad, thinking that they are seeing Kardashian and thus believing that Kardashian has endorsed Old Navy apparel?

So much for the legal analysis of this case (for now)...more importantly, it appears that Kardashian's former boyfriend is dating the purported look-alike in the Old Navy ads, Melissa Moldinado. Stay tuned...

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Jury Trials in the Age of Social Media

By Barry P. Goldberg and Melissa Cassel

FACEBOOK HAS OVER 900 million active users scrolling though their newsfeeds, posting statuses and writing on friends' walls. It is a big mistake for today's trial lawyer to disregard the immediate and significant influence that Facebook and other social media sites, such as Twitter, Instagram, MySpace, LiveJournal, GooglePlus, Flixter and Classmates, have on our current jury system.

The court system is just now coming to grips with the inevitable use and obvious impact on our jury system. In April 2012, the Judicial Council of California Advisory Committee on Civil Jury Instructions (CACI) amended its Jury Instructions to address the prevalence of electronic communication and social media amongst jurors. Instruction 116, "Why Electronic Communications and Research are Prohibited," states that "the parties can receive a fair trial only if the facts and information on which you base your decisions are presented to you as a group, with each juror having the same opportunity to see, hear, and evaluate the evidence."

The section continues on by stating that "using information gathered in secret by one or more jurors undermines the public process and violates the rights of the parties." This basic idea isn't new; jurors have been prohibited from discussing cases outside of the courtroom since the beginning. So what precisely is it about social media sites such as Facebook that have prompted the addition of CACI No. 116? Instruction 116's "Directions For Use" states to "give this instruction after CACI No. 100, Preliminary Admonitions, in order to provide more information to the jury as to the reasons why independent electronic research using the Internet and electronic communications are prohibited."

Attorneys know and assume that jurors breach the instruction to not discuss their cases. Whether it's chatting with a spouse before falling asleep, mentioning the general subject matter of the case to a neighbor in passing or using jury duty as a jumping off point for explaining the legal system to one's children, jurors feel a sense of security in their private conversations. The chance of a judge ever finding out that they privately discussed their case is practically non-existent. However, the presence of social media nearly guarantees that jurors are discussing their cases and might be influenced by numerous opinions of friends and relatives, whether related directly to the case matter or not.

How does this work? Each Facebook user has a profile, commonly referred to as a "wall." On this wall, one can post statuses (statements typically divulging a current location, life update or opinion), photos and videos, along with other less prominent usages. Furthermore, the site does not only function as a diary-type forum in which one can post about his or her own life, but also as a medium of communication. Just as easily as someone can post on his or her own wall, he or she can also post messages and media to someone else's wall, along with commenting on anything and everything that others have previously posted. Thus, the site works as a type of online bulletin

board, allowing users to post their own information, while simultaneously reading and commenting back on their friends' posts. In fact, not only can users post on other peoples' status and photos, but Facebook actually encourages and facilitates the transaction through each person's newsfeed or homepage.

On one's newsfeed, he or she is updated on a second-to-second basis with friends' newest statuses and photos, all controlled by a complicated and savvy computer algorithm which takes into account those who we've had the most Facebook interaction with in the past to create a newsfeed that focuses on these same peoples' updates, thus building and maintaining a circle of communication in which commentary is both stimulated and perpetuated.

It's easy to understand how Facebook is used for following one's journey across the world, or to see photos of our newly born nieces and nephews, but how is the site relevant to the courtroom?

Assuming that nearly every juror has access and uses Facebook, or other social media, it is reasonable to believe that social media can have a tangible effect on the outcomes of jury trials. Instruction 100 recognizes this and states in the "100 Preliminary Admonitions" that jurors cannot "use any electronic device or media, such as a cell phone or smart phone, PDA, computer, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog or web site, including social networking website or online diaries, to send or receive any information to or from anyone about this case or [their] experience as a juror until after you have been discharged from [their] jury duty." However, the instructions specify that jurors "may say [they] are on a jury and how long the trial may take." Jurors who follow these directions are still likely to expose themselves to the influence of friends and family.

Following CACI 100, a reasonable juror might post a Facebook status that says "Stuck with jury duty for the next two weeks." However, given Facebook's structure, the juror will receive numerous immediate comments, which may begin the process which Instruction 100 seeks to avoid. "Hey, I was on jury duty last month, too. If your case is anything similar to mine, the plaintiff was trying to win the lottery or the business is probably insured and to pay." Then, as Facebook designed, this one comment will spur an outpouring of commentary and "likes" from 50 of the juror's closest internet friends, with 50 unique and opinionated comments. Not only will the juror take a census from these comments during the trial, the juror may feel obligated to report the outcome of the case to these well-meaning "friends."

Given one's false sense of privacy on the internet, it is reasonable to assume that the Facebook format frequently lures a well-meaning juror into breaking the rules by leaking innocuous details about the case. But, the responses and comments will prompt inappropriate influence: "been to that store before," "those truck drivers are all crazy," "my aunt recovered completely from her broken collar bone," "that's the lawyer from TV!"—inappropriate external comments brought into the courtroom.

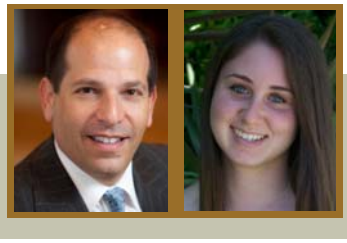
The court system is just beginning to grapple with the Facebook-effect. In *Juror Number One v. The Superior Court of Sacramento County* (May 31, 2012) 206 Cal.App.4th 854, the trial court learned that one of the trial jurors, fictitiously-named Juror Number One, had posted one or more items on his Facebook account concerning the trial while it was in progress, in violation of its admonition. Juror Number One admitted that during the trial he posted the number of weeks he was on jury duty, counting down the days, and that the phone record evidence he was listening to was boring. A realistic scenario repeats in our courts every day.

The legal issue in that case was whether the court had the authority to order Juror Number One to disclose the messages he posted to Facebook during the trial by requiring Juror Number One to execute a consent form pursuant to the Stored Communications Act (SCA) (18 U.S.C. §2701 et seq.) authorizing Facebook to release to the court for in camera review all items he posted during the trial. The reviewing court held that Juror Number One had no constitutional right to privacy under these circumstances; "Juror Number One has failed to demonstrate any expectation of privacy in his Facebook posts." (Id. at 858.)

Although that case presented an interesting issue regarding privacy, the underlying facts are far more troubling. Jurors are posting on Facebook. Further, it is unlikely that a trial court will ever find out or take any significant action.

Because social media cannot be realistically excluded from the jury system, lawyers must adopt strategies to understand how jurors are influenced by the Facebook-effect. Today's trial lawyer must not only understand a juror's background and inherent biases, a trial lawyer must reasonably assume that a typical Facebook-savvy juror will receive feedback from a sizable number of online friends. With this assumption, a trial lawyer can tailor voir dire by urging jurors to disregard outside comments and postings.

A trial lawyer must present evidence and argument with the eventual end-user in mind. How will the facts of my client's case be posted? What comments will be forthcoming? As with any technological advancement, a trial lawyer must adapt to these changes. Assuming that everything said, seen and argued in your case is being posted by jurors may even make us better lawyers and force us to streamline our cases. Or at the very least, accepting the role of social networking in a courtroom should make lawyers aware of how they present ourselves in a courtroom—no one wants to be the "dumb attorney with a mismatched tie" in a juror's inevitable Facebook status.



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TO TWEET OR NOT TO TWEET?

By Irma Mejia

The San Fernando Valley Bar Association is committed to engaging its members via social media, as well as offering online networking tools and social media workshops to help its members market themselves and their practice.

Connect with SFVBA on Facebook and Twitter!

TWITTER IS QUITE popular among attorneys throughout the country. Its popularity is most likely due to the ease with which it allows attorneys to connect with their peers; the speed at which the site provides breaking news; and the relatively few personal details required of users to set up accounts.

For members who are new to Twitter, it is not just a site frequented by teenagers. It is a valuable microblogging service which allows working professionals to publish content in short, concise messages of 140 characters or less. The character limit might initially seem severe but users quickly adapt and discover clever ways to publish only the most crucial information.

Twitter is a great tool for SFVBA attorney members to market their legal expertise and connect with other lawyers. It also keeps them informed of the latest developments and discussions relevant to their practice or social interests. Unlike Facebook, attorneys are not required to share too much detailed personal information. And unlike LinkedIn, it is an easy avenue for social interaction.

The site is very social in that users are able to follow or subscribe to other Twitter users and gather Followers of their own. Users can engage in public conversations with other users, share or retweet (RT) another user's message or keep a conversation private through a direct message. Users can also follow specific topics by searching for hashtagged (#) tweets, such as #London2012 and #ComicCon. For example, a user interested in reading what other people are saying about the U.S. Supreme Court's recent rulings or upcoming schedule can enter #SCOTUS into the Twitter's search field to yield the latest conversations.

The information on the site is constantly changing. News spreads like wildfire on the service. In fact, many recent news stories have appeared on Twitter before appearing on mainstream news outlets. For example, the death of singer Whitney Houston was posted on Twitter nearly half an hour before it appeared in regular news outlets.[1] The military raid on Osama Bin Laden's Pakistani compound was inadvertently live-tweeted by an IT consultant.[2]

Just as news spreads quickly on Twitter, it also dies quickly. A study by the link shortening-service Bitly indicates that the lifespan of a link shared via Twitter starts dropping dramatically after about 2.8 hours.[3] Links posted on Facebook last slightly longer, about 3.2 hours before they start to decline in visibility. This means Twitter is constantly updated. The information appearing on a user's home stream in the morning will be completely different by the afternoon.

With so much new information published constantly on the site, new users may feel overwhelmed. But there are ways to navigate the constant flow of tweets. The most helpful tool may be the list feature. This feature allows a user to group the accounts they follow into organized listings. This is very helpful in that an attorney can separate the tweets from legal news outlets from those of his or her child's summer camp. Lists add a significant sense of order to barrage of information on the site.

Newbies may also be confused by the use of shorthand and hashtags. The best way to understand these features of Twitter is to jump right in and start using them. New users can take cues from seasoned Twitter users. The character limit will certainly have a new user writing in clever shorthand in no time.

For members who are interested in getting started on Twitter, the San Fernando Valley Bar Association will be offering a free workshop in October. The workshop will provide valuable tips and insights on the ways Twitter can help attorneys in their practice. Members are encouraged to follow the San Fernando Valley Association for the latest legal news and event information. Follow the Bar at www.twitter.com/sfvba.

[1] "Twitter Breaks News of Whitney Houston Death 27 Minutes Before Press." http://mashable.com/2012/02/12/whitney-houston-twitter/. Published February 12, 2012. Viewed July 25, 2012.

[2] "One Twitter User Reports Live from Osama Bin Laden Raid." http://mashable.com/2011/05/02/live-tweet-bin-laden-raid/. Published May 2, 2011. Viewed July 25, 2012.

[3] "You just shared a link. How long will people pay attention?" http://blog.bitly.com/post/9887686919/you-just-shared-a-link-how-long-will-people-pay. Published September 6, 2011. Viewed July 25, 2012.

Irma Mejia is the Member Services Coordinator at the SFVBA. She also administers the Mandatory Fee Arbitration Program and manages the Bar's social media efforts. She can be reached at irma@sfvba.org.

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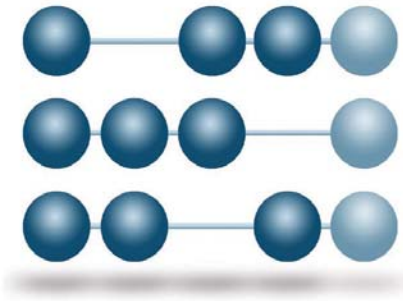

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