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OCTOBER 2008 • \$4

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VALLEY LAWYER

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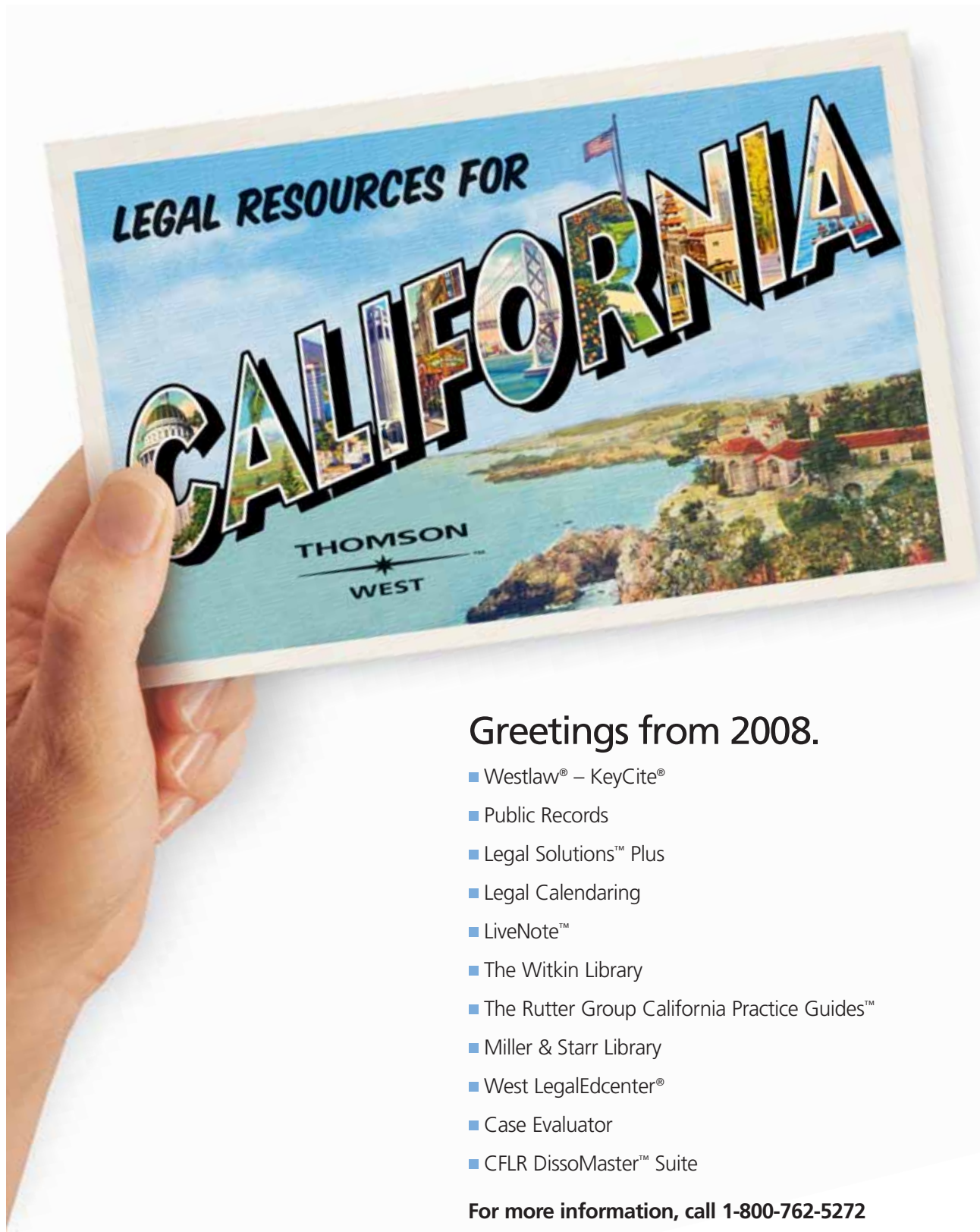
FEATURES

- 16 **State Trial Court Funding: Missing the Mark** BY JUDGE J. STEPHEN CZULEGER
- 20 **Sword and Shield: New Media's Legal Savior?** BY JOHN STEPHENS
PLUS: Earn MCLE Credit. MCLE Test No. 4 on page 23.
- 25 **SFVBA Board of Trustees Elected Five New Members Join Board** BY ANGELA M. HUTCHINSON

DEPARTMENTS

- 5 **President's Message**
California Courthouse Funding Matters
BY TAMILA JENSEN
- 6 **From the Editor**
A Tribute to Intellectual Property
BY ANGELA M. HUTCHINSON
- 9 **Public Service**
ARS Refresher Checklist
BY ROSIE SOTO
- 10 **Court News**
- 12 **Santa Clarita Valley Bar Association**
Today's Hero
BY TAMIKO HERRON
- 14 **Member Benefits**
- 14 **New Members**
- 21 **Above the Law**
Attorneys for Less Illustration
BY MARC R. JACOBS
- 26 **U.S. Trustee Profile**
Elizabeth Rojas
BY M. JONATHAN HAYES
- 27 **Valley Community Legal Foundation**
Looking Forward
BY STEPHEN T. HOLZER
- 28 **Classifieds**
- 30 **Event Calendar**
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California Courthouse Funding Matters



TAMILA JENSEN
SFVBA President

THE CALIFORNIA JUDICIAL Branch is the largest court system in the United States serving a population of over 36 million people. It includes more than 2,000 judicial officers who share about nine million cases a year in 451 court locations throughout the state. Since court unification and the plan for turnover of the court buildings to the State of California, one of the major issues facing the courts has been infrastructure. This includes the need for new courthouses, renovations of existing facilities, and expansion of facilities to accommodate the work of the court.

There is a five-year plan for providing the necessary infrastructure. The plan now includes about 175 projects at an estimated cost of \$9.8 billion. These plans have been grouped and prioritized by urgency. These 175 projects in the trial court capital outlay plan include 92 new construction projects, 40 renovations, and 43 expansions of existing or future courts in California.

In 2003, master plans were completed for each of the 58 counties. The first Judicial Branch Five-Year Infrastructure Plan was adopted by the Judicial Council in 2005 and is updated annually. The first trial court capital outlay projects were funded in 2006.

The matter is further complicated by the transfer of courthouse facilities from the counties to the State. The 2002 Trial Court Facilities Act (SB 1732) was enacted providing for the shift of responsibility for trial court facilities from county to state government under the direction of the Judicial Council. When courthouse facilities were evaluated, the state would not accept courthouses which were in serious disrepair or had other problems which might require an immediate need for capital expenditures. This has caused a hiccup in the transfer process.

The physical plant affects all of these issues. That is why funding for the projects has been a priority. The Governor's office generally supports the funding of judicial branch infrastructure.

However, the current budget crisis has thrown yet another monkey wrench into the attempts to move this needed work forward.

The transfer of courthouse problem is more acute than might generally be recognized, since of the courtrooms:

- 25% have no space for a jury, statewide;
- 75% are not ADA accessible;
- 41% require in-custody defendants to use public hallways; and
- 68% have inadequate security.

The recent adoption of SB 1407 (Perota), establishing a framework for the issuance of up to \$5 billion in lease revenue bonds to finance the construction of approximately 40 major capital court projects, is important. The amended bill is now awaiting the Governor's signature. Under the bond scheme of SB 1407, a new courthouse

for Los Angeles County in Long Beach is considered an immediate level one priority. Several court projects throughout Los Angeles are also on a priority list.

According to a recent article in the *Los Angeles Times*, SB 1407 provides a mechanism but not actual appropriation. Therefore, the funding fight is going to continue into the next legislative year.

This issue is going to continue to remain an important issue for our courts, for the practice of law in the State of California, and for the whole judicial branch of government, including the attorneys. The San Fernando Valley Bar Association has been supporting these efforts through participation of our members in the state-wide Bench Bar Coalition, local Bench-Bar Committee and through writing letters in support of legislation where appropriate. ▲

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From the Editor

For questions, comments or candid feedback regarding *Valley Lawyer*, please contact Angela at (818) 227-0490 ext. 109 or via email at Angela@sfbva.org.



ANGELA M.
HUTCHINSON
Editor

Welcome New Members!

For individuals who recently joined the SFVBA, we are excited to have you as a new reader. The last issue of *Valley Lawyer* focused on the Bar's Year in Review. We introduced our new Officers and expressed great thanks to the past leaders. This October issue focuses on court funding and Intellectual Property. Be sure to read our MCLE feature article, which is an informative overview of Intellectual Property Rights (IPR) as it relates to new media.

The legal framework for protecting intellectual property includes the Trademark, Copyright and Patent Laws. IPR refers to the property rights of one's ideas, concepts and products while IP refers to the actual creative work. For years, Intellectual Property has led to the economic progress in many countries. Often considered a powerful tool to

building a stronger economy, IPs have significantly contributed to liberal arts, sciences, business and technology.

From the light bulb, to the Mars Rover, to McDonald's, to Google, to Nike, to Microsoft, to the X-ray, to *Batman* – the world's greatest IPs showcase versatility and originality. Even with a growing intellectual property portfolio, our remarkable nation continues to produce genius creations.

On the contrary, there are many cases against intellectual property. Granting ownership of creative ideas or products to an individual or cooperation is not always productive. Breaking IP laws has almost become socially acceptable when dealing with digital media and Internet technology. Viable alternatives to intellectual property are currently in development.

As a writer, I have authored various literary works including articles,

screenplays, poems, and my first published children's picture book, *Charm Kids*. When I am acknowledged by the intended audiences of my work as the author, I am inspired to continue writing. I receive a sense of productivity from owning the intellectual property rights of my work.

Understanding the value of why the government should continue to allow creators to own the rights of their work, is a critical component to aligning oneself with our thriving Valley community. The future of Intellectual Property in this Information Age will be the subject of forthcoming controversies and the core of emerging creativity. 📌

Have an innovative month!

Angela M. Hutchinson

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MFA Program seeks attorneys who practice family law or criminal law, and attorneys bi-lingual in Spanish.

PUBLIC SERVICES (Rosie, ext. 104)

ARS seeks attorneys to perform seminars for the Bankruptcy Self-Help Clinic on Monday afternoons.

EVENTS (Linda, ext. 105)

Golf Tournament Committee still needs experienced golfers and individuals with an interest or background in marketing.

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ARS Refresher Checklist



ROSIE SOTO
Director of
Public Services

✓ **Renew Membership.** Membership is currently \$175 for renewing members who are also members of the SFVBA and \$325 for Non-Members. A \$25 fee applies to new applicants.

✓ **Join the Three Maximum Practice Areas Panels.** ARS Members are allowed to join a maximum of three (3) panels per applicant, but unlimited sub-panels. ARS has 18 panels.

✓ **Become Familiar with the ARS Subject Matter Panels.** The ARS maintains a variety of subject matter, specialty panels, and will establish sub-categories or other panels to effectively and efficiently serve client needs.

✓ **Provide Proof of Your Professional Liability Insurance Before the Date of Expiration.** Submission to the ARS with evidence of a policy of insurance is due on or before the date of expiration of the current policy.

✓ **Notify ARS if You are Fluent in a Foreign Language or Employ Staff that is Fluent in a Foreign Language.** ARS staff provides referrals to attorneys, while taking into consideration a person's spoken language.

✓ **Notify ARS if You Regularly Maintain Multiple Offices for the Private Practice of Law within the Greater San Fernando Valley, Where You are Able to Meet with ARS Clients.** The ARS does not charge extra to list a second office location. The average ARS client does not like to travel more than 10 miles for an in-office consultation. The ARS takes into consideration the geographical convenience of the meeting location when a client makes such request.

✓ **Provide the ARS with an Alternative Phone Number Where You Can Be Reached Immediately.**

The ARS highly markets itself as a service that will help clients find the right attorney, right now! Members who find themselves out of the office should list alternative phone numbers with the ARS to stay accessible.

✓ **Arrange Your Calendar so that You May Accommodate ARS Referral Appointments within 5 Business Days.** The ARS marketing campaign has put an emphasis on the fast service. The average ARS client is impressed with a same day appointment and expects to meet with an attorney within three to five days.

✓ **Refer a Client Back to the ARS if You Will Not Be Providing Any or All Legal Services Needed.** ARS member is required to notify the client and refer that person back to ARS, so that such services may be provided by an appropriate ARS panel member.

✓ **Stay Current with Case Status Reporting and Report Accurately.** It is each member's responsibility to assure proper and accurate reporting to the ARS of case status and payments due to the ARS. Failing to respond to a request for any case status report regarding the disposition of each referral status with any payment due within 30 days of the notice to report may result in automatic and immediate removal from rotation from all panels. Maintain your membership active in good standing by holding in trust the portion of all fees collected, which are due to the ARS, and submit payment due for each referral promptly (within 30 days).

Tip: Set an ARS Case Status Report recurrence reminder in your office calendar for the first of every month.

✓ **Become Acquainted with the Referral Service Consultants and Continue to Maintain a Professional Relationship.** Contact the Bar's Office at (818) 227-0490 to reach an Attorney Referral Service Consultant: Gayle Linde at ext. 107, Lucia Senda at ext. 106 and Aileen Jimenez at ext. 100.

✓ **Utilize the SFVBA Website to Obtain the ARS Rules and Regulations.** Go to www.sfvba.org. Members and their staff may obtain substantial information when there are questions about how the ARS works. ➤



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U.S. Bankruptcy Court Central District of California

Changes Re: Filing Requests for Special Notice Effective September 15, 2008

Effective September 15, 2008, the Court will no longer process Requests for Special Notice ("RSN") without a reasonable basis in fact and law. Pursuant to the Federal Rules of Bankruptcy Procedure ("FRBP") there is no reasonable basis in fact and law unless all of the following criteria are met:

1. The Requester is a creditor or equity security holder of the debtor;
2. A creditors' committee has been elected under 11 U.S.C. § 705 or a creditors or equity security holders' committee appointed under 11 U.S.C. § 1102 ("Committee");
3. The Court has limited notice to the Committee;
4. The RSN is made pursuant to FRBP 2002(i); and
5. The RSN does not include a request for pleadings and orders, including but not limited to proposed or entered orders and judgments, motions, oppositions, evidence, etc.

All filers of RSNs must certify in writing that they have met the above criteria, or the Requests will not be processed by the Court. The Court form *Request For Special Notice (09/08 revision)* may be used for this purpose. This form is available on the Court's website www.cacb.uscourts.gov under

Forms/Rules/General Orders>Court Forms.

Please note that pursuant to FRBP 2002(i), filers who meet the above criteria and file a *Request for Special Notice* are only entitled to service of notices specified in FRBP 2002(a)(2), (3) and (6), and pursuant to FRBP 9022 will not be served with entered orders or judgments unless the filer is a contesting party to the proceeding ruled upon in the order or judgment. Therefore, when preparing a Proof of Service for motions and pleadings and/or a Service List for entered orders or judgments, DO NOT list persons or entities who are not entitled to service. ⚡

THE LOS ANGELES SUPERIOR COURT IS RECRUITING TEMPORARY JUDGES

The Los Angeles Superior Court is currently scheduling Temporary Judges' Training. Rule 2.812, *et seq.*, of the California Rules of Court requires a Temporary Judge to be a member of the State Bar of California for at least 10 years and receive three hours live training in Bench Conduct and Demeanor **plus** three hours of training in Ethics and at least one area of substantive law (Small Claims, Traffic, Unlawful Detainer, Family Law and/or Civil, Non-Jury). The Temporary Judge Program is offering the following live training:

DATE: **October 30, 2008 – FAMILY LAW (3 hours)**

FEE: **\$50.00**

PLACE: **Van Nuys Court West, 14400 Erwin Street Mall, Dept. 104, Van Nuys, CA 91401**

TIME: **12:45 p.m. to 4:45 p.m. – Orientation and Training. (Registration starts at 11:30 a.m.)**

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The Los Angeles Superior Court is the sponsor of this program and has been approved as a provider of Minimum Continuing Legal Education credit by the State Bar of California. This program will qualify for Minimum Continuing Legal Education credit by the State Bar of California in the total amount of **3.0 hours of general credit** (of which **-0- hours** will apply to elimination of bias in the legal profession, legal ethics, prevention, detection, and treatment of substance abuse/mental illness that impairs professional competence), as appropriate to the content of the program. Records will be maintained with the Los Angeles Superior Court.

AS SPACE IS LIMITED AND MCLE CREDIT IS PROVIDED, PRE-PAID RESERVATIONS ARE REQUIRED AND MUST BE RECEIVED BY: OCTOBER 22, 2008. This is necessary to defer the cost of training, security services, etc. Please be advised that the pre-paid reservations are non-refundable and non-transferable.

Please make check payable to "Special Program Fund" and mail it to the Temporary Judge Program, 111 North Hill Street, Room 536, Los Angeles, CA 90012 or call (213) 974-6195 for further details.

SPECIAL NOTICE: The decision to appoint any attorney as a temporary judge is within the discretion of the Presiding Judge. An assignment to serve as a temporary judge does not constitute an employment relationship with the Court. For further information on requirements, disqualification, etc., see California Rules of Court, Rules 2.810 - 819, 10.740 -10.746; Code of Ethics, Canon 6D.

Today's Hero



**TAMIKO
HERRON, ESQ.**
SCVBA President

EVERYONE LOVES HEROES, BUT WHO ARE THEY? Are they the larger than life superheroes we see in the movies or on television; or the invincible athletes that excel in their sport, then market a brand name in their free time; or are they the unsung men and women who give sacrificially to the community everyday to make it a better and safer environment for people to live and play?

The term 'hero' comes from the Greek and described the offspring of a mortal and a deity. But today's definition is a little more down to earth. It describes a person who, in the face of danger and adversity, displays courage and self-sacrifice, a protector, defender and guardian of the people.

The Santa Clarita Valley Bar Association looks forward every year to the opportunity of honoring a few of the heroes of the Santa Clarita Valley. Our theme for this year's Law Day event is "Raising the Bar." Organizations and

agencies within the community were invited to nominate a local hero to be honored at the event.

A sampling of the many men and women who were nominated exemplify true heroism and will highlight their extraordinary accomplishments at Law Appreciation Day on October 3, 2008, from 12:00 p.m. to 1:30 p.m. at the Hyatt in Valencia.

Invited guests include: County Supervisor Michael Antonovich; District Attorney Steve Cooley; Los Angeles County Sheriff Lee Baca; Senator

George Runner; Assemblyman Cameron Smyth; Congressman Howard "Buck" McKeon; Mayor Bob Kellar; Los Angeles County Fire Department; California Highway Patrol and other dignitaries.

These honored guests - local heroes - work in harmony to make the fourth largest city in the Los Angeles County a "Home Sweet Home." 🏡

*"A **hero** is an ordinary individual who finds the **strength** to persevere and endure in spite of overwhelming obstacles."*

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State Trial Court Funding: Missing the Mark

By Presiding Judge J. Stephen Czuileger

FOR YEARS, CALIFORNIA trial court funding schemes have evolved in the name of creating reliable, adequate and discretionary funding. Sadly, these goals remain unachieved.

Budgeting is Governance

Budgeting is about more than money, it is about governance: the distribution of the means (i.e., money and the control over it) to achieve goals. The governance challenge in the California judicial branch is enormous – and not just because the California judicial branch is the largest in the world. The challenge also has to do with accommodating the vast variety of communities in our state, recognizing that different county courts have differing local needs.

Throughout the 1980s and 90s, government agencies of all kinds pursued a strategy of devolution, meaning that funding decisions about health and welfare, law enforcement, education and other programs moved from federal to state, then to county, and then to local levels. At the local level, each county provided funds for budgets developed by the courts in each county.

The Lockyer-Isenberg Trial Court Funding Act of 1997 eliminated county control over the trial court budgets. The Legislature now makes an appropriation

to the Judicial Council on behalf of the statewide judiciary, and the Judicial Council carves that appropriation into 58 allocations to the individual countywide trial courts.

The two justifications for state trial court funding remain laudable aspirations: 1) Judicial independence: assuming that state funding would offer less opportunity for other political subdivisions, e.g., counties, to put financial pressure on judges to make certain decisions; and 2) Equity: to even out imbalances in the relative level of financial support for courts across the 58 counties.

In practice, this system of appropriation to the Judicial Council, followed by the allocation of funds by the Judicial Council to the 58 county courts, has eroded the ability of the 58 county courts to set budget priorities locally. The loss of local flexibility in setting priorities is attributable to the following factors: program-based budgeting, in which the Judicial Council mandates statewide priorities; the lack of a stable, adequate and discretionary source of trial court funding; and the difficulty of balancing statewide and local interests.

Program-Based Budgeting

Judicial Council funding allocations for security illustrate the problems caused by

statewide program-based budgeting. For example, since 2002 — facing significant budget shortfalls — the Court reduced security costs by roughly \$14 million, which freed up resources for other programs and minimized the need to downsize court operations. While these actions eventually forced closure of four courthouses, customer safety was not compromised. The point here is that by devising local solutions, the Court was able to spread the pain of the budget shortfall by finding efficiencies in security needs and applying the savings where more urgent budget shortfalls threatened local operations.

Recognizing the wisdom of this strategy, the Judicial Council carved out security funding from the branch budget and undertook its own cost containment program. But the Judicial Council's program-based solution for statewide application led to shortfalls in funding for security. This happened because the Judicial Council's program-based allocations for security assumed that sheriff personnel assigned to the courts would fall in the middle of the salary seniority scale, while in fact most deputies assigned to court services have more experience and earn higher salaries. That is why, as of this writing, the Court faces a potential security funding shortfall for fiscal year 2008-09 of \$6 million.

The Legislature's decision to exclude retiree health insurance from the funding formula increased a security shortfall to approximately \$10 million. To further illustrate the problem of statewide programming, consider the example of funding for court-appointed dependency counsel. For years, locally controlled funding was sufficient to support a program in Los Angeles that was widely recognized as providing the best representation in the nation.

Within two years of the move to a statewide financing program, however, funding for court appointed dependency counsel statewide is over \$13 million in the red (of a budget of about \$99.7 million).

In other areas (i.e., jury fees and interpreter programs), locally administered program support traditionally exceeded our needs here in Los Angeles. These millions of dollars of annual savings were available to Court to support under-funded local programs. Since the move to program-based budgeting in these areas, however, these savings have been redirected by the Judicial Council to statewide, rather than local, priorities.

The Search For a Stable Source of Trial Court Funding

If judicial independence rests, in part, on administrative and budgetary discretion, then the branch as a whole, along with the 58 trial courts, needs a stable and adequate source of funding. It has proven an elusive goal.

Initially, the Judicial Council's Administrative Office of the Courts lobbied the Legislature and the Department of Finance for a yearly increment equal to the State Appropriations Limit, or SAL – an index tied to several measures of statewide growth. In a perfect world, the Judicial Council's priorities and those of the 58 trial court budgets would each be adequately supported by SAL. Unfortunately, SAL is often insufficient to satisfy both sets of priorities.

Over the past three years, SAL has averaged a bit over five percent, but the portion allocated to the trial courts has been closer to 3.5 %. The rest, 1.5%, has gone to Judicial Council priorities and is unavailable for equitable statewide distribution. When the Judicial Council's priorities overlap with those of the 58 trial courts, there is no problem. But, in a state as diverse as ours, those areas of overlap are necessarily limited. It is inevitable that the trial courts of one or

more counties, including the Court, will be disappointed with its SAL allocation from time to time.

Worse, the Legislature and governor view SAL as not only sufficient for sustainability but also for growth in trial court programs. They have denied requests for new funding (e.g., for self-help and security), expecting instead that the courts will rely on SAL for all their needs. In the end, the entire SAL experiment is at risk.

For the new fiscal year, the Legislature has proposed to rescind SAL, replacing it with the Consumer Price Index, or CPI, which recognizes only about half the required growth in court budgets that SAL accommodated.

Statewide Versus Local Priorities

The greatest impact of trial court funding, of course, is the most obvious: the budgetary discretion, and thus the governance, of the trial courts is vested, by legislation, in the Judicial Council.

But the AOC does not have the sort of comprehensive, court-by-court, program-by-program budgeting apparatus required to make a budget allocation tailored to the local needs of 58 widely diverse courts. Nor does it possess the experience and knowledge possessed by each trial court.

Thus, the AOC imposes a standardized budget strategy, where the same priorities are encouraged from

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Imperial to Los Angeles and Alameda to Amador. No one court, it seems, conforms to the assumptions in the mandatory cookie-cutter budget.

There seems to be a move away from local flexibility in setting budget priorities. Yet, it is wishful thinking to long for the “good ol’ days” when other Court had the ear of county budget-makers with whom we shared many of the same challenges and a common set of constituents. Now the judicial branch is a tiny voice in a cacophonous state budget process, with our priorities and needs often competing against those of the body that decides the allocations. New solutions are required.

Moving Forward


Much of this story reflects the normal problems of governing the largest judicial branch in the world. Thus, judges and staff continue to work closely with AOC staff, the Judicial Council, the Legislature and the governor's office to craft a workable system. While recognizing the limitations of the current system, new ways are being carved out to achieve local flexibility. A wide range of partnerships has been created with governmental agencies and community-based organizations to deliver high-quality services that are not affordable to be delivered.

Court staff has adopted a dizzying array of administrative innovations, from automated self-service traffic payments, to re-engineering back office procedures. Statutory authority is being used to self-finance the costs of an online services package that greatly benefits customers.

Finally, current leadership now participates directly in the state budget process, talking with legislators and executive branch staff about the needs of the trial courts. It is believed that the judicial branch will be better able to speak with one voice once the voices of the 58 trial courts are heard in Sacramento, including the state's largest trial court. This is a commitment.

Whatever success the staff and the rest of the judicial branch partners will have with these strategies, the new reality of state trial court funding is, for the foreseeable future, one of modest resources.

A strong judicial branch is built upon strong trial courts. The Legislature's insistence upon local flexibility in trial court funding reflects this fact. Strength is rooted in responsiveness to the needs of local stakeholders. The state trial court funding has been accepted as budget reality, but not content to accept its limitations. New ways are being invented to make this reality a positive one for the Court and the people it serves.

“I would like to thank you for your support of these efforts and for your commitment to justice and to the excellence of our Court. I have no doubt that, whatever this year's budget brings, the public will be proud of how their Court met the challenge. In the face of that challenge, we remain the finest trial court in the country.” 

This article was reprinted with permission from the summer 2008 Special Edition of Gavel to Gavel, the Los Angeles Superior Court Judicial Magazine.

At press time, the state budget was passed by the legislature and Governor Arnold Schwarzenegger was threatening to veto the spending bill.



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Sword and Shield: New Media's Legal Savior?

Technology May Temper User-Generated Liability

By John Stephens

SOME OF THE MOST interesting and high-profile entertainment cases are currently pending: Universal Music Group (UMG), the world's largest music company, has taken on social network powerhouse MySpace for copyright infringement of thousands of songs and videos (*UMG Recordings v. MySpace Inc.*, 06cv07361). UMG also is suing video sharing sites Grouper Networks Inc. and Bolt Inc. (*UMG Recordings v. Grouper Networks*, 06cv06561; *UMG Recordings v. Bolt Inc.*, 06cv06577). Also, videographer Robert Tur is suing YouTube for allegedly infringing upon the copyrights of his Los Angeles News Service (*Tur v. YouTube Inc.*, 06cv4436).

These cases raise new issues regarding the duty of copyright holders in the digital media world. Who has the obligation to enforce the protection of copyrighted materials, copyright holders or website owners? Should a copyright owner have to request that a site take down offending materials? Or should site owners have a duty to monitor?

Ironically, the answers may lie in technology itself, which, despite being the cause of many emerging legal issues, may provide Internet-based media companies a way to minimize liability.

Mixed, Limited Precedent

By now, most media lawyers are familiar

with the safe harbor provisions of the Digital Millennium Copyright Act (DMCA; 17 U.S.C. § 512). The problem with the DMCA is that it was written before peer-to-peer technology emerged. Thus, despite the litigation position being taken media-sharing websites, the law does not clearly address the myriad of issues being raised.

In fact, there are few cases addressing the application of the safe harbor provisions. These cases include *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004), in which the court found that AOL had not properly complied with the DMCA because a notification email address was not working. The case upheld the district court's dismissal of AOL's vicarious copyright infringement liability, but reversed on the contributory copyright infringement claim.

Also, in *Perfect 10 v. CCBill*, 340 F. Supp. 2d 1077 (C.D. Cal. 2004), the district court granted a defendant's motion for summary judgment and found that it was entitled to the safe harbor provision for copyright infringement and the alleged RICO violations, but denied summary judgment on claims for wrongful use of a registered mark and for violation of rights of publicity because these were rights excluded from immunity. This precedent is questionable, because the court appears to confuse the requirement to act expeditiously in

response to a §512(c)(3) notice with the requirement to terminate repeat infringers under §512(i).

And *Perfect 10, Inc. v. Cybernet Ventures*, 213 F. Supp. 2d 1146 (C.D. 2002), in which the court found a strong likelihood that the defendant could not establish that it had "reasonably implemented" a policy directed at terminating repeat infringers, and that there was "little likelihood that it can avail itself of section 512's safe harbors."

Statutory Defenses

Given these limited and conflicting precedents, the DMCA language is key. It states that, to avoid liability, an Internet service provider must not have the "requisite level of knowledge" of the infringing activity. Also, the service must not receive a financial benefit "directly attributable" to the infringing activity.

It is easy to argue that user-generated media websites have "knowledge" of the infringing activities of users because each site collects and stores content on a central server and reformats and distributes it for widespread use. Yet this argument is tenuous at best. By design, these websites store material at the direction of users, and the reformatting and distribution occurs without knowledge of the subject matter. Without actively monitoring user posts, these websites act merely as conduit services.

It is true that sites derive financial benefits from postings, including infringing materials. However, the DMCA looks to whether there is a "direct" financial benefit derived from the infringing post. Many websites rely on banner advertising, which is not directed at any particular music or video posting by a user. However, these sites often have "top picks" that hold out certain postings. This could give rise to an argument that certain clips are "directly" supporting the banner ads. As a consequence, websites should consider doing away with this system.

Notice and Takedown

The strongest DMCA defense is having a well-articulated policy for "notice and takedown" of alleged infringing posts. However, from a practical standpoint, this is cumbersome for both copyright holders and websites. This is YouTube's notice and takedown policy:

To file a copyright infringement notification with us, you will need to send a written communication that includes substantially the following (please consult your legal counsel or see Section 512(c)(3) of the Copyright Act to confirm these requirements):

- i. A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- ii. Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
- iii. Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material. Providing URLs in the body of an email is the best way to help us locate content quickly.
- iv. Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
- v. A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
- vi. A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

This provision requires an investment of time and money to provide notice to effectuate a takedown. It is foreseeable that courts may one day balk at the cumbersome nature of these policies. Accordingly, this may not be the strong safe harbor that it appears to be.

CDA: An Analogous Defense?

A recent decision by the California Supreme Court, *Barrett v.*

ABOVE THE LAW, By Marc Jacobs



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Rosenthal, S122953 (Cal. Supreme Ct. Nov. 20, 2006), may provide additional defense for the sites. The court invoked the federal statutory immunity created by Section 230 of the Communications Decency Act (CDA) to dismiss a defamation claim based on the publication of an Internet posting. The court also reinforced the leading case on Section 230 immunity, *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), in which the Fourth Circuit held that the plain language of Section 230 “creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”

User-based website defendants may look to *Barrett* and *Zeran* for an analogous argument. The problem with Section 230 is that the immunity is aimed at controlling online indecency. Accordingly, it cannot be used as a basis for avoiding liability for copyright infringement.

However, the CDA line of cases can be used to highlight the nature of websites as mere conduits. Further, one can glean from the analysis that courts are not inclined to conclude that the user-based websites are actively involved in the alleged infringement of intellectual property rights by virtue of merely storing and reformatting user postings.

Grokster Influence

Recently, YouTube unveiled a system for identifying pirated videos loaded onto its website. Despite the fact that YouTube's new software is technically flawed and politically controversial, it will likely satisfy the requirements set forth in *MGM Studios Inc. v. Grokster*, 545 U.S. 913 (2005), and result in a new standard for website liability that shifts the burden of protecting a copyright to the copyright holder.

YouTube says it is utilizing filtering software to identify pirated videos. YouTube requires that the copyright holder upload the full work into a designated database. This generates identification files against which future uploaded files can be compared. If the software identifies a “match,” then the newly uploaded video is subject to whatever action the rights holder has decided should be applied to it.

Technical Problems and Fair Use

The new software apparently has some issues. First, the definition of a “match” is uncertain. Also, the potential exists for numerous false positives. The software will likely be unable to recognize a fair use of copyrighted videos that are commentary or criticism. This could have a chilling effect on the free flow of information.

If the video is blocked, the uploader will receive a notice. The uploader can then contest the claim online. Once YouTube receives the user contest, it will put the video back on the site. If the copyright holder still wants the video removed, it would have to send a takedown notice, as required by the DMCA. The user can then send a counter-notice, whereupon the video would be reinstated.

The new system places the burden on copyright owners to find what they believe is copyright infringement and to allow them to follow the DMCA's procedures. The new system also does more than the law requires. The new software, however, creates a new dynamic in the industry. The DMCA does not require YouTube to have filtering software.

Dangerous Precedent - The Grokster Factor

Viacom's complaint is the most likely cause of YouTube's new filtering software. *Grokster* involved several entertainment titans filing a copyright infringement suit against distributors of peer-to-peer file sharing networking software. The U.S. Supreme Court held that under a theory of inducement copyright liability, a distributor who induces copyright infringement is liable for the acts of third parties. This includes anyone who distributes a device – such as software technology – with capabilities that can be used to infringe a copyright. The Court further held that additional culpability can be shown by the defendant failing to develop filtering tools to diminish infringement.

YouTube Setting the Standard

The *Grokster* Court's ruling is in line with what YouTube is implementing with its new anti-piracy software and the creation of the copyright holders' contribution database. The reality is that YouTube's

new software and the *Grokster* ruling may have the practical effect of changing filtering from “one” factor as provided by the Supreme Court's *Grokster* decision to “the only” factor a court should consider.

Grokster: A Way Out?

It seems that the strongest defense for user-based websites may come from *Grokster*. The Supreme Court's new standard for contributory infringement means a website host can be liable for the acts of its end users if that host “distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement.”

Ultimately, technology may provide the most solid defense. MySpace is partnering with Gracenote to implement new “fingerprinting” technology that allows copyright holders to digitally flag any user-posted video containing content that is allegedly unauthorized. YouTube also recently announced it is working on similar technology.

Taking a cue from the *Grokster* criteria, filtering software could effectively shield user-generated media sites from liability. Technology can thus be both a sword and a shield when it comes to copyright infringement.

Immensely popular sites such as MySpace and YouTube still must determine which of the millions of clips on their sites are infringing. But given the uncertainty of the law, the DMCA and *Grokster*, it appears this daunting task may ultimately be the only option available to ensure the continued growth of user-based media sites. 📌

John Stephens is a partner in the Los Angeles Office of Sedgwick Detert Moran & Arnold specializing in media and entertainment litigation. His clients

include entertainment and technology companies, online content and software providers, television and radio stations, and other media entities. He is Co-Chair of the SFVBA's Intellectual Property, Entertainment & Internet Law Section. He can be contacted at john.stephens@sdma.com.



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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. To avail oneself of the safe harbor provisions of the DMCA – one can have knowledge of an infringing activity.
True
False
2. Users can apply for immunity to YouTube for fair use of copyrighted materials.
True
False
3. YouTube is being sued by Viacom for copyright infringement.
True
False
4. The new YouTube filtering software prevents infringement by identifying the “fingerprint” of a particular copyrighted video.
True
False
5. Safe Harbor provisions of the DMCA apply to users of internet websites who post copyrighted material.
True
False
6. In the case of *Ellison v. Robertson*, the court found AOL complied with the DMCA and was therefore not liable.
True
False
7. In *Perfect 10 v. CC Bill*, the court found CC Bill had not complied with the DMCA Safe Harbor provisions but dismissed the case on other grounds.
True
False
8. YouTube’s notice and take down policy requires only legal counsel contact YouTube regarding any alleged copyright violation.
True
False
9. The DMCA allows three opportunities for a takedown once notice is provided.
True
False
10. Notice and take down provisions per the DMCA require information that enables the service provider to contact the complaining party such as an address, telephone number, an email if available.
True
False
11. The *Grokster* case involved copyright infringement for peer to peer file sharing software.
True
False
12. *Grokster* has set a new standard for contributing infringement.
True
False
13. The Communications Decency Act (“CDA”) provides a statutory immunity against defamation claims posted on the internet.
True
False
14. The alleged owner of the copyrighted material under YouTube’s new software gets to elect whether to block or exploit the material.
True
False
15. The CDA is exclusively used to provide immunity for online indecency.
True
False
16. User-based websites cannot avail themselves of the safe harbor provisions.
True
False
17. YouTube’s filtering software generates spontaneous memory patterns to identify infringing material.
True
False
18. If a video is blocked by YouTube’s filtering system, the poster will get notice.
True
False
19. The new YouTube software places the burden on the copyright owners to enforce copyrights.
True
False
20. *Grokster* is a U.S. Supreme Court decision.
True
False

MCLE Answer Sheet No. 4

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FRAUD ANALYSIS

SFVBA Board of Trustees Elected

Five New Members Join Board

By Angela M. Hutchinson

ON WEDNESDAY, SEPTEMBER 10, 2008, the San Fernando Valley Bar Association elected its 2008-2009 Board of Trustees. Incumbents Matt Crowley, Adam Grant and Steve Mehta were re-elected to serve 2-year terms; sitting trustee Chancela Al-Mansour was appointed by President Tamila Jensen to fill the last year of newly-elected Treasurer Alan Sedley's trustee term.

New trustees Natasha Dawood, Carmen McDonald-Goldberg and Lisa Miller were elected to serve 2-year terms; Brent Finch and John Stephens were appointed to 1-year terms.

Natasha Dawood



Dawood is a business litigator for the downtown law firm Parker, Milliken, Clark, O' Hara & Samuelian. As an active member of the SFVBA,

Dawood was appointed to serve on the 2005-2006 Board of Trustees and has regularly attended and supported SFVBA events, including the Law Day galas, Judges' Nights, installation dinners and various volunteer events.

Brent Finch



Finch is a business and real estate litigator with Stone | Rosenblatt | Cha in Woodland Hills. Finch looks forward to building on his recent leadership role in the Business Law,

Real Property & Bankruptcy Law Section; in June, Finch organized and moderated a presentation on residential real estate agreements.

One of his principle goals is to foster the participation and new membership of attorneys and professionals who live in the Valley, but who work in Century City or Los Angeles.

Carmen McDonald-Goldberg



McDonald-Goldberg has been a member of the SFVBA since joining Neighborhood Legal Services in 2004. She provides representation to

survivors of domestic violence. McDonald-Goldberg conducts the TRO and family law portion of the requisite domestic violence trainings at various domestic violence shelters to satisfy California's regulation state certified trainings. McDonald-Goldberg is an active member of the Latina Lawyers Bar Association, Women Lawyers Association and Los Angeles County Bar Association (LACBA).

Lisa Miller




Miller has held several volunteer positions with the SFVBA; she chaired the Bar's Small Firm & Sole Practitioner Section and edited the *Bar Notes* publication. Miller

also serves on the LACBA Professional Responsibility and Ethics Committee. Miller has a passion toward helping the Bar focus on growth and financial savings. By devoting resources to expand member benefits, Miller believes the Bar can demonstrate fiscal responsibility. Also, Miller is committed to improving the legal profession through education.

John Stephens



Stephens is a partner in Sedgwick, Detert, Moran and Arnold's Los Angeles office. His practice is focused on media and entertainment litigation, intellectual property licensing and transactions, and specialty insurance coverage and litigation. Stephens' leadership includes serving as the Chair of the ABA Tort Trial & Insurance Practice (TIP) Sections' Intellectual Property Committee and Chair Elect of the ABA TIPS Diversity Law Committee. He is Co-chair of the SFVBA Intellectual Property Section. Stephens is also involved with the Constitutional Rights Foundation, Lawyers for Human Rights, Gay & Lesbian Alliance Against Defamation (GLAAD) and Service Members Legal Defense Network (SLDN). 

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U.S. Trustee Profile

Elizabeth Rojas
Chapter 13 Trustee

By M. Jonathan Hayes

ELIZABETH ROJAS HAS BEEN the full-time Standing Chapter 13 Trustee for all chapter 13 bankruptcy cases filed in the San Fernando Valley and Santa Barbara since October 1, 1999.

A Loyola Marymount University graduate, Rojas was working for the

Metropolitan Water District when she was recommended for the Chapter 13 job by one of the district's outside attorneys. She started the office from scratch.

"I didn't even know how to spell bankruptcy," she says. "But they liked my background and experience in

management, budgeting and coming in building a startup program."


Currently, Rojas has nine full-time employees. She has an estimated 1,800 active cases and climbing. Her office disburses between \$1 million and \$2 million each month to creditors; 1,500 to 3,000 checks – every month. Some distributions are made in bulk, for example payments to the IRS.

She is audited every year by an outside firm which makes sure her office has sufficient internal control, checks and balances in her systems and procedures, given the amount of funds which clear her office every month. The U.S. Trustee's Office has significant requirements and procedures as well.

"My biggest priority is the custody of the assets," says Rojas. In fact, she has a full-time professional systems person on her staff who constantly checks the office computer system firewall, the internal control and the procedures. Rojas says, "New laws, new rules and new technology bring new systems and procedures and new kinks to work out. But it's fun."

When asked about what drives her crazy about her job, Rojas responds, "Obviously it is files with incomplete paperwork. I can't say if it's the attorneys or their clients, but most of the files have something missing and that can be frustrating."

"With the new amendments, I am getting a little bit overwhelmed. There are many more forms and considerably more detail required, but we have to work through it."

Attorneys can go to Rojas' website at www.ch13wla.com. All the forms are there, plus instructions, news and answers to questions. 

M. Jonathan Hayes is a 1976 graduate of Loyola Law School in Los Angeles. His practice is primarily in the area of bankruptcy. His email is jhayes@polarisnet.net.



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Valley Community Legal Foundation

Looking Forward



STEPHEN T. HOLZER
VCLF President

THE PAST AND INCOMING BOARDS OF DIRECTORS of the Foundation met at an August 22 dinner meeting held at the Woodland Hills Country Club, arranged by outgoing President Marcia Kraft. Besides giving the “new” and “old” Board Members the chance to get to know one another, the meeting also gave the Board an opportunity to review the past year’s successes and to discuss the challenges facing the Foundation in the new fiscal year.

In my column for the September issue of *Valley Lawyer* I reviewed the Foundation’s considerable successes during the past year. This includes the \$50,000 raised at the Law Day Gala for the Foundation’s charitable mission. Also, the Foundation is on the verge of opening the Children’s Waiting Room at the Van Nuys courthouse.

For this column, it is worth discussing the challenges that are facing the Foundation during the new fiscal year. First and foremost is the challenge of organizing another successful Gala. It is perhaps a Herculean task to exceed the success of this past year’s Gala – but it is a desire to increase charitable giving, so the Foundation is up for the challenge. The Board is off to a promising start since CBS Studios have agreed to let the Foundation use their venue for the event (this time at a different stage lot than the Seinfeld lot used for the past event.)

Second, there is the challenge of moving the San Fernando Courthouse Children’s Waiting Room project forward. Parents who must bring their children to court in Van Nuys will in the immediate future have a safe place for the kids to wait while the parents conduct their legal business. In San Fernando, the youngsters currently wait in the hallways. As a community, it is necessary to do better than this.

Third, SFVBA President Tamila Jensen established ways in which the Bar and the Foundation can work more closely together. The Foundation is, after all, the Valley Community Legal Foundation of the *San Fernando Valley Bar Association*. Both the Bar and the Foundation have as part of their missions, to promote increased respect and appreciation for the law; and the two organizations should be able in appropriate circumstances to join forces to promote this common part of such missions.

Fourth, like many volunteer organizations, the Foundation has allowed its Bylaws somewhat to gather dust. It is time for the Foundation Board to consider revising and modernizing those governing rules.

The Foundation’s challenges this year, as in years past, will be made easier by the tremendous support received from the Bar office. Both Liz Post, the Bar’s Executive Director, and Linda Temkin, the Bar’s Events Director, routinely take on tasks above and beyond the call of duty in support of the Foundation. Although the Foundation does routinely say “thank you,” adding another such note of appreciation in this column is more than warranted. 🐾

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Probate & Estate Planning Section

Utilizing Limited Liability Companies in Estate Planning and Asset Protection

**OCTOBER 14
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
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Attorney Robert Klueger will address how to best utilize LLCs in asset protection. Attend this seminar to learn how to use foreign and domestic LLCs to maximize the effectiveness of your client's complete estate plan.

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Santa Clarita Valley Bar Association

Calendaring as a Risk Management Strategy

**OCTOBER 16
12:00 NOON
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Small Firm & Sole Practitioner Section

Foreclosures: Are There Any Options?

**OCTOBER 17
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS**

With the real estate market wracked by crisis, it's more important than ever to know what options exist for clients in foreclosure. Michael S. Abrams, a real estate and corporate practitioner for over 25 years, and Senior Counsel with De Castro, West, Chodorow, Glickfeld & Nass, brings a seasoned perspective to this fast-growing field of law. He'll discuss rights and remedies for commercial and residential landlords as well as tenants, including protective lease provisions, pre-default planning and how bankruptcy can effect how landlords exercise their rights.

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Business Law, Real Property & Bankruptcy Section

Recent Decisions from the Woodland Hills Bankruptcy Court

**OCTOBER 22
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS**

Bankruptcy Bench officers and a distinguished panel of attorneys will discuss the latest cases of relevance.

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Intellectual Property, Entertainment & Internet Law Section

**OCTOBER 24
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS**

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Family Law Section

Electronic Evidence: How to Get It and How to Use It

**OCTOBER 27
5:30 P.M.
MONTEREY AT ENCINO RESTAURANT
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Attorneys Peter M. Walzer (American Academy of Matrimonial Lawyer Fellow), Christopher C. Melcher (State Bar Family Law Section Executive Committee member) and Judge Wendy Kohn (a former software engineer) provide step-by-step guidance on obtaining electronic evidence and using it at trial. The discussion will include Preservation Orders (requiring a party to maintain their computers and data), Protective Orders (dealing with confidential or privileged data) and Inspection Orders (compelling a party to submit the data for inspection by a forensic).

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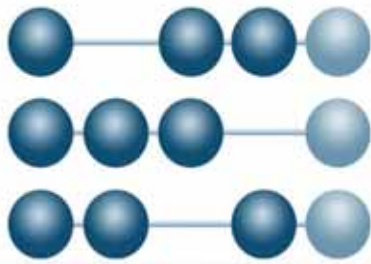
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