VALLEY LAWYER

MARCH 2018 • $5

A Publication of the San Fernando Valley Bar Association

Electronic Evidence and Social Media

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Fastcase: A Cosmic Approach to Legal Research

Free for SFVBA Members

Leadership Team Stems the Tide at Van Nuys Courthouse

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VALLEY LAWYER
A Publication of the San Fernando Valley Bar Association

FEATURES

DEPARTMENTS

VALLEY LAWYER

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Would You If You Could

ALAN E. KASSAN
SFVBA President

akassan@kantorlaw.net

I'VE BEEN ASKED THE QUESTION—"Why should I join a bar association?"—for almost as long as I've been a lawyer.

The answer to that actually comes in the form of several questions. Take a minute and ask yourself, "Where can I…

- Meet and network regularly with fellow lawyers, judges and other business leaders in my community?
- Gain free access to state-of-the-art, online legal research?
- Join a dynamic attorney referral service that has led to millions in fees for local lawyers?
- Publish an article in an award-winning legal magazine?
- Connect to my community and "give back" by volunteering time to local charitable causes?
- Get free continuing education credit and receive discounts on a myriad of professional products and services?

As lawyers, we are driven to learn, problem solve, serve, do justice, and succeed. The more tools and networking opportunities we have, the more likely we are to accomplish our objectives. That's obvious.

Our San Fernando Valley Bar Association provides members not only those indispensable tools and opportunities, but much more at the incredibly low cost of only a few hundred dollars annually. A remarkable return for so small an investment.

Yet there are several thousand lawyers in our Valley who are missing out on what our Bar has to offer. Aside from all of the benefits identified above, it's hard to imagine any better bang-for-the-buck than SFVBA membership when it comes to business development and professional growth.

Membership is the life-blood of every organization, and ours is no different. Increased membership brings more diversity, new perspectives, and new ideas, all of which can fuel bigger and better programs and benefits. In turn, those things bring greater value and opportunity for all.

So we will continue to reach out to all those who should be members to make them aware of all the terrific things our Association offers. For example, this month, we've expanded the circulation of *Valley Lawyer* magazine to include not only our current members, but every active attorney in the Valley as well.

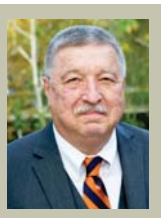
If you aren't a member, I invite you to join. If you still have questions about the Bar and how it can help you grow professionally and personally, feel free to email me at akassan@kantorlaw.net.

If you are a member and know any non-members, encourage them to join and ask if they've had a chance to check out this month's *Valley Lawyer* or visit our website at sfvba.org. If they give membership a try and use your name as a referral, you'll both get a nice discount on dues.

Call the Bar offices and speak with Executive Director Liz Post at 818-227-0494 for details.

Eureka!

MICHAEL D. WHITE
SFVBA Editor



michael@sfvba.org

I HAVE TO ADMIT HAVING A certain soft spot for examples of what psychologists call the eureka moment—a moment of sudden realization, inspiration, insight, recognition, or comprehension.

Isaac Newton and the proverbial apple falling on his head. Ben Franklin flying his key-bearing kite in an electrical storm. Alexander Graham Bell's "Watson, Come here. I need you!" exclamation that ushered in the age of audio telecommunications. The epiphany of realizing, at least in my own view, that I was better reshuffling words than working out mind-bending equations dealing with wave resistance and hull form and that I'd hopefully make a better writer than a naval architect—genuine instances of clarity and discovery, some uplifting and others melancholy, which have changed the course of human history.

Well, the Newton, Bell and Franklin moments of clarity, definitely; mine, well…perhaps not so much, if at all.

We all have them in varying degrees of criticality—the decision to fill a nagging void by picking up the brush and palette and attacking a canvas with Churchillian vigor; acting on that life-long desire to road-trip what remains of the legendary Route 66; hiking the Appalachian Trail; visiting the Hermitage in St. Petersburg; cleaning out your—or, please, my—garage. Whatever.

The moment hits, the light bulb flicks on, and we realize that the door to a new world has opened a crack and that it's now or never.

That's what most interested me during my conversation with attorney Ed Walters, co-founder of Fastcase—the "aha" moment when he realized that he was burning up time and his client's money searching for something that didn't exist—an online legal research tool that could be easily accessed by users and, at the same time, not break the bank and send the client into foreclosure.

> "Fastcase … has become the biggest, online legal research alternative to Westlaw and Lexis."

Frustrated by his failure to find such a research platform, Walters reached out to another lawyer at the Washington, D.C. law firm they were working at and the rest, as they say, is history.

"I have half a mind to go start the thing I was looking for all night," he remembers telling his friend. "He said, 'If you're serious…let's take a look at it.' And, so we did."

Over the following six months, the pair spent nights and weekends developing the prototype of what was to become Fastcase, which has become the biggest, online legal research alternative to Westlaw and Lexis.

"I have half a mind…" Hear the light switch flick? I did.

CALENDAR

MARCH 2018

SUN MON TUE WED THU FRI SAT

WOMEN'S HISTORY MONTH

1
Membership & Marketing Committee
6:00 PM
SFVBA OFFICES

2 **3**

4

5


5:30 PM
CHABLIS RESTAURANT TARZANA

6 **7** **8**

9


Fastcase Friday: Introduction to Fastcase 7
1:00 PM
WEBINAR

10

11 **12**

13
Probate & Estate Planning Section
Updates and Important Cases in Conservatorship Law
12:00 NOON
MONTEREY AT ENCINO RESTAURANT

Join John E. Rogers and Eugene Belous for a 60 minute review of important statutory and case law developments in California conservatorship law and related fields. (1 MCLE Hour)

Board of Trustees
6:00 PM
SFVBA OFFICES

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What You Need to Know about Tax Reform
Sponsored by
Morgan Stanley
6:00 PM
SFVBA OFFICES
Financial Advisor Rances Sainz of Morgan Stanley, Bryan Pacana of Alliance Bernstein, and CPA Marty Leffler of Charles, Blank & Karp LLP will break down how the Tax Cuts and Jobs Act of 2017 will affect you, your business and your financial plan. Free dinner seminar. (1 MCLE Hour)

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Taxation Law Section
International Tax Law Enforcement
12:00 NOON
SFVBA OFFICES

Certified tax law specialist Michel Stein will provide an overview of the current international tax law enforcement and available penalty relief programs. (1 MCLE Hour)

ARS Committee
6:00 PM
SFVBA OFFICES

21
Workers' Compensation Section
Internal Medicine
12:00 NOON
MONTEREY AT ENCINO RESTAURANT

Internist Dr. Mark Hyman will bring the Section up to speed on the latest developments in internal medicine as it relates to workers' compensation cases. (1 MCLE Hour)

22 **23** **24**

29
DINNER AT MY PLACE
A member benefit to help members get to know each other in an intimate setting and spur referrals.
6:30 PM • Studio City

$25 to attend

25 **26**

27
Editorial Committee
12:00 NOON
SFVBA OFFICES

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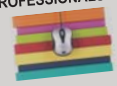
CALENDAR

SUN	MON	TUE	WED	THU	FRI	SAT
1 	**2** VBN VALLEY BAR NETWORK **5:30 PM CHABLIS RESTAURANT TARZANA**	3	4	**5** Membership & Marketing Committee **6:00 PM SFVBA OFFICES**	**6** Bankruptcy Law Section Weight of the Evidence: Bankruptcy Litigation on a Shoestring Budge **12:00 NOON SFVBA OFFICES** U.S. Bankruptcy Judge Barry Russell and attorney J. Scott Bovitz will discuss how a lawyer can best assemble and present evidence on a limited budget; the burden of proof in the most common evidentiary disputes; and how do elements and evidence fit together? (1.25 MCLE Hour)	7
8	9	**10** Probate & Estate Planning Section **12:00 NOON MONTEREY AT ENCINO RESTAURANT** Chris Hamilton addresses the Section. (1 MCLE Hour) — Board of Trustees **6:00 PM SFVBA OFFICES**	11	12	13	14
15	16	**17** Taxation Law Section Trust Fund Recovery Penalty **12:00 NOON SFVBA OFFICES** Certified tax law specialist Kneave Riggall will discuss how the IRS recovers unpaid employee payroll taxes under the Trust Fund Penalty recovery rules. (1 MCLE Hour)	**18** Workers' Compensation Section **12:00 NOON MONTEREY AT ENCINO RESTAURANT**	19	**20** fastcase Fastcase Friday: Introduction to Fastcase 7 **1:00 PM WEBINAR**	21
22	23	**24** Editorial Committee **12:00 NOON SFVBA OFFICES**	25 ADMINISTRATIVE PROFESSIONALS DAY 	**26** DINNER AT MY PLACE 	27	28
29	30					

The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. Visit www.sfvba.org for seminar pricing and to register online, or contact Linda Temkin at (818) 227-0490, ext. 105 or events@sfvba.org. Pricing discounted for active SFVBA members and early registration.

Mondragon & Associates Becomes SFVBA Silver Sponsor

ELIZABETH POST
Executive Director

epost@sfvba.org

THE SAN FERNANDO VALLEY Bar Association is pleased to announce that Mondragon & Associates Insurance Services is the SFVBA's newest Affinity Silver Sponsor.

"Valley lawyers have worked with Debra Mondragon for over 20 years," says SFVBA President Alan Kassan says. "The Bar felt it was important to partner with an insurance broker-agency that many members have come to know and trust."

Mondragon specializes in insurance that is specific to the needs of attorneys, including lawyers professional liability, employment practices liability, and cyber liability. "We are not satisfied with just providing a client with their incumbent insurance policy terms at renewal," says Debra Mondragon. "We work tirelessly with a full spectrum of insurance carriers to find our clients the best coverage at the lowest premium. Our experience has been that some brokers do not take the time to pursue other quotes as a lower client premium directly impacts their commission."

Debra is the firm's specialist in attorney insurance policies and is a sought-after resource for many insurance issues that face California lawyers and law firms. Debra has been active in the Valley community for over 20 years and is a member of the Valley Bar Networking group and the SFVBA Membership & Marketing Committee.

In addition to the above, Mondragon offers commercial and personal insurance policies as well as workers' compensation insurance. Michelle Mitchikoff is the firm's specialist with these policies and offers her clients over 30 years of insurance industry experience. Michelle specializes in hard-to-place insurance where a client may have a DUI, high value residence, brush area residence, or other high risks.

"As part of our new relationship," Mondragon says, "Mondragon & Associates Insurance Services would like the opportunity to work with the members, provide exclusive discounts, and be able to give back to the SFVBA. We promise you will receive excellent, professional and personal service. You are our top priority."

Members can contact Mondragon at (818) 351-5000 or debra@mondragonins.com for their insurance needs.

The San Fernando Valley Bar Association offers a variety of sponsorship opportunities to help businesses promote their services and connect with more than 2,000 attorneys and other legal professionals. Sponsorship packages fit any budget and any objective.

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- Named Sponsor at networking reception or MCLE seminar

For more information about sponsorship opportunities, visit sfvba.org/advertising-sponsorships or contact me at the email above.

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 23.

Electronic Evidence and Social Media

By Deborah S. Sweeney

With the proliferation of social media comes the availability of evidence and the courts have been forced to evolve and develop rules regulating the proper use of electronic data, social media, and discovery. Two recent legal cases address how if relevant information is found in the social media landscape we can determine its authenticity–the Texas standard laid out in *Tienda v. State* and the Maryland standard found in *Griffin v. State*.

IN 2015, THE PEW RESEARCH CENTER RELEASED a paper that tracked trends in social media usage and content postings over the 10-year span from 2005 to 2015.[1] According to the study, 65 percent of adults now use social networking sites. That marks a nearly ten-fold jump in usage during that same time period.

Noteworthy trends explored in the study covered age, gender, socio-economic, and community differences, along with racial and ethnic similarities, with a few points outlined below.

- Generally, the most likely to use social media were young adults, with 90 percent of ages 18 to 29 using social in 2015. Usage continued to rise for seniors age 65 and older at 35 percent, a radical uptick from 2 percent of seniors engaged with social in 2005.
- Both men and women continued to use social media at similar rates, with 68 percent of all women using social compared to 62 percent of men.
- Individuals attending some college were more likely to engage with social media than those with a high school diploma or less, which marked the continuing consistency of those in higher-income households opting to take part in social networking sites.
- Regarding race and ethnicity, trends in social media adoption were defined by similarities, rather than differences. As such, there were no notable differences exhibited by racial or ethnic groups, with Caucasians, African-Americans, and Hispanics all adopting social media usage at the same pace.
- Regarding whether the community you live in determines your social media intake, 64 percent of urban residents used social media along with 68 percent of suburban residents in 2015. Adults in rural communities made up 58 percent of social media users.

In the three years since that study was released, the global scale of social media's rise has continued to impact current events, communications patterns, and the method in which people receive and share information related to topics in the hourly news cycle, the economy, health, personal relationships, and civic life. The data reveals what many in the legal profession already know to be true—that social media is increasingly becoming a critical part of discovery.

With the proliferation of social media comes the availability of evidence and, as such, the courts have been forced to evolve and develop rules regulating its proper use. It is not uncommon, for instance, to read through briefs written with a social slant or to see in open court the production of texts and status updates shared on Facebook.

As social networking increases in scope and platform, and with an increase in potentially relevant evidence existing on those platforms, there is the question of how the law will adapt to remain in step.

The answer is obvious—the law must evolve. But before any progress can be made, it's important to reflect and evaluate past cases that highlight the effects of social media on the law and its administration. Only then we'll be able to better determine where the courts will land on the issue of electronic data, social media, and discovery.

Trail v. Lesko

One of the first cases juxtaposing evidence and social media was *Trail v. Lesko*,[2] a 2012 case that arose from a motor-vehicle accident.

The plaintiff claimed to have been injured in the mishap, while the defendant, denying that he was driving the vehicle, asserted that he couldn't even recall who was behind the wheel at the time of the accident. In response, the plaintiff sought access to the defendant's private Facebook account, claiming that posts and pictures from the account could provide insight into the exact whereabouts of the defendant or offer up potential witnesses.

In turn, the defendant insisted on access to the plaintiff's Facebook account, with both parties filing cross motion for their opposite to turn over their Facebook usernames and passwords to the court. Accessing either account would allow the court to get to the point of social media discovery; however, far too many issues were raised by the opposing requests.

The most significant issue, in the opinion of Judge R. Stanton Wettrick, was that the motions were simply unreasonable and unnecessary, and that allowing mutual Facebook account access would simply result in a fishing trip, reeling in information irrelevant to the case.

Deborah S. Sweeney is CEO of MyCorporation.com, an online legal filing services for entrepreneurs and businesses based in Calabasas. She can be reached at dsweeney@mycorporation.com.

Judge Wettrick denied the motion, stating that the requesting parties must show "sufficient likelihood," and that the non-public postings contain relevant information to the litigation. Then, and only then, could they be granted access to the Facebook account in question.

Ultimately in this case, there proved to be no need to show sufficient likelihood or investigate any further social media discovery. The defendant eventually admitted that he was the driver at the time of the accident and had been intoxicated while behind the wheel. The court upheld Rule 4011(b), protecting against unreasonable discovery and prohibiting unfettered access to social media websites. Because the defendant's confession was made of his own volition, information that could be uncovered on Facebook was no longer considered relevant.

Judge Wettick's ruling in *Trail v. Lesko* has proven to be a good sense rule for attorneys who request or object to social media discovery; that is, neither plaintiffs nor defendants can compel the opposing party to turn over login information to their personal social media accounts.

Revisiting the phrase "sufficient likelihood" for a moment, several interesting questions arise. If relevant information is found, how can we determine its authenticity in the social media landscape? How do we know which person wrote or published the content? What if someone else wrote and published it instead?

This can be a murky gray area, to say the least, since no one wants to be wrongfully convicted for a tweet or Facebook account or message that they may or may not have created.

Two recent legal cases address this topic in-depth—the Texas standard laid out in *Tienda v. State* and the Maryland standard found in *Griffin v. State*.

Texas Standard

In the 2012 case of *Tienda v. State of Texas*,[3] defendant Ronnie Tienda, Jr. was convicted of murder for his participation in a shootout on a Dallas highway that targeted David Valadez and two other passengers. The shooting was apparently the residue of a confrontation at a nightclub earlier that evening. Valadez was wounded in the shootout and later died of his wounds.

During the trial, court testimony varied significantly as to the defendant's specific involvement in the shooting. While witnesses agreed Tienda was present, testimony differed as to whether he had fired the first gunshots or was simply holding the weapon. There were also discrepancies as to which car Tienda was riding in and from which car the shots were fired from.

The deceased's sister, Priscilla Palomo, came forward in providing the State with three profile pages from the Myspace.com social networking website. Palomo believed that the defendant could be credited for registering and maintaining these pages. Myspace.com was subpoenaed by the prosecution for the general Subscriber Report associated with each profile account. The State then printed out the profile pages to mark and use as the State's exhibits for trial, along with the Subscriber Reports and Palomo as the sponsoring witness. Names and account information associated with the profiles, photos posted to the pages, comments, music links, and instant messages linked to the accounts were also permitted into evidence.

> "As social networking increases in scope and platform, and with an increase in potentially relevant evidence existing on those platforms, there is the question of how the law will adapt to remain in step."

Details that linked the Myspace pages to the defendants were noted on the Subscriber Reports. The circumstantial evidence included two of the Myspace accounts created by "Ron Mr. T" and a third by "Smiley Face," which was the defendant's recognizable nickname. "D TOWN" or "dallas" was where the account holder purportedly lived. The accounts were registered with a "ronnietiendajr@" email address. Multiple photos were linked to the three accounts because the person who appeared in the pictures resembled the defendant, who was shown displaying gang-affiliated tattoos and hand gestures.

Further still, instant messages exchanged between the account holders and other unidentified Myspace users specifically referenced the shootout and the passengers present, along with details of the State's investigation into the shooting.

Throughout the trial, the defendant repeatedly objected on the basis of improper authentication, hearsay, and relevance, asking if he could be the victim of an elaborate conspiracy where a third party had created fake Myspace profiles in his name and sent messages, supposedly written by Tienda, without his approval. The ease with which a Myspace account could be created without someone's approval was emphasized by counsel in the defendant's guilt/innocence closing argument.

Because the State could not provide technological evidence that the accounts had been created directly by the defendant, the defense counsel argued that the three Myspace profiles were not credible evidence for the jury to consider in support of a guilty verdict.[4]

Despite that argument, the jury found the defendant guilty and sentenced Tienda to 35 years in prison. Sufficient "individualization" had been found in the materials, particularly in the comments and photos found on the Myspace pages.

According to Texas Rule of Evidence 901(b)(4), those details satisfied factors to admit the evidence as a "conditional fact of authentication" to support a "finding that the person depicted supplied the information."

Jennifer Ellis, of Pennsylvania-based Lowenthal & Abrams PC, noted that the approach to authentication in the case of *Tienda v. State* is referred to as the Texas Standard.[5]

In *Texas*, she says, "the judge is the gatekeeper for the evidence and the jury makes the final decision as to the reliability of that evidence," adding that the Texas Standard is most commonly used in court cases around the country, using extrinsic evidence since social media is not self-authenticating.

Maryland Standard

The 2010 case of *Griffin v. State of Maryland*[6] navigated another approach in an effort to determine the best way to authenticate for evidentiary purposes electronically stored information printed out from a social networking site.

Five years previous, Antoine Levar Griffin was charged under numerous counts with the shooting death of Darvell Guest at Ferrari's Bar in Perryville, Maryland. Griffin's first trial ended in a mistrial.

During his second trial, a key witness provided testimony that differed from what had been provided during the first trial. The State then introduced the Myspace profile of Jessica Barber, the defendant's girlfriend, as corroborating evidence. Prior to the second trial, she had allegedly threatened a witness called by the State, resulting in testimony significantly different from that given at the first trial. However, when Barber was called by the State to take the stand, she was not questioned about the pages allegedly downloaded from her Myspace profile.

The State was unable to establish a connection between the Myspace profile and posting and Barber, and substantively the State could not say with any certainty that the purported "threat" had impacted the witness' testimony at the second trial. Electronically stored information on a social networking site had the potential to be fabricated or tampered with, posing significant challenges from the standpoint of authentication. In the present case, this pointed to the printed pages from Myspace.

The State then attempted to authenticate the pages through the testimony of Sergeant John Cook, the lead investigator on the case, and by using the Maryland State equivalent of Federal Rule of Evidence 901(b)(4), which focused on distinctive characteristics of the offered

evidence. This included appearance, contents, substance, internal patterns, or any other distinctive characteristics taken in conjunction with circumstances.[7]

Cook testified in support of the authentication of the pages printed from Myspace. Printed pages from Barber's alleged Myspace account were created under the profile name "sistasouljah" and listed a 23-year-old female from Port Deposit, the same age and place of residence as the defendant's girlfriend. Her birthday matched that of Barber's birth date and a photograph of the couple was also found on the profile, according to Cook. A blurb—*"FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!"*—was also posted on the profile that included references to the defendant's street name, "Boozy."

The defendant continued to allege that the printed pages were improper authentication, but the State concluded that the distinctive characteristics identified and supporting testimony provided sufficient authentication to its case. However, when the defendant raised the issue again to the Maryland Court of Appeals, it disagreed with the State.

The court observed that a Myspace account could be created at no cost by anyone under another person's name or by gaining access to someone else's account by obtaining the user's username and password. The Maryland Court of Appeals concluded that printed pages required a greater degree of authentication than simply identifying birth dates and images uploaded to the site to prove that Barber was its creator and author.

The Maryland Court of Appeals disagreed, finding that Barber's "distinctive characteristics" on her Myspace profile were not sufficient as a means of authentication. The court suggested that printouts from social networking sites should never be admitted and suggested three non-exclusive authentication methods instead:

1. Inquire if the purported creator created the profile and to ask if the posting in question was added
2. Search the computer of the person who allegedly created the profile or posting and examine its internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting
3. Obtain information directly from the social networking website that links the creation of the profile to the person who allegedly created it

Neither the State of Maryland nor the State of Texas had taken advantage of using these methods in the *Tienda v. State* or *Griffin v. State* cases. Ultimately, the difference between these two cases was that the Texas Standard

defaulted to the judge as the gatekeeper of the evidence and the jury given the ability to render a final decision based on said evidence. The Maryland Standard was more difficult to meet as it required more detailed evidence—testimony from the creator of the social media profiles and postings to determine authenticity, and data obtained from their internet history and hard drive.

As more social media platforms are created, and it becoming more commonplace to set public profiles on a private setting, it remains unclear exactly what is considered "social media," how information therein can be authenticated without the help of the purported author or a forensic expert, and what questions does the law still need to address.

Questioning the Authenticity of Social Media Evidence

As social media usage continues to play an increasingly significant role in society, evidence continues to accumulate on those information platforms that could be subject to legal action.

One positive development is that attorneys everywhere are becoming well-versed in social media as they counsel their clients. They know that a subpoena issued to Facebook or Twitter is futile as neither social networking platform will directly respond to the request. Instead, a lawyer may advise a client on the kind of content that can be publicly posted online, with the admonition that an online profile should be designated as private.

Increased user awareness of privacy settings raises several issues for accessing a party's social networking account during discovery as users are increasingly conscious that accounts created and posts published are now public and accessible to anyone. According to Brad E. Haas of *The Legal Intelligencer*, since attorneys can advise their clients to change their social media private settings once a lawsuit has commenced, this means relevant information can be concealed.[8]

The question remains whether or not existing legal standards will change in the future. Otherwise, the best a lawyer can hope for in discovery is that opposing counsel has either failed to advise their client to activate their privacy settings or is unaware of developments in the social media landscape.

What is a Social Media Platform?

Not too terribly long ago, the term "social media" referred to a handful of networking sites—primarily Facebook, Twitter, Myspace, and LinkedIn. Since then some lesser-known websites have phased out while many more such as Instagram, Pinterest, and Snapchat have been introduced into the online environment.

In addition, review websites such as Yelp, virtual communities like Reddit, and website commenting

applications that can range from the dating app Tinder to platforms like Disqus have drawn increased interest and online activity. Even routine text messages are jumbled up in the mix, as a growing number of judges are compelling the provenance of textual evidence in civil litigations.

The frenetic evolution of social media technology must also be reflected in the legal one, as it is crucial for the concept of discovery. Haas of the *Legal Intelligencer* notes that there are three questions that have been raised and that the law still needs to clearly address.

- Are review sites considered social media? If so, are they discoverable?
- Can eCommerce websites that are not purely transactional in nature be considered social media?
- Are applications that allow users to create profiles for the purpose of commenting and interacting with other users considered social media?

Keeping in Step with Social Media

Social media will not be disappearing anytime soon as more platforms will attract an increase of users creating and publishing content on said accounts.[9]

This information, however fleeting it is, can still be considered evidence. As such, the law must be able to evolve in step with social media while taking into consideration past case law and the methods used to determine authenticity.

As social networking platforms become increasingly more sophisticated, there is the possibility that what worked in the past in terms of social media discovery may not work in the future and that questions will continue to be raised as to whether old standards can evolve to fit the rules of that new world, or if the law will, out of necessity, dismiss old standards in favor of new ones.

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[1] Andrew Perrin, "Social Media Usage: 2005-2015," *Pew Research Center*, October 8, 2015.
[2] *Trail v. Lesko*, No. GD-10-017249 (Allegheny C.P. July 3, 2012).
[3] *Tienda v. State of Texas*, No. PD–0312–11 (Feb. 8, 2012).
[4] Matthew Verga, "Social Media Discovery, Part 10—*Tienda v. State*," *Modus*, September 25, 2015, http://discovermodus.com/blog/social-media-ediscovery-10-tienda-State.
[5] "How to Get Social Media Evidence Admitted to Court," *American Bar Association*, November 2016, https://www.americanbar.org/publications/youraba/2016/november-2016/how-to-get-social-media-evidence-admitted-to-court.html.
[6] *Griffin v. State of Maryland*, 19 A.3d 415 (Md. 2011).
[7] Matthew Verga, "Social Media Discovery, Part 9—*Griffin v. State*," *Modus*, September 24, 2015, http://discovermodus.com/blog/social-media-ediscovery-9-griffin-v-State.
[8] Brad E. Haas, "Social Media Discovery: Examining the Factual Predicate Standard," *The Legal Intelligencer*, March 5, 2016, http://www.marshalldennehey.com/media/pdf-articles/O%20406%20by%20B.%20Haas%20%2803.05.16%29%20The%20Legal.pdf.
[9] Matthew Verga, "Social Media Discovery, Part 10—*Tienda v. State*," *Modus*, September 25, 2015. http://discovermodus.com/blog/social-media-ediscovery-10-tienda-state.

Test No. 113

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. In *Tienda v. State*, Ronnie Tienda, Jr. was charged with the shooting death of Darvell Guest.
   ❑ True ❑ False

2. Judge R. Stanton Wettrick found that the motion to access the defendant's private Facebook account was reasonable and necessary.
   ❑ True ❑ False

3. In *Trail v. Lesko*, the defendant admitted that he was the driver at the time of the accident and had been intoxicated while driving.
   ❑ True ❑ False

4. The information uncovered on Facebook was still relevant to the *Trail v. Lesko* case even though the defendant admitted being the driver of the vehicle.
   ❑ True ❑ False

5. In *Tienda v. State*, instant messages exchanged between the account holder and other unidentified MySpace users did not specifically reference the shootout and its passengers.
   ❑ True ❑ False

6. The State was able to establish a connection between Jessica Barber, the defendant's girlfriend, and the MySpace profile in *Griffin v. State*.
   ❑ True ❑ False

7. The State attempted to authenticate the MySpace profile pages in *Griffin v. State*.
   ❑ True ❑ False

8. In *Tienda v. State*, the three MySpace profiles were considered credible evidence.
   ❑ True ❑ False

9. In *Griffin v. State*, Antoine Levar Griffin was convicted of murder in the shooting death of Darvell Guest at Maserati's Bar in Perryville, Maryland.
   ❑ True ❑ False

10. The first trial ended in a mistrial in *Griffin v. State*.
    ❑ True ❑ False

11. Jessica Barber, the defendant's girlfriend in *Griffin v. State*, allegedly threatened the witness called by the State.
    ❑ True ❑ False

12. Attorneys advise their clients to change their social media private settings once a lawsuit has commenced.
    ❑ True ❑ False

13. In *Tienda v. State*, plaintiffs and defendants can order the other party to turn over their login information to their personal social media accounts.
    ❑ True ❑ False

14. Individuals with a higher education level are more likely to engage with social media than those with a high school diploma or less.
    ❑ True ❑ False

15. Courts have remained stagnant and are not developing rules to regulate electronic data.
    ❑ True ❑ False

16. There is an increased amount of evidence existing on social media platforms.
    ❑ True ❑ False

17. In *Trail v. Lesko*, both the plaintiff and defendant requested access to each other's private Facebook accounts.
    ❑ True ❑ False

18. The social media rates among men and women are comparable to each other.
    ❑ True ❑ False

19. The deceased's sister, Jessica Barber, in *Tienda v. State* came forward in providing the State with three profile pages from the popular social networking website, MySpace.
    ❑ True ❑ False

20. Jennifer Ellis of Lowenthal & Abrams PC noted that the approach to authentication in the case of *Tienda v. State* is referred to as the Maryland Standard.
    ❑ True ❑ False

MCLE Answer Sheet No. 113

INSTRUCTIONS:

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

   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 $_____.**

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Credit Card Number **Exp. Date**

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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**


158
Since PTAB Inception
84%
92%
6%
Petition Denied: 3
fastcase
Smarter legal research.
Cited Cases
fastcase
Smarter legal research.

By Michael D. White

Fastcase:
A Cosmic Approach to Legal Research

Over the past 18 years Fastcase has become the biggest online legal research alternative to Westlaw and Lexis because—according to founder Ed Walters—it utilizes powerful software technology to make the search and comprehension process much easier and affordable by implementing citation analysis to find what is most authoritative. Through the Bar's decade-old partnership with Fastcase, SFVBA members have free access to Fastcase 7 and its expanded collection of treatises, handbooks, and other secondary sources, as well as federal and state docket alerts, legal news and data analytics.

FOR SOME, THE PROVERBIAL "Aha!" moment comes after tinkering for months on developing a longer lasting light bulb in one's garage or using the family waffle maker to mold the prototype rubber sole for a now-iconic sports shoe. Attorney Ed Walters's moment came late one summer evening in 1999.

A graduate of the University of Chicago Law School, Walters was practicing in the Washington, D.C. office of the international law firm Covington & Burling, focusing on corporate advisory work for software companies and professional sports leagues, as well as intellectual property litigation.

That particular evening, Walters had spent eye-aching hours working on an online research project for a client that had specifically requested that he not use either Westlaw or Lexis to do the work. The client was a Fortune 500 company, one of the biggest companies in America, "so the problem couldn't have been the cost of these services … right? Wrong. The problem was the cost."

The company, he recalls, had more than 300 outside law firms that worked for it, with every one charging their pro rata legal research expenses to the client. As a result, the client had a legal research bill "that was through the roof. It was just crazy. They said, 'We don't pay to put the books on your shelf. We're not going to pay to put them on your computer either. That's your expense so go find some other way to do it.'"

The problem was, at the time, there was no other way. "I tried but I couldn't find an alternative research tool," says Walters. "So I'm huffing around my office at 1 o'clock in the morning and my neighbor next door comes in and says, 'Ed have you lost your mind?' I said I was just upset because I'd just paid about $1,500 and spent five hours trying to do something that should have taken about 10 minutes."

The information he was looking for, he recalls, was in public domain case law. "It was paid for at taxpayer expense and given away to a publishing conglomerate that was selling it back to us for hundreds and thousands of dollars per hour. And so I said to myself, 'I have half a mind to go start something myself.'"

Walters's office neighbor, Phil Rosenthal, turns out was not only a magna cum laude graduate of Harvard Law, but a holder of a PhD in Physics from Caltech. "Phil said, if you're serious, let's take a look at it," and so they did, devoting nights and weekends for the next six months cobbling together a research platform prototype, "which worked great." The pair left Covington & Burling in November of 1999 to start Fastcase, which has over the past 18 years become the most popular legal research alternative to Westlaw and Lexis in the entire country.

Fastcase is effective, he says "in a 'work smarter, not harder' sort of way. We use really powerful software technology to make the search and comprehension process much easier and affordable. For example, Fastcase uses citation analysis, which looks at the citation relationships among cases and statutes to find what is most authoritative. It also uses data visualization, four-dimensional maps of search results that will call out the most important data, rather than spending hours and hours of reading cases. The most important results literally jump off of the map for you."

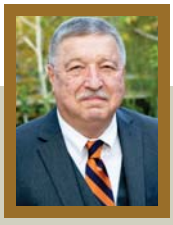
Ed Walters
Photo provided by Fastcase

It's so simple, he says, "My nine-year-old can use Fastcase."

Expanding Research Toolbox

Fastcase currently employs a staff of 120 around the world, including reference attorneys, product specialists, software developers and content specialists who attend to more than 800,000 subscribers worldwide out of offices across the street from the National Archives in Washington, D.C. The company maintains member benefit relationships with more than 50 bar associations and other professional organizations, including the San Fernando Valley Bar Association.

Over the last two months, the company has enhanced its research toolbox with the announcement of a partnership with Wolters Kluwer Legal & Regulatory U.S. to provide an expanded collection of treatises, handbooks,



Michael D. White is editor of *Valley Lawyer* magazine. He is the author of four published books and has worked in business journalism for more than 35 years. Before joining the staff of the SFVBA, he worked as Web Content Editor for the Los Angeles County Metropolitan Transportation Authority. He can be reached at michael@sfvba.org.

and other secondary sources to legal researchers through its platform, and its expansion into the federal and state docket alerts, legal news and data analytics markets with its acquisition of New York City-based Docket Alarm.

It's all part of a grand strategy that hinges on completion of Fastcase 7—the latest version of the company's hallmark research platform.

"A lot of Fastcase 7 is designed to be more predictive and help you better understand what it is you're looking for," says Walters. "There are a couple of ways we are doing that. One is a simple type-ahead entry in 'Search.' From there we can predict from the context of your entry what you're looking for and finish the query for you."

Another new capability, he says, is a machine-learning understanding of what people are searching for and the ability to look between the lines of the search results and try to find the missing components. "So if there is a law review article or a treatise that really explains the issue that they're researching, we can identify that and suggest it as a result."

Fastcase 7, which is currently available in beta, "goes beyond simple keyword searches, with citation analysis and data visualization that really gives people what they're looking for, not just what they think they need to search for."

Classic Fastcase, says Walters, "has been a stable platform for quite a long time, and we recognize that we are moving people's cheese, but we plan to move it pretty slowly. Our intention is that if people want to continue using the classic version of Fastcase, they'll be able to do that and over time, sunset it out. It's a multi-year process and not something that will be done overnight."

Value-Added Benefit for Valley Lawyers

The San Fernando Valley Bar Association entered into an agreement with Walters and Rosenthal in 2008 to provide Fastcase's Premium Plan to all members. The top plan includes access to court opinions from all 50 states and federal courts, as well as nationwide statutes and regulations.

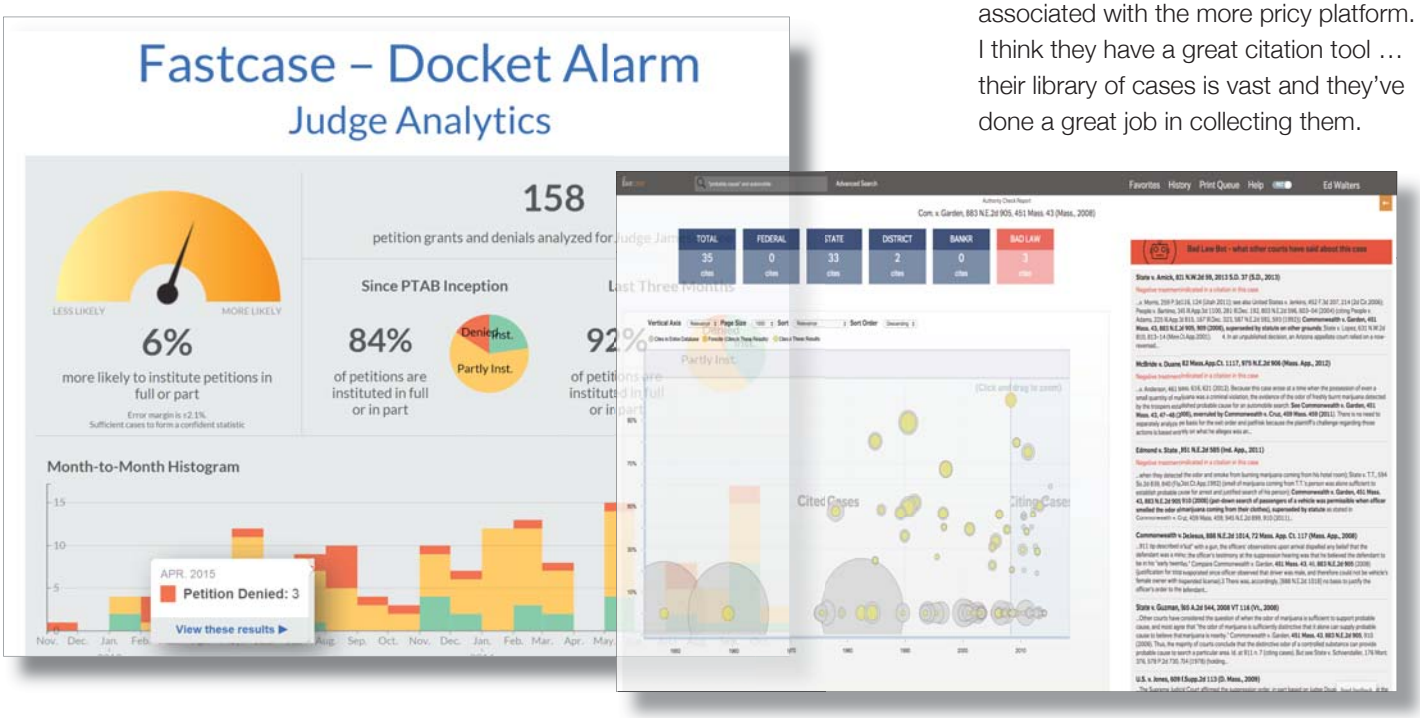
At that time, according to SFVBA Executive Director Liz Post, "the Bar was looking to replace its most popular member benefit—law library privileges at the University of West Los Angeles. The law school had moved to a new but smaller campus and was no longer able to offer library access to our members."

The Bar explored a variety of online services as well as brick-and-mortar libraries. "We quickly realized that Fastcase provided the best value and tools," says Post. "A decade later, Fastcase is now our most popular member benefit and one of top reasons attorneys join the SFVBA. We have attorneys—practicing as far away as San Francisco and San Diego—join the Bar because the Fastcase subscription is included with their $235 annual membership dues, a benefit that non-bar subscribers pay $995 a year for."

SFVBA members share Post's enthusiasm for the online legal research service and its features.

New lawyer D. Shawn Burkley, a sole practitioner, accesses the Fastcase platform "extensively" on a weekly basis. "Some of the more conventional platforms are pretty pricy, so I'm limited in the amount of access I can purchase from Westlaw or Lexis," he says. "I generally tend to use Fastcase for its federal component. I recently did a full-blown lawsuit and Fastcase was my go-to for finding appropriate federal law. We were on the plaintiff side in a multi-million dollar suit and were able to do good work for our client due in large part to the access to information we had through Fastcase."

The automatic citation tool, says Burkley, "is a feature that is generally associated with the more pricy platform. I think they have a great citation tool … their library of cases is vast and they've done a great job in collecting them.



> I generally tend to use Fastcase for its federal component."
> —D. Shawn Burkley

Their cut and paste tool also works very well when you're trying to put together a brief on the fly. It's an underrated benefit of membership in the SFVBA."

Another sole practitioner who accesses Fastcase on a regular basis is Woodland Hills attorney Benjamin Soffer, who started his solo practice three years ago after many years with a very large law firm and access to a broad variety of legal research tools.

"When I went out on my own, I had to be cost-conscious. I knew I needed to conduct affordable legal research, so when I learned that the SFVBA provided free access to Fastcase … that was one of the main reasons I decided to join the Association."

Soffer, who serves as Chair of the Bar's Membership & Marketing Committee, uses Fastcase "primarily for case law and case evaluation research, or if I'm drafting a motion and I need authorities that support legal arguments. I was unfamiliar with Fastcase but found that it was very similar to other more expensive tools that I had been using."

San Diego attorney Kenneth Rose has practiced international employment and labor law for more than 40 years. "Fastcase is a primary research tool for both litigation and non-litigation purposes and is a much less expensive alternative to Westlaw and Lexis," he says. "We use Fastcase about four times a month and haven't used Westlaw or Lexis in quite some time as it provides most of our research needs."

If the Bar were to conduct a survey about the value of Fastcase, says Rose, "It would have my strong endorsement."

Blasting through the Solar System

No doubt influenced by partner Phil Rosenthal's doctoral work at Caltech and experience gained at NASA's Jet Propulsion Lab in Pasadena, "We're actually naming all of the new versions of Fastcase after the planets," Walter says. "We're working outward from the sun, so we're currently involved with the Mercury release—Fastcase 7.1—right now. We're innovators and we're constantly pushing the edge of the envelope. There will always be a new version in the works with new features and hopefully each will be easier to use and more effective than the one before."

So what's in store when Fastcase reaches the outer edge of the solar system?

"If we do it right, Fastcase should be much, much easier to use. I think the Pluto version will use a lot more artificial intelligence than the Mercury version.

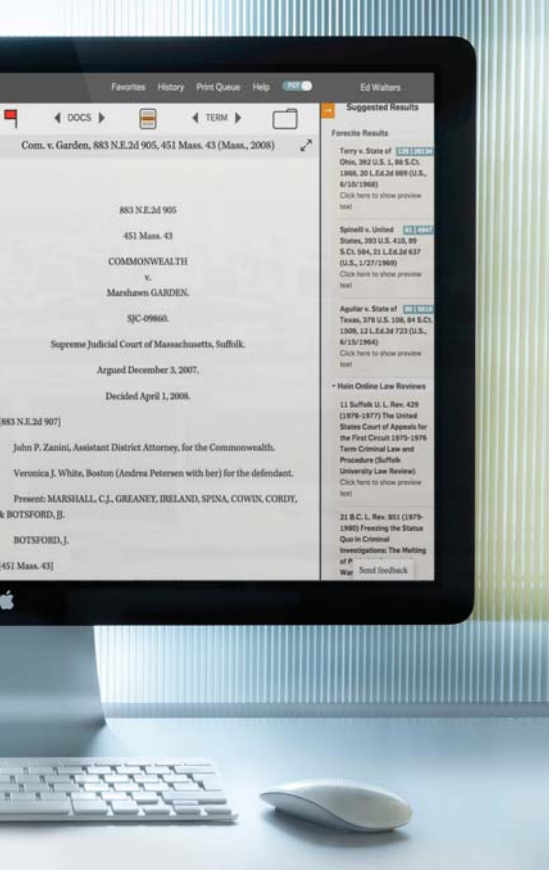
> Free access was one of the main reasons I joined the Bar."
> —Benjamin Soffer

If we do it right, it will have access to a lot of secondary materials," says Walters, alluding to the company's Wolters Kluwer partnership and Docket Alarm acquisition. "They specialize in that kind of work in a very analytical way."

A self-described "tech nerd," Walters has just finished writing a book on data analysis and the law, and serves on the faculties of both Georgetown and Cornell law schools.

His class at Cornell—The Law of Robots—analyzes how the law changes when machines start making decisions usually reserved for humans. "We look at things like weaponized drones, surgical robots the auto-pilots in airplanes or the operating system of a self-driving car—and when and if we should consider a robot a person under the law," says Walters. "It's a fun class to teach, and it arose out of our work at Fastcase because we are working on AI systems."

The driving force behind Fastcase—what Walters calls its "ethos"—"is to democratize the law and to make legal research smarter. The whole idea behind the work we



do is the belief that more people should have meaningful access to the law and the tools they use to find answers should be increasingly sophisticated. I think if you were to ask Fastcase subscribers what makes the company special, I think they'd say that it's a smarter tool because when they use it, they don't have to work as hard to find the critical information they're looking for."

"Fastcase provides most of our research needs."
—Ken Rose

Fastcase 7 Quick Reference Guide

Login

Start your Fastcase research by logging in through the SFVBA website.

1. Go to sfvba.org/member-resources/fastcase
2. Click on the blue **Member Login to Fastcase** link on the right side of the page
3. Enter your SFVBA username and password
4. Start your research. Access is free and unlimited.

Locating a case by keyword

To pull up a document by keyword, use **Advanced Search** and formulate your search query using one or more of the eight Boolean operators listed at the bottom of this sheet. Remember to add one or more **Libraries** to your search using the menus below the search bar.

Tip: Start with a broad search and use Fastcase's sorting and filtering tools to find the document you need. If you are not sure where to start, entering a natural language search into the search bar on the Start page may help point you in the right direction.

Locating a case by party name

Try performing a keyword search using the following format: **Plessy v. Ferguson**. You can use the search bar on the **Start Page** or switch to **Advanced Search** if you want to look in a specific **Library** or limit by date. To pull up Plessy v. Ferguson, 163 U.S. 537 (1896), type Plessy v. Ferguson into the search box. This works best when parties have less common names.

Viewing later citing cases

Click on the flag at the top left of the **Document View** pane. The **Authority Check** pane will open, showing statistical information and a list of later citing cases. If **Bad Law Bot** has spotted negative history, the flag will be red and the negative citation signals will be highlighted on the report.

Training Resources

Fastcase has many resources available to learn how to conduct better legal research, including a series of 5-minute video tutorials, reference guides, and in-depth training webinars! Resources available at www.fastcase.com/support.

Visit SFVBA.org to sign up for our new Fastcase Friday Webinars.

Leadership Team Stems the Tide at Van Nuys Courthouse

By Michael D. White

IT TURNED OUT TO BE QUITE A BIT MORE INVOLVED than just another average day for Los Angeles Superior Court (LASC) Supervising Judge Huey Cotton. It was mid-day, Saturday, January 27. Cotton was leaving his chambers in the Van Nuys East Courthouse, on his way home, unaware that a 2-inch water pipe running over in the jury room of Department U on the building's fourth floor had burst.

"I had left the backside of the building and the water was flowing out the front side at the same time," says Cotton, who as Supervising Judge oversees the Superior Court's Northwest District. "I found out about it in the form of a cellphone video showing water flowing down one of the elevator shafts."

According to Cotton, a young district attorney who was being reassigned had come in that day to clean out her office. She discovered the leak when she was trying to leave and couldn't get on the elevator due to the water pouring into the shaft.

"The amazing thing is that it took only minutes from the time she snapped the cellphone shot of the water flow and sent it up her chain of command until it came to me and I sent it to Debra [Debra Brinkman, Senior Administrator for the Northwest District]. We immediately sent it up our chain of command and we were mobilized."

Once the source of the leak was determined, the flow of unknown thousands of gallons per minute of water was checked and an initial survey revealed that substantial portions of the east side of the building below the fourth floor—basement and an elevator shaft included—was flooded out.

As a consequence, 15 courtrooms, the District Attorney's Office, Clerk's Office, Self-Help Center, and jury room were put out of commission. More than 150 employees from those operations had to be relocated, while as many as 300 jurors a day had to be accommodated.

(L-R) LASC Administrator Michele Oken, Supervising Judge Huey Cotton, and Senior Administrator Debra Brinkman

Temporary staff workstations

Operations, staff and equipment had to be moved next door to the West courthouse and fast, with as little inconvenience to the public or the Bar as possible.

The task was gargantuan. The second busiest court complex in Los Angeles County after the downtown Stanley Mosk Courthouse, the two Van Nuys courthouses handled a significant percentage of the more than 2.2

million cases filed in 2015 alone, with some 60,000—100,000 traffic cases handled annually, and more than one million people passing through its doors.

"Our clerk's office, which alone includes close to 50 employees and all the related staff for each one of those courtrooms, had to be relocated," says Cotton. "The miracle is how we've managed to relocate all of these operations and all of these people into the creases of the West building and keep everything functioning so that it's almost transparent to the public and we're very keen on making sure that we minimize the inconvenience to the Bar."

Only one courtroom has been moved offsite—the long-cause family law courtroom, which was moved to downtown Los Angeles. "All the rest of our operations are business as usual in terms of actual courtroom operations," he says.

"It's been a logistical stroke of genius as to how we've managed to squeeze three family law courtrooms into one courtroom here without sacrificing the time needed to fairly adjudicate those matters, including the domestic violence restraining order court. We've merged two criminal arraignment courts and we're processing well in excess of 250 cases a day in one courtroom," alluding to "a massive sexually violent predator case that's underway. We're doing our part countywide to keep those cases on track for trial."

of both courthouses up and running without a substantial hiccup.

"We've had a great support team that literally worked overnight to move over 100 workstations from the East courthouse into this one," says Brinkman. "IT brought in a team to handle that. Michele helped identify every square foot of space in the West courthouse that could be used. If we found space, IT was right behind us to put work stations in a blank area."

All this, she says, was accomplished over the span of about 48 hours. "All the wiring was pulled, workstations were set up and by mid-day Monday we were up and running," she says.

Saak Guladzhyan serves as Manager of Court Operations in the East courthouse. He and his team handle the processing of documents filed with the court by the public. With a Help Desk to offer assistance, documents dealing with small claims, family, civil, and unlawful detainer cases that would have been handled at the East courthouse are now being handled "as if nothing had happened."

The operation "is running very smoothly and if the lines get too long, we have people with headsets who work the line and make sure the people waiting have all their paperwork in order before they reach the window," he says.

Makeshift Self-Help Center

Manager of Court Operations Saak Guladzhyan (center) and IT team

Unlimited civil operations from four courtrooms have been merged into one, while six civil trial courts have been able to maintain their calendar of court and jury trials, including, he adds, "a massive asbestos case that we were able to move and keep on track, as well as other long-cause cases either sent from downtown or internally. You have to see it to really appreciate it, but it's been quite amazing."

Cotton credits Brinkman and Michele Oken, Administrator for the East Building, with pulling off "a logistical miracle" that has kept virtually all of the operations

The Self-Help Center, where assistance is available for individuals working on their own legal cases, is fully operational on the fifth floor, while a courtroom freed-up due to a judge's vacation schedule is being used as a jury assembly room and several jury deliberation rooms hold workstations for court clerks and other staff.

"Right now because the facility does have asbestos in certain areas, those areas are under a containment situation where we have to follow the procedures outlined by the Air Quality Management District (AQMD) to get the facility

operational again," says LASC Director of Facilities, Allen Leslein.

The work to get the East courthouse operational again, he says, has been divided into phases, the first of which—work on getting the fourth floor back into shape—has already been completed.

"The plan to do the work in the public areas and the elevators has been submitted to the appropriate agencies and we expect to have approval on that at any moment," he says. "That will take us about four or five days to get that cleaned up and operational. The area that suffered substantial water damage will take quite a bit more time; for that area we haven't submitted our plan yet. We're still working out the details and the AQMD will take some time to review that and approve our plan before we're allowed to proceed."

Once the public areas and elevators are operational in about a week's time, he says, "Floors four and above will be totally occupiable. There may be some spaces on the floors below that weren't impacted that we may be able to open. We're not sure about that yet. But certainly floors four and above should be able to be opened in about a week's time."

The San Francisco-headquartered Judicial Council of California, which establishes policies and priorities for the statewide administration of justice in the California courts, "owns the buildings, so we're actually tenants," says Leslein.

"We are working closely with them on this process. They are responsible for the buildings; however, we've suffered substantial losses because the contents of some offices were destroyed and have to be disposed of," he says. "We are working closely with them and they are working closely with AQMD. We're doing full air testing of all spaces to make sure that everything is adequately cleaned before anyone is allowed to re-occupy the building to make sure that the safety of the public and the workers in the building is secure."

"I had no doubt we'd be able to handle this one," says Judge Cotton, who is quick to praise "the team. The nuances of how many people could work on which floor and that sort of thing, I knew had to be worked out, but I had an overwhelming confidence that we'd pull it off because everybody from the people in the mailroom to our most senior judge said 'we can't stop delivering our services to the public.'"

From emergency matters, landlord-tenant matters, restraining orders, to criminal cases that have shortened constitutional deadlines for their hearing dates, he says, "All that pressure was there, but it was very exciting to see us pull it off. Once we had buy-in from everybody, it was just a matter of seeing it happen. Every single person that I've talked to and watched fulfill their duties, the one thing they've asked is 'What else can I do.' No whiners and that's just exceptional. Except for that one family law case, we have not had to send out a single case…so we haven't inconvenienced the public or the Bar in any way in the midst of all of this. That's the story to me."

Product Liability Litigation Tests Jurors' Perspectives

By Andrew L. Shapiro

WHEN THE PHRASE PRODUCT liability comes to mind, most people envision Takata's exploding airbags, Philip-Morris's cancer-causing cigarettes, many companies' asbestos-laden building materials triggering mesothelioma, and General Motors' fiery automobile deaths. But product liability law covers much more than these huge cases, and the practice protects millions of consumers across the nation.

So how does all of this work in California? Clients pursuing damages for defective products in California may generally make one of three arguments—strict liability, negligence, or breach of warranty. In a defective design lawsuit, a claim would be subject to one of two tests, the Consumer Expectations Test or the Risk-Benefit, also known as the Risk-Utility Test.

Consumer Expectations Test[1]

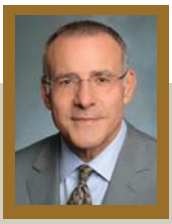
If the average consumer can expect a product to function safely and it fails to do so, the court will apply the Consumer Expectations Test, in which it must be demonstrated that 1) the defendant manufactured/distributed/sold the product (typically, multiple defendants are made party to the suit; 2) the product did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way; 3) the plaintiff was harmed; and 4) the product's failure to perform safely was a substantial factor in causing the plaintiff harm.

The defendant in the case may argue that the consumer plaintiff misused a product in an unforeseen manner. For example, a car manufacturer can reasonably expect drivers to speed. But if the driver loses power steering at 95 miles per hour on a freeway, that is probably going to fall under the reasonable expectation of misuse umbrella, and can still leave the defendant strictly liable.

It doesn't matter if minor or reasonable alterations such as adding a cold-air intake or high performance air filters were made to the vehicle. However, carmakers may not expect buyers to tweak drivetrains with increased performance aftermarket parts or inject speed inducing nitrous oxide into their carburation systems. In that type of situation a defendant would probably have a good argument for stupidity, if not plaintiff misuse.

Risk-Benefit Test[2]

If the defect is caused by factors beyond the scope of the average consumer's understanding, the



Andrew L. Shapiro is the Chair of Lewitt Hackman's Personal Injury Practice Group in Encino. He can be reached at ashapiro@lewitthackman.com.

Risk-Benefit Test is usually applied by defense attorneys.[3] Slightly more complicated, here the plaintiff must initially prove 1) that the defendant manufactured/distributed/sold the product; 2) the plaintiff was harmed; and 3) the product's design was a substantial factor in causing harm to the plaintiff.

If the plaintiff can prove all three of these points are true, the jurors are then instructed they should then find for the plaintiff. However, if the defendant can prove that the design of the product has benefits that outweigh the risks, jurors are provided with further instruction to consider:

- Gravity of the potential harm resulting from the use of the product
- Likelihood that the harm would occur
- Feasibility of an alternative safer design at the time of manufacture
- Cost of an alternative design
- Disadvantages of an alternative design
- Other relevant factor(s)

In the Risk-Benefit Test scenario, jurors are in essence asked to think in terms of cost-benefits, much like the Chief Executive Officer of a business, while under the Consumer Expectations Test, jurors are effectively asked to think like a person risking serious injury by using the allegedly defective product.

Both sides tend to lose a bit when the Risk-Benefit Test is employed, as it generally leads to significantly more research into the history of the product in question, engaging more expert witnesses, and investing more valuable time in trial prep and at court.

For defendants, however, getting the court to agree to a Risk-Benefit Test has value as the more complicated the jury deliberation—asking those hearing the case to think like CEOs—the better the chance any injury claims will be denied.

Practical Application

In some defective products lawsuits, the question of which test to apply becomes highly contentious. A detailed analysis of the two tests was done by the court in the recent case of *Demara v. Raymond Corporation*.[3]

In *Demara*, the plaintiff was walking through a warehouse where a narrow-aisle forklift was being used. A forklift driver was backing up and changing direction when Demara's foot was crushed. After numerous surgeries, he was deemed permanently disabled and suffered continual pain. The plaintiff alleged he did not see the forklift—the subject lift—or observe a warning light. Demara and his wife filed claims under the theories of strict liability and negligence.

Originally designed in 2006 by the Raymond Corp., the forklift was later customized for Seltzer Chemicals, later known as Glanbia Nutritionals, the company which operated the warehouse where Demara was injured. The Raymond Corp. was aware that the moving drive wheel on the subject lift could cause serious injuries if body parts came into contact with it. Further, the drive wheel lacked safety guards, bumpers or other features that could stop people from coming into contact with the drive wheel, although the subject lift was equipped with a top-mounted warning light.

The trial court granted Raymond Corp.'s motion for summary judgment, finding that 1) the plaintiffs had not established a triable issue of fact as to causation; 2) the Consumer Expectations Test did not apply as a matter of law; and 3) the defendants established the requisite elements for the application of the Risk-Benefit Test while the plaintiffs had not established a triable issue of fact as to whether the benefits of the design outweighed the risks of injury due to the design.

As for the applicability of the appropriate test, the defendants argued that the Consumer Expectations Test did not apply, as a matter of law, since the subject lift is a "complex piece of industrial equipment . . . beyond the typical understanding of the consumer."[4] As such, and based on not having experience or an understanding of the design, the consumer could not have an expectation as to the safety of the design.[5]

The appellate court disagreed and found that "the inherent complexity of the product itself is not controlling" in determining whether the Consumer Expectation Test applies.[6] "For example, in certain circumstances, where a technically complex product performs 'so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers,' a lay jury is competent to determine whether the product's design is unsafe. Accordingly, the critical question is whether the 'circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety standards of its ordinary consumers.'"[7]

> "In a defective design lawsuit, a claim would be subject to one of two tests, the Consumer Expectations Test or the Risk-Benefit, also known as the Risk-Utility Test."

The court further reasoned that the Consumer Expectation Test is not based on minimum safety assumptions or expectations of consumers in general regarding a product, but rather on the minimum safety assumptions of the product's users. In the *Demara* case, the court focused on the minimum safety assumptions or expectations of those present in a warehouse with pedestrian traffic in which the subject lift was designed for use.[8] In other words, the complexity of the product does not necessarily determine which test is to be administered. Consumers, after all, can reasonably expect to travel safely when boarding a jetliner, getting into a car, or riding a bicycle.

Further, the Court of Appeal found that the Superior Court should not have applied the Risk-Benefit Test, which requires that the defendant bears the burden of establishing that alternative, safer designs would not offset the costs of implementing those designs. Due to the complexity of the analysis involved in the Risk-Benefit Test, unlike the Consumer Expectations Test, expert testimony is necessary.

Although the defendants' expert provided testimony of certain benefits of the design, they presented no evidence of either the risks of those design features or other competing design possibilities.[9]

Demara presents a detailed analysis of the Consumer Expectations Test and the Risk-Benefit Test, and clearly demonstrates that both tests are not mutually exclusive, and depending on the facts, both tests may be presented to the jury.

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[1] California Jury Instructions (CACI) (2017) 1203.
[2] California Civil Jury Instructions (CACI) (2017) 1204.
[3] *Demara v. Raymond Corporation*, 13 Cal App. 4th 545 (2017).
[4] *Id.* at 558.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 559.
[8] *Id.*
[9] *Id.* at 563.

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Uber Profits Lyft Employment Misclassification Issues

By Jason Shamtoob

SITTING IN TRAFFIC COULD possibly be the worst part of the day for most Valley residents. In a recent study, the City of the Angels ranked at the top in the United States and worldwide in congested traffic,[1] with the average Angeleno sitting in traffic 102 hours during peak time periods in 2017.[2]

Over the past several years, ridesharing apps have become very popular and helped unclog, but not eliminate, congested arteries in Los Angeles and the Valley, as the top companies in the field have simplified the process of picking up passengers and dropping them off at their destination, giving riders time to multi-task instead of navigating traffic jams.

What Is Ridesharing?

Simply, ridesharing refers to sharing a vehicle with someone else, such as a workmate.[3] Many people confuse ridesharing with ride-hailing, which includes hailing a taxi and hiring a car service.

Uber and Lyft lead the list of the world's top ridesharing companies. Travis Kalanick and Garrett Camp created Uber in 2008 after failing to hail a cab in Paris, while the company officially launched four years later.[4] John Zimmer and Logan Green created San Francisco-based Lyft in 2012.[5] Zimmer and Green had founded a peer-to-peer ride sharing company, Zimride, in 2007, but sold it when they started to develop ideas on how Zimride would look if used on mobile devices.[6]

Business Model

Many believe that ridesharing companies' business model revolves entirely around their drivers, without whom they could be neither successful nor profitable. However, Uber's

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business model relies on drivers, passengers, fare estimates, payments, and dividing profits with passengers rating their drivers and vice versa. This gives drivers and passengers the opportunity to gather more information before they find themselves in the same vehicle.

The process of requesting a driver is simple—passengers download the app onto their mobile device, tap the screen and enter a desired destination. In minutes, a driver arrives to take the passenger to their destination. Lyft works basically the same way.

This raises an important question—do rideshare companies rely on their drivers as an integral component of their business model or are rideshare companies only a third-party connecting a passenger to a driver? This question has kindled a flame illuminating the misclassification issue at hand. In effect, Uber and Lyft believe they are technology companies rather than transportation companies.[7]

Struggles Faced by Rideshare Companies

The rideshare companies generate millions of dollars in revenue each month, profiting from each driver. As Uber and Lyft grew in popularity, more people wanted to participate as drivers, able to work but with the luxury of creating their own schedule of hours, income, break periods and holidays. All ridesharing companies classify their drivers as independent contractors, with no requirement for drivers to work a minimum number of hours in a day or week and no direct supervision.

However, many drivers were shortchanged at being classified as independent contractors because they were receiving none of the benefits that regular employees routinely receive from their employers.[8] Under California law, employees enjoy various benefits and protections, including laws establishing standards for minimum wage, overtime, rest breaks and reimbursements.[9] The unbridled success of ridesharing companies has been slowed and challenged as lawsuits have been brought claiming misclassification of drivers.

Employee v. Independent Contractor

Several factors determine whether workers are considered either employees or independent contractors. In a seminal California Supreme Court decision—*S. G. Borello & Sons, Inc. v Dept. of Industrial Relations*[10]—a multi-factor test was adopted.[11] By applying California law, the most important factors were found to be whether or not the service provided is under direct control of the employer[12] and the necessity of examining the manner and means of the worker in which they perform.[13]

For Lyft and Uber, it may seem that they have little or no control over drivers as their drivers choose their own hours, breaks, and days off. Drivers have autonomy and flexibility to take several weeks off without being held accountable and find these arrangements convenient, especially those who have second jobs and obligations to tend to.[14] In other words, Uber and Lyft provide people with extra income without being subjected to much control.[15]

Besides the right to control, the *Borello* case considered the following factors to determine if an employee/employer relationship was present:

- Whether the person performing services is engaged in an occupation or business distinct from that of the principal
- Whether or not the work is a part of the regular business of the principal or alleged employer
- Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work

- Alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers
- Whether the service rendered requires a special skill
- Kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision
- Alleged employee's opportunity for profit or loss depending on his or her managerial skill
- Length of time for which the services are to be performed
- Degree of permanence of the working relationship
- Method of payment, whether by time or by the job
- Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests[16]

This list of factors is not definitive and is used as a guide to shift the relationship between the employer and contractor in one distinct direction.[17]

Uber/Lyft v. Drivers

Two major cases, *O'Connor v. Uber Technologies*[18] and *Cotter v. Lyft*,[19] have stirred a major debate on how to determine whether Uber and Lyft have misclassified their drivers as independent contractors rather than as employees.

To adjudicate this debate, courts apply the *Borello* factors to clarify the issue. The trial courts in both the *Uber* and *Lyft* cases decided that most of the factors militated toward finding employee rather than contract status.[20] In both cases, the dissatisfied company filed an appeal.

Insufficient Settlement Agreement?

Courts have a very challenging legal issue at hand, namely how to determine if there was in fact a misclassification and how could they collectively apply their rulings to thousands of drivers as the ridesharing companies in question had stated in their agreements with drivers that the status of independent contractor status would apply to them.

With trial courts agreeing that most factors point to employer-employee status and the significant risk of being found liable for misclassification, Uber and Lyft could not fathom the idea of reclassifying millions of drivers. Their business model would shift and economic returns would be impacted.

Both companies therefore attempted to settle. Uber sought to settle their legal issue for a hefty price tag. In April 2016, Uber tried to reach a settlement agreement providing for payment of $100 million and classifying 385,000 drivers in two states as independent contractors rather than employees.[21] Of the $100 million, $16 million would have been contingent if the company decided to go public and reach certain goals.[22] The settlement was subject to court approval and if approved would have undoubtedly set a tone for other states.[23] However, in August 2016, Judge Edward M. Chen denied the settlement because it was "not fair, adequate, and reasonable."[24]

Lyft also tried to reach a similar settlement agreement for $12.25 million,[25] but the courts found the settlement to be inadequate.[26] Lyft then decided that $27 million would be reasonable and an agreement was reached at the preliminary level.[27] In the case of Lyft, a judge gave final approval of the $27 million settlement in March 2017.[28]

What's In Store for Ridesharing Companies?

As the Uber settlement fell short for California and Massachusetts, the big question remains unanswered—are drivers employees or independent contractors? Drivers in other states, like Florida, have filed lawsuits against Uber and Lyft.[29] In June 2016, nine cases were filed or pending in courts around the country alleging certain complaints to both technology companies.[30]

Simply put, the question of whether Uber drivers are employees or independent contractors has been in question for over four and a half years and it is far from settled.[31] Only time will tell the outcome.

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Supporting Rehabilitation and Second Chances

LAURENCE N. KALDOR
President

phenix7@msn.com

SINCE ITS FOUNDING IN 1979, the Valley Community Legal Foundation of the SFVBA has distributed grants and legal scholarships totaling nearly one million dollars. After vetting by its Grants Committee, the Foundation typically donates between twenty and forty thousand dollars annually to worthy Valley legal organizations.

After the successful restructuring and reorganization of the Foundation over the past three years and a resurgence in recent donor support, the VCLF is proud to announce that in late 2017 it issued its largest single grant to date to the Anti-Recidivism Coalition (ARC) in the amount of $50,000 to establish a Reentry Legal Clinic in Sylmar serving the San Fernando Valley and the greater Los Angeles communities.

The Anti-Recidivism Coalition serves more than 400 formerly incarcerated men and women. Its success is evidenced by the incredibly low recidivism rate of members, less than ten percent, compared to California's recidivism rate of nearly 50 percent. ARC's advocacy efforts have also been exceptionally successful, leading to numerous reforms that have drastically improved the state's juvenile justice system.

When Kent G. Mendoza Morales was only 12 years old he had his first encounter with the law. Three years later, he was sentenced to nine months in a juvenile facility, an experience that initiated a five-year ordeal within California's juvenile and criminal-justice systems.

Kent grew up in a low-income inner-city immigrant community in Los Angeles, recalling that he was "always feeling like an outcast, like I had no voice, like I always had something to hide"—a feeling that led him to make the poor decisions that led to a destructive lifestyle.

"After encountering the system at 12, it became easier for me to accept that I was nothing," he says. "I got tickets for things like skipping school, smoking, being out too late, or violating probation. It became a regular routine for me to spend a night in a juvenile-detention facility. When teachers, law enforcement, friends, and even your own community tell you who you are, it's difficult to believe in other options. So I joined one of the most hated gangs in the nation at 14."

During his incarceration, Kent's life radically changed the day he met with Scott Budnick, the founder and president of the Anti-Recidivism Coalition.

NEW MEMBERS

The following new members joined the SFVBA in January 2018:

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Litigation

Alexander Tsimanis
Law Office of Alexander Tsimanis, APC
Marina del Rey, CA
Workers' Compensation

"Since the day I met Scott, he has consistently supported me and saw potential in me that no one else saw, including myself. With Scott by my side during the darkest moments of my life, I developed a desire to change."

Through the successful completion of the ARC program, Kent was given an early release from prison, a formal education, work skills, and an open pathway to a career, providing him with a second chance to live a productive and fulfilling life.

ARC helped Kent through the serious challenges of coming home and re-acclimating to society and fitting in—perhaps for the first time in his life—providing him with a network of peers and mentors who understood the struggles that he was experiencing and helped him stay on the right track. ARC also gave him the opportunity to attend policy trips and meetings, which helped him to develop his professional skills, build self-confidence, and spark his interest in policy work.

Today, Kent is completing his political science degree at East Los Angeles College and is currently living independently. After a successful stint as a staff member at the Los Angeles Area Chamber of Commerce, he is now employed at ARC as a Policy Associate, where he plans and helps facilitate leadership development and advocacy training for ARC membership, coordinate policy trips, and supports the senior ARC Policy Director with research and tracking.

Kent also sits on the ARC Board, which helps guide ARC programs for others who are re-acclimating and re-entering the workforce. As an important aside, Kent performed so well in his position at the chamber that another ARC member was hired in his place shortly after he left the position.

"In the past few years, I've experienced moments I never dreamed of in my life," he says, alluding to visits to New York and the White House, as well as his being named by Governor Jerry Brown to serve on California's State Advisory Committee on Juvenile Justice and Delinquency Prevention.

"Today I know that when you surround yourself with a strong support system and people who believe in you, there is no border you cannot surpass."

Thank you sincerely for your continued generosity and support of our worthy and necessary Valley institutions, which enable our community to flourish and prosper.

ABOUT THE VCLF OF THE SFVBA

The Valley Community Legal Foundation is the charitable arm of the San Fernando Valley Bar Association, with a mission to support the legal needs of the San Fernando Valley's youth, victims of domestic violence, and veterans. The VCLF also provides educational grants to qualified students who wish to pursue legal careers. The Foundation relies on donations to fund its work. To donate to the VCLF and support its efforts on behalf of the Valley community, visit www.thevclf.org and help us make a difference in our community.

Identity Theft: A Case of Who's Who

CATHERINE CARBALLO-MERINO
ARS Referral Consultant

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SOPHIA (A PSEUDONYM) WAS TRAVELING overseas in 2015 when she learned that an unknown couple had used her credit card to buy $90,000 worth of marijuana growing products from a California-based online retailer.

The facts of the case are shocking because of the ease with which her identity was stolen, the illicit purchases made, and the unwillingness of her credit card company to even examine the incident. Sophia called the ARS and was referred to attorney Steven Simons, who is well versed with identity theft, having litigated several cases on behalf of identity theft victims against credit card companies.

Simons didn't hesitate to take the case and his first priority was to prove that his client was indeed out of the country at the time of the purchases. Her plane tickets, hotel reservations and so forth were used in discovery, while depositions were gathered verifying her relative's locations and activities at the time of the purchases and delivery of the items.

Simons then gathered evidence to prove that neither Sophia nor her immediate or extended family had had any part in the purchases. Oddly, in fact, the best evidence came from the phone calls between the online retail store and the credit card company at the time of the purchase. The online retailor had questioned the purchases and the credit card company still approved the charges.

In discovery Simons obtained the recordings between the credit card company and the thieves. The voices on the recording didn't sound anything like Sophia's, her husband's or her children's. Most importantly, even though the people on the recordings were unable to properly answer several security questions, such as the name of Sophia's mother, the identity thieves were still allowed to make the purchases.

Despite Sophia being vindicated, the culprits were never caught. "We had our suspicions at the time of the event occurring," says Simons. "The client had her house for sale and there were a number of realtors that had gone through and shown the property." But, he says, discovery and depositions proved that, like Sophia and her family, the realtors were blameless.

Investigators suspect that the thieves had somehow tapped into Sophia's home phone system, forwarded the calls to themselves, and were able to have the pot-related products delivered to her vacant property—all without leaving a trace.

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