VALLEY LAWYER

NOVEMBER 2021 • $5

A Publication of the San Fernando Valley Bar Association

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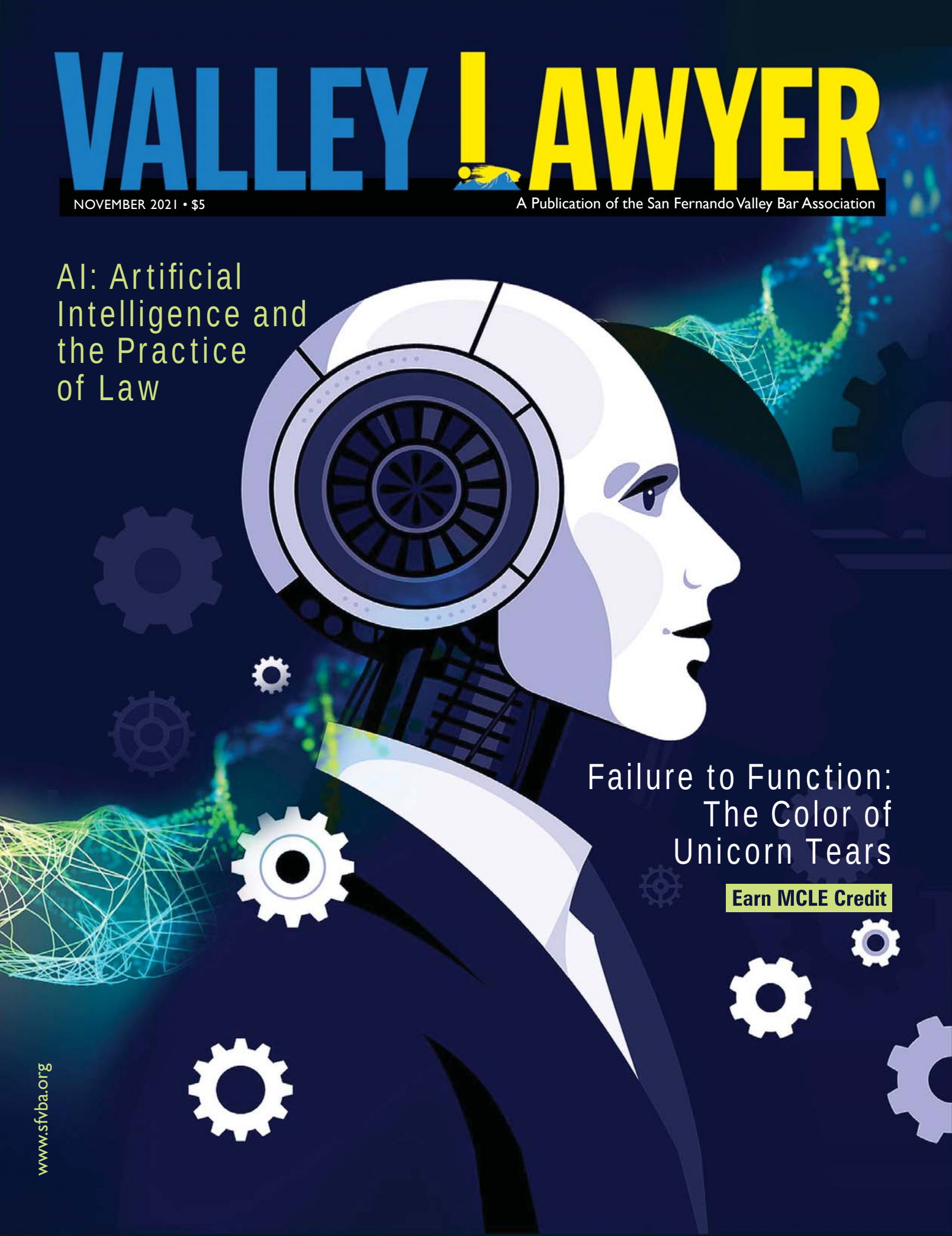

Failure to Function: The Color of Unicorn Tears

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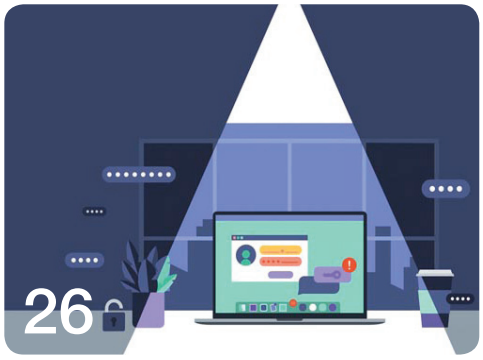

FEATURES

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VALLEY LAWYER

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Treasures Seen and Unseen

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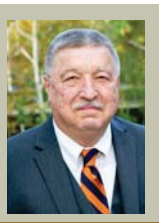

michael@sfvba.org

THE AGE-OLD BROMIDE THAT YOU CAN'T JUDGE a book by its cover conveys particular truth to me. Busy cramming a four-year degree into six years, I attended classes in the morning, drained, while working the night shift at an all-news radio station and managing a bookstore in the afternoons.

It was there that I learned the book-cover proverb does have a rather strong degree of truth to it.

One of the regular customers at the bookstore was an elderly lady, who, some would say, by all appearances, had seen her best days disappear in the rear-view mirror years before. A "lady," because despite her thread-bare, dated clothes and hairstyle, that's how she carried herself–like a lady.

Quietly, she would shuffle into the shop at least twice a week to peruse the shelves for what she called "treasures."

Occasionally, she would find one—usually a piece of classic literature as she was particularly keen on the works of Henry Fielding and Anthony Trollope—and share her insights about the authors with me like a teacher who had a genuine passion for the topic.

In fact, that's what she had been for almost 40 years—a teacher who happened to have earned a Master's degree in English Literature from the University of Wisconsin and had shared her love for the written word with countless students at several high schools and a junior college in the Midwest.

She was treasure herself and living proof that judgments about others based on outward appearances are for those sad mediocrities who value form over substance and misuse their eyes to never see anything greater than themselves.

Last month we ran a cover story on more than a dozen well-know and readily identifiable actors who had practiced—or at least aimed at practicing—the law. I intentionally left one actor out of the piece to make a point.

Anyone familiar with *film noir* knows the actor Mike Mazurki on sight. Born into a Jewish family in Ukraine, he came to the U.S. with his family at age six.

> "Anyone familiar with *film noir* knows the actor Mike Mazurki on sight."

Years later, Mazurki eventually went into acting and is best known for appearing in more than 142 films and numerous television shows, inevitably typecast as a low-IQ tough guy, a ruthless gangster, or an intimidating thug.

At 6'5" with a gravelly voice and a face that was once compared to a relief map of South America, he is undoubtedly best known for his role as the lumbering ex-con Moose Malloy in the classic 1944 dark thriller *Murder, My Sweet*, the film adaptation of Raymond Chandler's detective novel *Farewell, My Lovely*.

What is much lesser known about Mazurki is that, after high school in Troy, New York, he attended Manhattan College, where he played football and basketball, graduating with honors in 1930.

He enrolled at Fordham Law School, graduated near the top of his class and was licensed to practice law in the state of New York.

Before he went west to Hollywood, he made quite a name for himself as a professional wrestler, work he took up because, in his words, "I could make more money in the ring than in the courtroom."

Off screen, in real life, Mazurki was highly intelligent, very well read, and considered a witty conversationalist by just about everyone who came in contact with him. He died in Glendale in 1990 at age 82 and is buried at Forest Lawn.

Who would have thought—Moose Malloy for the defense? Some book, some cover.

CALENDAR

NOVEMBER 2021

SUN	MON	TUE	WED	THU	FRI	SAT

NATIVE AMERICAN HERITAGE MONTH

SFVBA COVID-19 UPDATES
sfvba.org/covid-19-corona-virus-updates/

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VBN VALLEY BAR NETWORK

ZOOM MEETING
5:30 PM

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ZOOM MEETING
Membership and Marketing Committee
6:00 PM

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WEBINAR
Probate and Estate Planning Section
Reimagining Postmortem Conception: California's Statute Has Significant Flaws
12:00 NOON
Professor Kris Knaplund will discuss postmortem children in regard to probate and estate planning. Many states, including California, have statutes detailing how these postmortem children can inherit from their predeceased parents. And yet, few of these children will be able to inherit. (1 MCLE Hour)
See ad on page 25

Board of Trustees
6:00 PM

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See ad on page 38

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WEBINAR
Family Law Section
Hot Tips
5:30 PM
Don't miss this important annual Family Law event. Our Family Law Judicial Officers will share their insights regarding the preparation and presentation of cases. Moderator: Gary Weyman
(1 MCLE Hour)

ZOOM MEETING
Mock Trial Competition
6:00 PM

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WEBINAR
Taxation Law Section
Key Tax Issues for Business Owners in 2021
12:00 NOON
Speaker Haleh C. Naimi of Advocate Solutions, Inc. presents. The COVID-19 pandemic and resulting economic uncertainty of 2020 left many business owners with remaining key questions in 2021. This webinar will address some federal and state tax issues for business owners, including:

- The state tax implications of continued virtual operations
- The state tax treatment of PPP loan deductibility; and,
- Maximizing the temporary use of NOL carryback provisions for losses incurred in tax years beginning after December 31, 2017 and before January 1, 2021,
- For businesses facing mounting debt, the use and limitations of the Bankruptcy Code to restructure or liquidate tax and vendor obligations

(1 MCLE Hour)

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WEBINAR
Criminal Law Section
The 10 Dos and Don'ts of Trial Practice. A Judge's Perspective.
12:00 NOON
Judge Hayden Zacky addresses the group.
(1 MCLE Hour)

Santa Clarita Valley Bar
Awards and Installation Dinner
6:00 PM
The Oaks Club
26550 Heritage View Lane, Valencia
https://scvbar.org/event/awards-installation-gala/

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ZOOM MEETING
Inclusion and Diversity Committee Meeting
12:15 PM

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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 19.

By Jeremy C. Beutler

FAILURE TO FUNCTION:

The Color of Unicorn Tears

Failure-to-function refusals for trademark applications are being issued with increasing frequency by the U.S. Trademark Trial and Appeal Board. Trademark attorneys are undoubtedly aware of the situation, but need to know that such refusals typically arise in the context of trademark examination.

TRADEMARK ATTORNEYS ARE UNDOUBTEDLY aware of the increasing frequency with which the U. S. Trademark Trial and Appeal Board (TTAB) has issued failure-to-function refusals for trademark applications.

Although such refusals typically arise in the context of trademark examination, the case of *Glow Concept Inc. v. Too Faced Cosmetics*, illustrates how a party can also use the failure-to-function doctrine in an *inter partes* proceeding brought before the Board.[1]

The case is notable because it contrasts with the Second Circuit's approach when confronted with an analogous issue in trademark infringement actions.

Also, it exemplifies the higher standard trademark applicants and petitioners face when they choose to bring claims before the TTAB rather than before, at least some federal courts.

As background, a trademark examiner may issue a failure-to-function refusal to an applicant that has applied to register a trademark when the applied-for mark does not function as a trademark. By definition, a trademark does not serve as a trademark when it does not identify or distinguish the source of goods or services to consumers.

Simple information—for example, 'DRIVE SAFELY' when used in connection with the operation of motor vehicles, or 'I❤DC' when printed on shopping bags, clothing, and plush toys—cannot be registered.

In the view of the TTAB, consumers are likely to perceive those uses as conveying general information rather than as a means to distinguish a brand's goods or services.

The doctrine also applies more broadly to any matter that consumers are unlikely to associate with a single source of goods or services, such as merely ornamental features or certain non-distinctive repeating patterns.

The doctrine is loosely based on the Lanham Act of which Sections 1, 2, and 3 address trademark eligibility requirements, while Section 45 contains the actual definition of a trademark. These sections do not use the phrase 'failure to function' or otherwise set out criteria for when a mark 'functions' as a source identifier.

Incoherent Rulings

Although there is some guidance from federal courts on the issue, much failure-to-function jurisprudence has been laid out by the Trademark Trial and Appeal Board through its own inconsistent rulings.[2]

Indeed, commentators have characterized the TTAB's failure-to-function framework as wholly extra-statutory and, at times, incoherent. [3] [4]

The Board has increasingly relied on this doctrine to refuse registration for a significant number of trademarks. By some counts, the number of failure-to-function refusals quintupled between 2010 and 2019.[5]

And although the number of failure-to-function refusals has dropped off since its 2019 peak, trademark examiners at the U. S. Patent and Trademark Office (USPTO) continue to rely on the doctrine, which was cited in more than 3,600 refusals from trademark examiners in 2020 alone.[6]

The cancellation proceeding the *Glow Concept* case illustrates how the TTAB's failure-to-function doctrine has diverged from the text of the Lanham Act and now imposes a heavier burden on applicants and petitioners to demonstrate that their marks function as trademarks.

In *Glow Concept*, the cosmetics company Glow Concept, Inc. filed a petition to cancel Too Faced Cosmetics, LLC's Unicorn Tears trademark based on its earlier use of the Unicorn Tears mark. Both companies used the trademark for their cosmetics products.

Glow's petition to cancel asserted ownership and prior acquisition of common law rights in the 'Unicorn Tears' mark and that there was a likelihood of confusion between the two marks. As a result, the company filed an application seeking to register the trademark.

In response to Glow's cancellation petition, Too Faced presented a failure-to-function argument, namely that Glow had used the name 'Unicorn Tears' solely as a shade name for a lip gloss.

As a result, the name did not function as an indicator of source as consumers were unlikely to associate 'Unicorn Tears' with a particular source of lip gloss—i.e., Glow.

According to Too Faced, consumers would rely on other source indicators, like Glow's other mark GLOSSY BOSS, to identify the source of its goods.

The TTAB found Too Faced's arguments persuasive and denied the petition to cancel. In particular, the Board agreed that Glow merely used the name as a shade name and not to identify and distinguish the company's goods.

Attorney **Jeremy C. Beutler** is an Associate at Stubbs Alderton & Markiles in Sherman Oaks. He advises clients on trademark and brand management issues and has represented clients in trademark matters in federal court and in trademark proceedings before the U.S. Trademark Trial and Appeal Board. He can be reached at jbeutler@stubbsalderton.com.

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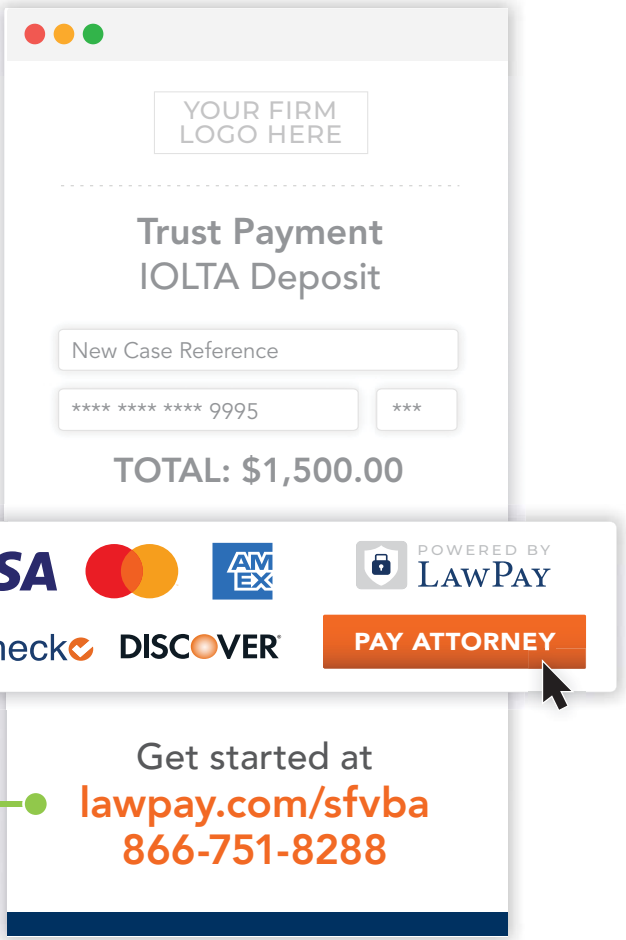

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As such, the TTAB found that Glow's 'Unicorn Tears' trademark failed to function as a mark and, thus, the company had never acquired proprietary rights to the mark through actual use as a trademark. Because Glow had no rights in the term 'Unicorn Tears' as a trademark, the Board held that Glow's likelihood of confusion claim must also fail.

The TTAB's decision is somewhat surprising given that the term Unicorn Tears is likely an arbitrary or suggestive name—it is not merely descriptive like the words blue and pink are for colors.

As such, the term is capable of functioning as both a shade name and a trademark. Indeed, unicorns are mythological creatures, and as such, it is up to consumers' imaginations to picture the color of their tears.

As an evidentiary matter, the Unicorn Tears name appears more prominently than some of Glow's other trademarks.

Perhaps most ironically, Too Faced's specimen of use showed that the company had also similarly used the 'Unicorn Tears' moniker as a shade name.

> "'DRIVE SAFELY' when used in connection with the operation of motor vehicles, or 'I♥DC' when printed on shopping bags, clothing, and plush toys—cannot be registered."

Acceptance and Rejection

Despite that, Too Faced maintained its registration while Glow's application to register the same mark was rejected.

Putting aside the TTAB's treatment of the evidence in Glow Concept, the Board's decision is troubling for a separate reason.

By adopting the requirement that a petitioner show it made use of an alleged mark before the Board considers the issue of likelihood of confusion, the TTAB has adopted an approach that contrasts with that of the Second Circuit in an analogous scenario that imposes a higher burden on applicants and petitioners.

In *Kelly-Brown v. Winfrey*, the Second Circuit addressed the issue, as a threshold matter, as to whether a plaintiff in a trademark infringement action must prove that the defendant made use of the plaintiff's mark as a trademark.[7]

The plaintiff in the case owned a motivational services business doing business as Own Your Power Communications, Inc. and had registered a trademark for OWN YOUR POWER in connection with those services.

The defendants were involved in the publication of a magazine, event, and website that used the phrase *Own Your Power*.

When the plaintiff discovered this, she brought a suit for trademark infringement. The lower court found that the defendant's use of the phrase was fair use under existing trademark law and dismissed the claim. The plaintiff then appealed to the Second Circuit.

At issue on appeal was whether, as a threshold matter, the plaintiff had to show that the defendants used the phrase "Own Your Power" as a trademark. The Second Circuit responded to that question in the negative. In its reasoning, the panel observed that defendants had conflated two distinct concepts under trademark law—use in commerce and trademark use.

Section 45 of the Lanham Act requires that a mark be "use[d] in commerce" to be eligible for registration. The use in commerce requirement is merely a "bona fide use of a mark in the ordinary course of trade."[8]

To satisfy such a requirement, the Second Circuit observed that "*[a] plaintiff is not required to demonstrate that a defendant made use of the mark in any particular way to satisfy the 'use in commerce requirement. The element is satisfied if the mark is affixed to the goods 'in any manner.'*"[9]

Trademark Use Context

The concept of trademark use, on the other hand, arises in the context of the classic fair use defense.

A defendant may claim the classic fair use defense when the defendant has used a mark only to describe some aspect of the defendant's goods, not to identify or distinguish the source of the goods in question.

For example, a producer of cranberry juice may use the term "sweet-tart" to describe the flavor of its juice without infringing a candy company's "SWEETARTS" registered trademark.

As part of the classic fair use defense, defendants have the burden of showing that the defendant used the plaintiff's mark otherwise than as a trademark—for example, the plaintiff's mark was not used as a symbol to attract public attention.

After clarifying this distinction, the Second Circuit held that, although the plaintiffs must satisfy the relatively light burden of showing use in commerce, there is no separate statutory requirement that the plaintiff must also show trademark use.

In such a case, the court will only consider the issue of trademark use after the plaintiff has established its prima facie case of trademark infringement and only if a defendant asserts classic fair use as a defense.

Notably, the Second Circuit in *Kelly-Brown* rejected the Sixth Circuit's contrary approach of adopting a requirement that, as a threshold matter in a plaintiff's trademark infringement claim, the plaintiff must show the defendant made a trademark use of the plaintiff's trademark.

Like the Trademark Trial and Appeal Board's failure-to-function jurisprudence, the Sixth Circuit has been criticized for imposing an extra-statutory requirement on plaintiffs that effectively shifts the burden of the fair use defense from the defendant to the plaintiff.

In response, a panel of the Sixth Circuit has acknowledged that criticism, but has not reconsidered its approach.[10]

Failure-to-Function

Putting aside the disagreement between the Second and Sixth Circuits, the Board's decision in *Glow Concept* epitomizes many scholars and commentators' concerns with the Board's failure-to-function jurisprudence.

By requiring that petitioners in a cancellation action demonstrate that they have made a trademark use of its alleged mark, the Board has effectively required them to meet a standard higher than what is required by the Lanham Act.

As the Second Circuit noted, to bring a claim for trademark infringement, a plaintiff need only show that the mark has been affixed to goods "in any manner."

The same standard should apply to applicants seeking to register a trademark and petitioners filing cancelation or opposition actions before the TTAB.

In general, the Board designates its decisions as precedential, in which case the decision is binding on the TTAB, or non-precedential, in which case the decision is not binding.

The Board designated the *Glow Concept* case as non-precedential, and, although it may be easy to dismiss it as so, such decisions "*may be cited for whatever persuasive weight to which they may be entitled*."[11]

Trademark attorneys commonly cite non-precedential decisions for general propositions of law.

But, more importantly, *Glow Concept's* outcome was driven by the TTAB's precedential failure-to-function jurisprudence, which has strayed from the use of commerce standard that the Lanham Act requires.

The disparity between the Board's failure-to-function jurisprudence and the Second Circuit's delineation of the "use in commerce" standard leaves brand owners with an important consideration when contemplating filing an action at the TTAB or pursuing a trademark infringement case in federal court.

A brand owner should carefully consider how its use of its trademarks and how the defendant's use of an infringing mark will be viewed under the use in commerce standard when compared with the trademark use standard.

The disparity between the Trademark Trial and Appeal Board's failure-to-function jurisprudence and the Second Circuit's delineation of the use in commerce standard leaves brand owners with an important consideration.

When contemplating the filing of an action or pursuing a trademark infringement case in federal court, a brand owner should carefully consider not only the use of its trademarks, but how a defendant's use of an infringing mark will be viewed and compared under both commerce and trademark use standards.

---

[1] *Glow Concept Inc. v. Too Faced Cosmetics, LLC*, Cancellation No. 92067143 (T.T.A.B. Nov. 2, 2020).
[2] See Lucas Daniel Cuatreasas, *Failure to Function and Trademark Law's Outermost Bound*, 96 N.Y.U. L. Rev. 101, 113 (forthcoming).
[3] Theodore H. Davis Jr. & John L. Welch, *United States Annual Review: The Seventy-Second Year of Administration of the Lanham Act of 1946*, 110 Trademark Rep. 1, 7 (2020).
[4] Cuatreasas, *supra* note 1 at 105.
[5] *Id.* at 114. *See also* Davis Jr. & Welch, *supra* note 1 at 7.
[6] *Failing to Function – A Short Defense of a Frustratingly Vague Refusal*, TM TKO Blog (Mar. 23, 2021) https://blog.tmtko.com/2021/03/23/failing-to-function-a-short-defense-of-a-frustratingly-vague-refusal/.
[7] *Kelly-Brown v. Winfrey*, 717 F.3d 295 (2d Cir. 2013).
[8] 15 U.S.C. § 1127.
[9] *Kelly-Brown*, 717 F.3d at 305 (quoting 15 U.S.C. § 1127).
[10] *Sazerac Brands, LLC v. Peristyle, LLC*, 892 F.3d 853, 859–60 (6th Cor. 2018).
[11] U.S. Pat. & Trademark Off., U.S. Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 101.03 (2020).

Failure to Function: The Color of Unicorn Tears
Test No. 157

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. A trademark is used to identify and distinguish the goods of one manufacturer or seller from another and to indicate the source of the goods to consumers.
❑ True ❑ False

2. According to the U.S. Patent and Trademark Office (USPTO), a word, name, or symbol fails to function as a trademark when it conveys merely informational matter and consumers are unlikely to associate the word, name, or symbol with a single source of goods or services.
❑ True ❑ False

3. The term "failure to function" appears in Section 1 of the Lanham Act.
❑ True ❑ False

4. Although issues concerning the "failure-to-function" doctrine typically arise during trademark examination, the doctrine can also be used by a party in an inter partes proceeding before the Trademark Trial and Appeal Board (TTAB).
❑ True ❑ False

5. In *Glow Concept Inc. v. Too Faced Cosmetics, LLC*, Cancellation No. 92067143 (T.T.A.B. Nov. 2, 2020), Glow Concept Inc. asserted a failure-to-function argument against Too Faced Cosmetics.
❑ True ❑ False

6. To be eligible for registration as a trademark, Section 45 of the Lanham Act states that the mark be "use[d] as a trademark in commerce."
❑ True ❑ False

7. The TTAB's "failure-to-function" doctrine is based on the plain text of Sections 3 and 45 of the Lanham Act.
❑ True ❑ False

8. In *Glow Concept*, the TTAB agreed with the defendant that plaintiff's UNICORN TEARS mark was merely used as a shade name for lip gloss and so failed to function as a trademark.
❑ True ❑ False

9. The primary issue on appeal in *Kelly-Brown v. Winfrey*, 717 F.3d 295 (2d Cir. 2013) was whether the phrase "Own Your Power" was capable of functioning as a trademark.
❑ True ❑ False

10. The number of failure-to-function refusals issued by the TTAB has remained steady since 2010.
❑ True ❑ False

11. In *Glow Concept*, the TTAB relied on evidence of widespread use of the term "Unicorn Tears" as a shade name for cosmetics to invalidate Glow Concept Inc.'s claim that it had trademark rights in the term.
❑ True ❑ False

12. Under trademark law's classic fair use defense, the defendant has the burden of showing that the defendant used plaintiff's mark otherwise than as a trademark.
❑ True ❑ False

13. All federal circuits agree that, as a matter of standing, a plaintiff in a trademark infringement action must show that the defendant made a "trademark use" of plaintiff's trademark.
❑ True ❑ False

14. A cranberry juice manufacturer's use of the term "sweet-tart" to describe the flavor of its juice does not likely infringe a candy company's registered trademark SWEEETARTS for sugar candy because the cranberry juice manufacturer's use of the term "sweet-tart" is likely a classic fair use.
❑ True ❑ False

15. In the Sixth Circuit, a plaintiff is required to show, as a threshold matter, that the defendant used plaintiff's trademark as a trademark.
❑ True ❑ False

16. In the Second Circuit, the phrase "use in commerce" in the Lanham Act means a *bona fide* use of a mark in the ordinary course of trade.
❑ True ❑ False

17. The TTAB's decision in *Glow Concept Inc. v. Too Faced Cosmetics, LLC*, Cancellation No. 92067143 (T.T.A.B. Nov. 2, 2020) decision is precedential.
❑ True ❑ False

18. Non-precedential decisions from the TTAB are not binding on the TTAB but may be cited for whatever persuasive weight to which they may be entitled.
❑ True ❑ False

19. The TTAB's "failure-to-function" jurisprudence is exclusively based on rulings from federal courts.
❑ True ❑ False

20. In the Second Circuit, the issue of "trademark use" arises only if a defendant asserts classic fair use as a defense and the plaintiff has established its prima facie case of trademark infringement.
❑ True ❑ False

Failure to Function: The Color of Unicorn Tears

MCLE Answer Sheet No. 157

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.**
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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**
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19.	❑ **True**	❑ **False**
20.	❑ **True**	❑ **False**

By Michael D. White

ARTIFICIAL INTELLIGENCE AND THE PRACTICE OF LAW

Regarding Artificial Intelligence, the obvious question involves the essential nature of what constitutes "artificial" and what accounts for "intelligence"—when those natures combine, how do they redefine the actual, day-to-day "practice of law"?

IN SEPTEMBER 2002, THE American Bar Association's Center for Professional Responsibility issued a document that offered a proposed draft definition of precisely what it means to 'practice law.'

The document, crafted by its Taskforce on the Model Definition of the Practice of Law, stated that:

The "practice of law" is "the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law…A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

- *Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;*
- *Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;*
- *Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or,*
- *Negotiating legal rights or responsibilities on behalf of a person."*

Note the words…" a person."

On its face, precise. But, today, almost two decades later, perhaps not so much with a myriad of issues—ethical, professional, intellectual, social, and even moral—presenting themselves.

Enter AI

Artificial Intelligence, or AI, is defined as "intelligence demonstrated by machines, instead of the natural intelligence displayed by animals including humans."

Interestingly, though, "intelligence" is characterized by "the capacity for abstraction, self-awareness, logic, understanding, emotional knowledge, reasoning, planning, creativity, critical thinking, and problem-solving."

The obvious question then involves the essential nature of what constitutes "artificial" and what accounts for "intelligence"—when those natures combine, how do they redefine the actual, day-to-day "practice of law"?

The answer, or answers, remain to be seen as technologies advance at a blistering pace and the structure of the legal profession itself morphs.

Yet, the public's legitimate expectations of access to competent legal representation intensify in an increasingly litigious environment.

AI in Action

The most obvious application of AI in the legal realm involves the prevention of security breaches such as data breaches, phishing, website attacks, and ransomware that can compromise sensitive client data.

According to the latest cybersecurity report compiled by the American Bar Association's Legal Technology Resource Center, the number of law firms reporting a security breach increased from 26 percent in 2019 to 29 in 2020.

Some of these results, it stated, "may have been impacted by COVID-19 since many law firms moved operations online—thus necessitating virtual work environments and [an increase in] online communications."

In addition to industry standards encompassed by federal law, every state has laws regulating data protection. Law firms in California, for example, must be mindful of the California Consumer Privacy Act.

The ABA's Model Rules of Professional Conduct states that lawyers must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

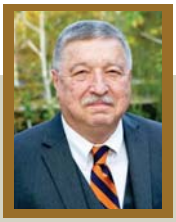
Comment 8 to Model Rule 1 takes that a step further, maintaining that, to maintain required knowledge and skill, lawyers should stay abreast of all changes "including the benefits and risks associated with relevant technology"—read, AI.

Another primary area of artificial intelligence application is the contract drafting and review crafted by companies such as ILawGeex, LexCheck and Clearlaw.

In May of 2021, ILawGeex, for example, announced that the Utah Supreme Court had granted the U.S./Israeli firm the authority to practice law.

The Court's decision makes LawGeex the first company to bring AI-driven contract review automation (CRA) technology to the practice of law in the U.S.

The authority was given under the state's new, so-called 'regulatory sandbox' program, which, the Court says, is designed to "rethink the legal system and increase access to legal services."



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In addition, the program "permits nontraditional legal services providers, including those with non-lawyer investors, to deploy innovative legal business models" to deliver those services.

Another area where the utilization of AI is surging—and, perhaps, shows the most significant promise—is document analysis.

In October 2017, more than 100 of London's top lawyers participated in a challenge match comparing their legal research skills with those of an artificial intelligence (AI) program developed by a small start-up business hatched by four law students at Cambridge University.

The lawyers lost.

To set the stage for the match, both the attorneys and the AI—called Case Cruncher Alpha—were provided with the facts of several hundred cases involving the English version of payment protection insurance (PPI).

In England, PPI will pay out a sum of money to help cover the monthly repayments on mortgages, loans, or credit/store credit cards if an individual cannot work because of illness, accident, death or unemployment, or other factors covered in your policy.

The match, overseen by two independent judges, focused on the conclusions drawn from the facts at hand and whether a financial ombudsman would allow or reject a claim.

The participants studied 775 cases, and the match results were eye-brow-raising—Case Cruncher Alpha racked up an accuracy rate of 86.8 percent, while the attorneys were able to compile a success rate of 66.3 percent.

"There's a lot of these cases and the information isn't too complicated. For certain things like this, you can ask a machine and it will do it far more speedily and efficiently than a human," challenge judge Ian Dodd, UK Director at Premonition AI told *BBC News*.

Premonition AI compiles and maintains predictive analytics on millions of legal cases.

Cambridge law lecturer Felix Steffek served as a judge and was careful not to read too much into the match.

"Both sides could have achieved better or worse results under different conditions," he said.

"The artificial intelligence might have benefited from more computing power. The lawyers' results might have improved if only experts in PPI claims as opposed to commercial lawyers generally participated."

The question, he added, revolves around whether AI—at this stage of its development—"will remain limited to descriptive analysis or whether it will be capable of evaluating rules and events."

A year after the Case Cruncher Alpha showdown in the UK, legal AI developer ILawGeex compared the performance of 20 experienced United Nations lawyers with their AI systems in a legal risk assessment task.

The highest performance among participating lawyers was 94 percent, the lowest performance was 64 percent with a performance average of 85 percent, while AI's success rate reached 94 percent.

In addition, the average time required for the lawyers to accomplish the task was 92 minutes, while the AI needed only 26 seconds.

AI in the Crosshairs

In 2016, the Cleveland, Ohio-based mega-law firm of Baker & Hostetler announced that it had 'hired' the AI developed by ROSS Intelligence to handle the research duties for its bankruptcy practice, which, at the time, consisted of nearly 50 attorneys.

The company was founded in 2014 when a pair of computer scientists at the University of Toronto collaborated with an attorney on a research project to develop AI

technologies "to make legal services more accessible."

The result was ROSS.

Built on the IBM Watson platform, ROSS, the company said, "is a cognitive system that can answer questions in natural language and can quickly respond to questions after searching through billions of legal documents. Lawyers can ask ROSS questions in plain English such as 'what is the Freedom of Information Act?'"

ROSS, it continued, "is constantly monitoring current litigation so that it can notify you about recent court decisions that may affect your case, and it will continue to learn from experience, gaining more knowledge and operating more quickly, the more you interact with it."

According to *Forbes*, it took about ten months for ROSS to ramp up and learn bankruptcy law before it commercially rolled out with ROSS Intelligence, "building more legal practice modules into the ROSS system beyond bankruptcy."

But, it all came crashing down in January 2021 when ROSS Intelligence shuttered its operations, citing the costs of an ongoing copyright infringement lawsuit brought against the company by Thomson Reuters, the Toronto-based international media conglomerate.

The suit, filed with the U.S. District Court for the District of Delaware the previous May, alleged that ROSS Intelligence had stolen "critical features" of Thomson Reuters' Westlaw legal research platform to develop its legal research tool.

> "Lawyers and their profession as a whole will have to adapt to AI, as much as AI will have to adjust to their genuine, and not perceived, needs."

In the suit, Thomson Reuters accused ROSS Intelligence of using "a then-Westlaw licensee to acquire access to and copy plaintiffs' valuable content."

The company, it said, "did so, not for legal research, but to rush out a competing product without having to spend the resources, creative energy, and time to create it. The net result is that plaintiffs find themselves in the unfair position of having to compete with a product that they unknowingly helped create."

AI and Reality

Substantive guidelines on what qualifies an AI platform to render legal advice are not only largely absent in the present but are likely to be challenging to establish in the future.

The potential pitfalls are deep and wide in a profession that is, by necessity, heavily regulated and monitored for good reason.

There are, despite the most far-reaching expectations, limitations on what AI can do as the human element in the practice of law is impossible to replicate.

Some work is too complex for AI to handle acceptably. Advising clients, writing legal briefs, negotiating, and appearing in court is out of the reach for their algorithms.

In 2015, a 17-year-old Stanford University student named Joshua Browder developed DoNotPay, an app to help friends dispute campus parking tickets.

The app relied on an AI-enabled chatbox and became popular almost immediately. Over the past six years, it has expanded its scope to include other consumer legal services ranging from consumer protection to immigration rights.

Interviewed by the *Wall Street Journal* in 2020, Browder alluded to the inability of AI, in a legal context, to comprehend human emotion and abstract thinking, skills only a human lawyer can have.

This emotional aspect is what makes the law profession much less prone to computerization, he said, adding that even the simple cases "require an abundance of human emotion and judgment"—something software cannot fully comprehend.

Computers, he said, "could never handle courtroom drama."

Another issue is that human error heavily impacts AI as even the most sophisticated artificial intelligence requires a human to operate it. As such, it will be as objective as the person who programs it—a person who may well inject their own pre-existing biases.

To create fair and unbiased AI, the system producing it first needs to be honest and unbiased itself.

In a well-publicized 2019 interview in *Forbes* magazine, L. Song Richardson, current president of Colorado College and then dean of the University of California-Irvine School of Law, stated succinctly that, "Biased data is going to lead to biased AI."

AI is Here…Adapt

Lawyers and their profession as a whole will have to adapt to AI, as much as AI will have to adjust to their genuine, and not perceived, needs.

As such, new technology will require acceptance and education as to how to utilize it to best serve the client, both practically and ethically.

In the same interview, Richardson said, "We won't have lawyers who understand algorithms and artificial intelligence well enough even to know what questions to ask, nor judges who feel comfortable enough with these new technologies to rule on cases involving them."

Therefore, the genuine concern is not the speed of AI development, but the ability and willingness of attorneys to make learning about it part of their continuing legal education, adapting to its appropriate use, and utilizing it accordingly.

Artificial Intelligence is, after all, only as intelligent and valuable as it is programmed to be.

Shadow IT: A Serious Threat to Law Firms

By Sharon D. Nelson and John W. Simek

THE FIRST PROBLEM WITH cautioning lawyers about the dangers of Shadow Information technology, or Shadow IT, is that most of them have no earthly idea what it is.

Technology consultancy Gartner has defined Shadow IT as "IT devices, software, and services—including cloud services—outside the ownership or control of the IT department of a business."

Once lawyers understand the definition, they generally say that everything is within the control of their IT department. Most of the time, that answer would be wrong, though many don't know it.

Just the Facts Please

Studies by Gartner have revealed that Shadow IT constitutes an amazing 30-40 percent of IT spending in big enterprises.

Advisory firm CEB estimates that the right percentage is 40 percent, while Everest Group research states that it makes up 50 percent or more of the spending. No need to split hairs – all three numbers are big.

Small law firms are not immune to this trend. How many law firm services are in the cloud, especially today? And are they all under the control and direction of the IT department?

The likely answer is no.

Are They All Renegades?

Absolutely not. In fact, Shadow IT is sometimes implicitly permitted or even encouraged.

Many would argue that Shadow IT makes businesses more competitive and allows for enhanced collaboration and innovation.

In their view, users discover applications or services that allow them to do their jobs better or more easily, and IT can subsequently go

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in and secure the applications or services.

In our experience, this is not a useful way to approach risky behavior by employees, the consequences of which can be dire.

Why do employees go off the reservation? Sometimes, IT departments move slower than the average tortoise or routinely raises objections to what employees want to do.

Undeterred, employees make an end-run around the rules—it is generally simple for those who have access to data to put it where they want and use it as they wish using tools or services that may not be authorized.

IT departments are often burdened by having a limited number of employees and constant demand for providing services. Sometimes, those who are outside of the IT department are pretty sharp technologically – and running Shadow IT operations doesn't intimidate them.

Cloud services and other vendors make it darn easy to implement new solutions. Just think about artificial intelligence—once it was complicated to implement, now it is so easy that solo/small practitioners do it all the time.

Limits on Control

Absolutely not. Ignoring policies is routine in most places. Employees know what they want to do and policies frequently do not deter them.

Often, they think the evasion of the policy is good for the law firm, that it allows for better solutions.

A good example is Dropbox, where we see many e-discovery productions made, usually without encrypting the data first before sharing it via Dropbox.

There may be a policy against using Dropbox without encrypting sensitive data first, but many lawyers will ignore that policy. Using technology to block access to Dropbox is possible but very unpopular with lawyers, who do indeed have many uses for it that do not involve sensitive data.

The consequence is that blocking is discarded as a solution, with IT relying on the policy instead. And we've seen how well that goes.

This puts the IT department in a difficult position. They mandate "don't do this," someone does do it – and there is no apparent harm.

We say "apparent harm" because often the Shadow IT solutions are riskier. They are not vetted by the IT department which is responsible for ensuring the law firm's security and compliance with any number of laws and regulations. Is it a conundrum?

Absolutely. IT often attempts to block certain applications, but the ability of employees to find a way around the blocking is uncanny. If Dropbox is blocked, not a problem. Google Drive, OneDrive, or any other cloud storage will work just fine.

A New Enemy in Town

Security experts have worried about Shadow IT for a long time, but now they must add shadow policies to the mix.

The larger the law firm, the more prevalent shadow policies are. They are rogue policies written by a particular group or department that are never reviewed, approved, and made part of the law firm's policies.

And yet, they expose the law firm to legal liability by setting their own duty of care to employees. If something goes south and rogue policies are discovered, the doors of legal liability may be thrown open.

Many shadow policies are written by people who are not experts at writing policies—without review, they often bear little relation to the law firm's

official policies—and yet an entire department may abide by them.

Shadow policies were spurred by the pandemic, with collaboration between distinct groups becoming more intense. Perhaps it was natural that they sought to write their own policies.

As crazy as it sounds, there needs to be a policy on writing policies. Why? Because it establishes the framework of policy management, sets forth how policies should be written and approved, etc.

All policies should be in one place where all employees know they can find them. Train employees: If they discover a shadow policy that is not in the centralized policy list, they need to report that policy.

Battening Down the Hatches

In a June 2021 study by security company Hysolate, the authors stressed what seems inevitable from the data cited above.

Employees need both more freedoms—and more restrictions. Moreover, almost all of those surveyed by Hysolate reported that their 2021 budgets included addressing remote IT challenges, including Shadow IT.

One statistic caught our attention. Only seven percent of users do not complain about security restrictions, but the remaining 93 percent look for ways to bypass them. With that mentality, we can certainly understand how hard it is to contain Shadow IT.

The goal is to batten down the hatches while allowing increased employee IT freedom. Some 87 percent of respondents want to increase employee IT freedoms while 79 percent want to increase employee IT restrictions.

IT respondents want to afford employees more freedom—browsing the internet freely, installing third party apps and plugins, printing at home, and performing personal activities on work devices, for example—but to do them securely.

And therein lies the heart of the problem. Can law firms give employees more IT freedom securely? Can they really batten down the hatches?

The upside, according to the Hysolate survey, is that most people believe that enhanced IT freedoms will increase employee productivity, make IT policies more palatable and reduce employee frustration.

The authors question whether the price tag of IT freedom is an increased danger to the law firm's confidential data, but then we admittedly look at everything from a security vantage point. We shudder at the installation of unapproved apps and using endpoints for personal activities.

The counterargument is that it may be possible to use endpoint privilege management, application isolation, and browser isolation to secure IT operations by employees.

Final Words

As last year's Hysolate 2020 report noted in *The CISO's Dilemma*, IT and security leaders then viewed worker productivity and enterprise security as mutually exclusive objectives.

The pandemic appears to have changed that view. At this point, there is a strong push to use isolation and privilege management technologies to afford security and IT freedom.

In conclusion, we may start to see Shadow IT come out of the shadows in law firms with the blessing of IT.

Everyone is looking for solutions to the risks presented by Shadow IT—it remains to be seen if they can successfully utilize technology and processes that afford secure employee IT freedom.

And to add another thought to the mix, perhaps law firms should be investigating Zero Trust Network Access (ZTNA) instead of battling Shadow IT.

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By Amanda L. Mineer

Genuine Thanks:

Helping Vets Through the VA Maze

JUST SAYING "THANK YOU FOR YOUR SERVICE" seems inadequate gratitude for those who have served our country, often at significant risk to their lives and well-being.

However, as lawyers, there are some more meaningful ways we can help veterans that we work with every day.

There are approximately 19 million U.S. veterans in this country, from those who served in WWII to soldiers who served in the Gulf War and Afghanistan, who will come into law offices for one reason or another.

Although their prior military service may not be a topic of conversation, being aware of potential needs that are only a referral away is a way to show genuine gratitude for their sacrifice.

I am an attorney who works exclusively with veterans, but I did not start out doing that—it became my mission quite by accident.

Living in Southern California, surrounded by active military veterans, I never connected that with my legal career until I had some veteran friends who were going through the process of filing Veterans Administration (VA) disability claims.

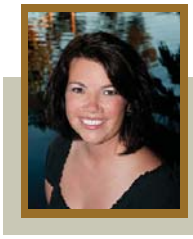
These were young people, but their time in combat had their consequences.

One, in particular, struggled quite a bit with post-traumatic stress disorder (PTSD) that interfered with his ability to hold down a job. He battled even more in trying to navigate the path to getting financial assistance from the VA.

Watching my friend go through that bureaucratic process, something he had no training in, prompted me to help. I found myself frustrated with the system even though, as a lawyer, my education and experience gave me an advantage in navigating it.

There are Veterans Service Organizations that can provide some help. Still, their lawyers are unaware of the complexity of VA cases, as only a few law firms handle such disability appeals, and there are few skilled resources available to veterans.

I decided to bring my talents as an attorney to the table and reached out to the Veterans Law Group, then a single attorney law firm with an exclusive veteran disability appeal



Amanda L. Mineer is the supervising attorney for Veterans Law Group and host of *The Veterans Voice* radio program, Tuesdays at 7:00 p.m., on KABC Radio 790 in Los Angeles. The Veterans Law Group, based in San Diego, offers support to veterans nationwide who appeal VA disability claims decisions. She can be reached at amineer@veteranslaw.com.

practice. They needed help, and I was happy to join the team.

Nine years later, we now have a staff of three lawyers and support staff, almost exclusively veterans, with increasingly streamlined processes for assisting veterans.

Every year we help veterans obtain millions of dollars in disability payments and assist them in receiving the compensation that the government guaranteed in return for putting their lives on the line for our nation.

Veteran's disability benefits are monthly payments available to veterans of any branch of the military dealing with combat or non-combat-related physical or mental disabilities.

In addition to physical wounds, these disabilities can include conditions such as PTSD and military sexual trauma (MST).

They also include the long-term effects of Agent Orange exposure after service in Vietnam with the Veteran's Administration acknowledging a presumptive connection between Agent Orange exposure and more than 20 medical conditions, including diabetes and several types of cancer.

There is no time limit on applying for VA benefits. If certain primary conditions are met, veterans of World War II, Korea, Vietnam, Iraq, and Afghanistan can apply.

The granting of a claim usually results in a lump sum payment covering the time the claim was being processed, with ongoing monthly payments paid out thereafter.

Barriers Defined

The most significant barriers that veterans face during the VA disability claims and appeals process are, first, knowing and acknowledging they have a potential claim; and, second, navigating the VA's complicated bureaucratic procedures.

Initially, lawyers aren't involved because it is illegal to charge to assist a veteran in this process. Should a claim be denied, or if the disability percentage rating offered by the VA seems too low, an appeal can be filed. That is when lawyers get involved.

Veterans usually handle the initial application process themselves or, less often, with the assistance of a VSO—a non-attorney Veteran Service Officer.

In any case, veterans should not do this alone and should not handle an appeal without a representative.

Unlike appeals in a court where review is narrow and only based on previously submitted evidence, the VA appeal process allows for the submission of new evidence and arguments, which sometimes can be sufficient to reverse or modify for the better the VA's original decision.

Fixable problems with a claim are much easier for an attorney to spot and remedy.

In short, a veteran filing a disability claim should not be without legal counsel in evaluating the initial claims decision and in pursuing an appeal, if warranted.

The problem of limiting attorney involvement in the initial process is that claims are often rejected for more procedural than substantive reasons and are very much fixable.

Sometimes service and medical records are missing or incomplete, or the veteran doesn't know how to validate their claim. They don't know what they don't know.

This is especially true for more complicated conditions such as PTSD and MST. Many doctors and mental health professionals do not even fully understand both conditions.

A soldier is trained in many skills, but navigating through the obstacle course that is the disability application process to a successful outcome is not one of them.

Barriers Removed

Veteran disability lawyers work in the arena where the Veteran's Administration has already issued a decision to a veteran and that ruling, in their opinion, is inaccurate.

A lawyer can step in to review a decision and determine whether the veteran received what benefits they were supposed to receive.

A skilled legal advocate comes in to make sure the veteran is getting everything they're entitled to and, if they're not, identify and present the missing piece of the puzzle to modify the decision.

A VA disability lawyer's job in this arena is to make sure all the ducks are in a row, making it easy for the agency to agree.

> "Veterans sacrificed much to serve this country, and we, as lawyers, can give a little something back when they come to our offices for help on any legal matter."

The lawyer pulls the case together whether it is helping arrange a medical examination, providing proper testimony about what happened to the veteran while in the service, or some other mitigating factor.

Many veterans don't know that help is out there; they hesitate to ask for it or tough things out themselves.

Increased education on the availability of benefits is essential, as is informing veterans that they may not need to accept a first-round decision from the VA. Before simply taking the decision, they should have their decision reviewed by someone with expertise to make sure that what they were granted is that to which they were entitled.

For veterans, it is somewhat challenging to transition from a strict hierarchy of command while they were in uniform to the civilian role of questioning and appealing a decision from a government authority like the VA.

Veterans don't think of themselves as victims and they often have a hard time acknowledging they need help.

Frequently, a spouse or other family member reaches out to a veterans disability law firm after seeing their loved one struggle with the after-effects of their military service.

Lawyers in other practice areas are also a good resource for identifying veterans with a potential need. Clients sometimes have legal issues that are immediate tipoffs that they may be eligible for VA disability benefits.

For example, if a veteran client is applying for Social Security benefits, they may also be eligible for VA disability benefits.

Similarly, someone with legal claims for Americans with Disabilities Act (ADA) accommodations based on a disability may also qualify for VA disability benefits.

At other times the connections are less obvious. Suppose a veteran is experiencing problems at work, such as excessive absences or altercations with fellow workers and bosses.

In such a case, those issues may be indicative of undiagnosed or untreated psychological problems that possibly stem from their military service and could be grounds for eligibility for disability benefits.

Ask questions to ascertain if there is a connection between what is going on in their lives and their experiences in the military.

It is also helpful to have at least a general understanding of what the symptoms of PTSD look like and, if the situation warrants it, make informal accommodations in the context of work with your client to mitigate those issues.

Some of those symptoms may come up during stressful parts of your legal representation, such as court hearings and depositions. Keep an eye out for veteran clients who easily display anger, or are constantly on guard, hyper-sensitive, readily startled, irritated, or having trouble concentrating.

Be candid with your client about stress points to anticipate, especially in family law matters and litigation. You can arrange for frequent breaks during a deposition, shortened meetings, working in shorter sessions on discovery responses, or other common-sense accommodations.

Where appropriate, talk with your veteran client about whether they have looked at the possibility of applying for Veteran's Administration disability benefits. If they have had an application denied or received an unsatisfactory ruling on the claim, refer them to a law firm specializing in VA disability benefits.

In almost all cases, the veteran will not have to pay any attorney fees unless and until the law firm secures a better outcome.

Veterans have sacrificed much to serve this country, and we, as lawyers, can give a little something back when they come to our offices for help on any legal matter.

CRUISING ALONG SOLO: An article about Driverless Cars and the question of liability ran in the August issue of *Valley Lawyer*.

In a new development on the topic, the California Public Utilities Commission (CPUC) has reportedly authorized San Francisco-based Cruise, LLC to participate in the state's first pilot program to provide driverless passenger services to the public.

According to the California Chamber of Commerce, Cruise is the first company to enter the CPUC's Driverless AV Passenger Service pilot program, in which passengers can ride in a test autonomous vehicle (AV) that operates without a driver in the vehicle. The company may not charge passengers for any rides in test AVs, which still must maintain a communication link between passengers and a remote safety operator.

A study by the Boston Consulting Group estimates that by the end of the next decade, 20 to 25 percent of U.S. rides will be logged by Level 5—that is, fully automated—AVs operated by ride-sharing services.

Cruise was founded in 2013 and acquired by General Motors in 2016, with subsequent additional investments from Softbank, Honda, T. Rowe Price, Microsoft and Walmart. The company has more than 300 all-electric AVs operating in San Francisco and Phoenix.

The CPUC states that its pilot programs are intended to allow AV companies to develop their technologies on a test basis, while "providing for the safety and consumer protection of passengers of commercial operators within the CPUC's jurisdiction."

DEBT COLLECTION: Up until last year, California had been one of 16 states that did not require licensing of debt collectors.

That changed with the enactment of SB 908—the Debt Collection Licensing Act (DCLA)—which takes effect at the beginning of next year and provides for the licensing and regulation of debt collectors.

As defined by the Act, a debt collector is "any person who, in the ordinary course of business, regularly, on behalf of that person or others, engages in debt collection." The act of "debt collection" is defined as "any act or practice in connection with the collection of consumer debt".

The term "debt collector" includes any person who composes and sells, or offers to compose and sell, forms, letters and other collection media used or intended to be used for debt collection. It also includes includes "debt buyer" as defined in Section 1788.50 of the Civil Code.

The DCLA exempts several classes of people and institutions, including depository institutions, such as FDIC-insured banks, credit unions, Department of Financial Protection and Innovation (DFPI)-licensed finance lenders, brokers, mortgage lenders and servicers.

In addition, Department of Real Estate licensed agents, persons subject to the Karnette Rental-Purchase Act, a trustee for a non-judicial foreclosure, and debt collections regulated under the Student Loan Servicing Act) are also exempt.

It is important to note here that the DCLA, however, does not expressly exempt licensed attorneys.

A CREATIVE WAY AROUND: A County Zoning Commission in the Midwest recently denied a permit to a rancher who wanted to build a shelter for his horses. The rancher did some homework and determined that a permit from the County isn't required to build a table and chairs.

ONLINE LAW SCHOOLS: A recent rule change by the State Bar of California means that state-accredited law schools in the state can teach JD programs entirely online.

Trinity Law School and John F. Kennedy University College of Law, both accredited by the state but not by the ABA, have filed major change applications to offer 100 percent online JDs.

Meanwhile, three distance-learning law schools that are entirely unaccredited are now seeking California accreditation. ABA-accredited law schools can only offer up to one-third of their credits online.

PARAPROFESSIONALS: California is on track to become the largest state to let specially trained nonlawyers offer legal advice in limited settings, such as employment and consumer debt.

The State Bar of California's Board of Trustees on Thursday gave its preliminary blessing to a proposed "paraprofessional" program by voting to gather public comment on the plan. The public will have 110 days to weigh in on the proposal, which, if adopted, has the potential to jumpstart the fledgling movement behind legal paraprofessionals, or limited license legal professionals, as they are sometimes called.

Under the proposal, paraprofessionals would be limited to offering services in the areas of consumer debt; employment and income maintenance; family children and custody; and housing. They would not be eligible to provide criminal legal services except for expungements. And they would be limited to specific functions within those areas. Within the employment category, for example, paraprofessionals would be able to handle unemployment and public benefits proceedings. Paraprofessionals would be allowed to appear in court under the current proposal but would be barred from handling jury trials.

Under the California proposal, paraprofessionals would have to complete a J.D. or LL.M, or have completed a paralegal program or be a qualified legal document assistant. They would have to undergo coursework covering court and ethics basics and legal topics specific to their practice areas, as well as 1,000 hours of practical training, testing, and a moral character evaluation.

If the State Bar of California adopts the proposal after the public comment period, it would still require the approval of both the California Supreme Court and the state legislature.

The Rule of Law: No One is Above It

By David G. Jones and Samantha Jones

THE TOPIC OF THE RULE OF LAW AND ITS relationship to presidential power has inserted itself into our national debate over the last 50 years, and it remains more relevant and compelling as each year passes.[1]

While each presidency stretches the limits of authority reserved to the executive branch, the presidencies of Richard Nixon, Bill Clinton, and Donald Trump have demonstrated that presidents will test the bounds of their power as it relates to their constitutional responsibility to "take care that the laws be faithfully executed."[2]

In many ways, it displays an apolitical concept of law; one that truly seeks to constrain all in an equal manner and avoid the exercise of power outside the law.

As James Madison so aptly explained: "[i]f men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and, in the next place, oblige it to control itself."[3]

Madison and the framers of the Constitution understood at an almost prescient level that powerful leaders, even those with good intentions, would exert as much power and control over the legal system as they were allowed by the people and other branches of government.

And while presidents regularly seek to assert their authority beyond the constraints set forth by the Constitution and our laws, a unique scenario allowing for rampant abuse arises when the president or those close to him become subject to legal jeopardy.

In these situations, we see the typically structured and normalized decisions as to criminal and civil liability matters subject to manipulation by the nation's chief executive.

A recent article in *The Hill* succinctly summarized the concept, explaining that…

> *"[a]t heart, the Rule of law ensures accountability under law for everyone, regardless of power or privilege, in or out of government. The idea, traceable to ancient scholars, resonates in most major legal traditions. America's founders spoke of "an empire of laws not men," and they institutionalized the idea in a constitutional framework that provides checks and balances on government authority…[I]t can be understood as a system that delivers accountability, just laws, open government and fair and impartial dispute resolution."*[4]

David G. Jones is a partner at the Encino firm of Lewitt Hackman. He specializes in all aspects of employment law and employment litigation and can be reached at djones@lewitthackman.com. **Samantha Jones** is his daughter and an aspiring politics-focused writer.

During the period encompassing the Constitutional Convention, Benjamin Franklin was asked, "What have we got[,] a republic or a monarchy[?]" Franklin responded, "A republic if you can keep it."[5]

According to Judge Edward W. Najam, Jr., preservation of the Rule of law,

> *"has been our nation's response to Benjamin Franklin's challenge. The Rule of Law has been the glue, the common denominator, the foundation —whichever metaphor you prefer—which has enabled us in Benjamin Franklin's words to "keep the Republic" and preserve our representative democracy…The Constitution was designed to compensate for human nature and contain political factions as threats to the Rule of Law."*[6]

As these sources indicate, the Rule of Law was historically a foundation for an ordered society that allowed for accountability for all. This article explores both sides of the coin.

On the one side, acknowledging the need for executive discretion and that of presidents to sometimes test specific laws in the best interests of our society.

On the other, reinforcing a firm but flexible Rule of Law to govern the conduct of presidents seeking to exert their authority outside the bounds of the law.

The Risk of Abuse

Recent events relating to President Donald Trump's term have reminded us of the risks of presidential involvement in the legal process regarding alleged illegal conduct prior to or during a president's time in office.

The ability to influence investigations, charging, and sentencing decisions as to presidential misconduct is real.

Again, the same concerns rang true for President William J. Clinton during his presidency as, clearly, the matter does not hinge on or is limited by political party affiliation.

Every president has faced calls for the Rule of Law to be applied to them like any other citizen. Each has resisted using executive power and aggressive legal challenges to core concepts within our laws.

Both Presidents Trump and Clinton faced civil suits and criminal challenges, which allegedly they used their influence and authority in office to minimize, all at significant risk to the integrity of the Rule of Law.

President Trump faced a myriad of both impeachment allegations, as well as more traditional personal and corporate civil and criminal investigations during his time in office, including allegations of self-dealing, tax evasion, and corporate fraud, to name a few.

As to the concept of delaying civil actions during presidential terms, scholars have argued both sides.

Some argued that the Court correctly denied President Clinton's request to defer the Paula Jones litigation to vindicate the principle that no person is above the law.

Like all other government officials, they said, the president is subject to the same laws that apply to all other members of our society.[7]

Others have contended that there will be no actual prejudice to civil litigants seeking to pursue civil actions against a president, as a mere delay will not deny them ultimate recourse.

In the other striking example of the courts supporting the Rule of Law in a dispute over executive misconduct, in *United States v. Nixon*, the Court rejected "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances" due to "our historic commitment to the Rule of Law."[8]

The concern raised was that the president would have the ability to influence and minimize his exposure to criminal and civil liability unless the system resisted in the name of the Rule of Law.

In each of these cases, "[n]o proper inquiry would occur if the president risked criminal investigation only by Department of Justice officials subject to his control. The president would, in effect, prosecute his cause, a violation of a basic idea of the Rule of Law that no one can be the judge of his own cause."[9]

Running counter to these arguments and legal precedents is the concept that every criminal or civil claim pursued against a president is inherently political.

In that regard, a president must have discretion to guard against the reverse—that the law would be more aggressively applied to him due to political or societal pressure.

Such pressures are constantly applied through the media and the political process to weaken presidential authority whenever an opportunity presents itself.

The Rule of Law Prevailing

Every president has advanced justifications for why the Rule of Law does not apply to them.

Many of the men elected to lead our country have genuinely believed that their office carries the type of unquestioned authority or superiority for basic laws not to apply to them.

While the Rule of Law is not a black-and-white notion, it presents and reinforces a set of concepts that every American citizen should abide by, despite their societal status.

As recent events have shown, there is a significant risk in abdicating the responsibility of adhering to the Rule of Law for those in a higher power.

Furthermore, when all branches of government are dominated by one political party, it creates even more potential risk as no person or entity is in a position of authority to oversee executive actions or step in when the president disregards the law.

Over the past several centuries, there are reasons why legal scholars have emphasized the significance of the Rule of Law.

Politicians of all stripes often reference the Rule of Law as "one of the great achievements of our civilization, for the alternative is the rule of raw power."[10]

It is, they have said, "what stands between all of us and the arbitrary exercise of power by the state."

Despite consistent efforts by presidents to overstep their bounds, it is essentially universally accepted that "no man or woman, no matter how highly placed…can be above the law in a democracy. [T]hat is a rock-bottom, irreducible principle of our public life."[11]

According to Richard H. Fallon, Jr., in *The Rule of Law as a Concept in Constitutional Discourse*, "Although the concept is somewhat amorphous, by most accounts it includes core tenets that have influenced many discussions of the presidency during the past quarter-century."

This is the reason why the Rule of Law is such a hotly debated political topic during each new presidency.[12]

The New York Times editorialized that the "Rule of Law is too vital to the future to be sacrificed as a concession to the president's whims, delusion or legal jeopardy."[13]

As can be seen with troubled presidencies of the past, presidents are willing to engage in questionable conduct to achieve their goals or satisfy their sometimes twisted desires.

Without a consistent application and enforcement of the Rule of Law to presidents, the risk for a Pandora's Box of problems is real.

The power of the presidency is immense and can corrupt the intentions of even well-intentioned men and women who will, in the future, occupy the office.

While many argue that their party's president should be freed from the burdens of the Rule of Law, there is no doubt that the Rule should be equally applied to presidents as we move into the future.

Striking a Balance

Astute commentators have recognized the push and pull between the Rule of Law and the presidency.

Joel Goldstein likely captured the sentiment best in his piece, *The Presidency and the Rule Of Law: Some Preliminary Explorations*:

> *"The fear of a lawless Chief Executive is not a frivolous concern…His supervision of law enforcement agencies presents formidable opportunity to harass and abuse. The urge to assert his subjection to the Rule of Law is therefore not surprising. This obsession with subjecting the president to law should not cause us to overlook the extent to which it is the president, not the courts, that the Constitution charges with the responsibility to vindicate the Rule of Law. Moreover, we should recognize, as did the framers and our greatest presidents, that the Rule of Law knows limits which occasionally must be exceeded in crisis time. This is not to say that the president is always, or even often, above the law. Absolving the Executive of all judicial accountability would pose an insult to the Rule of Law. Rather in extraordinary times the president must be free to ignore a particular law to protect the constitutional system."*[14]

The rub lies with many arguing that a president is subject to the Rule of Law in all contexts and scenarios.

The framers and the courts have recognized numerous situations where a President can and should work outside the bounds of existing law.

Further, blind reliance on the Rule of Law as a cure-all for all presidential power grabs is true folly. In this regard, Goldstein argues that…

> *"[t]here is also a tendency to put too much weight on the Rule of Law,…but rules alone cannot solve the most difficult problems of restraining government power…Elections, campaigns, free press and discussion were crucial aspects of the strategy. But the Constitution does not rely simply on electoral accountability to control government…A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions,*

observed Madison…Thus, the various institutional devices the Constitution provides and those our culture has added, help restrain presidential activity."[15]

Goldstein makes the critical point that the Rule of Law is primary, but electoral and media accountability are other powerful tools to provide real and perceived restraints on recalcitrant Presidents.

This holistic view of the mechanisms for control of presidential authority helps provide hope into the future for those who may have been frustrated by thwarted attempts to apply the Rule of Law to past presidential misconduct.

In the end, the people in government and the courts will determine whether the Rule of Law is applied equally and fairly to presidents. Without their commitment, it cannot be an effective tool for controlling such misdeeds.

"Ultimately, the ability of our system to travel safely through the most treacherous times depends not just on any rules we can fashion but in the good faith and wisdom of leaders and the people they serve in operating our political and governmental institutions."[16]

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[1] The Rule of Law is defined in the Oxford English Dictionary as "[t]he authority and influence of law in society, especially when viewed as a constraint on individual and institutional behavior; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes." Oxford English Dictionary online (accessed September 13, 2018; spelling Americanized).

[2] U.S. Constitution, Article II, Section 3.

[3] James Madison, Federalist Paper No. 51 (1788). The Rule of law is, as John Adams wrote in the Massachusetts Constitution, a government of laws and not of men. *The Constitution, Factions, and The Rule Of Law*, 64-APR Res Gestae 10, 12, April, 2021 Judge Edward W. Najam, Jr. Mass. Const. art. XXX. (citing MASS. CONST. art. XXX.)

[4] Andersen, Elizabeth, "*To Defend Rule Of Law, We Must Agree On Its Meaning*," January 22, 2021. https://thehill.com/opinion/criminal-justice/535366-to-defend-rule-of-law-we-must-agree-on-its-meaning.

[5] Papers of Dr. James McHenry on the Federal Convention of 1787, 11 AM. HIST. REV. 595, 618 (1906).

[6] *The Constitution, Factions, And The Rule Of Law*, 64-APR Res Gestae 10, 11, April, 2021 Judge Edward W. Najam, Jr..

[7] *Jones v. Clinton*, 72 F.3d 1354, 1358 (8th Cor. 1996).

[8] *United States v. Nixon*, 418 U.S. 683, 706-08 (1974).

[9] *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding appointment of independent counsel).

[10] 144 Cong. Rec. H11, 11776-77 (daily ed. Dec. 18, 1998) (statement of Rep. Hyde).

[11] *Id.* at B-2.

[12] Richard H. Fallon, Jr., *The Rule of Law as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1, 10 (1997); ("Respect for the Rule of Law is central to our political and rhetorical traditions, possibly even to our sense of national identity." Richard H. Fallon, Jr., The Rule of Law as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 3 (1997). Surely it is one of the Constitution's defining structural principles.") *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); ("the oldest principle of democracy" is that "the law must deal fairly with every man.") Debate on Articles of Impeachment, Hearing of the Committee on the Judiciary House of Representatives, 93d Cong. 1 (1974); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (Take care duty is president's most important constitutional duty).

[13] *The Shrinking Power of Lies*, N.Y. Times, Sept. 22, 1998, at A30.

[14] Goldstein, Joel, *The Presidency and the Rule Of Law: Some Preliminary Explorations* 43 St. Louis U. L.J. 791, 817 (citing Michael Rosenfeld, Executive Autonomy, Judicial Authority and the *Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 Cardozo L. Rev. 137, 139 (1993).)

[15] *Id.* at 851, 852 (citing The Federalist No. 51, at 322 (Madison) (Clinton Rossiter ed., 1961).)

[16] *Id.* at 852.

Member Focus

Without its individual members, no organization can function. Each of the San Fernando Valley Bar Association's 2,000-plus members is a critical component that makes the Bar one of the most highly respected professional legal groups in the state. Every month, we will introduce various members of the Bar and help put a face on our organization.

Angela M. Berry

Law School: Loyola Law School

Area(s) of Practice: Criminal Law, trials, writs and appeals

Years in Practice: 30

Firm and Location: Angeles Berry, PLC, Encino

What's your favorite vacation spot? "Any vacation."

What was your favorite childhood television program? "Twilight Zone and Perry Mason."

Your favorite Valley restaurant? "Firefly."

Angela M. Berry is a criminal defense attorney who practices in both trial courtrooms and before the appellate courts. Her practice involves a wide range of cases, including the defense of the accused in simple misdemeanor misconduct and those accused of capital murder.

Berry received her undergraduate degree in Political Science from UCLA in 1987, graduated from Loyola Law School in 1991 and was licensed to practice law later that same year.

She credits her precise and persuasive motion and appellate writing to her clerkship with the California Attorney General's Office, Criminal Appeals Section while attending law school. Her experience in the trial courts is a culmination of 30 years of trying cases, more than 50 of which have been jury trials.

Berry is actively engaged in, and currently sits on the Board of, the Criminal Courts Bar Association. She has also served as an executive board member of the Indigent Criminal Defense Appointments Program, and as a member of the organization's Billing and Discipline Committee.

She currently sits on the Bar's Attorney Referral Service Committee and was honored by the Constitutional Rights Foundation as its 2007 Lawyer of the Year.

The mother of two and the step-mother of two, Berry loves running marathons and has climbed Mt. Kilimanjaro.

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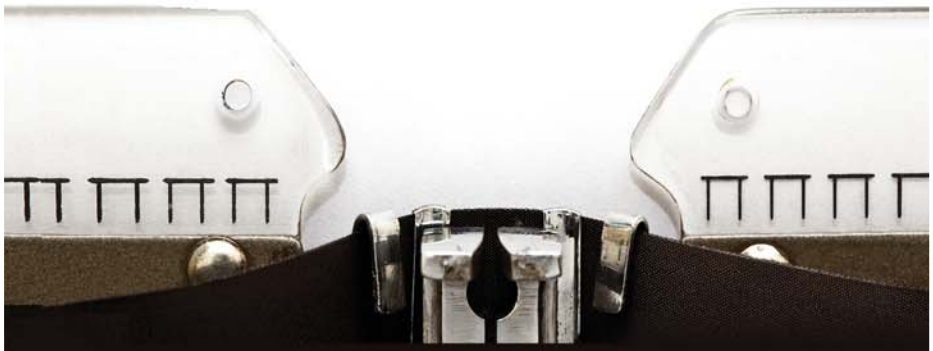

If you are of a certain age, the San Fernando Valley holds a lot of memories. Scroll down the list and smile if you remember...

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- Mad Man Muntz
- Dutton's Books
- White Front, Zody's, Akron, Fedco, Gemco Department Stores
- Thrifty Drugstores
- The San Fernando Valley Fair at Devonshire Downs
- Pepe's Kartland
- The Lockheed Skunk Works
- The Big Do-Nut Drive In
- B. Dalton Pickwick Book Store
- Wil Wrights Ice Cream
- Bel-Air Camera
- Ho-Toy's Restaurant
- Carpeteria
- Love's BBQ, Chris & Pitts, The Bear Pit
- Sir George's Smorgasbord
- Piggly-Wiggly Supermarkets
- The Corbin Bowl
- Moby Disc Records
- Philip Ahn's Moon Gate Restaurant
- Pup 'n Taco
- The Van Nuys Drive-In Theatre
- Pioneer Chicken
- Evan's White Horse Inn
- Home Savings & Loan
- Chicken Delight
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THE SAN FERNANDO VALLEY BAR'S ATTORNEY Referral Service (ARS) receives hundreds of legal inquiries via telephone, online, and an occasional office visit. These inquiries vary in complexity and case type.

The assistance ARS clients need ranges from general legal questions to representation in cases with upcoming trial dates. ARS success is mainly dependent on understanding our client's concerns and connecting them to the attorneys best-suited to assist.

Fortunately, whenever we are confronted with complicated situations, we can always turn to our experienced panelists for guidance.

One of the standard legal processes clients inquire about is conservatorships. Conservatorships fall within the area of probate law and can be very complicated at times.

In one instance, to better understand the process, ARS consulted with long-time panelist, attorney Tom Moser.

With more than 40 years of civil litigation experience, his Westlake Village practice specializes in probate and trust litigation, wrongful termination, and sexual misconduct.

In addition to his outstanding professional experience, he rarely turns away tricky cases and always takes the time to explain some client issues to ARS staff.

In the conservatorship discussion, Moser said that, "When a person is deemed mentally or physically incapable of making their own decisions, the court can create a conservatorship or a guardianship to make decisions for the individual. Conservatorships are generally established for adults, and guardianships are established for minors. Conservatorships create a legal responsibility to manage the financial or personal affairs of another person."

"A conservatorship of the estate grants a conservator the right to make financial decisions for the conservatee," said Moser.

"A conservatorship of the person allows a conservator to manage the daily life of the conservatee including important personal decisions, such as medical care and living arrangements," he added.

In his experience, conservatorships are most commonly created for the elderly to help them responsibly manage their affairs.

There is a lot at stake in conservatorship proceedings with the court basing its decision on the interest of the conservatee and enacting measures to protect those interests.

When ARS receives requests for legal help to establish a conservatorship, ARS coordinates an initial consultation with a qualified attorney. Clients often learn about the process—that the court requires doctor's letters or declarations to determine whether individuals are incapable of caring for themselves.

> "Conservatorships create a legal responsibility to manage the financial or personal affairs of another person."

Additionally, the court will also appoint an investigator to ensure that decisions benefit a conservatee. Once a conservatorship is established, it can be a challenge to dissolve.

"The creation and termination of a conservatorship is a costly and lengthy process. Conservatorships are rarely terminated by the courts. You must prove capacity and that can be challenging," said Moser.

Overall, conservatorships are complex and have a substantial impact on all parties involved. Tom Moser believes one of the best ways to protect yourself is to create a trust. A trust can delegate these responsibilities beforehand to prevent future complications.

Conservatorships fall within an area of law that exemplifies the advantages of preparation and foresight. For many unfamiliar with the legal process, it can seem daunting to seek legal counsel but may be beneficial in the long run.

At the ARS, we are committed to serving the community by providing legal resources and, when appropriate, no-cost referrals to our highly skilled San Fernando Valley attorneys.

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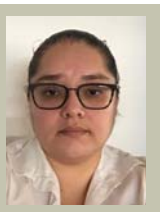

anazuniga@nlsla.org

THERE ARE ONLY TWO ELEVATORS IN THE 260-unit Cathay Manor apartment complex in Los Angeles' Chinatown, and this last summer, neither of them was working.

In May, the first elevator broke down, forcing the building's 300 tenants—all over the age of 60 with many in their 80s and 90s—to cram into one elevator amid a pandemic.

Then the second elevator stopped working, and tenants, a significant number of whom depend on walkers and wheelchairs to get around, found themselves trapped inside, unable to walk safely down the emergency stairwells of the 16-story building.

Despite federal subsidies to provide safe housing for low-income seniors, the owners and managers of Cathay Manor engaged in a years-long pattern of abusive behavior that significantly escalated over the summer months.

Their inaction forced disabled seniors to climb low-lit, dangerous stairwells while others were trapped in their apartments for weeks at a time.

The broken elevators also forced paramedics to climb stairs to reach elderly tenants with medical emergencies.

After tenants complained, the Los Angeles Housing and Community Investment Department ordered the landlord and management company to repair the elevators. The Los Angeles Department of Building and Safety issued a similar order, but the deadlines passed, and the owners made no repairs.

After months of trying to call attention to the broken elevators and other problems in the building—including a lone laundry room that has been closed since March—Neighborhood Legal Services of Los Angeles (NLSLA) helped tenants sue the owners and managers of Cathay Manor.

Plaintiffs in the lawsuit include Long Thai, an 81-year-old tenant on the thirteenth floor, Zhuo Chun Lin, an 80-year-old tenant on the fourteenth floor, and Pot Tam, an 85-year-old tenant on the fifth floor.

Within days of the lawsuit being filed, one of the elevators was fixed by workers from the City of Los Angeles, while the second elevator was scheduled to be replaced, and new washing machines were ordered.

The tenants of Cathay Manor are finally having their rights restored.

The NLSLA routinely works with community groups and tenant organizers to address the issues impacting low-income communities, especially issues related to housing. These groups see problems as they arise.

In the case of Cathay Manor, they gave tenants a voice and alerted NLSLA to the issues in the building.

It's just one of the ways that the NLSLA works to change lives and transform communities. To learn more or to get involved, please go to nlsla.org.

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