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From the Chair

BY JACQUELINE M. REAL-SALAS

At the end of 2006 most of us made a few new year’s resolutions. We put forward our best effort at meeting these goals during January, when gyms become crowded, sales of healthy foods at grocery stores skyrocket, and bookstores sell more how-to books. The new year offers us a clean slate and a new chance to be different people: the “new and improved” version of ourselves.

By February, our energetic start has met with challenges, and the reality of meeting our goals has grown more distant. Why does this happen even to us lawyers? After all, most of us are well disciplined, intelligent, and dedicated people, who have vast experience at setting and reaching goals. We are experts in this area. Indeed, two prime examples of our milestones are completing law school and passing the bar exam. Yet it seems that once a major goal is achieved, dreaming and planning about other goals fall by the wayside. We get trapped in everyday routines that make the days, weeks, and months pass by at a speed that gains momentum with each year. February, then, is the perfect month to review our goals for 2007 and measure our progress. There is still plenty of time to make realistic adjustments and be successful.

A good place to start is by taking an honest look at the reasons behind our goals. If the reasons are compelling enough, significant life changes can occur and astonishing resolutions may be accomplished. Personal reasons tend to be simple, like seeking recognition and respect or just enjoying the feeling of being a winner. Perhaps the desire fueling the goal is simply to experience the journey required to achieve it. If we are fortunate enough to be greatly affected by others, family reasons may be the powerful drive behind our goals. Often times we will do for others what we will not do for ourselves. Sometimes the reasons propelling our goals are benevolent—it is nice to be nice, and that may be sufficient to stir us to action. Finally, there are reasons motivating us that can only be described as mundane. But these too can be powerful. Whatever the reasons behind a goal, they must be crystal clear if the goal is to be met.

Once we are reminded of the reasons behind our goals, we should look at the goals themselves. Goals usually can be divided into long-term or short-term objectives—and a careful balance between the two is essential. Long-term goals often involve lifelong dreams and may involve a plan encompassing one year, five years, 10 years, or longer. Reaching the long-term goals likely depends on achieving some short-term goals. This is where balance plays an important role. Short-term goals are what we will do tomorrow, next week, or next month. Frequently these goals are the stepping stones to our dreams—but their most important role may be to give us the confidence we need to keep reaching for our long-term objectives. We must not forget to celebrate the small accomplishments. If you keep a written list of your goals, take pleasure in crossing each item off the list.

This year I have committed to my goals more seriously than ever before. I actually have a written list and a plan. One of my goals is particularly difficult in that it does not involve a change in behavior but rather a change in how I feel about certain things in life. I know this will be a challenging long-term goal—and I have set a few short-term objectives along the way so that I can pat myself on the back when I accomplish them. I am sure that my plan is not foolproof and that adjustments will be necessary. As motivational speaker Jim Rohn says, the future gets better by planning, not hoping. This column is part of my plan, and hopefully it will give us all the extra push that I know will be needed by the time you read it.

Jacqueline M. Real-Salas is a partner at Calleton, Merritt, De Francisco & Real-Salas, LLP, where she specializes in estate planning, trust administration, probate, and elder law. She is the chair of the 2006-07 Los Angeles Lawyer Editorial Board.
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I just got around to reading the December 2006 issue of *Los Angeles Lawyer* and am glad I did. The primary articles: “Good Marksmanship,” “Discoverability of Attorney Interview Notes,” “Exercising Rescission after Commencement of a Lawsuit,” and two more on accidental franchises and attorney obstruction of justice just blew me away (for the uninitiated, that’s a legal phrase meaning “wow”). Even though all of the articles fall outside my areas of practice, I couldn’t stop reading. I don’t often read all the articles in any magazine, and rarely do so in trade magazines, but this publication ranks head and shoulders above the others—even the State Bar magazine. I look forward to future issues.

Robert Giffin

Ethical Principles

I am concerned about an article titled “Walk the Line” in the December 2006 issue of your magazine. Specifically, page 26, column 2, the last full paragraph, in which the author says, “Because a lawyer’s goal is typically, at least in part, to impede his or her adversary’s search for the truth…a lawyer’s conduct may approach obstruction of justice.”

This statement is incorrect, in light of Code of Civil Procedure Section 2017(a), which mandates that unless limited by court order, “[a]ny party may obtain discovery regarding any matter” that is not privileged and is relevant to the pending matter. This section entitles a party to discovery and requires that a party, and therefore their lawyer, generally assist in the search for truth by providing full and accurate discovery responses unless specified restrictions apply. The section does not allow lawyers to generally or “typically” impede the search for truth, by hiding answers or items that an opposing party is entitled to receive.

The policy requiring cooperation versus obstruction in discovery is further supported by Code of Civil Procedure Section 2023, which deems a “misuse of discovery” to be a failure to “respond or submit to an authorized method of discovery” or make either an unmeritorious objection or evasive response to such discovery. Such conduct subjects the offender to sanctions up to and including contempt.

In short, the discovery statutes expect a party and attorney to provide requested information to, not hide it from, their opponents in most situations. Your magazine should correct any assertion to the contrary and ensure that MCLE credit is only given to those who understand this distinction.

Thank you for your time in considering my response.

Robert Klepa

Carole Levitt’s and Mark Rosch’s excellent article (“Should Attorneys Use Macs?” Computer Counselor, October 2006) on Apple's Macintosh computer in the law office overlooked probably the best reason for a litigator to add a Mac notebook computer: Apple’s Keynote presentation software. This Power Point replacement is far easier to use and has many more attractive themes than Power Point. And there’s no comparison in its ability to incorporate photos and video into individual slides.

Gordon Ownby

I’m thrilled that Charles Michaels would set the tone for his presidency of LACBA by calling on lawyers to remember that our profession has played an important role “in the struggle for liberty and equality throughout America’s history” (President’s Page, July/August 2006). Yet he fell into the habit of too many lawyers, politicians, and others who speak of America’s achievement as “the attainment of liberty for its citizens” and that “equal justice is no more than a pipe dream unless citizens can use our justice system” (emphasis added).

But the great sweep of rights protected by the Constitution, the Bill of Rights, and our historic civil rights laws are not limited to citizens, except in the area of voting. They speak more broadly in terms of “persons” and “the people”: immigrants, aliens, and visitors, many of whom are the very victims of the injustices and inequalities that Michaels urges lawyers to address.

With that more inclusive vision, Michaels has set the Association on an ambitious and worthwhile course.

Stephen F. Robde

I read with great interest the Los Angeles County Bar Association’s Formal Ethics Opinion No. 514, Ethical Issues Involving Lawyer and Judicial Participation in Listserv Communications (*Los Angeles Lawyer*, January 2006). I have been deeply interested in legal issues relating to listserv technology since my successful Ninth Circuit argument in *Batzel v. Smith* (333 F. 3d 1018 (2003)) (holding that a listserv operator is immune from suit predicated on retransmission of allegedly defamatory e-mail, if retransmission did not materially alter e-mail content), *cert denied*, 451 U.S. 1085 (2004).

In addition to the detailed discussion of Professional Conduct Rule 5-300(B), attorneys also may wish to consider Rule 5-120, which governs publicity of legal proceedings. The Opinion recognizes that a listserv may be a public forum, and thus Rule 5-120 potentially may apply. Rule 5-120(A) forbids attorneys from making extrajudicial statements about pending matters “that a reasonable person would expect to be disseminated by means of public communication if the [attorney] knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.” Rule 5-120(B) contains certain safe harbors, permitting attorneys to disseminate, for example, “the information contained in a public record” and “the scheduling or result of any step in litigation.” Rule 5-120(C) also permits an attorney to respond publicly to adverse publicity if doing so is reasonably necessary “to protect a client from the substantial undue prejudicial effect of record publicity not initiated by the attorney or client, so long as the statement is “limited to such information as is necessary to mitigate the recent adverse publicity.”

I commend LACBA for taking a serious look at how new technologies affect traditional ethical rules and look forward to future opinions on cutting-edge topics.

Stephen J. Newman
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WHILE RECENT AMENDMENTS TO BANKRUPTCY LAW are known as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), they generally favor landlords over tenants who are debtors in bankruptcy. The BACPA amendments are numerous, but a few highlights, especially as they apply to commercial leases, are valuable to real estate and bankruptcy practitioners.

Under prior bankruptcy law, if a debtor in possession or bankruptcy trustee did not assume or reject an unexpired lease of nonresidential real property under which the debtor was a lessee within 60 days after the date of the order for relief—which is usually the bankruptcy filing date—then the lease was deemed rejected, and the trustee had to surrender the property to the lessee. The U.S. Bankruptcy Court could extend the time for the trustee to assume or reject the lease, for cause, if the extension was made within the 60-day period. There was no limit on the number of extensions. The DIP and trustee therefore could hold lessors at bay for a long time while the debtor tenant evaluated its reorganization prospects during the chapter 11 case.

Under the BAPCPA amendments, the leverage has shifted to the landlords. Although the time for the DIP or trustee to assume or reject an unexpired nonresidential real property lease in which the debtor is the lessee has increased to 120 days after the order for relief (or the date an order confirming a plan of reorganization is entered, if earlier), this limit may be extended by the court only once, for a period of 90 days, for cause. The motion to extend must be made before the 120-day deadline has expired, and subsequent extensions may be obtained only if the lessor landlord agrees in writing.

DIPs and trustees now have up to 210 days from the start of the bankruptcy case to assume or reject their nonresidential real property leases. If the trustee does not act within the time allotted by the statute, the lease is automatically rejected. In many cases, this will be insufficient time for the DIP or trustee to make an informed decision about whether the lease is necessary for the debtor’s reorganization or has value to the estate. The debtor will then need the landlord’s cooperation to extend the time to assume or reject the lease. BAPCPA gives landlords power to dictate the terms of any agreement to extend the 210-day limit. On the other hand, debtors will try to avoid the landlords’ influence by carefully analyzing their leasehold needs before they file for relief, so that they can use the entire 210-day period to market any excess properties.

Assignment of leases. Under prior bankruptcy law, the courts were fairly liberal in allowing debtors to assign shopping center leases—even in cases in which the proposed tenants intended to use the premises for purposes that violated restrictive use lease terms—by finding that tenant mix and use restrictions were unenforceable antiassignment clauses. BAPCPA restricts a court’s discretion to allow a trustee to assign a lease to tenants whose use of the premises will not conform with the lease use restrictions by excluding tenant mix provisions from classification as antiassignment clauses.

Curable defaults. The leverage may have shifted in favor of the landlords, but tenants are not completely without recourse. Under prior bankruptcy law, if there had been a default in the debtor’s executory contract or unexpired lease, the trustee or DIP could not assume the contract or lease unless, at the time the contract or lease was assumed, the trustee cured, or provided adequate assurance that he or she would promptly cure, the default. However, it was unsettled whether a trustee or DIP could assume an executory contract or an unexpired lease in cases in which the nonmonetary default was not curable. In Worthington v. General Motors Corporation, the Ninth Circuit concluded that the debtor’s breach of a lease term was noncurable, and therefore the debtor could not assume the lease. The First Circuit disagreed with that approach, holding, in the context of equipment leases, that a lease could be assumed despite the debtor’s inability to cure a noncurable nonmonetary default.

Under the BAPCPA amendments, the trustee or DIP is not required to cure or provide adequate assurance that the trustee will cure a default arising from a nonmonetary obligation (other than a penalty rate or penalty provision) under an unexpired lease of real property, if it is impossible for the trustee to cure the default by performing nonmonetary acts either at the time of or after assumption. However, if the default in the lease arises from a failure to operate in accord with a nonresidential real property lease, then the default must be cured by performance of the lease terms at the time of or after assumption of the lease, and the trustee or DIP must compensate the lessor for pecuniary losses arising from the default.

Thus, a debtor is not required to cure a nonmonetary default in residential real estate leases if it would be impossible to cure the default. A debtor is also excused from curing a nonmonetary default if the default relates to the satisfaction of any penalty rate or penalty provision, but the debtor must reimburse the landlord for any pecuniary loss occasioned by the default.

Landlord’s administrative claim. Under prior law, the assumption of an unexpired lease in a chapter 11 case created a chapter 11 administrative expense in the event of a breach of the lease. If the lease were later rejected, the future rent and other charges under the lease were entitled to a priority as an administrative claim.

Under the BAPCPA amendments, in cases in which a nonresidential real property lease is initially assumed under Section 365, but then rejected, the lessor has an administrative priority damage claim with regard to all monetary obligations due by the debtor, except those arising from or relating to a failure to operate or penalty provisions, with a cap of two years’ rent.

The lessor may assert a claim for the remaining amount due on the lease (beyond the two-year limitation) under Section 502(b)(6), which also limits the lessor’s claim to rent reserved by the lease for the greater of one year or 15 percent, not to exceed three years, of the remaining term of the lease.

Uzzi O. Raanan and Kim Tung are with the firm of Danning, Gill, Diamond & Kollitz, LLP, and extend special thanks to John J. Bingham Jr. of the firm for his help with this article.
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Administrative priority claims assure that the landlord will be paid ahead of any priority and unsecured creditor. However, as is the case with regard to a landlord’s prepetition claim, this postpetition administrative claim is now also capped. Although California law allows a reduction of the landlord’s damages for failure to mitigate, Section 503(b)(7) does not include such a requirement. This likely will be an area for dispute.

Other benefits for landlords. Landlords also benefit from various exceptions that BAPCPA has added to the provisions of the automatic stay. For example, the automatic stay does not apply in cases involving eviction or unlawful detainer actions by a lessor against a debtor with regard to residential property in which the debtor resides as a tenant pursuant to an agreement, to the extent that the lessor had obtained a judgment for possession of the property against the debtor prior to the petition date. The automatic stay is subject to a limited exception that is detailed in Section 362(l). Also, the stay does not apply (subject to conditions) in cases involving an eviction action that seeks possession of a residential property in which the debtor resides as a tenant pursuant to an agreement, based on endangerment of, or the illegal use of controlled substances on, the property, but only to the extent that the lessor has filed with the bankruptcy court, and served on the debtor, a certification that an eviction action was filed.

BAPCPA further affects real estate through amendments concerning, among other things, the use, sale, or lease of property by nonprofit corporations or trusts; the postdischarge collection by secured claim holders; the grace period for calculating when a transfer was made for fraudulent transfer analysis; the homestead exemption; single-asset real estate bankruptcy cases; debts to utility companies; and other exceptions to the automatic stay. To learn more about recent changes to bankruptcy law, real estate and other practitioners should research recent trends and interpretations of BAPCPA.

5 Worthington v. General Motors Corp. (In re Claremont Acquisition Corp.), 113 F. 3d 1029, 1034-35 (9th Cir. 1997).
6 See In re Bank Vest Capital Corp., 360 F. 3d 291 (1st Cir. 2004), cert. denied, 124 S. Ct. 2874.
7 See 11 U.S.C. §§502(b)(7); In re Klein Sleep Prods., Inc., 78 F. 3d 18 (2d Cir. 1996).
8 See 11 U.S.C. §§502(b)(6), 503(b)(7); In re AB Liquidating Corp. 416 F. 3d 961, 963 (2005).
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The U.S. Department of Labor is frequently called upon to address the issue of the payment of overtime wages, as well as the application of other wage laws, to paralegals. It may be surprising to many attorneys that in 2000 the California Legislature passed laws establishing minimum qualifications for paralegals, with revised statutes that became effective in 2004. Clearly the legal issues affecting paralegals are much more extensive than the frequently expressed concern over the unauthorized practice of law.

Sometimes employers designate employees performing particular duties as paralegals or legal assistants. No matter what term an employer may use, in California the occupation of paralegal has a single, statutory definition whose contours can have a significant impact on legal employers. Under Business and Professions Code Section 6450(a), a paralegal is “qualified by education, training or work experience,” works for “an attorney, law firm, corporation” or other organization, and “performs substantial legal work under the direction and supervision of an active member of the State Bar of California.” The statute sets forth a number of typical and permissible paralegal duties.

Before the state legislature revised the definition in 2004, persons could present themselves as paralegals after fulfilling minimal educational requirements. These requirements were augmented and codified in Section 6450(c). Under California law, there are three acceptable paths for becoming a paralegal (although state employees are excepted):

- Completion of a paralegal program approved by the American Bar Association or completion of 24 semester units in law-related courses from an approved postsecondary institution.
- A bachelor’s or advanced degree in any subject, with at least one year of law-related experience and a supporting declaration from a supervising attorney who has been an active member of the State Bar for at least the preceding three years.
- A high school or equivalent diploma, with at least three years of law-related experience (if completed before December 31, 2003) and a supporting declaration from a supervising attorney who has been an active member of the State Bar for at least the preceding three years or who has practiced in the federal courts in California for at least the preceding three years.

Work experience in a law firm is now an insufficient qualification on its own for becoming a paralegal. Unless an employee completed three years of experience before 2004, California law requires a person to graduate from a university or qualified paralegal program to be considered a paralegal.

There are a number of reasons why the paralegal definition is important. First, Business and Professions Code Section 6452 makes it unlawful to hold oneself out as a paralegal if the minimum requirements are not met. Significantly for employers, the code places “liability for any harm caused as the result of the paralegal’s negligence, misconduct, or violation of this chapter” on the employee’s supervising attorneys.²

It is not difficult to imagine how the paralegal statutes could operate to the detriment of supervising attorneys. Consider a legal malpractice case in which an attorney referred to an employee as a paralegal in communications with a client. The employee had not met the minimum statutory requirements, and the acts or omissions of the employee caused the client’s harm. The fact that an attorney defending against malpractice cannot demonstrate that he or she made sure that the paralegal met the minimum requirements under the Business and Professions Code will likely be damaging evidence in the malpractice case.

In cases in which a prevailing party can recover fees and costs, opposing counsel can make a motion to consider the reasonableness of the billings of a paralegal who lacks the statutory qualifications. An attorney’s disregard for the basic legal mandate regarding the requirements for an employee qualifying as a paralegal would be a significant factor in this situation as well.³

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The paralegal definition also matters because the California statute establishes legal consequences for noncompliance—and again, the supervising attorney bears the ultimate responsibility. The first line of enforcement is a cause of action that permits a “consumer” of legal services to sue either the paralegal or supervising attorney for restitution, damages, and even attorney’s fees for any violation of the paralegal statutes. Second, it is a crime to hold oneself out improperly as a paralegal or for a paralegal to provide legal services to clients other than those services enumerated in the statute. Paralegals and supervising attorneys can be found “guilty of an infraction for the first violation” and “guilty of a misdemeanor for…each subsequent violation.” By law, the penalties include fines and even imprisonment.

All paralegals are subject to a continuing education requirement. This requirement is distinct from any educational mandate that paralegal trade associations may establish for their continued membership. Under Business and Professions Code Section 6450(a), all paralegals must certify to a supervising attorney their completion of four hours of legal training every two years. While there is no direct enforcement mechanism, supervising attorneys should again remember that they bear the liability for their paralegals’ negligence or statutory violations. Also, a supervising attorney should have concerns about what might happen in a malpractice case if the paralegal’s action—or inaction—somehow contributed to the client’s injury, and the attorney failed to require the paralegal to take continuing education courses or meet other requirements of the statute.

Attorneys should also bear in mind that failure to adequately supervise employees, including paralegals, can result in discipline by the State Bar. Especially if a client suffers, an attorney’s disregard for a paralegal’s continuing education requirement could constitute inadequate supervision and a violation of the ethical rules. Attorneys need to encourage and require their paralegals to meet the statutory mandate for continuing education.

**Wage and Antidiscrimination Laws**

While law firms and legal departments should be vigilant about ensuring that the employees they hire as paralegals comply with the statutory definition of paralegals and the statutory education requirements, they should also take note of other employment laws that affect paralegals.

As recently as July 24, 2006, the U.S. Department of Labor singled out the paralegal occupation for review regarding the issue of compliance with state overtime wages and other wage laws. The DOL’s California counterpart, the Division of Labor Standards Enforcement, has not issued a similar pronouncement with respect to paralegals. But because California employers must comply with both state and federal law, those who hire paralegals should pay close attention to the pronouncements and actions of the federal department, which ruled that a paralegal in a corporate legal department was a nonexempt employee.

Prior to this most recent pronouncement, the DOL issued an even more instructive Opinion Letter on December 16, 2005, in which the DOL addressed whether employers could claim that their paralegals fall within the “professional” or “administrative” exemptions to federal wage protection laws. If so, the paralegals would be considered exempt regarding entitlement to overtime pay. The DOL affirmed its prior opinions stating that, with few exceptions, paralegals are not exempt employees and must receive overtime wages.

While this was not the first or even the last DOL Opinion Letter addressing paralegals, the Opinion Letter firmly sets forth the DOL’s position on nonexempt status since the late 2004 revisions to the DOL regulations that address exemptions. This Opinion Letter is a

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thorough reaffirmation of the DOL’s long-standing position on the nonexempt status of paralegals in light of the new regulations. Attorneys should make sure that they comply with federal and state wage laws or risk claims for back wages, meal and rest period violations, and premium pay for failure to comply with these laws. Legal employers who question whether employees would actually pursue these types of claims need only look at a local court’s docket sheet to see the numerous class actions filed daily against employers in a cross section of industries seeking recovery based on similar claims.

The December 16, 2005, Opinion Letter was issued in response to a law firm’s inquiry to the DOL requesting its stance on the firm’s classification of its six paralegals, who had differing levels of education but similar, and significant, client responsibility. Indeed, the law firm billed the work of their paralegals to its clients. The DOL rejected any attempt to deem the paralegals as falling within the professional or administrative exemptions. Noting that the position of paralegal fails the exemption’s “primary duty” test, the DOL stated that to qualify for a professional exemption for purposes of wage law compliance, a position must require advanced knowledge in a field of “science or learning” that comes from specialized instruction. According to the Opinion Letter, which cited the federal regulations, the paralegal profession does not meet these requirements because “an advanced specialized academic degree is not a standard prerequisite for entry into the field.” Instead, even though many paralegals hold a bachelor’s degree, the standard for paralegal jobs is two years of college instruction.

Furthermore, regarding the administrative exemption, the DOL ruled that while paralegals perform nonmanual work, they fail to meet the exemption because they do not exercise “discretion and independent judgment with respect to matters of significance.” Instead, their work involves “the use of skills rather than discretion and independent judgment.”

The exceptions to nonexempt status are few. Exempt status may arise if a paralegal “possesses an advanced specialized degree in other professional fields [and] applies advanced knowledge in that field to the performance of his or her primary duty.” For example, if an employee deemed to be a paralegal provides significant scientific advice to a patent prosecution department, the employer should scrutinize the paralegal’s educational background and actual duties. If the employee qualifies as a professional and is therefore exempt, the employer need not pay overtime. Also, a paralegal who has risen the corporate ladder to a position of management could fall within an altogether separate exclusion, the executive exemption, and in so doing not be entitled to overtime. Employers with questions on these legal gray areas should seek the advice of an employment lawyer.

A survey by the National Federation of Paralegal Associations revealed that, in 2003, the average age of a paralegal was 40. This is, of course, the age that triggers liability for age discrimination under the federal Age Discrimination in Employment Act. It also implicates the safeguards regarding workers over 40 under the Older Workers’ Benefit Protections Act. Employers should be aware of these laws when taking employment actions that may have a disparate effect on legally protected categories. For example, if a law firm or legal department decides it has to downsize its support staff, it should avoid layoffs on the basis of salary. This is particularly true in California, because the use of salary as the basis for deciding which employees to terminate can constitute age discrimination “if use of that criterion adversely impacts older workers as a group.”

The consequences for discrimination within a law practice go beyond legal penalties. Aside from the legal ramifications, a claim against a law firm or legal department for discrimination based on race, national
Employee Benefits

Attorneys must address the laws regarding employee benefits in connection with paralegal employees. For example, employers need to address the tax consequences of their decisions to pay for their paralegals’ mandatory continuing education courses. The same issue arises for those generous employers who pay for their paralegals to attend law school. While the relevant laws are not unique to paralegals, some legal employers are not sufficiently knowledgeable about providing these benefits in a way that is most efficient toward resolving their tax liabilities.

A legal employer may pay for a paralegal’s continuing education courses on a tax-free basis provided that the employee could have deducted the course under Internal Revenue Code Section 162 as a trade or business expense if the employee had paid for it. The tax code considers this a “working condition fringe” benefit to the employee, who can exclude the employer’s act from gross income. The employer can also deduct the payment from taxable income as an “ordinary and necessary” business expense under IRC Section 162.

Providing financial aid to a paralegal employee for law school tuition is a very different proposition, however. For tax law purposes, this is not considered a fringe benefit. Paralegals lucky enough to receive tuition aid from their employers will find that their new profession as attorneys will constitute a “new trade or business” under the tax laws. Because of this classification, employees cannot deduct the tuition expenses from their own taxes, and so employers cannot provide the benefit under IRC Section 132 on a tax-free basis. Legal employers may provide the benefit without subjecting the employee to tax consequences if the employers fund the education through an “educational assistance program,” as defined in the tax code. This type of program has many limitations, including an annual maximum benefit amount of $5,250. Despite the benefit’s vast expense, providing this perk is considered “ordinary and necessary,” and thus employers can deduct the cost from their taxable income.

While addressing the tax consequences of paying for a paralegal employee’s education, a legal employer should examine the question of whether the employment relationship is one that will be enhanced by the employer providing this type of benefit. Employers may devote considerable resources to consulting outside counsel for advice on a repayment agreement for a paralegal seeking...
Privilege and Protection

As a practical matter, paralegals frequently confront confidential client information. They also come across the musings of their supervising attorneys, and they document some of their own. Courts generally extend the attorney-client privilege and work product protection to paralegals. In California, state statute buttresses this protection of client confidences. Under Business and Professions Code Section 6453, “A paralegal is subject to the same duty as an attorney... to preserve the attorney-client privilege,” which is codified in Evidence Code Section 954. The court of appeal addressed the privilege issue at length in In re Complex Asbestos Litigation, a case involving an appeal by a plaintiffs’ law firm from an order disqualifying it from multiple personal injury asbestos cases. The law firm’s paralegal had previously worked with opposing counsel on the pending litigation. Soon after joining the law firm, the paralegal served a subpoena on an asbestos contractor. The company contacted its defense attorney, who then successfully disqualified the law firm from the litigation.

On review, the appellate court approved of the disqualification in those cases on which the paralegal worked, given that the paralegal’s previous employer did not provide consent, and the new employer made no attempt to construct an ethical wall around the new employee. The court indicated that either may have sufficed to prevent the disqualification. In so ruling, the court noted that the employee’s conduct affected attorney-client confidentiality and, as the employer, firm attorneys are accountable for the paralegal’s acts.

Attorneys certainly know that the investigatory work they perform for a pending lawsuit is protected from disclosure to opposing counsel under the attorney work product doctrine. The California civil procedure rules codify this basic tenet of confidentiality. Is the work of paralegals afforded similar protection? The procedural rules are silent on this issue. But California courts have indicated that there is indeed protection for the work performed by a paralegal. The federal counterpart to the state statute makes explicit that the work product protection covers an attorney’s “agent” in federal court proceedings. To ensure adequate protection from disclosure, corporations, firms, and other organizations should make sure that the work of their paralegals is investigative in nature
and is requested—even generally—by the supervising attorney.

Unauthorized Practice of Law

The connection of paralegals to the practice of law is profound, and many attorneys rely heavily on these employees. As a result, the work done by legal assistants may come dangerously close to violating statutes prohibiting the unauthorized practice of law. Business and Professions Code Section 6126 makes it a crime for anyone to practice law without a license. Attorneys need to be aware of this proscription because they are liable for the UPL of their paralegals.30 Furthermore, the California Rules of Professional Conduct specifically prohibit lawyers from aiding their paralegals in UPL.31

Business and Professions Code Section 6450(b) sets forth acts that paralegals must not perform. While some of these prohibited acts are patently unacceptable (and often constitute UPL violations as well), the impropriety of other acts is not as readily apparent. Under Section 6450(b), paralegals must not:

• Provide legal advice.
• Represent clients in court (although they may appear at some administrative hearings).
• Draft any legal document for anyone other than a supervising attorney or advise clients regarding the use of such a document.
• Establish the rates that a law firm charges to clients for services performed.
• Agree to perform paralegal services under the supervision of anyone other than an attorney.
• Induce anyone to make an investment, purchase a financial product or service, or enter a transaction from which income or profit may be derived by the paralegal.

Supervising attorneys need to make themselves aware of the laws and rules that address and affect the employment of paralegals. These laws are not burdensome, and compliance with them will likely advance the occupation of these valued employees and, at the same time, improve the practice of law for their supervising attorneys.

4 BUS. & PROF. CODE §6435(a).
5 BUS. & PROF. CODE §6435(b).
10 See note 8, supra, at 1.
11 Id. at 2-3.
12 Id. at 2.
13 Id. at 3.
14 Id. at 4.
15 Id. at 5.
16 Id. at 3.
17 See note 1, supra.
19 GOV’T CODE §12941.1.
21 I.R.C. §132.
23 I.R.C. §127.
24 I.R.C. §162.
26 Id. at 587-88, 597.
27 See CODE CIV. PROC. §§2018 et seq.
30 BUS. & PROF. CODE §6452(b).
31 See CAL. RULES OF PROF’L CONDUCT R. 1-300 (Unauthorized Practice of Law).
The Fiduciary Duties of Real Estate Agents

REAL ESTATE AGENTS WHO assume the role of principal or buyer in a transaction with a client should be wary of the potential for problems relating to their duty to disclose. In Roberts v. Lomanto, the court held that the real estate agent and buyer, Patricia Lomanto, was liable for breach of fiduciary duty when she failed to disclose the amount of an assignment fee she was receiving in the transaction, which the court said amounted to a “secret profit.” Real estate agents should take all reasonable steps to ensure that their clients are informed of all material facts to a transaction. Material facts are defined as those facts that a reasonable person would want to consider in making a decision to purchase or sell. Money paid to an agent during a purchase or sale may always be seen as a material fact that could affect the principal’s decision and thus would be required to be disclosed. When determining which facts are material, it is best to remember: “When in doubt, disclose.” Agents should put themselves in the place of the buyer, and ask themselves, if they were the buyer, would this information influence their decision to buy? If the answer is yes, it should be disclosed.

Profits from a real estate transaction belong to the principal, not the agent, unless the principal knows of and consents to the agent’s retention of profit. An assignment fee paid to the buyer is a form of compensation that must be disclosed to the principal prior to completion of the sale. Failure to disclose the amount of the assignment fee would be considered a secret profit. Agents are not allowed to retain secret profits, and courts will disgorge any secret profits garnered in the transaction, as well as impose any other remedies that may be available. Agents should obtain a client’s informed consent in order to retain an assignment fee by disclosing the amount of the fee before the escrow closes.

Averting a Secret-Profit Problem

One way to avoid the problem of retention of secret profits is to close escrow on the transaction with the principal, and then resell the property. Any profits garnered would not amount to a secret profit. The duty to disclose would have been fulfilled upon completion of the transaction. However, agents should beware that they can still be guilty of violating their fiduciary duty to their clients if they represent the value of the property as less than what they are able to realize immediately upon resale of the property, if they have knowledge prior to the close of escrow that they can resell it for more. If there is an offer from a buyer, the agent may be subject to claims of misrepresentation of the true value of the property if he or she offers an opinion of its value. If the agent is aware before the purchase closes that there is a potential buyer offering more than the contracted purchase price, the agent has a fiduciary duty to the principal to disclose this information and allow the principal to reap the benefit. This is true of known offers, not potential ones.

Real estate agents owe fiduciary duties to clients. These duties are imposed on agents because a principal has reposed trust and confidence in the integrity and fidelity of the agent. A fiduciary duty under common law constitutes the highest good faith and undivided service and loyalty. Real estate agents should not take advantage of their positions by acting on opportunities that would have benefited their principals, if the opportunities are learned of while acting in the capacity of a fiduciary. A real estate agent has the same obligations of undivided service to a principal as a trustee has to a beneficiary. When agents become principals in transactions, their fiduciary duties to clients do not end. Instead, agency terminates by expiration of the term contained in the contract, revocation by the principal, death of either party, extinction of the subject matter, incapacity of the agent to perform, or renunciation by the agent.

A fiduciary relationship between a principal and an agent not only imposes upon the agent the duty of acting in the highest good faith toward the principal but also precludes the agent from obtaining any advantage over the principal in any transaction gained by virtue of the agency. The agent has a duty to disclose to the principal all information in the agent’s possession that is relevant and material to the agency and would affect the principal’s decision. One court has summarized a real estate agent’s fiduciary responsibility broadly: The agent cannot compete with the principal on matters connected with the agency, nor can the agent take part in any transaction in which the agent has an interest adverse to the principal, nor undertake any other agency responsibilities adverse to the interests of the principal.

When an agent learns of facts as a result of his or her agency that give the agent an advantage over a client, he or she may not act on those facts to his or her advantage and to the detriment of the client. An agent’s fiduciary duty requires that the agent tell the client the facts so that the client can decide to take advantage of the information or not. If the agent (or a relative or associate of the agent) purchases the property, the agent’s fiduciary duties continue even though he or she may be a principal in the transaction. Disclosure of these family or business relationships are necessary, as the agent owes a fiduciary duty to the principal that comes before other considerations.

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If a principal discovers that an agent may realize a “hidden” profit from a transaction, he or she should consider completing the transaction. The principal is obligated to consider the consequences of proceeding or not proceeding. Parties to a lawsuit are required to mitigate their damages. A party who is aggrieved cannot sit back and do nothing, allowing the damages to escalate, if it is possible for the party to take action to stop them. The fact that a seller chooses to resell the property to a third party and receive some sort of assignment fee does not mean that it is acceptable for an agent to withhold the amount of the fee being paid. The Lomanto court agreed that the seller would have had to close escrow even if he had known about the amount of the assignment fee and disagreed with it. Completing the transaction was the only appropriate thing to do under the circumstances. Disgorgement of the assignment fee could then be discussed after the transaction. In some cases it is better to allow the transaction to proceed and argue over the differences later than to stop the escrow midstream, which would cause the accrual of significantly higher damages.

In order to avoid the impropriety of information learned while acting as a fiduciary, how long must the agent wait before reselling the property for a profit? The general consensus is that there is no specific time. This is especially true in sellers’ markets, in which real estate values quickly increase. If an agent is not aware of any offers to purchase for a significantly higher value of the property during his term of agency, for example because he or she was in receipt of a written offer to purchase for a higher value of the property during his term of agency, for example because he or she was in receipt of a written offer to purchase for a higher value of the property during his term of agency, for example because he or she was in receipt of a written offer to purchase for a higher value of the property during his term of agency, for example because he or she was in receipt of a written offer to purchase for a higher value of the property during his term of agency, for example because he or she was in receipt of a written offer to purchase for a higher value of the property during his term of agency, for example because he or she was in receipt of a written offer to purchase. Disgorgement of the assignment fee could then be discussed after the transaction. In some cases it is better to allow the transaction to proceed and argue over the differences later than to stop the escrow midstream, which would cause the accrual of significantly higher damages.

2 Id.
3 Crogan v. Metz, 47 Cal. 2d 398, 404-05 (1956).
4 Id.
5 12 MILLER & STARR, CALIFORNIA REAL ESTATE DIGEST 89, §3:17 (3d ed. 2002) (footnotes omitted) [hereinafter MILLER & STARR].
6 Id. at 119, §3:25.
7 Id.
8 CIV. CODE §§2335, 2356; PROB. CODE §4152.
9 See Batson v. Strehlow, 68 Cal. 2d 662, 674-75 (1968).
12 MILLER & STARR, supra note 5, at 87, §3:17 (footnotes omitted).
WITH THE FEDERAL TORT CLAIMS ACT, THE FEDERAL GOVERNMENT HAS WAIVED ITS SOVEREIGN IMMUNITY ON A LIMITED BASIS

IMMUNE RESPONSE

IT IS NOT AT ALL UNCOMMON for a U.S. government employee or agency to be involved in a tortious act. This can result from a mundane occurrence, such as a government employee negligently causing a car accident. Or, it could be the consequence of an unusual tragedy, such as medical malpractice committed by a Veterans Administration surgeon. In such cases, can the victim sue? If so, who, how, and where does he or she sue? Are there any limitations or prerequisites to filing suit? The answers to these questions can be found through a solid understanding of the Federal Tort Claims Act1 (FTCA).

Traditionally, under common law, the U.S. government was immune from tort liability. Indeed, the Supreme Court has long upheld the principle of sovereign immunity—that the federal government “cannot be lawfully sued without its consent.”2 This concept of sovereign immunity derived from the English aphorism that the “King can do no wrong,” which arose from the notion that the English monarchy was sovereign and could not be liable for damage to its subjects.3 Justice Oliver Wendell Holmes Jr. explained further that a “sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”4

The effect of sovereign immunity was that individuals injured by government action, or inaction, were precluded from seeking any redress from the tortfeasor. The FTCA was Congress’s response to providing recourse for persons injured by government activity notwithstanding the principle of sovereign immunity. Originally enacted in 1946, the FTCA provides a statutory mechanism by which the United States has waived its sovereign immunity on a limited basis to allow civil suits for actions arising out of negligent acts of agents of the United States.5

The jurisdictional threshold for suing under the FTCA is the filing of an administrative claim presented to the federal agency employing the person whose act or omission caused the alleged injury.6 The most common method of filing an administrative claim is through the use of Standard Form 95 (Claim for Damage, Injury or Death), which is available online or upon request from the particular federal agency.7 The regulations also provide that “other written notification of the incident” may be substituted for SF-95. Regardless of the
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method by which the administrative claim is submitted, the claim must include a sum certain of damages sought and sufficient information to allow the agency to investigate the merits of the claim. Failure to properly present a claim to the appropriate federal agency on either an SF-95 claim form or a written notice which is sufficient to satisfy the FTCA’s requirements “deprives a claimant of federal court jurisdiction over his or her claim.”

An administrative FTCA claim must be presented to the appropriate federal agency within two years of the accrual of the claim. Once presented to the appropriate agency, the agency has six months to either admit or deny the claim. A complaint cannot be filed until the administrative claim has been denied or until six months have passed without the agency acting on the administrative claim.

An agency’s failure to act on an administrative claim within six months of presentation can, at the option of the claimant, be treated as a denial of the administrative claim by the agency. Under these circumstances, a claimant may also choose not to file suit after six months. Unless the administrative claim is expressly denied, the six-month statute of limitations does not begin to run, and a claimant has an indefinite time within which to file suit.

Of important note, an action may not be brought for damages greater than the amount originally presented on the claim submitted to the federal agency. However, an exception is made when damages have changed based on newly discovered evidence that was not reasonably discoverable at the time the claim was presented or when there are intervening facts relating to the amount of the claim. In 1988, Congress amended the FTCA in order to undo the effect of the Supreme Court’s decision in Westfall v. Erwin. In that case, the Court held that a federal employee was immune from a state tort action only if the employee was acting within the scope of his or her employment and the conduct that caused the harm was discretionary. The Federal Employees Liability Reform and Tort Compensation Act, commonly known as the Westfall Act, amended the FTCA by broadening this immunity for federal employees by providing that an action against the United States is the only remedy for injuries caused by federal government employees acting within the scope of their employment, regardless of whether the conduct in question was discretionary.

The Westfall Act also established a process frequently called Westfall certification, whereby the attorney general may certify that a federal governmental employee was acting within the scope of employment when the allegedly harmful conduct occurred. Upon certification, the United States is substituted as the defendant in the tort suit, and the government employee is dismissed. (If the case was brought in state court, the case is then removed from state to federal court.) At that point, the government employee is immune from other civil actions arising from the alleged tortious conduct. If the attorney general denies certification, the employee may petition the district court to certify that he or she was acting within the scope of employment.

Once the United States is substituted for the individual federal employee, and if the suit is dismissed for failure to file an administrative claim, the claimant will have 60 days to present an administrative claim. Thereafter, the claim will be considered timely if it would have been timely had it been presented on the date the underlying civil action was commenced.

Suits under the FTCA

The FTCA specifies five conditions that must be satisfied in order for liability to be imposed on the United States under the FTCA: 

1) The claim must be for money damages.
2) The damage claim must be for injury or loss of property or for personal injury or death.
3) The damage must have been caused by a negligent or wrongful act or omission.
4) The wrongful actor must have been a federal employee acting within the scope of his or her employment.
5) The circumstances must be such that, if the United States were a private person, liability would be imposed under the law of the place where the wrongful act or omission occurred.

The FTCA covers acts or omissions of employees of any federal government employee—executive departments, legislative branch employees for nonlegislative acts of Congress, and judicial branch officers for nonjudicial acts. Because the FTCA only applies to government employees, a contractor or other person who receives funds and guidance from the United States but over whom the United States does not exercise physical, day-to-day control generally does not implicate the FTCA. Even if government property is utilized, the United States is not liable for acts or omissions of its contractors.

In suits brought under the FTCA, the United States is considered the only defendant, because the FTCA equates the United States, for purposes of liability, with a private person. Other parties whom the claimant wishes to bring into the action may be sued as pendent parties, if the claims are related to the primary suit against the United States.

Since an FTCA action is an action against the sovereign, there is no entitlement to a jury trial. Instead, such actions are tried by the court (i.e., as a bench trial). Therefore, the standard for appellate review of damage awards entered by district courts is the “clearly erroneous” standard. Further, federal law and the Federal Rules of Civil Procedure control the procedural aspects of a suit under the FTCA, including the interpretation of the FTCA’s exclusions and the question of who is an employee of the government. State law, however, determines whether the facts in a given case give rise to a cause of action in favor of the claimant.

It is important to note that neither federal statutes nor the Constitution create a cause of action under the FTCA. As such, plaintiffs who attempt to assert constitution-based claims are not stating a claim within the jurisdiction of the court under the FTCA unless they can point to an actionable tort recognized under the law of the state where the act or omission occurred. To be sure, the plain language of the FTCA statute only permits claims for damages for “injury or loss of property, or personal injury or death” specifically resulting from negligence or wrongful acts or omissions.

As stated, the only remedy allowed to a plaintiff under the FTCA is money damages. Specifically, liability under the FTCA is limited to actual or compensatory damages. The FTCA expressly prohibits awards for punitive damages. If the plaintiff prevails in an FTCA action, damages are measured by the law of the place where the negligent act or omission occurred, determined by applying the whole law of that jurisdiction. As such, damages under the FTCA are governed by state law. To the extent that property is involved, the FTCA covers real and personal property. Similar to the measurement of damages, what constitutes a personal injury or death claim is governed by state law.

An increasing number of states have enacted statutes limiting liability (such as the California recreational use statute), or imposing caps on the amount of noneconomic damages that may be awarded in state civil suits. These statutes would apply to further bar or limit recoveries against the United States. Thus, in a medical malpractice action brought under the FTCA, California’s cap on noneconomic damages for medical malpractice would serve to limit any nonmonetary damages award—including compensation for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary injury—to no more than $250,000.

The FTCA also imposes limitations on the fees that attorneys may
charge for handling a claim arising under its purview. An attorney may collect no more than 20 percent of any administrative settlement made before the institution of the lawsuit. Once the complaint has been served, an attorney may collect no more than 25 percent of any judgment or settlement negotiated before judgment.

The FTCA venue provisions give the claimant a choice of bringing an action in either the district in which the claimant resides or in the district in which the act or omission at issue occurred. Although the issue of where the act or omission occurred is usually easily determined, in some cases, the district in which the tortious conduct took place may be different from the district in which that conduct has a harmful effect. For instance, which district is proper in a case in which the negligent act occurs in one state but the effect of that negligent act is felt in a different state? In such cases, the appropriate venue would likely be in the district in which the wrongful conduct occurred, rather than the district in which the conduct had the harmful effect. Thus, for example, if a veteran received negligent medical treatment in a Veteran’s Administration Hospital located in Nevada that resulted in his death several months later while visiting Colorado, the appropriate venue would lie in Nevada.

Exceptions to the FTCA

Several exceptions bar FTCA liability; some are judicially created and others are specifically enumerated in the FTCA statute. If an exception applies, the United States may not be sued, and litigation based upon an exempt claim effectively ends.

Discretionary function immunity. A frequently applied and therefore, not surprisingly, frequently litigated FTCA exception is the “discretionary function exception.” Under this exception, the government is not liable for any claim based upon a government agency or employee’s exercise of (or failure to exercise) a discretionary function or duty. In Berkovitz v. United States and United States v. Gaubert, the Supreme Court delineated a two-prong test for determining whether government activity is protected by the discretionary function exception. First, the conduct must be “discretionary in nature,” meaning that the conduct must necessarily involve “an element of judgment or choice.” Second, the conduct must be “of the kind that the discretionary function exception was designed to shield.”

In determining whether the actions involved were “discretionary in nature,” the court will look to whether a federal statute, regulation, or policy specifically prescribed a course of action for an employee to follow. If a statute, regulation, or policy governing the agency or employee’s action that is the subject of the claim, the court will next test the action’s compliance with that statute, regulation, or policy. If an employee has disobeyed a specific statute, regulation, or policy, the action could not have been truly discretionary, and the exception would not apply to bar the claim. The necessary corollary to this statement is that if there is no federal statute, agency regulation, or policy directive that imposes mandatory duties upon the federal agency or employee, the agency or employee will have to exercise discretion, and the discretionary function exception may preclude jurisdiction under the FTCA.

Cases may also arise in which a statute, regulation, or policy directive itself gives the government employee discretion to make decisions in specific circumstances. In such cases, the Supreme Court has noted that “the very existence of that regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies that led to the promulgation of the regulations.”

If the court determines that the actions involved were indeed discretionary in nature, the second prong will only be satisfied “if the action challenged in the case involves the permissible exercise of policy judgment.” Actions that fall into this category are those typically involving “considerations of social, economic, or political policy.” Courts have generally interpreted this second prong of the discretionary function exception rather liberally.

For example, in Sute v. United States, the Fourth Circuit held that...
employee or official charged with the breach of duty, so long as the employee or official is performing, or failing to perform, a discretionary function. Moreover, as suggested by the Suter decision, by the very terms of the exception itself, the exception applies despite allegations of abuse of discretion.

**Section 2680 exceptions.** A number of other exceptions to the FTCA are included in the statute, including exceptions for claims arising out of the loss, miscarriage, or negligent transmission of letters of postal matter; matters arising out of the assessment or collection of any tax or customs duty or the detention of goods or merchandise; admiralty claims; claims for damages caused by the imposition or establishment of a quarantine by the United States; claims for damages caused by the fiscal operations of the Treasury or by regulation of the monetary system; any claim arising out of combatant activities of the military or naval forces during time of war; any claim arising in a foreign country; claims arising from the activities of the Tennessee Valley Authority and Panama Canal Company; and any claim arising from the activities of a federal land or cooperative bank. As with the discretionary function exception, courts have applied these exceptions rather broadly.

For example, a number of courts have held that the Section 2680(c) exception to liability for “matters arising out of the assessment or collection of any tax or customs duty or the detention of goods or merchandise” effectively precludes suits for damages arising out of the allegedly tortious activities of IRS or U.S. Customs agents when those actions were in any way related, even remotely, to the agents’ official duties. Accordingly, a plaintiff’s claim that U.S. Customs officers had used excessive force when they restrained her while her car was being inspected to determine if any customs duty was owed was, in fact, barred by Section 2680(c).

Section 2860(d) excludes from the coverage of the FTCA “any claim for which a remedy is provided by sections 741-752 (Suits in Admiralty Act), 781-790 (Public Vessels Act) of Title 46, relating to claims or suits in admiralty against the United States.” Thus, when an admiralty action is brought under the FTCA, the case is subject to dismissal for lack of subject matter jurisdiction because the government has not waived sovereign immunity with respect to those claims.

Instead, any maritime torts asserted against the United States must be brought under the applicable admiralty statute.

Section 2680(h) bars claims under the FTCA that allege the torts of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. An exception exists, however, when the tortfeasor is an investigative or law enforcement officer. The term “investigative or law enforcement officer” is defined to be any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

This exception of investigative and law enforcement officers to the Section 2680(h) exemption was added by Congress in response to a series of illegal searches and seizures committed by federal agents mistakenly executing “no-knock” raids at wrong addresses.

Section 2860(j) excludes from the FTCA “any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard during time of war.” It is well settled that a formal declaration of war is not necessary for this exception to apply.

Indeed, Section 2860(j) bars suit for injuries suffered as a result of actual hostilities or “activities both necessary to and in direct connection to actual hostilities.” The courts have applied Section 2860(j) to dismiss FTCA suits for injuries suffered during the Vietnam War, the first Persian Gulf War, and to actions taken by the United States during hostilities between two foreign countries.

The FTCA’s exclusion in Section 2680(k) of “any claim arising in a foreign country” has been held to bar “all claims based on injuries suffered in a foreign country regardless of where the tortious act or omission occurred.” This exception rests on a congressional unwillingness to subject determinations of U.S. government liability to foreign law.

The *Feres doctrine.* Unlike the exceptions statutorily created in Section 2680, the *Feres doctrine* is a judicially created exception to the FTCA. In *Feres v. United States*, the Supreme Court held that the estate of a soldier killed in a barracks fire while on active duty, allegedly due to Army negligence, could not maintain an action against the United States under the FTCA. Concluding that in enacting the statute Congress never intended to abrogate sovereign immunity against suits by servicemen, the Court held that the United States is not liable under the FTCA for “injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”

An alternative to the FTCA for actions involving the military is the Military Claims Act. The MCA is a congressionally mandated system of compensation that delegates to the secretary of each military branch the discretion to settle certain tort claims against that branch. The MCA gives the secretaries of each military branch the authority to settle tort claims up to $100,000. In some
respects, the MCA is broader than the FTCA. For instance, unlike the FTCA, the MCA is applicable to acts or omissions committed overseas. However, the MCA is also more restrictive. Significantly, the MCA expressly excludes judicial review of claims adjudicated under its provisions.

The FTCA provides a mechanism for a party to seek damages from the United States in cases in which the tortfeasor happens to be an employee of the United States. Though criticism has been levied against the limitations of the FTCA and its numerous exceptions to government tort liability, the FTCA attempts to strike a balance between the realization that injured persons should be entitled to seek remedial relief when injuries are caused by employees of the United States and the practical and policy considerations that would follow from allowing suits to reign free against the federal government.

1 The provisions of the FTCA are found in 28 U.S.C. §§1346(b), 1402(b), 2401(b), and 2671-2680.
3 Sovereign Immunity, 17 ALASKA BAR RAG, No. 3 (1993).
5 28 U.S.C. §§1346(b), 1402(b), 2401(b), & 2671-2680. See also Dalehite v. United States, 346 U.S. 15, 30-31 (1953).
8 28 C.F.R. §14.2(a) (2005); Deutsch v. United States, 67 F. 3d 1030, 1080 (3d Cir. 1995).
9 Tucker v. United States Postal Service, 676 F. 2d 954, 959 (3d Cir. 1982); Melo v. United States, 505 F. 2d 1026, 1028 (9th Cir. 1974).
11 28 U.S.C. §2675. However, there may be instances in which the agency may be attempting to settle the administrative claim and notifies the claimant that additional time for negotiation or authorization is necessary. See, e.g., MacCaskill v. United States, 834 F. Supp. 14, 16 (D. D. C. 1993) (Navy unsuccessfully negotiated possible settlement with plaintiff’s attorneys for a year before denying plaintiff’s FTCA administrative claim.).
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Until recently, the enforceability of arbitration agreements in bankruptcy courts was the subject of confusion. While a number of decisions held that arbitration agreements were generally enforceable, other courts—particularly within the Third Circuit—had ruled that an arbitration agreement was not enforceable when 1) the dispute to be arbitrated involved a “core” bankruptcy matter, or 2) the arbitration would otherwise jeopardize the policy and purposes of the Bankruptcy Code.

Now, the Third Circuit has clarified its prior decisions, holding that the distinction between core and noncore matters is irrelevant to the question of enforcing arbitration agreements. Rather, the issue is whether Congress, in enacting provisions of the Bankruptcy Code, intended to preclude a waiver of judicial remedies for the rights embodied in those provisions. Courts must discern this intent from the text of the provisions or their legislative history, or they must determine whether an inherent conflict exists between the underlying policies of the provisions and arbitration. Under this formulation, there is little room under the Bankruptcy Code to argue that arbitration agreements should not be enforced in ordinary tort or contract disputes, even when they may have a significant effect on the bankruptcy estate. Whether other disputes in bankruptcy, including core bankruptcy matters, are subject to arbitration continues to be determined on a case-by-case basis.

The Federal Arbitration Act (FAA) generally applies when parties have agreed to “[a] written provision in any…contract evidencing a transaction involving [interstate]...
The Third Circuit also took the opportunity in Mintze to explain its earlier decision in Hays v. Merrill Lynch, a case that has been frequently miscited for the proposition that a court has discretion to determine whether to order arbitration in core matters.
There is no inherent conflict between arbitration and the underlying purposes of the Bankruptcy Code. (True)

The Federal Arbitration Act applies to all agreements affecting interstate commerce, regardless of the dollar amount at issue. (True)

When goods and services are not sold across state lines, a contract affects interstate commerce if the contract or the underlying purposes of the Bankruptcy Code. (True)

There is no inherent conflict between arbitration and the enforcement of arbitration agreements in bankruptcy cases. (False)

A stay of proceedings under the FAA is subject to the discretion of the court. (True)

A court may dismiss an action with prejudice if an arbitration agreement applies to all claims of the plaintiff. (True)

The enforceability of arbitration agreements in a bankruptcy case has been a disputed issue. (True)

Before 2006, bankruptcy courts and district courts within the Third Circuit fashioned a bright-line test for enforcing arbitration agreements in a bankruptcy case. (True)

The Third Circuit in In re Mintze perpetuated the notion that bankruptcy courts have discretion whether to enforce arbitration agreements. (True)

The Mintze decision harmonized the rule governing enforcement of arbitration agreements in bankruptcy court with the rule promulgated in Moses H. Cone Memorial Hospital v. Mercury Construction Corporation. (True)

The U.S. Supreme Court has ruled that an arbitration agreement subject to the FAA must be enforced unless Congress intended to preclude a waiver of judicial remedies for the rights at issue. (True)

The court in In re First Alliance Mortgage Company might have decided the case differently if it had followed the ruling in Mintze. (True)

Core bankruptcy matters are not amenable to arbitration. (True)

In its decision in In re U.S. Lines, the Second Circuit anticipates Mintze because it ruled that the distinction between core and noncore matters was not a decisive factor in enforcing arbitration agreements. (True)

The Bankruptcy Code contains express prohibitions against arbitration in certain limited circumstances. (True)

An agreement by a debtor before filing bankruptcy to waive the automatic stay in the event the debtor files a bankruptcy case is automatically enforceable. (True)

The Bankruptcy Code provides that certain actions can be approved only after the bankruptcy court has made findings supporting their approval. (True)

The court in In re Elcom Technologies Corporation refused to enforce an arbitration agreement because one of the parties was an insurance company. (True)

A good strategy for a party seeking to avoid arbitration is to name as parties any persons or entities that did not sign the arbitration agreement. (True)

The legislative history behind the Bankruptcy Code, while extensive in its discussion regarding the enforcement of arbitration agreements, offers no conclusions about the enforceability of arbitration of any particular matter. (True)
In re U.S. Lines, a case decided by the Second Circuit, in which a motion to compel arbitration was denied, U.S. Lines involved 12,000 employees who had filed 18,000 separate claims for asbestos-related injuries sustained while sailing on ships in the debtors’ fleet over four decades. The case involved the insurers’ motion to compel arbitration of the declaratory judgment proceedings in bankruptcy court regarding the insurance policies that were the only potential source available to the personal injury creditors. The court held that under the particular circumstances of the case—a “complex factual scenario involving...multiple claims, policies and insurers” and “mass tort actions involving claims against an insolvent debtor”—the bankruptcy court did not err in finding that arbitration would jeopardize the policy and purposes of the Bankruptcy Code. Although the U.S. Lines court applied a standard that would, at least theoretically, comport with Mintze, the court did not further elaborate about the actual manner in which arbitration and the Bankruptcy Code were at odds. Nor is it obvious why arbitration would jeopardize the policy and purposes of the Bankruptcy Code in that case.

Nonetheless, the court in Mintze explained that U.S. Lines “actually support[s] the contention that Hays applies to core proceedings.” It noted that in U.S. Lines, the finding that a proceeding was core did not automatically give the bankruptcy court discretion regarding arbitration, since the McMahon standards governed.

Finally, another case that is sometimes cited in support of a looser, discretionary standard for enforcement of arbitration agreements is In re First Alliance Mortgage Company. First Alliance involved “a rather large case that includes enforcement actions...brought by various states, the Federal Trade Commission, and several private claimants” against an officer of First Alliance and other mortgage lenders, among others—and priority of claims to be paid out of the general funds and, thus involve the interests of other creditors.

Had the First Alliance court followed Mintze, discretion would have played no role in the decision whether to compel arbitration. The Third Circuit’s logic in that regard, following McMahon, appears unassailable. The involvement of other creditors is not by itself enough to deny arbitration. Indeed, it is questionable whether, in light of Mintze, the First Alliance court would have decided that case as it did.

**Enforcement of the Agreement to Arbitrate**

These developments leave open the question of what disputes in bankruptcy are subject to arbitration. The obligation to arbitrate, undertaken as a matter of contract, is particularly strong when one of the litigants is seeking benefits under the terms of the contract. Fundamentally, a plaintiff cannot enforce only the “beneficial” parts of a contract without assuming the burdens of the contract. Citing to this basic tenet, California courts have held that a party was precluded from seeking the benefit of a contract, in the form of damages, while seeking to avoid an arbitration clause. Indeed, the Bankruptcy Code itself provides that, with respect to executory contracts, a debtor cannot assume part of a contract but instead must accept the burdens as well as the benefits. A debtor that wishes to recover damages under the terms of a contract containing an arbitration clause ordinarily would be required to arbitrate the dispute.

In re Elcom Technologies Corporation is illustrative of a case in which the plaintiffs, seeking to benefit from a contract, were held bound by its arbitration provision. In Elcom, the bankruptcy court enforced an arbitration clause against the former directors of the debtor on coverage issues brought under directors and officers (D&O) policies. The plaintiffs, the former directors of the debtor, filed an action in bankruptcy court against the insurers to determine whether the insurers were required to defend and indemnify the plaintiffs in the trustee’s action in the bankruptcy court against the plaintiffs for breach of various duties owed to the debtor’s creditors and the bankruptcy estate. The bankruptcy court granted the insurers’ motion to compel arbitration of the coverage dispute based on the terms of the policies. The district court affirmed the bankruptcy court’s order, finding that the proceeding involved a dispute that did not jeopardize the objectives of the Bankruptcy Code and that the arbitrators would not have to resolve any issue concerning bankruptcy law.

It is generally not relevant to the issue of determining whether a dispute is subject to arbitration that persons who did not agree to arbitration might be involved—a frequent occurrence in bankruptcy matters. The U.S. Supreme Court has ruled that under the FAA, an arbitration agreement must be enforced notwithstanding the fact that persons who are parties to the action are not signatories to the arbitration agreement.

In Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, a hospital filed an action against a construction contractor and an architect. The contract between the hospital and the contractor included an arbitration clause, but there was no arbitration agreement between the hospital and the architect. Even though the architect was a party to the action but not a signatory to the agreement, the U.S. Supreme Court enforced the arbitration agreement. The Court explained that a party may be forced to resolve related disputes in two different forums—in court and in arbitration—because federal law requires resolution of each part of an action sequentially when necessary to give effect to an arbitration agreement.

Many other cases have reached the same result. One court, quoting another, noted: If arbitration...could be foreclosed simply by adding as a defendant a party not a party to an arbitration agreement, the utility of such agreements would be seriously compro-
Disputes Not Subject to Arbitration

In determining the bankruptcy court's authority to require that they be arbitrated, there are cases in point. This is due perhaps to the fact that courts and parties alike previously accepted the distinction between core and noncore matters as the basis for deciding whether a dispute could be arbitrated. Now that the Third Circuit has clarified that this distinction is irrelevant to the question of enforcement, the issue is likely to arise more frequently and, at least initially, with somewhat unpredictable results.

Clearly, there are no express prohibitions in the Bankruptcy Code against arbitration. And legislative history is silent about enforcement of arbitration agreements in bankruptcy court. Moreover, with respect to the resolution of noncore matters, it is difficult to argue that arbitration could be contrary to the purposes of the Bankruptcy Code, since the bankruptcy courts have no authority to issue a final resolution in these matters.

Nonetheless, the nature of certain rights in bankruptcy arguably evinces an inherent conflict between arbitration and the Bankruptcy Code's underlying policies. For example, those rights that, according to courts, cannot be invalidated by parties in their contracts may not be subject to a mandatory agreement to arbitrate. A party might be able to avoid arbitration of a motion for relief from the automatic stay, since courts have found that the automatic stay constitutes an inalienable right under the Bankruptcy Code. Similarly, an agreement to resolve through arbitration any dispute concerning the automatic stay might be considered antithetical to basic bankruptcy policy.

Other provisions in the Bankruptcy Code that require the bankruptcy court to make findings or approve certain actions are arguably inconsistent with resolution through arbitration. For example, the confirmation of a plan, sale of property outside the ordinary course, use of cash collateral, or assumption or rejection of executory contracts all require express authorization by the court. Arguably, this authorization requirement does not comport with allowing disputes over these matters to be handled through arbitration. The substance of these actions under the Bankruptcy Code and the need for quick resolution of them might be cited in opposition to any effort to require that they be arbitrated. Nevertheless, a broad spectrum of matters in a bankruptcy case must to some extent be approved by the bankruptcy court, and the reasons why a dispute over them could not be successfully resolved through arbitration are not necessarily compelling. Indeed, there may be ample room to argue that disputes involving the use of cash collateral or assumption of an executory contract must be arbitrated when the underlying agreement includes an arbitration clause.

Although these issues remain to be settled, the Mintze decision has clarified the text for deciding when an arbitration provision is enforceable in the bankruptcy context. Mintze has helped to usher in a more principled approach to the enforcement of arbitration agreements in bankruptcy courts. How the courts develop this law in future cases could alter the way in which disputes are resolved in bankruptcy courts.

9 See Sims v. Clarendon Nat’l Ins. Co., 336 F. Supp. 2d 1311, 1316 (S.D. Fla. 2004) (A health insurance policy involved interstate commerce within the meaning of the FAA because the policy was issued by a New Jersey insurer to a Florida resident); Hart v. Orion Ins. Co., 433 F. 2d 1358 (10th Cir. 1971) (The FAA applied to an arbitration provision in an insurance policy issued by an Illinois insurer to a Montana resident.).
Even if the subject of the arbitration were covered only under state law because it did not involve interstate commerce, the result would presumably be the same. Although the federal court might not have the power to enforce an arbitration agreement subject to state and federal law, it would unquestionably have the power to stay an action subject to arbitration pending in federal court under its general authority to control its own docket. Nevertheless, no authority has been found on this point.
Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (FAAA § 2 “is a congressional declaration of a liberal federal policy favoring arbitration agreements, not withstanding any state substantive or procedural policies to the contrary.”); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (The FAA favoring arbitration is not diminished when a party bound by an agreement raises claims based on statutory rights.).
9 U.S.C. §2. 9 Id.
Neal v. Hardac’s Food Sys., Inc., 918 F. 2d 34, 37 (5th Cir. 1990).
7 9 U.S.C. §3.
8 Id.
Quackenbush v. Allstate Ins. Co., 121 F. 3d 1372, 1380 (9th Cir. 1997) (quoting Dean Winter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985)). See also McMahon, 482 U.S. at 229 (The FAA requires a court to “stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement.”); Wagner v. Stratton Oakland, Inc., 83 F. 3d 1046, 1048 (9th Cir. 1996) (“The Federal Arbitration Act requires a court to stay an action whenever the parties to the agreement have in writing to submit their claims to arbitration.”).
13 In re Mintze (Mintze III), 434 F. 3d 222 (3d Cir. 2006).
14 Id. at 229.
16 Id. at 227.
17 Mintze III, 434 F. 3d at 231.
18 Id. at 232.
20 Id. at 1136.
21 Mintze III, 434 F. 3d at 230.
22 In re U.S. Lines, 197 F. 3d 631, 640 (2d Cir. 1999).
23 Id. at 631.
24 Id. at 641, 643.
25 Mintze III, 434 F. 3d at 231.
26 Id. at 251 (quoting In re F&T Contractors, Inc., 694 F. 2d 1229, 1332 (6th Cir. 1981)).
32 Id. at 20.
34 Lawson Fabrics, 355 F. Supp. at 1151 (quoting Hitte, Inc. v. Oldich, 392 F. 2d 368 n.2 (1st Cir. 1968)).
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When the full scope of President George W. Bush’s “war on terror” is eventually revealed, one lawyer will emerge as the chief legal architect of Bush’s policies on torture, the Geneva Conventions, and the treatment and interrogation of prisoners at Guantanamo Bay and elsewhere. John Yoo served as deputy assistant attorney general in the Office of Legal Counsel in the Department of Justice from July 2001 to June 2003. After September 11, he was part of a small group of lawyers asked to provide legal advice to the administration on a wide range of issues. In his new book, War by Other Means, Yoo stridently defends his work. This is a tall task, since subsequent U.S. Supreme Court decisions have largely repudiated key aspects of Yoo’s legal analysis.

Yoo begins with a frontal assault on America’s judicial branch. On the seminal decision Hamdan v. Rumsfeld, in which the Supreme Court struck down the system of military commissions that the Bush administration had established without congressional authority, Yoo accuses the Court of making “the legal system part of the problem, rather than part of the solution to the challenges of the war on terrorism.” In this example and throughout his book, Yoo substitutes the incantation of the “war on terrorism” in place of reasoned and objective analysis.

When the courts are called upon to test what the administration has done against the Constitution, Yoo accuses judges of “unwisely inject[ing] themselves into military matters.” He announces that “many people have an exaggerated view of the role of law.” To him, “the law is not the end of the matter; indeed it is often the beginning.” He invents a new paradigm in which the “law sets the rules of the playing field, but it does not set the policies within that field.” In Yoo’s game, it is the president who sets “policies,” which conveniently trump the law. By radically recasting our constitutional system, if Yoo had his way, we would end up with the rule of policy, not the rule of law.

The Memos

Only two weeks after the attacks of September 11, Yoo issued a memo claiming: “In the exercise of his plenary power to use military force, the President’s decisions are for him alone and are unreviewable.” This memo totally ignored the key Supreme Court decision that explicitly limited executive war powers, Youngstown Sheet & Tube Co. v. Sawyer. In a famous concurring opinion in that case, Justice Robert Jackson wrote that the president’s powers as commander in chief are “subject to limitations consistent with a constitutional Republic whose law and policymaking branch is a representative Congress.” Justice Jackson, who had recently served as chief prosecutor at the Nuremberg war crimes trials, pointed out that the president had “no monopoly on ‘war powers.’” A first-year associate would have been fired for writing a memo on the president’s war powers without addressing Youngstown. For Yoo to do so while advising the president of the United States is unconscionable.

On January 9, 2002, Yoo issued another controversial memo advising the president that the Geneva Conventions do not apply to the Taliban or al Qaeda, arguing that while Afghanistan was a party to the Geneva Conventions, the country should now be treated as a “failed state” that could not fulfill its Geneva obligations. But a January 11, 2002, State Department memo from William Taft IV to Yoo stated: “[T]he most important factual assumptions on which [the memo]...is based and its legal analysis are seriously flawed.” Taft concluded that a U.S. refusal to abide by the Geneva Conventions could constitute a “grave breach.” In fact, Taft warned Yoo that “criminal responsibility attaches to the commission of grave breaches of the Convention, including by operation of fundamental principles of command responsibility. If a court or other U.S. body were to find that the [Geneva Convention III on the Treatment of Prisoners of War] applies to all persons detained in any armed conflict. Common Article 3 prohibits ‘(a) violence to life, and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’

Stephen Rohde, a partner with the firm of Rohde & Victoroff, is a constitutional lawyer and a past president of the ACLU of Southern California.
By ignoring Common Article 3, Yoo gave his client faulty and incomplete advice. It was not up to the Justice Department or the president at the outset of an armed conflict to presumptively announce that any person or group of persons were categorically not entitled to POW status. Under the Geneva Conventions, persons seized in an armed conflict are presumed to be POWs unless and until their status is determined by a “competent tribunal.” Instead, for several years the United States interrogated all the prisoners at Guantanamo without convening any tribunals. In June 2004, when the Supreme Court in *Rasul v. Bush* held that Guantanamo was subject to the jurisdiction of U.S. courts to hear and determine habeas corpus petitions, Bush grudgingly set up a limited version of the tribunals. Yoo calls *Rasul* “a wrongheaded decision that posed the threat of judicial micromanagement of military operations as never before.” In Yoo’s world, when the Supreme Court upholds separation of powers, checks and balances, and judicial review, it is guilty of “micromanagement.”

**The Torture Memo**

Yoo issued his most famous memo on August 1, 2002, after CIA officials expressed concern over their criminal liability for the harsh methods, such as waterboarding, they were using to interrogate high-level al Qaeda prisoners. In response, Yoo narrowly defined torture as pain “accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” He overlooked the fact that interrogation methods need not reach the level of torture to be prohibited by U.S. and international law. For example, the Geneva Conventions prohibit “cruel treatment” as well as “outrages upon personal dignity, in particular humiliating and degrading treatment.”

On November 14, 2006, the Center for Constitutional Rights and others filed a criminal complaint requesting that, under the doctrine of universal jurisdiction as found in the Code of Crimes against International Law, the German Federal Prosecutor open an investigation. If the investigation proceeds, a criminal prosecution may result in the responsibility of high-ranking U.S. officials for authorizing war crimes. The complaint was brought on behalf of 11 Iraqi citizens and one Guantanamo prisoner.

The complaint alleges that American military and civilian officials, including Yoo, “ordered” war crimes, “aided or abetted” war crimes, or “failed, as civilian superiors or military commanders, to prevent their commission by subordinates.” Time will tell whether *War by Other Means* will vindicate Yoo or is a first draft of his defense against charges of war crimes.
Making Internet Searches Part of Due Diligence

As information is added to the Internet every minute of every day, the chance that lawyers can find key evidence there steadily increases. The evidence may prove or refute a point in contention, or allow an attorney to get the upper hand in a settlement conference or decide whether to take a client’s case. While questions of admissibility will remain, due diligence should now be understood to include Internet searches.

For example, after being attacked by skinheads, a person learned that his name, address, and picture, along with a call to action to attack him, had been posted on a skinhead organization’s Web site. When the person’s lawyer accessed the site, the information about his client had been removed. Not willing to give up, the lawyer turned to his teenage nephew, who advised him that the old Web page might be stored at the Internet Archive Way Back Machine (www.archive.org) site, which is maintained by a nonprofit organization that stores old Web pages to preserve virtual history.

The lawyer found the incriminating pages at the site. If he had not, however, it would not have proven that the incriminating page had never appeared on the skinhead site. The Internet Archive does not archive every page of every Web site—there is a six-month delay before pages are archived on the Internet Archive site, and Web site owners can request that their sites not be archived. If a Web site owner has requested that the site not be archived, this fact appears in the search results at Archive.org. In that case, a lawyer could surmise that the site owner had something to hide and could attempt to subpoena the old pages from the site owner.

Once the lawyer found the pages at Archive.org, the next step was to get them admitted into evidence. Getting Internet evidence admitted is no different than getting other evidence admitted. To be admitted, the evidence must be relevant, authentic, and admissible. In the skinhead beating case, it would seem obvious that the evidence is relevant. Showing that the evidence was authentic could be accomplished by pointing to a case such as Telewizja Polska USA, Inc. v. Echostar Satellite. In that case, the court rejected the plaintiff’s claim that Web pages from the Internet Archive were not properly authenticated and further rejected the plaintiff’s attack on the Internet Archive as an unreliable source. The court stated that Rule 901 of the Federal Rules of Evidence “requires only a prima facie showing of genuineness and leaves it to the jury....”

When an attorney attempts to authenticate evidence from the Internet, it is important to prove when the research was done. This can be accomplished by having the researcher sign a declaration explaining how, and on what date, the researcher found the Web page evidence. To further authenticate the evidence from a Web site, the page should be printed with the URL listed. It is advisable to print any page on the Web site that indicates who owns the site. This is usually found on a page titled “About us” or “About.” Searching a domain registry, such as whois.com or betterwhois.com, to verify ownership is not necessarily going to yield the true owner or operator of a site, because domain registries do not verify names.

As to admissibility, many courts have indicated that hearsay objections to Internet evidence can be overcome. In the Telewizja case, the court rejected the plaintiff’s contention that the archived Web pages stored at the Internet Archive constituted hearsay, holding that they were not statements but merely images and text showing what a Web site once looked like. The court also found that the Web site pages were an admission by a party-opponent and were admissible under the best evidence rule. The attorney attempting to counter authenticity would need to prove that someone planted the evidence at issue.

No Longer Voodoo

Only seven years ago, a district court cautioned against relying on data from the Internet as “voodoo information.” Today, not only are judges admitting information from the Internet into evidence but also conducting their own Internet research to help make decisions. In a recent Indiana decision, the court was incredulous that the plaintiff had failed to Google the missing defendant as part of due diligence. The court noted that the investigative technique of merely calling directory assistance to find a missing defendant has gone “the way of the horse and buggy and the eight track stereo” as a consequence of the Internet. The court upheld the defendant’s claim of insufficient service of process and affirmed dismissal.

In a recent Indiana decision, the court was incredulous that the plaintiff had failed to Google the missing defendant as part of due diligence. The court upheld the defendant’s claim of insufficient service of process and affirmed dismissal.

— Carole Levitt and Mark Rosch are principals of Internet For Lawyers and coauthors of The Cybersleuth’s Guide to the Internet.
listed numerous surviving relatives who might have known his whereabouts.”3 The plaintiff could argue that there was no proof that the data the judge found had been available on the Internet at the time the plaintiff searched for the defendant, but a better course of action clearly would have been to conduct an Internet search.

In another recent case, the Louisiana Appeals Court upheld a decision in which the trial court nullified a government tax sale because the original tax-delinquent owner would have been “reasonably identifiable” and locatable if the government had run a simple “Internet search” to “locate the named mortgagee.” It was the trial court judge who conducted an Internet search and determined that the owner was in fact “reasonably identifiable.” Part of the basis of the appeal was whether or not it was appropriate for the judge to conduct such a search at all. The appeals court dismissed this argument, observing: “[W]e find any error the trial court may have committed by conducting the internet search is harmless, because the trial court’s ultimate conclusion that the tax sale violated Dr. Weatherly’s due process rights is legally correct.”4

To find potentially relevant evidence, lawyers also need to look beyond the obvious, such as a person or company’s Web site. Other avenues for research include social network sites (myspace.com or facebook.com), blogs (http://blogsearch.google.com), podcasts (ipodder.com), and videos (youtube.com). People often drop their guard when they are posting to these sites. Not only their written words but also their behavior, attitude, or tone of voice can be put before a jury. For example, Hugh Foskett might have had a better chance at winning Seattle’s 43rd district state house seat in 2006 if pictures from his facebook.com page showing behavior unbecoming to a candidate had not been publicized. (Social networking sites are no longer just for kids. All ages are beginning to add profiles and pictures.)

Lawyers should also look to other places on the Internet that are not traditionally thought of as useful to serious researchers. These include dating sites (match.com), reunion sites (classmates.com), and discussion groups that leave searchable records at Google Groups. These are all places where people post personal information. A divorce lawyer, for example, may be able to find information at these sites that can make a significant difference at a settlement conference. Admissibility is not at issue when the parties are not at trial. Searches of group discussion lists should be routine. A lawyer may learn, for example, what a client who allegedly caused an accident told a discussion group but not the attorney. A search for the client’s name...
and e-mail address on Google Groups could reveal, for example, that the client tried methadone as a means of coping with migraines and shared this information with other migraine sufferers but not the police at the accident scene.

It is important to remember that many people do not use their real names when posting to discussion groups. In those cases, searching by the poster’s e-mail address may yield more useful results. Attorneys who already routinely ask their clients and others for such information as telephone numbers should also ask for e-mail addresses. Sometimes, however, people post their true names. On classmates.com, for example, people tend to use their real names because they are trying to find former friends. At classmates.com, people often post information about where they work (or worked), attended school, or served in the military. These bits and pieces of information might be exactly what a lawyer needs.

The powers of Internet searching do not end there. For example, using Google’s advanced search page to search only for specific file formats, lawyers can sometimes unearth a Power Point presentation, an Excel spreadsheet, or a Word document that bears some relation to a client or opponent. If a search yields a Power Point presentation, lawyers should be sure to view it in the editing mode so that they may read the presenter’s outline and notes.

Attorneys can even arrange to have potential evidence automatically collected and delivered to an e-mail account by means of an alert service (for example, www.google.com/alerts). Google Alerts originally monitored only news that correlated with the researcher’s key words (e.g., a topic, a company name, or a person’s name), but now monitoring has been expanded to Web sites, Google Groups, and most recently to blogs. If a given topic, person, or company is mentioned in the news, on a Web site, in a Google Group discussion, or on a blog, an alert service will automatically add the information to the collection of evidence. As useful as search engines are in collecting evidence, however, they cannot be expected to show how the evidence is relevant or how to authenticate it and get it admitted. That job still belongs to attorneys.

Classifieds

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Managing Civil, Criminal, and Ethical Risks

ON THURSDAY, FEBRUARY 15, the Los Angeles County Bar Association will present a course designed for attorneys at mid-sized and larger law firms, ethics and risk management partners, and senior law firm management who assist with risk management and ethical compliance strategies. Speakers James I. Ham, Evan A. Jenness, and Ellen A. Pansky will address the following topics: pretexting, wiretapping, and privacy; e-discovery of the law firm; retainers, fee agreements, and advance conflict waivers; advertising and marketing; attorney migration; multijurisdictional practice; and performing a risk management checkup. The program will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Reduced parking is available with validation for $9. On-site registration and the meal will begin at 5 p.m., with the program continuing from 5:30 to 7:30. The registration code number is 009594. The prices below include the meal.

$15—CLE+Plus members
$60—LACBA members
$100—all others
2 CLE ethics hours

Class Actions for Non-Class Action Lawyers

ON FRIDAY, FEBRUARY 23, the Los Angeles County Bar Association will present a seminar featuring speakers Wendy R. Fleishman, Jessica L. Grant, Steven A. Kanner, Daniel R. Karon, Christopher J. Keller, and Brian A. Ratner on how to recognize class action claims, get involved in potential class actions, protect client and victim rights, and grow your business. This event is for attorneys interested in helping individual and business clients understand when they have been victimized in a manner that creates a class action claim, whether involving consumer fraud, price fixing, securities or commodities fraud, mass tort claims, or wage and hour or employment discrimination. The program will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Reduced parking is available with validation for $9. On-site registration and the meal will begin at 8:30 a.m., with the program continuing from 9 a.m. to 5 p.m. (with lunch from noon to 1 p.m.). The registration code number is 009384. The prices below include the meal.

$190—CLE+Plus members
$330—LACBA members
$400—all others
6.25 CLE hours, including 1 hour of ethics

THE BENCH MEETS THE BAR
ANNUAL LUNCHEON

ON WEDNESDAY, FEBRUARY 28, the Litigation Section will award its 11th Annual Clerk of the Year Award to a federal and a state courtroom clerk. In addition, Chief Judge Alicemarie H. Stotler and Presiding Judge J. Stephen Czuleger will provide updates on issues of current concern to the courts. This luncheon will take place at the Omni Los Angeles Hotel, 251 South Olive Street, Downtown. Omni Hotel valet parking will be available for $10. On-site registration will begin at 11:30 a.m. and the meal at noon, with the program continuing from 12:30 to 1:30 p.m. The registration code number is 009573. Judges and justices may attend for free. The prices below include the meal.

$40—CLE+Plus members
$65—Litigation Section members
$75—LACBA members
$85—all others
$850—Law firm or group table of 10 (8 firm or group members and 2 judicial officers)
1 CLE hour

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://calendar.lacba.org/.
For a full listing of this month’s Association programs, please consult the County Bar Update.
Paper Doesn’t Grow on Trees

FROM NEWSPAPERS TO WATER BOTTLES, my friend is a compulsive recycler. When we go hiking, rather than toss her empty water bottle in a nearby trash receptacle, she carries it for the entire hike so she can put it in the recycling bin when she gets home. Not until she took me to see An Inconvenient Truth this summer (at which she saved yet another water bottle) did I begin to consider the impact my law firm has on the environment. Like most law firms, we churn through a shocking amount of paper. Then I started noticing articles in the Wall Street Journal and U.S. News & World Report about how large corporations—like Dupont, IBM, Boeing, and British Petroleum—have been saving billions of dollars through their conservation efforts. Evidently, environmentally responsible business practices can result in massive cost savings, increased profits, greater efficiency, and increased morale among the staff. I was intrigued. If there was nothing to lose and everything to gain, why couldn’t our firm do something like this? We could, and we did.

Ungerlaw, PC, forms hundreds of corporations and LLCs and maintains the corporate records for thousands of entities, representing nearly every jurisdiction. Several years ago, in an effort to improve efficiency, our firm became “paperless” internally by creating a paperless infrastructure. Most of our staff have two monitors for easy viewing of multiple documents. We stopped creating physical files, and our fee agreements have clients acknowledge that we keep their records only in a digital format. These digital files are safeguarded through a complex backup system, including a nightly backup to a remote server called eVault. But, even with our internal efforts to minimize paper, we were still organizing each client’s corporate documents in binders, and our shredders were still working overtime.

In August 2006, I decided it was time to put conservation to the test and investigate a paperless delivery option, something we could not have accomplished without first having a paperless infrastructure. When a client selects paperless delivery, we deliver documents on a CD-ROM in lieu of a binder and post copies of the documents in the PDF format on a private access page of our firm’s secure Web site. We also plant a tree in our client’s name through American Forests. Founded in 1875 by citizens concerned about the waste and abuse of the nation’s forest, American Forests is the oldest nonprofit citizens’ conservation organization in the United States. It focuses on assisting communities in restoring and maintaining healthy ecosystems and practicing urban forestry.

Plenty of professional services firms are becoming “paperless,” but our paperless delivery of documents takes being paperless to another level. I anticipated that only a fraction of our clients, say 10 to 15 percent, would opt for paperless. However, an astonishing 70 percent of our clients have gone paperless, and more than 80 percent of our new business is opting for digital format. We have already planted hundreds of trees through American Forests, and we expect to save a significant amount of money in labor and production costs.

Before I started down this path, I did not fully understand the financial benefits of environmentally responsible business practices. I think most environmental groups pitch the wrong message to business owners. Instead of telling you, “Just do these things because they are good for the environment,” they should emphasize that you can be environmentally responsible and benefit your business at the same time. Law firms should consider how much paper they use in delivering documents to clients. With paperless delivery, everyone wins—the environment, the people who work at the firm, and the firm itself.

Law firms should consider how much paper they use in delivering documents to clients. With paperless delivery, everyone wins—the environment, the people who work at the firm, and the firm itself.

Our rewarding experience with paperless delivery has sparked an internal crusade to seek out other opportunities to reduce our firm’s impact on the environment. We have made environmentally responsible business practices a priority by forming a committee of interested staff volunteers to research and implement other eco-friendly business practices. One exceptional opportunity has already come from this. After consulting an employment attorney, and following a legally required vote by the staff, we initiated a 9/80 work week in January 2007. Here’s how it breaks down: The employees work nine-hour days Monday through Thursday. Every Friday the staff members alternate, with one half working an eight-hour day, while the other half enjoys a day off. Our employees are incredibly excited about this. They truly value having more time off. Not only does the 9/80 work week boost productivity and morale, it also reduces our commuter emissions by 50 percent on Fridays. We are also expanding the hours that we are open, from 7 A.M. to 6 P.M., as some staff members want to avoid peak traffic hours and get home to their families at a reasonable hour.

We are looking forward to implementing more programs that benefit our firm, our employees, and the environment. Our success with paperless delivery is proof that business can be environmentally friendly and benefit financially from doing so. So next time the din of paper shredders causes you to lose your train of thought, think about going paperless.

Jeffrey A. Unger is president of Ungerlaw, PC, and the founder of eMinutes.com.
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