Mark My Words

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For all the right reasons . . . we made history!
Writers are often counseled to write about what they know or what interests them most. Right now, what interests me most is taking a vacation.

If you have not already done so, now is the time to plan your summer vacation. But the question is: Can a lawyer really take a vacation?

For many of us, there are always matters pending that need immediate attention, and we can get so caught up in our work that sometimes we forget why we are working and fail to take time off to enjoy our lives. We may either forego vacations until the right time, which never comes, or allow ourselves only short breaks whenever the opportunity arises. Even if we can get away for any significant length of time, we tend to have to work extra hard before and after a vacation. And with computer access in most places, there is frequently no excuse for not continuing to work while on vacation—at least in the eyes of many of our colleagues and clients.

Perhaps the best strategy is not to fight the trend but rather embrace it. This summer my wife and I plan to visit my wife’s family in Asahikawa, Japan. Asahikawa is located in the central part of the northern island of Hokkaido. I have been there many times, and it is surrounded by some of the most scenic areas imaginable. It still takes at least 20 hours to get there from Los Angeles. Once upon a time, I felt largely cut off from the rest of the world when I was there. But now, I am making arrangements to set up shop and perform most of the tasks in Japan that I could otherwise do from my office. This means that I can schedule a longer trip, which is critical when one’s vacation involves substantial travel time, and I can worry less that last-minute issues will derail or complicate my travel plans.

This, no doubt, comes as no surprise to many of you who have, for example, encountered customer service personnel lending assistance from halfway around the world or who have yourselves worked from faraway places. Most major hotels have computer lounges or even in-room wireless access that will allow you to log in to your firm’s computer system and other important Web sites, though the quality of the access may vary from place to place. And you can e-mail your office to handle any further tasks. All the recent advances in computer access around the world can be liberating, enabling us to take vacations we otherwise might not be able to take.

But we still need to balance our work and vacation plans, especially when a significant time difference is involved. When in Japan, for example, an effective strategy is to check e-mails first thing in the morning when it is early afternoon here in Los Angeles, and again in the evening, leaving much of the day available for touring and sightseeing. Due to a difference in systems, our ubiquitous BlackBerries (or similar devices) will not work in Japan. But for those of us who may need constant access, I am informed that you can rent a cell phone to which you can forward your e-mails. In Europe, I understand that our BlackBerries will continue to function. In either case, however, I would not recommend that you advertise that you will always be reachable—except in the case of emergencies—as you might find yourself without any free time to enjoy your trip.

So now, rather than worrying about how I will be able to manage at least two weeks off this summer to go to Japan, my biggest decision is whether to go in July or August. And this has me thinking about other places I want to go, such as France or Italy, or Tahiti. Because even though we can work while taking a vacation, the opposite is simply not true.
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Reemployment Rights for Returning Military Personnel

**SINCE SEPTEMBER 11, 2001**, over 500,000 men and women have returned from military service and reentered the civilian workforce. During the same period, the Department of Labor has reported a rise in the number of employee claims for violations of the Uniform Service Employment and Reemployment Rights Act (USERRA), which mandates reinstatement and prohibits employers from discriminating against employees based on their military service. Notably, however, USERRA has fewer procedural and jurisdictional hurdles to enforcement than other antidiscrimination laws and therefore is more likely to be privately enforced through civil litigation. In order to avoid these land mines and properly advise employees and employers alike, it is important to understand basic USERRA law and the significant differences between USERRA and other antidiscrimination laws, such as Title VII of the American Civil Liberties Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and the California Fair Employment and Housing Act (FEHA).

Under USERRA, an employee who returns from military duty must be reinstated to the position that he or she would have held but for the military service. If an employee would have received a promotion while on military duty, he or she must be reinstated to the elevated position. Employees who lack training for a promotion must be trained for the elevated position. If training efforts are unsuccessful due to an employee’s service-related injury, then the employer must offer the employee all possible reasonable accommodations, including a return to his or her preservice position. If these efforts are unsuccessful, the employer must provide the employee with a position of equal status and pay or a position that is the most equivalent.

An employer is not required to reinstate an employee if 1) he or she was discharged due to dishonorable conduct, 2) reemployment is “unreasonable or impossible” due to a change in business circumstances, 3) reemployment would cause the employer an undue hardship, or 4) the employee’s job was seasonal or temporary.

USERRA also provides employees with additional protection following reinstatement, depending on the length of their military service. An employee whose service lasted between 31 and 180 days may be terminated only for good cause within the first 180 days after reinstatement. For employees serving more than 180 days, the good cause period is extended to 1 year after reinstatement.

**Reasonable Accommodation**

USERRA requires employers to make reasonable efforts to accommodate employee disabilities that are incurred or aggravated as a result of military service. If an employee cannot be reasonably accommodated back into the position that he or she would have held but for his or her military service, then the employee is entitled to a position of equivalent seniority, status, pay, and duties that the employee can perform with or without an accommodation. If the employee cannot perform any equivalent position with or without an accommodation, the employer must provide the employee with a position that is consistent with his or her physical abilities and that most nearly approximates the seniority, status, and pay of the position that the employee would have held but for his or her military service.

Under USERRA, employers are prohibited from terminating or otherwise discriminating against employees because of their military service. By itself, this antidiscrimination provision appears similar to the antidiscrimination provisions of Title VII, the ADA, and the ADEA, which prohibit employers from discriminating on the basis of race, sex, national origin, religion, disability, and age. However, in practice, USERRA is different from other equal employment opportunity laws, making it easier for employees to file lawsuits and ultimately recover for discrimination based on military service.

First, USERRA has fewer procedural and jurisdictional requirements than Title VII and other antidiscrimination laws. For example, in order to pursue a claim for employment discrimination under the FEHA, an employee must exhaust his or her administrative remedies by filing a complaint with the California Department of Fair Employment and Housing (DFEH) within one year of the alleged unlawful act. Thereafter, the employee must file a civil action within one year after the DFEH issues a Right to Sue Notice in response to the employee’s administrative complaint. Failure to exhaust administrative remedies or to file a civil action within the limitations period is ground for dismissal as a matter of law. Under USERRA, on the other hand, there is no requirement that employees exhaust their administrative remedies. In addition, USERRA does not require employees to file a lawsuit by a particular deadline. In fact, in order to limit an employee’s USERRA claim, an employer must plead and prove the affirmative defense of laches: that the employee’s inexcusable delay has prejudiced its ability to defend against the lawsuit.

In addition, USERRA also has a lower standard for liability than Title VII and numerous other antidiscrimination laws, which utilize the burden shifting analysis announced by the U.S. Supreme Court in *McDonnell-Douglas v. Green*1. Under *McDonnell-Douglas*, the employer has the burden of establishing a prima facie case of discrimination. If the employee produces sufficient evidence, then the burden shifts to the employer to prove evidence of a legitimate, nondiscriminatory reason for the alleged discriminatory act. If the employer does so, then the final burden shifts back to the employee to prove that the employer’s reason is untrue or pretext for discrimination. Under USERRA, however, the employee is only required to establish that his or her military service was a substantial motivating factor behind the alleged discriminatory act. If the employee produces this evidence, then the final burden shifts to the employer to establish that it would have taken the alleged discriminatory action regardless of the employee’s military service.

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Jenai Sumida practices labor and employment law with Seyfarth Shaw LLP in Los Angeles.
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Using Interpreters in Litigation

IN A GLOBAL ECONOMY, in which it is increasingly common to have disputes between individuals and companies from around the world, interpreting from a foreign language into English requires significant attention. It is not enough simply to hire an interpreter on someone’s recommendation and then let the interpreter take it from there. On the contrary, there are a number of legal and practical issues that should be considered when using interpreters in the course of litigation.¹

The first issue counsel needs to confront is whether to use an interpreter at all. Often there is no choice; it is clear that the client simply cannot testify in English, or the other side’s witness demands an interpreter. Sometimes, however, it is a close call. The witness may not be fluent but can understand and be understood. If there is a significant dispute between the parties regarding the need for an interpreter, ultimately it is the province of the court to determine.² More commonly, however, the decision is one of strategy. It is important to make a good decision early in the litigation, since it is difficult to change the approach at trial. A witness who testifies through an interpreter at deposition and then without an interpreter at trial, or vice versa, is likely to lose credibility.

Sometimes counsel automatically insists on an interpreter for his or her client’s deposition simply to play it safe or make things more cumbersome for the other side. However, that approach does not necessarily benefit the client. Counsel should consider various factors. Cost is one; interpreters add expense. In criminal cases, a court is necessarily benefit the client. Counsel should consider various factors. Cost is one; interpreters add expense. In criminal cases, a court is required to appoint an interpreter when necessary for the defendant to communicate. There is no such requirement in civil cases.³ As a consequence, civil litigants must pay for their own interpreters. But strategic considerations almost always are more important than cost.

A major consideration is the importance of the witness communicating directly with the judge or jury, weighed against the importance of the testimony sounding like what the jury expects. When a witness testifies through an interpreter, the time lag between the testimony and the interpretation often disconnects the emotions, gestures, and speech of the witness from the English interpretation. This can reduce the impact of the testimony. Furthermore, it is very difficult for an interpreter to convey the nuances of what the witness means or what the witness’s state of mind is. Truly, much is lost in the translation. On the other hand, a witness who is not reasonably skilled in English probably will not be able to convey nuances or emotions without an interpreter. Moreover, jurors may be jarred by hearing a witness speak with a heavy accent, use unfamiliar idioms, or make errors in vocabulary and grammar, and may be frustrated by having to struggle to understand the witness.

Another factor is whether the witness has been in the United States for a long time or regularly conducts business in English. It is counterproductive for a witness to be thought of as trying to hide behind the interpreter or taking advantage of the extra time that the interpretation takes in order to concoct answers. Similarly, if the witness uses English to speak with his or her attorney (such as in meetings or preparation sessions or at the deposition itself), using an interpreter to speak with opposing counsel in the deposition may make it appear that the witness is playing games. In this regard, counsel deposing a witness who is using an interpreter should ask the witness to testify about his or her use of English. Does the witness use English at home, in business meetings, and in conversations with counsel? This can be a way to undercut the credibility of a witness who uses an interpreter at the deposition.

Although not determinative, some consideration should be given to the fact that using an interpreter at least doubles the time it takes to provide testimony, whether in deposition or at trial. Questions and answers are stated twice (once in each language), objections often are interpreted,⁴ issues of the accuracy of the interpretation invariably arise and take time, and more frequent breaks are necessary. This can be frustrating and expensive and substantively affect the case if there is a time limit on the witness’s testimony. Judges sometimes do not understand how much extra time is needed for interpreted depositions and may not permit extra time if the other party objects to how long a deposition is taking.

Also, an interpreted deposition permits the attorney somewhat less control. If a deposition is given entirely in English, the attorney can

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interrupt his or her witness if the witness appears to be heading into a problem, such as revealing privileged information. In an interpreted deposition, the answer can be given (at least in the foreign language) before the attorney has a chance to do anything. Even if the interpretation is not provided, the answer will be understood by anyone in the room who understands the foreign language (such as an opposing party), and if the deposition is being taped there will be a recording for possible future use.

Whether an interpreter will be required typically becomes apparent early in litigation, although sometimes the need for an interpreter arises only after a witness who does not speak English is identified. In either situation, as soon as a decision is made that an interpreter is needed, counsel should take steps to identify a qualified interpreter. Government Code Section 68561 requires use of a court-certified interpreter in any “court proceeding” using a language designated by the Judicial Council under Section 68562(a), except for good cause shown. A court proceeding is defined as any civil, criminal, or juvenile proceeding, including a deposition in a civil case. One source of interpreter candidates is the court’s list of certified interpreters. However, as in any other profession, certified interpreters have strengths and weaknesses, and some may be better than others in particular situations. In deciding which interpreter to use, an attorney should consider numerous factors.

Court certification is beneficial and helps to overcome objections or reservations from judges or opposing counsel. However, court certification is not a guarantee, and not necessarily even an indicator, of competency. Conversely, an interpreter who is not court certified is not necessarily unqualified.

Ideally, the interpreter should be fluent in English and the foreign language. However, most interpreters are stronger in one language than the other. In that situation, attorneys are well advised to use an interpreter who is stronger in English than in the foreign language. It is critical to have an English interpretation that a judge or juror will readily understand. After all, the main purpose of the interpretation exercise, as with every other aspect of litigation, is to be able to provide information to the fact finder in a clear, cogent, and understandable manner. That purpose is undermined by having an interpreter speak in halting or stilted English.

Another factor to consider is whether the interpreter is experienced in litigation. Interpreting at a deposition or during trial is quite different from interpreting at a business meeting. The interpreter must be familiar with, and not intimidated by, the adversarial process, including interpreting pointed cross-

examination questions, handling arguments between counsel, understanding legal terms, and dealing with an interpreter who checks the first interpreter’s work. Also, a litigation-savvy interpreter is more likely to understand the need to provide precise interpretations, rather than simply conveying the gist of the question or the testimony. Interpreters who primarily handle business meetings are used to conveying the sense of what the speaker intends, taking liberties to interpret what is meant. And this is much easier and safer to do when people are conversing about business issues. In contrast, litigation typically hinges on rather specific events, statements, words, and phrases. More precise interpretations are required. In this regard, it also is important that the interpreter be experienced in seriatim interpretation (providing the interpretation after the statement rather than simultaneously).

Before retaining an interpreter, counsel should interview the candidate, in person if possible. If counsel has access to someone who is fluent in, or at least knowledgeable about, the foreign language at issue, include that person in the interview. Even with an interview, it may be difficult to gauge the interpreter’s skills in the foreign language. At the least, confirm that the interpreter’s English is strong, so that the interpretations will be understandable, that the candidate will be able to get along with you and others involved in the case and survive the ups and downs of litigation, and that the candidate will be generally available for assignments so that you do not need multiple interpreters working on the case. Speaking to other attorneys who have used the interpreter will help in considering these factors.

After selecting a primary interpreter, it is good practice to identify a backup interpreter. Having another interpreter preselected will help in the event that the primary interpreter is not available or is unacceptable to opposing counsel, or a checking interpreter is needed, or other circumstances arise that prevent using the first choice.

**Using the Interpreter**

Once the interpreter has been selected, counsel can take several steps to increase the likelihood of obtaining interpretations that are understandable and useful. Counsel should be proactive in taking these steps; it is not enough to trust that the interpreter can handle everything on his or her own.

At the outset, counsel should help the interpreter understand the case. Counsel should provide a copy of the complaint or cross-complaint and answer and a noncontroversial, impartial summary of the case, so that the interpreter has an idea of what the controversy is about and what events and issues are important. This information should be provided with the concurrence of opposing counsel if possible; if not, counsel should recognize that communications with the official (or neutral) interpreter likely are not privileged and could become known to opposing counsel. In addition, the interpreter should be given a list of the key names, terms of art, and technical terms that are likely to be used in the course of testimony, so that he or she can determine the appropriate interpretation in advance. If possible, counsel should agree as to the proper interpretation of these terms.

Efforts should be made to allow the interpreter to speak with the witness prior to the testimony. They should not discuss the case per se, since their conversation will not be privileged. But having them talk to each other in advance (even if only for a few moments prior to the testimony) will help the interpreter and the witness become used to particular accents, mannerisms, and speech patterns.

During the course of testimony, counsel should take breaks more frequently than normal, preferably every hour. In an interpreted deposition, the examining attorney, witness, and court reporter basically work only part of the time, when their language is being spoken. Only the interpreter is concentrating and talking essentially all the time, interpreting either the question or the answer. In this situation, the interpreter tires more quickly, while the attorney, reporter, and witness do not always notice, since they are more or less resting part of the time.

Counsel should try to use the same interpreter for as many witnesses as possible. This increases the continuity of the interpretations and reduces the time and effort needed to bring the interpreter up to speed. Since interpreters are supposed to be impartial (and the good ones truly are), it should not matter whether your interpreter interprets the testimony of your witness or that of the opposing witness. Of course, the issue becomes somewhat complicated when checking interpreters are factored into the process. Also, if counsel needs to use the interpreter in order to be able to speak confidentially with his or her witness, letting the other side use the interpreter probably is not very wise.

If possible, real-time reporting should be made available at the deposition. This allows the interpreter to look at the questions while framing his or her interpretation, rather than having to rely solely on handwritten notes or having to have the question read back. It also allows counsel to more easily refresh his or her memory as to the exact question being answered (since the question may have been asked several minutes earlier).

Consideration should be given to whether to use simultaneous interpretation (the interpreter interprets as the question is being asked
or the testimony is being given) or seriatim interpretation (the interpretation is given only after the question or answer is completed). The latter is more commonly used in depositions. Typically, it is easier and more accurate to have the interpretation given after the entire question or answer is provided. In addition, it is difficult to concentrate when two people (the interpreter and the attorney or witness) are speaking at the same time. In either event, it is important that the interpreter provide a complete and accurate interpretation that conveys the entire intended meaning of the witness. Also, examining counsel should keep in mind that the questions are directed to the witness, not the interpreter (e.g., “Did you attend that meeting?” not “Ask her whether she attended that meeting”), and the interpreter is to interpret in the first person (“Yes, I attended that meeting”; not “She says that she attended that meeting.”).

Counsel should educate his or her witness on how to make the interpreter’s job easier (and thus increase the likelihood of accurate interpretations) and should keep these points in mind as he or she is conducting the examination. With an interpreter, it is especially important to speak slowly and distinctly. Counsel and the witness should avoid using slang or colloquialisms. The question or answer should be as complete within itself as possible. This is particularly important in languages (such as Chinese and Japanese) in which it is common to speak without specifically identifying such things as who the subject of the sentence is or what quantity of items is being discussed. Leaving it to the interpreter to guess is a recipe for disaster. Make sure that actual names are used, rather than simply titles (i.e., “Mr. Lin” rather than “the chairman”). Counsel should keep questions short, and witnesses should do the same with answers to the extent possible. If a longer answer is necessary, have the witness break it down into parts, a sentence or two at a time. Remind the client that everything he or she says will (or at least is supposed to be) interpreted, so the witness should avoid extraneous starts and stops in answers and avoid asking the interpreter to explain the question. As with English, if the witness does not understand the question as interpreted, he or she should simply say so and let the attorney and interpreter figure out how to get it right. On the other hand, if the witness is continually having difficulty understanding the interpretations or believes that the interpretations are not accurate (which can happen even if the witness is not fluent in English), he or she should say so and steps should be taken to figure out what the problem is and correct it.

Finally, counsel should avoid having the interpreter translate documents on the fly or through the witness. Interpretation of oral tes-
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TIMETESTED SOLUTIONS — Translations

When opposing counsel is taking the de- position of a client and retains an interpreter, it is advisable to learn whether that interpreter is likely to do a good job. If there are concerns, counsel should try to resolve them beforehand. Both sides are well served by having a competent interpreter. However, there is a right to object to the competency or qualifications of the interpreter, either before the proceeding begins or later if competency becomes an issue.12

Whether or not there is a lack of confidence in the interpreter chosen by the other side, counsel should consider bringing an interpreter to the deposition in order to check the work of the primary interpreter. Otherwise, counsel is committed to whatever interpretations are provided by the official interpreter. Counsel does have the right to discredit the accuracy of an interpretation through cross-examination or independent proof.13 However, this is not a realistic option unless the deposition is audio recorded. Even if there is a recording, objecting to a particular interpretation after the fact is a very problematic proposition. Counsel is much better off dealing with the issue at the deposition, which means having a checking interpreter available.

There is virtually no mention of checking interpreters in either the case law or treatises. However, it is common in international litigation for counsel to use checking interpreters. Moreover, it seems unlikely that a judge would prohibit an attorney from bringing a checking interpreter to assist the attorney at a deposition, much as attorneys often have paralegals, experts, or colleagues assist them at depositions. Furthermore, quite often counsel can communicate with a non-English speaking client only through an interpreter, and has retained such an interpreter to be part of the litigation team.14 In such cases, there will be little added effort and expense in having that interpreter attend the client’s deposition to verify the official interpretations. Using the official or neutral interpreter for such communications risks waiver, since the
neutral often will be working for both sides. When selecting a checking interpreter, the same care should be taken as when selecting an official interpreter. As an additional consideration, counsel should select someone who knows how to be discreet and professional in making suggestions and corrections to the official interpreter. This is no easy feat. Naturally, interpreters are confident that their interpretation is correct, and often do not help that frequently there is no single correct interpretation. The best approach is to have the checking interpreter provide suggested changes only when truly necessary to make the question or answer intelligible, or where some word or phrase that is important to the litigation is used (thus highlighting the need to make sure that the interpreter has been briefed beforehand and understands the key issues in the case). Sometimes it is best to have the checking interpreter explain the problem to the attorney personally (by speaking off the record or by providing a note), and then letting the attorney decide whether or not to raise the issue on the record. If there is a disagreement, and the interpreters cannot work out a mutually agreeable interpretation, an objection should be made on the record, and the checking interpreter should specify what he or she believes is the correct interpretation.

In sum, today it is common for cases to involve witnesses whose native language is not English. Counsel should take care to ensure that the inability of a witness—particularly one’s client—to communicate in English does not adversely affect the case. As with every other aspect of litigation, proper preparation and attention to detail will allow non-English speakers to have a fair day in court.

1 The terms “interpreter” and “translator” often are used interchangeably. However, an interpreter is one who takes the meaning of oral statements (such as testimony) from one language to another, while a translator is one who takes the meaning of written statements (such as documents) from one language to another. See Evid. Code §751(a) (interpersonal required to “make a true interpretation of the witness’ answers”) and §751(c) (translator required to “make a true translation…of any writing”).

2 Hilbert v. Kundicoff, 204 Cal. 485 (1928).

3 See Jara v. Municipal Court, 21 Cal. 3d 181 (1978).

4 See Standards of Judicial Administration, Standard 2.11(a)(1).

5 Once an answer is given, an interpretation may be required. See People v. Wong Ah Bank, 65 Cal. 305 (1884) (It is the duty of the interpreter to report every statement made by the witness; the court should require strict compliance with this requirement.).

6 At the end of 2007, the languages designated by the Judicial Council were Arabic, Cantonese, Eastern Armenian, Western Armenian, Japanese, Korean, Mandarin, Portuguese, Russian, Spanish, Tagalog, and Vietnamese. See http://www.courtinfo.ca.gov/programs/courtinterpreters.

7 Gov’t Code §68560.5. As a practical matter, many attorneys use noncertified interpreters for depositions. In the absence of an objection by opposing counsel, a court is unlikely to intervene, but a court likely would require a certified interpreter if the issue were presented prior to the deposition, or if opposing counsel preserves the right with a proper objection. The certification issue may trap the unwary in international litigation if opposing counsel preserves the record with a proper objection. For example, if a deposition is taken in a foreign country through the use of a non-court-certified interpreter, and a proper objection is made, the deposition testimony may not be allowed at trial. Since the out-of-state witness would not be subject to the subpoena power of the California courts, the witness’s testimony may be unusable. See Code Civ. Proc. §1989.

8 See http://www.courtinfo.ca.gov/programs/courtinterpreters for a list of certified interpreters.


10 People v. Wong Ah Bank, 65 Cal. 305 (1884); Standards of Judicial Administration, Standard 2.11(a)(5).


14 Use of an interpreter with a client would not waive the attorney-client privilege, since the interpreter is “reasonably necessary” for confidential communications between lawyer and client. Evid. Code §952.
Manufacturer Liability for Off-Label Uses of Medical Devices

AN “OFF-LABEL” USE OF A DRUG OR MEDICAL DEVICE is a use other than one deemed approved by the Food and Drug Administration. The FDA does not prohibit off-label use, and the U.S. Supreme Court has found that off-label use furthers the mission of the FDA. Indeed, it is relatively common for doctors to prescribe drugs or medical devices for off-label uses. Researchers have estimated that off-label uses of prescription medical products make up 25 percent to 60 percent of all prescriptions written each year. In fact, off-label use allows doctors to find new uses or indications for drugs or devices.

Still, the FDA prohibits prescription drug and medical device manufacturers from promoting off-label uses. And while California law is generally favorable to manufacturers regarding liability for off-label uses, product liability actions are on the increase against manufacturers for off-label uses based on the argument that the manufacturer improperly promoted the off-label use. Drug and device manufacturers should make every attempt to avoid running afoul of the FDA’s prohibition on the promotion of off-label uses.

Medical device manufacturers must obtain FDA approval for each use indicated in the product labeling—often a costly, time-consuming, and painstaking process. When the FDA determines that each labeled use is “safe and effective,” the manufacturer is permitted to market the medical device for the labeled uses. The labeling that accompanies the marketed product will show that the product’s indications are FDA-approved.

The off-label use of a medical device is not illegal or unethical. According to the federal Food, Drug and Cosmetic Act (FDCA), “[N]othing in this chapter shall be construed to limit or interfere with the authority of a health care practitioner to prescribe or administer any legally marketed device to a patient for any condition or disease….” In addition, the U.S. Supreme Court stated that “off-label uses of medical devices…is an accepted corollary of the FDA’s mission to regulate [medical devices] without directly interfering with the practice of medicine.”

Courts recognize that off-label uses can be an aid in advancing medical discovery and may even be considered the “state-of-the-art” treatment. Courts have also determined that off-label uses can actually be recognized as the standard of care. Because the FDA does not regulate the practice of medicine and off-label uses are recognized as beneficial, courts and the FDA overwhelmingly agree that any approved product may be used by a licensed practitioner for off-label uses.

Liability for Promotion

Nevertheless, the FDA forbids the promotion of off-label uses by manufacturers. The FDCA prohibits the introduction, or delivery for introduction, into interstate commerce of any device that is adulterated or misbranded. A device may be misbranded if its label lacks adequate directions for use or if its labeling is false or misleading in any way. Misbranding has been found when a label contains any information about unapproved uses. An approved medical device that lists unapproved uses in its advertising is also considered a misbranded medical device.

The FDA can impose a wide array of penalties for violations of its regulations, including the imposition of hefty fines on a manufacturer. Additionally, manufacturers may be exposed to civil liability for injuries resulting from the off-label use of a medical device when the manufacturer promotes the medical device for off-label uses.

Courts recognize the potential liability for manufacturers but still may require plaintiffs to meet significant evidentiary burdens. For example, in Sita v. Danek Medical, Inc., the Eastern District of New York recognized that doctors may prescribe an FDA-approved drug or device for nonapproved uses, but manufacturers may not promote nonapproved uses of the drug or device. The plaintiff in Sita argued that the defendant marketed the off-label use of bone screws by funding seminars and textbooks and endorsing universities and private physicians to teach others how to perform off-label procedures using the medical device. The court recognized that a manufacturer could be negligent for promoting a device for an unapproved use if it can be shown that the promotion proximately caused the plaintiff’s injuries. However, the court stated that the only way the plaintiff could make a causation argument is to assert that the treating physician “was influenced by illegal marketing efforts which, in effect, made the use of [the medical device]…so prevalent that the off-label use…became the standard of care” in the medical community. The court granted the defendant’s motion for summary judgment on the issue of causation, holding that the plaintiff failed to present facts to show that the defendant’s illegal marketing efforts influenced the plaintiff’s treating physician to use the bone screws off-label.

Proctor v. Davis, another case examining manufacturer negligence for the promotion of off-label uses, involved a jury verdict in favor of a plaintiff who suffered eye injuries due to the off-label intraocular injection of a corticosteroid. In upholding the jury verdict, the Illinois appellate court found evidence that the manufacturer encouraged and participated in disseminating misleading information concerning the use of its drug to “learned intermediaries.” The manufacturer did...
so through financial support and supplies of the drugs as well as by contributions to articles in journals. The court also noted that the defendant had concealed the risks associated with the off-label use, stating that “[a] drug company cannot absolve itself...by pointing to the unauthorized use of its drug by physicians with whom it has not shared its knowledge of dangerous side effects and injury.”19

Known Off-Label Use But No Promotion

Although a manufacturer may be found liable for injuries that result from the off-label use of a medical device when the manufacturer promotes that use, several courts have wrestled with whether manufacturers of medical devices who do not promote off-label uses and do not conceal risks associated with those uses can be liable for injuries resulting from off-label use. Two California cases attempted to resolve this issue: Little v. Depuy Motech, Inc. and Cox v. Depuy Motech, Inc.20

In Little, the U.S. District Court for the Southern District of California addressed whether a manufacturer can be liable for injuries resulting from the off-label use of a medical device when the manufacturer knew of the use.21 In an unreported decision, the court found that the treating physician’s decision to use a medical device off-label does not subject the manufacturer to liability even if the manufacturer had knowledge of the off-label use. The Little decision was reaffirmed when the Southern District, facing the same issue in Cox, held that a seller is not liable even if it knows of the off-label use.22 These cases, however, provide little analysis of why a manufacturer is not liable under these circumstances.

The Eastern District of Pennsylvania has since adopted the finding in Little and Cox. In Davenport v. Medtronic, Inc., the plaintiff alleged that Medtronic was negligent because it knew that its medical device was being used by physicians off-label.23 Davenport involved an implantable pulse generator that electronically stimulated targeted tissues in the brain controlling muscle movement to assist patients suffering from Parkinson’s disease.24 The device was implanted into the plaintiff to create bilateral stimulation—an off-label use for the device.25

In analyzing whether Medtronic was negligent for “allowing” the off-label use to occur, the court adopted the reasoning in Cox and Little and found that doctors may use devices in an off-label manner. According to the court, a doctor’s decision to use a device in an off-label manner will not subject the manufacturer to liability even if the manufacturer knows of the off-label use.26 Thus the court held that Medtronic did not owe a duty to the plaintiff to prevent the off-label use.27

In Talley v. Danek Medical, Inc., the Fourth Circuit analyzed whether a claim based on a
failure to warn could be asserted a gainst a manufacturer of bone screws that were being used off-label.28 A manufacturer generally has a duty to provide warnings regarding risks associated with a foreseeable use of its product. In Talley, the plaintiff alleged that Danek did not provide “sufficient instructions concerning its spinal application”—a known off-label use of its device. The use was off-label because the device had not been approved for pedicle fixation.

In analyzing the plaintiff’s claim, the Fourth Circuit applied the learned intermediary doctrine to bar relief. According to the court, “The learned intermediary doctrine provides an exception to the general rule imposing a duty on manufacturers to warn consumers about the risk of their products.”29 The doctrine “holds that a manufacturer need only warn doctors and not consumers” for prescription drugs or devices.

The warning in Sita that accompanied the bone screw device stated that the device is only intended for indicated uses. The court found the warning sufficient for experienced doctors, because the warning alerts the doctors that the device has not been approved for other uses beyond those that are FDA-approved.30 The court in Sita applied the learned intermediary doctrine in addition to finding a lack of proximate cause. It found that Danek, in that case, had provided adequate warning about the risks associated with the use of its one-screw system.31 The court in Little also applied the learned intermediary doctrine and found that the doctor knew of the risks that were associated with off-label use. Thus the cause of action for failure to warn could not be sustained.32

In fact, a manufacturer may not be liable even if it provides an inadequate warning. In Minisan v. Danek Medical, Inc., another bone screw case in which the plaintiff alleged a failure-to-warn claim, the court stated in dicta that “even if the manufacturer provides inadequate information…the manufacturer will not be liable if the plaintiff’s physician independently knew of the risks and failed to advise the plaintiff.”33 Similarly, a manufacturer will not be liable if the physician did not read or rely upon the warning when prescribing the drug or device because the essential element of proximate cause cannot be established.34

Case law in California is favorable to manufacturers regarding liability for off-label uses when the manufacturer does not promote the off-label use. Drug and device manufacturers should make every attempt to avoid running afoul of the FDA’s prohibition on the promotion of off-label uses. For example, manufacturers should, at a minimum, avoid funding seminars involving off-label uses,
making contributions to periodicals or textbooks in which off-label uses are described, and teaching physicians how to perform procedures involving off-label uses. Manufacturers should also be properly prepared to respond to unsolicited inquiries from the medical community regarding off-label uses to ensure compliance with FDA regulations.

With the proliferation of litigation regarding various prescription drug and medical devices, it is likely only a matter of time before more appellate cases are decided on this issue. Therefore, manufacturers should not promote the off-label use of their prescription products in order to fully benefit from the protections afforded under California law.

5 See Buckman, 531 U.S. at 343; see also Riegel v. Medtronic, Inc., No. 06-179, slip op. at 5 (2001).
7 Buckman, 531 U.S. at 350.
8 Id.
9 See Southard v. Temple Univ. Hosp., 566 Pa. 335, 340 (Pa. 2001) (finding that the off-label use of bone screws to attach a spinal fixation device was the standard of care for the surgical community).
10 See Alvarez v. Smith, 714 So. 2d 652, 654 (Fla. App. 5th Dist., 1998) (“[A] physician is free to use a medical device for an off-label purpose.”); see also Weaver v. Reagen, 886 F. 2d 194, 198 (8th Cir. 1989) (“[T]he fact that FDA has not approved labeling of a drug for a particular use does not necessarily bear on those uses of the drug that are established within the medical and scientific community as medically appropriate.”).
16 Id. at 263.
17 Id.
19 Id.
22 Cox, 2000 WL 1160486, at *8.
24 Id. at 424.
25 Id. at 427.
26 Id. at 440.
27 Id.
29 Id.
31 Id. at 264.
33 Minisan v. Danek Med., Inc., 79 F. Supp. 2d 970, 978 (N.D. Ind. 1999); see also Beale v. Biomet, Inc., 492 F. Supp. 2d 1360, 1365 (S.D. Fl. 2007) (finding that “failure of the manufacturer to provide the physician with an adequate warning of the risks associated with a prescription product is not the proximate cause of a patient’s injury if the prescribing physician had independent knowledge of the risk that the adequate warning should have communicated”).
34 Huntman v. Danek, 1998 WL 663362 (S.D. Cal. 1998) (granting the defendant’s motion for summary judgment by finding that in a failure-to-warn case, the treating physician did not rely on any statements by the manufacturer in his decision to perform off-label treatment on the plaintiff; see also Motus v. Pfizer, 196 F. Supp. 2d 984 (C.D. Cal. 2001) (finding that the plaintiff failed to prove that the prescribing physician would have acted differently had an adequate warning been provided); and Ramirez v. Plough, Inc., 6 Cal. 4th 539 (1993) (finding that an aspirin label that was only in English was not defective, because the mother who provided the aspirin to her child “neither read nor obtained translation of the product labeling. Thus, there is no conceivable causal connection between the representations or omissions that accompanied the product and plaintiff’s injury.”).
MARK MY WORDS

While single-work titles may not be federally registered, other legal strategies are available to protect a movie title

TITLES ARE TROUBLESOME. Case law and U.S. Trademark Office rules provide that while the title of a series of creative works—such as books or movies—can be registered for trademark protection, the title of a single work cannot. The distinctiveness of the title is irrelevant to the doctrine. Single-work titles are deemed per se “inherently descriptive” or “inherently generic” and thus incapable of the necessary distinctiveness for registration.

This judicial fiction applies regardless of how arbitrary or fanciful—that is, distinctive—the title might actually be. Thus, under this doctrine, Pulp Fiction and The 40-Year-Old Virgin, as the titles of single movies, would not be registrable, whereas Harry Potter, as the title of a series of movies, would be. Even if a single-work title has acquired secondary meaning—essentially, significant recognition among the public—it will not be eligible for registration.

While the prohibition is not statutory, it is seemingly absolute. The leading case, In re Cooper, although 50 years old, has been consistently followed by courts to this day with little explanation. Moreover, the Trademark Office has stated flatly, “The title of a single creative work is not registrable on the Principal Register or the Supplemental Register.” While some might cheer a legal doctrine that protects young wizards and leaves gun-toting mobsters and late bloomers to their own devices, the difference in treatment between single-work titles and series titles is peculiar and has been soundly criticized.

Many of the criticisms are valid. Still, lawyers may not be aware that there are a variety of approaches to single-work title registration that circumvent—or, at least, circumnavigate—the accepted doctrine.

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trine. With one exception,\textsuperscript{13} these approaches have not been previously discussed in the literature.

First, a practical question—why bother registering? It is not as though single-work titles altogether lack protection. For example, federal unfair competition law under Section 43(a) of the Lanham Act\textsuperscript{14} provides protection for some single-work titles.\textsuperscript{15} However, this route is difficult and unsatisfactory. The title owner must show that the title has achieved secondary meaning even if it is distinctive,\textsuperscript{16} and this, in turn, is a question of fact with a high burden of proof.\textsuperscript{17} Meeting the burden may require consumer surveys, proof of significant advertising expenditures, media coverage, and/or other evidence.\textsuperscript{18} State unfair competition law may provide protection as well but is generally subject to the same difficulties.\textsuperscript{19} Moreover, protection under California unfair competition law is even more limited than under federal law, because state case law does not permit enjoining use of an infringing title and instead requires only a disclaimer by the junior user.\textsuperscript{20}

Under some circumstances, contract law may provide protection, but this is true only when there is privity.\textsuperscript{21} The applicable contract can range from an agreement between two parties regarding a specific title to a multiparty agreement relating to the use of titles. The Title Registration Bureau of the Motion Picture Association of America (MPAA) is an example of the latter.\textsuperscript{22} However, the Bureau only protects titles registered by members of the Bureau, which consists of the major studios and other companies that choose to sign up—and only protects the titles against use by other Bureau members.\textsuperscript{23} Nonmembers are beyond the MPAA’s reach.\textsuperscript{24}

In contrast, federal trademark registration has none of the limitations of unfair competition or contract law or the MPAA system and, instead, has many benefits that those approaches do not. One key advantage is a set of evidentiary presumptions: Federal registration constitutes prima facie evidence of 1) the validity of the mark, 2) the registrant’s ownership of the mark, and 3) the registrant’s exclusive right to use the mark in commerce or in connection with the goods or services specified in the registration.\textsuperscript{25} In addition, a registrant whose mark has been infringed may be able to obtain costs, treble damages, and attorney’s fees; destruction of infringing goods; and prevention of importation of infringing goods.\textsuperscript{26} These presumptions and potential remedies are powerful tools in any contest with a potential infringer and can not only help settle a dispute early but also reduce the likelihood of infringement altogether.

Even more powerful is a benefit available if a mark survives the first five years of its use in commerce. At that time, with the filing of a simple Trademark Office form, the mark becomes “incontestable.”\textsuperscript{27} This status means, among other things, that the registration becomes conclusive proof of the validity of the mark\textsuperscript{28} and is thus a powerful deterrent to infringing use.

Federal registration also constitutes constructive notice of the registrant’s claim of ownership of the mark.\textsuperscript{29} Moreover, federal registrations and applications appear in commercially available trademark and title clearance reports that are customarily used in the entertainment industry. This provides an additional deterrent to would-be infringers and their errors and omissions (E&O) carriers.\textsuperscript{30}

Yet another advantage of federal trademark law is the ability to apply for registration on an intent-to-use (ITU) basis.\textsuperscript{31} While “actual use” applications are filed after the mark has been used in commerce, ITU applications are filed based on a bona fide intent to use the mark in commerce.\textsuperscript{32} The application must first overcome substantive bars against registration, and once it does so and the registration is allowed, the registration will issue when the mark is used in commerce.\textsuperscript{33} ITU applications in effect allow the applicant to reserve a name for a period of up to about four and one-half years because it can take up to 18 months to obtain a Notice of Allowance, and then the applicant generally is allowed up to three years to begin using the mark in commerce.\textsuperscript{34} The ability to reserve a mark in this fashion is a powerful commercial tool, since the title owner avoids spending money establishing a mark only to later discover that registration is not achievable.

**Federal Registration**

Thus there are powerful reasons to seek federal registration of single-work titles—and, despite the contrary rule, this type of registration may be possible to obtain. The technique for doing so requires a review of the system by which goods and services are classified for purposes of trademark registration.

Trademarks—whether designating goods or services\textsuperscript{35}—are registered in one or more International Classes according to the nature of the goods or services represented by the mark.\textsuperscript{36} A close reading of the list of International Classes,\textsuperscript{37} or a quick search of some existing registrations,\textsuperscript{38} suggests an interesting question: Under what class should motion pictures be registered?

On the one hand, there is Class 41, which encompasses a number of services, including “entertainment.” This seems simple enough and, indeed, a variety of movie series titles are registered in this class. Harry Potter, for example, is registered in Class 41 for “motion picture theatrical films,” among other things.\textsuperscript{39}

On the other hand, a movie today is more often watched on DVD than in a theater, and a DVD is a good, not a service. Further exploration of the list of International Classes reveals Class 9, a grab bag of goods ranging from viewfinders to vending machines, and even computer heat sinks—everything, it seems, but the kitchen sink (which is found in Class 11). Notably, Class 9 includes “recording discs,” “apparatus for recording, transmission or reproduction of sound or images,” and “cinematographic, [and] optical...apparatus.”

These Class 9 descriptions seem broad enough to encompass DVDs, and indeed they do. Thus, Harry Potter is also registered in Class 9, for “digital versatile discs” (DVDs) and for “[m]otion picture films.”\textsuperscript{40} So, as a result of magic taught at the Hogwarts School of Trademark Law, Harry Potter identifies a single thing—a series of movies—as both a good and a service. Wizardry this may be, but it is clear that the Trademark Office approves, since the same duality is reflected in the office’s compendium of recommended phraseologies for identification of goods and services.\textsuperscript{41}

Interestingly, neither the forms in the Trademark Office’s *U.S. Acceptable Identification of Goods and Services Manual* nor the Harry Potter registrations explicitly recite that the subject matter is a series of DVDs or films. Indeed, the Trademark Office’s Examination Guide on the subject expressly provides that the identification of goods need not reflect their series nature.\textsuperscript{42} Accordingly, one naturally wonders whether the Trademark Office has registered titles that are not series titles at all. The answer is yes. Although the Trademark Office has stated that it will not register titles of single creative works, it has done exactly that, on several occasions.

One example is Reservoir Dogs,\textsuperscript{43} registered for “[p]re-recorded video-cassettes, video discs and DVDs featuring general entertainment,” in Class 9. This registration is almost as interesting as the movie itself, because it is a trademark registration for the title of a single work—a movie without sequels, prequels, or spinoffs. The registration is relatively recent (2002) and the file shows only a single specimen of use in Class 9—a photo of a DVD box cover.

Nor is Reservoir Dogs a lone wolf. There are at least two other registered marks for single-work movie titles: The Blair Witch Project (2003)\textsuperscript{44} in Class 9, and Judge Dredd (2005)\textsuperscript{45} in Classes 9 and 41. In addition, a pending application in Class 9 for the single-work title Enter the Matrix\textsuperscript{46} was approved for publication (and has been published), notwithstanding a statement of record by the applicant that the mark relates to a single motion picture.\textsuperscript{47}

Registration of a single-work title does raise two questions. The
first is whether failure to disclose that the mark is the title of a single work constitutes fraud on the Trademark Office. It appears not, because the failure to disclose facts that help show that registration is barred for descriptiveness is not fraud on the Trademark Office. Indeed, the Reservoir Dogs, Blair Witch, and Jekyll registrations were obviously the result of applications filed notwithstanding the single-work title rule. This approach to registration is no doubt aggressive, as it amounts to a sotto voce challenge to a longstanding, if flawed, rule. However, the leading trademark treatise has approved taking an aggressive approach to a similar matter, stating that “[a]s a matter of strategy, an applicant should not in [a trademark application] concede that the [proposed mark] falls within any of the statutory bars of § 2(e) which require proof of secondary meaning under § 2(f).”

Second, one may ask whether a single-work title registration would survive legal challenge. Perhaps it would not. If the above registrations are viewed as mistakes, then the fact that they achieved registration has no precedential value. Nonetheless, even a vulnerable registration is likely to cause a prospective infringer to choose another title rather than incurring the expense and several-year delay that result from litigating.

In addition, if a title achieves registration and survives the first five years of its use in commerce, the owner can then file for incontestability. As a result, the mark may no longer be challenged because it is descriptive, which is one basis on which the rule against registration of single-work titles is founded. Thus, incontestability may insulate registration of a single-work title from challenge based on the rule against such registrations.

**Federal Intent-to-Use Application for a Series**

If the above approach is refused by the Trademark Office, another way to approach federal registration is to extend the time for filing specimens of actual use. During the remaining time period, the title owner can release an actual sequel to the first movie, thereby creating a series.

As a practical matter, this technique provides some protection for the title even before the series has been created. The use of the single-work title by a third party is deterred during the pendency of the ITU application—even though the third-party use is not enjoined until the registration issues (if in fact it does). In addition, even if a series ultimately is never created and the application expires, by that time secondary meaning may have been achieved, allowing protection under Section 43(a) of the Lanham Act. Also, the expired application will continue to appear in trademark and title reports, providing notice not otherwise available under a Section 43(a) approach.

An ITU strategy may engender an objection that when the trademark application is filed, the studio might not have a bona fide intent to create a series because it may not know at that time whether it intends to release a sequel. However, the term “bona fide intent” encompasses the possibility that the trademark applicant may conduct market research, product or service development, and promotional activities before deciding whether to release a product with the proposed mark. Since the release of a movie often serves effectively as a market test to determine franchise potential, the objection seems without merit.

**State Registration**

Yet another approach for protecting a single-work title is to bypass federal registration altogether. Although seldom discussed, each state has its own state trademark registration system. The examination process is typically cursory, and registration is almost always achieved in a matter of weeks (and at a lower filing fee than federal registration). One limitation, however, is that applications must be based on actual use, not intent to use. Notably, none of the states appears to have rules against registration of single-work titles, although state courts may choose to impute federal substantive requirements when interpreting state trademark statutes.

State registration provides few, if any, substantive legal benefits, and state rights are limited by concerns regarding territoriality. Nonetheless, state registrations show up in trademark and title reports and are therefore likely to have a deterrent effect. Also, state registrations are more difficult for a challenger to cancel than federal registrations, because generally no administrative procedure exists for the cancellation of state trademarks. Instead, the opponent of the registration has to file a civil action.

For these reasons, registration in key states—such as California, New York, and others of particular commercial or strategic value—is useful. Although state trademarks may be Lilliputian, a group of them can help tie down potential title poachers.

**Foreign Registration**

It is also possible to protect single-work titles using foreign trademark registrations—and this approach can even be used to protect the titles within the United States. Canada and the EU are the most significant jurisdictions to consider.

Registration in Canada offers interesting possibilities for those seeking to protect a motion picture title. On the one hand, Canada is obviously not bound by the U.S. doctrine against registration of single-work titles and indeed, no such prohibition exists in Canada. On the other hand, in the U.S. film industry, English-speaking Canada is treated along with the United States as part of a unitary “domestic” territory for contractual and marketing purposes. Thus, a registration in Canada, whether on a proposed use or actual use basis, will have the practical effect of blocking a third party from using a confusingly similar title not just in Canada but also in the United States. It is unlikely that a studio will wish to market a movie under two separate titles within the single domestic territory.

Likewise, it is possible in the EU to register single-work titles for
trademark protection.70 By registering for an EU-wide Community Trade Mark (CTM), one gains protection in much of Western Europe, including several foreign territories considered key in the international film distribution business.71

Although an EU registration does not preclude use of the title in the United States, it may have some deterrent effect, albeit less so than Canadian registration. This effect arises from the transnational nature of Internet-based film marketing. Movie Web sites—including a film’s “official” Web site, fan sites, and movie review sites—are available throughout the world. The inability to use a consistent English-language title across these online venues makes even a simple reference to the movie more difficult,72 which is clearly a commercial disadvantage.

It may be possible to obtain U.S. registration, or its equivalent, by virtue of the foreign registration. This is accomplished using Lanham Act provisions that implement two of the major trademark treaties—the Paris Convention and the Madrid Protocol.73 In both cases, however, there are two limitations to overcome. The first is that these provisions are intended primarily for the benefit of foreign registrants—that is, persons or entities that are nationals of or domiciled in a foreign country that is signatory to one of the treaties. However, there is a useful exception for U.S. entities that have a “real and effective industrial or commercial establishment” in the foreign country.74 This “establishment” can include production facilities, business offices, or personnel.75 Thus, distribution or film production offices should suffice.

The second limitation is that both provisions are subject to all the usual bars to registration.76 This means that the supposedly absolute rule against registration of single-work titles would prevent use of the foreign registration for Paris or Madrid purposes. Nevertheless, the Trademark Office does not always scrupulously enforce this rule. Thus, not surprisingly, there is at least one example of an otherwise-barred mark achieving registration in this fashion: Mama Mia!, the title of a musical based on songs of the 1970s pop group Abba.77

There is yet another, potentially helpful twist: The Lanham Act provision regarding the Paris Convention provides that if an inter-nationally registered mark is not entitled to registration on the Principal Register, it can be registered on the Supplemental Register.78 As applied to single-work titles, this provision suggests a partial end run around the single-work title rule, which bars registration on either register. Once registered on the Supplemental Register, the registered trademark symbol ® can be used in connection with the mark, and the mark will show up in trademark and title searches—both with possible deterrent effect.79

In a mystery film, the culprit is sometimes hiding in plain sight. So, too, are solutions for those who seek to protect single-work titles. Parties seeking to protect a movie title should consider rounding up some less-than-usual suspects. Indeed, they can achieve their goal by using a variety of available trademark registration approaches, which can be used singly or in concert. Unless and until the law changes, the work-arounds suggested here—most of them previously unexplored—allow the creators of distinctive titles to attain practical protection.


3 See Cooper, 254 F. 2d at 615 (“[W]henever arbitrary, novel or non-descriptive of the content of the name of a book—its title may be, it nevertheless describes the book.”); Herbkio, 308 F. 3d at 1164 (stating that precedent treats single-work titles as “inherently descriptive” at best and “inherently generic at worst”); 2 McCarthy §10:4 n.1, 150 (Trademark Office views titles as “not just ‘descriptive,’ but ‘generic.’”).

4 See Cooper, 254 F. 2d at 615. See also 2 McCarthy §10:5.

5 See 2 McCarthy §10:4.

6 See Lanham Act (Trademark Act) §§2(a)-(e) (15 U.S.C. §1052(a)-(e)) (listing grounds for refusal to register).

7 See Cooper, 254 F. 2d at 615.

8 See supra note 3, at 253; 2 McCarthy §10:4 n.1, 150.

9 See supra note 3, at 253; 2 McCarthy §10:4 n.1, 150. Sometimes the word “mark” is ambiguous. Sometimes the word “mark” is used instead to embrace both trademarks (for goods) and service marks (for services). Cf. 1 McCarthy §4:19.

10 See also 2 McCarthy §10:5. This interpretation is adopted, then incontestability will not shield a single-work title registration from challenge, because a challenge based on the generic nature of a mark is an exception to incontestability. See Lanham Act §§105(a)(4) (15 U.S.C. §1055(a)(4)); 6 McCarthy §§1206.06-8, 12:149 nn.13-14.

11 See supra, at note 2. However, some cases alternately suggest that titles may be generic. See id. If this interpretation is adopted, then incontestability will not shield a single-work title registration from challenge, because a challenge based on the generic nature of a mark is an exception to incontestability. See Lanham Act §§105(a)(4) (15 U.S.C. §1055(a)(4)); 6 McCarthy §§1206.06-8, 12:149 nn.13-14.

12 See see also 2 McCarthy §15:36; John R. Thompson Co. v. Holloway, 366 F. 2d 108, 113 (5th Cir. 1966).

13 See supra, at note 2. However, some cases alternately suggest that titles may be generic. See id. If this interpretation is adopted, then incontestability will not shield a single-work title registration from challenge, because a challenge based on the generic nature of a mark is an exception to incontestability. See Lanham Act §§105(a)(4) (15 U.S.C. §1055(a)(4)); 6 McCarthy §§1206.06-8, 12:149 nn.13-14.
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1946, 94 TRADEMARK REP. 1, 28 (Jan.-Feb. 2004).
64 See text, supra, at notes 13-16.
65 See TMF §1101; 37 C.F.R. §2.89(d) (Trademark Rules of Practice); 3 McCarthy §19:14 n.12.
67 See JAMES E. HAVES & AMANDA DWIGHT, 2 TRADEMARK REGISTRATION PRACTICE §22:1 (2d ed. 2007); 5 GILSON §36.01.
68 See 3 McCarthy §§22:1 n.9, 22:10.
69 Cf. 3 McCarthy §22:7 (appropriate for court to rely on Lanham Act case law in interpreting state trademark statutes); Andrew L. Goldstein, Dilution Law: At a Crossroads? Bringing the Model State Trademark Bill into the 90s and Beyond, 83 TRADEMARK REP. 226, 234 (1993) (same) (citing cases). Such imputed requirements could include the rule against single-work title registration, although there appear to be no cases on point.
71 See 3 McCarthy §22:1; 5 GILSON §36.01.
72 See HAVES & DWIGHT, supra note 60, at §22:2.
73 Also, copyright (and quasi-copyright) protection for titles is available in some foreign jurisdictions. See PAUL EDWARD GELLER & MELVILLE B. NIMMER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE §24[a][a] in each national chapter (2007). This contrasts with the U.S. rule. See supra note 2.
74 See e-mail from Canadian Intellectual Property Office (Sept. 6, 2007) (on file with author) (“[The title of a single work can be trade-marked.”); Leslie Alan Glick, Protection of Literary and Artistic Titles, 55 CORNELL L. REV. 449, 453-54 (1970).
75 See, e.g., FARRER, supra note 30, at Form 17-1 (Acquisition and Distribution Agreement), cmt. 2 (“United States…territory…normally includes…English-language versions in Canada.”).
76 Proposed use” is the Canadian equivalent of the U.S. intent-to-use system. See Canada Trade-Mark Law §30(e).
77 See e-mail from Natasha Semjevski, OHIM (EU trademark office) (July 17, 2007) (on file with author) (“[T]he title of a single book or single motion picture is registrable as a CTM.”). This type of registration is also possible in each of a number of European states. See Glick, supra note 67, at 454-69.
78 The UK, Germany, France, Italy, and Spain. Cf. 2 FARRER, supra note 30, at §17.01 (listing Korea but not Spain).
80 See Lanham Act §§44(e); 66(a) (15 U.S.C. §§1126(e), 1114(f)); TMEP §1902.0(j) (discussing Lanham Act §§66(a); 3 MCCARTHY §19:31.40. The language in Lanham Act §44(e) is similar but substitutes “bona fide” for “real.” See Lanham Act §44(e) (15 U.S.C. §§1126(c)); TMEP §1902.04; 5 MCCARTHY §§29:10 n.10, 29:18.
81 See TMEP §1902.04.
82 See Lanham Act §§44(e), 66(a)(1) (15 U.S.C. §§1126, 1114(h)(1)); TMEP §§1007, 1904.02(a); 5 MCCARTHY §§29:9.50, 29:10, 29:13 nn. 6-7 (discussing Lanham Act §44(e); 5 MCCARTHY §§19:31.20 et seq. (discussing Lanham Act §66(a)).
84 See HAVES & DWIGHT, supra note 60, at v. 1, §§2:3, 12:4; 2 MCCARTHY §19:37(3).
Employers who monitor computer use must take into account their employees’ reasonable expectations of privacy

The hit song “Somebody’s Watching Me”\(^1\) made the charts in the 1980s, but today its lyrics reflect reality rather than paranoia—at least at the office. Workplace surveillance has become commonplace in today’s business environment, with surveys suggesting that over 78 percent of all companies use some type of surveillance system.\(^2\) As for workplace computer use, surveys show that 76 percent of employers monitor workers’ Web site connections; 55 percent retain and review e-mail messages; 36 percent track content, keystrokes, and time spent at the keyboard; and 32 percent of companies with 1,000 or more employees hire staff whose primary duty is to read and analyze the contents of outbound e-mail.\(^3\) The prevalence of workplace monitoring may be a documented trend, but the critical issue for employers is whether their use of surveillance techniques exposes them to potential liability.

Employees clearly have good reason to believe that they are being watched, but employers likewise have good reason for engaging in surveillance of their employees. One study suggests that 24 percent of employers have had e-mail subpoenaed in litigation, and 15 percent of employers have been defendants in workplace lawsuits triggered by employee e-mail.\(^4\) Aside from ensuring that

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employees do not create a hostile work environment by sending inappropriate e-mails, there are numerous other reasons why employers engage in surveillance, most of which boil down to prohibiting their employees from engaging in improper activity, such as stealing a company’s trade secrets or spending all day surfing the Internet.

Employers use a variety of methods to track their employees’ computer activities. Use in the workplace, and to what extent, without violating the privacy rights of their employees. Like so many legal questions, the determination of these issues ultimately may be fact specific. There are, however, a few bright-line rules in California regarding what an employer cannot do.

One of these bright-line rules is set forth in Labor Code Section 435, which directly prohibits audio or video surveillance of employees in rest rooms, locker rooms, or rooms designated for changing clothes, unless authorized by court order. Another is found in Penal Code Section 632, which prohibits anyone (including employers) from tape recording confidential communications without the consent of all parties to the communication. A Section 632 “confidential communication” is “carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto...”7 Penal Code Sections 630 through 638 are referred to as the California Invasion of Privacy Act (CIPA).

In Coulter v. Bank of America National Trust and Savings Association, the court of appeal held that an employee who “began secretly tape-recording face-to-face and telephone conversations with various bank employees, supervisors and officers” was properly held liable for violation of the statute.8 Because the statute prohibits recordings in which either party expects the communications to be confidential, “[i]t is sufficient that the bank employees who were secretly recorded expected the conversations to be private.”9 Accordingly, a California employer seeking to record conversations of its employees must do so only with the consent of all participants to the conversation.

Beyond the limited bright lines, the question of what an employer can or cannot do in the area of workplace surveillance becomes less clear. The sources of law regarding workplace surveillance in California include federal, state, and constitutional protections.

**Federal and State Privacy Law**

The Electronic Communications Privacy Act of 1986 (ECPA) updated the federal wiretapping laws to create protections for digital communications. While employees have attempted to use the provisions of the ECPA...
1. In California, a search by a supervisor of an employee’s office will be justified at its inception when reasonable grounds exist that the search 1) will uncover evidence of the employee’s work-related misconduct, or 2) is necessary for a work-related purpose unrelated to an investigation, such as to retrieve a file.
   True. False.

2. Under California law, audio or video surveillance of employees in rest rooms, locker rooms, or rooms designated for changing clothes is prohibited unless authorized by court order.
   True. False.

3. Under California law, a confidential communication between parties may be tape recorded if only one party consents to the taping.
   True. False.

4. The Electronic Communications Privacy Act of 1986 has been an effective vehicle for employees asserting privacy claims against their employers.
   True. False.

5. The California Supreme Court has held that Article I, Section 1, of the California Constitution creates a private right of action against private parties.
   True. False.

6. To succeed on a California constitutional right to privacy claim, a plaintiff must establish:
   A. A legally protected privacy interest.
   B. A reasonable expectation of privacy under the circumstances.
   C. Conduct by the defendant constituting a serious invasion of privacy.
   D. All of the above.
   True. False.

7. Employers can diminish an individual employee’s expectation of privacy by clearly stating in a policy that electronic communications are to be used solely for company business, and that the company reserves the right to monitor or access all employee Internet or e-mail usage.
   True. False.

8. Employer searches of an employee’s office in California will be permissible when the measures adopted for the search are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the suspected employee misconduct.
   True. False.

9. Employees do not have a reasonable expectation of privacy regarding their purses or automobiles.
   True. False.

10. An employer that conducts a nonsensical physical search risks being held liable criminally and civilly for battery.
    True. False.

11. Courts generally prohibit surveillance of workers when they do their jobs in an open and undifferentiated workspace.
    True. False.

12. Employers today use which of the following methods to monitor employees?
    A. Packet sniffers.
    B. Desktop monitoring.
    C. Video surveillance.
    D. All of the above.
    True. False.

13. California Penal Code Section 632 defines a “confidential communication.”
    True. False.

14. Workplace surveillance in California is governed by:
    A. Federal law.
    B. State law.
    C. Constitutional protections.
    D. All of the above.
    True. False.

15. A public employer that uses video surveillance to target areas in which employees have a reasonable expectation of privacy may be in violation of the Fourth Amendment.
    True. False.

16. An employer may defeat its employees’ reasonable expectation that they will not be strip searched by announcing in advance that all employees will be subject to periodic strip searches.
    True. False.

17. Employee surveillance is a mandatory subject of collective bargaining in certain circumstances.
    True. False.

18. An employer may engage in the surveillance of employees involved in union organizing activities without fear of being found to have committed an unfair labor practice.
    True. False.

19. It is impermissible for an employer to make a visual inspection of cars in the employer’s parking lot.
    True. False.

20. An employer’s computer use policy can affect whether an e-mail sent by an employee on a work computer to his or her attorney is protected by the attorney-client privilege.
    True. False.
protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.14

The application of the test in the workplace setting is highly fact specific: “[I]n the workplace, as elsewhere, the reasonableness of a person’s expectation of visual and aural privacy depends not only on who might have been able to observe the subject interaction, but on the identity of the claimed intruder and the means of intrusion.”15 This can make it difficult for attorneys to give definitive guidance on the legality of a surveillance technique in a particular workplace setting, but some guiding principles may be gleaned from California case law.

While video surveillance of employees is expressly prohibited under specific circumstances by Labor Code Section 435, it is probably permissible in a public area and likely impermissible in a private office. In Sacramento County of Sacramento v. County of Sacramento, the court of appeal found that a nonprivate office in the middle of a jail’s booking area was a place in which the plaintiffs would have a diminished expectation of privacy.16 Thus, the videotaping that took place in that area did not violate the plaintiffs’ privacy rights. Importantly, the court noted that the video surveillance system lacked audio capabilities and the “defendants’ objectives were lawful.”17 Relying on this range of factors, the court granted summary judgment to the defendants on the plaintiffs’ invasion of privacy claim.18

However, in Hernandez v. Hillsides, Inc., an employer’s placement of surveillance equipment in two employees’ private offices was found to be an invasion of privacy. The court reasoned that the employer’s action allowed anyone who had access to the room in which the surveillance system was housed to activate the system “at any time during the day without plaintiffs’ knowledge, thus at least presenting the possibility of unwanted access to private data about plaintiffs.”19 This case has been accepted for review by the California Supreme Court, so further guidance may be forthcoming.

Computer monitoring, the most widely utilized technique for workplace surveillance, generally has been upheld by California courts. The main rationale is that “the use of computers in the employment context carries with it social norms that effectively diminish the employee’s reasonable expectation of privacy with regard to his use of his employer’s computers.”20

**Employer Policies**

Employers can significantly increase their protection against invasion of privacy claims by adopting a policy for the use of their computer systems, e-mail, and the Internet, and requiring all employees to read and sign a statement acknowledging receipt of the policy. According to the court of appeal in TBG Insurance Services Corporation v. Superior Court, “employers can diminish an individual employee’s expectation of privacy by clearly stating in the policy that electronic communications are to be used solely for company business, and that the company reserves the right to monitor or access all employee Internet or e-mail usage.”21

Although it is not clear from case law, an employer’s failure to have such a policy may support a finding that an employee had an objectively reasonable belief in the confidentiality of information stored on the employer’s computer.22

These rules extend to computers kept in an employee’s home that are owned by the employer and are therefore subject to the employer’s computer use policy. For example, the TBG court held that the employer was entitled to discovery from an employee’s home computer that was owned by the company and subject to the company’s policy on computer use. Of course, certain practical difficulties may thwart attempts to obtain information from a home computer, such as the possibility that an employee will simply refuse to produce the computer.23

No California case law directly addresses whether an employer can monitor an employee’s use of his or her personal e-mail accounts—such as Gmail and Hotmail accounts—when they are accessed on an employer’s computer system. Based on the case law that exists, however, it is likely that this is permissible—especially if the employer has a policy in place. One federal court found that an employer did not violate an employee’s right to privacy when it accessed an employee’s e-mails from a personal account that had been saved on the employer’s network.24 The court found that an employee had no reasonable expectation of privacy in e-mails saved on the employer’s network, especially considering the specific warnings contained in the employer’s policy.25

An employer’s policy can also affect whether an employee’s e-mail sent on a work computer to his or her attorney is privileged. In a now depublished decision, one California court held that an employee had an objectively reasonable belief in the confidentiality of his e-mail communications because “[t]he agreement signed by [the employee] did not preclude personal use of the computer or mention anything about [his employer] copying or disclosing the contents of the computer” and the employee “made substantial efforts to protect the documents from disclosure by password-protecting them and segregating them in a clearly marked and designated folder.”26 By contrast, a New York decision found that an employee who communicated via e-mail with his counsel over the employer’s server waived the attorney-client privilege.27

The New York court distinguished the California decision by noting that the e-mail policy in the California case did not prohibit personal use; the employer’s policy in the New York case did. This fact, combined with the employer’s retained right to monitor an employee’s e-mails, persuaded the court that there was no attorney-client privilege in the e-mail communications. The court also dismissed the employee’s argument that he was unaware of the policy because it was available on the employer’s intranet and also in an acknowledgement form the employee was required to make new employees sign as part of his duties as an administrator.28

The lesson is clear. If an employer wants to conduct electronic or other surveillance of its employees, it pays to have a well-crafted policy and to have employees acknowledge their receipt and understanding of the policy.

**Searching an Employee’s Office and Property**

Another issue that can arise in the workplace as a result of an employer’s surveillance is whether an employer may search an employee’s office or personal property. According to the Ninth Circuit in Schowengerdt v. General Dynamics Corporation:

Ordinarily, a search of an employee’s office by a supervisor will be “justified at its inception” when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a file….The search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of…[the] nature of the [misconduct].29

The same search may be unlawful, however, if conducted for an improper purpose: Because [the employee] had a constitutional right to be free from unnecessary, overbroad, or unregulated employer investigations into his sexual practices, the search of his desk and credenza to find and seize materials relating to such matters would be reasonable only if relevant to his job as a naval engineer. Furthermore, the scope of the inquiry must be no broader than necessary.30

Unlike an employee’s office, it is generally
not permissible to search an employee’s personal property in California. In Greenberg v. Alta Healthcare System, L.L.C., the plaintiff alleged a cause of action “for invasion of privacy, for searching her desk, computer, files and purse.” The court held that the plaintiff’s admission that the employer “had a right to search her desk, computer, and files defeats her cause of action with respect to the search of these items [but] we conclude that rifling the contents of an employer’s purse may support an award of punitive damages.” Employees have a reasonable expectation of privacy regarding their personal property. It is true when they are in their automobiles, although an employer may make a visual inspection of any cars in its parking lot.

Conducting a nonsensical physical search of an employee in California raises a number of issues. An employer that conducts a nonsensical physical search risks being held civilly and criminally liable for battery under Penal Code Section 242. A policy on these types of searches may also be insufficient to overcome an employee’s reasonable expectation of privacy:

[A]n employer may not, simply by announcing in advance that all employees will be subject to periodic strip searches, thereby defeat the employees’ otherwise reasonable expectation that such searches will not occur. Governing social norms, not the specific practices of an individual defendant or industry, define whether a plaintiff has a reasonable expectation of privacy.

Surveillance in a Unionized Workplace

The National Labor Relations Board and the courts have created two categories of collective bargaining subjects—mandatory bargaining and permissive bargaining. For mandatory bargaining subjects, the employer and the union must bargain until they reach an impasse; that is, until it becomes clear to the parties, and the reviewing authority, that no further progress can be made on the issue.

In one case, the NLRB analyzed a situation in which the employer had installed hidden video systems throughout its facilities. The board held that the employer’s actions affected employment security, and the video systems could not be used unless the employer engaged in collective bargaining on the subject prior to installing the systems.

Circuit courts also have found that surveillance by employers of their employees is a mandatory subject of collective bargaining in certain circumstances. For example, in National Steel Corporation v. NLRB, the Seventh Circuit upheld the NLRB’s decision that a company must engage in collective bargaining with the union as to whether the company could engage in hidden surveillance. Moreover, the D.C. Circuit reinstated a union employee who was terminated based on information gathered through the use of a hidden camera. The court held that the employer’s use of a hidden camera was a subject that required a prior bargained-for agreement between the employer and the union.

Other issues may arise in addition to potential bargaining requirements. Surveillance of employees engaged in union organizing activities also may potentially constitute an unfair labor practice.

Workplace surveillance is a fact of life for virtually all employers and employees. Employers face significant risks of employee data or trade secret theft, vicarious liability for discriminatory or harassing activity, or other harms caused by illegal or unproductive employee behavior. As a result, employers have turned to an increasing array of technological tools that allow them to monitor their employees throughout their workday. The decreasing cost of these techniques will only serve to increase their use.

For employers attempting to minimize potential exposure to an invasion of privacy claim, the best defense is to implement a clear policy explaining what employees can expect in terms of monitoring and what constitutes appropriate use of the company’s computer systems, e-mail, and Internet. Employee monitoring should not exceed the guiding principles established by case law, and defined parameters for computer use should limit an employee’s reasonable expectation of privacy. Once the policy is established, the employer should require employees to acknowledge its receipt.

For employees worried about an employer intruding on his or her personal life in the workplace, the best approach is simply not to engage in personal activities on the company’s computer network. While there are limits on what an employer can do in California regarding workplace surveillance, an employer can employ various monitoring techniques without crossing the line—especially if it has a policy in place. Thus, unless legislation or case law imposes new prohibitions on workplace surveillance—and this is always a possibility in California—an employee entering the workplace and using an employer’s computer system should expect that “somebody’s watching me.”

But why do I always feel like I’m in the twilight zone
Always feel like somebody’s watching me
And I have no privacy
I always feel like somebody’s watching me
3 Id. See also Proofpoint, Outbound E-mail and Content Security in Today’s Enterprise, at www.proofpoint.com/oubound.
6 Id.
7 Penal Code §632(c).
9 Id. at 929.
10 See, e.g., Konop v. Hawaiian Airlines, Inc., 302 F. 3d 968, 876-78 (9th Cir. 2002).
13 Hill v. NCAA, 7 Cal. 4th 1, 39-40 (1994).
14 Id.
17 Id. at 1477.
18 Id.
21 Id. at 451.
25 Id.
26 Jiang, 33 Cal. Rptr. 3d at 204 (depublished).
28 Id.
29 Schwengert v. General Dynamics Corp., 823 F. 2d 1328, 1335-36 (9th Cir. 1997) (citation and internal quotation marks omitted).
30 Id. at 1336.
32 Id. at *13 & n.18.
34 Hill v. NCAA, 7 Cal. 4th 1, 60 (1994).
36 Id.
38 National Steel Corp. v. NLRB, 324 F. 3d 928, 932 (7th Cir. 2003).
39 Brewer & Maltsters, Local Union No. 6 v. NLRB, 414 F. 3d 36, 39 (D.C. Cir. 2005).
40 See, e.g., Local Joint Executive Bd. of Las Vegas v. NLRB, No. 05-75315, ___ F. 3d ___, 2008 WL 216935 (Jan. 28, 2008).
The economy is in decline, and bankruptcy filings are on the rise. Upon the filing of a bankruptcy case, creditors inexperienced with the process may believe that they must wait and see how many pennies on the dollar a bankruptcy trustee or chapter 11 plan will ultimately pay. This is not necessarily true.

After a bankruptcy case is filed, most holders of claims need not passively await their fate. Claims of the bankrupt are regularly bought and sold. Often, especially in the larger public bankruptcy filings, creditors of the newly bankrupt will receive a letter (or several letters) that offer ready cash in exchange for their claims. The letters may come from a hedge fund on Wall Street, or a solo investor at a Bloomberg terminal, or perhaps a company of retired accountants that reviews bankruptcy filings looking for claims. The potential claim buyer may be an arbitrage trader hoping that the value of the claim will be higher at a later time in the bankruptcy process, or the buyer could be an active investor seeking to have influence on the debtor during or after the reorganization process. Another motivation may be the acquisition of assets of the bankrupt—for example, purchase of secured debt with the potential for acquiring an asset through foreclosure. The reasons may vary, but one thing is certain: Trading bankruptcy claims is a vibrant and substantial market.

In order to understand the rules and risks associated with trading bankruptcy claims, a definition is required. Section 101(5) of the Bankruptcy Code defines “claim” as:

- Right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured or unsecured; or
- Right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed,

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Congress intended the language of Section 101(5) to encompass the broadest available definition of the word “claim,” and the U.S. Supreme Court has held that right to payment means nothing more or less than an enforceable obligation. The universe of tradable claims is therefore extremely broad. However, not all claims are treated alike in the bankruptcy process, and the claims trader must understand where in the pecking order of payment a claim resides.

The notion that claims of equal priority receive a pro rata share of the debtor’s property is fundamental to bankruptcy law. In other words, creditors of the same classification share proportionately in any distribution. For example, if there is $2,500 available to pay $10,000 of general unsecured claims, each dollar of the claim has value of 25 cents. Distribution of money or property to a particular claim is governed by its type and the priority of its class.

Claims are either secured (the claim attaches to collateral), partially secured (the claim attaches to collateral, but the collateral is worth less than the claim), or unsecured. Generally, secured claims get paid first.

Next, priority claims get paid before other unsecured creditors in the following order set forth in Section 726 of the Bankruptcy Code: 1) court-ordered child and spousal support, 2) administrative expenses of the bankruptcy (for example lawyers, committees, and accountants), 3) unsecured claims in an involuntary bankruptcy case that arose after the filing of the involuntary bankruptcy petition, 4) wage claims of employees and certain independent contractors up to $10,000 (earned within 180 days of the filing of the bankruptcy petition), 5) contributions to employee benefit plans up to $10,000 per employee (earned within 180 days of the filing of the bankruptcy petition), 6) allowed claims of certain fisherman and farmers against debtors operating storage and/or processing facilities, 7) deposit claims of individuals (up to $2,225) for purchase, lease, or rental of property or personal family services, and 8) priority tax claims (generally, recent income, sales, and employment taxes).

After priority claims, general unsecured creditors are next in line for distribution in a liquidating case. This group includes unsecured creditors that have filed a tardy proof of claim (if the tardiness was due to lack of notice or knowledge of the case). Next in line are general unsecured creditors that filed late proofs of claim and had notice or knowledge of the bankruptcy case. Following them are holders of fines, penalties, or forfeitures for multiple, punitive, or exemplary damage claims. Coming afterward are those seeking postbankruptcy interest on prebankruptcy claims. Lastly, if there is anything left, the remaining property is returned to the debtor.

Accordingly, valuing a claim in a liquidating case may be a complex process. The claims trader must estimate the dollar amount that the bankruptcy estate will receive, determine the priority of the claim, compute the total dollar value of claims in the particular class, and assess how much the class will ultimately receive (that is, what is left after the distribution funnels through the senior classes). Liquidation value is also important in the reorganization process because one requirement of chapter 11 plan confirmation is that within each class of claimants, any dissenting claimant must receive at least as much as would be available in a chapter 7 liquidation.

Claims in a Reorganization

A claims trader attempts to buy claims at a price lower than the value of what ultimately will be distributed through the chapter 11 plan. As in the liquidation context, this is a function of estimating the value of estate assets and how that value will ultimately translate into payment on the claim. Other buyers of claims seek to purchase claims in a class (or classes) in order to have sufficient claims to attempt to control the outcome of the vote that determines the acceptance or rejection of a proposed chapter 11 plan. If a claimant controls the vote of a class in the reorganization process, that claimant has negotiating power with the plan proponent because of chapter 11 plan confirmation requirements.

A chapter 11 plan cannot be confirmed without the requisite votes of all classes of impaired claims and interests. An unsecured claim is impaired if the contractual rights are modified or if it will be paid less than full value. Acceptance by a class means that at least two-thirds of the amount of claims and more than half in number of allowed claims who actually voted have cast votes in favor of the plan. Therefore, owning more than a third of the amount of claims or half of the number of claims in a class may allow the claimholder to block confirmation of a plan.

In light of these rules, an important issue for a claims trader is the method of counting the number of claims purchased by the same buyer. For example, if there are 10 claims in a class and a trader purchases six of them, do all six claims count as one vote (since they are now all owned by the same entity) or does the buyer of the six claims have six votes (and hence a majority and controlling number of claims)?

In re Figger Limited13 addresses this issue. Teachers Insurance and Annuity Association of America (TIAA) held a note secured by a deed of trust on an apartment complex in chapter 11. During the chapter 11 case, TIAA purchased 21 of 34 unsecured claims in order to block the debtor’s proposed reorganization plan that would have converted the apartments into condominiums. The debtor argued that TIAA must be limited to one vote for the 21 unsecured claims that it purchased, since all 21 votes were now held by TIAA. To answer the vote counting question, the Ninth Circuit looked to Section 1126(c): “A class of claims has accepted a plan if such plan has been accepted by creditors...that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors...that have accepted or rejected such plan.”

Citing cases in which Section 1126(c) was interpreted to refer to claims that originally arose out of distinct transactions for which separate proofs of claims were filed, the court held that it would not make sense to require a vote by creditors holding more than half in number of claims while at the same time limiting a creditor with multiple claims in the same class to one vote. Hence, the general rule provides that a buyer of separate claims in a class may cast one vote for each distinct claim purchased.

However, purchasing sufficient claims to control the vote of a class is not a guarantee that the claims buyer will control the chapter 11 plan confirmation process. For example, if the requirements for chapter 11 plan confirmation are met except that not all impaired classes of claimants have accepted the plan, the plan may nonetheless be confirmed by means of the so-called cram down provisions of the code, provided that the plan does not discriminate unfairly and is fair and equitable with respect to the impaired class. “Fair and equitable” in the context of unsecured claims means that a nonaccepting impaired class will either receive or retain property of a value equal to the amount of the claims, or, alternatively, no creditor of lesser priority can receive any distribution under the plan. Under this absolute priority rule, a claims trader that has purchased sufficient claims to block plan confirmation may not dictate the results of chapter 11 plan confirmation but may nonetheless insist on full payment.
of its claims before any money is paid to any junior class.\textsuperscript{18}

Rules limit the effectiveness of trading claims for voting control. Section 1126(e) provides: “On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such was not in good faith, or was not solicited or procured in good faith.”\textsuperscript{19} If claims are purchased for the purpose of blocking confirmation of a chapter 11 plan, the bankruptcy court may disqualified a claims purchaser from voting on a chapter 11 plan based on lack of good faith. A definition of “good faith” is absent from the code, so courts have defined the term. In \textit{Young v. Higbee Company}, the U.S. Supreme Court held that claimants could be denied their vote if their “selfish purpose was to obstruct a fair and feasible reorganization in the hope that someone would pay them more than the ratable equivalent of their proportionate part of the bankrupt assets.”\textsuperscript{20}

However, buying claims with the belief that one will profit by controlling the votes of a class (or classes) of claimants is not by itself bad faith. Courts have explained that creditors are not expected to be altruistic toward the debtor or other creditors. In an apparent homage to objectivist philosophy, the Ninth Circuit stated:

If a selfish motive were sufficient to condemn reorganization policies of interested parties, very few, if any, would pass muster. On the other hand, pure malice, “strikes” and blackmail, and the purpose to destroy an enterprise in order to advance the interests of a competing business, all plainly constituting bad faith, are motives which may be accurately described as ulterior. That is to say, we do not condemn mere enlightened self-interest, even if it appears selfish to those who do not benefit from it.\textsuperscript{21}

Bad faith requires more than mere selfishness; it requires an ulterior motive.\textsuperscript{22} The purchase of claims by an existing creditor for the purpose of protecting or improving its position is not per se bad faith.\textsuperscript{23} Voting against a plan of a debtor that has sued the claimant is not, by itself, enough to find bad faith.\textsuperscript{24} Likewise, purchasing claims for the purpose of bargaining in the preconfirmation stages of a chapter 11 reorganization does not constitute bad faith.\textsuperscript{25} However, indicia of bad faith include the purchase of claims by associates of a competing business with the intent to destroy the debtor\textsuperscript{26} and purchases made in order to aid an interest other than an interest of a creditor or claimant.\textsuperscript{27}

The good faith analysis is usually not based on any one factor. Rather, the bankruptcy court considers the totality of the circumstances, including an examination of whether the creditor is motivated by self-interest or some ulterior motive. Claims trading by those who have fiduciary duties to the bankruptcy estate creates another set of special issues and risks.\textsuperscript{28}

If the guiding principle for noninsider claims traders is enlightened self-interest, then the general rule for a fiduciary is: Do not pursue your own interests at the expense of the debtor or creditors. The term “fiduciary” is not defined in the code. However, the term “insider” is defined in 11 U.S.C. Section 101(30) and includes anyone with a sufficiently close relationship to the debtor so that his or her conduct is subject to closer scrutiny than those dealing at arm’s length with the debtor.\textsuperscript{29} Officers and directors of a corporate debtor have fiduciary obligations to the debtor and the bankruptcy estate. Likewise, general partners and controlling shareholders are fiduciaries, as are parties with a sufficiently close relationship to, and control over, the debtor.\textsuperscript{30} Receipt of nonpublic, insider information may also result in a finding that a claims trader is an insider, as defined by the code, and a fiduciary.\textsuperscript{31}

A claims purchaser that is a fiduciary traded is appropriate when a fiduciary has breached its duty, resulting in injury to the debtor or its creditors, and subordination is not inconsistent with other provisions of the code.\textsuperscript{32} Equitable subordination is remedial. Claims should be subordinated only to the extent necessary to offset the harm resulting from the inequitable conduct.\textsuperscript{33}

Equitable subordination pursuant to Section 510 is a separate remedy from Section 1126(e), which provides for disqualification of a vote. Claim traders are therefore susceptible to both subordination and vote disqualification.

\textbf{Risks of the Claim}

Bankruptcy claims are often the junkiest of junk debt, and trading these claims is a risky business. Additional risk comes from exposure to a bankruptcy trustee’s actions that may have followed the claim from.
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A decision by the bankruptcy judge in the Enron bankruptcy case expanded this notion to include subordination of a claim held by a third-party purchaser, based on the original claimant’s prebankruptcy inequitable conduct, even though the conduct was unrelated to the claim itself.

Before Enron’s bankruptcy filing, it entered into various revolving loan agreements, including with Fleet National Bank. Fleet’s prebankruptcy claims were transferred to third parties. Enron then sued Fleet within the bankruptcy case, alleging that preferential payments and fraudulent transfers had been made and that Fleet aided and abetted Enron in engaging in accounting fraud. However, there were no allegations that fraud or inequitable conduct existed under the loan agreements from which the traded claims arose. Still, Enron sought to have the traded claims equitably subordinated based on the seller’s misconduct. The claims purchasers argued that equitable subordination requires bad conduct by the claim holder, and that a claim seller’s conduct does not pass to a purchaser who had committed no inequitable conduct. However, the bankruptcy court agreed with Enron:

The purchase of the claims in a bankruptcy proceeding should not grant a transferee any greater rights than the transferor had. The risks inherent in proceedings are merely shifted to another who stands in the shoes of the original or previous claimant.

The bankruptcy court’s subordination order was appealed to the district court. The district court recently held that claim disallowance and equitable subordination are personal to the claimant (not the claim itself) and therefore the analysis must focus on whether the claim was assigned or sold. If the claim was assigned, then the assignee stands in the shoes of the assignor and is subject to disallowance and subordination based on the misconduct of the assignor. However, if the claim was sold, the claim’s negative attributes will not automatically pass through to the purchaser—especially a good faith, open market purchaser. Based on this ruling, the case was remanded to the bankruptcy court to determine whether the claims at issue were sold or assigned. This ruling has resulted in renewed focus on substance and documentation of claims trading.

Net Operating Losses

Before 1991, Bankruptcy Rule 3001(e)(2) required court approval, after notice and a hearing, of the transfer of a claim if a proof of claim had been filed prior to the transfer. Under the pre-1991 rule, the terms of the transfer were disclosed to the court and parties in interest in the bankruptcy case. Through this procedure, the bankruptcy court could determine (with or without an objection) if sellers were aware of their rights or whether they had fallen prey to the belief that they would ultimately receive “the proverbial ten cents on the dollar or worse.”

A 1991 amendment to Rule 3001(e) substantially reduced judicial oversight of claims trading. The Advisory Note to the Amendment states:

Subdivision (e) is amended to limit the court’s role to the adjudication of disputes regarding transfers of claims. If a claim has been transferred prior to the filing of a proof of claim, there is no need to state the consideration for the transfer or to submit other evidence of the transfer. If a claim has been transferred other than for security after a proof of claim has been filed, the transferee is substituted for the transferor in the absence of a timely objection by the alleged transferor. In that event, the clerk should note the transfer without the need for court approval. If a timely objection is filed, the court’s role is to determine whether a transfer has been made that is enforceable under nonbankruptcy law. This rule is not intended
either to encourage or discourage postpetition transfers of claims or to affect any remedies otherwise available under nonbankruptcy law to a transferor or transferee such as for misrepresentation in connection with the transfer of a claim.

Under this rule, the terms of the transfer are not required to be disclosed. The sole notice required is to the transferor. The bankruptcy court’s role in the process is limited to “whether a transfer has been made that is enforceable under nonbankruptcy law.”

A notable exception to this limited court oversight arises in the context of a debtor’s net operating losses (NOLs). The ability to carry forward certain past losses against future tax liabilities may be a valuable asset of a business that has filed for bankruptcy protection. In such circumstances, the unregulated trading of claims has affected the policy of preserving bankruptcy estate assets (the NOLs) for the benefit of all creditors.

The tension between NOLs and claims trading arises because there are complex IRS rules regulating the preservation of NOLs. Most significantly in the bankruptcy context, these rules relate to change in ownership. Trading in the debt and equity of a bankrupt company may significantly affect ownership. As a result, this trading can jeopardize the company’s ability to utilize some or all of its NOLs. As illustrated in the large airline chapter 11 cases, this tension is often resolved through orders from the bankruptcy court that require notice to the reorganizing company and its creditor committees prior to any purchase or sale of claims. Such orders are obtained so that the debtor and its creditors have an opportunity to object to the trade if it adversely affects the debtor’s NOLs.

The filing of a bankruptcy case does not equal the end of the road for a claim or its holder. In fact, the Bankruptcy Code places duties on debtors and others that may result in a higher valuation of claims than if the debtor had been left to linger outside the bankruptcy process. As new bankruptcy cases are filed in the current cycle of credit uncertainty, claim traders will evaluate opportunities and buy and sell claims of the bankrupt. These traders will fuel the burgeoning marketplace of bankruptcy claims and as a result they will provide a source of immediate liquidity to the holders of claims.

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1 According to the Web site for the U.S. Bankruptcy Court, Central District of California, chapter 7 bankruptcy filings for the district increased 76.8% for July.
72.7% for August, and 46.6% for September 2007 from the previous year. Chapter 11 cases were also on the rise, posting similar gains. See https://www.cacb.uscourts.gov.

5 Beper v. IRS, 496 U.S. 53 (1990); In re N. Am. Coin & Currency, Ltd., 767 F. 2d 1573 (9th Cir. 1985).
7 11 U.S.C. §726. An expansive outlook:

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37 A trustee in bankruptcy has broad powers to recover certain preferential payments and fraudulent transfers. See 11 U.S.C. §§544-547.
39 In re Metiom, Inc., 301 B.R. 634 (Bankr. S.D. N.Y. 2003); but see In re Odom Antennas, Inc., 340 F. 3d 703 (8th Cir. 2003).
41 Id. at 224.
45 Id.
46 In re Feiler, 230 B.R. 164 (9th Cir. B.A.P. 1999); 11 U.S.C. §541 sets forth what constitutes property of the bankruptcy estate. The concept of estate property is broadly construed and includes all property in which the debtor has a legal or equitable interest at the moment the bankruptcy petition is filed. United States v. Whiting Pools, Inc., 462 U.S. 196 (1983).
47 See 11 U.S.C. §§382 et seq.
48 See, e.g., In re Northwest Airlines Corp., Case No. 05-17930 (ALG) (Bankr. S.D. N.Y. 2007); In re United Airlines Corp., Case No. 02-48191 (ERW) (Bankr. N.D. Ill. 2002).

29 In re Holloway, 955 F. 2d 1008, 1011 (5th Cir. 1992).
30 Pepper, 308 U.S. at 306; see also In re Gilbert, 104 B.R. 206, 210 (Bankr. W.D. Mo. 1989).
31 Allegheny, 118 B.R. at 210.
34 Matter of Mobile Steel Co., 563 F. 2d 692, 700 (5th Cir. 1977).
36 Lorraine Castle Apartments Bldg. Corp. v. Machiewich, 149 F. 2d 55, 58 (7th Cir. 1945), cert. denied, 326 U.S. 728 (1945).
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Child and Adolescent Psychological Injury

THE PSYCHOLOGICAL TRAUMA CENTER PROVIDES CASE CONSULTATION FOR DEFENSE OR PLAINTIFF ATTORNEYS, EVALUATIONS AND TESTIMONY REGARDING ALLEGEDLY TRAUMATIZED CHILDREN, ADOLESCENTS AND FAMILIES.

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The Center is directed by Gilbert Kliman, MD, a Harvard Medical School Graduate, board certified child psychiatrist and Distinguished Life Fellow of the American Psychiatric Association. Dr. Kliman spends more than half of his time in practice and research and less than half in litigation.

International literary prize winner and author of over 50 articles and books, recipient of over 50 grants, he has spent over 35 years founding public health organizations to help children. Diplomate of the American College of Forensic Examiners and four psychiatric specialty boards, Dr. Kliman has served as psychiatric expert in some of the nation’s most important institutional neglect and child psychological trauma cases.

Known for appearances on 20/20 and The Today Show, listed in “Best Doctors in America”, he can provide attorney references from over 100 trials and 225 depositions. He has been accepted as psychiatric expert by federal and state courts in Alaska, California, Florida, Mississippi, New York, Michigan, Montana, Ohio, Oregon, Texas and Washington. Much of his testimony is for defense of municipalities, schools, corporations, and individuals, in which attorneys references describe remarkable effectiveness. He is one of the nation’s most highly credentialed forensic child psychiatrists and has a distinguished team of associates.

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SOMETIMES THE LITTLE THINGS IN LIFE, like gadgets, make a day at the office a little more enjoyable. One example is the USB thumb drive, the de facto replacement for the floppy disk. Lightweight and with considerable memory capacity, a single drive may hold the equivalent of a roomful of documents. While thumb drives are easy to use, they are also easy to lose. Moreover, the information stored on a USB drive may require protection as a matter of attorney-client confidentiality under applicable California data security laws. (See Civil Code Sections 1798 et seq.)

The Sandisk Cruzer Professional USB drives make it easy for attorneys to protect data. The first time its user plugs it into a PC, it establishes a password and designates how much of the drive will be protected. The protected part of the drive is an internal partition with 256-bit AES encryption. The encryption software is built into the drive. When the drive is plugged into another PC, the data in the protected partition cannot be accessed without the password. The unencrypted part of the drive is available for anyone to see.

The Professional currently comes in a capacity of 1 GB to 4 GB. The retail price for the 1 GB version is about $55. It has a transfer rate of up to 24MB per second to read, and 20MB per second to write, in a USB 2 port. The device has another security feature intended to prevent a hacker from endlessly typing possible passwords (and, unfortunately, this security feature cannot distinguish between a hacker and a legitimate user who makes mistakes typing the password). The Professional allows nine tries at entering the password. After that, the data on the drive will be erased. For a single user the Professional is a simple-to-use, secure solution for protecting data on a USB drive.

The Cruzer Enterprise also currently comes with the same capacities and has the same transfer speed as the Professional. It costs about $75. The Enterprise has the same built-in encryption feature as Professional, but its entire drive must be encrypted. The benefit of the Enterprise is central administrative control that can be implemented over a network. A server-based software package, available at an additional cost, allows an administrator to designate and control passwords. Sandisk has partnered with third-party software companies to implement the enterprise capabilities of this drive, which include synchronization options and software that can prevent computers within a company from accepting any USB drive except Enterprise drives.

There are software alternatives that allow users to create encrypted files or sections on a generic USB drive. Ninja, from NewTech Infosystems (www.ntius.com), costs about $25. Ninja uses a public-private partition like the Sandisk Professional. It has an amusing interface that uses a ninja theme. Ninja does not erase the drive in the face of multiple attempts to hack the password, which will be a relief to those computer users with less than stellar typing skills.

Cryptainer LE is a free version of a commercial program from Cypherix (www.cypherix.com). This software creates an encrypted file, called a container, on the USB drive. The user then adds files that need protection to that container. Cryptainer also does not erase the drive in the face of multiple attempts to hack the password. I found implementing this solution a little more difficult to use than Ninja or Cruzer security methods, but Cryptainer LE has the benefit of being free.

Green Battery Recharger

Innovation in green technology has resulted in the Hymini. This battery charger for cell phones, I-Pods, and similar portables is sure to be a conversation starter. The Hymini (www.hymini.com) costs around $50. It can be charged by power from the palm of your hand. Moving air charges the Hymini’s on-board battery, then it charges a portable device. The Hymini, which looks like a hand-held fan, can generate power when held and spun around, but you will be better off using a more sustained air flow, such as attaching the device to a bicycle. An indicator light shows if the fan is rotating at a sufficient speed to charge the internal battery. A wind speed minimum of 9 and a maximum of 40 miles per hour will charge the Hymini. Speeds above 40 miles per hour do not charge the unit any faster, and a safety circuit prevents overcharging.

A wall outlet adapter is included, and a separately purchased solar panel can also be used to charge the Hymini. The solar panel or wall charger may turn out to be the recharging source that a deskbound attorney uses most often. The company that makes the Hymini says four hours on the wall charger will give the device a full charge. Wind charging is supposed to supplement a partially charged unit. The Hymini’s battery is supposed to be able to retain its charge for two weeks, but the unit does not need to be fully charged in order to transfer power to another device. I tried the Hymini on Treo and Blackberry phones, and it does the job. Unfortunately, it is not pow-
erful enough to charge a more demanding portable, such as a laptop.

The Hymini comes with adapters that fit most major cell phones. Buyers should check to see if their device is supported. A cable with a standard USB connection at one end and the proprietary connection for a portable device at the other should be able to connect to the Hymini. The device is surprisingly lightweight and compact. The windmill is a must see, and the device appropriately comes in green (and black and white). The Hymini could be improved with a desk stand so it can be left on a porch on a windy day.

Stress Buster

Stresseraser (www.stresseraser.com) costs approximately $300. The Stresseraser is like a relaxation coach in a box. It is a biofeedback machine about the size of a deck of cards, with a small LCD screen on one side and an infrared sensor at the top. You put your finger into the sensor, and it measures your pulse rate. The screen then graphically displays a moving wave of small squares along the bottom and small triangles along the top. According to the company that makes the device, our hearts, lungs, and minds all get overactive with the stress of daily life. The Stresseraser allows you to see your pulse rate. As you calm yourself and take regular steady breaths, the display changes to steadier, smoother waves. Squeezing a sponge ball, running up and down a staircase, or screaming until hoarse all have their drawbacks, after all, although they cost less than the Stresseraser.

You can use the device for as little or as much time as you like, but the standard session is based upon achieving a set score of 30 during the day and 100 before bed. The score represents the number of squares under each peak you have aggregated. I am still puzzled about what the squares represent, but more is evidently better. Stresseraser can also log when you use it, for how long, and what scores you obtain. I tried the device for a week, and at a minimum it made me more mindful of my breathing and pulse rate. Its greatest benefit may be that to use it, you sit down and take the time to monitor your breathing and pulse. This act of taking some time for a break has benefits all by itself.

Can the Stresseraser help overstressed lawyers? Yes, but its success or failure depends on the individual. Using this device is like hiring a personal trainer to help you work out—you do not need to have a personal trainer or a device to help you develop better habits, but both can help a person who is determined to achieve a goal. Whether as eminently practical as a thumb drive or as fun as a little windmill, gadgets may help attorneys muddle through the day with a little more ease.
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Federal and State Cleanups

ON THURSDAY, APRIL 17, the Environmental Law Section and the Barristers will present a nuts and bolts program on cleanup and cost recovery under CERCLA, RCRA, the Porter Cologne Act, and common law theories. The speakers will review the federal and California processes for investigation and remediation of contaminated sites and will discuss the tools available to achieve cleanups, including unilateral orders, civil litigation, and administrative and judicial settlements. The program will include an overview of cost recovery and contribution actions, including the elements of recovery, the current state of the law, and how to navigate the maze of decisions. This program is designed for new attorneys and those who wish to become familiar with the requirements governing cleanups. Experienced practitioners will find the update on agency practices and the law of contribution and cost recovery invaluable. The speakers—Ron Aronovsky, Gene Lucero, and Jennifer Novak—are experts in the field of site cleanup and cost recovery. The program will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Figueroa Courtyard reduced parking with LACBA validation costs $10. On-site registration and the meal begin at 11:30 A.M., with the program continuing from noon to 2 P.M. The registration code number is 010004. The prices below include the meal.

$15—CLE+ Plus members and law students
$35—Section members
$45—LACBA members
$55—at-the-door registrants
2 CLE hours

Avoiding Powers

ON WEDNESDAY, APRIL 9, the Commercial Law and Bankruptcy Section and the Bankruptcy Law Committee will present a program about the law of avoiding powers in bankruptcy—including preferences, fraudulent transfers, equitable subordination, and the like. The first session will cover the basic sources and contours; the second session will focus on recent developments in the area. The speakers are Thomas E. Patterson and Dan S. Schechter. The program will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Figueroa Courtyard reduced parking with LACBA validation costs $10. On-site registration and the meal begin at noon, with the program continuing from 12:30 to 1:30 P.M. The registration code number is 009964. The prices below include the meal.

$15—CLE+ Plus members
$25—law students
$55—Barristers
$65—Section members
$75—LACBA members
1 CLE hour

Crocker Symposium 2008

ON WEDNESDAY, APRIL 9, the Real Property Section will present its annual real estate law symposium in honor of Benjamin S. Crocker. The section has partnered with the Richard S. Ziman Center for Real Estate at UCLA to present the 2008 program. More information and registration is available online at http://www.crocker2008.com.

The program will begin at 7:30 A.M. with on-site registration and continental breakfast. The morning’s featured speakers include Richard S. Ziman, Stuart A. Gabriel, Harvey E. Green, and Jeffrey M. Gault, with the opening keynote address by Edmund G. Brown Jr. The breakout sessions will address global warming, housing the aging baby boomer, and leasing. The luncheon keynote speaker is Henry G. Cisneros. In the afternoon, breakout sessions will address green development and LEED certification, commercial real estate risk management, real estate opportunities abroad, the Patriot Act, water, and real estate in 2012. The program ends at 5:30 P.M.

The symposium will take place at Covel Commons in UCLA’s Sunset Village. Those who attend may purchase a parking permit and park in Lot 7. The registration fee for the symposium is $345. There is a discounted fee of $275 for current members of the LACBA Real Property Section. There is a discounted fee of $100 for full-time students.

6.5 CLE hours

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, where you will find a full listing of Association programs.
RECENTLY I WAS SURPRISED, yet honored, to be asked by the American Bar Association Standing Committee on Minorities in the Judiciary to give concluding remarks at the Diversity on the Bench reception during the ABA’s midyear meeting in Los Angeles. I was the fifth and final speaker among several well-respected judges, including Judge James A. Wynn Jr., chair of the American Bar Association Judicial Division. A great deal has been written recently about diversity, both in the profession and on the bench. Diversity has become one of those noncontroversial issues that everyone favors—like recycling and protecting abused children. I worried about what I could add. I decided to address the one topic that I knew would not already have been discussed: my own thoughts on why a diverse judiciary was important and how I have personally benefited from the diverse role models who sit on the bench.

When I was appointed a Superior Court referee in 2000, I struggled over what type of judicial officer I should be. Considering my gender and race, I felt so different from the typical judge. I thought that a good judge created fear in those that appeared before him and was intolerant, impatient, and heavy handed. I therefore purposefully sought to model my behavior contrary to the Asian woman stereotype.

My attitude changed dramatically in the fall of 2003 when I attended a program on diversity in the legal profession at the California State Bar Annual Meeting in Anaheim. Judge Erica Yew of Santa Clara County Superior Court, one of the panelists, spoke of her own journey, of being insecure as the first Asian woman to sit on the bench in Santa Clara County. But she looked at her resume and noted that hers was just as good, if not better, than that of other judges. After a time, she came to realize that due to her different life experiences, she brought something unique and special to the bench. Her words deeply resonated in me: You can be yourself and, at the same time, add something special to the bench.

Judge Yew was instrumental in my admission to the California Asian–Pacific American Judges Association (CAAJA), as well as to my eventual appointment to its governing board. Because of her efforts I became a member of the influential Court’s Working Group of the State Bar’s Pipeline Diversity Task Force. Judge Yew prodded me into putting in my papers for a Superior Court judgeship. A few weeks later a copy of the application she had submitted to the governor was delivered to me in the mail.

Judge Nho Nguyen of Orange County Superior Court, past president of CAAJA also has had an enduring influence on me. I met Judge Nguyen at the New Judges Orientation in 2002 in San Francisco. NJO is an intensive, heavily structured judge-training program. On the second night, Judge Nguyen extended a warm invitation to me to join him and his daughter, an attorney in San Francisco, for dinner. He expressed the same warmth and inclusiveness a few months later at the Judges’ College held on the UC Berkeley campus. Each time I see him, he greets me as warmly as if I were a long lost family member. He tells any judges sitting around us, “We need to get Cynthia appointed!”

Several additional women and minority judges have gone out of their way to mentor and support. These include Los Angeles Superior Court Judge Fumiko Wasserman, who, when awarded the Constitutional Rights Foundation Judge of the Year in September, managed to get my name in her acceptance speech; Judge Judith Chirlin, who has gone out of her way to speak at programs I arrange; who roots for me, and picks me up when I stumble; Judge Marcus Tucker, who offers suggestions on how to advance my career; Judge Lance Ito, who has provided enthusiastic mentorship and support for diversity programs; Judge Diana Wheatley, who has always treated me as an equal and a friend; and U.S. District Court Judge Consuelo Marshall, who approached me at a Southern California Chinese Lawyer event and told me, “You know Cynthia, I started out just like you, a juvenile court referee.”

Because each speaker was limited to 10 minutes, I concentrated on describing—well, actually roasting—the influence that Judge Allen Webster has had on my career. I met Judge Webster, the assistant supervising judge of the Compton courthouse, about six years ago when I was assigned to the same building. Judge Webster had a habit of sending me frequent encouraging e-mails and letters. He has willingly participated in the mentoring lunches I have arranged, and has helped immeasurably with the development of several programs promoting diversity on the bench. He often prods me about my own application for a judgeship. His advice: “You won’t get appointed if you don’t apply.”

Judge Webster has been so tireless in his efforts on behalf of diversity, that I felt he was the obvious choice to make the concluding remarks at the ABA reception. I later learned that, in fact, he was the one who suggested that I have that honor.

This is what motivates me to promote diversity on the bench: to be a Judge Webster, a Judge Chirlin, a Judge Nguyen; to be the type of judge who is able to see something in others that they do not see in themselves; to help draw someone out and assist them in achieving their potential. As a judge, one has a unique and special opportunity to do that. I hope to be in that position one day.

Cynthia Loo is a referee in the Los Angeles County Superior Court.
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