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Symposium:
Friday, January 28, 2011 ■ 7:30 a.m. – 5:00 p.m.
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KEYNOTE SPEAKER

Professor Steven Schwarcz
Stanley A. Star Professor of Law and Business at Duke University

CONFIRMED SPEAKERS INCLUDE:
Gary Aguirre, The Aguirre Law Firm
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STEVEN L. GLEITMAN, ESQ. 310-553-5080

Biography available at lawyers.com or by request.

Mr. Gleitman has practiced sophisticated estate planning for 26 years, specializing for more than 14 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.
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As Chief Justice William Rehnquist put it several years ago, the law is purposely vague in some areas so that there is “play in the joints.” Locke v. Davey, 540 U.S. 712, 718 (2004). Perhaps more vividly, the California Court of Appeal in Farmers Insurance Exchange v. Smith, 71 Cal. App. 4th 660, 668-69 (1999), explained why sometimes there is no good reason for habitually cutting the ends off a meatloaf before baking it. (Spoiler alert: When asked why the sacred family recipe that had been handed down from mother to daughter through generations required the ends to be cut off, the matriarch of the family responded that she “didn’t have a serving tray big enough to accommodate the meatloaf, and wrote the recipe down that way.” Id.) And with the slash of (both ends of) a meatloaf, the Farmers court justified not becoming the next in a line of decisions to reach the same conclusion as the court before it. This is but a more flavorful variant of one of my favorite maxims of jurisprudence: “Superfluity does not vitiate.” California Civil Code Section 3537. Of course, state and federal courts differ in their adherence to the principle of stare decisis. See Benjamin Shatz, “What Every Lawyer Should Know about Stare Decisis,” County Bar Update, April 2008, http://www.lacba.org/showpage.cfm?pageid =9375. And there is “play in the joints” even regarding the strictness with which stare decisis is applied. “[I]n constitutional cases, the doctrine carries such persuasive force that [the U.S. Supreme Court has] always required a departure from precedent to be supported by some ‘special justification.’” United States v. IBM Corporation, 517 U.S. 843, 856 (1996) (quoting Payne v. Tennessee, 501 U.S. 808, 842 (1991) (Souter, J., concurring) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

Less rigor is applied when courts overturn statutory, regulatory, or judge-made law. Courts have repeated time and again that when it suits them, “[s]tare decisis is not an inexorable command; rather, it ‘is a principle of policy and not a mechanical formula of adherence to the latest decision.’ This is particularly true in constitutional cases, because in such cases ‘correction through legislative action is practically impossible.’” Payne, 501 U.S. at 828 (citations omitted).

Rule 11 of the Federal Rules of Civil Procedure expressly contemplates that attorneys will craft arguments for “extending, modifying, or reversing existing law or for establishing new law.” So does California Code of Civil Procedure Section 128.7. But while arguments for changing the law are statutorily permitted when a client’s life or livelihood is on the line, the pages of Los Angeles Lawyer offer a substantially less perilous venue in which to explore the limits of the law. I invite you to submit articles that explore these bounds for publication in Los Angeles Lawyer.
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How to Start and Run a Thriving Small Practice

**ECONOMIC REALITIES** and entrepreneurial impulses are driving an unprecedented number of new attorneys to launch their own practices. Solo and small legal practices present new attorneys a host of opportunities—to gain experience, to take control of their careers, to build a book of business, and to have real work-life balance. However, the challenges can be daunting. Unlike being an associate at a law firm or a junior attorney at a nonprofit organization or public agency, solo and small firm attorneys must not only perform the legal work but find clients and run a business all at the same time.

Fortunately, these attorneys do not have to learn how to do all this by themselves. Books and resources with practical and strategic advice abound. Jay G. Foonberg’s *How to Start and Build a Law Practice* is especially helpful. The best advice, however, comes directly from solo and small firm practitioners who are facing the challenges of building a law practice. They concur on the following points.

First, reconnect with your contacts. Your first business development step should be getting in touch with all your past and present contacts. Arrange lunch or coffee dates to catch up with friends, classmates, colleagues, relatives, and even acquaintances. If you inspire them to feel connected to your new endeavor, they will remember you when they have a matter to refer. One attorney recounts that those initial meetings in the first few months of practice garnered several significant referrals, including the attorney’s biggest client to date. However, even when starting up, it pays to be judicious in taking cases. You will be eager to gain as many new clients and cases as possible, but you build a successful law practice not by the cases you take but by the cases you do not take.

In addition to looking up old friends, you will need to make new ones. Networking is your key to success. You will not survive in Los Angeles’s competitive legal market unless you practice networking. Become active in multiple organizations and groups. Put in the effort to meet as many people as you can. Your ability to connect with other professionals as part of a larger network will be the key to your long-term success.

Once cases come in, it will be easy but wrong to ignore the business side. Before you take clients, do your homework. Try to get a sense of what other attorneys in your field charge and request for retainers. Research malpractice insurance and the best business structure for your practice. Other small business owners—not just lawyers—can be extremely valuable resources.

Servicing your clients is business development. Your current clients could be your best sources of future business. Giving extra attention to your current clients will reap rewards beyond what you can immediately see. That is, giving a current client more time (without compensation) will help the client appreciate you as good counsel, a listener, and an attorney to whom they will want to refer other clients. That give-and-take is important for business development.

Do not be afraid to call experienced attorneys with questions. Even simple questions—such as, Where should I park for a particular courthouse? or, What information should I jot down on my business card for the clerk?—are worth asking. You will quickly realize you did not learn anything about the actual practice of law in law school. As soon as you lose this apprehension to ask questions, each day will go more smoothly. Remember, all lawyers were in your shoes with the same empty feeling of just not knowing—so ask.

While developing clients and running a business, take some time to predict the future. As a lawyer starting your own practice, you are now competing in a highly hierarchical industry. Your clients have the option of working with attorneys with decades more experience. To keep up and get ahead, you will need to aggressively develop your core area of practice. Track the business trends, case law, and legislation in your area. Be ready to advise clients on how they can plan for the future.

When you work for yourself, the boss is the client. Keep your clients happy, and your practice will flourish. Believe in your ability to build a successful practice. Clients want attorneys who are confident in their abilities. Clients also want attorneys who are responsive—and in the era of Blackberries and text messaging, they expect hyper-responsiveness. Failure to return calls is the basis for most grievances against attorneys with their state bar associations.

Finally, remember whether you are solo or have several partners, you are not alone in this endeavor. Should you start your own practice, you will join a growing community of ambitious young attorneys in Los Angeles. They are not your competitors but colleagues in your new endeavor, and you will be practicing law in this city for a long time. For example, I regularly consult some of the bright young lights in the Los Angeles legal community—Ori Blumenfeld, Adam Gauthier, Arash Khorsandi, Daren Schlecter, David Soffer, Jonathan Yagoubzadeh, and Raymond Zolekhian—when a complex legal issue, a thorny ethical dilemma, a business development opportunity, or a basic practical question arises.

Once you start your own practice, do not forget that there is a community of solo and small firm practitioners—including the Association’s Small Firm and Solo Practitioner Section—who are eager to share what they know of the best (and worst) practices.

Sam Yebri is a founding partner of Merino Yebri, LLP, a boutique litigation firm in Century City.
The Expansive Reach of Proposition 213

**ON NOVEMBER 5, 1996,** California voters passed Proposition 213, the Personal Responsibility Act of 1996. The measure was designed to prohibit the recovery of noneconomic losses—such as pain, suffering, physical impairment, and disfigurement—resulting from car accidents under certain situations while still allowing the victims of those accidents to pursue economic losses—including lost wages, medical expenses, and property damage.

Proposition 213 was particularly aimed at drivers subsequently convicted of driving under the influence as well as uninsured drivers. Neither drunk nor uninsured motorists are permitted to bring an action for noneconomic losses against another driver at fault for an accident arising out of the operation or use of a motor vehicle. The law also prohibits a person convicted of a felony from suing to recover any losses suffered while committing the crime or fleeing from the crime scene if those losses resulted from another person’s negligence. An exception to these restrictions is that if an uninsured driver is injured by a driver subsequently convicted of a DUI, the uninsured driver may still recover noneconomic losses.1

Since its enactment, Proposition 213 has evolved from a legislative effort to increase the number of insured drivers into a practically all-encompassing prohibition of noneconomic damages in cases involving an injured plaintiff without car insurance. In light of the ever-expanding number of scenarios to which courts are applying Proposition 213, plaintiffs’ lawyers should know the pitfalls before filing cases on behalf of uninsured motorists.

**Chude v. Jack in the Box, Inc.,** a case decided this year, is illustrative. Teclka Chude suffered second-degree burns and skin discoloration to her buttock and thigh after being handed a cup of hot coffee with an unsecured lid at a local Jack in the Box drive-through window. Her injuries prevented her from working, sitting, or driving for nearly two weeks.

Thereafter, Chude sued Jack in the Box for negligence and sought both economic and noneconomic damages. The trial court granted Jack in the Box’s motion for summary adjudication on Chude’s noneconomic damages claim. On appeal, the Second District Court of Appeal affirmed the lower court’s decision, holding that Chude was barred from recovering noneconomic damages for one reason alone: She had no car insurance at the time of the incident.2

Lawsuits challenging Proposition 213’s constitutionality were filed almost immediately following its passage. On December 17, 1996, the Congress of California Seniors and other groups representing consumers, taxpayers, and citizens as well as three individuals brought an action in state court for an injunction and for declaratory relief against Charles Quackenbush, California’s insurance commissioner at the time. The plaintiffs alleged that Proposition 213 violated equal protection and due process rights under the U.S. and California Constitutions, burdened the right to travel, and denied the targeted drivers the First Amendment right to petition government for redress of grievances.3 The court held that the law had a rational basis for classifications among personal injury plaintiffs and found that the insurance related-penalties were constitutionally permissible travel regulations.4 Later cases also held that the law did not violate due process or equal protection rights.5

Courts also began interpreting Proposition 213’s operative provisions. Upon its passage, Proposition 213 was codified as Civil Code Sections 3333.3 and 3333.4. Unlike other statutes, however, these sections do not define certain key words and phrases contained in their provisions. Courts thus found themselves with the responsibility of interpreting critical words in the statute such as “operation” and “use” and “arising out of.” The result has been an ever-growing expansion of the law’s applicability. Indeed, while the law may have once been deemed a measure “remedying an imbalance in the justice system that resulted in unfairness when an accident occurred between two motorists—one insured and the other not,”6 it has since become a protective mechanism utilized by a variety of defendants other than insured motorists.

**Broad Interpretations**

This progression is attributable to the courts’ broad interpretations of the words “operation” and “use.” In particular, courts faced with the question of whether an injured and uninsured plaintiff’s lawsuit is an “action to recover damages arising out of the operation or use of a motor vehicle” under Section 3333.4(a) have typically held that “operation” and “use” encompass more situations than simply driving the car. For example, the court in **Cabral v. Los Angeles County Metropolitan Transportation Authority** found that “operation” does not require that the vehicle be in motion or even that its engine be running, and “use” in the context of automobiles extends to any activity utilizing the vehicle. Therefore, according to the **Cabral** court, an uninsured motorist’s act of opening the door of a parked vehicle to exit was “operation” or “use” of a motor vehicle within the meaning of the statute.

Similarly, courts have liberally construed “arising out of” so that the phrase is not limited to injuries stemming from accidents occurring between two motorists. In **Harris v. Lammers**, an extreme example, an uninsured motorist was struck in a parking lot while she was standing outside her vehicle and handing balloons to her children inside the vehicle. Her resulting personal injury action was determined to be one “arising out of the use of a motor vehicle,” within the meaning of Section 3333.4,8 and thus she was precluded from recovery.

These expansive definitions for Proposition 213’s language have led to the denial of recovery for uninsured plaintiff motorists in cases extending far beyond accidents occurring between two motorists. Cases involving dangerous conditions are prime examples. Plaintiffs suffering injuries attributed to negligently maintained or designed roadways have not been compensated if they were uninsured while oper-
at their vehicles. For example, in *Day v. City of Fontana*, an uninsured motorcyclist sued a city and county regarding overgrown vegetation near an intersection where the collision occurred in which the motorcyclist was injured. The motorcyclist, alleging that the vegetation was a nuisance and a dangerous condition of public property, sought to recover damages “arising out of the operation or use” of the motorcycle. The court held that Proposition 213 prevented recovery for injured owners of uninsured vehicles, including the uninsured motorcyclist, from recovering noneconomic damages against the city and county.

Some courts have even precluded an insured spouse from recovering noneconomic damages for loss of consortium of an uninsured spouse under Proposition 213. For example, in *Honsickle v. Superior Court*, the husband owned and insured his vehicle, but at the time of the accident the car was being driven by his wife, who was excluded from the insurance policy. The court concluded that the husband was the owner of an uninsured vehicle for the purposes of the accident and the case arising from it. Under Civil Code Section 3333.4, an “owner” of a vehicle is a person having or exercising the incidents of ownership—dominion, control, right, interest, and title.

When the Second District Court of Appeal in *Chude v. Superior Court* decided that Proposition 213 also applied when a motorist without car insurance was burned by hot coffee in a fast food drive-through, it first discussed many of the prior cases applying Proposition 213. After this review, the court concluded that “Chude would not have been in the drive-through lane purchasing coffee but for her vehicle.” Moreover, the plaintiff’s “action to recover damages arise out of the operation or use of a motor vehicle” and so [Section]3333.4, subdivision (a) applies to her recovery of noneconomic damages.” Her injuries, the court contended, were caused and exacerbated by the vehicle: “Had she been standing at the take-out counter, presumably the coffee might have spilled on her shoe, but she would not have been forced to sit in a puddle of hot liquid as she tried to extricate herself from a seatbelt.”

**Surviving Remedies and Theories**

Based on the decisions of courts regarding the reach of Proposition 213, uninsured drivers will find it exceedingly difficult to recover noneconomic damages from any classification of defendant—motorist or not. Nevertheless, plaintiffs’ lawyers working on contingency should not turn away a client simply because the potential plaintiff did not have car insurance at the time he or she was injured. Indeed, a case involving catastrophic injuries, such as quadriplegia, will offer plaintiffs damages that will be sufficiently substantial, notwithstanding the inability to recover noneconomic damages. Moreover, uninsured drivers are not prohibited from recovering noneconomic damages in products liability cases. For instance, if Chude had pursued a claim for products liability against the coffee cup manufacturer—much like the plaintiff in the infamous 1994 products liability case, *Liebke v. McDonald’s*, who sued McDonald’s claiming that the coffee served by the fast food entity was “defective” because it was too hot—her case would most likely be characterized as something other than an example of the harsh application of Proposition 213.

Plaintiffs’ lawyers also can pursue noneconomic damages for uninsured clients in a variety of other circumstances. For example, Proposition 213 does not preclude an uninsured driver involved in a car accident from recovering punitive damages against a reckless defendant. Plaintiffs also may recover noneconomic damages in wrongful death cases in which the decedent was the uninsured operator of a vehicle involved in an accident. Further, the state legislature has exempted employees involved in an accident while driving their employers’ vehicles from having to establish proof of financial responsibility. Therefore, these employees may allege claims for noneconomic damages.

The court in *Goodson v. Perfect Fit Enterprises, Inc.* held that Section 3333.4 does not apply to injuries sustained in an accident by an uninsured vehicle owner when the driver of the car at the time of the accident was the owner’s daughter-in-law, who was covered by a liability policy that was applicable to her operation of the owner’s vehicle. Finally, an uninsured owner of mobile machinery who was injured in the process of transporting the device from one place to another could recover noneconomic damages once the device was removed from the road and placed as freight for transportation to another site.

Plaintiffs’ lawyers should not relent in the face of Proposition 213 and refrain from taking cases involving an uninsured driver. Rather, practitioners should carefully determine at the outset of a case if it contains a products liability component. If so, a products liability claim should be pursued, because the uninsured status of the driver will have no bearing on his or her ultimate recovery from the defendant responsible for the defective product. Other fact patterns may also offer avenues for seeking significant recoveries for noneconomic damages in cases involving an uninsured plaintiff motorist.

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3 Quackenbush v. Superior Court (Court of California Seniors), 60 Cal. App. 4th 454 (1997), modified on denial of rehearing, review denied, cert. denied, 525 U.S. 826.
4 Id. at 466, 469.
5 See Yoshikawa v. Superior Court, 58 Cal. App. 4th 972, 989 (1997) (Due process did not require that an uninsured driver be given a hearing before being denied recovery for noneconomic damages in an action arising out of the use of a motor vehicle.). The Yoshikawa court noted that potential culpability was not at issue. The driver could have avoided the penalty by simply choosing alternative forms of transportation or if he had made any attempt to buy insurance. See also Honisickle v. Superior Court, 69 Cal. App. 4th 756, 763 (1999). The Honisickle court found that the interest in restoring balance to the judicial system and in reducing costs of mandatory automobile insurance were legitimate. The court also ruled that it was not arbitrary to distinguish between those who obey the law, buy automobile insurance, drive sober, and commit no vehicle-related felonies and those who are disfavored because they do not. Even retroactive application of Civil Code §3333.4 was held to be constitutional. Nakamura, 83 Cal. App. 4th at 829.
9 Day v. City of Fontana, 25 Cal. 4th 268, 280 (2001); see also Allen v. Sully-Miller Contracting Co., 28 Cal. 4th 222, 229 (2002) (An action to recover damages arising out of an accident caused by a private construction company’s negligent creation or maintenance of a dangerous road condition—an unmarked, elevated bus pad—was an “action to recover damages arising out of the operation or use of a motor vehicle” within the meaning of Proposition 213. Thus the uninsured motorist could not recover noneconomic losses.).
10 Honisickle, 69 Cal. App. 4th at 767.
11 Jeremia v. Hilmar United Sch. Dist., 166 Cal. App. 4th 324, 331 (2008); see also Savin v. Hall, 74 Cal. App. 4th 733, 743 (1999) (Whether passenger in uninsured vehicle was the vehicle’s “owner,” for purposes of Civil Code §3333.4, was a jury question in an action arising from an accident involving the vehicle. Passenger did not contribute any funds to buy the vehicle, never drove it, and had no knowledge that her name was listed on the registration.).
13 See, e.g., Hodges v. Superior Court, 21 Cal. 4th 109, 112 (1999) (Civil Code §3333.4 does not apply to a products liability action brought by an uninsured motorist against a vehicle manufacturer.).
15 See Nakamura v. Superior Court, 83 Cal. App. 4th 825, 839 (2000) (The defendant was not convicted of violating Vehicle Code §23152 or §23153, so the exception in Civil Code §3333.4(c) did not apply. Thus the plaintiffs could recover punitive damages but were barred from recovering noneconomic damages.).
TO MANY ATTORNEYS, the concepts of estoppel and res judicata may seem like arcana from their law school days. These two concepts, however, may have very practical applications for employers in disability discrimination claims. The Americans with Disabilities Act (ADA), the Family and Medical Leave Act, California’s corresponding Family Rights Act, and other related provisions such as the Pregnancy Disability Leave Law have created ways for employees to qualify for protected leaves from work when they have some physical or mental health issue. These, in turn, provide employees with various mechanisms to sue employers for disability discrimination, failure to accommodate, and failure to engage in the interactive process. Judicial estoppel and res judicata come into play, however, when employees who make claims of disability discrimination confront the issue of whether they are too disabled to work.

Employment disability claims typically arise after an employee is terminated from his or her position for being unable to return to work following medical leave. In order to prevail on a disability discrimination claim, an employee must establish that he or she was an “individual with a disability within the meaning of the statute[,]...that the employer had notice of the disability[,]...that he or she could perform the essential functions of the job[,]...and...the employer refused to make reasonable accommodation.”

In ADA cases, employees have the burden to establish that they could perform the essential functions of their job, with or without reasonable accommodation. The California Supreme Court held that plaintiffs have the same burden under the California Fair Employment and Housing Act, stating, “We see no statutory basis for construing the FEHA any differently than the ADA with regard to a plaintiff’s burden of proof.” Ultimately, the only way an employee can prevail on a disability discrimination claim is if he or she shows that he or she is a qualified individual who can perform the job with or without accommodation. A qualified individual is an employee who can perform the essential functions of the job with or without reasonable accommodation. “Essential functions” are the fundamental job duties of the plaintiff’s position.

The supreme court explained it best in Green v. State of California: “Indeed, the Legislature has never indicated the intent to compel an employer to employ such a person who could not perform the essential job duties with or without reasonable accommodation. To do so would defy logic and establish a poor public policy in employment matters.” Placing the burden on employees arms employers with an excellent mechanism, judicial estoppel, to defeat disability discrimination claims. After all, how can an employee present a certificate from a doctor saying he or she is totally disabled and unable to work, and then, as a part of a later disability discrimination claim, allege that he or she could have performed the essential functions of the job?

Asserting a judicial estoppel claim is straightforward and, in certain circumstances, extremely effective. Judicial estoppel “provides that a party who prevails on one ground in a prior proceeding cannot turn around and deny that ground in a subsequent one.”

The seminal decision applying judicial estoppel in an employment disability claim in California is Drain v. Betz Laboratories. In Drain, the employee sued his employer, claiming that he was wrongfully terminated due to his disability and that he could perform the essential functions of his job with or without reasonable accommodation. The employee argued that even though he had a disability, he could work, and that the only reason he could not work was because the employer refused to let him.

The employer, however, had an important piece of evidence in its arsenal—a physician’s certificate that the employer had provided to the employee indicating that the employee was totally disabled and unable to work. In short, the employee was arguing that he was totally disabled and unable to work and that the employer could have made reasonable accommodations to allow him to work. Confronted with such an argument, a trial lawyer could reasonably be expected to ask of the employee (and his doctor), was he lying then, or is he lying now?

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In Drain, the employer made just that point, arguing that the employee’s statement on his disability paperwork that he could not perform his regular work was inconsistent with his position in litigation. The trial and appellate courts agreed with the employer.11 Because the employee was seeking disability benefits based on his “total inability to perform any of his job functions or any other occupation,” his inconsistent positions in his discrimination lawsuit and his disability claim “support[ed] the...application of judicial estoppel.”12

Limitations
Judicial estoppel, however, is not a guarantee. For example, in Cleveland v. Policy Management Systems Corporation, the U.S. Supreme Court held that a plaintiff’s receipt of Social Security Disability Insurance benefits did not automatically entitle the defendant employer to summary judgment in a claim seeking reasonable accommodations under the ADA.13 SSDI is issued under the Social Security Act to any person who is unable to engage in gainful activity due to a physical or mental impairment.14 The impairment must be so severe that the person is unable to perform work in his or her prior field and unable to perform “any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.”15

After suffering a stroke, the plaintiff in Cleveland applied for SSDI benefits but returned to work before her application was considered.16 The Social Security Administration denied her application once they learned she had returned to work, and she was fired four days later. Cleveland reaped for disability and was awarded SSDI benefits. Cleveland then filed suit against her employer under the ADA. The district court granted the employer’s motion for summary judgment, finding the plaintiff had made inconsistent statements by representing herself as totally disabled in order to receive Social Security benefits and later claiming to be a “qualified individual” who is able to perform the “essential functions” of her job in order to state a claim under the ADA.17

Reasoning that the ADA and the Social Security Act were aimed at different purposes and that the ADA’s definition of a “qualified individual with a disability” is meant to take reasonable accommodations into account, the Court held that the plaintiff’s claim could survive a summary judgment motion if inconsistent statements about her disability were sufficiently explained. To be sufficient, an explanation must “warrant a
reasonable juror concluding that, assuming the truth of, or the Plaintiff’s good-faith belief in, the earlier statement, the plaintiff could nonetheless ‘perform the essential functions’ of her job, with, or without ‘reasonable accommodations.’” While Cleveland involved SSDI claims, the court’s analysis will likely be applied to other cases in which an employee seeks disability benefits under similar circumstances.

While filing for disability benefits and bringing ADA claims are not always mutually exclusive, a “plaintiff’s sworn assertion in application for disability benefits that she is, for example, ‘unable to work’ will appear to negate an essential element of her ADA case—at least if she does not offer a sufficient explanation.” The Seventh Circuit, in Butler v. Village of Round Lake Police Department, appears to allow employees little leeway, stating, “[A] person who applied for disability benefits must live with the factual representations made to obtain them, and if these show inability to do the job then an ADA claim may be rejected without further inquiry.” In Butler, a police officer suffering from chronic obstructive pulmonary disease filed an application for a disability pension. To support his position that he was unable to work, Butler presented the pension board with certificates of disability from three physicians, including one which stated that Butler was “permanently disabled from police service.” The pension board found that Butler qualified as disabled and awarded him benefits.

While collecting his pension, Butler filed a claim under the ADA, stating that the Round Lake Police Department failed to make reasonable accommodations for his disability. The Seventh Circuit found that Butler was estopped from bringing his ADA claim, based on his testimony and evidence presented to the pension board. The court stated, “Round Lake needs police officers that can protect the community, and Butler proved that he could not meet those expectations in order to get his pension. He cannot turn around and say ‘But I really can!’ for the purpose of this lawsuit.”

Outside California

While California courts have been receptive to this defense, recently, courts in other jurisdictions have evaluated similar circumstances and have, in some cases, made contrary holdings. For example, the Second Circuit held that an employee was not judicially estopped from arguing that he could fulfill the essential job functions of his job with reasonable accommodations, even after he applied for, and was granted, Social Security Disability Insurance. In DeRosa v. National Envelope Corporation, an employee suffered from
venous insufficiency and was instructed by his doctor to “limit the dependency of his right leg...avoid sitting or standing for prolonged periods of time...and...elevate his leg above his heart at regular intervals.” For two years, to accommodate his disability his employer allowed him to work from home. Then a new chief executive officer informed DeRosa that he would have to return to the corporate facilities or be terminated. DeRosa informed his supervisor that he could not work from the corporate facility, and he was terminated. DeRosa then filed for Social Security Disability Insurance. In his claim, he stated that “I became unable to work because of my disabling condition on October 13, 2004,” and “I am still disabled.” In his application, “DeRosa answered the question, ‘[h]ow do your illnesses injuries or conditions limit your ability to work?’ He replied, ‘[c]an’t write, type, sit, stand, walk & lift, reach, grab, bend.’” DeRosa also explained that his disability caused a change in his job duties in that he “could no longer commute, had to work from home.” DeRosa then sued his employer alleging that his termination violated the ADA.

The district court granted summary judgment in the employer’s favor, holding that DeRosa was judicially estopped from claiming that he was able to perform the essential functions of his position, and therefore, could not satisfy an essential element of his ADA claim. However, the Second Circuit overturned the district court, holding, “The statement ‘I am disabled’ on an SSDI application should generally be taken as a statement that ‘I am disabled for the purpose of the Social Security Act. The Social Security Act does not concern itself with reasonable accommodation.’” Furthermore, New Jersey courts have held that simply filing a claim for permanent disability may not be sufficient for a court to grant summary judgment on the basis of judicial estoppel, if no decision has been made on the employee’s claim. The Superior Court of New Jersey held in Marshall v. Township of Galloway, “An essential element of the doctrine of judicial estoppel in New Jersey is that the position alleged to be inconsistent in the present litigation was successfully advanced in the earlier litigation.”

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The court held that the doctrine of judicial estoppel could not be used if the employee’s claims for permanent disability were not successful.

These decisions may infuriate employers, but they offer some insight into how to file a successful defense under judicial estoppel. First, the employer’s attorney should review prior paperwork provided by the employee to determine whether it contains an unequivocal statement that the employee could not...
work. With some courts offering employees more latitude, a statement that illustrates that the employee could not work with or without reasonable accommodations is best. The closer the statement comes to this, and the less equivocal it is, the better. Next, determine to whom the document was submitted and if there is any indication that the physician reviewed the employee's job description or was aware of what constituted the employee's regular and customary work before making the statement. Additionally, determine what benefits the employee received by virtue of the initial statement. An employee's mere filing for disability may not be enough. The claim must have been adjudicated, and the employee must have succeeded on the claim.

Employers must be made aware that documentation is the key to prevailing on the defense of estoppel. When employees take time off of work or take leaves of absence for medical reasons, employers must ensure that they receive documentation that is sufficiently complete. Employers should keep an eye out for documentation relating to unemployment and state disability claims. These documents should be maintained in a separate file relating to the employee’s request for leave or time off and should be kept for at least three years after the employee has resigned or been terminated.

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1 Americans with Disability Act of 1990, §102, 42 U.S.C.A. §12112.
4 Id. at 266.
5 Id. at 260.
6 See Gov’t Code §12926(f).
7 Green, 42 Cal. 4th at 266.
8 Butler v. Village of Round Lake Police Dep’t, 585 F. 3d 1020, 1022 (7th Cir. 2009).
10 Id. at 953.
11 Id.
12 Id. at 961.
14 42 U.S.C.A §423(a)(1).
16 Cleveland, 526 U.S. 795.
17 Id.
18 Id. at 807.
19 Id. at 806.
20 Butler v. Village of Round Lake Police Dep’t, 585 F. 3d 1020, 1024 (7th Cir. 2009).
21 Id.
22 Id. at 1022.
23 Id.
24 Id. at 1024.
26 Id.
27 Id. at 101.
28 Id.
29 Id.
30 Id. at 102.
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A term currently in circulation describes the longstanding phenomenon of up-to-the-minute time-sensitive information: “hot news.” Other news services provided hot news about the recommendations of traditional brokerage houses, but Barclays decided to proceed against TheFly. It did so in the Southern District of New York on a variety of theories in Barclays Capital Inc. v. Theflyonthewall.com,1 the most significant being the misappropriation of hot news. The district court issued an injunction against TheFly, and TheFly has appealed to the Second Circuit Court of Appeals. The ultimate disposition of this case is garnering significant attention and commentary among practitioners and others affected by the hot news phenomenon.

Digital technology has raised questions about the reach of the tort of the misappropriation of hot news. The district court Rod S. Berman is a partner at Jeffer, Mangels, Butler & Mitchell LLP, where he is chairperson of the Intellectual Property Group. He focuses his practice on patent, trademark, copyright, trade secret, and Internet law.
asserts that, as the ‘fastest news feed on the web,’ it delivers to its customers ‘actionable, equity news in a concise & timely manner.’ In the words of TheFly’s website, ‘[o]ur quick to the point news is a valuable resource for any investment decision.’ In marketing its services, TheFly points to ‘its quick and comprehensive access to Recommendations made by Wall Street research analysts….Fly asserts that ‘[h]aving a membership with the Fly is like having a seat at Wall Street’s best houses and learning what they know when they...’’ [I]t allows its subscribers to be a ‘fly on the wall’ inside the investment firms’ research departments.

Barclays, a major financial institution, provides wealth and asset management services, brokerage services, and investment advice. It spends hundreds of millions of dollars a year in stock research to develop stock reports. It does not sell its reports in the traditional sense; rather, it provides them as a service to its clients in order to encourage them to invest with Barclays. It employs sophisticated, password-protected Internet platforms to minimize the chances that investors who are not clients of Barclays will gain access to its recommendations before the New York Stock Exchange opens.

Barclays regularly monitors the list of recipients entitled to receive its reports. The reports also include prohibitions on redistribution. Barclays's customers include businesses of every size—including private equity firms and money managers, as well as families and individuals. Barclays markets its brokerage services to provide its customers paying the highest commissions—typically large institutional and wealthy individual investors—an edge in equity buying.

In its opinion, the district court in Barclays noted that the development and marketing of equity research is a “critical component” of Barclays's business model. Barclays uses its equity research to enhance its reputation for “creating reliable and valuable advisory reports” and recommendations that, if followed, are more likely to enable customers to reap significant monetary benefits from timely trades in the financial markets.

TheFly, after extensive searching on the Internet and other public records, might find a Barclays equity research report on the near term (meaning within hours) projection for a stock price. These reports, as described in the opinion, typically “range from a single page to hundreds of pages in length.” They “may include projections of future stock prices, judgments about how a company will perform relative to its peers, and conclusions about whether investors should buy, sell, or hold stock in a given company.” A Barclays report may “indicate whether analysts believe the price of a stock is likely to increase, decrease, or remain relatively steady.”

According to the Barclays district court, the majority of key “actionable” reports are “issued between midnight and 7:00 a.m. [They] may move the market price of a stock significantly, particularly when a well-respected analyst makes a strong Recommendation. Such market movement usually happens quickly, often within hours of the market opening following the Recommendation’s release to clients. Thus, timely access to Recommendations is a valuable benefit to each [of Barclays’s] clients, because the Recommendations can provide them an early informational advantage.” Barclays provides a personalized service to its key customers—“short horizon” investors—to discuss its exclusive “Recommendations” and solicit business before the financial markets open and when the recommendations are most timely and valuable.

TheFly was aware that Barclays’s reports 1) were generated confidentially, 2) were issued before the NYSE opened, 3) could materially impact stock prices, and 4) were intended for Barclays’s most private clients. Nevertheless, TheFly allegedly was able to locate some of Barclays’s equity reports without breaching any confidentiality agreements or Web security employed by Barclays—although proof of “its actual source of any particular Recommendations was limited.”

These actions, according to Barclays, constituted elements of a claim for the misappropriation of hot news.

INS and NBA

Hot news misappropriation is a tort based upon a seminal U.S. Supreme Court decision, International News Service v. Associated Press, a 1918 case. The INS—an entity associated with the infamous newspaper publisher William Randolph Hearst—lifted news reports from the Associated Press about military and political developments during World War I. The INS did this in lieu of spending the company’s own resources employing reporters covering the battlefields of Europe. When the AP posted its news reports on the East Coast on bulletin boards and early editions of newspapers—the hot news of the day—the INS would reword the information, formulate its own copy, and telegraph the paraphrased reports to the West Coast, where they were published in Hearst newspapers.

Copyright infringement was not at issue in INS. Instead, the Supreme Court found that the hot news at issue in the case was quasi property and permanently enjoined the INS from engaging in its practices involving the AP’s hot news reports. Justice Mahlon Pitney, writing for the majority, wrote that “the defendant has reaped where it has not sown.”

The INS relied on the First Amendment for its argument that once the news reports were made public, the information contained in those reports was free for anyone to use and publish. Moreover, the INS argued that even though the reports were developed at great expense by the AP, they could be freely used by others. Justice Louis Brandeis, writing for the dissent, agreed: “The general rule of law is that, the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.”

Thus to Justice Brandeis, the means by which the INS obtained the news, whether from public sources or the open market, were not an issue for redress by the Court. While Justice Brandeis thought that perhaps some remedy for the INS’s conduct might be in order, he nevertheless opined that the courts were ill-equipped to make that decision. Indeed, he wrote that the issue of news gathering conduct was one for Congress to address. Notwithstanding Justice Brandeis’s sensible approach, Congress has not taken action on hot news misappropriation in all the years since INS was decided. But courts have continued to address the topic.

In 1997, in National Basketball Association v. Motorola, Inc., the NBA sued the maker of a handheld pager that displayed real-time information regarding scores and statistics about professional basketball games while they were in the process of being played. Although the Second Circuit declined to find Motorola liable, the court articulated the now fairly well-established elements of a claim for hot news misappropriation:

• A plaintiff generates or gathers information at a cost.
• The information is time-sensitive.
• A defendant’s use of the information constitutes free riding on the plaintiff’s efforts.
• The defendant is in direct competition with a product or service offered by the plaintiff.
• The ability of other parties to free ride on the efforts of the plaintiff would so reduce the incentive to produce the plaintiff’s product or service that its existence or quality would be substantially threatened.

The NBA court emphasized that a hot news misappropriation claim “is about the protection of property rights in time-sensitive information.”

One of the defenses urged by the defendants in hot news misappropriation cases is that the federal Copyright Act preempts state law claims for hot news misappropriation. However, this defense has been confronted and rejected, at least by the Second Circuit. In NBA, the Second Circuit held that the elements that it found to constitute a hot news misappropriation claim “allow [the] claim to survive preemption” by the Copyright Act.
Nevertheless, after noting that “older New York misappropriation cases involving radio broadcasts...considerably broadened INS,” the NBA court concluded its analysis by holding that “only a narrow ‘hot-news’ misappropriation claim survives preemption....”17 However, in June 2010, a Maryland district court in *Agora Financial, LLC v. Samler*18 further refined the preemption conclusion in NBA by holding that if the alleged misappropriated information is not mere facts but is copyrightable, then the hot news misappropriation tort is preempted by the Copyright Act.19 A review of the information that TheFly is alleged to have misappropriated suggests that some of it may be copyrightable, and thus Barclays’s claims regarding this information may be preempted.

The Ninth Circuit recognizes the tort of hot news misappropriation and applies the NBA test. In *X17, Inc. v. Lavandeira,*20 for example, a district court in the Central District of California stated that “California law recognizes the misappropriation tort in the broad sense, of which the ‘hot news’ tort is a subset, and acknowledges that it survives preemption when accompanied by additional elements distinguishing it from a copyright infringement cause of action.”21

In another recent application of hot news misappropriation theory, on July 14, 2010, a district court for the Southern District of New York in *Banxcorp v. Costco Wholesale Corporation*22 issued a decision denying Costco’s motion to dismiss Banxcorp’s hot news misappropriation claim for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Banxcorp alleged that Costco obtained database compilations and market research performance indices, known as BanxQuote Indices,23 from Banxcorp. This information includes selected banking, mortgage, and loan data that “are frequently used as original benchmarks to measure the rates and performance of the U.S. banking and mortgage markets.” Banxcorp claimed that Costco distributed the BanxQuote Indices in “direct mail, print advertisements, newspaper advertisements, websites, and marketing presentations.”24 Moreover, according to Banxcorp, the BanxQuote Indices published by Costco contained information that was highly time-sensitive and subject to change by the plaintiffs since the data in the compilation and indices are intricately intertwined with, and based on, thousands of variable interest rates that are also subject to change at any time. Indeed, in at least one example, Costco allegedly misappropriated continuously updated hot information. Thus BanxQuote was able to sufficiently allege not only that the news was time-sensitive when it was gathered but that it was time-sensitive when it was misappropriated.

**District Court Injunction and TheFly’s Appeal**

The Barclays suit was tried in district court in March 2010. This was after both sides waived their claims for damages to the extent that the claims entitled either party to a jury trial, and after the district court denied summary judgment motions by both parties. In applying New York law, the district court readily found that Barclays generated its investment reports at great expense and that the stock recommendation information was very time-sensitive. Moreover, even though TheFly used significant efforts to gather the hot information from public records and that others used the public information just like TheFly did, the court still found TheFly to be free riding. The fact that TheFly may have obtained some of its information from the public domain was not significant to the court: “[E]ven if true, it is not a defense to misappropriation that a Recommendation is already in the public domain by the time Fly reports it.”25

The district court found that TheFly was in direct competition with Barclays even though Barclays did not sell its reports. The court reasoned that TheFly aligned itself with discount brokers who were in competition with Barclays. Also, even though the court found that TheFly constituted a tiny competitor, the subscription services provided by TheFly “substantially threatened” the economic viability of Barclays’s research reports.

As a result of its findings, the district court issued an order enjoining TheFly from distributing reports released by Barclays at the close of the New York financial markets until half an hour after the financial markets opened the next day or at 10 A.M., whichever came later. Further, for reports that Barclays issues when the markets open, TheFly must wait two hours after Barclays’s recommendations are released by financial firms before distributing headlines from the recommendations.

In formulating the terms of the injunction, the district court tried to balance the incentive for financial institutions to create equity research and spread the benefits of that research against the “ordinary presumption in favor of the free flow of information.”26 The court pointed out the Supreme Court’s admonition in INS: An injunction against dissemination of hot news should only last “until its commercial value as news to the complainant and all of its members has passed away.”27 However, the court held that TheFly would not be held in contempt of the injunction if it engaged in the actual analysis of mar-
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ket movements and referred occasionally to a recommendation in the context of its own independent analytical reporting on significant market activity that had already taken place.

Although not stated explicitly by the district court, it is likely that the court would not find TheFly in contempt if the information it reports is not time-sensitive. But how time-sensitive must information be for its misappropriation to be actionable under a hot news claim? In Financial Information, Inc. v. Moody’s Investors Services, Inc., the Second Circuit required “immediacy of distribution…to sustain a ‘hot news’ claim,” finding that this requirement was not met when “the information [the defendant] published would have been at least ten days old.”

The district court awarded hardly any statutory damages to the plaintiffs for TheFly’s copyright violations—and other than affecting the defendant’s credibility, the finding that copyrights were violated did not guide the court’s ruling on the hot news claim. Still, the court awarded attorney’s fees of $200,000 to the plaintiff.

The appeal in Barclays was filed with the Second Circuit on April 9, 2010. At the request of TheFly, on May 19 the imposition of the district court’s order was delayed by the Second Circuit pending the appeal (although its request for a stay was denied by the district court), and the appeal has been expedited. The issues on appeal include whether Barclays and TheFly are really competitors and whether TheFly’s alleged free riding has actually threatened the viability of Barclays’s equity research model.

Google Inc., Twitter, Inc., and StreetAccount LLC are among the many companies filing amicus curiae briefs in the case. Google and Twitter argue that reversal is required because after INS, the Supreme Court rejected the “sweat of the brow” theory for protecting facts. They are concerned that the ruling could have a significant impact on the traditional way that television and radio stations broadcast information obtained from newspapers. For Google and Twitter, the issue is how long they have to refrain from disseminating breaking news that they have acquired but not developed as a result of their own news gathering efforts. Google and Twitter argue that delay in reporting news deprivesthe public of important, time-sensitive, factual information. They contend that Barclays should be required to enter into less constitutionally intrusive confidentiality agreements, and those agreements could then be enforced against those who disclose confidential information.

Not surprisingly, the Securities Industry and Financial Markets Association (SIFMA)
urges in its amicus curiae brief that the Second Circuit affirm the district court’s order to remedy what SIFMA deems an industry-wide problem affecting many of its members.33 Even the district court noted that in light of TheFly’s lead, other companies are reporting on the recommendations of financial institutions before and shortly after the financial markets open. SIFMA argues that an injunction is critical so that financial institutions will still have the economic incentive to produce equity research. The injunction, according to the brief, will also protect the exclusivity of analysis provided by financial institutions to their key investors. Indeed, according to SIFMA, the exclusivity of time-sensitive news provided by financial institutions must be protected from misappropriation by the institutions’ competitors. SIFMA contends that affirmance of the injunctive order is necessary not only to deter TheFly but also the other entities engaged in activities similar to TheFly’s. SIFMA notes that timely analyst information facilitates efficient markets—and “efficient markets serve the critical public interest of promoting the effective use of society’s limited resources.”34

SIFMA does not mention Justice Brandeis’s dissent in INS. Nor does SIFMA discuss what the First Amendment should preclude in a world of instantaneous transmission of information via handheld devices. It does not address whether a court should provide a monopoly on public information to SIFMA members and enjoin the dissemination of facts in the public interest even if those facts are obtained by misappropriation.

Several companies have submitted amicus curiae briefs that do not support either party, including Dow Jones and Company, Inc.; the Associated Press; Gannett Company, Inc.; the New York Times Company; and the Washington Post Company. These entities have expressed their views regarding news gathering but have not taken a position in the outcome of the Barclays dispute. Dow Jones, for example, urges the court to take “care and surgical precision” in applying the hot news tort to ensure a balance between the First Amendment and the “proprietary interests at stake.”35 According to Dow Jones, “If injunctions containing these restraints were to become the norm in hot-news cases, they would interfere with legitimate journalistic activity and pose a serious conflict with the First Amendment.”36

So the Second Circuit must perform a classic balancing act. Should it follow Justice Pitney writing for the majority in INS and confirm that TheFly has not sown what it has reaped and thus the district court was right to issue its injunction? Or should it take the position of Justice Brandeis’s dissent in INS and reverse the lower court decision in

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Barclays, finding it in conflict with the First Amendment right to gather and publish facts? Most likely, in line with its NBA decision, the Second Circuit will find that the First Amendment precludes the district court’s broad injunction.

But the Second Circuit must also make sense of TheFly’s incomprehensible decision to waive its First Amendment defense at trial. Will the Second Circuit nevertheless consider the defense even though it was only first articulated in TheFly’s reply to Barclays’s opposition to TheFly’s motion to stay the injunction? Will the Second Circuit—and the public—be deprived of the opportunity to revisit whether INS is inconsistent with the First Amendment? Perhaps the district court’s decision will be limited to its facts because the principal witness for TheFly “was not a reliable reporter of facts….He frequently contradicted himself. His unreliability appeared attributable to his motive to escape liability.”

The Second Circuit’s answers to these questions are clearly not just of interest to the disputants in Barclays. Practitioners and judges as well as those in the financial and news gathering industries are all interested flies on the wall, awaiting the decision. However, no matter how the Second Circuit rules, the ultimate arbiter of these issues remains the Supreme Court. The real breaking news regarding this issue will be whether Barclays becomes the vehicle for the Court to reevaluate the viability of the scope of injunctive relief in hot news misappropriation cases.

2 Id. at 322.
3 Id. at 323.
4 Id. at 315.
5 Id.
6 Id.
7 Id. at 315-16.
8 Id. at 316.
9 Id. at 326.
11 Id. at 239.
12 Id. at 250 (Brandeis, J., dissenting).
13 National Basketball Ass’n v. Motorola, Inc., 105 F. 3d 841 (2d Cir. 1997).
14 Id. at 853.
15 Id.
16 Id. at 852.
18 See id., Report and Recommendation at 15.
19 X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102, 1107 (C.D. Cal. 2007) (The court denied the plaintiff’s request for a preliminary injunction when the plaintiff failed to provide sufficient evidence that the defendant’s use of the photographs in question threatened the existence of the service the plaintiff provides.).
22 Id.
23 Id.
24 Id.
25 Id.
26 Id. at 344.
28 Financial Info., Inc. v. Moody’s Investors Servs., Inc., 808 F. 2d 204, 209 (2d Cir. 1986).
29 Barclays Capital Inc. v. Theflyonthewall.com, No. 10-1372 (2d Cir., filed Apr. 9, 2010).
31 Id. at 3.
32 Id.
34 Id. at 26.
36 Id. at 2.
Administrative procedure plays an essential role in federal appellate practice, particularly in the Ninth Circuit Court of Appeals. According to the Ninth Circuit’s most recent published statistics, appeals from administrative agency decisions accounted for 6,040 of 14,636 total appeals filed in 2006, or more than 40 percent. This represents a significant increase from 2001, when appeals from administrative agencies represented approximately 10 percent of all appeals (1,150 out of 10,342). Of the 6,387 cases decided on the merits in 2006, the greatest number by far, 1,974, were agency appeals.

Judicial review of an agency decision is available only if it is not precluded by statute and a “meaningful basis for review” exists. For those seeking this type of review, the most important procedure with which they must comply is the exhaustion of administrative remedies. Counsel should be aware of the basic constitutional underpinnings of the exhaustion doctrine, including the leading U.S. Supreme Court precedents, and devise careful strategies based on how the exhaustion doctrine works in practice.

Federal courts are courts of limited jurisdiction. The doctrine of exhaustion of administrative remedies, like the related timing doctrine of primary jurisdiction, is a threshold issue that protects federal jurisdiction. Just as the related doctrines of standing, ripeness, and mootness serve as barriers to entry in federal court for cases and controversies not ready for adjudication, the exhaustion doctrine ensures the integrity of administrative agency review and “assure[s] that agencies have an opportunity to resolve issues over which they have primary responsibility.”

Although case law has established a presumption in favor of the right to judicial review of agency decisions, the doctrine of exhaustion of remedies is a critical issue that must be carefully considered by counsel in federal appellate practice.

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review of administrative agency decisions, review is nonetheless quite limited. Consistent with Article III of the U.S. Constitution, the Ninth Circuit has jurisdiction to review agency decisions only to the extent provided by various statutes; and since there is no general statute empowering the Ninth Circuit to review agency decisions, the scope of review is delineated by those individual statutes. In circumstances not governed by a specific judicial review statute, a party may seek review under the Administrative Procedure Act, but the scope of review under the APA is largely the same as provided by other statutes. The APA is clear that only final agency action is subject to judicial review. Thus exhaustion may be seen as the flip side of the finality coin. An agency decision is not “final” regarding the issues raised on appeal unless a party challenging the decision has exhausted all of his or her available remedies at the agency level.

The basic rule of exhaustion is that failure to raise an issue with the tribunal below results in waiver of that issue on appeal. The rule applies not just in direct appeals from federal district court decisions but also in other substantive arenas. Bankruptcy appeals require exhaustion, although the rule is applied much more flexibly given the responsibility of trustees and debtors in possession to raise certain issues and the bankruptcy court’s duty to adjudicate those issues “whether or not they are specifically put in dispute.” Tax court decisions also mandate exhaustion before appeal. Appellate courts review these decisions “in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.” Under the Immigration and Nationality Act, the U.S. Court of Appeals may review a final order of removal only if “the alien has exhausted all administrative remedies available to the alien as of right.”

Most attorneys know that they cannot challenge nonfinal agency actions. Nevertheless, determining whether a petitioner has pursued the agency review process to its final conclusion requires careful analysis. Moreover, counsel must craft strategies depending on whether the petitioner has raised the legal and factual issues during the agency review process that are most likely to obtain the relief sought on appeal, such as obtaining a hearing before the relevant government agency, restoration of essential benefits, or cancellation of deportation.

Exhaustion is simple in theory but complicated in practice. Early precedents underline that the doctrine resists strict mechanical application. Many exhaustion precedents involve balancing the harm to the agency if exhaustion is not found versus the harm to the petitioner if exhaustion is strictly enforced. Litigators devising an effective strategy in a given case must understand how strict enforcement of the doctrine will either further or undermine the policy goals underlying the doctrine.

**Balancing Act from the Vietnam Era**

One of the leading cases in the area of exhaustion is *McKart v. United States,* a 1969 decision. The U.S. Supreme Court reversed the indictment of a draftee during the Vietnam War for willfully and knowingly failing to report for induction into the Army. After his 18th birthday, McKart dutifully reported to his local Selective Service Board (commonly referred to as a draft board), and the board initially classified him as fit for service, or I-A, in February 1963. While McKart took no official steps to change this classification, he insisted that he was eligible for a “sole surviving son” exemption on his written classification questionnaire. The draft board granted the exemption after receiving further information from McKart and reclassified him as IV-A. However, after the death of McKart’s mother, who had been his sole remaining parent, the military returned him to I-A status. McKart did not challenge his reclassification; he merely refused to report for duty and was charged as a result.

On appeal, the Army moved to bar McKart’s exemption defense on the ground of exhaustion. According to the Army, McKart had failed to exhaust his administrative remedies because he did not challenge his classification to the local board—a prerequisite under the Code of Federal Regulations to further appeals.

In a majority opinion by Justice Thurgood Marshall, the Supreme Court held that McKart was not required to exhaust the administrative appeals process. The Court stated its aim to balance the competing interests of the agency and the petitioner. In doing so, according to the opinion, the Court found that judicial review of McKart’s claim would not impair the administrative process applicable to the draft, but McKart would suffer irreparable harm if the exemption defense were disallowed. The majority reasoned that “such a result should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review.”

For exhaustion to apply, the Court held that administrative discretion or expertise must actually contribute to the decision-making process. In *McKart,* however, the issue was simply whether the sole surviving son exemption to the draft applied once the son was the last surviving member of the family. The majority deemed the issue one of pure statutory interpretation and concluded that the Court was just as competent to resolve it as the Selective Service Boards that composed the Selective Service System—the agency charged by Congress with administering the U.S. program for military conscription and preparedness. The Court rejected the government’s argument that failure to strictly enforce the exhaustion requirement would encourage draftees to flout the induction system and emphasized that the strict criminal penalties for draft dodging—up to five years in prison—should be more than enough of a deterrent to most individuals contemplating draft evasion.

Nevertheless, the Court reached the exact opposite conclusion just two years later in another significant exhaustion case addressing facts almost identical to those in *McKart.* *McGee v. United States* also involved a Vietnam draftee’s failure to exhaust administrative remedies in the Selective Service System’s induction process. This time, however, the majority held that the draftee waived his defense of incorrect classification because he had failed to renew his conscientious objector (CO) status after his student deferment lapsed.

In February 1966, while attending the University of Rochester, McGee applied to the Selective Service for CO status. The draft board continued his existing classification—a student deferment—and advised him that his CO claim would be decided when his student status was no longer applicable. In April 1967, McGee wrote to President Lyndon Johnson, sending him the charred remnants of his draft cards and declaring he must “sever every link with violence and war.” The letter stated that he had already been accepted for graduate study in a program in which he would qualify for theological deferment. A copy of the letter was forwarded to the local draft board, which continued classifying McGee’s status with a student deferment.

McGee graduated from college in June 1967, and the board requested updated information, including any information regarding McGee’s future educational plans and any other facts that he thought relevant to his classification. McGee returned his Selective Service questionnaire unanswered with a cover letter stating that he would adhere to a policy of noncooperation with the draft system. In September 1967, the board reviewed McGee’s file and rejected the CO claim that had been pending since prior to McGee’s graduation from college. The majority noted that in response to his reclassification, McGee sought neither a personal appearance nor review by an appeal board (just like McKart). Instead, McGee returned...
MCLE Test No. 198

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

The U.S. Constitution requires exhaustion of administrative remedies for all appeals.

1. True.
   False.

In accord with Article III of the U.S. Constitution, federal appellate courts have jurisdiction to review agency actions only to the extent provided by statute.

2. True.
   False.

Exhaustion promotes and protects the limited jurisdiction of federal courts.

3. True.
   False.

Judicial review of administrative agency decisions is always available under the due process clause of the Fifth Amendment.

4. True.
   False.

If a statute or regulation does not provide for review per se, review still may be available under the Administrative Procedure Act.

5. True.
   False.

The failure to raise an issue before an administrative agency generally results in waiver of that issue on appeal.

6. True.
   False.

Exhaustion applies not only to federal agencies but also to proceedings in bankruptcy and tax courts.

7. True.
   False.

Whether an issue has been sufficiently exhausted is readily discernable by looking at the certified administrative record.

8. True.
   False.

Exhaustion does not apply to constitutional challenges to administrative agency actions, because agencies lack jurisdiction to address constitutional questions.

   False.

Whether a court will deem an issue to be exhausted may depend upon seemingly collateral issues, such as balancing the equities and determining if the agency acted competently.

10. True.
    False.

Exceptions to the exhaustion requirement include irreparable injury, futility, and the inadequacy of administrative remedies.

11. True.
    False.

The exception to exhaustion for constitutional challenges is limited to procedural errors that could not have been corrected by the agency.

12. True.
    False.

The district court in Marella v. Terhune found that a prison inmate bringing a civil rights challenge under 42 USC Section 1983 had waived the challenge by not filing a grievance within the 15-day period required by the California Code of Regulations.

13. True.
    False.

The Ninth Circuit reversed the district court in Marella, finding that the lower court erred as a matter of law in concluding there was no exception for the timely filing requirement.

14. True.
    False.

In Ahmed v. Holder, the Ninth Circuit held that the immigration judge abused her discretion by failing to grant the requested six-month continuance of removal proceedings, even though the regulations provide that IJs have discretion to grant continuances for “good cause.”

15. True.
    False.

The Ninth Circuit in Soco-Gonzales v. INS held that an immigration petitioner did not satisfy the exhaustion requirement because he never invoked the term “exhaustion” in his briefs.

16. True.
    False.

In a dissent, Justice William O. Douglas wrote that the Supreme Court in McGee v. United States should have reached exactly the same result as the Court’s decision in McKart v. United States.

17. True.
    False.

The Ahmed court held that the so-called Baires factors are mandatory, not discretionary.

18. True.
    False.

The Supreme Court established the concept of primary jurisdiction in McCarthy v. Madigan.

19. True.
    False.
unopened the letter from the Selective Service notifying him of his reclassification and of his right to appeal. McGee did respond to an order to appear for induction in January 1968, but he refused to submit for induction and was convicted under the Military Service Act. McGee was sentenced to two years in prison.23

The Supreme Court majority, led once again by Justice Marshall, sought to distinguish its decision in McKart by emphasizing that McGee’s claim to exemption depended upon careful factual analysis, which the Selective Service was uniquely qualified to perform.24 The Court claimed that unlike McKart, McGee’s case did not simply involve statutory interpretation—for example, McGee’s eligibility for CO status was more complex than McKart’s eligibility for a sole surviving son exemption.25 By contrast, McKart’s failure to exhaust did not impair the record on appeal, according to the Court, because all the relevant facts regarding McKart’s eligibility for sole surviving son status had been available.26 The majority in McGee observed that “McGee’s claims to exempt status, as a ministerial student or a conscientious objector, depended upon the application of expertise by administrative bodies resolving underlying issues of fact.” In addition, McGee made “no effort to invoke administrative processes for factfinding,” and he neither requested classification as a ministerial student “nor submitted the information that would have been pertinent to such a claim.”27

Finally, Justice Marshall’s majority opinion asserted that the failure to strictly apply exhaustion under these facts would have had a harmful effect on the Selective Service. This was because McGee, unlike McKart, did not simply fail to reapply for CO status but adopted a policy of noncooperation against all military personnel.28

Justice William O. Douglas wrote a scathing dissent to Justice Marshall’s majority opinion, arguing that McGee could not have been found to have exhausted his administrative remedies when the Selective Service Board in fact never considered his CO claim on the merits. He noted that there was no factual dispute that McGee was a conscientious objector—he was enrolled as a student at Union Theological Seminary and was studying to be a priest.29

The central issue in the case, according to Justice Douglas, was whether the Selective Service Board in 1966 actually “consider[ed]” and rejected McGee’s CO claim. The district court and court of appeal both found that the board acted on the claim. The majority refused to consider McGee’s assertion that the board did not actually resolve the CO claim, but Justice Douglas wrote that anyone who read the factual record would necessarily find that the conclusion that the board took action on the CO claim in 1966 was clearly erroneous. In March 1966, the board wrote to McGee: “We wish to advise that your claim as conscientious objector will be considered when you no longer qualify for student classification.” Justice Douglas emphasized that the letter expressly said that a decision on the “claim as conscientious objector” would be decided later. Then, in 1967, the board reclassified McGee as 1A not merely because McGee had finished college, as the chairman of the board testified, but because the board specifically [and erroneously] claimed that CO status had been previously denied.30

Justice Douglas noted that it was the draft board that had defaulted, not McGee, because federal regulations explicitly required the board to “receive and consider all information, pertinent to the classification of a registrant, presented to it.”31 Douglas concluded that since the board did not “consider” the claim of CO status and then reject it but rather deferred decision until 1966 and then in 1967 that the 1966 deferment was in fact a decision “on the merits,” there was no way McGee could have timely appealed to the board.

Douglas wrote that the McGee Court should have reached exactly the same result as the McKart Court:

[W]e should conclude that cases where the local board does not “consider” the conscientious objector claim must be few and far between. Moreover, the term “consider” is a key part of a Regulation and just as much a question of law as the phrase in issue in McKart. Men should not go to prison because boards are either derelict or vindictive.32

Considered together, McKart and McGee illustrate how unpredictable courts can be when facing exhaustion issues. Outcomes are driven not just by whether an issue was broached in the tribunal below but rather the judges’ own inherent sense of fairness, the balance of equities, and whether the administrative agency in question acted with appropriate diligence and competence.

How Exhaustion Works in the Ninth Circuit

Whether an issue has been exhausted at the agency level may prove dispositive in a district court action and on appeal. For trial and appellate counsel, this analysis is crucial. Resolving the issue of exhaustion is frequently more complicated than whether the petitioner—often an unsophisticated party acting in pro per—has squarely presented his or her claim to the agency.

In a perfect world, a petitioner appealing from an administrative agency decision will have clearly raised the issues that form the basis for his or her appeal, or petition for review,33 in the proceedings below. Precision is important, as the Ninth Circuit has clarified regarding immigration proceedings that “[a] petitioner cannot satisfy the exhaustion requirement by making a general challenge to the [immigration judge’s] decision, but, rather, must specify which issues form the basis for the appeal.”34

Exhaustion is primarily a statutory issue. Courts consider exhaustion because statutes require it, not because prudence dictates doing so.35

The Ninth Circuit has held that exhaustion must not be mechanically applied. In the immigration context, for example, the court looks to “whether the issue was before the BIA [Board of Immigration Appeals] such that it had the opportunity to correct its error.”36 As the Ninth Circuit clarified in its 2009 en banc decision in Abebe v. Makasey, if the notice of appeal mentions the grounds for relief and the petitioner does not file a brief, as is permitted before the BIA under 8 Code of Federal Regulations Section 1003.38(f), the issues raised in the notice will be deemed exhausted.37 However, if the petitioner does elect to file a brief, Abebe holds that only those issues actually raised and argued in the brief will be deemed exhausted.38

Petitioners are not required to employ precise legal language to exhaust an issue, but they must identify the problem on appeal with sufficient clarity. Thus in Socop-Gonzales v. INS, the Ninth Circuit held that an immigration petitioner sufficiently exhausted the issue of equitable tolling in his briefs before the BIA even though he never actually invoked the phrase.39

The amount of administrative or judicial attention necessary for an issue to be deemed exhausted by the lower tribunal in a given case depends first upon the statute or regulation in question and then its judicial interpretation.40 The statute at issue may include numerous exceptions over the years, although their successful application is rare in light of the strong presumption in favor of the exhaustion requirement.41

Settled exceptions include the statutory exceptions42 as well as assertions of:

• Irreparable injury.43
• Futility.44
• Inadequacy of administrative remedies.45
• Constitutional challenges.46
• Voidness regarding the administrative proceedings.47
• Purely legal issues.48
• Challenges of bias.49
The Ninth Circuit overruled the magistrate judge who had found Marella failed to exhaust his remedies and the district court that adopted the magistrate judge’s recommendation. According to the Ninth Circuit, both the magistrate judge and district court erred as a matter of law by concluding that no exceptions to the timely filing require-

ment existed. As a practical matter, without a finding of appropriate exceptions, the inmate would have had no administrative remedy.

Exhaustion Arguments in a Removal Challenge

A recent immigration case is illustrative of how the doctrine of exhaustion of administrative remedies works for parties and the interplay of administrative and appellate law. A Bangladeshi alien, Manik Ahmed, was challenging his removal on the ground that he had been arbitrarily denied a continuance of removal proceedings.58

The facts, and the need for appellate relief, seemed relatively straightforward. Ahmed was in the process of seeking to adjust his status to that of permanent resident on the basis of his employment. He had already completed the first step of obtaining a labor certification from the Department of Labor (Form ETA 750). Although his request for an alien worker visa (I-140) had been denied by the Department of Homeland Security at the threshold of the appeal, Ahmed had filed an internal agency appeal to the Administrative Appeals Office as he was required to do to preserve his right to challenge the denial later on.

After Ahmed received an initial continuance of removal proceedings from the immigration judge (IJ) in Los Angeles, Ahmed requested a second six-month continuance at a removal hearing on February 1, 2005, which the IJ summarily denied. The IJ stated, “I’m not keeping this on my calendar for his appeal pending on the I-140.”

Ahmed’s Opening Brief argued that 1) the IJ’s decision violated Ahmed’s due process right to a full and fair hearing;59

From Ahmed’s perspective, exhaustion of these issues was noncontroversial. The IJ’s failure to consider the so-called Baires factors60 was manifest in the hearing transcript and her final written order of removal. The IJ simply did not mention any of them. The lack of a reasoned explanation for the denial of the continuance was likewise manifest in the text of the transcript and final order, as the IJ said nothing more than “I’m not keeping this on my calendar.” The BIA’s decision affirming the IJ clearly stated that the denial of the continuance was not an abuse of discretion. According to the BIA, Ahmed was ineligible for adjustment of status in any event because no visa was “immediately available” as required by the INA.61 Also, deprivation of the constitutional right to a full and fair hearing is exempt from the exhaustion requirement.

Nevertheless, exhaustion of remedies was the thrust of the government’s Opposition Brief. The first, and main, argument by the Department of Justice was that Ahmed failed to exhaust any of the four issues in his Opening Brief before the BIA.62 The DOJ stated, “In his brief to the BIA, Ahmed argued only that a further continuance should not have been denied ‘solely because [an I-140] petition had not been approved.’”63 Further, the DOJ asserted that “Ahmed did not argue to the BIA that the immigration judge had failed to consider factors set forth by this court, or that the immigration judge’s decision had failed to set

The amount of administrative or judicial attention necessary for an issue to be deemed exhausted by the lower tribunal in a given case depends first upon the statute or regulation in question and then its judicial interpretation.
forth adequate grounds, or that he had a visa petition ‘immediately available,’ or that he had been denied due process.” The DOJ even cited to Liu for the proposition that “procedural due process issues must be exhausted before the BIA has jurisdiction to address such issues.”

In Ahmed v. Holder, a unanimous published decision in Ahmed’s favor on June 24, 2009, the Ninth Circuit rejected the government’s arguments. The court held that the claims addressed on the merits by the BIA are deemed exhausted and may be raised on appeal even though the petitioner did not specifically raise the issue in his briefs before the BIA.

While the BIA’s decision neither mentioned the Baires factors per se, nor discussed the adequacy of the IJ’s explanation for her denial of the continuance, the BIA decision had generally acknowledged that “[Ahmed] argues that the [IJ] erred in denying his request for a continuance pending appeal even though the petitioner did not specifically raise the issue in his briefs before the BIA.”

Ahmed confirms the vitality of exhaustion issues in immigration and other agency appeals and underscores that whether a given issue is exhausted may be more complicated than the record itself reflects. It also stands for the important proposition that, in immigration matters, an issue is exhausted if addressed by the BIA, even if absent from the petitioner’s notice of appeal and his or her briefing below.

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2 U.S. CONST. art. III, §§1, 2.
4 According to the concept of primary jurisdiction, even when courts and agencies share equal jurisdiction, courts should defer if the agency has primary authority over the matter in question to avoid unnecessary conflicts. The concept of primary jurisdiction derives from the Supreme Court’s decision in Texas & Pacific Railway Company v. Abilene Cotton Oil Company, which involved the reasonableness of freight rates charged by railroad companies subject to the approval of the Interstate Commerce Commission. Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). The court reasoned that permitting federal courts to decide the reasonableness of freight rates would undermine the regulatory authority of the ICC and prevent it from achieving its goal of maintaining uniformity of freight rates. Parties injured were required to seek redress from the agency over allegedly unreasonable rates, lest conflicts over ratemaking develop between courts and the agency.
7 Longview Fibre Co. v. Rasmussen, 980 F. 2d 1307, 1309 (9th Cir. 1992).
12 See, e.g., Barron v. Ashcroft, 358 F. 3d 674, 677-78 (9th Cir. 2004).
13 Beck v. Pace Intr’l Union, 427 F. 3d 668, 674 (9th Cir. 2005) (Case law regarding preservation of issues from district court judgment also controls appeals from bankruptcy proceedings.).
14 In re Perez, 30 F. 3d 1209, 1213 (9th Cir. 1994).
18 Id. at 195.
19 Id. at 197.
20 The Court undertook a significant change between May 26, 1969, when McCart was decided, and May 17, 1971, when McGee was decided. First and foremost was the end of the Warren Court. Chief Justice Warren Burger was appointed by Richard Nixon in 1969 and was sworn in on June 23, 1969 (following former Chief Justice Earl Warren’s retirement). Justice Abe Fortas, a Johnson appointee, suddenly resigned in scandal in 1969 after he was accused of arranging for a presidential pardon for a friend and former client in exchange for $20,000 per year for the rest of his life. Fortas’s seat remained vacant for the entire 1969-70 term, until Harry Blackmun was sworn in on June 9, 1970.
22 Id. at 481.
23 Id. at 482.
24 Id. at 487-88.
25 Id. at 485.
26 Id.
27 Id. at 486.
28 Id. at 491.
29 Id. at 492 (Douglas, J., dissenting).
30 Id. at 493 (Douglas, J., dissenting).
31 32 C.F.R. §3222.1(c).
33 Fed. R. App. P. 15(a)(1): “Review of an agency order shall be sought for a continuance pending appeal even though the petitioner did not define the term, it was not clear prior to Ahmed that the question whether the IJ abused her discretion by denying Ahmed’s request for a continuance.
34 Ahmed confirms the vitality of exhaustion issues in immigration and other agency appeals and underscores that whether a given issue is exhausted may be more complicated than the record itself reflects. It also stands for the important proposition that, in immigration matters, an issue is exhausted if addressed by the BIA, even if absent from the petitioner’s notice of appeal and his or her briefing below. In Ahmed v. Holder, a unanimous published decision in Ahmed’s favor on June 24, 2009, the Ninth Circuit rejected the government’s arguments. The court held that the claims addressed on the merits by the BIA are deemed exhausted and may be raised on appeal even though the petitioner did not specifically raise the issue in his briefs before the BIA.

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Transborder Divorce
ON FRIDAY, DECEMBER 3, the International Law, Family Law, Immigration Law, and Taxation Law Sections will host a program concerning the tax and immigration consequences of transborder divorce. Speakers Qiang Bjorndak, Albert S. Golbert, James Stewart, and Peter M. Walzer will discuss how an international divorce can implicate taxes, enforcement, and custody under two different legal systems. International divorce also has consequences for immigration status. However, there are options for alien spouses to get permanent resident status after divorce or annulment. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby parking lots. On-site registration will begin at 11:30 A.M., with the program beginning at noon and continuing until 2 P.M. This program is also available as a live Webcast. The registration code number is 011109. The prices below include lunch.

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<tr>
<td>$25—CLE+PLUS member</td>
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<td>$65—LACBA member</td>
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<td>$85—at-the-door registrants</td>
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2 CLE hours

CEQA Update
ON WEDNESDAY, DECEMBER 8, the Environmental Law Section, Real Property Section, and the Land Use Planning and Environmental Law Subsection will sponsor a program, led by speakers Frank P. Angel and Timothy A. Tosta, covering recent CEQA cases as well as the climate-related changes to CEQA guidelines implemented earlier this year. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby parking lots. On-site registration and lunch will begin at noon, with the program continuing from 12:30 to 1:30 P.M. This program is also available as a live Webcast. Registration for the Webcast closes on Friday, December 3. The registration code number is 011056. The prices below include lunch.

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<td>$20—CLE+PLUS member</td>
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<td>$75—audio conference and Webcast, LACBA member</td>
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1 CLE hour

Introductory TAP (i-TAP)
Trial Advocacy and the Litigation Section will host the Introductory Trial Advocacy Project on January 4, 6, 11, 13, 18, and 20 (Tuesday and Thursday evenings from 5:30 P.M. to 8:30 P.M.). This is one in a series of courses offered in LACBA’s acclaimed TAP program, in which attorneys can get trial experience quickly.

Designed specifically for attorneys who have little or no trial experience, this six-evening course provides introductory trial advocacy instruction, emphasizing participant mock trial performance and constructive feedback. Participants will learn basic trial skills, including how to mark exhibits, lay evidentiary foundation, deliver opening statements, conduct witness direct and cross exam, and deliver closing arguments.

Offered up to four times a year, this is a three-week course. Successful completion of this course meets the prerequisites for admission to the five-week Traditional TAP course taught annually in the fall. Completion and certification from Traditional TAP qualifies participants for a pro bono practicum with a local prosecutorial agency trying criminal cases. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby parking lots. The registration code number is 011070. Cancellations cannot be accepted after December 20, 2010.

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16.5 CLE hours, including 1 in ethics and 2 in prevention of substance abuse
The Need for an E-Discovery Certification Program

LIKE IT OR NOT, society is undergoing a digital transformation. The digitization of conduct and communications is steadily expanding into almost every aspect of life, and, as it does, the evidence of what happened and what was said is also becoming increasingly digital. Indeed, the University of California at Berkeley School of Information Management estimates that 92 percent of all new information created during 2002 was stored in a digital format on devices such as computer hard drives. Each year, the percentage and volume of new information being digitally created and stored has accelerated, with no slowdown in sight.

This transformation has important implications for lawyers. After all, many of us spend much of our professional lives looking for evidence of what people said or did. A search that once involved bankers’ boxes and filing cabinets, now involves e-mail accounts, file servers, smart phones, thumb drives, and dozens of other devices. Best practices that served us well when paper predominated no longer work efficiently or effectively. And, while the policies underlying discovery rules remain largely the same, even brief exposure to disputes involving electronically stored information confirms that digital is different.

These differences present new challenges that require new, more sophisticated skills. Today, lawyers must be familiar with more than the facts and law relating to their case. They must also be familiar with information technology and know what digital evidence might exist, where it could be located, and how it can be collected and reviewed. The staff and vendors who support lawyers can no longer narrowly limit themselves to technical expertise. Instead, they must understand the interrelationship between technological capabilities and the most recent e-discovery case law.

The transition to evidence that is digitally created, communicated, and stored has resulted in problems of competency in the legal community. For lawyers, learning curves in highly technical areas can be steep, and the time available for climbing them can be short. Technologies change rapidly, and judges seem to impose new requirements with increasing frequency. As a result, lawyers find it necessary to rely heavily on nonlawyers, including support staff and vendors, to perform e-discovery work, stay abreast of new e-discovery requirements, and ensure their work complies with those obligations.

However, very few people really understand how to handle electronically stored information. Lawyers too frequently lack the expertise or time to know what constitutes e-discovery competency, let alone whether a particular individual is, in fact, competent. Formal e-discovery training programs are almost nonexistent. Lawyers and nonlawyers alike are often self-taught. Consequently, locating competent support staff and vendors is fraught with uncertainty.

With so much riding on those who collect, cull, and distill large volumes of electronically stored information, lawyers should not be forced to find support staff and vendors through trial and error or word of mouth. Lawyers need an effective and efficient way to identify people who possess the skills and qualifications necessary to meet the e-discovery obligations in contemporary litigation.

Many professions use certification programs to identify people with the training or experience necessary to perform specific jobs or tasks. Given the technically sophisticated, rapidly evolving issues affecting e-discovery, the time has come for the legal profession to follow suit and adopt an e-discovery certification program. A rigorous, objective certification program administered by an independent, reputable organization that is recognized profession wide would benefit every one who participates in providing legal services involving electronically stored information.

The legal system would benefit. A professionally meaningful certification program would encourage more people to develop the interdisciplinary skills needed to perform e-discovery work. As more people become qualified to handle electronically stored information, the quality of work will also increase.

Lawyers would benefit. E-discovery certifications would help identify staff and vendors who are qualified to perform needed tasks. Lawyers could then be more confident that work assigned to those people will be done effectively, efficiently, and accurately.

Certification holders would benefit. Certifications would make holders more marketable and give those who earned them credibility by assuring potential employers or clients that the holder is qualified to perform the job or task for which he or she is being hired.

Clients would benefit. Overall, e-discovery costs would generally be lower, and the quality of work would be higher. Expensive or prejudicial mistakes would be fewer. And unnecessary discovery disputes could be avoided.

A legal profession that seeks to serve a digital society does not serve society well when its practitioners use paper-based skills. The legal system would benefit. A professionally meaningful certification program would encourage more people to develop the interdisciplinary skills needed to perform e-discovery work. As more people become qualified to handle electronically stored information, the quality of work will also increase.

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A legal profession that seeks to serve a digital society does not serve society well when its practitioners use paper-based skills. The near future, lawyers will find it more difficult to meet their client’s needs unless they employ people who are qualified to handle e-discovery. An e-discovery certification program recognized profession wide and administered by an independent organization is essential to ensuring that those who provide legal services are qualified to handle today’s and tomorrow’s digitally created evidence.

Douglass Mitchell, a partner and litigator in the Las Vegas office of Boies, Schiller & Flexner, LLP, chairs the board of governors of the Organization of Legal Professionals.
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